

CITATION: Malcolm Silver et al. v. State Farm Fire and Casualty Company, 2019 ONSC 4264
COURT FILE NO.: CV-18-607501
DATE: 2019-07-15

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MALCOLM SILVER & CO. LTD., 1532383 ONTARIO LTD., 1662 QUEEN WEST HOLDINGS INC., 2344 DUFFERIN STREET INC., 2346 DUFFERIN STREET HOLDINGS INC., 2401 EGLINTON AVENUE WEST., 3663 LAKESHORE WEST LTD., 1179 WESTON ROAD INC. AND 2150840 ONTARIO LTD. Applicants

AND:

STATE FARM FIRE AND CASUALTY COMPANY, Respondent

BEFORE: Sossin J.

COUNSEL: Stephen Schwartz and Aryan Ziaie, Counsel for the Applicants

Wayne Morris and Melissa Miles, Counsel for Respondent

HEARD: May 16, 2019

REASONS FOR JUDGMENT

[1] The applicants, Malcolm Silver & Co. Ltd., 1532383 Ontario Ltd., 1662 Queen West Holdings Inc., 2344 Dufferin Street Inc., 2346 Dufferin Street Holdings Inc., 2401 Eglinton Avenue West Ltd., 3663 Lakeshore West Ltd., 1179 Weston Road Inc., and 2150840 Ontario Ltd. (collectively, the “applicants”), bring this application under Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] Malcolm Silver & Co. Ltd. (“Malcolm Silver”) is a company which purchases properties to renovate, operate and manage them for a return on investment. The remaining applicants are corporations that each hold properties purchased and managed by Malcolm Silver, all of whom were insured by State Farm.

[3] Malcolm Silver was the victim of sustained fraudulent activity by Gwendolyne Martinez (“Martinez”) between the years 2013-2017 resulting in losses of over \$1 million. The frauds resulted from various schemes including forged cheques and unauthorized ABM withdrawals.

[4] The applicants commenced an action in July 2017 against Martinez and related defendants to recover losses from the fraud. The defendants did not defend the action and the applicants obtained judgment in the amount of \$1,003,164.00. No funds have yet been recovered by the applicants pursuant to this judgment. Martinez also pleaded guilty to fraud-related criminal charges.

[5] The application arises out of a denial by the respondent, State Farm Fire and Casualty (“State Farm”), dated September 11, 2017, of a claim by Malcolm Silver relating to losses Malcolm Silver alleges are covered by the “Forgery or Alteration” endorsement in State Farm’s insurance policy.

[6] Initially, State Farm took the view that Martinez’s fraud was carried out with the use of cheques which Mr. Malcolm Silver (“Silver”) “pre-signed”. During examinations for discovery conducted on April 15, 2018, however, State Farm learned that Martinez also forged cheques. State Farm has accepted that losses tied to forged cheques are covered under the “Forgery or Alteration” endorsement in the applicable insurance policies.

[7] The Notice of Application was issued on October 24, 2018.

[8] The application seeks a declaration that State Farm is required to provide coverage to the applicants under various policies of insurance for losses arising from the fraudulent transactions and damages for breach of contract relating to State Farm’s denial of coverage.

[9] Based on the settlement of various issues between the parties on this application, it appears that the main issue in contention relates to losses arising from Martinez’s use of company bank accounts to pay for her personal credit card debts by using online banking services without authorization.

[10] The aggregate of the online banking payments to credit card accounts to which the applicants contend they are entitled under the relevant insurance policies, less deductible amounts, is \$101,474.15 (relating specifically to the losses of 1532383 Ontario Ltd.).

ANALYSIS

[11] The main issue remaining in this application is whether the losses to Malcolm Silver, flowing from the online banking transactions as part of Martinez’s broader fraudulent scheme, are covered by the “Forgery or Alteration” clause in the applicable State Farm insurance policy.

[12] The general principles applicable to the interpretation of an insurance policy are not in dispute. In *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, Justice Karakatsanis summarized these principles as follows (at paras. 12-13):

[12] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language: *Ledcor*, at para. 49; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 22; *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity: *Ledcor*, at para. 50.

Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly: *Ledcor*, at para. 51.

[13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, “as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law”: *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[13] Clause 8(a) of the applicable insurance policy, under the heading “Forgery or Alteration,” provides:

We will pay for loss resulting directly from forgery or alteration of any cheque, draft, promissory note, bill of exchange or similar promises payment in ‘money’ that you or your agent has issued, or that was issued by someone who impersonates you or your agent.

[14] The term “money” is further defined in the policy as “currency, coins, and bank notes in current use and having a face value, travelers’ cheques, registered cheques and money orders held for sale to the public.”

[15] Online banking is not mentioned as one of the instruments to which forgery or alternation applies. Therefore, if online banking is analogous to these instruments in that it “similarly promises payment in ‘money,’” within the meaning of this clause, then the losses relating to these credit card payments falls within the “Forgery or Alteration” coverage, and Martinez’s unauthorized use of online banking to make these credit card payments may be covered by the policy in the same way the cheques forged by Martinez were covered.

[16] It is somewhat surprising that there is not yet significant case law on the question of whether online banking is analogous to a promise to pay “money” or more analogous to a transfer of money itself (i.e. analogous to currency, coins and bank notes). I was referred to no case by either party which squarely addresses this issue.

[17] Where the question of how to characterize online banking has arisen, it has been raised in passing. For example, in *Walker v. Aviva Canada Inc.*, 2011 CarswellOnt 1944 (F.S.C.O. Arb.), the Arbitrator dealt with the following issue regarding the compliance with proper notice, at para. 14:

Section 11(1.3) of Ontario Regulation 777/93 requires that the notice must advise an insured person that the insurance contract will terminate on a specified day, unless the insured person pays an administration fee and the full premium instalments owing to the insurer by cash, money order or certified cheque. The notice Scottish and York alleges it sent to Ms. Walker lists certified cheque, online or telephone banking and credit card as the 3

methods by which Ms. Walker could remit her premium payment to Scottish and York to continue her insurance coverage. Ms. Walker contends that online or telephone banking payments are electronic transfers and not cash and therefore the notice does not comply with the legislation.

[18] Having determined the issue on another point, the Arbitrator did not have to address the argument. However, the Arbitrator noted in *obiter*, at paras. 24-25:

While I do not have to address this argument, I disagree with Ms. Walker.

She presented no compelling argument that an electronic or telephone transfer of funds is not the same as a cash transfer from one party to another. In fact, electronic or telephone transfers of funds are often easier methods of transferring cash than withdrawing money from an account and physically delivering the money to its intended recipient.

[19] Where someone impersonates another party and accesses their online banking account without authorization for purposes of removing funds (whether by transfer to another account, or as here, payment of credit cards or other bills online), this action is a sophisticated fraud. Forging cheques is similarly a species of fraud. Criminal prosecutions for fraud may arise both from forging cheques and unauthorized online banking transfers; see *R. v. Trotter*, 2012 CarswellOnt 17149.

[20] Interpreting this clause in the policy with its ordinary meaning, however, I find online banking is not a form of “Forgery and Alteration”.

[21] The analogy between online banking and the definition of ‘money’ in the policy is a close fit. When an online payment is made on a credit card account, or as a transfer between accounts, the funds have been moved by that action. These payments are not a promise to pay but rather payment itself. There is no signature or other indicator of a promise by one party to pay another, but rather a password or P.I.N. that enables a party to access to the account from which the transfer of funds has been authorized. If one wishes to cancel or alter the transaction, there is no cheque or other evidence of a promise to pay which can be ripped up or reversed; rather, an additional transaction must be undertaken specifically to affect a new transfer.

[22] I do not find enough ambiguity respecting online banking to bring it within the *contra preferendum* principle, which would favour the broad interpretation of an unclear coverage provision.

[23] Therefore, I find that losses which flow from accessing online banking without authorization are not included within the “Forgery or Alteration” endorsement in State Farm’s insurance policy for the relevant applicant (1532383 Ontario Ltd.).

[24] State Farm raises other concerns with respect to verifying the amounts at issue in these online banking payments, which are contained in a spreadsheet, but which have not been authenticated through an affidavit from an expert or otherwise. State Farm also raises a

procedural concern with how these alleged losses have been claimed as “proof of loss” documentation was not properly submitted.

[25] In light of my finding on the scope of the policy coverage, I need not consider these additional issues.

[26] For the reasons set out above, this application is dismissed.

COSTS

[27] State Farm is entitled to its costs of the application, fixed in the amount of \$15,000.00, all inclusive, payable within 30 days of this judgment.

Sossin J.

Released: July 15, 2019

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INC., 2344 DUFFERIN STREET INC., 2346
DUFFERIN STREET HOLDINGS INC., 2401
EGLINTON AVENUE WEST., 3663 LAKESHORE
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