

Date: 20090331

Docket: T-1238-08

Citation: 2009 FC 328

Toronto, Ontario, March 31, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**LYNNE CHERYL KATZ and
ORNO HOLDINGS LTD.**

Plaintiffs

and

**THE BANK OF NOVA SCOTIA,
MARIA IAFRATE and MONICA PRASAD**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] Three motions came on for hearing before the Court, in Toronto, on March 30, 2009:

- a. A motion dated the 23rd day of September 2008, on behalf of the defendants, for an Order pursuant to Rule 181 of the *Federal Courts Rules* for particulars of the allegations in the plaintiffs' Statement of Claim, as requested in the Demand for Particulars attached as Appendix 'A' to the Notice of Motion;

- b. A motion dated the 14th day of October 2008, on behalf of the plaintiffs for an Order pursuant to Rule 210 of the *Federal Courts Rules* for default judgment against the defendants for failure to serve and file a statement of defence within the time set out in Rule 204; and

- c. A motion dated the 27th day of February 2009, on behalf of the defendants, for an Order pursuant to Rule 221 striking the plaintiffs' statement of claim for lack of subject matter jurisdiction over the claims set out therein;

The Court heard submissions on the last motion first, and in light of my determination on that motion, the others did not need to be addressed.

[2] The plaintiffs were account holders with the defendant Bank. The personal defendants were, at the material times, branch manager and an employee in the customer service department of the Bank's branch at Yonge and Lawrence in Toronto, Ontario.

[3] The plaintiffs allege that the defendants released information contrary to their instructions and that the defendants' actions breached their confidentiality and was an invasion of their privacy. It is further alleged that the defendants failed to close the plaintiffs' accounts as directed, causing damage to the plaintiffs. The claims as against the personal defendants are premised on the alternate claim that they were acting outside the scope of their authority.

[4] The motions were based on the Statement of Claim that issued on August 11, 2008. On March 18, 2009, after these motions had been brought, the plaintiffs filed an Amended Statement of Claim. The defendants are not in default of filing a defence to that amended claim under the *Federal Courts Rules* and thus the motion for summary judgment has been rendered premature as a consequence of filing the Amended Statement of Claim. Further, counsel for the defendants informed the Court that the amended claim responds, in part, to the motion for particulars. In any event, the Court directed that the motion to strike be heard first because, if successful, the remaining two motions would become moot and unnecessary. Both parties indicated that they were prepared to argue that motion on the basis of the recently filed Amended Statement of Claim. Following the motion, I indicated that the motion to strike would be allowed. These are the reasons for the determination.

[5] The plaintiffs' claim is set out in the Amended Statement of Claim, filed March 18, 2009, as follows:

1. The plaintiff, Lynne Cheryl Katz ("Katz") claims against the defendants, jointly and severally, for breach of confidentiality, invasion of privacy, negligence and for breach of contract:
 - a) general damages in the amount of \$100,000.00,
 - b) special damages in an amount to be specified before trial.
 - c) pre- and post-judgment interest and legal costs pursuant to the *Courts of Justice Act*,
 - d) such other relief as this Honourable Court may advise.

2. The plaintiff Orno Holdings Ltd. ("corporate plaintiff") claims against the defendants, jointly and severally, for breach of confidentiality, invasion of privacy, negligence and for breach of contract:
 - a) general damages in the amount of \$75,000.00,
 - b) special damages in an amount to be specified before trial.

- c) pre- and post-judgment interest and legal costs pursuant to the *Courts of Justice Act*,
- d) such other relief as this Honourable Court may advise.

[6] The tri-partite test set out in *ITO-International Terminal Operators Limited v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, provides that this Court's jurisdiction is limited to cases where there is a statutory grant of jurisdiction, there is an existing body of federal law essential to the disposition of the case, and the law on which the case is based is a "law of Canada" as the phrase is used in Section 101 of the *Constitution Act, 1867*. A statement of claim should only be struck for want of jurisdiction at a preliminary stage where the lack of jurisdiction is plain and obvious: *Sokolowska v. Canada*, 2005 FCA 29.

[7] The plaintiffs assert that the impugned conduct of the defendants which grounds their action is conduct by them that is contrary to the *Personal Information Protection and Electronic Documents Act*, 2000, S.C. 2000 c. 5 (*PIPEDA*) and to the *Bank Act*, S.C. 1991 c. 46. The plaintiffs submit that the interplay of these Federal Acts provides the underpinning necessary to provide this Court with jurisdiction, although possibly only concurrent jurisdiction, over the claim.

[8] *PIPEDA* does grant jurisdiction to this Court to hear any matter arising out of a complaint made under that Act to the Privacy Commissioner; however, subsection 14(1) stipulates that it is a condition precedent to this Court having jurisdiction that a complaint has been made to the Privacy Commissioner and the Privacy Commissioner has issued a report. There is no allegation in the amended claim that there was any complaint filed. In fact, Ms. Katz informed the Court at the

hearing of this motion that the plaintiffs have not filed any complaint. Accordingly, this Court's limited jurisdiction under *PIPEDA* is not engaged.

[9] The *Bank Act* regulates the creation and administration of chartered banks in Canada. The plaintiffs rely on section 455 of that Act that provides that each Bank shall establish complaint procedures.

455. (1) A bank shall

(a) establish procedures for dealing with complaints made by persons having requested or received products or services in Canada from a bank;

(b) designate an officer or employee of the bank to be responsible for implementing those procedures; and

455. (1) La banque est tenue :

a) d'établir une procédure d'examen des réclamations de personnes qui lui ont demandé ou qui ont obtenu d'elle des produits ou services au Canada;

(i) au traitement des frais à payer pour leur compte de dépôt, pour les arrangements visés au paragraphe 452(3) ou pour leur carte de crédit, de débit ou de paiement,

(ii) à la divulgation ou au mode de calcul du coût d'emprunt à l'égard d'un prêt consenti par elle;

b) de désigner un préposé — dirigeant ou autre agent — à la mise en oeuvre de la procédure;

(c) designate one or more officers or employees of the bank to receive and deal with those complaints.

c) de désigner un ou plusieurs autres préposés — dirigeant ou autre agent — aux réclamations.

(2) A bank shall file with the Commissioner a copy of its procedures established under paragraph (1)(a).

(2) La banque dépose auprès du commissaire un double de la procédure.

(3) A bank shall make its procedures established under paragraph (1)(a) available

(3) La banque met à la disposition du public la procédure à la fois :

(a) in the form of a brochure, at its branches where products or services are offered in Canada;

a) dans ses succursales où sont offerts des produits ou services au Canada, sous forme de brochure;

(b) on its websites through which products or services are offered in Canada; and

b) sur ceux de ses sites Web où sont offerts des produits ou services au Canada;

(c) in written format to be sent to any person who requests them.

c) dans un document écrit à envoyer à quiconque lui en fait la demande.

(4) A bank shall also make prescribed information on how to contact the Agency available whenever it makes its procedures established under paragraph (1)(a) available under subsection (3).

(4) La banque doit accompagner la procédure qu'elle met à la disposition du public des renseignements — fixés par règlement — sur la façon de communiquer avec l'Agence.

[10] The plaintiffs have filed complaints with the Office of the Superintendent of Financial Institutions and with the Financial Consumer Agency of Canada with respect to the Bank's conduct that underlies this action. The latter agency is that prescribed by the government to deal with

complaints arising under section 455 of the *Bank Act*. There is no allegation in the amended claim that a decision of either agency forms the basis of the claim.

[11] In my view, there is nothing in the *Bank Act* that grants this Court jurisdiction over a claim by an account-holder for breach of contract, negligence, breach of confidentiality or other tortious conduct of the sort alleged in the claim filed by the plaintiffs.

[12] The plaintiffs' claims are essentially claims grounded in property and civil rights against a party other than the Crown and are thus within the jurisdiction of the Ontario Superior Court of Justice. The Federal Court has no jurisdiction over these claims.

[13] To the extent that the plaintiffs have complaints relating to the improper disclosure or use of personal information, they must first file a complaint with the Office of the Privacy Commissioner and receive its report before this Court has jurisdiction: See, for example, *Englander v. Telus Communications Inc.*, [2004] F.C.J. No. 1935, 2004 FCA 387.

[14] Merely because the defendant is federal work business or undertaking does not, without more, provide a basis for this Court's jurisdiction: See *Gracey v. Canadian Broadcasting Corp. (T.D.)*, [1991] 1 F.C. 739. Jurisdiction must be found in either the *Federal Courts Act* or elsewhere in federal legislation specifically granting this Court jurisdiction. The plaintiffs have been unable to point to any provision either in the *Federal Courts Act* or elsewhere granting jurisdiction to this Court over the claims being advanced.

[15] The defendants seek their costs. Ms. Katz, although she is not a practicing lawyer, is a lawyer and thus ought to be in a better position than most litigants to understand the niceties of jurisdictional issues. Further, defendants' counsel wrote to the plaintiffs on September 11, 2008, informing them that the defendants were of the view that this action had been commenced in the wrong Court. Ms. Katz responded by letter dated September 17, 2008, indicating that she did not share that view. Frankly, even a cursory understanding of the jurisdiction of the Federal Court and the Ontario Superior Court of Justice would have been sufficient to see that the defendants' counsel was correct in his assessment.

[16] It is precisely because the lack of jurisdiction in this Court was clear, that the defendants must be taken to task for failing to immediately bring their motion to strike. Instead, they engaged in correspondence with the plaintiffs regarding particulars and ultimately brought a motion for particulars before they filed their motion to strike. Because of that delay and its resulting actions, needless costs were incurred by both parties relating to the motion for particulars and the corresponding default judgment motion brought by the plaintiffs.

[17] Accordingly, it would be unjust that the plaintiffs be held responsible to the defendants for this unnecessary part of this litigation. As a result, there will be no order as to costs; each party shall bear its own costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

- (a) The defendants' motion to strike the Amended Statement of Claim is granted, without leave to further amend, and this action is dismissed;
- (b) The defendants' motion for particulars is dismissed as moot;
- (c) The plaintiffs' motion for default judgment is dismissed as moot; and
- (d) Each party shall bear its own costs of these motions and this action.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1238-08

STYLE OF CAUSE: LYNNE CHERYL KATZ and ORNO HOLDINGS LTD. v. MARIA IAFRATE and MONICA PRASAD

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 30, 2009

REASONS FOR JUDGMENT AND JUDGMENT: ZINN J.

DATED: March 31, 2009

APPEARANCES:

Lynne Cheryl Katz	FOR THE PLAINTIFFS (Self Represented)
Meighan E. Leon	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

N/A	SELF REPRESENTED PLAINTIFFS
McCARTHY TETRAULT LLP Barristers and Solicitors Toronto, Ontario	FOR THE DEFENDANTS