CITATION: Baybourdi v. Starkman Barristers, 2024 ONSC 1882
COURT FILE NO.: CV-23-00693445-0000
DATE: 20240402

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mohammad Reza Baybourdi

AND:

Starkman Barristers, Starkman Lawyers

BEFORE: J.T. Akbarali J.

COUNSEL: *Mohammad Reza Baybourd*, in person

Calvin Zhang, for the defendant

HEARD: March 27, 2024

ENDORSEMENT

Overview

[1] The plaintiff was a client of the defendant law firm. When a billing dispute arose between them, the plaintiff took steps to assess the defendant's accounts, and the defendant obtained an order removing itself from the record.

[2] The order for assessment, dated January 20, 2023, attached invoices dating back to August 2018. After the order for assessment was obtained, the defendant issued two further invoices to the plaintiff.

[3] The defendant brings this motion for an order quashing or dismissing the order for assessment the plaintiff has obtained on the basis that the request to assess the accounts was made outside the 30-day time period provided for in s. 3 of the *Solicitors Act*, R.S.O. 1990, c. S. 15, and that the plaintiff has not proven that there are special circumstances, as required by s. 4(1) of the *Solicitors Act*, to require the assessment.

[4] The plaintiff argues, first, that because invoices were delivered after the order for assessment was obtained, he is within the time frame set out in s. 3 of the *Solicitors Act*, and alternatively, if he is not, special circumstances are present in this case.

Analysis

[5] I will assume without deciding that the delivery of the invoices after the plaintiff obtained the order for assessment, which obviously were not attached to the order for assessment because

they had not yet been delivered, does not relieve the plaintiff of the burden of demonstrating that special circumstances exist that require the assessment of the earlier accounts. I note that counsel on this motion indicated that they would not object to the plaintiff proceeding with an assessment of the accounts that were delivered after the order for assessment was obtained.

[6] The question is thus whether the plaintiff has met his burden to show special circumstances in order to proceed with the order for assessment.

[7] In *11138120 Canada Inc. v. Rizk*, 2023 ONSC 2461, Ryan Bell J. recently set out the relevant law where the question at issue is whether there are special circumstances such that the solicitor's accounts, (here, those delivered prior to December 21, 2022) can be considered for assessment. I adopt her articulation of the law at paras. 9-12:

> [9] Section 3 of the *Solicitors Act* provides:
>
> > 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,
> >
> > (a) by the client, for the delivery and assessment of the solicitor's bill;
> >
> > (b) by the client, for the assessment of a bill already delivered, within one month from its delivery;
> >
> > (c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.
>
> [10] Section 4(1) provides:
>
> > 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 proved to the satisfaction of the court or judge to whom the application for the reference is made.
>
> [11] The payment of a bill does not preclude assessment if the special circumstances of the case, in the court's opinion, appear to require the assessment: *Solicitors Act,* s. 11.
>
> [12] The words "special circumstances" imply that the court has a broad discretion to determine the matter having regard to all the circumstances in the case; "'[s]pecial circumstances' are those in which the importance of protecting the interests of the client and/or public confidence in the administration of justice, demand an assessment": *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016

ONCA 377, at paras. 84 and 86. In *Clatney*, at para. 87, the Court of Appeal for Ontario identified the relevant circumstances as including but not limited to:

- the sophistication of the client;
- the adequacy of communications between solicitor and client concerning the accounts;
- whether there is evidence of increasing lack of satisfaction by the client regarding the services relating to the accounts;
- whether there is overcharging for services provided;
- the extent of detail of the bills;
- whether the solicitor-client relationship is ongoing; and
- whether payments can be characterized as involuntary.

[8] I am satisfied on this record that the special circumstances of this case, which I describe below, appear to require the assessment of all of the accounts rendered to the plaintiff by the defendant during the course of the retainer.

[9] First, almost all of the defendant's bills lack detail, in that there is no disclosure of the time spent on the steps in the action, or of the timekeepers who undertook those steps, in any bill until at least late August 2022.

[10] It is relevant to note that the plaintiff moved his file, dealing with a single action relating to a commercial lease and partnership agreement, to the defendant firm after discoveries were completed by previous counsel. The plaintiff left his previous counsel, at least in part, because the plaintiff was frustrated that his previous counsel had not been able to obtain answers to an undertaking made by the defendant in that litigation to produce bank records. Thus, at the time the defendant took over the file, the action had progressed a substantial way towards trial.

[11] The defendant's accounts total over $66,000 which seem to relate to getting up to speed on the file, attending a brief pre-trial that was adjourned due to an amendment of the plaintiff's claim, commencing a motion for production that the plaintiff deposes was not authorized, and perhaps attending a mediation where no offers were exchanged. No trial date has yet been set.

[12] The plaintiff argues that the amount billed is out of proportion to progress made in the action, but it is impossible to properly analyze the bills given that they include no detail with respect to time spent on the different tasks identified.

[13] Second, the record indicates that the plaintiff asked for detailed bills, including time spent by the timekeepers on different tasks, and he received no response to his request. No detailed bills were provided except on a go-forward basis commencing sometime in late August or September

2022. The plaintiff did not receive any information about the timekeepers or the time spent in respect of the bills that had been previously delivered.

[14] Moreover, there are emails in the record that indicate that, as soon as the plaintiff raised questions about the bills, the response he received from the defendant was aggressive. For example, after the plaintiff paid about $57,000, with about $6,700 in invoices outstanding, and after he raised questions about the account, counsel emailed the plaintiff and said, among other things:

> If the outstanding accounts are not paid no further [*sic*] can be undertaken. It is up to you whether you want to keep the action moving forward or not. If our accounts are not paid this week I will have to remove my firm as lawyers of record in the new year which is not to your benefit. I do not accept your reason for not paying months after the accounts were delivered and without any issues raised by you. I do not agree with your comments now about the motion or obtaining the defendants [*sic*] financial statements and tax returns. If you have a concern about specific entries in our statements of accounts I will look at them but not on the basis you have stated in your email.

[15] Rather than engage with the plaintiff meaningfully about his concerns, counsel moved straight to an ultimatum.

[16] In addition, the plaintiff deposes that he sought a meeting with counsel to discuss the accounts, but was told that in order to secure a meeting with counsel, he would have to first pay the accounts. An email from the defendant at the time disputes that narrative, but the defendant did not address that allegation in the affidavit evidence filed in the record, so I have only hearsay evidence from the defendant on the point.

[17] I conclude that communications between the solicitor and client concerning the accounts were not adequate.

[18] Third, the record raises concerns with respect to over-charging. I have already noted that over $66,000 was billed for getting up to speed on a file that does not appear, from the pleading at least, to be more complex than average, for attending a pre-trial that adjourned after a very short period of time, for amending a pleading, and perhaps for a mediation that did not result in a single offer.

[19] At the same time, the invoices in the record reveal charges for items that I find concerning. For example, the plaintiff's evidence is that he did not authorize a production motion, yet he was billed for work undertaken in connection with one. It also appears that counsel charged the plaintiff for the time he spent writing emails to the plaintiff with respect to the plaintiff's questions about his account, which I find astonishing.

[20] In an account delivered after the order for assessment was obtained, the defendant billed the plaintiff over $2,500 in connection with its motion to get off the record, although there is no indication that the motion was opposed. Costs were not sought in the notice of motion, and there

was no provision ordering costs in the order signed by Associate Justice Frank. By billing the plaintiff for the motion, with respect to which the parties were, at least theoretically, adverse in interest, the defendant in effect charged him full indemnity fees, when a successful party on an opposed motion is presumptively entitled to partial indemnity fees. I recognize that this account is not technically in issue before me, in view of counsel's statement that the defendant does not object to the plaintiff assessing the accounts delivered after the order for assessment was obtained, but especially in view of the lack of detail in the earlier accounts, the defendant's billing practices raise concerns more broadly, and appear to warrant scrutiny to guard against overcharging.

[21] The detailed accounts delivered after the parties' email exchange reveal that there were at least three timekeepers involved in the plaintiff's file at that time, though it is not clear to me why staffing the account in this way was required. I have no idea how many lawyers were involved at earlier stages of the file, because, as I have noted, for the first four years of the retainer, the timekeepers were not disclosed on the bill. Moreover, the invoices disclose inter-office discussions, emails, and reporting, all of which becomes more expensive when more people are involved in the file.

[22] I also note that counsel who appeared on this motion does not appear to be one of the lawyers whose work is disclosed on the bill in December 2022, leading me to wonder if in fact there were four lawyers involved in this file. (I recognize that it is possible that a clerk or student was also a timekeeper, but the bill itself describes the timekeepers as lawyers.)

[23] I am cognizant that the plaintiff paid his bills throughout voluntarily and without complaint until the billing dispute arose between the parties. However, as I have already noted, the payment of bills does not preclude assessment of those bills if, in the court's view, special circumstances require it.

[24] The defendant submitted that the plaintiff was a sophisticated businessperson, and relied on the statement of claim in the plaintiff's action, and the emails the plaintiff sent complaining about his account to establish the plaintiff's sophistication. The statement of claim (which consists of allegations) makes no assertion that the plaintiff is particularly sophisticated. I note that the commercial lease and partnership agreement at issue in that litigation relate to a sandwich shop and the claim alleges that the plaintiff was defrauded by his partners. The emails in the record indicate that the plaintiff can express himself. In my view, this evidence does not establish any particular sophistication on the part of the plaintiff.

[25] For these reasons, I find that special circumstances exist that appear to require the assessment. I exercise my discretion to permit the plaintiff's order for assessment to proceed. The defendant's motion is dismissed.

Costs

[26] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[27] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[28] In this motion, the plaintiff is the successful party, and is presumptively entitled to his costs.

[29] The plaintiff argued that he is entitled to costs at the same level claimed by the defendant, that is, about $8,000 on a partial indemnity scale or $12,000 on a substantial indemnity scale.

[30] However, the plaintiff is self-represented. Self-represented parties are entitled to costs, but not with respect to the time and effort any litigant would have devoted to their case. Rather, lay litigants are entitled to costs if they can demonstrate that they devoted time and effort to do the work ordinarily done by a lawyer retained to conduct the litigation and that they incurred an opportunity cost by forgoing remunerative activity: *Fong*, at para. 24.

[31] The plaintiff has taken time off work to deal with the defendant's motion. I conclude that some level of costs is appropriate.

[32] I find that costs of $500 are fair and reasonable. The defendant shall pay $500 to the plaintiff within thirty days.

Conclusion

[33] The defendant's motion is dismissed. The order for assessment shall proceed.

[34] The defendant shall pay the plaintiff's costs, fixed at $500, within thirty days.

J.T. Akbarali J.

Date: April 2, 2024