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Docket: CI 20-01-28667
(Winnipeg Centre)
Indexed as: *CropConnect v. Bank of Montreal et al.*
Cited as: 2020 MBQB 186

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

CROPCONNECT CONFERENCE INC.,	)	Appearances:
)	
	)	<u>Dana J. Nelko,</u>
applicant,	)	<u>Ari M. Hanson and</u>
	)	<u>Andrea Signorelli,</u>
- and -	)	<u>Articling Student-at-Law</u>
	)	for the applicant
)	
BANK OF MONTREAL AND	)	<u>Alyssa M. Mariani</u>
9392 – 1484 QUEBEC INC.,	)	for 9392 – 1484 Quebec Inc.
)	
respondents.	)	No one appearing
	)	for Bank of Montreal
)	
	)	JUDGMENT DELIVERED:
	)	December 21, 2020

HARRIS J.

Introduction

[1] This application arises out of a sophisticated fraud wherein the applicant was tricked into directing payment of \$197,706.48 owing to one of its creditors to a bank account in the name of the respondent. Fortunately, the fraud was detected before the money disappeared and is now held in this court.

[2] The applicant seeks an order that those monies are the property of the applicant, and that the said monies be transferred to the applicant's account with the Access Credit Union in Carman, Manitoba. The respondent, 9392 – 1484 Quebec Inc. ("9392"), says that it is also an innocent victim of the fraud and that the funds were received as payment with respect to a legitimate land transaction.

[3] For the reasons that follow, I conclude that the applicant, CropConnect Conference Inc. ("CropConnect"), is entitled to immediate payment of the whole amount held in court.

Proportionality

[4] The application was commenced on October 9, 2020. Senso Kiakuama ("Kiakuama"), the President and sole shareholder of the respondent, received the application materials, including an affidavit sworn by Darcelle Graham ("Graham"), from his Montreal lawyer, Nadia Buttino ("Buttino"), on or about October 20, 2020. On November 10, 2020, Bond J. directed that the disputed \$197,706.48, then held by the Bank of Montreal ("BMO"), be paid into court.

[5] On November 24, 2020, I adjourned the matter to December 9, 2020 and directed that the respondent file an affidavit by December 4, 2020, which it did. Both Graham and Kiakuama then filed supplementary affidavits on December 8, 2020. Neither Graham nor Kiakuama have been cross-examined on their respective affidavits.

[6] Having reviewed the materials and hearing submissions from counsel, I am satisfied that cross-examination on the affidavits is not required and that it is

appropriate to dispose of the application based on the materials before me. I am mindful of the culture shift since *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, which encourages proportionality. Cross-examinations will only unnecessarily lengthen the process and increase the expense to both parties. Nothing would be gained.

The Facts

[7] CropConnect is a non-profit corporation incorporated in the Province of Manitoba, with a registered office in Carman, Manitoba.

[8] On February 12 and 13, 2020, CropConnect hosted an annual two-day agricultural conference at the Victoria Inn Hotel & Convention Centre ("Victoria Inn") in Winnipeg, Manitoba. CropConnect booked guest rooms, a conference room, food and beverage services, and other services related to conferences. CropConnect retained a contractor, Planners Plus, to provide logistics and execute all aspects of the conference. Elena Gagliardi ("Gagliardi") of Planners Plus was CropConnect's contact. She liaised with Stephanie Enns ("Enns") of the Victoria Inn in planning for the conference.

[9] On or about February 20, 2020, the Victoria Inn submitted an invoice in the amount of \$197,706.48 ("the invoice") to CropConnect in relation to the services provided for the conference. On April 8, 2020, the invoice was approved for payment and was forwarded to Graham, a Director of CropConnect, for payment. Ms. Gagliardi was authorized to pay the invoice, and she prepared a cheque for payment in full.

[10] On April 15, 2020, Gagliardi received an e-mail, ostensibly from Enns, advising that due to COVID concerns, the Victoria Inn had changed its "mode of operation with respect to accounts receivable" and now wanted to have payment wired to its subsidiary trading account. Included with the e-mail was a document on Victoria Inn letterhead, with wire transfer details, directing payment to a branch of BMO. Of note is the "beneficiary name" being 9392 at 925 Boul de Maisonneuve in Montreal, Quebec.

[11] While in all respects the e-mail and attachment appeared to come from Enns at the Victoria Inn, it in fact was the product of a fraudster.

[12] On April 16, 2020, Gagliardi forwarded the fraudulent Enns' e-mail of April 15, 2020, including the wire instructions, to Graham who arranged for the transfer from CropConnect's financial institution to BMO, as directed.

[13] On April 23, 2020, Graham received what appeared to be a copy of an e-mail from Enns to Gagliardi requesting further assistance with respect to the wire transfer. These e-mails displayed an e-mail address for Enns as @vic**ni**n.com instead of @vic**inn**.com. In all other respects, the e-mail appeared to be a legitimate e-mail from the Victoria Inn.

[14] During the period between April 17 and May 6, 2020, the Victoria Inn received a series of fraudulent e-mails purporting to be from Gagliardi explaining the delay with respect to the payment of the outstanding account.

[15] On May 6, 2020, Gagliardi telephoned Graham and advised that the Victoria Inn did not receive payment, and at no time had the Victoria Inn requested payment by wire transfer.

[16] Realizing that CropConnect was the victim of a fraud, Graham contacted CropConnect's financial institution to determine if the transfer could be recalled. The Winnipeg Police Service and the Royal Canadian Mounted Police ("RCMP") were contacted and both opened investigation files. The \$197,706.48 was traced to a Royal Bank of Canada ("RBC") account, where it was frozen. Subsequently, as a result of information regarding the transaction, the funds were returned to BMO. BMO advised that it required a court order in order to transfer the money to CropConnect's financial institution.

[17] Further communication from BMO revealed that the recipient of the funds, 9392, claimed the funds were for a legitimate transaction.

[18] Kiakuama was born and raised in the Democratic Republic of Congo ("DRC"), where he lived until 1988. In 1991, he moved to Canada and has lived here ever since.

[19] As noted, Kiakuama is the sole shareholder of 9392, a corporation duly incorporated pursuant to the laws of Quebec and operates as a moving and storage company, with its primary business being recruitment and placement of employees in a variety of businesses.

[20] Kiakuama deposed that in late 2019, he learned that various individuals had been expressing interest in buying a parcel of agricultural land that he owned in

the DRC. He says that he retained Roger Bongo ("Bongo"), an attorney in the DRC and a childhood friend of his, to assist in selling the land. Bongo worked for a consulting firm specializing in real estate transactions in the DRC.

[21] On January 20, 2020, Kiakuama executed a mandate letter appointing Bongo to represent him in connection with the sale of the land. Bongo was authorized "to represent [Kiakuama] and to take all actions useful for the sale of [his] agricultural land" in the DRC. Bongo advised Kiakuama that the land could sell for between CAD\$175,000 and CAD\$180,000. Kiakuama gave Bongo instructions to sell the land for CAD\$180,000.

[22] In or around the end of January 2020, Bongo telephoned Kiakuama to advise that an agent had a client in Canada by the name of Jean-Pierre Manoka ("Manoka") who was interested in buying the land for CAD\$180,000. In addition to that price, Manoka was to pay the costs for administration of the sale, commissions for both Bongo and Manoka's own representative, and the cost to transfer the land, bringing the total to CAD\$197,706.48.

[23] Kiakuama was not surprised by the additional \$17,706.48 because he was aware that the DRC is a very corrupt country where "officials...use their positions to take advantage of others and try to make a profit for themselves." He considered these additional fees to be the cost of doing business in the DRC.

[24] Around mid-February 2020, Bongo sent Kiakuama a copy of a Deed of Sale dated February 16, 2020, pursuant to which Manoka agreed to buy the land from

Kiakuama effective April 16, 2020. The Deed of Sale is a one-page document with five paragraphs. Of significance is Article 2, which provided as follows:

Art 2: The amount concluded between the two undersigned to complete said sale is equivalent to \$197,706.48 Canadian; amount that the second undersigned agrees to pay and to be paid into the corporate account (CROP CONNECT CONFERENCE) of the seller, no. 9392 – 1484 Quebec Inc. as of April 16, 2020. (emphasis added)

[25] Kiakuama says he did not read the Deed of Sale, but that Bongo advised him as to the terms. Bongo advised him that the reason for the delay between the date of the agreement and the date he was to be paid was due to “administrative reasons and verification in the DRC land management system.”

[26] On or about April 16, 2020, Bongo telephoned Kiakuama to advise that Manoka had made payment by wire transfer to the corporate bank account at BMO, and that he would now arrange for registration of the land in Manoka’s name. Kiakuama asked Bongo for proof of payment and Bongo provided him with a copy of the wire transfer showing payment from the Access Credit Union in Carman, Manitoba to 9392’s account at BMO. Of course, this was the payment by CropConnect with respect to the Victoria Inn invoice.

[27] Being satisfied that the funds were in 9392’s account, Kiakuama authorized Bongo to complete the sales transaction. The land was apparently registered in favour of Manoka on April 29, 2020.

[28] On April 23, 2020, Kiakuama transferred the funds from the BMO account to his personal account at RBC. He then learned of a hold on the funds at RBC which would prevent release of the funds for four days. After several days, he

was advised that the funds had been traced to a fraudulent transaction, and that the funds had been transferred back to the BMO account.

[29] Kiakuama retained Buttino to assist him in having the funds released to him. He met with her in early May 2020 and provided her with a copy of the sales transaction documents (the Deed of Sale and wire transfer). It was when he reviewed the documents with Buttino that he learned “for the first time” that CropConnect was referred to in both documents. He deposed in his affidavit that this was “not something I had previously noticed and came as a complete shock to me. I explained to Ms. Buttino that this must have been a mistake.”

[30] Kiakuama’s efforts to get information from Bongo were unsuccessful.

[31] Kiakuama says that both he and CropConnect were victims of a fraud committed in Manitoba. According to Kiakuama, because he “actually received” the purchase funds, the transaction in the DRC could not be set aside despite the fraud.

[32] According to information provided to Graham by the RCMP, the RBC account that Kiakuama transferred the funds to on April 23, 2020 was opened on April 23, 2020, and was not in Kiakuama’s name, but was an account owned by 9291 – 5255 Quebec Inc. (“9291”). The sole director of 9291 is Kiakuama and the registered address is the same post office outlet as that for 9392.

Analysis

[33] Both parties allege that they were innocent victims of fraud and as such, each claim entitlement to the funds held in court. The applicant does not concede

that the respondent is an innocent victim and says that there is sufficient evidence before the court to conclude that 9392 and Kiakuama are part of the fraud. I agree.

[34] Kiakuama's assertion that he was not aware of the reference to CropConnect in the Deed of Sale until he reviewed it with Buttino, defies logic. He is a businessman who is engaged in a transaction involving land worth CAD\$180,000 in a country which he says is "very corrupt". I do not believe that he did not read that document or that he did not know of the reference to CropConnect in the documents. Moreover, he provides evidence in his own affidavit which contradicts this assertion.

[35] First, Kiakuama says that Bongo advised him of the contents of the Deed of Sale. If so, he in fact would have been fully aware of the contents and specifically, the reference to a corporate account that was not related to his business.

[36] Second, Kiakuama says that when Bongo advised him that Manoka made payment by wire transfer to 9392's bank account, he "immediately asked Mr. Bongo to provide proof of payment." In response, he received the wire transfer document showing payment by CropConnect from Access Credit Union in Carman, Manitoba. There was no reference at all to Manoka.

[37] Despite this, in paragraph 28 of his affidavit he swears that it was not until he met with Buttino in early May 2020 that he became aware of the name "CropConnect":

28. Around this time [early May 2020], I provided the Sale transaction documents I had received from Mr. Bongo to Ms. Buttino for her review. Ms. Buttino informed me that the name "CropConnect" was mentioned in both documents, which was name unknown to both her and I. This was not something I had previously noticed and came as a complete shock to me. I explained to Ms. Buttino that this must have been a mistake. (emphasis added)

[38] I do not believe his assertion in paragraph 28.

[39] One would expect that the reference to CropConnect in both the Deed of Sale and wire transfer document, and the absence of a reference to Manoka in the wire transfer document, would raise concern for Kiakuama, but it did not. This is likely because Kiakuama was part of the fraud.

[40] Kiakuama is unable to produce any communications between himself and Bongo because he says that they used a messaging application called "Telegram", wherein messages are available only for a limited period of time. CropConnect has provided information explaining Telegram messaging, which informs that messages are saved unless one of the participants actively chooses to delete them.

I agree with the conclusion suggested by the applicant that either:

- (a) Kiakuama has access to his correspondence with Bongo and does not wish to produce it;
- (b) Kiakuama deliberately deleted his communications with Bongo; or
- (c) Bongo does not exist.

[41] Kiakuama has known since early May 2020 that the funds were traced back to a fraudulent transaction and he was unable to access same. One would expect that a person in this position would immediately contact his lawyer to seek advice as to steps he could take to protect his rights to either prevent the transfer from

taking place or have it set aside. However, Kiakuama did not contact Bongo to advise him of the fraudulent transaction until he received the application materials. It was at this time that Bongo advised him that the land transaction could not be set aside because he received the funds. Why would he wait six months to ask the question unless there was no land transaction to set aside?

[42] I am satisfied, based on the evidence before me, that Kiakuama and 9392 were part of the fraud and therefore, 9392 has no right to the monies held by this court.

[43] Even if 9392 was an innocent victim of fraud as it alleges, as between 9392 and CropConnect, 9392 was in a better position to prevent the fraud and is therefore the party that should bear the loss.

[44] In ***Bank of Montreal v. Asia Pacific International Inc.***, 2018 ONSC 4215, ("***API***"), the Ontario Superior Court of Justice examined the two lines of authority, originating from the doctrine of unjust enrichment, in which the courts apply principles of restitution to determine which of two parties in cases like this should bear the loss of the fraud.

[45] The first is that as between the two innocent victims of a fraud, (i) justice requires that the party who was in a position to prevent the loss should bear it, and (ii) a person who takes money obtained by fraud in satisfaction of a *bona fide* debt is entitled to retain it. (***Marvco Color Research Ltd. v. Harris***, [1982] 2 S.C.R. 774 at 786) ("***Marvco Color***")

[46] The second line of authority deals with the recovery of money paid under mistake of fact, as set out by the Supreme Court of Canada in ***B.M.P Global Distribution Inc. v. Bank of Nova Scotia***, 2009 SCC 15, [2009] 1 S.C.R. 504 as follows:

[22] The test laid down in *Simms* for recovering money paid under a mistake of fact...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 payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; (b) 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 principal on whose behalf he is authorized to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so.

[47] As both parties alleged that each was the innocent victim of fraud, I will apply that test to the facts.

[48] The issue that I am required to determine is, of the two, which party was in the best position to prevent the loss as it is that party that is required to bear the loss. In my view, the respondent was in the best position to do so. (The second part of the ***Marvco Color*** test is not applicable as it is not alleged that receipt by 9392 was in satisfaction of a *bona fide* debt.)

[49] In mid-February 2020, a full two months before the transfer of funds took place, Kiakuama was in possession of a one-page Deed of Sale that obliged the purchaser to "pay and to be paid [the purchase monies of \$197,706.48] *into the corporate account (CROP CONNECT) of the seller, No. 9312 – 1484 Quebec Inc...*"

(emphasis added). Kiakuama knew that he did not have a corporate account named CropConnect.

[50] Kiakuama says that despite receiving this document from his lawyer and agent Bongo, he did not read it. Reasonable diligence suggests that a person who is entering into a transaction for the sale of land in a country which he acknowledges is corrupt, would have read that document. The very simple act of reading that document would have revealed the fraud a full two months before the funds were transferred and enabled Kiakuama (9392) to prevent it.

[51] Even if he relied on his lawyer to explain the transaction to him, as he said he did, one would expect that his lawyer would have told him about the requirement for payment of the purchase monies to be paid to his (non-existent) corporate account in the name of CropConnect.

[52] On or about April 16, 2020, Bongo advised Kiakuama that Manoka had made payment by wire transfer to 9392's account at BMO. Kiakuama "immediately asked Mr. Bongo to provide proof of payment by Manoka". In response, he received a copy of the wire transfer from Western Union showing payment. However, that document does not refer at all to Manoka, but does disclose the involvement of CropConnect. Despite his attempt to make this court believe that he did not know of CropConnect until his meeting with Buttino in May 2020, it is clear that he saw it on or about April 16, 2020. At that point, before he told Bongo to complete the sales transaction, he could have stopped the fraud.

[53] For its part, CropConnect received cleverly disguised correspondence from the Victoria Inn which, in the circumstances, did not raise any red flags. I take judicial notice of the fact that in the spring of 2020, businesses were changing operational modes in response to COVID-19 and there was nothing about this change which would be expected to raise concerns or require follow-up.

[54] Regardless of CropConnect's response or lack thereof to the wire transfer instruction, Kiakuama had two whole months to inform himself as to the contents of the Deed of Sale and was clearly in the best position to prevent the fraud. 9392 did not and accordingly, 9392 must bear the loss of the fraud.

[55] In addition to the return of the \$197,706.48, the applicant will have its costs, which if not agreed to, may be spoken to before me.

Harris J.