Federal Court  Cour fédérale

Date: 20160725

Docket: T-1540-15

Citation: 2016 FC 869

Ottawa, Ontario, July 25, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ITKA DALFEN

Plaintiff

and

BANK OF MONTREAL

Defendant

ORDER AND REASONS

I. Introduction

[1] The Bank of Montreal [BMO] has brought a motion in writing to strike Itka Dalfen's amended statement of claim for want of jurisdiction pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106 [Rules].

[2] For the reasons that follow, I have concluded that it is plain and obvious that this Court lacks jurisdiction over Ms. Dalfen's proposed class action against BMO regarding its allegedly

unlawful banking and credit card practices. The amended statement of claim is therefore struck in its entirety without leave to amend.

II. Background

[1] On August 23, 2013, Ms. Dalfen applied for a BMO MasterCard, which she obtained and began to use in September 2013. She admits that the account became delinquent after she refused to make payments for amounts that were owed pursuant to the MasterCard agreement between Ms. Dalfen and BMO [the MasterCard agreement].

[2] On March 30, 2015, BMO commenced an action against Ms. Dalfen in the Ontario Superior Court of Justice, Small Claims Division to recover the amounts owed pursuant to the MasterCard agreement. In her amended statement of defence to that action, Ms. Dalfen raised numerous defences, including: negligence; no "meeting of minds" respecting the terms of the MasterCard agreement; the Ontario *Consumer Protection Act*, SO 2002, c 30; the federal *Bills of Exchange Act,* RSC 1985, c B-4 [*Bills of Exchange Act*] and; the federal *Bank Act*, SC 1991, c 46 [*Bank Act*]. The defences premised on the *Bills of Exchange Act* and *Bank Act* are similar to the claims contained in the amended statement of claim filed by Ms. Dalfen in this Court. The proceedings before the Ontario Superior Court of Justice, Small Claims Division are ongoing.

[3] Ms. Dalfen's initial statement of claim, which was filed in this Court on September 14, 2015, named both BMO and Her Majesty the Queen as defendants. In Ms. Dalfen's amended statement of claim, filed in this Court on March 8, 2016, she pleads three causes of action.

[4] First, she alleges that the MasterCard agreement is a "consumer note" that should have been marked with the words "Consumer Purchase" pursuant to s 190(2) of the *Bills of Exchange Act*. She says the MasterCard agreement was not marked in the required manner and is therefore void.

[5] Second, Ms. Dalfen alleges that s 440 of the *Bank Act* prohibits a bank from receiving monies in respect of any account without "express agreement". She says that the MasterCard agreement is void due to its non-compliance with the *Bills of Exchange Act* and, *a fortiori*, there is no express agreement as required by the *Bank Act*. She says that BMO's collection efforts in respect of all BMO MasterCard accounts are therefore unlawful.

[6] Third, Ms. Dalfen pleads that BMO's collection efforts against BMO MasterCard account holders violate several provisions of the *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations*, SOR/2009-257 and the *Cost of Borrowing (Banks) Regulations*, SOR/2001-101 [*Bank Regulations*], resulting in damages. She says the mandatory disclosure requirements of the *Bank Regulations* were not adhered to, and that BMO unlawfully threatened to publicly disclose her delinquency.

[7] Based on the premise that the MasterCard agreement is void and unenforceable pursuant to the *Bills of Exchange Act* and *Bank Act*, Ms. Dalfen pleads various common law causes of action, including unjust enrichment, restitution, constructive trust, negligence, and breach of contract. She seeks the following relief: (a) declarations that the MasterCard agreement is void by virtue of the *Bills of Exchange Act* and/or the *Bank Act*, that BMO violated both statutes and

the appurtenant *Bank Regulations*, and that BMO breached the credit card agreement with each member of the proposed class; (b) orders that BMO cease and desist its collection efforts, that it pay declaratory relief and general damages greater than $50,000 as a result of its unlawful collection efforts, and that it disgorge any amounts received in respect of BMO MasterCard accounts; and (c) such further and other relief as this Court may consider just.

[8] On March 16, 2016, BMO moved for an order striking Ms. Dalfen's statement of claim for want of jurisdiction pursuant to Rule 221. BMO took the position that it is plain and obvious that the MasterCard agreement is not a promissory note, and that there is no basis upon which this Court could find that BMO is prohibited from collecting the amounts owing under all MasterCard accounts. BMO also argued that Ms. Dalfen's pleadings contained no allegations against the Crown, and did not seek any remedy against the Crown. BMO therefore maintained that this Court lacked jurisdiction over the claim, citing s 23(a) of the *Federal Courts Act*, RSC 1985, c F-7 [Act]. This provision grants the Court jurisdiction over an action in relation to bills of exchange or promissory notes only if the Crown is a party to the proceedings. In response, Ms. Dalfen agreed to discontinue her claim as against the Crown.

[9] On March 18, 2016, during a case management conference [CMC], this Court granted Ms. Dalfen leave to discontinue her claim as against the Crown, and directed that Her Majesty the Queen be removed from the style of cause. During the CMC, counsel for Ms. Dalfen asserted that the Court's jurisdiction over the proposed class action is found in s 23(c) of the Act, which concerns "works and undertakings connecting a province with any other province or extending beyond the limits of the province". This Court directed BMO to deliver a fresh motion record to address this jurisdictional question. BMO complied with the Court's direction on April 1, 2016,

and Ms. Dalfen provided a responding motion record on April 22, 2016. BMO replied on April 29, 2016.

III. Analysis

[10] A motion to strike under Rule 221 will succeed only if it is "plain and obvious" that the claim discloses no reasonable cause of action (*Hunt v Carey Canada Inc,* [1990] 2 SCR 959, [1990] 1 WDCP (2d) 523 (SCC)). The "plain and obvious" test applies to the striking out of pleadings for lack of jurisdiction in the same manner as it applies to the striking out of any pleading on the ground that it evinces no reasonable cause of action (*Hodgson v Ermineskin Indian Band No 942,* [2000] FCJ No 313 at para 10, 180 FTR 285).

[11] The Federal Court is a statutory court established "for the better Administration of the Laws of Canada" under s 101 of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. This Court may decide a matter only if it has the requisite statutory jurisdiction, which is usually found in the Act, together with constitutional jurisdiction under s 101 of the *Constitution Act, 1867* (*Canadian Transit Co v Windsor (City),* 2015 FCA 88 at para 19 [*Canadian Transit*]).

[12] The test to determine whether this Court possesses jurisdiction was established by the Supreme Court of Canada in *ITO-International Terminal Operators Ltd v Miida Electronics Inc,* [1986] 1 SCR 752 at paragraph 12, [1986] SCJ No 38 [*ITO-Int'l Terminal Operators*], and requires that the following three criteria be met:

1. There must be a statutory grant of jurisdiction by the federal Parliament;
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction; and
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s 101 of the *Constitution Act, 1867*.

[13] BMO argues that the first branch of the *ITO-Int'l Terminal Operators* test is not met, because there is no statutory grant of jurisdiction that would permit this Court to adjudicate Ms. Dalfen's proposed class action. BMO says that Ms. Dalfen's claim is grounded in property and civil rights, and amounts to a purely private dispute that is within the exclusive jurisdiction of the Ontario Superior Court of Justice.

[14] The parties agree that the relevant statutory grant of jurisdiction, if any, is found in s 23 of the Act, which provides in relevant part:

Except to the extent that jurisdiction has been otherwise specially assigned, the Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to any matter coming within any of the following classes of subjects:	Sauf attribution spéciale de cette compétence par ailleurs, la Cour fédérale a compétence concurrente, en première instance, dans tous les cas — opposant notamment des administrés — de demande de réparation ou d'autre recours exercé sous le régime d'une loi fédérale ou d'une autre règle de droit en matière :

(a) bills of exchange and promissory notes, where the Crown is a party to the proceedings;	a) de lettres de change et billets à ordre lorsque la Couronne est partie aux procédures;
…	[…]
(c) works and undertakings connecting a province with any other province or extending beyond the limits of a province.	c) d'ouvrages reliant une province à une autre ou s'étendant au-delà des limites d'une province.

[15] BMO says that Ms. Dalfen's claim is premised on the assumption that the MasterCard agreement is a "consumer note". Subsection 189(2) of the *Bills of Exchange Act* expressly provides that a consumer note is a "promissory note".

[16] According to BMO, the only statutory grant of jurisdiction that might apply is s 23(a) of the Act, which clearly states that the Court's jurisdiction to adjudicate matters concerning bills of exchange or promissory notes is conditional on the federal Crown being a party to the proceedings. Since Ms. Dalfen has discontinued her claim as against the federal Crown, BMO says that the Court's lack of jurisdiction is plain and obvious.

[17] Ms. Dalfen responds that BMO is characterizing her claim too narrowly. She argues that her claim is founded on three causes of action that are separate and independent, although admittedly related. She says that her claim against BMO for violating the *Bank Regulations*, including by threatening to publicly disclose her delinquency, is independent of her claim that the credit card agreement is void under the *Bills of Exchange Act* and *Bank Act*. She says it is a fallacy to characterize her claim as being contingent on "suing on a promissory note".

[18] Ms. Dalfen has provided no response to BMO's assertion that this Court lacks jurisdiction under s 23(a) of the Act. Instead, she maintains that this Court's jurisdiction is found in s 23(c) of the Act. She submits that s 23(c) of the Act permits a litigant to seek relief in this Court under an Act of Parliament in relation to "works and undertakings connecting a province with any other province or extending beyond the limits of a province". She says that BMO is a federal undertaking, whose services are regularly provided inter-provincially.

A. Rule of Implied Exception

[19] BMO argues that it would defeat Parliament's clear intention, and would lead to absurdity, if this Court were to assume jurisdiction pursuant to s 23(c) of the Act over an action relating to promissory notes where the Crown is not a party to the proceedings.

[20] BMO relies on the rule of implied exception, a principle of statutory interpretation also known as *generalia specialibus non derogant*. The rule provides that a "specific provision prevails over a general one only if applying the general provision would render the specific one superfluous" (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, ON: LexisNexis, 2014) at 363-64). The Federal Court of Appeal has held that "[o]ne of the fundamental principles of legislative construction is that a statute or provision of a statute which deals specifically with a subject-matter must take priority over, and override, any general legislation or provision dealing with the same subject-matter" (*National Bank Life Insurance v Canada*, 2006 FCA 161 at para 9).

[21] According to BMO, since Ms. Dalfen's action is premised on the assumption that the MasterCard agreement is a promissory note, s 23(a) of the Act must be read as superseding s 23(c) of the Act.

[22] Subsection 189(2) of the *Bills of Exchange Act* provides that "[a] consumer note is a promissory note (a) issued in respect of a consumer purchase; and (b) on which the purchaser or any one signing to accommodate him is liable as a party". Subsection 176(1) of the *Bills of Exchange Act* defines a "promissory note" as "an unconditional promise in writing made by one person to another person, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer".

[23] If the MasterCard agreement is a "consumer note", and therefore a "promissory note" as defined under the *Bills of Exchange Act*, then I agree with BMO that the governing statutory provision is s 23(a) of the Act. As previously mentioned, s 23(a) of the Act confers jurisdiction on this Court to adjudicate disputes arising from promissory notes only where the Crown is a party to the proceeding. If this Court were to assert jurisdiction pursuant to s 23(c) of the Act, solely because BMO is a federal undertaking whose services are provided beyond the limits of one province, this would defeat Parliament's clear intention that this Court may assume jurisdiction over disputes concerning promissory notes only where the Crown is a party to the proceedings.

[24] However, if the dispute is not wholly premised on the assumption that the MasterCard agreement is a "promissory note" as defined under the *Bills of Exchange Act*, then Ms. Dalfen's claim is not solely "in relation to any matter" concerning "bills of exchange and promissory notes". In these circumstances, the rule of implied exception would not prevent this Court from assuming jurisdiction under s 23(c) of the Act. I note that some of Ms. Dalfen's claims do not on their face relate to the subject-matter of promissory notes, including those related to BMO's alleged violations of the *Bank Regulations*. I must therefore consider whether the Court's jurisdiction may be found in s 23(c) of the Act.

B. Federal Work or Undertaking

[25] There is no dispute that BMO is a federal work or undertaking. However, as noted by Justice Zinn, "merely because the defendant is a federal work or business or undertaking does not, without more, provide a basis for this Court's jurisdiction" (*Katz v Bank of Nova Scotia*, 2009 FC 328 at para 14, citing *Gracey v Canadian Broadcasting Corp* (1990), [1990] FCJ No 1155, [1991] 1 FC 739). This Court's jurisdiction must therefore be found either in the Act or in other federal legislation that explicitly confers jurisdiction upon the Court.

[26] There is nothing in the *Bills of Exchange Act* that specifically contemplates this Court's jurisdiction. In the *Bank Act*, the word "court" is defined in s 2 to mean the various provincial courts described therein. Some provisions of the *Bank Act* do contemplate Federal Court jurisdiction, such as s 977(1), pursuant to which an appeal lies to the Federal Court of certain directions issued by the Minister of Finance (see also ss 617.2(7), 624(2), 647.1(7), 654(2), 964(7)). However, none of the provisions that contemplate the Federal Court's jurisdiction are

involved here. Nor has Ms. Dalfen identified any other federal legislation that may serve as the basis for the Court's jurisdiction over this dispute.

[27] According to Ms. Dalfen, BMO is a "federal work or undertaking" that provides services beyond the limits of the province of Ontario and has property and equipment in more than one province. She says that her claim therefore concerns a "federal work or undertaking" extending beyond the limits of the province of Ontario, as contemplated in s 23(c) of the Act.

[28] BMO notes that there are no reported cases in which this Court asserted jurisdiction over an action against a Canadian bank under s 23(c) of the Act. All reported decisions where jurisdiction has been asserted under this provision have concerned physical enterprises such as bridges, railroads, telecommunications networks, or the movement of physical items beyond provincial boundaries.

[29] Ms. Dalfen responds that the Supreme Court of Canada has liberally construed the statutory language of s 23(c) of the Act to include business enterprises that are federal undertakings and that provide their services inter-provincially. She says that there is no requirement of a "physical connection" for a subject-matter to fall under the purview of a "work or undertaking […] extending beyond the limits of the Province" (citing *Capital Cities Communications Inc v CRTC* (1977), [1978] 2 SCR 141, [1977] SCJ No 119 [*Capital Cities*] and *Alberta Government Telephones v Canadian Radio-television & Telecommunications Commission*, [1989] 2 SCR 225, [1989] 5 WWR 385 [*Alberta Government Telephones*]). She says that federally chartered banks such as BMO may be "easily" included under this provision.

[30] In my view, the cases relied upon by Ms. Dalfen do not assist her. In *Capital Cities*, which concerned a cable television company that operated a "broadcasting receiving undertaking", the Supreme Court acknowledged a decision of the Privy Council which held that there is "no doubt that the undertaking of broadcasting is an undertaking connecting the Province with other provinces and extending beyond the limits of the Province", and that an "undertaking is not a physical thing but is an arrangement under which of course physical things are used" (*Capital Cities* at paras 17, 28). *Alberta Government Telephones* concerned a local exchange system, and *Canadian Transit* concerned a bridge connecting the City of Windsor to the City of Detroit.

[31] Put simply, the subject-matter of Ms. Dalfen's action against BMO is the MasterCard agreement. This cannot be construed as a federal work or undertaking that connects a province with another province or extends beyond the limits of the province, as recognized in the jurisprudence. Ms. Dalfen's assertion regarding the Court's jurisdiction under s 23(c) of the Act is without merit.

[32] In light of my conclusion that there is no statutory grant of jurisdiction under the Act, the first branch of the *ITO-Int'l Terminal Operators* test is not met. It is therefore unnecessary to consider the second and third branches of the test.

IV. Conclusion

[33] Ms. Dalfen's proposed class action is largely premised on the assumption that the MasterCard agreement is a promissory note. Subsection 23(a) of the Act specifically addresses

the Court's jurisdiction over disputes arising from promissory notes. Jurisdiction under s 23(a) is conditional on the Crown being a party to the proceeding, which is not the case here.

Furthermore, the Court's jurisdiction over this matter cannot be found in s 23(c) of the Act. A MasterCard agreement cannot be construed as a federal work or undertaking that connects a province with any other province or that extends beyond the limits of the province. It is therefore plain and obvious that the Court lacks jurisdiction over this dispute.

ORDER

THIS COURT ORDERS that:

1. The amended statement of claim is struck in its entirety without leave to amend; and

2. If the parties are unable to agree upon costs, they may make written submissions, not exceeding five (5) pages, within thirty (30) days of the date of this Order.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1540-15
STYLE OF CAUSE:	ITKA DALFEN v BANK OF MONTREAL
ORDER AND REASONS:	FOTHERGILL J.
DATED:	JULY 25, 2016

BY WRITTEN REPRESENTATIONS:

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