CITATION: Northwest Protection Services Ltd. v. Wellington, 2024 ONSC 1292
COURT FILE NO.: CV-20-646796-0000
DATE: 20240301

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
NORTHWEST PROTECTION SERVICES LTD.	)	*Amanda McBride and Daniel Michaud-Shields*, for the Plaintiff (Defendant by counterclaim)
Plaintiff (Defendant by counterclaim)	)	
	)	
– and –	)	
	)	
RENVILLE WELLINGTON, ROBERT DEE, MICHAEL COMPOSANO and PROTOCOL7EVEN SECURITY MANAGEMENT INC.	)	*Evan Moore*, for the Defendants (Plaintiffs by counterclaim) Renville Wellington and Protocol7even Security Management Inc.
Defendants (Wellington and Protocol7even Plaintiffs by counterclaim)	)	*Leon Melconian*, for the Defendant Robert Dee
	)	
	)	**HEARD:** February 15 and 16, 2024

L. BROWNSTONE J.

Overview

[1] Northwest Protection Services Ltd. is in the business of providing security in various settings including live events, retail outlets and commercial properties. The defendants Renville Wellington and Robert Dee were long-term part-time employees of Northwest. Both Wellington and Dee had other employment while providing part-time services to Northwest. They both started working for Northwest as supervisors and later became senior supervisors. Wellington also provided security in the form of close personal protection, known as black ops, for Northwest VIP clients.

[2] Both Wellington and Dee stopped working for Northwest in about March, 2020, shortly after the COVID-19 pandemic was declared. Northwest claims that both Wellington and Dee were fiduciaries of Northwest and improperly competed against it, making use of Northwest's confidential information to do so. That confidential information was alleged to include information about bidding, pricing and requests for proposal. Northwest alleges that the defendants used this information themselves and provided it to Northwest's direct competitors. Northwest claims that Wellington's wrongful actions were carried out both personally and through his corporation, the defendant Protocol7even ("P7"). Northwest and the defendant Michael Composano, another of its employees, settled their claim prior to trial.

[3] Northwest's claim is for breach of contract, breach of a duty of care, breach of fiduciary duty, breach of confidence as well as aggravated and punitive damages. It also sought an accounting and disgorgement of profits and a declaration that the defendants are constructive trustees of the plaintiff's confidential information, as well as special damages. At trial, Northwest decreased its damages claim to a total of $500,000.00. Northwest provided no damages brief, no expert report, and no particulars in support of its claim for damages.

[4] By counterclaim, Wellington and P7 claim Northwest wrongfully placed Wellington on an involuntary layoff, which he did not accept, and therefore constructively dismissed him. Wellington and P7 also claim that Northwest improperly interfered with their economic relations with a third party, Fan Expo, in the fall of 2021. Wellington alleges that Northwest advised Fan Expo it would not fulfill its own contract to provide security at Fan Expo if Wellington or P7 were providing any services for the event, which Wellington and P7 had been contracted to provide. Wellington and P7 claim damages of $9,413.38 for their subsequent loss of that contract and funds expended for supplies for that contract.

[5] The trial proceeded on a summary basis. Out-of-court cross-examinations on affidavits occurred. One witness on behalf of Northwest, as well as Dee and Wellington, were cross-examined at trial.

[6] For the reasons that follow, I dismiss both the claim and the counterclaim.

Issue One: Did Wellington, P7 or Dee breach any contract, fiduciary duty or other duty owed to Northwest?

[7] Northwest claims Wellington, P7 and Dee breached their duties to it in the following ways: they breached their fiduciary obligations to Northwest, they misused Northwest's confidential information, they wrongfully worked for Northwest's competitors and in the case of P7 wrongfully competed with Northwest, and they wrongfully recruited staff for Northwest's competitors.

[8] I find that none of these claims has merit for the reasons set out below.

1. Dee and Wellington were not fiduciaries of Northwest

[9] Northwest hired Dee in 1999 and Wellington in 2001. Both employees signed a pre-employment agreement; neither is party to a written employment contract.

[10] Dee and Wellington were first hired as security supervisors and became senior supervisors in more recent years. As senior supervisors, they had some role in planning specific security requirements for events and were the point of contact for clients at the events at which they were acting as supervisors. At those events, they would organize the crew of security personnel provided by Northwest. If problems arose on site, they would try to manage them, or would call managers at Northwest for assistance.

[11] Dee and Wellington worked part-time for Northwest and were paid an hourly rate. They each held other jobs and did not have set hours or workdays with Northwest. Wellington's annual earnings from Northwest ranged from $4,616.25 to $11,679.60 between 2011 and 2019. He received no benefits or perks from Northwest. Both were laid off from Northwest at the start of the COVID-19 pandemic in March 2020. The reason for layoff on their records of employment was listed as shortage of work.

[12] Northwest claims the two men were in a fiduciary relationship with Northwest. It argues that they were integral to Northwest's functioning and success. Bruce McBean, Northwest's Chief operations officer and the son of its founder, swore that the two men were "senior and trusted employees".

[13] In cross-examination, McBean had difficulty answering straightforward questions in this regard. When it was put to him that neither Dee nor Wellington were part of the management team he answered, "they were part of the supervisor team". When pressed to confirm this was not management, he answered, "define managerial." When it was suggested to him that they could not sign contracts, he answered "they could make suggestions".

[14] Yet in his own affidavit he had set out the members of the management team, which did not include Dee or Wellington. McBean's evidence demonstrated that the management team had significant responsibilities well beyond those expected of senior supervisors – they were in charge of scheduling guards, managing personnel, addressing health, safety or human resource concerns, marketing, obtaining new business and building relationships with existing clients. These were never duties of the senior supervisors.

[15] McBean made many bald assertions in his evidence. When asked to back them up, he repeatedly said "it is in my affidavit." I find him to be an evasive witness whose evidence does not accord with common sense. He was more interested in arguing than in answering questions properly posed to him.

[16] Wellington and Dee, on the other hand, were straightforward in their responses to questions. They provided clear answers, even when those answers may not have been to their benefit. Their evidence accorded with the documentary evidence, to the extent such evidence existed.

[17] I accept Wellington's and Dee's evidence that they had no managerial functions, that they communicated with clients in advance of events for logistics and planning purposes only, that they did not do any marketing or client development, and that they were not involved in administrative work with respect to the contracts. They did not assign guards to events, or price or co-ordinate dates for events. Their duties were primarily to oversee security at the events.

[18] I find that they were not in a fiduciary relationship to Northwest. I reject Northwest's contention that they were trusted with customer relationships and were the "face and personification" of the company: *Computer Enhancements v J.C. Options, et al,* 2016 ONSC 452

at paras. 66 and 73. They were part-time employees who functioned within a limited operational scope, and who were among the first to be laid off when the pandemic hit.

2. Dee and Wellington did not have access to confidential information

[19] Northwest asserted that Wellington and Dee had access to confidential information belonging to Northwest and used such information against Northwest. That information was claimed to be confidential lists of clients, information about bidding, pricing and requests for proposal. At trial, Northwest suggested that its contact information for its employees was also confidential and had been wrongly used by Dee and Wellington.

[20] McBean swore in his affidavit that both Dee and Wellington knew of the intended pricing of Northwest for events and contracts. Wellington and Dee denied that they had access to this information.

[21] McBean provided no evidence to support his bald assertion. He acknowledged that Northwest had not produced a single email showing Dee or Wellington had this information, despite the assertion in his affidavit that they received such emails.

[22] Neither Dee nor Wellington had access to the firm's software that housed its client lists. There was evidence that Wellington was involved in email communications with a particular client's representative prior to a specific event to discuss security requirements and logistics for that event. Northwest also produced a single document it claimed contained confidential information. This document comprised a list of concerts at various stages. It did not contain the name of the client, nor any contact information. The concerts had all been confirmed; the fact they were occurring was public knowledge. There was no pricing information on the document. McBean asserted Dee and Wellington would have had access to many such lists. When it was put to him that Northwest had produced not a single one, he answered "If that is what you say". No such documents were in fact produced in Northwest's evidence.

[23] Wellington may have had some information about the hourly wages paid to security personnel through his work at Northwest. There is no evidence that Dee had this information about anyone other than himself. McBean conceded in cross-examination that this kind of information is regularly shared between security companies. There is no evidence that either Wellington or Dee had access to Northwest's pricing formulas for bidding on a project; the cost of personnel is a small piece of information not difficult for two people working in the industry to come by.

[24] Northwest relies on *Camporese v Bay Area Investigations*, 2019 ONSC 962 at paras. 33 and 34 in support of its contention that confidentiality is of utmost importance in the security industry. In *Camporese*, the plaintiff brought a motion for production of a private investigator's surveillance report prepared, but not produced, in the context of matrimonial litigation. The defendant investigator had been hired by the plaintiff's wife in those proceedings. The plaintiff started an action against the defendant for, among other things, intrusion upon seclusion. The defendant investigator resisted production on the grounds of privilege. In the course of his

discussion, Goodman J. accepted that private investigators are often hired to gather deeply personal information that are to be provided only to the client. Justice Goodman referred to s. 2(1)(h) of the *Code of Conduct*, O.Reg 363/07 made under the *Private Security and Investigative Services Act*, 2005, SO 2005, c 34 which requires licensees to respect the privacy of others by treating all information received while working as a private investigator or security guard as confidential. *Camporese* arose in a very different context. There is no confidential information in this case that is any way comparable to information obtained secretly by a private investigator in a matrimonial case. In any event, there is simply no evidence that the defendants had access to confidential pricing information, client lists, contact information, or requests for proposals, much less that they disclosed it or used it for their own, or anyone else's, benefit.

3. *Wellington and Dee did not wrongfully work for Northwest's competitors; P7 did not wrongfully compete with Northwest*

[25] All parties testified that security companies, including Northwest, often worked together with other security companies by way of sub-contracting to provide security for events. In December 2019, McBean was asked to subcontract some security services for a New Year's Eve event in the Niagara area for another security company, Viking, and was unable to do so. He later learned that Dee and some others who worked for Northwest had attended the event and appeared to have worked security. He states that some Northwest staff came to him to be paid for that evening, being under the impression they were working for Northwest not Viking.

[26] Dee acknowledged attending that event as well as two or three others (one in 2021 and one in 2022) in a Viking security jacket. He stated he did not get paid for any of them. He attended the events because his friends were working security or because he wished to gain access to the event. He testified that "giving a friend a jacket" was a known and common way for someone to attend an event for free. Northwest claims this is contrary to s. 35(2) of the *Private Security and Investigative Services Act*. It cited no authority in support of this proposition. I do not read s. 35(2) this way; that provision requires security guards to wear a uniform but does not render someone a guard by virtue of wearing a uniform.

[27] Wellington had an active role with Viking for a period of time after he was laid off from Northwest. He states that he worked for Viking from March 27, 2020 until 2022 as an hourly worker. For a period of time, he held the titles of regional manager and president, but states he did this as there was restructuring at Viking and they asked him to assist while the restructuring was underway. He agreed and billed Viking hourly. This lasted for a couple of months. There is no evidence that Wellington ever had any financial stake in Viking.

[28] In any event, on McBean's own evidence, Viking was not a competitor of Northwest at the relevant time. Although he attempted to challenge this assertion when put to him on cross-examination with the response "says who?", he was reminded of his evidence given under oath at his cross-examination where after an exchange about Viking he stated: "I don't view them as competition". When asked why, he answered "because they operate in different markets, and when they work in the GTA, they typically work as subcontractors for us." I do not accept his attempt

to change this answer on cross-examination to render Viking competitors. I find that he did not view Viking as direct competitors of Northwest in 2020.

[29] In any event, the parties agree that there was nothing prohibiting Dee and Wellington from working for other security companies. Both Dee and Wellington claim that the *Private Security and Investigative Services Act* assures them of this right. Prior to 2007, licenses of private security guards were issued to employers. After 2007, licenses were issued directly to employees. Wellington and Dee take the position that the change in the legislation meant that guards were free to work for different employers, and any non-competition agreements that did exist prior to 2007 were negated.

[30] While he disagrees about their interpretations of the legislation, McBean acknowledged that there is no prohibition on security guards working for other companies, nor was there at the time relevant to these proceedings. He acknowledged that Northwest does not try to enforce "non-compete" clauses with respect to those employees that had signed them (Dee and Wellington had not).

[31] In sum, I find that Dee did not work for Viking, and that even if he had, there was no prohibition on him doing so. I find that Wellington started to work for Viking after he was placed on a layoff by Northwest, and nothing prohibited him from doing so.

[32] I also find that P7 does not compete with Northwest and that in any event, there is nothing prohibiting it from doing so. Wellington operated P7 as a sole proprietorship for many years and incorporated it in June 2020. P7 focuses on small events and security detail for private clients, as contrasted to Northwest whose focus is on large events. Sometimes, Wellington conducted his work for Northwest through P7. Sometimes, Wellington advised Northwest he was not available to work for them because he was working private security detail. Wellington has always been free to provide security services through P7.

4. Wellington and Dee did not wrongfully recruit staff for Northwest's competitors

[33] Northwest claimed it was unable to staff its own events on New Year's Eve with its own staff, and had to subcontract out some of its work to another security company.

[34] Northwest provided no evidence that connected the actions of Dee, Wellington or P7 to its inability to staff its New Year's Eve events. It provided no evidence that it suffered any losses from subcontracting out part of this work and acknowledged it may have had to pay its own staff more than it paid the subcontracted staff; this obviously would have resulted in a net gain to Northwest, not a loss. Even the hearsay evidence provided that certain Northwest staff told McBean they thought they were working for Northwest, not Viking, at the New Year's Eve event in Niagara does not connect any of the defendants to this purported belief, McBean's bald statement to that effect notwithstanding.

[35] Mr. Composano provided a list of events for which he worked for Viking. He does not allege Wellington or Dee recruited him to work on behalf of Viking for any of them.

[36] There is no evidence from any employee who states they were contacted by either Wellington or Dee to engage in a different security business to the exclusion of Northwest. McBean acknowledged that some of the people he alleged were "poached" by Dee or Wellington in fact continued to work for Northwest.

[37] The total evidence of recruitment is the following: one or two Facebook reposts by Dee, not directed at anyone in particular, of notices advising of another company's need for licensed security guards throughout Ontario, and Wellington's evidence that he contacted two guards who had been laid off by Northwest and who were available to work for Viking in 2020.

[38] I find that neither Dee nor Wellington breached any duties of any kind to Northwest.

Issue two: Even if Northwest could make out its claim, it has proven no damages

[39] Northwest filed no expert report and no damages brief quantifying its alleged damages. Northwest made no attempt to quantify or particularize its damages, and no attempt to separate damages caused as between the defendants or as related to any of its claimed causes of actions. The first time it advised of its quantification of the damages it was seeking ($500,000.00) was in its opening statement at trial. No particulars of special damages were every provided. Although it claimed its reputation was damaged and undertook to provide particulars, it did not do so. In closing argument, Northwest submitted that it was capping the damages it sought to those in paragraph 1(a) of this claim, $500,000.00 for breach of contract, breach of duty of care and/or breach of fiduciary duty. Northwest claimed that alternative relief of breach of confidence may also be available. It abandoned its claim for punitive damages.

[40] In cross-examination, McBean asserted that Northwest's "biggest damages" was its inability to secure a 25-million-dollar City of Toronto contract to provide security at shelters during the pandemic that was awarded to one of its competitors. He claims Northwest would have secured the contract if the "backbone" of its supervisory team were working with it. In addition, he claimed Northwest was unable to provide as much security for grocery stores during the pandemic as it could have if Dee and Wellington had worked together with Northwest.

[41] Northwest also attached to an affidavit a chart showing that its concert revenues decreased in 2020 and 2021 from 2019. The chart was prepared by an administrator at Northwest. McBean testified that he did not rely on the chart for damages purposes. Nonetheless, counsel for Northwest argued that Wellington and Dee were responsible for the entirety of the downturn in Northwest's fortunes after their departure in 2020. This submission was made despite McBean's acknowledgement in cross-examination that live events were the largest part of Northwest's business in March of 2020, and that live events were shuttered in March of 2020 owing to the pandemic. Northwest laid off over 50 security personnel in March 2020 as a result of the pandemic. I do not accept Northwest's suggestion that the downturn in its business was as a result of any actions of Dee or Wellington.

Issue Three: The counterclaim - Was Wellington constructively dismissed from Northwest? If so is he entitled to damages?

[42] Once the pandemic was declared and live events were shuttered, Wellington was one of the employees placed on what Northwest described as a "temporary layoff". In April 2020 Northwest's counsel sent Wellington a "cease and desist" letter, alleging he breached his employment agreement, improperly used Northwest's resources, and was required to cease acting against Northwest's interests. By correspondence dated the following day, Wellington asked for details of the information and resources he was alleged to be improperly using, and details of the interference with Northwest's business functioning. No reply was provided. Northwest's response came in the form of its statement of claim.

[43] Wellington argues that a unilateral layoff by an employer amounts to a constructive dismissal, absent agreement to the contrary: *Elsegood v. Cambridge Spring Service (2001) Ltd.*, (2011), 109 O.R. (3d) 143, 2011 ONCA 831 at para. 14. He claims he is entitled to payment in lieu of notice in the amount of $25,000.00, based on a notice period of 24 months. He argues that it is the employer's burden to demonstrate the employee has failed to mitigate his loss, and Northwest has not done so. Further, given Northwest's interference with his contract with Fan Expo, it cannot state he has failed to mitigate.

[44] Northwest states that at no time did Wellington tell it he did not consent to the layoff, and that he only wished to work in the live events division, which was not operating in late March 2020 as a result of the pandemic. McBean also testified that Northwest decided it was not going to reinstate Wellington when it heard that he was working for Viking.

[45] In support of his claim, Wellington relies on the case of *Monti v Hamilton-Wentworth (Regional Municipality)*, 1999 CanLII 14858 (ON SC). In that case Reilly J. noted at paragraph 20 that "[i]f the employer is experiencing a downturn in fortune, thereby requiring the termination of an employee, but the field of skill, talent or expertise is thriving within the general economy, and there is abundant alternate employment, then the issue is rendered academic or moot, as the employee will be expected to mitigate her damages by obtaining alternate employment." In the case before me, Northwest did not call Wellington back from the layoff to work security at grocery stores at least in part because it learned that Wellington was providing these same services for Viking. In this respect, it is not a duty to mitigate that is at issue but an argument that Wellington did in fact mitigate and has sustained no damages. I accept Wellington's argument that Northwest would have the obligation of proving Wellington's losses were avoidable by mitigation and that his mitigation efforts were insufficient, but Wellington has to first prove those losses. This is clearly stated by Lafrenière J. in a case relied on by Wellington: *Brien v. Niagara Motors Limited*, 2008 CanLII 41823 (ON SC) at para. 271 (appeal allowed in part on the damages calculation: 2009 ONCA 887). Justice Lafrenière cited the Supreme Court of Canada decision in *Red Deer College v. Michaels et al* (1975), 1975 CanLII 15 (SCC), 57 D.L.R. (3d) 386 in which the Court stated at page 330: "It is, of course, for a wronged plaintiff to prove his damages, and there is therefore a burden upon him to establish on a balance of probabilities what his loss is." The court went on to explain at p. 331: "In the ordinary course of litigation respecting wrongful dismissal, a

plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences."

[46] Wellington also relies on *Fong v Big Picture Home Entertainment Limited*, 2020 ONSC 7503. In that case, the plaintiff provided affidavit evidence in support of his damages and mitigation efforts. Wellington provided no such evidence in this case.

[47] In sum, even if Wellington was constructively dismissed by Northwest in March or April 2020, he has led no evidence of any damages suffered. He began working for Viking within a week of his layoff. He held the roles of regional senior manager and president during his claimed notice period. His claim for damages against Northwest must fail.

Issue Four: Did Northwest wrongfully interfere with P7's and/or Wellington's economic relations?

[48] The tort of intentional interference with economic relations requires the defendant to have committed an actionable wrong against a third party that intentionally caused economic harm to the plaintiff. The conduct must be actionable by the third party, or actionable if the third party had suffered a loss: *Gaur v. Datta*, 2015 ONCA 151 at para. 25. Wellington submits the actionable wrong by Northwest against Fan Expo was the threat to breach its contract with Fan Expo unless Fan Expo agreed not to work with P7.

[49] In late September 2021, Wellington was contacted about providing security services for the Fan Expo event in October 2021. Wellington and P7 provided an estimate for the provision of black ops services. Wellington produced emails in which there were clear plans and details for him to provide the black ops services to Fan Expo, about a week prior to the event. He produced invoices for expenses he incurred in relation to his intended provision of services at the event. A few days before the event, he was advised his services would not be needed.

[50] This is another instance in which Northwest produced affidavit evidence that contains bald allegations unsupported by the evidence. Northwest adduced the evidence of Ian Byrd, who acknowledges having a close relationship with Bruce McBean, Northwest's founder, and who expressed a belief that Wellington and Dee attempted to have him removed from the black ops operation at Fan Expo to pursue the contract directly with the promoter. He swore to a belief that Wellington and Dee were using Northwest's confidential information for their own benefit in this regard.

[51] These are nothing more than beliefs and bare assertions, put forth in the guise of affidavit evidence. Dee, Wellington and Shawn Parsons, a previous employee of Northwest, explained why Mr. Byrd was removed from the black ops work; it related to Mr. Byrd's own actions at a Fan Expo event in 2019, and was the decision of Mr. Parsons. Mr. Parsons had recommended Wellington for the black ops services for Fan Expo for 2021.

[52] McBean acknowledged that Northwest told Fan Expo that if Wellington or P7 were providing black ops services, Northwest would not provide its security services. Fan Expo advised Wellington and P7 their services would not be needed, and Northwest provided the black ops services for Fan Expo at no cost to Fan Expo.

[53] The exact nature of the arrangement between Northwest and Fan Expo was not in evidence. No contract was produced. It is therefore not possible to determine if Northwest's threat to Fan Expo would have been a breach of contract, and thereby an actionable wrong by Fan Expo.

[54] Given the lack of evidence on what has been described as the most important question concerning this tort (*Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] 1 S.C.R. 177, 2014 SCC 12 at para. 25) this claim is dismissed.

Issue Five: Counterclaim - Wellington's claim for punitive damages

[55] Wellington claims that Northwest owed him a duty to treat him with good faith and candor, and breached it. Northwest advanced this action, a meritless claim, and held a claim of over a million dollars over his head for years. It failed to answer his request for clarification of its "cease and desist" letter, instead serving Wellington with a claim. It interfered with his ability to earn an income in a manner that can only be described as vindictive. He claims this is high handed and egregious conduct.

[56] Even if Wellington had succeeded in his claim, I would have found that Wellington did not meet the test for an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595 at para. 94. The submissions he makes may be relevant to costs.

Disposition

[57] The claim and the counterclaim are both dismissed. The parties are encouraged to agree on costs of the trial. Should they be unable to do so, the defendants may provide costs submissions of no more than three pages double spaced, along with a bill of costs and any offers to settle, within 14 days. The plaintiff shall have 14 days to respond, with the same page limits. There shall be no reply submissions without leave. These submissions may be sent to my judicial assistant at linda.bunoza@ontario.ca.

L. Brownstone J.

Released: March 1, 2024

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NORTHWEST PROTECTION SERVICES LTD.
Plaintiff (Defendant by counterclaim)

– and –

RENVILLE WELLINGTON, ROBERT DEE, MICHAEL COMPOSANO and PROTOCOL7EVEN SECURITY MANAGEMENT INC.
Defendants (Wellington and Protocol7even Plaintiffs by counterclaim)

REASONS FOR JUDGMENT

L. Brownstone J.

Released: March 1, 2024