

2011 CarswellAlta 1610, 2011 ABPC 274

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Hillview Park Condominium Corp. 8120257 v. Exit Realty Fort McMurray

Hillview Park Condominium Corp. 8120257 (Plaintiff / Defendant by Counterclaim) v. Exit Realty For McMurray
(Defendant / Plaintiff by Counterclaim)

Alberta Provincial Court

S.A. Cleary Prov. J.

Heard: June 9, 2011

Judgment: September 13, 2011

Docket: Fort McMurray P1102000037

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Counsel: Ian Snook (Agent), for Plaintiff / Defendant by Counterclaim

Jodie Thorne, for Defendant / Plaintiff by Counterclaim

Subject: Contracts; Property

Contracts --- Formation of contract — Consensus ad idem — Certainty of terms — General principles.

Real property --- Condominiums — Condominium corporation — General principles.

Real property --- Condominiums — Practice and procedure — Miscellaneous.

S.A. Cleary Prov. J.:

Facts

1 Neither of the parties to this action are large or sophisticated entities. The plaintiff and defendant by counterclaim (hereinafter referred to as "Hillview") is a condominium corporation run by a volunteer board.

2 The defendant and plaintiff by counterclaim (hereinafter referred to as "Exit"), is a company contracted by Hillview to manage its properties. It appears to be a relatively small operation owned and staffed by local people.

3 A contract between the two parties was signed December 1, 2009.

4 It appears that Hillview originally had a management contract for some years previous with Exit's predecessor, Fort Management. It also appears the corporate officers and/or staff at Fort Management essentially remained the same when Exit took over the business. The members of Hillview's board and various officers and certain staff at Exit seemed to have a close personal working relationship. In particular, a woman named Fatima Salvador was handling Hillview's business, and Hillview was very happy with her and her work.

5 During Hillview's dealings with Fort Management (Exit's predecessor as manager), Hillview purchased a filing

2011 CarswellAlta 1610, 2011 ABPC 274

cabinet to be used for the purpose of containing the documents that Fort Management used to manage the properties. This filing cabinet eventually ended up in the possession of Exit.

6 Fort Management also held certain drawings and plans relating to the Hillview properties in its offices. They were described in evidence as being held in "dusty boxes" and it is said they eventually ended up at some point in Exit's new office location.

7 In addition, it appears that Hillview paid some extra money to Fort Management for the preparation of an electronic database to be used in management of the properties. Fort Management prepared that database and eventually it was used by Exit. The database as originally prepared was updated continually first by Fort Management and subsequently by Exit. It is mentioned because it is one of the main subjects of the original claim.

8 Throughout most of 2010 things seemed to go quite well between the parties. However, in November 2010 there was what might be called an internal shake-up at Exit. The result of this was that Fatima Salvador, Arlene Mevetsik and Yvonne Harris either left the company or, as appears likely in the case of Fatima Salvador, were asked to leave.

9 The president of the Hillview board, Ian Snook, found out that Fatima Salvador was being removed from her position at Exit and was quite upset about how this had transpired. He felt that the reason for the removal and method of removal were unjust. I think it is fair to say that Mr. Snook sincerely held the opinion that Fatima was good at her job and that the way in which he understood her to be removed was inappropriate and wrong. I accept he perceived the situation to be unprofessional and personally upsetting. In addition, Mr. Snook felt that certain of Hillview's affairs were not being properly handled at approximately this same time, in particular there was the issue of a bounced cheque which Hillview felt was the fault of Exit and Exit felt was the result of lack of communication on the part of Hillview.

10 Needless to say, the relatively good working relationship between the parties was seriously compromised.

11 After a meeting of the Hillview Board, it was decided that Hillview did not wish to continue any longer in a business relationship with Exit.

12 Hillview purported to give Exit notice of termination of the contract between them by letter dated December 6, 2010, stating that the business arrangement would be at an end on January 14, 2011.

13 Hillview contemporaneously entered into a management agreement with a new company, ACRM. Undoubtedly a factor in what transpired thereafter is that ACRM was formed by the three employees who left Exit - Ms. Harris, Fatima Salvador and Arlene Mevetsik.

14 It is clear to me that these developments were not palatable to Exit. Several emails or calls from Hillview to Exit went unreturned. While the explanation was that the staff at Exit had no further information to give, it rather appears that the owner of Exit, Ms. Kathy Bowers, was herself quite hurt and upset by the development. This is perhaps understandable given the undoubted value of Hillview's business to Exit, the method in which it was lost, and the parties who eventually gained its benefit.

15 After the purported termination of the contract, Hillview sought the return of certain things it said were its property. This included client files and corporate financial documents, the electronic database, drawings and plans and the filing cabinet.

16 Exit rather grudgingly returned the client files and various other items in a series of boxes. The pickup of these items at Exit's office was accompanied by a rather unseemly incident wherein Ms. Yvonne Harris was threatened with the police being called, and a certified cheque was demanded from Ms. Thecla Kelly, the volunteer treasurer of Hillview, before the items would be returned. This cheque was to cover management fees for the entire month of

2011 CarswellAlta 1610, 2011 ABPC 274

January and amounted to \$3,657.29. It was paid "under duress" as stated in the original claim.

17 Eventually, however, Ms. Harris and Ms. Kelly retrieved various boxes and left Exit's premises.

18 The filing cabinet, drawings and plans and electronic database (or a printout thereof) were never provided to Hillview in spite of several requests and some apparent confusion on the part of Exit's staff at least one of whom intimidated early on that it might be possible to provide an electronic copy of the database.

19 Hillview then let the staff at ACRM take over management of the files. Ms. Yvonne Harris testified and said that Ms. Mevetsik told her the client files were incomplete. Ms. Harris then authorized Ms. Mevetsik to prepare a new electronic database from scratch. Hillview was billed the sum of \$7,543.20 for this work. My understanding is that the database contains various details of the owners' banking information and provides the manager the ability to electronically conduct financial transactions to and from the corporation's accounts.

20 The witnesses called on behalf of Exit testified that as far as they were concerned everything relevant, with the exception of a copy of the electronic database, was contained in the files sent to Hillview. They testified it was never their practice to provide a digital copy of such a database to any of their clients in order to preserve the integrity of the data it contained. They also testified that it might have been possible to provide a hard copy of the database, but that one was never formally requested by Hillview. Certainly Exit did not provide a hard copy voluntarily.

The Subjects of the Claims

21 I will now deal with each individual item forming part of the claims.

1. The Electronic Database

22 Hillview maintains the database is their "property" because years ago they paid a predecessor company some undefined sum of extra money to set it up. While I am satisfied that Hillview did pay that money, it is impossible to determine under what terms the database was created. The database was not returned to Hillview when the relationship with Fort Management came to an end. There certainly is nothing in the contract between Exit and Hillview stating that the database is to be returned at the end of their relationship contract. Indeed, as counsel for Exit pointed out, the contract is clear that Exit is not required to do anything that is not listed in the contract and return of a database is certainly not listed. Exit's witnesses further stated it is their practice never to return a digital copy of any client's database.

23 Further, the predecessor company and then Exit maintained and added to the database over the years for the purposes of carrying out their duties under their business relationship with Hillview. Mr. Snook agreed that the database as it existed in January of 2011 would have had little resemblance to that originally created and that as a result of the passage of time the original database would have had no value for Hillview.

24 Further, Hillview's witnesses were not personally able to testify that the information to create the database was not contained in the files obtained from Exit, whose witnesses maintained that all the information was actually there. The information relied upon by Hillview is hearsay. All Ms. Harris could say is that Ms. Mevetsik told her the information was missing. In other words, the person who examined the files and determined the information to be missing, also the same person who billed Hillview for recreating it, was never called as a witness herself. While I am satisfied that Ms. Harris truly believes this is the case, it is also a classic example of hearsay evidence and, indeed, the only evidence on a central point.

25 Although I am satisfied that Exit was perhaps less than completely serene in how it responded to the termination of the contract, and I am satisfied that the files were returned to Hillview in a state of some disarray because of

2011 CarswellAlta 1610, 2011 ABPC 274

that, I am unable to determine even on the balance of probabilities that the information was actually missing from the files. There is no evidence beyond hearsay to prove that the information was not there. How Exit responded in how it returned the files may have been a reflection of the upset felt by its owner at the termination of the contract. It might also be a practice not likely to ensure that Hillview would recommend Exit as a company to do business with in the future. However, such a response has not been proven to be an action which amounts to breach of contract, or otherwise unlawful retention of Hillview's property.

26 I therefore find as follows.

27 There is insufficient foundation to prove that the database was actually the property of Hillview subject to return. There is no original contract to that effect, the database was not returned by its original creator when that relationship ended, and the return of the database and its content was not the subject of a term of the existing contract.

28 If I am incorrect, and the information contained in the database was the property of Hillview, I am not satisfied it has been proven the information was withheld. There is no direct evidence on that point from Ms. Mevetsik or anyone else. In such a case it would be improper of me to rely on hearsay evidence on that point, central as it was to the claim.

29 Therefore the claim for the re-creation of an electronic database must fail.

2. Other Miscellaneous Property

a. Filing Cabinet

30 I find the filing cabinet held by Exit is certainly the property of Hillview. For Exit to insist many years later on a receipt or other proof prior to its return is perhaps a reflection on how upsetting it found the breakdown of the relationship. However, I accept that Hillview purchased that filing cabinet with its own money and only for the purpose of holding their files at the office of the management company. Exit does not own that filing cabinet and has no other legal reason to keep it. Indeed, in the end it seems conceded that this item ought properly to be returned to Hillview and that will be my order.

b. Drawings and Plans

31 I am prepared to find that these items were, at least at one time, in the possession of Exit. I am also prepared to find that they are no longer there. Ms. Bowers testified that there is nothing left at Exit's offices that has anything to do with Hillview. I accept her evidence on this point. What happened to the drawings and plans is more than a bit of a mystery. Why they were not the subject of a term of any contract or why they were not treated with more care by either party is difficult to imagine, but as I indicated earlier, these are relatively unsophisticated parties. I am certain that the absence of these documents is likely to cause serious difficulty at some point for Hillview, but I simply cannot order the return of items I am satisfied Exit no longer has.

c. Other Financial and Receipt Books

32 Hillview insists that certain of these items, necessary for the completion of a financial audit, were not returned by Exit. Exit insists that they were returned. It might be said that the return of these items falls within the manager's obligations under s. 2.05 of the contract. However, I am simply unable to determine from the evidence, even on a balance of probabilities, what, if anything, is missing. I am also satisfied that Exit has nothing left in its possession that would fall within the description of these items or anything else to do with Hillview aside from the filing cabinet. Since the claim was for the return of the items, and I find they are not Exit's possession, I will not order them returned.

2011 CarswellAlta 1610, 2011 ABPC 274

3. Other Outstanding Monetary Issues

33 Hillview seeks to recover the monies it paid "under protest" to Exit following the purported termination of the contract. Essentially Hillview's position is that they gave fair notice to Exit on December 6 that they would have a new manager as of January 14. The position is that Hillview should not have had to pay for Exit's services beyond that date. At the time of termination, Exit originally demanded payment to the end of January of 2011.

34 Having been served with the claim for this and the other items previously mentioned. Exit counterclaims that Hillview breached the terms of the contract between the two by not providing proper notice amounting to 90 days, and so claims for payment for that period of time.

35 In this regard the contract is clear.

36 Term 1.02 of the contract says the contract was for the period from December 1, 2009 until January 31, 2011, and that the contract would automatically renew unless 60 days' written notice was provided.

37 To terminate the contract on January 31, 2011, therefore, Hillview would have had to provide written notice to Exit no later than December 1, 2010. Such notice was not provided until December 6, 2010, less than the 60 days required to terminate the contract on January 31, 2011.

38 Term 8.04 of the contract provided that either party could otherwise terminate the contract on 90 days' notice to the other.

39 I read these terms together to mean that the earliest Hillview could have terminated the contract by providing written notice on December 6 was February 5, 2011.

40 To terminate the contract on January 14, Hillview would have had to provide notice dated approximately October 15, 2009.

41 I recognize that the president of Hillview is of the opinion that it would be harsh and unfair to enforce the terms of the contract since from his perspective Hillview couldn't work with Exit. As he said, "they wouldn't let us on the premises." It is clear the reasons for how acrimonious the dissolution of the relationship was are not entirely black and white, though. It cannot be said that the failure to give proper notice was the fault of Exit. Further, Hillview made no attempt to continue the relationship until the end of the notice period. It chose to move on and begin a relationship with another manager in spite of the terms of its pre-existing contract with Exit.

42 Indeed, it appears that neither party averted to the terms of the contract until after this action was commenced. Mr. Snook really had to agree the terms were clear when presented them by counsel for Exit and when questioned by the Court. Ms. Bowers indicated she only got the contract out and looked at it when she was served with the original claim. Perhaps if either party examined the terms of the contract at the time of the dissolution of the relationship, this action might have been avoided either through negotiation or different choices being made in the first place.

43 As previously stated, the terms of the contract are clear. Hillview agreed to provide 60 days' notice to terminate the contract on January 31, and otherwise to provide 90 days' notice. It provided neither. Therefore, Hillview is in breach of its obligation to pay out the notice period.

44 The counterclaim in the amount of \$7,541.29 will therefore succeed.

2011 CarswellAlta 1610, 2011 ABPC 274

Conclusion

45 My order is therefore as follows.

46 Hillview's original claim succeeds insofar as I order the return of the filing cabinet no later than September 15, 2011. I will award costs in the amount of \$100, being the filing fee that would have applied to the filing of a claim for that item only. I will deduct these costs from my concurrent award to Exit. The balance of Hillview's claim is dismissed.

47 Exit's counterclaim also succeeds. It will have judgment in the amount of \$7,541.29, plus costs in the amount of \$654.29 (10% of the award less the \$100 costs payable to Hillview) with pre-judgment interest from April 5, 2011 to June 9, 2011, the date of trial (\$27.04), for a total of: \$8,222.62.

48 I wish to thank counsel and all the witnesses for their assistance and civility during these proceedings. Such matters can be quite difficult for individuals with busy lives outside the legal system and I truly appreciated the attitude displayed by all involved.

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