

CANADA / JUDGMENT

Dakota Ridge Builders Ltd. v. Niemela

2015 BCSC 1245

COURT

Supreme Court of British Columbia

DECIDED

25 June 2015

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2015 BCSC 1245 Dakota Ridge Builders Ltd. v. Niemela

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dakota Ridge Builders Ltd. v. Niemela,

2015 BCSC 1245

Date: 20150625

Docket: S151023

Registry: Vancouver

Between:

Dakota Ridge Builders Ltd. and Andreas Koberwitz

Petitioners

And

Glenn J. Niemela

Respondent

Before: The Honourable Mr. Justice J. Sigurdson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

Dale G. Sanderson, QC;

Tamlin S.N. Cooper

Respondent Glenn J. Niemela:

Appearing in person

on his own behalf

Place and Date of Hearing:

Vancouver, B.C.

June 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 25, 2015

INTRODUCTION

- [1] THE COURT: Under the Legal Profession Act, a client may obtain an appointment to have a bill of his lawyer reviewed before the registrar before 12 months after it was delivered or three months after it was paid whichever occurs first. If that time has passed, as it has in this case, the bill must not be reviewed unless the court finds that "special circumstances justify a review of the bill and orders that the bill be reviewed by the registrar" (s. 70(11)(b)).
- [2] In this case, the solicitor's bills totalling \$93,201.83 to prosecute a builder's lien claim were paid at the end of January 2014 under protest, but the application to tax was not brought within three months and this proceeding for a review of the solicitor's accounts pursuant to the Legal Profession Act and the inherent jurisdiction of the court was not commenced until February 5, 2015.
- [3] The respondent solicitor denies that there are "special circumstances" or that the inherent jurisdiction of the court should be invoked (as the client asserts is also a source of the court's jurisdiction to order a taxation) and he accordingly opposes the relief sought.
- [4] Pursuant to an application made by the lawyer when this matter was initially partly heard by me, I granted the lawyer the right to cross-examine the client for a period of no more than one hour and cross-examinations of both the lawyer and the client have now taken place.

GOVERNING LAW

- [5] The following principles are applicable to applications of this sort.
- [6] Each case turns on its own facts and circumstances.
- [7] The judge in each case must determine whether there are special circumstances such as to make it right and reasonable that the bill should be taxed, although it has been paid (Re Cheesman, (1891) 2 Ch. 289).

- [8] A number of facts, none of which individually may amount to special circumstances, in combination may do so. (I refer to the concurring judgment of Southin J.A. in *Doig v. Davidson*, [1998] B.C.J. No. 723 (C.A.).)
- [9] The phrase "unless the Supreme Court finds that circumstances justify a taxation of the bill" has been said to require a liberal interpretation as a matter of public policy. As Wetmore L.J.S.C. said in *Re Norton*, [1982] B.C.J. No. 1186:

A special right of audience in the courts renders barristers and solicitors not only officers of the courts but in the public eye identifies them as part of the court's function in the administration of justice.

- [10] In considering whether there are special circumstances, the court, I think the authorities indicate, can also consider whether there are genuine issues relevant to the account, even if at this stage unresolved, such as whether legal fees were agreed not to exceed a certain amount of money or the fees rendered exceeded a particular estimate (see *Phillips Paul, Barristers and Solicitors v. Malak Holdings Ltd.*, 2002 BCSC 1191 at para. 26.)
- [11] A useful summary of some of the guiding principles and the non-exhaustive criteria for determining if there are special circumstances was set out by Master Young, as she then was, in *Worth v. Spelliscy*, 2011 BCSC 847 at para. 22:
1. Each case must be determined on its own facts.
 2. The onus of proving that a special circumstance exists rests on the applicant seeking to review the legal accounts.
 3. Reasonable explanation for the delay in filing the appointment is critical. The longer the delay, the more important the reasons become.
 4. Ignorance of the existence of the limitation period by itself is not sufficient to establish a special circumstance.
 5. The very size of accounts when considered with the nature of the work can be taken into account as a special circumstance.
 6. A number of factors, none of which individually would amount to special circumstances, in combination may be so.
 7. Charging for work that was not performed is a special circumstance.
 8. Pressuring the client to pay without giving him the opportunity to review the account may be a special circumstance; for example, threatening to abandon a client the day before his trial if the bill rendered that day is not paid.
 9. Rendering an account far in excess of an estimate for fees might be a special circumstance.

10. If the account document itself does not set out sufficient detail to determine how many hours were charged for what by whom, that may be a special circumstance.
11. The court will consider prejudice to both parties. When the lawyer received actual notice of the intention to review his or her accounts may be a factor in determining prejudice.

SPECIAL CIRCUMSTANCES ASSERTED BY THE CLIENT

[12] The client asserts the following things amount to special circumstances:

- (a) The fees are very large given that the client paid almost \$100,000 for work before trial in a claim for about \$425,000.
- (b) The solicitor gave an estimate of \$60,000 to \$70,000 including trial, but had charged \$93,201 when the retainer was terminated.
- (c) The client was pressured or threatened with abandonment if the bills were not paid.
- (d) The bills do not set out in sufficient detail how many hours were charged for and the evidence discloses that fees were charged for work not done or the bills were inflated and exaggerated.
- (e) The bills do not set out sufficient detail to determine how many hours were charged for what and by whom.
- (f) The lawyer was given notice of the client's intention to review his accounts within the statutory time to tax the bill and the solicitor is not prejudiced by the delay.
- (g) The bills were rendered in a relationship where the solicitor misconducted himself or acted improperly by borrowing money from the client contrary to R. 3.4-31 of the Code of Professional Conduct or, alternatively, if not a loan from the client, the solicitor received money from the client as a retainer, but did not place it in trust for two months and used it without having first billed the client and then taking it from trust.

LAWYER'S POSITION

- [13] The solicitor denies that there are special circumstances. Mr. Niemela submits that the client on cross-examination generally resiled from many of his allegations and that although the client threatened to tax his bill within the limitation period, the delay, the result of his new lawyer's mistake in not proceeding with the taxation in a timely way, was not properly or fully explained.
- [14] The lawyer asserts that there was no fee quote as there was a written retainer agreement making that clear. The lawyer says that even if there were a genuine issue about a fee quote, that in itself is insufficient to constitute special circumstances.

- [15] The lawyer says that the \$5,000 advanced was not, as suggested by the client, a loan and, if not dealt with correctly by being placed in trust forthwith, that is a professional conduct issue concerning the Law Society and not a special circumstance relevant to the inquiry at hand. The lawyer says there was no threat to terminate the retainer for non-payment and there was no work billed for that did not take place.
- [16] The lawyer says that once the mistake not to tax in time was learned of in June, there was a deliberate decision to wait, and the delay to about January 15, 2015 has not been properly explained. The lawyer suggests that there is prejudice if an extension is granted because of his difficulty to be able to go back and recall conversations with the client and others from two years earlier that relate to the services rendered.

DISCUSSION

- [17] Although there are a great number of things advanced that are alleged to be special circumstances, I have satisfied myself that there are special circumstances when considering a number of matters as a whole.
- [18] I find the following things taken together amount to special circumstances justifying an extension of time so that the accounts may be taxed before the registrar:
- (a) The amount of the bills themselves, given the stage reached in this litigation before trial and the amount involved, appear substantial and of itself raises a question as to the reasonableness of the solicitor's fee.
 - (b) The existence of a genuine question, that I find remains unresolved following cross-examinations, whether there was a fee quote that the fees including trial would be \$60,000 to \$70,000 and the fees before trial significantly exceeded that.
 - (c) The client, through his new lawyer, advised the solicitor that his accounts would be taxed during the time that the client was entitled to tax and the delay in doing so appears to be the fault of the new lawyer. Although not fully explained, it is a relevant fact that the lawyer was aware of the client's desire to tax and it is also a relevant consideration that the lawyer, given the notice that he received, has not, in my view, demonstrated any significant prejudice if the time to tax to his bill is extended.
 - (d) The payment by the client to the lawyer of \$5,000 is either a loan which appears improper or a retainer that was not put in trust as required for several months which may be improper, as well. I think that while of itself this last fact is perhaps not a special circumstance, taken with the other facts, it is a relevant consideration in determining that there are special circumstances given the court's jurisdiction exists because of the special role lawyers enjoy as officers of the court.
- [19] Taken together, I am satisfied that those matters constitute special circumstances and the extension should be granted and it is so ordered.

- [20] The client's new counsel also outlined other arguments that he said also support the contention that there are special circumstances and they are that the bills do not contain sufficient detail to determine how many hours were charged for what, that there was allegedly charging by the lawyer for work that was not performed, or that the client was pressured to pay a bill or face abandonment. Those appear, although disputed, to be genuine issues and may well support an extension, but I find that I need not rely on them or revert to the inherent jurisdiction of the court given that I find that, even absent a consideration of those factors that I have just set out, that there are special circumstances for the reasons that I have already outlined.
- [21] Accordingly, the extension is granted for 30 days to file and serve the appointment before the registrar. Although the petitioners sought special costs because of the late delivery of documents and material, I am not inclined to grant those and I need not call on Mr. Niemela to respond to that request.
- [22] I leave the question of costs of the taxation and this application to the discretion of the registrar.

"The Honourable Mr. Justice J. Sigurdson"

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Prepared on 29 October 2026 · Esheria