Court of Queen's Bench of Alberta

Citation: The Brick Warehouse LP v Chubb Insurance Company of Canada, 2017 ABQB 413

Date:
Docket: 1203 13414
Registry: Edmonton

Between:

The Brick Warehouse LP

Plaintiff

- and -

Chubb Insurance Company of Canada

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice G.R. Fraser

Introduction

[1] The applicant in this matter, the Brick, and the defendant, Chubb Insurance, have chosen to resolve this matter by way of a summary trial. Each party admits the facts as set out in the Agreed Statement of Facts which is attached to this judgment as Appendix "A". If there is a disagreement between the facts in this document and the agreed statement of facts, the agreed statement of facts shall apply.

Background

[2] In August 2010 an individual called the Brick's accounts payable department and spoke with an employee. The caller indicated he was from Toshiba and that he was missing some payment details. He indicated that he was new to Toshiba and the Brick Employee, being helpful, faxed some payment documentation to a number provided by the caller.

[3] A few days later, the same person called again providing the same story. This time, the same Brick employee advised the caller to write to the Brick's lender to set up address and update Toshiba's email addresses so he would receive electronic notification of payments.

[4] On August 20, 2010, a different individual in the Brick accounts payables department received an email from an individual with the name "R. Silbers" and an email address of silbers_toshiba@eml.cc. The individual claimed to be the controller of Toshiba Canada and indicated that Toshiba had changed banks from the Bank of Montréal to the Royal Bank of Canada. It indicated all payments should be made to the new account and provided the necessary information to transfer money into the account.

[5] On August 24, 2010 a person phoned the Brick's accounts payable department. That individual spoke to the same employee who received the August 20 email. The individual wanted to confirm the transfer of banking information.

[6] After the phone call, the employee changed Toshiba Canada's bank information on the Brick's payment system to reflect the Royal Bank account information. The employee followed the Brick's standard practice on changing account information and the paperwork was reviewed by another Brick employee. Nobody from the Brick ever took any independent steps to verify the change in bank accounts. Nobody contacted the Royal Bank, nobody contacted Toshiba, and nobody contacted the Bank of Montréal.

[7] As a result of the change in banking information, payments that should have gone to Toshiba Canada were now going to the mysterious Royal Bank account. A total of ten Toshiba invoices were paid. The total amount transferred to the Royal Bank account was $338,322.22.

[8] The fraud was only discovered on September 3, 2010 when an individual again contacted the Brick's accounts payable department claiming to be from Sealy Canada. This individual gave the same story about Sealy changing banks and again provided a Royal Bank of Canada account number. That account number was the same number associated with the Toshiba Canada account, and as a result could not be entered into the Brick payment system.

[9] On that same day, an employee from the Brick contacted the number provided in the Toshiba email. The employee was able to speak with an individual who indicated that Toshiba Canada and Sealy Canada had merged. However, he would not be able to provide any further details until after the Labor Day weekend.

[10] Fortunately for the Brick, on September 10, 2010 a representative of Toshiba Canada called to inquire why it had not received payment for recent invoices. That call started an investigation at the Brick that prevented any Sealy Canada payments going to the fraudulent Royal Bank account. Sadly, it did not stop to payments regarding Toshiba Canada still been sent to the fraudulent account.

[11] The fraud was reported to the police and an investigation was started. Over the course of the investigation, it was discovered that the Royal Bank account belonged to an individual in Winnipeg who was also the victim of fraud. He had been convinced by an individual purporting to be in Dubai to receive the money as part of the business investment and then transfer some of the money to the individual in Dubai. As a result of the investigation, the Brick was able to recover $113,847.18 of the fraudulently transferred funds.

[12] On December 6, 2011, the Brick made a claim to Chubb Insurance for $224,475.14. This represented the total amount transferred less the amount recovered.

[13] On March 15, 2012, Chubb gave the Brick its formal decision denying coverage for the claim on the basis that the loss did not fall into one of the areas covered under the insurance

policy. Specifically, Chubb claimed that the file transferred fraud coverage clause in the policy did not cover the type of loss suffered by the brick.

Issue

[14] The question to be answered in relation to the summary trial is whether or not the policy issued to the Brick by Chubb covers this type of loss. In order to answer the question it is necessary to look closely at the policy and its wording.

Discussion

[15] In ***Consolidated-Bathurst Export Ltd.*** v ***Mutual Boiler and Machinery Insurance Co.***1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888, the Supreme Court of Canada outlined a two-step interpretation procedure in relation to insurance policies. The first step is the interpretation of the intention of the parties followed by the second step which is a resolution of ambiguities that exist.

> In determining the intention of the parties, the following principles apply according to a leading text on Canadian Insurance Law:
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> - Undefined contract is you will;
> - Clearly worded terms should be given full effect of the contract read as a whole;
> - An undefined word with two meanings should be assigned a meaning which "is more reasonable in promoting the intention of the parties"; and
> - The objective of the contract should not be negated by a technical definition or by an interpretation "which will result in either a windfall to the insurer or an unanticipated recovery to the insured".
>
> (Barbara Billingsley, ***General Principles of Canadian Insurance Law***, 2nd ed. (LexisNexis Canada Inc., 2014) at 146.

[16] It is only necessary to move on to the second step of the interpretation framework if after an application of the general principles; a conflict exists between two reasonable but differing interpretations of the policy. In such a case, the contract would be ambiguous and further analysis by the Court in relation to the ambiguity would be necessary to resolve it. Ms. Billingsley's text continues at page 147:

> The principles applicable at Step Two are essentially mechanisms to assist the court in resolving contractual ambiguity. They include:
>
> (i) the *contra proferentem* rule;
>
> (ii) the broad interpretation of coverage clauses and the narrow interpretation of exclusion clauses;
>
> (iii) the fulfilment of the reasonable expectations of the parties so as to avoid an unrealistic result; and

(iv) the continuity or consistency of judicial interpretation.

[17] In this case, there is no doubt that the Brick intended to ensure itself against loss as a result of criminal action. That is why it purchased a crime coverage policy. If this policy simply covered any loss as a result of criminal activity, this matter would have been settled long ago. Not surprisingly, the insurance policy places restrictions on what sort of criminal actions will be covered.

[18] The Brick contends that its loss should be covered as it falls under the umbrella of funds transfer fraud. The policy defines funds transfer fraud as follows:

> Funds transfer fraud means the fraudulent written, electronic, telegraphic, cable, teletype or telephone instructions issued to a financial institution directing such institution to transfer, pay or deliver money or securities from any account maintained by an insured at such institution without an insured's knowledge or consent.

[19] In order for the Brick to be successful, it must show that its bank transferred funds out of the Brick's account under instructions from a third party impersonating the Brick. It is not covered if the Brick knew about, or consented to the instructions given to the bank. The insurance policy also contains in the exclusion section a clause which denies coverage if the loss is due to the insured knowingly having given or surrendered money, securities or property in exchange or on purchase to a third party, not in collusion with an employee. The only exceptions to this clause involve money orders and counterfeit currency.

[20] There is no doubt that funds were transferred out of the Brick's account. The question really is whether the funds were transferred under instructions from an employee who did not know about or consent to the fraudulent transactions.

[21] In this case, the funds were transferred by a Brick employee as a result of fraudulent emails. The defendant in this action seeks to have the court follow the decision of an American case from the United States District Court for the Central District of California, ***Taylor and Lieberman v Federal Insurance Company***, 2:14-cv-03608, unreported. I note that Federal Insurance Company is related to Chubb Insurance. In the case, the Ninth Circuit Court of Appeals examined a case with very similar facts. Emails were sent to a company employee who then acted upon them, transferring money out of the insured's account. The emails were fraudulent. The court held that the insurer was not liable because the Taylor and Lieberman employee requested and knew about the transfers. Although the employee did not know that the email instructions were fraudulent, the employee did know about the transfers.

[22] There are other similar pending cases in the United States.[1] It is notable all of the decisions absolving the insurance company of liability seem to involve Chubb Insurance or one of its affiliated companies.

[23] The Brick contends that the policy provision states that Chubb will pay for direct loss resulting from funds transfer fraud by a third-party, and the focus should be on the fraud itself and not on the fraudulent instructions. While it is true that clause 1(E) does state that, that clause must be examined in conjunction with the definition of fund transfer fraud contained in the

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[1] Ameriforge Group Inc v Federal Insurance Company No.4:16 cv-00377
Medidata Solutions, Inc. v. Federal Insurance Company, No. 1:15-cv-00907 (S.D.N.Y. Mar. 10, 2016).

contract. That definition includes the words "insured's knowledge or consent". There is no definition in the contract of either the term "knowledge" or "consent". There is no mention anywhere in the insurance policy of the term "informed consent". If the policy contained these words, again it is unlikely the parties would be before the court.

[24] When a word or a term is undefined, the word should be given its "plain, ordinary and popular" meaning, "such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it". One of the definitions of consent is "permission for something to happen, or agreement to do something. Examining the facts, a Brick employee did give instructions to the bank to transfer funds. The employee was permitting the bank to transfer funds out of the Brick's account. Consequently, the transfer was done with either the Brick's knowledge or consent. Even applying the *contra proferentem* rule, the Brick still consented to the funds transfer.

[25] Even if the Brick did not consent to the funds transfer, there is still the issue of whether the transfer was done by a third party. Certainly, the emails with the fraudulent instructions were from a third party. The actual transfer instructions; however, were issued by a Brick employee. There was no one forcing the employee to issue the instructions, there were no threats of violence or other harm. The employee was simply a pawn in the fraudster's scheme. Therefore, the transfer was not done by a third party.

Conclusion

[26] The end result is that the Brick is not entitled to recover its loss from Chubb. The plaintiff's request is denied.

Heard on the 29th day of March, 2017.
Dated at the City of Edmonton, Alberta this 29th day of June, 2017.

G.R. Fraser
J.C.Q.B.A.

Appearances:

Stephanie C. Chau and Andrea M. Steen
for the Plaintiff

Anne Juntunen
for the Defendant