

Case Name:

Pavilion Sports Club Inc. v. Condor Security Inc.

**Between
The Pavilion Sports Club Inc., Plaintiff, and
Condor Security Inc., Defendant**

[2012] O.J. No. 4148

Court File No. SC-10-00111856-00

Ontario Superior Court of Justice
Small Claims Court - Toronto, Ontario

D. Anshell Deputy J.

Heard: June 10, November 18, and December 15, 2011.

Judgment: August 23, 2012.

Released: August 29, 2012.

(45 paras.)

Counsel:

Dylan Crosby, Counsel for the Plaintiff.

Andrew Monkhouse, for the Defendant.

Decision

1 D. ANSHELL DEPUTY J.:-- This matter was heard on June 10th, 2011, November 18th, 2011 and December 15th, 2011. Having read the pleadings and heard the evidence, I find in favour of the Defendant in the main action, and I find in favour of the Plaintiff with respect to the Defendant's Claim.

The Pleadings

2 In the Amended Plaintiffs Claim, the Plaintiff, Condor Security Inc. ("Condor") seeks damages from the Defendant, The Pavilion Sports Club Inc. ("Pavilion") in the amount of \$10,637.55 together with prejudgment interest. Condor states that Condor and Pavilion entered into a written contract ("the Security Services Agreement") dated June 16th, 2009 whereby Condor promised to provide

security services to Pavilion in exchange for payment. Condor pleads that it provided security services to Pavilion as promised under the Security Services Agreement. Condor further pleads that Pavilion failed to pay for security services provided during the months of April, May and June, 2010. Condor's claim is for the balance owing in the amount of \$10,637.55 to Condor for security services provided by Condor to Pavilion for the months of April, May and June, 2010.

3 In its defence, Pavilion states that in June, 2009 it retained Condor to provide security services including monitoring Pavilion property and preventing theft or damage to its property. Pavilion pleads that Condor employees were told to closely monitor Pavilion's equipment and property located at the premises of Pavilion's tenant, Avida Restaurant.

4 In or about March, 2010, during an overnight security shift, Pavilion pleads that Condor's employee facilitated or permitted the removal and theft of a substantial amount of Pavilion's equipment and property. Pavilion pleads that Condor's employee sat idly at the security desk, while Avida Restaurant's agents methodically emptied all of Pavilion's equipment and property located at its premises, and loaded the property into a van parked outside the building. Pavilion pleads that Condor's negligence in facilitating or permitting the removal and theft of a substantial amount of Pavilion's property is a fundamental breach of the parties' security agreement. Pavilion denies that it breached the Security Services Agreement with Condor.

5 Pavilion delivered a Defendant's Claim. In its Defendant's Claim, Pavilion repeats the allegations in the Defence. Pavilion pleads that it has been forced to incur substantial costs in replacing stolen equipment and property. In its Defence to Defendant's Claim, Condor denies that the Security Services Agreement provided that it would be responsible for any theft carried out by a third party against Pavilion. Condor pleads that Pavilion did not communicate any specific instructions regarding the performance of security services to Condor's management. In addition, Condor denies that its employees were told to closely monitor Pavilion's equipment and property located at the premises of Pavilion's tenant, the Avida Restaurant. Further, Condor denies that Pavilion owned any equipment located at the premises of the Avida Restaurant. In addition, Condor pleads that if it failed to fulfill any of its contractual obligations, then such breach of contract was not causally related to the theft of Pavilion's equipment or property. Condor pleads that its employees provided security services to Pavilion in a competent and professional manner.

The Evidence

6 Benjamin Tabesh ("Tabesh") was the first witness for the Plaintiff. He is the owner and operator of Condor. Condor presently is a security company with approximately 80 employees, with various types of portfolios and clients. Condor provides security and concierge services for various properties including commercial properties, industrial properties, and religious institutions in and around the Greater Toronto Area.

7 Tabesh referred to Tab 1 of Exhibit 1 - The Security Services Agreement between Condor and Pavilion dated June 16th, 2009. The Security Services Agreement provided for an hourly rate for security services of \$16.50 per hour. The term of the Security Services Agreement was for one year, commencing on June 17th, 2009. The interest rate stipulated for late payments was 6.1 per cent, compounded monthly. (Condor amended its Statement of Claim, seeking a reduced monthly interest rate of 5 per cent).

8 At Page 2 of the Security Services Agreement it stated that Condor would develop the standing orders for the client and produce a security manual. The Security Manual can be found at Tab 2 of

Exhibit 1. Page 1 of the Security Manual states as follows: "Condor Security staff posted at the Pavilion are responsible for safeguarding only the main fitness centre - the restaurant, karate club, and ice rinks are separate entities." At the time that the Security Manual was prepared there wasn't any restaurant operating in the Pavilion. Tabesh testified that Condor's responsibilities ultimately with respect to the restaurant were to oversee restaurant customers using Pavilion's washroom facilities since the restaurant didn't have its own washroom. The restaurant was approximately seven feet away from the security desk at Pavilion.

9 Tabesh testified that he met three times with Henry Karl, a Pavilion executive ("Karl") prior to providing security services to Pavilion. The first was a general meeting where he met Karl. Karl provided a quick tour of the premises, and Tabesh advised that he would produce a proposal for him. Towards the end of May, he met Karl again, for the purpose of discussing pricing. There was a third meeting where Tabesh attended the Pavilion with a training supervisor, and they took pictures and obtained all of the information necessary to produce the standing orders.

10 Tabesh testified that for day-to-day minor changes with respect to Condor's responsibilities, Tabesh was to be the point person. Tabesh would in turn instruct his operation staff with respect to those types of minor changes.

11 One such communication occurred on March 11th, 2010. This is found at Tab 26 of Exhibit 1. Tabesh advised Karl that Condor's guards had been instructed to secure the site restaurant's furniture. Tabesh requested that any of these types of requests should be made to Condor management, instead of to the security guard onsite. Tabesh did not receive a reply to this email. The specific security guard that received this instruction was Sergey Kovalev, ("Kovalev"). Kovalev was the security guard monitoring the Pavilion on March 14th, 2012.

12 On March 15th, 2012 Tabesh received a telephone call from Karl that there was an incident at the Pavilion; furniture and equipment had been removed from the Avida Restaurant. Condor continued providing security services for another month and a half after this incident. The Security Services Agreement came to an end according to Tabesh because Pavilion decided to hire their own internal employee to monitor the premises overnight. Services by Condor ceased on June 9th, 2012.

13 At the time that Condor ceased providing services a number of invoices remained outstanding - Invoice No. 2375 dated April 19th, 2010 in the amount of \$4643.10, Invoice No. 2431 dated May 31st, 2010 in the amount of \$4365.90 and Invoice No. 2496 dated June 15th, in the amount of \$1628.55 (the "Invoices"). Up to the date of trial, Condor had not received payment for any of the Invoices. Tabesh contacted Pavilion on numerous occasions throughout the summer of 2010 with respect to payment, but didn't receive any funds.

14 Tabesh referenced an email dated October 13th, 2010 from him to Karl, Alex Zolotnitsky and Johnny Druckmann of Pavilion with respect to the balance outstanding. He asked that any claims with respect to the furniture theft be summarized and sent to him along with the video footages available for the night that the furniture was moved out of the restaurant. This email is found at Tab 30 of Exhibit 1.

15 The second witness for the Plaintiff was Sergey Kovalev ("Kovalev"). Kovalev is a security guard for Condor and began working there in July, 2009. He worked for Condor at the security desk at Pavilion on the ground floor. Kovalev's last day of duty at the Pavilion was at the end of May, 2010. Kovalev referenced the Security Manual, and explained how the Security Manual provided

direct instructions for the security guards with respect to their responsibilities when working at the Pavilion.

16 Kovalev testified that he was not responsible for safeguarding the Avida Restaurant at the Pavilion. However, his evidence was that he would occasionally check inside the restaurant to determine how busy it was. He was responsible for monitoring the stairs, corridors, the changing room, the pool area, and the washroom located behind the concierge desk. He indicated that with respect to his responsibilities, he only took instruction from Condor staff; he did not take instructions from Pavilion personnel. However, on one occasion Alex Zolotnitsky made a verbal request to let him know if there was any suspicious activity in the restaurant. Kovalev told Alex that he would have to pass along this request to his supervisor at Condor. He passed along this request the same day to his supervisor at Condor. His best recollection was that this discussion took place in December, 2009 or January, 2010.

17 Kovalev was working at the Pavilion on March 14th, 2010. He began his duty at 9:45 p.m. and his shift ended at 6:00 a.m. on March 15th, 2010. He did not notice any suspicious activity at the Avida Restaurant. There were a few male customers in the restaurant. He was not aware at the time that on March 14th, 2010 various men entered the restaurant and removed furniture and equipment from the restaurant.

18 Kovalev testified that while he was working at the Pavilion, that he observed a monitor on the security desk. From the monitor, he was able to watch any activity inside the gym and inside the swimming pool. He wasn't able to observe any exterior facilities at the Pavilion.

19 Kovalev's records from his shift on March 14th and March 15th are found at Tab 39 of Exhibit 1 ("Condor Daily Shift Report"). The Condor Daily Shift Report does not reveal any unusual activity; the entries all reveal that there was nothing out of the ordinary.

20 The Defendant's first witness was Johnny Druckmann ("Druckmann"). He is the President and part owner of the Pavilion Group of Companies. He is the general manager of the whole facility. He conducts site checks, talks to employees, handles problems, resolves disputes, develops new programs, and oversees the marketing. He has a similar role with Aventura 2 Properties Inc., ("Aventura"), a related company, which is the landlord and owner of the premises. Aventura rents space to other tenants in the premises. Druckmann testified that different corporations run different part of the Pavilion business including fitness, food and beverage. The corporations have separate employees, but management works for both companies.

21 The lease between Aventura and the Avida Restaurant is contained at Tab 2 of Exhibit 1 ("the Restaurant Lease"). The Restaurant Lease identifies Aventura as the Landord and 1783858 Ontario Corp. as the Tenant. It is dated December 1st, 2008 and is for a five year term from December 1st, 2008 through November 3rd, 2013. The Avida Restaurant opened in June or July, 2009. The restaurant did not have a restroom facility; patrons used the washroom directly behind the security desk. Druckmann wanted to hire a security firm to monitor the restaurant patrons' use of the washroom facility. He had a concern about the restaurant's clientele; he wanted to make sure that customers wouldn't get rowdy and break or steal any of Pavilion's equipment.

22 He testified that the Avida Restaurant started falling behind in its rent in December, 2009. He had asked Alex to speak to the security staff to make sure they watched the restaurant. The owners of the Avida Restaurant ultimately breached their lease agreement by vacating the premises at night on March 1e, 2010. Perpetrators removed 80 chairs, 40 tables, dishes, plates, boilers and ovens.

Druckmann went in to observe the restaurant a day or two later. The restaurant was empty, and filthy. Chandeliers had been removed from the ceiling; a commercial boiler was removed from the wall. The restaurant owners had broken a wall in the restaurant and removed ovens, burners and a commercial barbeque. A list of items missing was introduced as Exhibit 2. This documents a total value of missing items as being \$59,360.00. Druckmann testified that this theft should have been prevented by Condor's security personnel.

23 Druckmann testified that there are 68 cameras inside the Pavilion premises, and just one security desk. Nobody from Pavilion notified the police about this incident.

24 Tab 4 of Exhibit 1 was referred to. This is an August 4th, 2009 notice sent by Aventura to the Avida Restaurant advising that certain invoices were not paid on time. At Tab 5 of Exhibit 1 a second notice is sent with respect to rental arrears dated November 20th, 2009. Tab 6 of Exhibit 1 is a further notice of default of the Lease Agreement dated March 2nd, 2010. Tab 7 of Exhibit 1 contains the final notice of default dated March 17th, 2010 and seeks payment of \$11,528.24.

25 Druckmann had little recollection with respect to whether the outstanding Condor invoices were paid by the Pavilion. He identified Exhibit 3, the Assignment Agreement signed by him on behalf of Pavilion Sports Clubs Inc. and Aventura.

26 The second witness for the Defendant was Henry Karl, ("Karl"). Karl's role was as the internal auditor for Pavilion. He provides accounting support to Pavilion and helps with legal matters. He testified that he wanted to have uniformed security staff at the Pavilion to control rowdy restaurant customers. Karl indicated that there were 72 security cameras on site at the Pavilion. 32 of the security cameras monitored the fitness facility. The remaining 40 cameras monitored the remainder of the premises including the ice arena. Any of those cameras can be accessed at any time, 25 cameras can be viewed at any one time. The security desk has access to all of the cameras.

27 Karl reviewed Tabs 4 through 8 of Exhibit 1, documenting the Avida Restaurant owners falling behind with their rent. With respect to Tabs 10, 11 and 12 of Exhibit 1, Karl indicated that he could not recollect if these invoices were paid to Condor. Karl signed the Security Services Agreement on behalf of Pavilion.

28 The final witness for the Defence was Alexander Zolotnitsky "(Zolotnitsky)". Zolotnitsky is a civil engineer. He is employed by Aventura. He supervises the maintenance of all of the equipment on the premises. Druckmann asked him to speak to Kovalev about a security issue, since both Zolotnitsky and Kovalev are fluent in Russian. Four or five days before the Avida Restaurant removed its equipment from the restaurant, he asked Kovalev to watch over the restaurant, and Kovalev agreed to do so.

29 Zolotnitsky observed the damage to the restaurant after the tenants removed the furniture and equipment.

Decision

30 Many of the facts in this case are agreed. It is not disputed that Pavilion and Condor entered into a Security Services Agreement whereby Condor would provide security services to Pavilion at an agreed upon rate of \$16.50 per hour. It is also not disputed that Pavilion failed to pay for services provided by Condor for the period April, 2010 through June, 2010. Condor maintains that the amount owing by Pavilion is \$10,637.55 and this figure is not disputed.

31 The question that must be answered is whether the removal of the property from the Avida Restaurant on March 15th, 2010 constituted a breach of the Agreement, relieving Pavilion of its obligation to make further payment to Condor after March, 2010. I find that the failure of Condor to adequately monitor the premises in the early hours of March 15th, 2010, constituted a fundamental breach of the Security Services Agreement. This fundamental breach relieved Pavilion of its obligation to make payment after this date for the security services delivered by Condor.

32 The Security Service Agreement indicates that the restaurant is a separate entity. Tabesh testified that Condor was not retained to provide any security for the Avida Restaurant. The Defendant's witnesses, Druckmann and Karl testified that they hired Condor specifically to monitor any rowdy patrons of the restaurant. While the interior of the restaurant was clearly exempt in the Security Services Agreement, I find that the entire premises of the Pavilion were to be monitored in some fashion by Condor. Page 4 of the Security Manual makes specific reference to Condor's duties with respect to the Restaurant. The following passages appear at Page 4 of the Security Manual: "The role of security at this point is to ensure patrons of the restaurant do not wander into the gym area". Also the following is stated: "After the restaurant closes, security must again conduct a building sweep, ensuring that all areas are free of people and all exit doors are locked." So while Condor did not have to provide security for the interior of the Avida Restaurant, Condor security guards were required to monitor the area outside of the restaurant, and do an entire building sweep. This is supported by the evidence of Kovalev as well when he testified that it was a normal practice for him to look in the restaurant on average once per shift.

33 It is clear from the testimony of Druckmann, Karl, and Zolotnitsky that the Pavilion was looking for security for the entire facility. Furthermore, according to Tab 26 a request had been made to the security guards directly that they secure the restaurant's furniture. Although Tabesh responded to this email with respect to communication procedure, he did not indicate that this would not be done. Tabesh's evidence on this point was that the request was made directly to Kovalev. This is corroborated by Zolotnitsky's testimony.

34 I have viewed the video footage taken by cameras monitoring both the reception area and the patio area of the Pavilion (cameras 15 and 41) from the night in question. I do not accept the testimony of Kovalev with respect to not noticing any unusual activity throughout the night on March 15th, 2010. I find him to be a less than credible witness in this regard. I fail to see how he could not notice the numerous individuals coming and going past his security desk in the middle of the night. As argued by Pavilion, Kovalev was only 7 feet away from the Avida Restaurant, for the duration of his 8 hour shift. His failure to take note of this activity amounts to a fundamental breach of the Security Services Agreement.

35 The basic services to be provided are described at page 2 of the Security Services Agreement in part as follows: "Security personnel to conduct general security services, including access control, crowd control, and foot patrol in a sports facility and to report and enforce rules as mandated by Condor and approved by client". I find it inconceivable that Kovalev conducting general security services was unaware of the removal of numerous, and large items from the Avida Restaurant premises. In this regard, Condor clearly breached the Agreement in a fundamental way on March 15th, 2010. This fundamental breach excused Pavilion from its further obligations under the contract. Pavilion had every right to declare the Agreement with Condor abrogated as a result of the fundamental breach of it by Condor.

36 This leaves the issue of the Defendant's Claim. The first hurdle that the Pavilion must overcome is the issue of privity of contract. Pavilion in its Defendant's Claim pleads that it suffered a loss in the amount of \$25,000. This is based on the allegation that Condor's employees permitted the removal and theft of a substantial amount of Pavilion's equipment and property. At trial, Pavilion also argued that it lost its rights to distress against the Avida Restaurant's property due to non-payment of rent.

37 The Lease Agreement names Aventura as the landlord. Aventura is a related company to Pavilion. Pavilion would not have a right of distress, but Aventura would. At trial, it was argued by Condor that Aventura would be the proper party to launch a separate claim against Condor, relating to any allegations of default under the Lease Agreement, and that Pavilion could not argue that it lost a right of distress against the Avida Restaurant since it never had that right.

38 To answer that concern, Pavilion provided the Court with an Assignment of Action, signed by Aventura and provided to Pavilion. The Assignment is not dated.

39 The ability of a party to assign a cause of action to a second party was dealt with recently by our Court of Appeal in *Ma v. Ma* [2012] O.J. No. 2689. In this case, K.N. Feldman J.A. reviewed recent jurisprudence considering the assignment of actions. In determining whether a cause of action for breach of contract is assignable, it is advisable to ask in each case whether this assignment savours of maintenance. Generally, where a commercial interest would justify an assignment of a cause of action, or where there is a legitimate commercial interest in the cause of action, an assignment will be permissible and there will not be a situation of maintenance.

40 Applying this reasoning to the test at hand, I find that the close relationship of the two companies Pavilion and Aventura legitimizes the assignment. Notwithstanding the fact that the assignment is not dated, I am prepared to deal with the issues contained in the Defendant's Claim on their merits. The Defendant's Claim was properly assigned by Aventura to Pavilion.

41 There are further difficulties however with respect to the Defendant's Claim. Druckmann testified with respect to Exhibit 2, and estimated the total value of items take from the restaurant to be \$59,360.00. However, there was no supporting documentation proving these values. Further, there was no evidence entered supporting the proposition that all of these items taken were actually purchased, leased, or owned by Pavilion. It would appear than many of the items listed in Exhibit 2 may have actually belonged to the Avida Restaurant, as opposed to Pavilion. On the other hand, it is possible that the Avida Restaurant had encumbered some of these goods with other security interests, which would limit Aventura's right of distress. *Honey Grove Estates Inc. v. Diversey Lever* [2000] O.J. No. 4147 (Ontario Court of Appeal).

42 Pavilion also argued that because of Condor's faulty security, Pavilion lost its right to distraint for rent due. This is an argument that is not found in the pleadings. Condor did not have an opportunity to establish values for the items that were taken and listed in Exhibit 2. Nor did Condor have an opportunity to determine if there were any security interests registered against the restaurant's goods. Lawsuits should be decided within the boundaries of the pleadings. It is unfair to inject a novel theory of liability into a case, *Rodaro v. Royal Bank of Canada* [2002] O.J. No. 1365 (Ontario Court of Appeal).

43 In addition, as argued by Condor, it is not clear that Aventura would have elected to distraint against the restaurant's property in any event. As at March 15th, 2010 the Avida Restaurant was al-

ready in default for several months' rent, and Aventura had taken no steps to distrain or to terminate the tenancy for non-payment of rent.

44 Finally, Aventura took no steps to mitigate its losses once the restaurant moved the items. Aventura did not file a police report nor attempt to locate the stolen property to pursue its remedies in accordance with s. 48 of the Commercial Tenancies Act, R.S.O. 1990, C. L.7 (fraudulent removal). I am not convinced on a balance of probabilities that Aventura suffered damages as a result of Condor's breach of contract, and I am therefore dismissing the Defendant's Claim.

Judgment

45 Both the Plaintiffs Claim and the Defendant's Claim are dismissed. Given this mixed result, I am ordering that each party shall bear their own costs. I want to thank both Mr. Crosby and Mr. Monkhouse for their thorough and skilled advocacy throughout.

D. ANSCHELL DEPUTY J.

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