CITATION: *BMO v. 2761387 Ontario Inc. et al.*, 2024 ONSC 6281
COURT FILE NO.: CV-22-00674841
DATE: 20241104

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bank of Montreal, Plaintiff

AND:

2761387 Ontario Inc. O/A Shatter Abbas Restaurant, 2761376 Ontario Inc. O/A Shatter Abbas Central Kitchen, Behnam Nikaiin and the Bank of Nova Scotia, Defendants

BEFORE: C.J. Brown J.

COUNSEL: James R.G. Cook, for the plaintiff

No one appearing for the defendants, although duly notified of the trial date

HEARD: November 4, 2024

REASONS FOR DECISION

Background

[1] This trial commenced on November 4, 2024. The defendants were not anticipated to appear and, indeed, did not appear, although duly notified of the trial. While they had delivered a statement of defence, they delivered no affidavit of documents, did not attend at examinations for discovery, for which a certificate of non-attendance was obtained, did not appear at mandatory mediation although duly notified, and did not appear at the pretrial conference held in August of 2024.

[2] Further, the two corporate defendants, 2761387 Ontario Inc. O/A Shatter Abbas Restaurant and 2761376 Ontario Inc. O/A and 2761376 Ontario O/A, which are both solely owned and operated by the defendant, Behnam Nikaiin ("Mr. Nikaiin"), had no lawyer of record, and no motion pursuant to rule 15.01(2) has ever been brought.

[3] The trial proceeded in the absence of the defendants.

The Facts

[4] The plaintiff, Bank of Montreal ("BMO"), claims from the defendants $277,827.96 regarding funds that were mistakenly deposited in the defendants' accounts rather than the proper accounts for which the cheques had been destined, and were then shortly thereafter withdrawn by the defendant, Mr. Nikaiin.

[5] The defendant, Mr. Nikaiin, operated seven Persian restaurants across the GTA. He had a personal account at BMO and 2761387 Ontario Inc. ("276 Ontario Inc.") holds a business account with BMO.

[6] Between October 7 and 13, 2021, numerous cheques intended for Orillia Motorcar Inc. were credited to the BMO corporate account of 276 Ontario Inc., in the total amount of $303,727.38, due to a transposition error on handwritten deposit slips.

[7] Orillia Motorcar Inc. informed BMO that it was missing deposits. BMO investigated and discovered that the amounts which Orillia Motorcar Inc. had expected being credited to their account had erroneously been credited to 276 Ontario Inc., and that someone had been depleting the deposited funds through a series of cash withdrawals, drafts, and credit card payments. It was further determined that the person who had withdrawn all of the monies was Mr. Nikaiin.

[8] BMO reversed the deposits and debited the account of 276 Ontario Inc. for the total of the funds mistakenly deposited, which rightfully belonged to Orillia Motorcar Inc. The reversal of the deposits left account 276 Ontario Inc. in a significant overdraft position, resulting in a negative account balance of $-299,640.39.

[9] BMO took steps to recover the depleted amounts by reversing some payments and placing a freeze on approximately $20,000 of payments made from the account. As a result of these efforts, $27,534.02 was returned to 276 Ontario Inc.'s account and credited toward the overdraft balance, reducing the amount outstanding to $-277,827.96.

[10] BMO also arranged for BNS to place a hold on the $20,000 of funds that Mr. Nikaiin had deposited into its account at BNS via bank draft.

[11] Further, BMO immediately contacted Mr. Nikaiin, who failed to return any of BMO's calls until November 9, 2021. On November 9, 2021, Mr. Nikaiin suggested to BMO repaying the amounts by a credit application. However, BMO determined that extending credit to Mr. Nikaiin to repay the improperly withdrawn funds was not a viable option.

[12] The defendant has acknowledged receiving the deposits by mistake, but has not voluntarily repaid the amounts, and also has not participated in this lawsuit, after delivering the statement of defence.

[13] The plaintiff claims return of the funds from the defendants by virtue of the equitable doctrine of restitution for monies paid under mistake of fact. Based on the evidence and submissions of counsel, BMO honestly believed that they had the correct payee and account information on the deposit slip when the deposits were made. Upon realizing that the deposits had been mistakenly paid to the wrong recipient, BMO took steps to investigate and recover the funds. The defendant, who had withdrawn all funds from the accounts, has not made any attempt to repay the deposits erroneously made to them, despite knowledge of the erroneous payments.

[14] The defendants were or ought to have been aware of the funds erroneously deposited into their account and knew or ought to have known that they received money they are not entitled to. They have acknowledged as much.

The Law and Case Law

[15] The plaintiff submits that the defendants are liable for returning the funds on the basis of restitution (mistake of fact), or alternatively on the basis of conversion or unjust enrichment.

Restitution

[16] BMO relies on the equitable doctrine of restitution for money paid under mistake of fact. The law with respect to money paid under mistake of fact is well established. If a person pays money to another under mistake of fact which causes them to make the payment, they are *prima facie* entitled to recover it as money paid under a mistake of fact: *B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, 2009 SCC 15 at paras. 20-22, citing *Barclays Bank Ltd. v W. J. Simms Son & Cooke (Southern) Ltd*., [1979] 3 All E.R. 522 (Q.B.) at p.541; *CIBC v Desrochers*, 2020 ONSC7629 (CanLII) at para. 33. A bank has a *prima facie* right to recover from a recipient a payment made under mistake of fact.

[17] The erroneous deposits into 276 Ontario Inc.'s account were made under mistake of fact as BMO honestly believed that they had the correct payee and account information on the deposit slips. At no point did BMO intend for 276 Ontario Inc. to be the recipient of the funds; it is only due to a misreading or transposition of account numbers that the defendants found themselves in possession of funds that rightfully belonged to Orillia Motorcar Inc. BMO crystallized this lack of intention by immediately reversing the deposits once it became aware of the error, and advising Mr. Nikaiin of the error at its earliest opportunity.

[18] I find that the defendant is, by law, required to return the funds erroneously paid to it forthwith in the amount of $277,827.96. I further order the defendants to pay the costs of the plaintiff on a partial indemnity basis in the amount of $42,253.50 as well as interest at the rate of 6% per annum commencing November 4, 2024.

[19] I further order that the Bank of Nova Scotia shall, immediately upon service of this judgment, pay to the plaintiff, BMO, the amount of $20,000 currently held to the credit of the defendants pending judgment in this action pursuant to the provisions of section 437(2) of the *Bank Act*, SC 1991, c. 46.

[20] The available defences to such claim are not applicable in this case, namely (i) the payor intends that the payee shall have the money in all events, whether the fact be true or false, or is deemed in law so to have intended; (ii) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorized to receive the payment) by the payor or by a third party by whom he is authorized to discharge the debt; (iii) the payee has changed his position in good faith, or is deemed in law to have done so. See *B.M.P. Global Distribution Inc. v Bank of Nova Scotia*, 2009 SCC 15. The erroneous deposits were made directly into 276 Ontario Inc.'s BMO account which, at the time, did not have an overdraft balance. As such, the deposits were not made for any good consideration or in satisfaction of any debt owing by 276 Ontario Inc. Further, the defensive change of position cannot be made out if the defendant knew or ought to have known he was not entitled to the funds. In order to challenge a bank's claim for recovery, the defendant must be, in

effect, an "innocent recipient of the excess funds" in the sense of not realizing they had been "recipient" at all: *CIBC v Derochers*, 2020 ONSC 7692 (CanLII).

[21] As Lederer J. stated in *RBC Direct Investing Inc. v Khan*, 2010 ONSC 3100 (CanLII) at 04 para. 21:

> It stands to reason that if a person is the recipient of funds he, she or it knows it should not have, but spends it anyway, they cannot then rely on a materially-changed circumstance to claim they should not be compelled to return the funds.

[22] In this case, Mr. Nikaiin knew well that 276 Ontario Inc. had been the unintended recipient of the funds. Any change of position that may have occurred as a result of Mr. Nikaiin dissipating the funds cannot be said to have occurred in good faith and therefore this defence is not available to the defendants.

Conversion

[23] The plaintiff further, and in the alternative, relies on the tort of conversion for the return of the funds. The tort of conversion involves the wrongful interference with another person's chattels such as taking, using or destroying the goods in a way that is inconsistent with the owner's ownership of or title to the goods: *Khosla v Korea Exchange Bank of Canada*, 2008 CanLII 56011 (ONSC), aff'd 2009 ONCA 467; *Forstner v Sandhu,* 2004 ONSC 2283 at para. 53; *Del Giudice v Thompson,* 2020 1ONSC 5379 at para. 170; *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 SCC 727.

[24] The references in the classic definitions to "goods" or "chattels" include funds or money: *Wymor Construction Inc. v Gray*, 2012 ONSC 5022 (CanLII) at para. 10; *Pang v Zhang,* 2021 BCSC 591 (CanLII) at para. 42; *Reliable Mortgage Investment* Corp. *v* Chan, 2016 BCSC 405 at paras. 106-112; *Columere Park Development Ltd*. *v Enviro Custom Homes I*nc., 2010 BCSC 1248 (CanLII) at para. 30.

[25] Conversion is a tort of strict liability; accordingly, it is no defence if the act that deprives the real owner of its right was committed in all innocence: *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 SCC 727. The intent to deny a true owner's title for possessory interest will be proven where someone receives or disposes of a chattel without satisfying himself of its title: *Wescom Solutions Inc. v Minetto,* 2020 ONSC 5845 (CanLII) at para. 49.

[26] The defendants received money into their account which had, prior to the receipt of funds, an almost nil balance. Mr. Nikaiin took no steps to inquire of BMO or to bring to its attention the unusual deposits. Instead, he simply withdrew the funds.

[27] The defendants converted the funds that were mistakenly deposited into 276 Ontario Inc.'s account for their own use. The fact that they have withdrawn those funds now is inconsistent with BMO's right to deposit the funds to Orillia Motorcar Inc. as the intended recipient and true owner of the funds.

[28] While the defendants pled contributory negligence on the part of BMO, contributory negligence is not a valid defence to the tort of conversion, the liability for which is strict.: see *Boma Manufacturing Ltd. v Canadian Imperial Bank of Commerce*, 1996 CanLII 149 (SCC), [1996] 3 SCC 727 at para. 32.

[29] Accordingly, the default defendants having committed the tort of conversion are required to return the funds to BMO.

Unjust Enrichment

[30] BMO further submits in the alternative that the defendants have been unjustly enriched at BMO's expense. The cause of action for unjust enrichment has three elements: (i) an enrichment of the defendant; (ii) a corresponding deprivation of the plaintiff; and (iii) an absence of juristic reason for the enrichment: *LaRochelle v Elite Environments Inc*., 2023 ONCA 206 (CanLII) at para. 12; *Garland v Consumers' Gas Co*., 2004 SCC 25 at para. 30.

[31] The defendants received the benefit of funds that did not belong to them. BMO and Orillia Motorcar Inc. have suffered a loss in the amount of the depleted funds. There is no basis in contract, common law or statutory obligation to justify the defendant's retaining the benefit of the funds to the detriment of BMO, which is indebted to Orillia Motorcar Inc for the amount mistakenly deposited: *Espartel Investments Limited v Metropolitan Toronto Condominium Corporation No 993*, 2024 ONCA 18 (CanLII) at para. 37; *Garland* at para. 44.

[32] The defendants have failed to put forth any defence to show why their enrichment should be retained. Based on their failure to respond to BMO and based on their failure to participate in this lawsuit, they have shown an intention of retaining the funds that do not belong to them. As such, the defendants have been unjustly enriched in the amount of $277,827.96 due to the deposits made under mistake of fact and are therefore required to repay the same amount to BMO by way of restitution.

Conclusion

[33] Based on all of the foregoing, I find that the defendants are liable to repay to BMO the amount of $277,827.96 on the basis of the doctrine of restitution for money paid under mistake of fact. In the alternative, I find that the defendants are liable for the conversion of monies belonging to another which they have wrongfully retained for themselves in the same amount of $277,827.96. In the further alternative, I find the defendants have been unjustly enriched at the expense and deprivation of BMO, and that there is an absence of juristic reason for said enrichment. Accordingly, in all the circumstances of this case and based on all of the reasons above, the defendants are to pay to the plaintiff the amount of $277,827.96 forthwith, with interest accruing thereon at the rate of 6% per annum commencing November 4, 2024. The defendants are further to pay forthwith to the plaintiff costs on a partial indemnity basis in the amount of $42,253.50.

[34] Further, I order that the Bank of Nova Scotia shall, immediately upon service of this judgment, pay to the plaintiff, the Bank of Montreal, the amount of $20,000, currently held to the

credit of the defendants pending judgment in this action, pursuant to the provisions of section 437 (2) of the *Bank Act*, SC 1991, c. 46.

C.J. Brown J.

Date: November 4, 2024