CITATION: Sefcikova v. Monkhouse Law Professional Corporation, 2023 ONSC 7091
COURT FILE NO.:CV-22-00687063-0000
DATE: 20231215

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
GABRIELA SEFCIKOVA	)	*Gabriela Sefcikova*, Self-Represented Plaintiff
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
MONKHOUSE LAW PROFESSIONAL CORPORATION and ANDREW H. MONKHOUSE	)	*Tim Gleason* and *Megan Phyper*, for the Defendants
Defendants	)	
	)	
	)	
	)	**HEARD:** September 27, 2023

MERRITT J.

REASONS FOR DECISION

OVERVIEW

[1] The plaintiff, Gabriela Sefcikova, retained the defendants, Monkhouse Law Professional Corporation and Andrew H. Monkhouse, to represent her in an application before the Human Rights Tribunal of Ontario ("HRTO") and then terminated the retainer. The defendants say there are legal fees owing to them.

[2] The plaintiff commenced this action seeking a declaration that an arbitration clause in the retainer agreement is invalid, damages for malpractice and an assessment of the defendants' legal fees.

[3] The plaintiff has refused to participate in the arbitration, and as a result, the arbitrator has declined to continue until the court disposes of this motion.

[4] The defendants move for an order staying the action pursuant to ss. 7 and 17 of the *Arbitration Act*, 1991, S.O. 1991, c. 17 (the "*Act*").

DECISION

[5] The action is stayed.

BACKGROUND FACTS

[6] On May 7, 2019, the plaintiff retained the defendants to represent her in an application before the HRTO. On April 17, 2020, the plaintiff terminated the defendants' retainer. The defendants claim that the plaintiff owes $41,306.00 to them in legal fees.

[7] The retainer agreement between the parties provides for the arbitration of all disputes relating to the agreement.

[8] On June 22, 2020, the defendants referred the claim for fees to arbitration and Arbitration Place appointed Liz Roberts as arbitrator.

[9] The defendants were not willing to be held jointly and severally liable for arbitration fees, so Arbitrator Roberts sent the parties an amended version of the terms of appointment. The defendants signed and returned the document on March 16, 2022.

[10] Arbitrator Roberts left Arbitration Place and Raven Schofield continued as arbitrator.

[11] On August 2, 2022, the defendants served a notice of arbitration seeking payment of their outstanding fees.

[12] On August 8, 2022, the plaintiff filed an objection to the arbitration challenging the validity of the arbitration agreement.

[13] On September 13, 2022, the plaintiff served a notice of arbitration seeking a declaration that the arbitration clause in the retainer agreement is invalid, damages of $100,000 for malpractice and an assessment of the defendants' legal fees.

[14] On September 14, 2022, Arbitrator Schofield dismissed the plaintiff's objection to arbitration and ordered the arbitration to proceed.

[15] On October 6, 2022, the plaintiff issued the Fresh as Amended Statement of Claim in this action for a declaration that the arbitration clause in the retainer agreement is invalid, damages of $100,000 for malpractice, punitive and exemplary damages, and a review of the defendants' fees.

[16] On November 16, 2022, Arbitrator Schofield wrote to the parties advising that she would no longer act as arbitrator. She also advised that Arbitration Place required the parties to pay retainer deposits. The defendants requested the appointment of a new arbitrator and offered to pay the retainer deposit for the plaintiff in order to proceed with arbitration.

[17] On December 19, 2022, Arbitrator Schofield wrote to the parties, setting out a timetable for proceeding.

[18] On January 2, 2023, the defendants proposed that the terms of appointment be revised to include the arbitration of the plaintiff's counterclaim.

[19] On January 3, 2023, the plaintiff challenged the appointment of Arbitrator Schofield on the grounds of bias and lack of qualification and also expressed concern about the manner in which Arbitration Place had conducted itself with respect to the appointment of the arbitrators.

[20] On March 16, 2023, Arbitration Place advised that it could no longer complete the arbitration, and it would appoint ADR Chambers.

[21] ADR Chambers sent an email to the parties on March 17, 2023 confirming that any dispute concerning jurisdiction must be determined by the arbitrator. On March 20, 2023, ADR Chambers advised the parties that the arbitration was commenced in accordance with its Rules and invited them to select an arbitrator.

[22] The plaintiff objected to the three arbitrators proposed by the defendants and the defendants then suggested waiting for ADR Chambers to appoint an arbitrator.

[23] On March 27, 2023, ADR Chambers proposed three arbitrators to the parties, all of whom were acceptable to the defendants. The plaintiff did not agree to any of the proposed arbitrators and objected to the appointment of ADR Chambers. She indicated that she had commenced an application in the Superior Court challenging the appointment of the arbitrator.

[24] On April 4, 2023, ADR Chambers appointed an arbitrator. The following day it advised that the arbitration would be held in abeyance pending the determination of the plaintiff's application to the Superior Court.

[25] On April 10, 2023, counsel for the defendants wrote to ADR Chambers requesting reconsideration of the decision to hold the arbitration in abeyance. The decision was not reconsidered.

POSTIONS OF THE PARTIES

[26] The plaintiff says the action should not be stayed and alleges that the arbitration agreement is invalid.

[27] The defendant says the action should be stayed pursuant to s. 7 of the *Act*. The defendant says this issue has already been determined by the arbitrator and the plaintiff has not appealed.

THE ISSUE

[28] Should the court stay the plaintiff's action pursuant to s. 7 of the *Act*?

ANALYSIS

[29] The *Act* provides that a court must stay a proceeding which is commenced in respect of a matter to be submitted to arbitration with limited exceptions:

> 7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall,

> on the motion of another party to the arbitration agreement, stay the proceeding.
>
> (2) However, the court may refuse to stay the proceeding in any of the following cases:
>
> …
>
> 2. The arbitration agreement is invalid.
>
> …

[30] The *Act* also provides that an arbitrator may rule on objections regarding jurisdiction and the validity of the arbitration agreement:

> 17 (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

[31] The competence-competence principle requires that the threshold question of the arbitrator's jurisdiction must first be determined by the arbitrator: *Dell Computer Corp. v. Union des consommateurs,* 2007 SCC 34 at para. 184.

[32] In this case, the arbitrator did determine the question of jurisdiction and dismissed the plaintiff's objection.

[33] In her letter of August 2, 2022, the plaintiff specifically raised the issue of unconscionability.

[34] In response, the law firm submitted that the arbitration was the proper place to address the fee dispute and enclosed two decisions of this court where the same retainer agreement was addressed. In *Adam Waldman v. Monkhouse Law Professional Corporation,* unreported, 2019, the client argued that the clause was not clearly worded or brought to his attention. Chalmers J. found the same arbitration agreement to be clear and unambiguous and ordered the matter to proceed to a private arbitration. In *Monkhouse Law Professional Corporation v. Borys Matvyeyev*, unreported, 2019, Stinson J. considered the same arbitration agreement and appointed an arbitrator.

[35] On September 14, 2022, in Procedural Order 2, Arbitrator Raven Schofield said that *Jean Estate v. Wires Jolley*, 2009 ONCA 339, applies. In *Jean Estate* the parties agreed that disputes in relation to a contingency fee agreement would be resolved by arbitration. A dispute arose and the solicitors served a notice of arbitration. The client successfully applied to strike out the notice on the basis that the agreement to arbitrate was unenforceable for reasons of public policy. The Court of Appeal allowed the appeal. The court said that the enforceability of an arbitration clause should usually be decided by the arbitrator. Exceptionally, however, a Superior Court judge can assume jurisdiction over the threshold issue of enforceability when an important question of law is raised and only cursory reference to the evidence is necessary. The court said, at paras. 73-85, that a solicitor and client can agree to arbitrate fee disputes. In this case, in referring to *Jean Estate,* Arbitrator Raven Schofield held that the parties could agree to arbitrate fee disputes and ordered the arbitration to proceed.

[36] Section 17(8) of the *Act* provides for a review, by the court, of an arbitrator's preliminary ruling regarding an objection to jurisdiction:

> Review by court
>
> (8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

[37] The plaintiff has not applied to the court to review this determination under s. 17(8) of the *Act*. On this basis alone, the action should be stayed.

[38] In the event that I am wrong, I will consider whether I should exercise my discretion to refuse to stay the proceeding.

[39] The test for determining whether a stay should be granted by the court under s. 7 is:

1. Is there an arbitration agreement?

2. What is the subject matter of the dispute?

3. What is the scope of the arbitration agreement?

4. Does the dispute arguably fall within the scope of the arbitration agreement?

5. Are there grounds on which the court should refuse to stay the action?: *Haas v. Gunasekaram*, 2016 ONCA 744, at para. 17.

[40] In this case there is an arbitration clause in the retainer agreement which provides:

> It is important to keep our relationship professional, and to that regard if you have any complaints or issues about this retainer we agree to work things out between ourselves first, and confidentially at all times. The parties further agree that if matters cannot be worked out between the parties that they agree to be bound by binding confidential arbitration under the Ontario Arbitration Act regarding any complaints, issues, or payment problems relating to the retainer including but not limited to negative comments, reviews or invoice payments. The arbitration to proceed before a single arbitrator appointed by the Arbitration Place arbitration centre (the "Arbitration Clause").

[41] The subject matter of the plaintiff's claim is the validity of the arbitration agreement, the amount of the defendants' fees and damages for malpractice/negligence.

[42] The plaintiff has raised s. 5(5) of the *Act* which provides that an arbitration agreement may be revoked. In this case the parties did not revoke the arbitration agreement.

[43] The plaintiff's claim is within the scope of the arbitration agreement. The plaintiff's objections to the arbitrator's jurisdiction are within the jurisdiction of the arbitrator. The plaintiff's objections to the scope of the arbitration agreement are also within the jurisdiction of the arbitrator. The arbitrator has jurisdiction to determine the validity and existence of the arbitration agreement: *Trade Finance Solutions Inc. v. Equinox Global Limited*, 2018 ONCA 12.

[44] Where it is arguable that the dispute falls within the terms of the agreement, the stay should be granted and that matter left to the arbitrator to determine: *EDF (Services) Ltd. v. Appleton & Associates*, 2007 CanLII 36078 (Ont. S.C.), at para. 36. The plaintiff's tort claims for malpractice/negligence fall within the scope of the arbitration agreement wording (*i.e.*, "any complaints, issues, or payment problems"): *Haas*, at para. 41. Claims for solicitor's negligence can be arbitrated: *Hodder v. Eouanzoui*, 2020 ONSC 7905, at para. 60.

[45] The court may refuse to order a stay if the agreement is invalid. This is a matter of discretion. The court is not required to do so. The plaintiff says the arbitration agreement is invalid because it is unconscionable and relies on *Uber Technologies Inc v. Heller*, 2020 SCC 16. *Uber* is distinguishable from this case. In *Uber*, the arbitration process was inaccessible because of the location of the arbitration as well as the extensive fees required to commence the arbitration. The court found that it was likely that the arbitrator would never decide the jurisdictional issue and the agreement was unconscionable on its face. In this case there is nothing to prevent the arbitrator from deciding the issues.

[46] The plaintiff says the arbitration agreement is unconstitutional because it violates her rights under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") to freedom of thought, belief, opinion and expression. The *Charter* only applies to government action and has no application to this private dispute: s. 32(1) of the *Charter*; *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at paras. 33-34.

[47] The case of *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, relied on by the plaintiff, is an anti-SLAPP ("Strategic Lawsuit Against Public Participation") case where the court found that reviews of products and services are expressions of public interest. This is not an anti-SLAPP motion and the issue of whether the arbitration agreement prevents the plaintiff from publicly reviewing the defendants' services is not before me.

[48] The plaintiff says the arbitration agreement is invalid because of misrepresentations made by the defendants, but has not provided particulars of any misrepresentations.

[49] The plaintiff says the arbitration agreement is invalid because it prevents her from filing complaints to other bodies such as the Competition Bureau of Canada and the Law Society of Ontario ("LSO"). The plaintiff also objects to the fact that lawyers are exempt from the *Consumer Protection Act* (the "CPA"). Lawyers are not governed by the CPA; they are governed by the LSO and the *Solicitors Act*, R.S.O. 1990, c. S.15, which is essentially consumer protection legislation: *Andrew Feldstein & Associates Professional Corporation v. Keramidopulos*, 2007 CanLII 40202 (Ont. S.C.), at para. 60.

[50] The defendants concede that the arbitration clause does not, and cannot, prevent the plaintiff from making a complaint to the LSO: *Thompson Family Trust (Re)*, 2011 ONSC 7056, at paras. 18 and 19.

[51] The plaintiff says that allowing lawyers to draft retainer agreements and include arbitration clauses puts them in a conflict of interest. If this were true, lawyers would never be able to negotiate retainer agreements and all clients would require independent legal advice before agreeing to the terms of a retainer agreement. It is not a conflict of interest for a lawyer to draft a retainer agreement with his or her own client. To have a conflict the lawyer must be representing more than one client or interest: *Marino v. L-Jalco Holdings Inc.*, 2007 CarswellOnt 1673.

[52] In her factum, the plaintiff raised duress and undue influence. Her affidavit sets out the timing and circumstances surrounding the signing of the retainer agreement but does not say that she was under duress. In her factum, the plaintiff suggests that she was under duress or undue influence because she signed the retainer approximately 16 days before the HRTO mediation and without legal advice. The plaintiff also says that Mr. Monkhouse should have informed her that an arbitration process does not include examination for discovery, that it replaces the right to have the account assessed, that arbitrators are not regulated, that arbitrations are public, and that she might have to pay costs of the arbitration. The plaintiff does not say she would not have agreed to the retainer had she understood all of these things.

[53] If a party enters into an unfair or improvident contract without independent advice, when her bargaining power is grievously impaired because of undue influence or duress, she will be relieved of her obligations under the contract: *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, at p. 339.

[54] In this case, the retainer agreement with the arbitration agreement is not unfair. The plaintiff is not unsophisticated and I cannot find that her bargaining power was grievously impaired. She consulted with at least one other law firm and decided not to retain it because she did not agree with the terms of its retainer agreement.

[55] The plaintiff objects to the fact that when Arbitration Place refused to conduct the arbitration it referred the matter to ADR Chambers. The *Act* addresses the appointment of substitute arbitrator:

> 16 (1) When an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedure that was used in the appointment of the arbitrator being replaced.
>
> (2) When the arbitrator's mandate terminates, the court may, on a party's application, give directions about the conduct of the arbitration.
>
> (3) The court may appoint the substitute arbitrator, on a party's application, if,
>
> (a) the arbitration agreement provides no procedure for appointing the substitute arbitrator; or
>
> (b) a person with power to appoint the substitute arbitrator has not done so after a party has given the person seven days notice to do so.)

[56] The plaintiff does provide any grounds for her objection to the appointment of ADR Chambers other than saying that Arbitration Place does not have authority to appoint another institution pursuant to the Arbitration Clause. To the extent that it is necessary for me to do so, I appoint ADR Chambers as substitute arbitrator pursuant to my jurisdiction under s. 16.

[57] Finally, the plaintiff says the arbitration agreement is invalid because the retainer agreement was not signed by the lawyer and was breached by the firm because accounts were not rendered quarterly. There is no doubt that the plaintiff agreed to the terms of the retainer; she signed it and does not say she did not agree to it. The fact that the lawyer did not sign it is of no consequence particularly since services were performed and accepted pursuant to the retainer agreement: *Kernwood Ltd. v. Renegade Capital Corp.*, 1997 CarswellOnt 203 (C.A.), at para. 17.

[58] The failure to render quarterly accounts did not deprive the plaintiff of the entire benefit of the contract or constitute substantial non-performance and therefore she was not entitled to terminate the contract on this basis: S.M. Waddams, *The Law of Contracts*, 8th ed (Thomson Reuters, 2022) at 592. The plaintiff has not provided any evidence of damages she suffered as a result of the failure to provide quarterly accounts.

[59] Here a stay of the action is needed because the arbitrator has declined to proceed with the arbitration in the face of the plaintiff's claim.

[60] The action is stayed and this matter is to proceed to a private arbitration at ADR Chambers..

COSTS

[61] Prior to the hearing, the parties submitted costs outlines. The plaintiff's partial indemnity costs are $6,210.00 plus HST. The defendants' partial indemnity costs are $15,971.99, inclusive of HST, plus disbursements of $339.00.

[62] The factors to be considered in determining costs are set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;

> (c) the complexity of the proceeding;
>
> (d) the importance of the issues;
>
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
>
> (f) whether any step in the proceeding was,
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;
>
> (g) a party's denial of or refusal to admit anything that should have been admitted;
>
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
>
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
>
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
>
> . . .; and
>
> (i) any other matter relevant to the question of costs.

[63] The overarching principle is that costs must be fair, reasonable and proportionate: *Harley v. Harley*, 2023 ONSC 4611, at paras. 34-35; *Bender v. Dulovic*, 2023 ONSC 4753, at paras. 24-25.

[64] As the successful party, the defendant it entitled to costs. I have considered the factors under r. 57.01(1), including the time spent, rates charged, and reasonable expectations of the parties. In my view, having regard to all of the factors, I find that $7,500.00, inclusive of HST and disbursements is appropriate. The plaintiff is ordered to pay the defendant's costs of $7,500.00, inclusive of HST and disbursements.

Merritt J.

Released: December 15, 2023

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