COURT FILE NO.: 06-CV-306197 PD1
DATE: 20060725

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: EMMANUEL HOWBOTT (Plaintiff) v. TD CANADA TRUST, CHARLENE AQUINO, TORONTO POLICE SERVICE, PC CRAIG INGLIS, DC RONALD HENSELWOOD (Defendants)

BEFORE: JUSTICE WILSON

COUNSEL: *Richard A. Odeleye* for the Plaintiff

Theodor Kerzner, Q.C. for the Defendants TD Canada Trust and Charlene Aquino

DATE HEARD: JULY 6, 2006

ENDORSEMENT

[1] The defendants TD Canada Trust and their employee Charlene Aquino ("the Bank") bring this motion for summary judgment seeking to dismiss the action against them for negligence and malicious prosecution. The Bank relies upon both rule 20 and 21 of the *Rules of Civil Procedure.*

[2] The Bank argues that the law in Ontario is that there is no cause of action against the Bank for negligence in what they report to the police. They also assert that there is no genuine issue for trial that the Bank was the initiator of the proceedings against the plaintiff leading to his arrest and incarceration.

[3] I conclude that the motion must fail.

[4] In this case there are contested issues with respect to material facts involving credibility that are relevant to determining both issues and which cannot properly and fairly be assessed by a motions court judge. After reviewing the moving parties' motion materials I am left with many questions about what went on. The Bank has not established *prima facie* that there is no genuine issue for trial. Although the Bank may well succeed at trial as malicious prosecution is difficult to prove and the claim against the Bank for negligent investigation is novel, it is not plain and obvious at this stage of the proceedings that the plaintiff's claim is devoid of merit. Pleadings have been exchanged. Discovery has not taken place.

THE FACTS

[5] The brief synopsis of facts is outlined in the affidavits filed by the Bank and by the plaintiff. There are conflicts and gaps in the affidavits. Neither party has chosen to cross-examine, and the Bank employee, Charlene Aquino, has not responded in any substantive way to the plaintiff's affidavit.

[6] The plaintiff came to the Bank on August 26, 2005 intending to deposit twenty $100.00 bills to his account at the branch. Aquino met with the plaintiff and indicated that the bills looked "bad". The plaintiff indicated that he had by mistake washed the bills in question in his laundry. He bluntly made it clear that he was offended by the Bank's inquiry.

[7] Aquino indicated that the Bank would have to retain the bills. She recorded the serial numbers and gave the plaintiff a receipt.

[8] There is a conflict in the evidence about what happened in the initial encounter on August 26, 2005 and what happened between August 26, 2005 and August 30, 2005, when the plaintiff was charged by the police and arrested.

[9] The affidavit of Aquino outlines her contact with the police prior to the plaintiff's arrest. According to Aquino, an officer came to the branch, viewed the banknotes and was uncertain as to their genuineness. She asserts that she was told by the officer that the police would submit the banknotes to the RCMP for verification as to their genuineness, and would not take any action until it was determined that the currency was counterfeit.

[10] The plaintiff asserts that he was told by Aquino on August 26, that he was to return to the Bank to allow the Bank to conduct tests on the bills to determine whether they were counterfeit or not. When the plaintiff returned to the Bank on August 30, 2005 Aquino told him that the Bank had concluded its investigation, had determined that the currency was counterfeit, and that she would "call the police to lay charges".

[11] Aquino called 911 to report that the plaintiff had submitted "20 fake $100.00 bills" to deposit to his account. Within an hour or two of the call the plaintiff was arrested. He was detained in custody for two weeks for the offence of tendering counterfeit currency, pending the RCMP investigation.

[12] The plaintiff was released from custody after the RCMP investigation into the genuineness of the notes was completed. The RCMP report is not before the court.

[13] The plaintiff outlines in his affidavit, which is not responded to by Aquino, that the police advised him, that the Bank had put the bank notes through their "machine" and had found that the notes were counterfeit.

NEGLIGENCE

[14] The Bank relies upon *Mirra v. Toronto Dominion Bank*, [2004] O.J. No. 1804 for the proposition that in Ontario "no action lies against the Bank defendants for negligence in what they report to the police".

[15] *Mirra* is the sole decision in Ontario considering this issue, and is distinguishable on its facts. In *Mirra* a bank employee erroneously provided eye-witness identification that the plaintiff was the perpetuator of a credit card fraud. The plaintiff in *Mirra* was a stranger, not a client of the bank. There was no question that the mistake was honest. The finding of Wilton-Siegel J. that there was no duty of care is limited to the circumstances of that case, and cannot be held to be a broad general statement applying to all cases regardless of the facts. He concludes at para. 51:

> I agree with the T-D Defendants that they do not owe a duty of care to the plaintiffs with respect to their investigation. The absence of authority in support of the plaintiffs' position reflects a clear public policy against allowing claims in the circumstances of this action against private complainants or victims, provided the mistake was honest. Accordingly, the claims of the plaintiffs in respect of damages based on an alleged negligent investigation are dismissed.
>
> [emphasis added]

[16] In *Mirra* the court emphasized on numerous occasions that the facts were not in dispute. Therefore, the motions court judge could fairly determine the questions of law.

[17] In *Mirra*, the bank employee was in the shoes of an ordinary citizen. He honestly but mistakenly provided eye-witness identification of a third party allegedly perpetuating a credit card fraud. This case is distinguishable as the plaintiff was a client of the Bank seeking to deposit funds in his own account. At law, a bank owes a duty to its clients to exercise "reasonable care and skill" in carrying out its part the operation of the contract with its customer: *Groves-Raffin Construction Ltd. and Fidelity Insurance Company of Canada v. Canadian Imperial Bank of Commerce and Bank of Nova Scotia* [1976], 2 W.W.R. 673 (B.C.C.A.) at p. 718 citing Atkin L.J. in *Hilton v. Westminster Bank Ltd.* (1926), 135 L.T. at p. 362.

[18] According to the plaintiff's affidavit the Bank conducted an investigation using their expertise, experience and apparently their machinery to determine whether the currency was genuine. The police apparently relied upon this investigation, arrested and detained the plaintiff immediately, before conducting the RCMP testing on the currency.

[19] The law with respect to negligence in this context is uncharted. I note that *Mirra* cites only US authority, as there is no authority in Canada. The plaintiff's assertion is novel, but the facts of this case are unique. It would be premature to strike the action at this stage of the

procedure. The issue of the Bank's responsibility in negligence should be determined with all of the facts, before a trial judge.

[20] For these reasons I conclude that the Bank, as moving party, has failed to meet the initial onus in accordance with a rule 20 summary judgment motion that there is *prima facie* no genuine issue for trial with respect to the issue of the Bank's negligence. In any event, the responding material filed by the plaintiff meets the secondary evidentiary burden of presenting evidence that is capable of supporting the position outlined by his pleading. As well, it would be premature given the developing state of the law to strike the claim pursuant to rule 21 at this stage of the procedure.

MALICIOUS PROSECUTION

[21] There are strong statements in the case law with respect to malicious prosecution and the onus that the plaintiff must meet to prove that the defendant initiated the criminal proceedings. See: *Bainard v. Toronto Police*, [2002] O.J. No 2765, *Scintolore v. Larche,* [1999] O.J. No 2945, and *Mirra, supra*.

[22] With one exception, all of the cases cited with respect to malicious prosecution grappling with these issues were determined in the context of a trial. The one exception is the decision in *Mirra* relied upon by the Bank. In *Mirra* no facts were in dispute. As well, the facts underpinning *Mirra* are clearly distinguishable from the facts of this case.

[23] Some of the facts in this case do not appear to be disputed. It is not disputed that Aquino told the plaintiff that the currency looked "bad", and that he would have to leave the funds with the Bank to conduct their investigation. When the plaintiff returned after the Bank had conducted their investigation, the Bank informed the plaintiff that they concluded that the currency was not genuine. Aquino advised that she would call the police "to lay charges". In the 911 call she advised that the plaintiff had "submitted 20 fake $100.00 bills" to deposit to his account. One to two hours later the plaintiff was detained, questioned by the police and arrested. The police advised the plaintiff that the Bank had tested the currency with their "machine" and concluded that the notes were counterfeit.

[24] There are facts in dispute and gaps in the Bank's outline of the facts. The initial affidavit of Aquino makes no mention of conducting an independent investigation using the Bank "machine" to determine the authenticity of the currency in question. It appears that Aquino's initial affidavit filed on the motion for summary judgment may well be very misleading. The responding affidavit filed by the Bank is that of a legal secretary attaching various correspondence. Aquino does not respond to the factual assertions in the plaintiff's affidavit outlining from the plaintiff's perspective the various factual inaccuracies in the Aquino rendition of the facts.

[25] The law with respect to what constitutes initiation or putting into motion the criminal proceeding with respect to the tort of malicious prosecution is developing, and has not been

squarely considered by an appellate court. When it is considered, it should be considered in the context of all of the facts.

[26] There are factual discrepancies, gaps in the Bank's evidence and the relevant law is developing. I conclude that the Bank has not met the preliminary onus in accordance with rule 20 of proving that there is no genuine issue for trial with respect to whether the Bank initiated, or put into motion the criminal proceeding. In any event, the responding material filed by the plaintiff meets the secondary evidentiary burden of presenting evidence that is capable of supporting the position outlined by his pleading.

[27] For these reasons the motion to strike the claim against the Bank for malicious prosecution is dismissed.

[28] If counsel are unable to agree as to costs, I would ask that the plaintiff file both parties' submissions in bound form within 30 days of the release of this endorsement.

RELEASED:

WILSON J.