

Federal Court



Cour fédérale

Date: 20141009

Docket: T-1660-14

Citation: 2014 FC 961

Ottawa, Ontario, October 9, 2014

PRESENT: The Honourable Mr. Justice S. Noël

BETWEEN:

TONY AGOSTINO

Applicant

and

THE BANK OF MONTREAL

Respondent

JUDGMENT AND REASONS

[1] The Respondent, the Bank of Montreal (BMO) (the motion to strike against the other Respondent, Mr. W. Downe, was granted by Order dated September 18, 2014) is presenting to this Court a motion to stay the proceedings because the issue being dealt with in the Federal Court Application has already been dealt with in Court File No. 500-22-213315-149 between the same parties in the Court of Quebec, Civil Division, in the district of Montreal. An *ex parte* judgment of the Court of Quebec was issued October 3, 2014.

I. The Facts

[2] On or about June 26, 2014, counsel for BMO prepared and filed a motion to institute proceedings against Mr. Agostino (the Applicant in the Federal Court and the Defendant in the Court of Quebec file: “Mr. Agostino”) for a total of \$41,486.70 of money owed for reasons of default and indebtedness. The BMO also sought the liquidation of damages for \$3,500.00 (pursuant to article 1673(2) of the *Civil Code* of the province of Quebec) suffered by Mr. Agostino as a result of an admitted breach of privacy committed by an employee of BMO and judicial compensation (pursuant to article 1673(2) of the *Civil Code* of the province of Quebec) between the amounts owed to BMO by Mr. Agostino and the damages owed to Mr. Agostino, with costs, against him.

[3] The Court of Quebec procedure was personally served on Mr. Agostino on June 27, 2014. Mr. Agostino did not appear and therefore the BMO proceeded by default and presented the motion on August 4, 2014. The default judgment was issued October 3, 2014. At the hearing of this motion, Mr. Agostino informed this Court that he did not appear for unspecified “personal reasons”, which he did not want to disclose. Mr. Agostino informed this Court that he knew he owed money to the BMO, but that he disagreed on the \$41,486.70 being claimed; rather, he claimed that he owed close to approximately \$25,000.00. He also said that he knew that the BMO was seeking the liquidation of damages for \$3,500.00 for the breach of privacy that he sustained and for judicial compensation. He was also aware that a default judgment would be issued against him, but that he did not know what he would do once issued.

[4] On July 24, 2014, almost a month after the BMO's Court of Quebec procedure had been issued and served, Mr. Agostino served, on July 25, 2014, an Application against BMO in the Federal Court for the breach of privacy that he sustained, caused by an employee of the BMO. For this procedure, he relied on a report of the Office of the Privacy Commissioner of Canada, dated June 17, 2014, following a complaint filed by him against the BMO and claimed \$35,000.00 in damages.

[5] A review of both procedures (the Federal Court and the Court of Quebec procedures) reveals that the same facts (a detailed voicemail message containing financial information on Mr. Agostino was left by a BMO employee at a business managed by a family member of Mr. Agostino's family) were the cause of the breach of privacy of Mr. Agostino. The report of the Privacy Commissioner's Office dealt with the same facts and took note that the BMO apologized following the voice mail call, took several initiatives to inform employees on how to deal with telephone messages and concluded that the matter was "[...] well-founded and resolved". The Court of Quebec's BMO procedure refers to the same voice mail message, the written apology made by a Senior Manager, the Privacy Office report and assesses the damages associated to the breach at \$3,500.00. It arrived at this amount by relying on the jurisprudence for such a situation, such as *Mike Henry v Bell Mobility*, 2014 FC 555, which at paragraph 22, establishes the damage amount in a similar situation to be between nil and up to \$5,000.00 plus costs.

[6] This summary of both procedures shows that both files deal with the admitted breach of privacy, but disagree on the damage amount. It is noteworthy that Mr. Agostino wants

\$35,000.00, while the BMO assesses the damages to be \$3,500.00 following a review of the jurisprudence.

[7] As noted earlier, the Court of Quebec *ex parte* Judgment issued October 3, 2014, granted the BMO motion and specifically assessed the changes arising from the Privacy Breach to be \$3,500.00.

II. The Issue

[8] Can the Court exercise its discretion and stay the proceedings against the BMO?

III. Analysis

[9] This Court has the discretion to grant a stay of proceeding when the claim is being dealt with another Court or jurisdiction or when the interest of justice calls for it. See sections 50(1)(a) and (b) of the *Federal Courts Act*, RSC 1985, c F-7:

Federal Courts Act, RSC
1985, c F-7

Loi sur les Cours fédérales,
LRC (1985), ch F-7

Stay of proceedings authorized

Suspension d'instance

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :

(a) on the ground that the claim is being proceeded with in another court or jurisdiction;
or

a) au motif que la demande est en instance devant un autre tribunal;

(b) where for any other reason it is in the interest of justice that the proceedings be stayed. b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[10] In order to exercise its discretion properly, this Court has to conclude that both Courts had the respective jurisdiction to deal with the breach of privacy committed by a bank employee of the BMO and the granting of damages that it may involve. Pursuant to section 14 of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (the *PIPED Act*), the Federal Court can deal with any matter (which includes assessment of damages following a breach of privacy, see *Henry, supra*) that may arise as a result of a complaint filed and the Privacy Commissioner's report that follows. A direction was issued to the parties on September 26, 2014 asking if the Court of Quebec also has the jurisdiction to hear matters that deal with general damages resulting from a breach of privacy committed by a bank employee. After reviewing both parties' responses, I am satisfied that the Court of Quebec, just like the Federal Court, can also deal with the general claim for damages following a breach of privacy committed by an employee of a bank as part of the Court of Quebec's general competence in such matter and the statutory jurisdiction given to the Federal Court pursuant to section 14 of the *PIPED Act*.

[11] Once the jurisdiction is established, the Court must determine if the "triple identities" is met between the two proceedings: the identity of the object, the identity of cause and the identities of parties (see *Rocois Construction Inc. v Quebec Ready Mix Inc.*, [1990] 2 SCR 440, at page 451 for the jurisdiction and pages 451 to 456 for the triple identities).

[12] The object being sought in both proceedings is the amount of damages as a result of the breach of privacy. Mr. Agostino would like to have \$35,000.00 (as sought in the Federal Court Application) and the BMO assesses the damages to be \$3,500.00 (as admitted and assessed by the BMO in the Court of Quebec procedure). Therefore, the same object is being sought, namely the damages following a breach of privacy, but there is a different amount being assessed by each party.

[13] As for the identity for the cause, both procedures relate to the damages following a breach of privacy. Therefore, in both proceedings, the cause, being the breach of privacy, is the same.

[14] Concerning the identity, it is evident that both proceedings involve the same parties, Mr. Agostino and the BMO.

[15] Consequently, the triple identities exist in both proceedings and therefore, when Mr. Agostino issued his Application, more than one month after the BMO Court of Quebec procedure was initiated, he was seeking to obtain relief in respect to the same privacy issue and damage remedy that was already dealt with by the BMO Court of Quebec procedure.

[16] Therefore, there is a duplication of proceedings for the same privacy issue and the damage as a result of the breach of privacy. Further, at the time of issuing his Application, Mr. Agostino knew that the same matter was already being dealt with by the BMO Court of Quebec procedure.

[17] In *Safilo Canada Inc. v Contour Optik Inc.*, 2005 FC 278, at para 27, Justice de Montigny reviewed the jurisprudence dealing with stays of proceedings (section 50 of the *Federal Courts Act*) and enumerated a list of factors to be considered at paragraph 27:

27 [...]

1. Would the continuation of the action cause prejudice or injustice (not merely inconvenience or extra expense) to the defendant?
2. Would the stay work an injustice to the plaintiff?
3. The onus is on the party which seeks a stay to establish that these two conditions are met.
4. The grant or refusal of the stay is within the discretionary power of the judge.
5. The power to grant a stay may only be exercised sparingly and in the clearest of cases.
6. Are the facts alleged, the legal issues involved and the relief sought similar in both actions?
7. What are the possibilities of inconsistent findings in both Courts?
8. Until there is a risk of imminent adjudication in the two different forums, the Court should be very reluctant to interfere with any litigant's right of access to another jurisdiction.
9. Priority ought not necessarily be given to the first proceeding over the second or, *vice versa*."

[18] I will review them with the particulars of this case.

[19] The BMO's claim for money owed for an amount of more than \$41,000.00 is clearly the sole jurisdiction of the Court of Quebec, not the Federal Court. It seems then that the Court of Quebec is the natural forum to deal with all the issues involving the parties, including the breach

of privacy. The *Civil Code* of the province of Quebec provides for the liquidation of damages and for an Order for judicial compensation between the money owed by Mr. Agostino to the BMO and the damages as a result of the breach of privacy to Mr. Agostino. It follows that it is in the interest of both parties that only one proceeding deals with all matters between them rather than two proceedings.

[20] Mr. Agostino decided not to appear and contest the BMO's motion in the Court of Quebec for unknown "personal reasons". Therefore, although he knew that the BMO was assessing the breach of privacy damage at \$3,500.00, he decided not to contest it. He made a decision to let the BMO's assessment of damages be the sole evidence presented to the Court of Quebec.

[21] Therefore, if these two proceedings were to proceed and knowing that a default judgment has been issued, there would be a potential of two different judgments on the same issue and possibly different assessments of damages. It is not in the interest of justice that this situation should happen.

[22] As seen above, there is a duplication of proceedings for the same issues and for the same remedies. The fact that Mr. Agostino decided not to contest the Court of Quebec proceedings against him is not a justification to let the Federal Court Application proceed. He made a decision not to appear and contest the amounts being claimed against him, to which he admits owing, at least in part, but more important for the present motion to strike, he concurrently decided not to contest the \$3,500.00 damage assessment caused by the admitted breach of

privacy. As a result of his inaction, a default judgment was granted against him which assesses the damages for the breach of privacy to be \$3,500.00. The same damages being claimed in the Federal Court Application, but for a higher amount.

[23] The default judgment issued by the Court of Quebec on October 3, 2014 permits this Court to stay the proceedings instituted by the Plaintiff at the Federal Court because there is *res judicata*.

[24] To let the Federal Court's Application proceed creates a prejudice to the BMO. The fact that it could be condemned to further damages as a result of the same breach of privacy is in itself a prejudice. Also, having to deal with two procedures on the same issues is also an evident prejudice.

[25] As for Mr. Agostino, he made a decision not to contest the assessment of the breach of privacy damages in the Court of Quebec proceedings. He therefore cannot pretend that staying the Federal Court's proceedings would create a prejudice. He made a choice not to contest, he must, therefore, also live with the consequences of that decision. It goes without saying that such a situation would not be an injustice to him.

[26] As seen earlier, the "triple identities" show that both proceedings raise the same facts, issues and seek damages between the same parties. Having already noted that the default judgment deals with the same facts, issues and remedy, this is thus a clear case to exercise my discretion in favour of the motion to stay.

[27] As for the costs being claimed by the BMO of an amount of \$1,970.00 including disbursement, the fact that the Applicant is a self litigant does not justify not granting costs. His submissions at the hearing show that he understood, in general, the situation he was in, but also, his insistence to oppose the motion to stay the Application seemed to indicate that he wanted his Application to proceed in order to give him a better negotiation element with the BMO. This is not a valid justification not to grant the motion to stay the proceedings. Relying on Rules 400 and 401 and exercising my discretion as to the costs, I adjudicate them to be \$1,000.00 plus disbursement to an amount of \$150.00 for a total amount of \$1,150.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion to stay the present Application against the BMO is granted with costs against the Applicant for a total amount of \$1,150.00.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1660-14

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PLACE OF HEARING: MONTREAL, QUEBEC

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JUDGMENT AND REASONS: NOËL S J.

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