Civil Resolution Tribunal

Date Issued: June 30, 2021

File: SC-2021-000684

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Smed v. Interior Savings Credit Union*, 2021 BCCRT 733

B E T W E E N :

CARON SMED

APPLICANT

A N D :

INTERIOR SAVINGS CREDIT UNION, VANCOUVER CITY SAVINGS CREDIT UNION, and TORONTO DOMINION BANK (THE)

RESPONDENTS

REASONS FOR DECISION

Tribunal Member: Eric Regehr

INTRODUCTION

1. This dispute is about a stolen $2,000 email money transfer (e-transfer). The applicant, Caron Smed, sent the e-transfer from her account at the respondent Interior Savings Credit Union (Interior Savings) to her own email address. She did this to move money to her account at the respondent Vancouver City Savings Credit Union (Vancity). A person Ms. Smed does not know, MC, somehow accessed the

email and deposited the funds into an account at the other respondent, Toronto Dominion Bank (TD). Ms. Smed says that the respondents are responsible for the lost $2,000 and claims that amount.

2. Vancity and TD did not file Dispute Responses or participate in this dispute. I discuss their default status below.

3. Interior Savings does not dispute that MC stole Ms. Smed's money. However, it says that it is Ms. Smed's fault for using an easily guessed security question. In any event, Interior Savings says that the terms and conditions that Ms. Smed agreed to when opening her account prevent her from recovering the stolen $2,000 from Interior Savings. Interior Savings asks that I dismiss Ms. Smed's claims.

4. Ms. Smed is self-represented. Interior Savings is represented by an employee.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). Section 2 of the CRTA states that the CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between the dispute's parties that will likely continue after the CRT process has ended.

6. Section 39 of the CRTA says the CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. Here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the CRT's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary in the interests of justice.

7. Section 42 of the CRTA says the CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information

would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to pay money or to do or stop doing something. The tribunal's order may include any terms or conditions the CRT considers appropriate.

ISSUE

9. The issue in this dispute is whether any of the respondents must reimburse Ms. Smed the stolen $2,000.

EVIDENCE AND ANALYSIS

10. In a civil claim such as this, Ms. Smed as the applicant must prove her claim on a balance of probabilities. While I have read all the parties' evidence and submissions, I only refer to what is necessary to explain my decision.

11. Ms. Smed says that she first became an Interior Savings member in 2004. Interior Savings provided a membership application that Ms. Smed signed in 2014. The parties do not explain this discrepancy, but nothing turns on it. As part of that form, Ms. Smed agreed to Interior Savings' terms and conditions. Ms. Smed does not dispute this, so I find that the terms and conditions that Interior Savings provided are part of the parties' contract.

12. The facts surrounding the theft are undisputed. On December 4, Ms. Smed sent the e-transfer from Interior Savings to her own email address for the purpose of moving $2,000 to her Vancity account. To send the e-transfer, Ms. Smed had to choose a security question and answer, which the recipient would need to deposit the funds. The security question was "last name?" and the answer was "Smed".

13. On December 28, 2020, she received a notification that the money had been deposited, even though she had not deposited it yet. Interior Savings later determined that MC, who again Ms. Smed does not know, deposited the money into

a TD account by answering the security question correctly. Ms. Smed does not know how MC gained access to her email. MC is not a party to this dispute.

14. Ms. Smed immediately notified Interior Savings and Vancity that the money had been stolen. Ultimately, Interior Savings refused to reimburse Ms. Smed the $2,000 because it believed Ms. Smed's security question had an obvious answer.

15. In this dispute, in addition to arguing that Ms. Smed's security question was insufficient, Interior Savings relies on several terms of the parties' contract. First, Interior Savings refers to clause 2.3, which is about Ms. Smed's use of third-party services. Presumably, Interior Savings refers to this clause because email money transfers are performed, at least in part, by a third party, Interac Corporation (Interac). However, I find that Interior Savings has not explained enough about its relationship with Interac for me to conclude that this clause applies.

16. Interior Savings also relies on several clauses about "passwords", which are defined in the terms and conditions as words used to access an Interior Savings account. I find that an e-transfer security answer is not a password under this definition because it is not used to access an Interior Savings account.

17. Clause 5.6 says that Interior Savings is not responsible for any loss that Ms. Smed suffers unless Interior Savings causes the loss due to "gross negligence or intentional or willful misconduct". There is no suggestion that Interior Savings did anything intentional or willful. To prove gross negligence, Ms. Smed must prove that Interior Savings' conduct was a "very marked departure" from the standard of a "responsible and competent" person, in this case a financial institution: see *Hildebrand v. Fox*, 2008 BCCA 434. With that, I will assess Ms. Smed's remaining arguments against this high standard.

18. First, Ms. Smed argues that Interior Savings should reimburse her because they have insurance for when their members are victims of fraud. There is no evidence that Interior Savings actually has such insurance. However, I find that whether

Interior Savings has insurance is not relevant to assessing whether its conduct in preventing or reacting to the theft fell below the standard of gross negligence.

19. Second, Ms. Smed says that Interior Savings should have known sooner that the money had been stolen. Given that MC deposited the money by using the correct security question, I do not see how Interior Savings could have been aware that the money did not go to its intended recipient before Ms. Smed notified it, or at least before the money was already gone.

20. Finally, Ms. Smed says that Interior Savings should "take responsibility" for the theft because the money was stolen from an Interior Savings account. I disagree with this characterization of the theft. I find that once Ms. Smed sent the e-transfer, the money was no longer in her Interior Savings account. Once sent, I find that Interior Savings had no control over who deposited the money. There is no evidence that her Interior Savings account was compromised or hacked. Rather, MC stole the money by somehow accessing Ms. Smed's email, which is not Interior Savings' responsibility. So, MC did not steal the money from Ms. Smed's Interior Savings account, so it is unclear what Interior Savings could have done to prevent the theft.

21. I agree with Interior Savings that the theft would likely not have been possible if Ms. Smed had chosen a security answer that could not be easily guessed. Ms. Smed said that she followed the instructions on Interior Savings' website, but I disagree. According to Ms. Smed, the Interior Savings website says that the security answer should be something that "only the recipient would know". I find that Ms. Smed's last name is something that anyone accessing the e-transfer could easily determine, since her full name appears as the sender. So, while I do not agree with Interior Savings that the theft was Ms. Smed's "fault", I do agree that Ms. Smed failed to follow Interior Savings' instructions on how to reasonably safeguard the e-transfer.

22. For these reasons, I find that Ms. Smed has failed to identify anything that Interior Savings did or failed to do that caused or contributed to the theft. It follows that she did not prove that Interior Savings was grossly negligent. For this reason, I find that

Interior Savings is not liable for the stolen funds. I dismiss her $2,000 claim against Interior Savings.

23. As mentioned above, TD and Vancity did not file Dispute Responses. Ms. Smed sent them both Dispute Notices by registered mail. The CRT rules do not say how to serve banks or credit unions because the rule for serving companies only applies to companies as defined in the *Business Corporations Act*, which does not include banks or credit unions.

24. CRT staff told Ms. Smed to send the Dispute Notice to TD's CEO at its head office in Toronto, as set out on the federal Office of the Superintendent of Financial Institution's website. CRT staff told Ms. Smed to send the Dispute Notice to Vancity's head office, as set out on the BC Financial Services Authority's website.

25. In the absence of a specific rule about serving banks and credit unions, I find that the CRT staff's instructions were appropriate and reasonable. I find that they are both consistent with how other corporations are served under the CRT's rules.

26. Therefore, I find that Vancity and TD were properly served and are both in default.

27. However, this does not necessarily mean that they are liable for the theft. This is because under CRT rule 4.3(1), I have discretion to decide Ms. Smed's claims against TD and Vancity even if they did not file Dispute Responses.

28. I find that Ms. Smed has not identified any reason why Vancity or TD should be liable for the stolen funds. It is undisputed that Vancity's only connection to the e-transfer is that it is where Ms. Smed intended to deposit the money. In other words, the money was never in a Vancity account or in Vancity's control. As for TD, Ms. Smed provided no argument about why TD is legally required to return the stolen money to her just because that is where MC's account is. For these reasons, I dismiss Ms. Smed's claims against Vancity and TD.

29. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable

dispute-related expenses. Ms. Smed was unsuccessful, so I dismiss her claim for CRT fees and dispute-related expenses. Interior Savings did not claim any dispute-related expenses or pay any CRT fees.

ORDER

30. I dismiss Ms. Smed's claims, and this dispute.

Eric Regehr, Tribunal Member