
CANADA / JUDGMENT

Marion Family Ventures Inc. v. Lam

2020 BCSC 1526

COURT

Supreme Court of British Columbia

DECIDED

7 October 2020

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2020 BCSC 1526 Marion Family Ventures Inc. v. Lam and others

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marion Family Ventures Inc. v. Lam and others,

2020 BCSC 1526

Date: 20201007

Docket: S172910

Registry: Vancouver

Between:

Marion Family Ventures Inc.

Plaintiff

And

Annie Wai Fun Lam and Toronto-Dominion Bank

Defendants

Before: Master Elwood

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

E.J. Allan

Counsel for Defendants:

J.D. Shields

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 5, 2020

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2020

INTRODUCTION

- [1] The plaintiff applies for production of documents from the Toronto-Dominion Bank, a defendant in this action. Broadly described, the documents sought are five categories of internal bank policies or procedures related to wire payments, four categories of banking documents related to the plaintiff, and a listing of selected branches of the bank which routinely serviced commercial and corporate customers, all as of mid-January 2017.
- [2] For the reasons which follow, I have concluded that the bank must produce all but the list of selected branches.

BACKGROUND

- [3] The plaintiff is in the business of importing wines, beers and spirits. It is, or was, since 1996, a commercial banking client of the bank.
- [4] In January 2017, an employee of the plaintiff named Annie Lam facilitated or fell victim to, what is known as a spoofing scam. Ms. Lam received a series of emails designed to resemble requests from the president of the company asking her to arrange wire transfers to offshore accounts. To carry out what she says she believed were legitimate instructions from her employer, Ms. Lam forged the president's signature on a series of four wire transfer templates, scanned the documents and sent them to the bank by email. The bank approved the wire transfers and withdrew funds from the plaintiff's accounts totalling close to \$1 million Canadian. The recipients of the funds were fraudsters.
- [5] The plaintiff initially sued Ms. Lam. It later added the bank as a defendant in a second amended notice of civil claim. The plaintiff claims against the bank in negligent misrepresentation, breach of contract, gross negligence, or alternatively, negligence.
- [6] The plaintiff alleges a contract that was formed when it engaged the bank in 1996 to provide full commercial facilities and services.
- [7] In para. 3(c) of the second amended notice of civil claim, the plaintiff alleges an express or an implied term of the contract that the bank owed a duty of care to:

- (i) ensure that it would carry the plaintiff's banking with reasonable care and skill;
 - (ii) ensure that what is suspicious or questionable is queried;
 - (iii) require verification of the authentication of any wire transfer instructions from the plaintiff where required by the circumstances; and
 - (iv) suspend or terminate its services if it became aware of possible suspicious or questionable activities that could result in a loss to the plaintiff and/or could not obtain the necessary additional authentication from the plaintiff.
- [8] The plaintiff further alleges, in para. 7(b), representations by the bank in June 2014 that its web-based wire transfer system was secure and included a high level of protection against fraud and unauthorized transactions, including but not limited to releasing payments only upon instruction of the plaintiff's authorized principals and encryption combined with other levels of security.
- [9] The plaintiff alleges that the wire transfers in question were unauthorized, irregular and suspicious. It alleges that the bank's acceptance of the transfers was a breach of contract, including a breach of the bank's duty of care, particulars of which breach are set out in para. 11(a) of the second amended notice of civil claim.
- [10] The plaintiff further alleges that the bank's acceptance of the transfers made the representations in June 2014 inaccurate, negligent and a breach of contract.
- [11] The plaintiff alleges that, as a result of the bank's breach of contract and gross negligence or negligence, the plaintiff suffered damages, including a loss of the funds withdrawn pursuant to the unauthorized transfers.
- [12] In response, the bank pleads, amongst other defences, that it reasonably believed all authorizations and directions from the plaintiff were authorized.
- [13] In its document production, the bank produced an email in which a bank employee approved one or more of the subject wire transfers. The email includes "Approver Instructions" which state that:

* Please note that proper due diligence and KYC policies must be followed when approving the Amendment/Cancellation.

Please click on the B-web link here to review "Wire Payment Services - Security and Due Diligence".

- [14] The plaintiff demanded and then applied for production of all of the policies and procedures of the bank related to wire transfer services, security and due diligence, including but not limited to the Wire Payment Services - Security and Due Diligence Policy referred to in the approver instructions (the "Due Diligence Policy").

[15] On August 31, 2020, Master Taylor ordered the bank to produce the Due Diligence Policy. The document produced by the bank pursuant to the order of Master Taylor instructs, in part, as follows (underlining indicates the documents or categories of documents now sought by the plaintiff on this application):

Familiarize yourself with the following security and due diligence policies for wire payments.

Know Your Customer

Criminals have been found using the internal banking community's wire transfer systems for illegal purposes. Due to this, all outgoing and incoming payments are thoroughly examined in accordance with the Bank's Know Your Customer (KYC) policy.

(For definition refer to Know Your Customer)

Outgoing Payments

Supervisors must carefully analyze the outgoing wire payments. This should be done in accordance with the Bank's KYC policy.

Supervisors providing overrides (initial or 2nd) to release outgoing wire transfers are required to ensure that:

- Customer ID has been reviewed and authenticated (KYC),
- Funds are available and the transaction is in context with the client's financial profile and normal banking behaviour (KYT).

Note: For retail branches - signing officers with compliant CIF profile can approve the outgoing wire payment(s).

Confirming Payment

For Commercial Banking:

For procedures on outgoing wire payment due diligence, refer to Complete Wire Payment Due Diligence.

Sending/Releasing Payment

Attach the customer's payment instructions to the Outgoing Data Entry Report.

Second Supervisor Override Required

After the initial release is completed on WPS or on S3, a second supervisor override is required to release a wire on WPS for:

- All outgoing wire payments over \$200,000 CAD.
- Selected branches listing routinely servicing commercial and corporate customers with large outgoing wires (volumes, dollar amounts) over \$500,000.

Incoming Payments

On reviewing transaction histories, bank branches may be alerted to unusual transactions involving wires. If the transaction is deemed to be unusual, the bank must complete an Unusual Transaction Report (UTR) located on the B-Web.

If there is a suspicious wire or pattern of questionable wires, the branch should:

- Conduct a client meeting (Client Meeting Tips) and/or invoke the Enhanced Due Diligence Policy.

For additional guidance on whether or not to return a wire:

- Invoke the enhanced due diligence policy.

[16] By letter dated September 9, 2020, plaintiff's counsel requested the 10 documents or categories of documents sought on this application, noting that each was referred to in the Due Diligence Policy.

[17] The bank's counsel declined to produce the additional documents, stating that the request was "a fishing expedition gone wild".

ANALYSIS

[18] The plaintiff framed its demand for further production of documents under Rules 7-1(10) and 7-1(11). There is an important difference between the two grounds, as explained by Mr. Justice Kent in *Imperial Parking Canada Corporation v. Anderson*, 2014 BCSC 989 at para. 23:

- a demand under Rule 7-1(10) is for additional documents that should have been disclosed under subrule (1) i.e. documents that are probative of a material fact or any other document to which the party intends to refer at trial, whereas
- the additional documents that may be demanded under Rule 7-1(11) are for such additional documents within the listing party's "possession, power or control" and which "relate to any or all matters in question in the action" i.e. the Peruvian Guano discovery under the former rules with the addition of the word "power".

[19] In *Jones v. Donaghey*, 2011 BCCA 6, the Court of Appeal held, at paras. 9 to 10, that a material fact is an issue or a disputed fact the resolution of which, without more, will have legal consequences as between the parties.

[20] I agree with the bank that its internal policies cannot be used to prove or disprove a material fact in this case.

- [221] The essential issue raised between the parties is whether the bank breached the banking contract or a legal duty of care by approving the wire transfers requested by Ms. Lam. There is no allegation by the plaintiff that the bank's internal policies form part of the contract or the duty of care. There is no allegation that the plaintiff knew and relied on the policies and incurred a loss as a result. Moreover, there is no pleading by the plaintiff that a breach of a policy caused it loss or damage.
- [222] Accordingly, the bank is not required by Rule 7-1(1) to list and produce the policies sought by the plaintiff.
- [23] However, the analysis does not end with Rule 7-1(1). When the plaintiff's application is considered under Rules 7-1(11) and (14), the question becomes whether the policies relate to any matters in question in the action.
- [24] Documents relate to matters in question if they may properly be said to advance a litigant's case or damage the case of one's adversary: *Global Pacific Concepts Inc. v. The Owners, Strata Plan NW 141*, 2011 BCSC 1752, at para. 8.
- [25] An application for production of documents under this broader scope of discovery requires some evidence to support a connection between the documents sought and the matters in question: *Araya v. Nevsun Resources*, 2019 BCSC 511, at paras. 90-97.
- [26] Matters in question in this action include whether the banking contract had the terms alleged in para. 3(c) of the second amended notice of civil claim, the standard of care under the contract or at common law, and whether the bank acted reasonably and in compliance with the contract when it approved the wire transfers.
- [27] In my view, the Due Diligence Policy produced by the bank, and the references in that document to the policies and banking records sought by the plaintiff, provides the required evidentiary link between the documents sought on this application and the matters in question.
- [28] It was argued by the bank that its internal policies in 2017 are irrelevant to a contract made in 1996 or any legal standard of care. For the purposes of this application, I do not agree with the bank that the terms of the banking contract were frozen in time based on the factual matrix when the plaintiff opened its accounts. The bank's relationship with the plaintiff may have evolved as alleged by the plaintiff with changes in technology and banking practices and new scams such as email spoofing. Whether the banking contract is a living document - or not, as the bank submits - is an issue for the trial judge. I will not prejudge that issue on this application so as to limit discovery to banking policies that existed in 1996.

- [29] I agree with the bank that its internal policies are not necessarily the same as the standard of care the bank owes to its customers under the contract or at law. The trial judge will determine the legal standard of care with reference to the objective standard of a reasonable banker in the circumstances. The legal standard of care may be higher or lower than the bank's internal standards. The parties will likely tender expert evidence from experienced bankers and evidence of general banking practices.
- [30] However, the question on this application is not whether the policies in question establish the standard of care, but whether those documents can properly be used by the plaintiff to advance its case or damage the bank's case with respect to a legal standard of care.
- [31] The bank cited a number of authorities in support of its argument the policies are irrelevant. With respect, I do not understand any of those cases as standing for the general proposition that internal banking policies are never relevant in an action against a bank by a customer.
- [32] In *Alberta Treasury Branches v. Hammond*, 1996 CanLII 10534, the court held that the defendant bank's policy regarding the taking of guarantees was irrelevant to whether there was a fiduciary duty.
- [33] In *Alberta Treasury Branches v. Georgopoulos*, 1998 ABQB 984, the court held that the general lending principles of the defendant bank were irrelevant to whether a mortgage was lawful.
- [34] In *Allen v. Girard*, 2002 BCSC 1354, the court held, following a trial, that breach of an internal bank memo did not constitute negligence or cause the plaintiff's loss.
- [35] In *Isaacs v. Royal Bank*, 2010 ONSC 3527, the court held that a loan is not rendered unenforceable merely because a bank does not follow its established internal procedures.
- [36] In *Bank of Montreal v. Duguid*, 2000 CanLII 5710, the court held that the fact that a bank does not comply with its internal lending practices does not by itself render its loan unenforceable or give a borrower a right of recourse.
- [37] Each case must be decided on its own merits. In my view, the additional policies referenced in the Due Diligence Policy are relevant, in the sense discussed in para. 24 above, to the standard of care and the reasonableness of the bank's belief that the wire transfers requested by Ms. Lam were authorized by the plaintiff.
- [38] Further, in my view, the banking records sought, being the financial profile and CIF of the plaintiff as of January 2017, any ongoing data entry reports in relation to the plaintiff in mid-January 2017, and any unusual transaction reports for that period in relation to the plaintiff, are relevant to the bank's state of knowledge and whether it fell below the standard of care when it approved the wire transfers requested by Ms. Lam.

- [39] However, I do not regard a listing of the bank's branches that routinely serviced corporate customers as relevant at this time. The plaintiff might ask the bank on discovery whether the branch at which the plaintiff banked was considered one of those branches for the purposes of the Due Diligence Policy, but the list itself seems irrelevant.
- [40] In addition to its submissions on relevance, the bank referred to passages from the examination for discovery of the representative of the plaintiff to argue that:
- a) the plaintiff's claims of loss are caused not by the bank but by the plaintiff;
 - b) the plaintiff was expressly warned in writing twice by the bank in December 2016 about the very scheme the plaintiff was apparently being taken advantage of;
 - c) the plaintiff failed to take any steps to protect itself from this scheme; and
 - d) the contract between the plaintiff and the bank excludes any liability of the bank.
- [41] These asserted weaknesses in the plaintiff's case are said by the bank to relate to proportionality and to militate against further production of documents to the plaintiff.
- [42] Proportionality promotes conducting a proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding: Rule 1-3(2).
- [43] The plaintiff's claim in this case is for close to \$1 million. The bank itself describes the issues as important, although perhaps not complex.
- [44] The documents sought by the plaintiff are all readily accessible to the bank. Many of the policies appear to be hyperlinked in the policy already produced by the bank. There is no suggestion of privacy issues if the banking documents produced are limited to those relating to the plaintiff.
- [45] If the plaintiff's case is ill-conceived or doomed to fail as the bank submits, then it is open to the bank to apply to strike the pleadings or apply for summary judgment or a summary trial. But now is not the time to litigate the factual merits of the plaintiff's claim. The relevance of the documents and whether an order for their production is proportionate is to be determined on the pleadings and evidence relating to the documents themselves: see *Burgess v. Buell Distribution Corp.*, 2012 BCSC 402, para. 14-16.

CONCLUSION

- [46] For these reasons, I will order the bank to produce the categories of documents sought in paragraph 1 of the notice of application, with changes to subparas. (f) and (h), limiting those categories to documents in relation to the plaintiff, and excepting category (g), which need not be produced.
- [47] The bank must produce the documents by October 30, 2020.

[48] The plaintiff sought costs of this application in any event of the cause. I don't think an order for costs in any event of the cause is justified. In my view, the bank raised legitimate arguments on this application on which it was entitled to a hearing by the court. I will award the plaintiff as the successful party with costs of the application against the bank in the cause.

"Master Elwood"

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