

CITATION: Cummings v. Peopledge, 2015 ONSC 308
COURT FILE NO.: CV-12-9896-00CL
DATE: 20150703

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:)	
)	
BONNIE CUMMINGS IN HER)	<i>Joseph Bellissimo</i> and <i>Eleonore L.</i>
CAPACITY AS ESTATE)	<i>Morris</i> , for the Receiver, BDO
EXECUTRIX OF THE ESTATE OF)	Canada Limited
THE LATE JOHN CUMMINGS)	
)	
Applicant)	
)	
- and -)	
)	
PEOPLEGE HR SERVICES INC.,)	<i>Edmond Lamek</i> , for the Respondents
WINSTON PARK FINANCIAL)	
SERVICES LTD., CMC FRASER)	
LTD., 1624452 ONTARIO LIMITED)	
)	
Respondents)	
)	
)	
)	
)	HEARD: January 14, 2015

L. A. PATILLO J.:

Introduction

[1] By order dated October 29, 2012, BDO Canada Limited (“BDO”) was appointed as receiver (the “Receiver”) over all of the assets, undertakings and

properties owned by Peopledge HR Services ("Peopledge") and other related companies (collectively the "Debtors") (the "Receivership Order").

[2] The Receivership Order provides, among other things, that all rights and remedies against the Debtors or affecting the property of the Debtors are stayed and suspended except with the written consent of the Receiver or leave of the court.

[3] The Receiver seeks a declaration that the Durham College of Applied Arts & Technology ("Durham College") has breached the stay provision of the Receivership Order and an order requiring it to return \$256,536.38 (plus interest) to the Receiver which it alleges was wrongly recalled by Durham College from Peopledge's bank account after it had received notice of the Receivership Order.

[4] For the reasons that follow, I allow the Receiver's motion. In my view, Durham College's actions in recalling the monies from Peopledge's bank account after it had notice of the Receivership Order constituted a breach of the stay provision. Durham College must repay the monies to the Receiver.

Background

[5] Peopledge provided payroll processing, human resources and benefits services to both Canadian and U.S. customers.

[6] As part of its administration of its customer's payrolls, Peopledge received the funds designated for payroll and related governmental and other remittances (collectively "Payroll Funds") from its customers, generally three days in advance of their required distribution date. The Canadian customer funds were deposited into Peopledge's "Canadian Consolidated Account" held with the Bank of Montreal, Burlington ("BMO Burlington") and its American customer funds were deposited into the "U.S. Consolidated Account" held with BMO Harris Bank in the U.S.

[7] Durham College is an applied arts and technology school established in 1967 as a result of Ontario legislation. Durham College bank is the Bank of Montreal, Oshawa, ("BMO Oshawa").

[8] Peopledge provided payroll services to Durham College pursuant a master services agreement entered into by them and dated October 26, 2010 (the "Master Services Agreement"). Among other things, it sets out, in Schedules attached to the agreement, various agreements in respect of the processing of Durham College's

payroll and the transfer of Payroll Funds from Durham College to Peopledge by way of pre-authorized debit transaction. In particular:

- a) Schedule 3 - Authorization to Debit Corporate Account;
- b) Schedule 5 – Service Level Agreement; and
- c) Schedule 6 – Banking Agreement.

[9] Schedule 3 to the Master Services Agreement is a pre-authorized debit agreement signed on behalf of Durham College, the terms and conditions of which provide, in part, that Durham College agrees to provide the funds required for Peopledge to process Durham College's payrolls by way of pre-authorized debit of a specific account and authorizes its financial institution, BMO Oshawa, in that regard. Paragraph 5 waives the 10 calendar day pre-notification otherwise required for business pre-authorized debits.

[10] Schedule 5 sets out, among other things, a Processing Schedule which provides that Peopledge will initiate a pre-authorized debit request three days in advance of pay day and that Durham College's Payroll Funds must be received by Peopledge two days before pay day.

[11] Schedule 6, the Banking Agreement, provides, among other things, that Durham College will provide funds required for Peopledge to process Durham College's payroll by way of electronic funds transfer initiated three days in advance of pay day (paragraph 1(a)). Further, Peopledge acknowledges that the financial institution is not required to verify that a pre-authorized debit against Durham College is issued in accordance with the terms of the agreement or that the funds received by Peopledge from the pre-authorized debit are used for the purposes of the agreement (paragraph 4).

[12] Paragraph 7 of the Banking Agreement provides:

The Employer [Durham College] may dispute a pre-authorized debit made by the Service Bureau [Peopledge], on any of the following grounds: one, the pre-authorized debit was not issued in accordance with this agreement; and, two, the Employer's authorization was withdrawn before the debit was initiated by the Service Bureau. Such a dispute must be filed with a branch of the Employer's own financial institution within 10 business days after the date the pre-authorized debit is posted to the Employer's account. A pre-

authorized debit disputed by the Employer constitutes a return or rejection of clearing, as per the following paragraphs, and is to be settled solely between the Employer and the Service Bureau.

The Events in Issue

[13] The events in issue relate to Durham College's October 30, 2012 staff payroll. They are not in dispute.

[14] As of October 25, 2012, Durham College had no monies on hand with Peopledge as all prior payrolls and government remittances on its behalf had been made by Peopledge in accordance with the Master Services Agreement.

[15] Sometime shortly before October 24, 2012, Peopledge prepared a Funds Summary Report for the October 30, 2012 payroll based on payroll data electronically supplied by Durham College to Peopledge. The Funds Summary Report specified the amount to be debited from Durham College's bank account and transmitted to it by Durham College in respect of the payroll.

[16] On or prior to October 24, 2012, Durham College approved the Fund Summary Report and on October 24, 2012, Peopledge prepared and submitted an electronic funds transfer debit to Durham College's bank account at BMO Oshawa for the amount approved by Durham College.

[17] The electronic funds transfer debit request submitted by Peopledge specified that the "Due Date" for the pre-authorized debit was to be October 26, 2012.

[18] In accordance with the electronic funds transfer request submitted by Peopledge, on October 26, 2012, Durham College's bank account was debited \$845,164.34 and Peopledge's Canadian Consolidated Account was credited with the identical amount (the "First Payroll Deposit").

[19] On October 29, 2012, Peopledge's Canadian Consolidated Account received a further \$1,998,615.03 from Durham College's account by way of pre-authorized debit on account of the October 30, 2012 payroll (the "Second Payroll Deposit")

[20] On October 29, 2012, following the granting of the Receivership Order, the Receiver sent notice of the receivership and the Receivership Order to Peopledge's customers, including Durham College.

[21] Immediately after it had received notice of the Receivership Order on October 29, 2012, Durham College contacted BMO Oshawa and requested a stop payment of both the First Payroll Deposit and the Second Payroll Deposit.

[22] Shortly after Durham College's stop payment request had been processed by BMO Oshawa, it was discovered that Peopledge had automatically distributed to or on behalf of Durham College employees \$588,627.96 in respect of the First Payroll Deposit and \$1,467,769.33 in respect of the Second Payroll Deposit.

[23] Durham College subsequently returned the \$588,627.96 of the First Payroll Deposit to the Receiver but has refused to return the balance of \$256,538.38. The parties have resolved all issues relating to the Second Payroll Deposit.

The Receivership

[24] The Receivership Order required that the Receiver set down a comeback date on notice to all parties within 30 days of the issuance of the Receivership Order. It also provided that any interested party may apply to the court to vary or amend the Receivership Order on the comeback motion or on not less than seven days' notice to the Receiver and other interested parties.

[25] Although a number of Peopledge's customers participated in the comeback motion, Durham College did not nor did it bring any motion with respect to the Receivership Order.

[26] Subsequently in the receivership, the Receiver received customer deposit claims in respect of amounts paid to Peopledge for the purpose of funding payroll services which Peopledge failed to complete in whole or in part. The aggregate claim amount for Canadian customers in respect of the Canadian Consolidated Account was in excess of \$5.7 million and for US customers in respect of the US Consolidated Account it was \$180,000.

[27] In a decision dated May 15, 2013, (2013 ONSC 2781), Newbould J. held that both the Canadian Consolidated Account and the US Consolidated Account should be treated as trust accounts and ordered that the monies in those accounts should be distributed to the Canadian and US customers who had proven deposit claims on a pro rata basis, subject to prior payment of the allocated portion of the receivership costs (the "Claim Determination and Interim Distribution Order").

Position of the Parties

[28] The Receiver submits that Durham College's action in recalling the First Payroll Deposit on October 29, 2012, was a breach of the stay provisions of the Receivership Order.

[29] The Receiver submits that prior to October 29, 2012; all of the necessary steps and actions had been taken by both Peopledge and Durham College in connection with the First Payroll Deposit to fully effectuate the transfer of the First Payroll Deposit into Peopledge's bank account in accordance with the terms of the Master Service Agreement. Once in Peopledge's bank account, the monies became the property of Peopledge within the meaning of the Receivership Order. Durham College's subsequent request to its bank to recall those monies after the Receivership Order had been granted constituted a clear breach of the Receivership Order's stay provisions.

[30] Durham College denies that it ever took possession of any monies in Peopledge's bank account or that it exercised a remedy against Peopledge or its property. Durham College submits that it sought reimbursement of the debited amounts from its bank and that its bank complied with its obligations under the Rules of the Canadian Payment Association ("CPA") and reimbursed Durham College from its own funds. Thereafter, the CPA Rules governed the rights and obligations as between Durham College's bank and Peopledge's bank and the banker-customer relationship governed the actions taken by Peopledge's bank against its Canadian Consolidated Account.

[31] Durham College also takes issue with Peopledge's actions in initiating the pre-authorized debit for the First Payroll Deposit when it knew it would be applying for a receivership order and then proceeding *ex parte*, in the absence of any notice. Had Durham College received advanced notice of the receivership application, it submits it could have cancelled the pre-authorized debit in advance of it happening.

Analysis

[32] Pursuant to the Master Services Agreement, the payment and clearing schedule that applied between Peopledge and Durham College is clearly set out in Schedule 5 to the Agreement. It provides that the electronic transfer of payroll funds must "clear" two days before the applicable payroll date.