

In The Territorial Court of The Northwest Territories

Between:

Yellowknife Condominium Corporation #9

Plaintiff

- and -

Shelter Canadian Properties Limited

Defendant

Reasons for Decision of The Honourable Judge L.J. Wenden

[1] The Plaintiff, Yellowknife Condominium Corporation #9 (Condominium #9) is a residential condominium tower located in the City of Yellowknife in the Northwest Territories.

[2] The Defendant, Shelter Canadian Properties Limited (Shelter) is a property management company carrying out business in the City of Yellowknife in the Northwest Territories.

[3] The Plaintiff's claim is for the return of \$7,465.28, which they allege was wrongfully taken from their bank account by the Defendant. The amount represents what Shelter alleges was owing by Condominium #9 for security services that they (Condominium #9) received but for which they were not billed.

[4] There is another Condominium #16 that is part of the same development. This is a commercial condominium that at all material times shared some services with Condominium #9.

[5] There were only two witnesses, Ms. Marchant for Condominium #9 and Mr. Dillabaugh for Shelter.

Plaintiff's Evidence:

[6] Ms. Marchant testified that Condominium #9 and Shelter entered into a Management Agreement 1st March 2006 for property management services. The contract terminated on the 31st December 2006 (Exhibit D1).

[7] In September 2006, Shelter attended a Board meeting of Condominium #9 and told the Board that they were going to be charged for additional security services.

[8] The Board advised Shelter there was a Service Agreement with Twilite Security that Condominium #9 had signed on December 7th, 2005 and that they wanted to follow the terms of that Agreement. The Board made it clear that they were not going to accept these back charges.

[9] In January 2007, the Board of Condominium #9 found out that Shelter had transferred \$7,468.28. Shelter was able to do this because as the management company they had access to the bank account.

[10] The bank account had been left open at Shelter's request so that invoices that needed to be could be paid. Ms. Marchant testified that: "... they had 30 days to clean up the bank accounts and during the period of ... the ... month of January of 2007 they transferred this money out."
(Transcript, page 22, lines 1- 4)

[11] The money was transferred out of Condominium #9's bank account after the Management Agreement between them had terminated. Condominium #9 did not receive any invoice prior to the money being transferred from their bank account.

[12] When Shelter asked for documentation to back up their claim, they were given Invoice No. 228 dated 02/20/07. Under "Description" was "Reimbursement of security costs that were paid but were not approved for payment." Total amount was \$7,468.28. Attached as well was the internal memorandum referred to below.

Defendant's Evidence:

[13] Mr. Dillabaugh testified. He said that Shelter took over management of both condominium towers from the previous property management company, Humford, in August 2005.

[14] On taking over, Shelter examined agreements between Condominium #9 and Condominium #16. They also examined billing practices and found out that there were a series of expenditures that were covered by a single invoice. The expenses were divided up, and each of the parties would pay their proportionate shares.

[15] In late 2005, he had advised Condominium #9 to arrange their own contracts for services as Shelter wanted to change the system of invoicing, and go to separate billing.

[16] As a result, Condominium #9 entered into a Service Agreement with Twilite Security Ltd. on 7th December 2005 (Exhibit P1).

[17] The Service Agreement has a weekly schedule. Total minutes of service for each day of the week were set out. In total there were four and one half hours given over to the security duties that are set down in the Agreement. In the margin of the Agreement, an unidentified person had written in "9 hrs. 2wks."

[18] Upon further review Shelter determined that the cost sharing was not covered by either the cross property agreements or any other written agreements. One of the reasons for the review was to allocate costs in a manner that was a more accurate reflection of the services that were actually used by Condominium #9 and Condominium #16, and to recover any costs that were outstanding as a result of the review.

[19] On March 1, 2006, a Management Agreement (Exhibit D1) was signed between Condominium #9 and Shelter.

[20] Mr. Dillabaugh testified that it came to his attention in April 2006 that there was a security contract signed between Condominium #9 and Twilite Security. Shelter was also aware that the number of hours being provided by the security company might be in excess of the contract amount.

[21] He said the issue was discussed with the Board of Condominium #9 in April, but there seemed to be much confusion as to the terms of the Service Agreement with Twilite Security and it was uncertain if, in fact, there was an excess of hours.

[22] Exhibit D2 is a Management Report dated April 2006. It was prepared by Ms. T. Spence, a property manager for the Defendant, Shelter. One of the items that was examined was *Security's Duties*. After outlining these duties she observed that: "This amounts to a minimum of nine hours per week."

[23] Mr. Dillabaugh contacted Twilite Security some time in April and confirmed through them that they were spending 18 hours and 20 minutes every two weeks at Condominium #9 and these extra hours were being paid by Condominium #16.

[24] He asked Twilite Security to explain why there was a discrepancy between the number of hours contracted for and the number of hours actually invoiced.

[25] The information that he received from Mr. Pinkowsky, an officer of Twilite Security was as follows: In late 2005, Mr. Pinkowsky was contacted by Ms. Marchant and asked to set up a separate contract for Condominium #9 that showed a billing of nine hours every two weeks. This was the Service Agreement dated 7 December 2005, and I find was entered into as a result of Shelter's instruction that Condominium #9 enter into separate contracts.

[26] According to Mr. Dillabaugh, Mr. Pinkowsky said that Mr. Marchant told him that the hours of service between the two condominiums (#9 and #16) should remain constant but to invoice Condominium #9 only nine hours every two weeks and the remainder to be charged to Condominium #16.

[27] Rather than telling Twilite Security to have their hours conform to the contract signed with Condominium #9, Shelter decided to let matters stay as they were.

[28] Mr. Dillabaugh explained that Section 3.02 (g) and Section 3.02 (i) gave Shelter the authority to make that decision.

[29] He explained the decision to continue on with the security service as it was in the following words:

“...we were entrusted to provide service ... Our duty and responsibility was to provide service. Because this situation existed at the time of assumption of the management, we continued because we felt that it was fair and equitable. ... we felt that the service that was being provided by Twilite needed to be provided to the property and it was the most economic way to provide the service.”

(Transcript, page 47, line 3, lines 6-13)

and

“... We supported the level of service and the amount of hours through there. ...”

(Transcript, page 52, lines 11-12)

and

“... The service was needed -- when we took a look at this as property managers the service was needed. It was the service level that we assumed on the property and we could support that service level ... in our interpretation of the standard that was needed at the project, somebody had to do those duties and we felt that the most cost effective way to do them was to continue to do them the way it was done ...”

(Transcript, page 65, lines 4-8, lines 14-17)

[30] Exhibit D7 is an unsigned copy of the Minutes of Condominium Corporation No.9 Board of Directors' Special Meeting dated August 3rd, 2006. These reveal that Exhibit D3 *“Initial review of Cost allocation for Condo 9 expenses.”* was discussed with Mr. Dillabaugh who was in attendance.

[31] The minutes state: *“The document outlines YCC16 and YCC9 billing deviations from the above mentioned agreements and identifies possible remedies. Board noted that arbitrator may be the only recourse to settle billing deviations.”*

[32] In September, Mr. Dillabaugh received the Security Patrol Review (Exhibit D4) from Twilite Security. At the bottom of the single sheet that forms the report the following appears:

“Average hours per week spent is 11 hours every week.

Invoice only covers 9 hours every two weeks.”

[33] He said that the level of service was maintained until Shelter received a formal notification by Condominium #9's Board to reduce security service to the contract level of nine hours every two weeks. This formal notification was given at the meeting in September 2006.

[34] He agreed that Shelter simply removed the money from Condominium #9's bank account. No invoice was sent to them.

[35] Instead an internal memorandum (attached to Condominium #9's Statement of Claim) was drafted. It was entitled:

“Additional Charges for Security to YK Condo 9”. There were invoice dates from the 7-Jan-06 to 30-Sept-6 of \$366.91 for two week periods, except for the 7 Jan which was \$176.40. The total with GST added was \$7468.28.

[36] At the bottom of the page was the following notation:

“Lori these are additional charges for security services provided to YK Condo 9 by YK Condo 16. Condo 9 was getting an additional 14.4 hour (sic) per 2 week period that wasn’t paid for.

Can you please pay this amount to YK Condo 16 from YK Condo 9

*Thanks for your help.
Sam”*

[37] He justified taking the money by invoking Section 3.04 of the Agreement. He said:

“And the expenditure of \$366.91 bi-weekly was in keeping with the authority given to us in the March 1st, 2006 agreement. We do not agree that it was a situation of us entering into – over a \$5,000 expenditure. The expenditure was assumed and was 366.91 biweekly, which would have fallen into our approval authority by agreement.” (Transcript, page 71, lines 5-11).

Analysis:

[38] It is clear that this dispute came about as a result of Shelter’s decision to review the allocation of expenditures between Condominium #9, and Condominium #16. In their view, the way in which expenditures had been allocated under the previous management company did not accord with the agreements that were in place to handle such expenditures. Security was only one of several areas examined by Shelter.

[39] Evidence was given by both sides about several agreements that were in place to deal with shared services between Condominium #9 and Condominium #16. As well *viva voce* evidence was given by both sides as to how the services were shared and the cost decided. While this provides some history as to how the matter developed, I find that it is not material to determine the issues before the Court. How the costs were to be divided up is not the issue. Nor is the amount. Condominium #9 takes the position that no money is owing. Furthermore, they had a contract for security and they wanted that contract respected.

[40] What is before the Court is essentially whether or not Shelter had the right to make the decision to carry on with the *status quo*, and if they had the right to remove the money from Condominium #9's bank account.

[41] As mentioned above, Shelter said that some of the sections in D3of the Management Agreement, authorized them to continue on with the hours of security that were actually being provided, notwithstanding that it was in excess of the contracted for hours, and to withdraw the money from Condominium #9's bank account.

[42] In addition to the sections that Shelter said authorized their actions there are others that must be examined. These are the sections that limit the manager's authority. They are found in Article II:

"Appointment of Manager

2.01 The Corporation hereby appoints the Manager to be its sole and exclusive representative and Managing Agent (subject to the overall control of the Corporation and to the specific provisions hereof) to manage the property and to act on behalf of the Corporation in carrying out the duties of the Manager as herein set out, and to enter into such contracts and agreements in the name of the Corporation as may be necessary in the performance of such duties, for a term commencing March 1, 2006, continuing in force thereafter for a period of one (1) year to February 28, 2007 unless otherwise terminated by the manner provided in this Agreement.

2.02 The Manager hereby accepts such appointment and agrees to manage the property on behalf of the Corporation in a faithful, diligent and honest manner, and subject to the direction of the Board of Directors."

[43] Sections 2.01 and 2.02 are clear that it is the Corporation that has the "overall control", and that the manager's duties are "the duties of the Manager as set out herein". These are contained in Article III and are specific and detailed. The amount of discretionary power given to the manager is limited to emergency situations. The appointment of a Manager is "*subject to the overall control of the Corporation*" and the manager accepts the appointment "*subject to the direction of the Board of Directors.*"

[44] Shelter had justified keeping the level of patrols on two sections of the Agreement, Sections 3.02 (g) and 3.02 (i).

[45] In their view Section 3.02 (g) is relevant because it mentions as part of the duties of the manager "*all building security*". Section 3.02 (i) is relevant because it gives the manager an "*absolute discretion*" to employ people "*to fulfil promptly and efficiently its duties hereunder,*"

[46] Section 3.02 states:

"The Manager, in the performance of the duties hereunder, shall:

...

(g) Repair and maintain or cause to be so repaired and maintained at the expense of the Corporation those parts of the property which require repair and maintenance by the Corporation in accordance with the provisions of the Declaration and By-Laws, and, without limiting the generality of the foregoing, such repair and maintenance shall include, where applicable, the repair and maintenance of: all condominium lockers, the property access systems, all lawns and landscaped areas, elevator maintenance where applicable, snow removal, providing for the removal and disposal of garbage, pest control, the keeping of the common elements in a neat and tidy condition by the removal of the litter therefrom, and providing all cleaning equipment and material required therefore, keeping all plumbing and water systems, electrical wiring circuits and lighting

*fixtures and central air-conditioning and heating systems where applicable in the common elements in good working order, and **all building security**;* (Emphasis added)

...

(i) Select, employ, supervise, direct and discharge in its absolute discretion such persons as it may require at all times to fulfil promptly and efficiently its duties hereunder, in its name;”

[47] It is the phrases “*and all building security*”, and “*employ ... in its absolute discretion ...*” that according to Shelter authorized them to continue on with the level of security being provided by Twilite Security.

[48] As I read Section 3.02 (g) it is limited to “*repair and maintenance*” of physical components of the property, items such as condominium lockers, plumbing water and heating systems, etc. This is evident from the phrase “*those parts of the property which require repair and maintenance ...*”.

[49] The manager is responsible for the building in a physical sense. The phrase “*all building security*” in my view relates to physical components such as closed circuit television cameras, or issuing cards that allow entry into the building. Security such as was provided by Twilite Security is essentially supervision, a service, and as such is not covered by this section.

[50] Section 3.02 (l) states the manager will: “*Periodically prepare for review by the Board a summary of the preventative maintenance measures which are to be applied to all aspects of the physical components of the property*;” (Emphasis added)

[51] Section 3.03 of the Management Agreement requires the manager to furnish the Board in writing an “estimated budget” that includes *inter alia* “*(d) Cost of all repairs, renewals, maintenance and supervision of the property*.” (Emphasis added)

[52] This subsection and section are a clear indication that “... *all building security*” mentioned in Section 3.02 (g) is limited to the physical components of Condominium #9.

[53] Therefore neither Sections 3.02 (g) or 3.02 (i) provided Shelter with the authorization to deal with the Service Agreement with Twilite Security in the manner that they did.

[54] Significantly there is a specific section in the Management Agreement dealing with the performance of contracts and agreements:

“3.07 In performing the above duties, the Manager shall use reasonable diligence to ensure that the contracts and agreements between the Corporation and suppliers or service persons are performed in accordance with their terms and inform the Board in the event that performance is considered by the Manager to be inadequate or contrary to the agreed terms and where services are properly performed and or materials provided in accordance with the contract, take advantage, where possible, of all trade discounts by prompt payment of trade invoices.”

[55] This section imposes two positive obligations on the manager:

- (1) To use reasonable diligence “... to ensure that the ... agreements between the Corporation and ... service persons are performed in accordance with their terms ...”;
- and
- (2) “... inform the Board in the event that performance is considered by the manager to be inadequate or contrary to the agreed terms ...”

[56] In the case at bar, there was a Service Agreement, between Condominium #9 and Twilite Security for security services. It was clear that the Agreement was not being performed in accordance with the terms of the Agreement.

[57] At this point Shelter was obligated to ensure that security was carried out in accordance with the terms of the Agreement and to notify the Board if in their view it was inadequate.

[58] This was not done. Instead they made the decision that the amount of service then being provided was what was necessary, so they allowed Twilite Security to continue on as before. It was not until they were instructed by Condominium #9's Board in September, to have Twilite Security adhere to the original contract that anything was done.

[59] The witness for Shelter, Mr. Dillabaugh said that Section 3.04 of the Management Agreement authorized them to remove the money from Condominium #9's bank account.

[60] That section states:

“Save for repairs that are immediately necessary for the preservation and safety of the property or for the safety of persons or required to avoid suspension of any necessary service to the Condominium, the Manager shall not make any expenditure other than those provided for in the budget approved by the Board, unless such expenditure is approved by the Board . In addition, the Manager shall not authorize any work, repairs, alterations or maintenance estimated to cost in excess of Five Thousand Dollars (\$5000.00) for any one item without first obtaining the Corporation’s approval to proceed with such work, except for monthly or recurring operating charges.”

[61] That section did not provide authorization to have the money transferred from Condominium #9's bank account to Condominium #16's bank account.

[62] There are several reasons for this:

- (1) The expenditure was not one in the “*budget approved by the Board*”, and was not an “*expenditure ... approved by the Board.*”
- (2) The section authorizes “*repairs*” or “*any work, repairs or maintenance*”. What was being provided by Twilite Security was security service. This is not “*repairs*” or “*any work, repairs or maintenance*”.
- (3) The section contemplates work to be done in the future and is limited to a single item “*... not authorize work ... estimated to cost ... for any one item ...*”. In the present case there is no question of an estimate, as the precise cost is known, \$7,465.28.

(4) The explanation by the witness for Shelter that the cost is actually \$366. 91 per invoice is specious and I reject it.

(5) The contract between the parties had expired at the end of December 2005. The evidence is clear that the money was taken in the month of January after the contract had expired.

[63] The account had been kept open at the request of Shelter so that they would be able to pay any invoices that came in later. It was not intended that it be used for situations such as the one before the Court where there was a real dispute as to whether or not the money was actually owed.

[64] The Defendant had no right to transfer the money. The entire situation came about as a result of the decision taken by Shelter to recover money that it felt was owed as a result of a misapplication of certain agreements.

[65] It was made clear at the August 2, 2006 meeting that Condominium #9 did not accept Shelter's position and were prepared to arbitrate the matter.

[66] I do not accept the explanations that were given by Shelter that the terms of the Management Agreement (Exhibit D1) authorized them to continue on with the actual number of hours dedicated to security and to remove the money from Condominium #9's bank account.

[67] The Court had asked the witness for the Defendant the following questions at page 69, lines 16-22 of the Transcript:

THE COURT: But then at the end of the day you simply took the money out of the account.

A: *Yeah.*

THE COURT: You never said, "We are taking the money out of your account"?

A. *(NO VERBAL RESPONSE)*

THE COURT: You never said, "We are taking the money out of your account"?

[68] The answer that the witness gave to this question was unresponsive. It had that same quality of justification that characterized many of the witnesses other responses.

[69] I find as a fact that the Plaintiff was not told beforehand that money was going to be transferred from their bank account. This is substantiated by the fact that the Plaintiff had to ask for an invoice. As financial documents intended to apprise the Plaintiff of their financial situation, they leave a great deal to be desired. The Defendant provided no explanation why they waited until January 2007 to recover the money.

[70] The explanation that Mr. Dillabaugh said that he received from Mr. Pinkowsky about the discrepancy between the contracted for hours and the number of hours actually spent on the job was never put to Ms. Marchant. I give it no weight.

[71] The Defendant had alleged in his Statement of Defence that a term of the Agreement was that disputes ought to be resolved by arbitration, and that the Defendant did not follow the terms of the Agreement. The Plaintiff had shown himself as willing to arbitrate. It was the actions of the Defendant in transferring the money that rendered the arbitration procedure not viable.

[72] I accept the evidence of the Plaintiff. Where there is a conflict between the evidence of the Plaintiff and the evidence of the Defendant, I accept the evidence of the Plaintiff and reject the evidence of the Defendant.

[73] I am satisfied that the Plaintiff has proven their case.

[74] There will be judgment for the Plaintiff in the amount of \$7,465.28, disbursements of \$50.00, and court costs of \$100.00.

Dated at the City of Yellowknife, Northwest Territories this 15th day of May, 2008.

L.J. Wenden
A Judge of the Provincial Court of Alberta

Appearances:

Ms. Bluck
for the Plaintiff

R.W. Dillabaugh
for the Defendant