CITATION: Crosslink Bridge Corp. et al. v. Fogler Rubinoff & David Moldaver LLP, 2023 ONSC 3466
COURT FILE NO.: CV-18-00606306-0000
DATE: 20230627

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Crosslink Bridge Corp. et al, Applicants

AND:

Fogler Rubinoff & David Moldaver LLP, Respondents

BEFORE: Carole J. Brown J.

COUNSEL: *Jeffrey Radnoff and Charles Haworth*, Counsel, for the Applicants

Hailey Abramsky, Counsel, for the Respondents

HEARD: March 15, 2023

ENDORSEMENT

[1] The respondent, Fogler, Rubinoff LLP ("Fogler"), brought this motion to set aside the applicants' assessment order on the ground that it was statute-barred, as well as for payment of outstanding legal fees.

[2] The applicants cross-moved for an order directing the assessment of all 32 accounts of the respondent law firms during the four and one half years of their retainer from 2014 to 2018. The applicants also cross-moved for a stay of the applicants' action brought against the respondents and others.

[3] The respondents consented to the stay. Thus, this motion only raises the issue of whether the assessment order was statute-barred and improperly issued.

Background Facts

[4] Commencing on April 22, 2014, Milton Davis, while at Davis Moldaver LLP and subsequently at Fogler, acted for the applicants, Crosslink Bridge Corp. ("Crosslink") and Andrew Penuvchev ("the applicants" or "the Penuvchevs") in two complex lawsuits: a $4 million action against them by Canadian National Railway ("CN") and the Penuvchevs' third-party claim for negligence against their former lawyers.

[5] CN's $4 million action against the Penuvchevs was for a vendor takeback mortgage on the lands that CN had sold to Crosslink, of which Dr. Penuvchev was one of two sole shareholders and had, with the other shareholder, personally guaranteed the mortgage. In

that case, upon attempting to sell the property, they realized that the property was deeply contaminated and would require $15 million worth of remediation. There was evidence to suggest that the two law firms that had represented them neglected to conduct the necessary due diligence. Further, there was a risk of Dr. Penuvchev's personal liability and, consequently, his potential bankruptcy. As a result, the second action, the third-party action for negligence against his former lawyers was commenced on the Penuvchevs' instructions.

[6] As regards the main action brought by CN, in the early fall of 2014, CN brought a summary judgment motion. Mr. Davis advised the Penuvchevs that the motion would be hard to defeat. In the end, Mr. Davis was able to secure CN's agreement to mediate the action. He succeeded in resolving the CN action and settling the matter for full payment of $100,000 to CN, thus avoiding a multimillion dollar claim against them.

[7] On December 8, 2016, counsel for the two third-party law firms served a summary judgment motion to dismiss the third-party claim against them. Mr. Davis never guaranteed any success to the Penuvchevs; on the contrary, he advised them that the motion involved risk. The summary judgment motion was a complex, labour-intensive three-day motion against two sets of senior counsel. The lawyers for the Penuvchevs cautioned that there was a risk to the action; however, the Penuvchevs wanted to continue with it. In the end, the motion was granted and the Penuvchevs third-party claim was dismissed.

[8] Mrs. Penuvchev often called to discuss the claims, having done her own legal research. She was not a lawyer. She was continually advised that this would drive up legal fees. Nevertheless, she continued to call and discuss the legal matters and her theories concerning the issues with her counsel.

[9] Several times during the four and one half year retainer, the Penuvchevs requested that accounts be deferred due to cash flow problems which they indicated they were having. However, the majority of the accounts were paid upon receipt as was the understanding between the parties. The retainer stated that all accounts were due when rendered. Interest on unpaid amounts was charged from 30 days after the account statements were rendered. The Penuvchevs understood that once rendered, the accounts were immediately payable and not subject to readjustment at the completion of the retainer.

[10] The accounts related not only to the matters above, namely the CN action, the third-party claim and the summary judgment motions for that claim, but also to other matters for which the Penuvchevs requested legal assistance during the material times, including a fee dispute with another lawyer and issues related to properties that they owned on Avenue Road and Lawrence Avenue.

[11] In the winter of 2018, an account was rendered for which the Penuvchevs requested payment deferral. It was agreed that they would pay $100,000 in December of 2018 and $100,000 prior to the hearing of the summary judgment motion.

[12] However, the second payment was not made and, after the Penuvchevs received an unfavourable decision in the summary judgment motion, they refused to pay that account and any other unbilled amounts related to the summary judgment motion.

[13] Following the unfavourable decision in the summary judgment motion in the third-party action, the Penuvchevs requested, on October 5, 2018, that the respondents waive all outstanding legal fees because of the unfavourable outcome of the motion, which the respondents declined to do.

[14] Without the respondent's knowledge, the Penuvchevs obtained an assessment order after the unfavourable decision in the summary judgment motion was rendered and after counsel had requested payment of the outstanding accounts. On October 9, 2018, the Penuvchevs retained other counsel to pursue an appeal of the unfavourable summary judgment decision, which was denied by the Court of Appeal for Ontario.

[15] It appears that some fees may have been reimbursed to the Penuvchevs by insurance companies. I have not taken this into consideration in arriving at my decision.

The Subject Assessment Order

[16] The subject assessment order was served on the respondents on October 11, 2018. It did not specify which accounts the applicants sought to assess, nor were accounts attached to the order. The respondents were ordered to produce a brief containing a bill of all fees and disbursements. They complied with said order.

[17] The applicants now seek an assessment of all 32 accounts paid over the course of the four and one half year retainer. All but the last three accounts were paid in full and without question or complaint. Notably, the Penuvchevs paid all accounts until April 6, 2018. The outstanding invoices are as follows: April 6, 2018 in the amount of $109,174.06; November 22, 2018 in the amount of $391,146.07. There was a further outstanding balance from an unpaid invoice dated November 27, 2017 in the amount of $1,722.79. All invoices relate to the summary judgment motion. In total, $502,112.92 remain outstanding.

[18] The respondents dispute that the accounts can all be assessed pursuant to the *Solicitors Act*, R.S.O. 1990, c. S.15. I agree and find that all 32 accounts cannot be assessed, based on my findings below.

[19] On October 1, 2021, the parties appeared before assessment officer Ittlelman, who determined that he did not have jurisdiction to hear the assessment given that there was a dispute as to which accounts could be assessed. He referred the matter to a judge for determination. Hence, this motion was brought.

Issue

[20] The issue on this motion is whether the assessment order of October 2, 2018 is statute-barred pursuant to ss. 3(b), 4(1), and/or s.11 of the *Solicitors Act*.

Analysis

[21] Section 3(b) of the *Solicitors Act* states as follows:

> Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice, …(b) by the client, for the assessment of a bill already delivered, within one month from its delivery.

[22] Section 4(1) provides as follows:

> No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be provided to the satisfaction of the court or judge to whom the application for the reference is made.

[23] Section 11 provides as follows:

> The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

[24] The applicants confirmed, in this motion, that there are no special circumstances in this case. Therefore, ss. 3(b) and 4(1) are the only relevant sections to be considered.

[25] It is clear that all accounts rendered were paid up until those of April 6, 2018 and October 22, 2018. Refusal to pay any further accounts was made in writing in October 2018.

[26] It would appear that those two accounts were rendered and disputed within one year of a verdict or judgment being obtained. It further appears that both related to the loss of the three-day third-party summary judgment motion, after which the applicants refused to pay any amounts and severed their relationship with the respondents.

[27] The applicants have further disputed that the accounts were final. They argue that the accounts were all "interim accounts".

[28] To defeat the limitation periods set forth in ss. 3(b) and 4(1), and to satisfy the court that all 32 accounts should be assessed, including the 29 accounts that have been paid, the applicants must establish 1) that the accounts were interim and not final; or 2) that there are sufficient special circumstances, as explicitly mentioned in the statute, to warrant the assessment of the otherwise statute-barred accounts: see *Gonsalves v. Birnboim*, 2021 ONSC 4014, at para. 52.

[29] The applicants conceded that there are no special circumstances in this case. Therefore, the issue becomes whether the accounts rendered were interim or final accounts. Where interim

accounts are rendered in connection with the same matter, the limitation period for assessment under the *Solicitors Act* begins to run from the date of the final account, even if some of the interim accounts have been paid: *Coventree Inc. v. Stockwoods LLP*, 2012 ONSC 2737, at para. 17, citing *Price v. Sosini* (2002), 60 O.R. (3d) 257 (C.A.), at para. 15.

[30] The distinction between "interim" and "final" accounts was explained by Perell J. as follows in *Fiset v. Falconer*, [2005] O.T.C. 814 (S.C.), at para. 25:

> In this area of the law, we discover that much turns on whether an account is "final" or "interim". Unfortunately, the word "interim" is used in an ambiguous way. It turns out that an account that is "interim" in one sense may actually be a "final" account. Thus, an account that is "interim" in the sense that it comes before the last or "final" account may nevertheless be "final" in the sense that the amount of the account is not provisional but is fixed. Thus, an account that is "interim" in a temporal sense may be "final" in a monetary sense. See: *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 (C.A.); *Enterprise Rent-a-Car Co. v. Shapiro, Cohen, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 (C.A.); *Bunt v. Assuras* (2003), 63 O.R. (3d) 622 (S.C.J).

[31] The *Solicitors Act* does not distinguish between "final" and "interim" accounts: see *Enterprise Rent-a-Car Co. v. Shapiro, Cohen, Andrews, Finlayson* (1998), 38 O.R. (3d) 257 (C.A.). The determination is a question of fact: *Fellowes, McNeil v. Kansa Canadian Management Services Inc.* (1997), 34 O.R. (3d) 301 (C.A.); *Enterprise Rent-a-Car Co.*; *Coventree*, at para. 20.

[32] An account rendered during an ongoing matter will be a final account if it was clear that the amount of the account was not provisional and subject to later adjustment: see *Fiset*, at para. 26, citing *Enterprise Rent-a-Car Co.*

[33] In determining whether an account is final or interim, the intention of the parties is important, and where clear, should be decisive: see *Bunt v. Assuras* (2003), 63 O.R. (3d) 622 (S.C.). Where solicitors bill their clients strictly on the basis of an hourly rate applied to time spent, the case for treating earlier bills as final is stronger: see *Lamoureux et al. v. Vice & Hunter LLP et al*, 2021 ONSC 2549, at para. 38.

[34] Based on the jurisprudence regarding determination of an account as "interim" or "final", the following are also relevant:

> 1. When a client pays an account, he or she is presumed to have accepted the account as proper and reasonable. This creates a rebuttable presumption that the account is reasonable: *Davisville Bridge & Road Works Limited v. Kramer Simann Dhillon LLP*, 2015 ONSC 7402, at para. 24; *Tsigirlash v. Walker*, 2016 ONSC 968, at para. 65;
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> 2. Where accounts are rendered on a regular basis and paid over the course of years, this strengthens the presumption of implied reasonableness upon

payment: see *Tsigirlash*, at para. 66, citing *Gordon v. Osler, Hoskin & Harcourt*, [1994] O.J. No. 2023 (Ont. Gen. Div.);

3. Periodic accounts for work performed under a general retainer with accounts rendered for a specific time period for work performed on all matters for the client are presumed to be final accounts: see *Davisville Bridge*, at para. 34; and

4. Where there is no indication that the accounts were provisional or subject to a later adjustment; where the accounts are paid without complaint; where the accounts are payable upon delivery, with each account relating to a specific time period, the accounts are final: see *Coventree.*

[35] Based on all the evidence presented in this case, I find that the accounts were final and not interim. It was the parties' intention and understanding that the accounts be paid immediately. The retainer stated that all accounts were due when rendered. Interest on unpaid amounts was charged from 30 days after the account statements were rendered. The Penuvchevs understood that once rendered, the accounts were immediately payable and not subject to readjustment at the completion of the retainer.

[36] The accounts were rendered on a periodic basis and billing was on an hourly basis for work rendered. Over four and one half years, the accounts were paid without question or complaint. They were often paid from monies held in trust, upon the rendering of an account.

[37] While, on occasion, the applicants requested that payment amounts be deferred due to cash flow problems that they were experiencing, it was never intended or assumed that any of the accounts rendered were open for readjustment. Deferred payments were later paid when cash flow issues improved.

[38] I note, as well, that the refusal to pay the last outstanding accounts, as well as the request for an assessment order, were attributable to and appear to have arisen from the unfavourable results of the summary judgment motion. The evidence indicates that they had been told by the respondents that there was a risk as regards the said motions. The issues appear to have arisen from a failure on the part of the applicants to accept the court's decision. Instead, the applicants appear to have attempted to blame the respondents. In this regard, there does not appear to be a genuine concern regarding the accounts: see *Coventree*, at para. 59; *Katana v. McComb Dockrill*, 2007 CanLll 34436 (Ont. S.C.), aff'd 2008 ONCA 224, 237 O.A.C. 220.

[39] I am satisfied that the accounts rendered by the respondents were all final accounts. No accounts were requested to be assessed within the applicable time limit as set forth at 3(b) of the *Solicitors Act.* The applicants conceded that there were no special circumstances. As final accounts, they can only be assessed if fraud or gross misconduct were demonstrated. The applicants have raised neither of these allegations, and they are accordingly not

applicable. Given my findings above, the applicant's arguments under ss.3(b) and 4(1) are dismissed.

[40] As no order has been obtained for the delivery and assessment of a solicitor's bill of fees, given my findings above, the timeline set out in section 6(1) does not apply.

[41] I find no basis on which the accounts, or any of them, can be assessed pursuant to the *Solicitors Act.*

Orders

[42] In consequence, I make the following orders:

> 1. The assessment order dated October 2, 2018 is set aside as statute-barred pursuant to subsection 3(b) of the *Solicitors Act*; and
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> 2. The applicants are to immediately pay to the respondents the outstanding fees owing in the amount of $502,112.92.

Costs

[43] I strongly urge the parties to agree upon costs payable by the applicants to the respondents on this motion. In the event that they are unable to do so, they are to provide their bills of costs of no more than 3 pages total within 60 days.

C.J. Brown J.

Date: June 27, 2023