

CITATION: *McGuinty Law Offices Professional Corporation v. 13819850
Canada Inc.*, 2023 ONSC 1880
COURT FILE NO.: CV-22-00090494
DATE: 2023/03/21

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
McGuinty Law Offices Professional) Ronald Caza and Albert Brunet, for the
Corporation) Applicant
)
Applicant)
)
- and -)
)
13819850 Canada Inc., Beant Baring and) Beant Baring, self-represented
Toronto-Dominion Bank)
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Respondents)
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)
) **HEARD:** February 1, 2023

2023 ONSC 1880 (CanLII)

REASONS FOR DECISION

HOOPER J.

Overview

- [1] The Applicant seeks the release of funds held by the Toronto Dominion Bank (“TD Bank”). Those funds have been traced as part of monies erroneously transmitted to the wrong bank accounts.
- [2] TD Bank has frozen the account holding the disputed funds until this court’s decision.
- [3] The Respondent, Mr. Baring, is opposing this relief arguing ownership over the disputed funds currently frozen in the TD Bank account he controls.
- [4] For the reasons that follow, the application is granted and TD Bank is ordered to release the funds to McGuinty Law Offices Professional Corporation.

Background Facts

[5] The Applicant law firm, McGuinty Law Offices Professional Corporation (“McGuinty Law”) was retained to assist vendors in four real estate transactions closing respectively on June 16, 21, 22, and 23 of 2022.

[6] Unbeknownst to McGuinty Law, fraudsters had breached the law firm’s email system before the closing dates. The fraudsters impersonated McGuinty Law’s clients and/or TD Bank employees in emails. The fraudsters requested that the proceeds of the transactions be transferred to different accounts than those originally provided by the clients. Unsuspecting foul play, employees of McGuinty Law transferred (through wire transfer) the proceeds of three of the four transactions from the firm trust account to accounts that were not controlled by the clients.

[7] In total, \$959,102.05 of trust funds were fraudulently diverted.

[8] Once the fraud was discovered, McGuinty Law contacted their bank, TD Bank, who was able to trace and put a hold over certain funds, including \$254,139.82 relating to the June 23, 2022 wire transfer. TD Bank advised McGuinty Law that they could not release these funds as the owner of the account was objecting. TD Bank further advised that the owner’s identity could not be released absent a court order. As a result, McGuinty Law brought an application to this court for a Norwich Order. In granting this order, Hackland J. recognized that the Norwich Order was “required urgently to deal with a major fraud/theft from a law firm.”

[9] Pursuant to the Norwich Order, TD Bank provided information identifying the owner of the business account to be 13819850 Canada Inc. (“138 Canada Inc.”) and with Beant Baring identified as the owner of 138 Canada Inc.

[10] McGuinty Law thereafter brought the present application.

[11] The application was originally scheduled for December 6, 2022. Mr. Baring attended on that date but did not have legal representation. He informed the court that he required Punjabi interpretation services. The Applicant undertook to arrange those services, and the hearing was adjourned to February 1, 2023.

Preliminary Issues

[12] Two preliminary issues arose at the commencement of submissions. The first was whether Mr. Baring had been properly served with the original application. The second was the receivability of a new affidavit sworn February 1, 2023, the date of the hearing.

[13] With respect to service, during his responding submissions, Mr. Baring advised the court that he could not provide a full response as he did not have the exhibits referred to by the Applicant’s counsel. These exhibits included the bank statements of the account in dispute.

[14] All documents referred to by Applicant’s counsel were contained either in the original application record, or in the February 1st affidavit. An Affidavit of Service was filed confirming

Mr. Baring had been served the application record by email on November 25, 2022. Mr. Baring confirmed the email address was correct. The court further notes that, during the initial attendance on December 6, 2022, Mr. Baring indicated that he had received the application record. As a result, I find Mr. Baring was properly served.

[15] With respect to the February 1, 2023 affidavit, it was sworn by Albert Brunet, a lawyer with Caza Saikaley, the law firm representing the Applicant. The affidavit contained evidence of communications between Mr. Brunet and Mr. Baring in the twelve days leading up to this hearing. Mr. Brunet had engaged the assistance of a Punjabi translator to act as a translator during telephone discussions and to translate emails sent to Mr. Baring to ensure the emails would be understood.

[16] Mr. Baring confirmed he had received this new affidavit but was not able to fully understand its contents. To ensure procedural fairness, the Punjabi interpreter for the hearing translated all thirteen paragraphs to Mr. Baring who confirmed he now understood the affidavit's contents,

[17] While I will allow this new affidavit as evidence on this Application, it serves a limited purpose to provide the court with information about what has occurred in the days leading to this hearing. I have disregarded paragraph 9 of the affidavit, as this constitutes settlement discussions and should not have been included.

Substantive issue on this motion

[18] The sole issue on this Application is whether I should order the release of the funds held by TD Bank to McGuinty Law

The erroneous transfer of funds

[19] Although there were three wire transfers in error, this application only involves one: wire transfer ID 220623W2829900RPW of \$656,570.15.

[20] On June 23, 2022, a law clerk of McGuinty Law, received an email from someone identified as "Kevin Young", who was known by the clerk to be the firm's client's financial advisor at TD Bank. In that email, Kevin Young sent a payout statement showing \$656,570.15 owing on the client's line of credit with corresponding account information for that line of credit.

[21] Prior to releasing the funds, the law clerk prepared the electronic trust transfer requisition confirming the apparent wire details described in Kevin Young's email. The wire transfer was successfully completed.

[22] On June 29, 2022, the real Kevin Young emailed the law clerk to advise that he did not send a payout statement. The fraud was discovered but the funds had already been sent.

[23] Mr. Young escalated the matter to TD's fraud department. TD traced the funds originally transferred to other accounts at TD, the Bank of Montreal ("BMO"), and the Canadian

Imperial Bank of Commerce (“CIBC”). TD has been successful in recovering some of the amounts deposited in other bank accounts and, prior to this application, \$260,500 has been returned to McGuinty Law.

[24] Following Hackland J.’s Norwich Order, TD confirmed that Account Number 5257158-1741 received the original \$656,570.15 and still held \$254,068.82. This was a corporate account held by 138 Canada Inc. Beant Baring was identified as the individual controlling the account. Mr. Baring does not deny that this is his company and this is his company’s bank account.

[25] Mr. Baring did not file anything in response to this Application but did make oral submissions. These submissions were, at times, difficult to follow. As I understand his position, he states that he is also a victim of fraud having sold a property in India with the proceeds of sale to be deposited in this bank account. While the India property was not worth \$650,000 CAD, Mr. Baring advised the court that he understood the \$656,570.15 deposit contained both his proceeds of sale and amounts due to others. He did not identify who those “others” were. He also did not explain why this mixed deposit would be put into his company’s bank account.

[26] No documentation was produced to support a sale of land in India nor could Mr. Baring provide any details of the sale, including sale price. He indicated he sold the land for “between 20-30 million rupees”. One would expect Mr. Baring would know the exact amount he received for the land. Instead, he provided a range. He offered no explanation of the deposits or withdrawals on the account following the original June 23, 2022 deposit of \$656,570.15.

[27] Mr. Baring’s oral explanation as to why he thought he was entitled to retain these funds was not credible and I reject it completely.

Analysis

[28] This is not an action for damages based on the tort of conversion (civil fraud). This is an application for the return of money. The court does not have to determine if the respondents were part of the fraudulent scheme or not. All that has to be demonstrated is that an error was made and funds were paid into the respondents’ bank accounts that should not have been deposited.

[29] The test for the recovery of money paid under a mistake of fact are set out in the decision of *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, where the Supreme Court of Canada adopted the test from *Barclays Bank Ltd. V. W.J. Simms Son & Cooke (Southern) Ltd.* [1979] 3 All E.R. 522 (Eng. Q.B.) (“*Simms/BMP* test”):

The test laid down in *Simms* for recovering money paid under a mistake of fact (at p. 5) is straightforward:

1. if a person pays money to another under a mistake of fact which causes him to make the payment, he is *prima facie* entitled to recover it as money paid under a mistake of fact.

2. His claim may however fail if: (a) the payor intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law to so intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, at debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payor or by third party by whom he is authorized to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so.

[30] I find that McGuinty Law paid the money under a mistake of fact and the first step of the *Simms/BMP* test is satisfied.

[31] I further find that McGuinty Law did not intend for the Respondents to receive the benefit from the money or that there was any consideration for the payment of these funds. Therefore, the elements in 2(a) and 2(b) of the *Simms/BMP* test have been satisfied.

[32] The only consideration that remains is whether the Respondents “changed their position in good faith or are deemed in law to have done so.”

[33] In *CIBC v. Bloomforex Corp.*, 2020 ONSC 69, the change of position defence was summarized, relying on the British Columbia Court of Appeal’s decision in *International Longshore & Warehouse Union Local 502 v. Ford*, 2016 BCCA 226 at para 30:

The analytical framework for money paid under a mistake of fact does not include an open invitation to the court to undertake a loose examination of what might be fair. To the extent that the equities are considered in cases of money paid under a mistake of fact, the jurisprudence indicates they are considered in assessing the change of position defence. In that context, the court is required to consider if it would be inequitable to require payment because of the manner in which the recipient has relied on the funds paid by mistake, *Ford*, supra, at para 30. This suggests, if anything, that the focus is on the conduct of the recipient not that of the payor.

[34] The change in position defence ensures that any equities that exist are protected. In the case before me, the Respondents have failed to provide any evidence to suggest that they have relied upon these funds in good faith or would be adversely affected if the amount is returned to McGuinty Law. Even if Mr. Baring was also a victim of fraud, this does not allow him to retain funds that were clearly paid in error by the law firm. He would have his own rights and remedies against his fraudsters.

[35] As a result, I find there has been no change in position for the Respondents and it would be inequitable to deny the return of these funds on the evidence before me.

Costs

[36] The Applicant claims legal fees on a partial indemnity basis of \$6,100 with disbursements of \$529.30. The cost for the interpreter during the hearing is not included in this amount but, during the hearing, the Respondent undertook to pay the interpreter directly.

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REASONS FOR DECISION

Justice J. Hooper

Released: March 21, 2023