

CANADA / JUDGMENT

Mitroi v. Epstein

2015 BCSC 1946

COURT

Supreme Court of British Columbia

DECIDED

23 October 2015

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2015 BCSC 1946 Mitroi v. Epstein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mitroi v. Epstein,

2015 BCSC 1946

Date: 20151023

Docket: S166709

Registry: New Westminster

Between:

Marius Mitroi

Plaintiff

And

Mark Epstein

Defendant

Before: District Registrar Nielsen

Reasons for Decision

Plaintiff Appearing in Person:

Marius Mitroi

Defendant Appearing in Person:

Mark Epstein

Place and Date of Hearing:

New Westminster, B.C.

February 17, 2015

September 14, 2015

October 19, 2015

Place and Date of Decision:

New Westminster, B.C.

October 23, 2015

introduction

- [1] This is an application by the client for review of the lawyer's bill pursuant to the provisions of the Legal Profession Act, R.S.B.C. 1998, ch. 9.
- [2] The lawyer presented the client with a bill in the amount of \$5,596.15, for fees and disbursements relating to a family law matter in which the client was seeking orders against his former common-law spouse, and responding to orders sought against the client by the former common-law spouse. The client was seeking an order for unsupervised access and full guardianship of the client's three year old child. There was also an ongoing criminal case against the client, which tied into the family law proceedings and prevented the client from obtaining unsupervised access to his child. To put the matter simply, the court was reluctant to grant the order sought by the client for unsupervised access with the criminal charges against him pending.
- [3] During the course of the proceedings, supervised access was offered to the client but he refused the offer due to the conditions imposed and the associated cost.
- [4] At the heart of the dispute surrounding the lawyer's bill is the belief held by the client that the lawyer had agreed to handle the entire case for a flat fee of \$5,000.
- [5] The lawyer denies that he made an agreement to act for a flat fee, and states unequivocally, that he never acts in family law cases for a flat fee given the volatile and unpredictable nature of the proceedings involved which can result in multiple applications and court appearances. Indeed, in the present case, there were two court applications on April 15, 2015 and May 26, 2015, which ended most unsatisfactorily for the client, as his first application was adjourned and the second resulted in no orders made, the reason being the unresolved criminal charges against the client and the court's hesitation to resolve parenting issues pending the resolution of the criminal charges.

Retainer

- [6] The parties did not execute a retainer agreement, which is regrettable, as it would have prevented the subject dispute. It is the lawyer's usual practice to execute a formal retainer agreement. However, by oversight, this did not take place.
- [7] There is no dispute that the lawyer was retained. The dispute centers on the terms of the retainer.
- [8] Lawyers will be held to agreements that limit their fees where they have agreed to a contract on the basis of a fixed fee. See *Conkie & Company v. Free Quincy Productions Ltd*, 2012 BCSC 33 at para. 103. The onus to prove such an agreement rests on the client. In the present case, I find no such agreement existed.
- [9] Clearly, the client held the belief that such an agreement did exist, and from the email exchange, it appears to have arisen from his lack of understanding regarding the retainer of \$5,000.
- [10] The client believed the retainer was an agreement to provide services for a fixed fee. It was not. The misunderstanding may, in part, be due to the client's limited command of the English language and writing skills. English is a second language for the client.
- [11] The client's initial email to the lawyer dated January 22, 2014, is indicative of the client's difficulty in communicating in English. It was also a red flag, which should have signaled the need for a written retainer agreement in the circumstances.
- [12] I should note that once the misunderstanding concerning fees was identified, the lawyer immediately and appropriately explained his position, both on his hourly rate, and the need for a retainer on that basis. The lawyer also offered alternate payment terms given the client's limited means. This involved the client agreeing to assign proceeds of a motor vehicle case which was ongoing, in the event that his case was successful.

Discussion

- [13] The lawyer attended two court hearings on behalf of the client. At the first hearing on April 15, 2014, the matter was stood down while settlement discussions ensued. Although counsel for the ex-spouse expressed grave concerns regarding the client's character, an offer of supervised access was made to the client. The client refused the offer of supervised access and the matter proceeded. The court declined to order unsupervised access with the criminal matter outstanding. The court ordered that the client take a "parenting after separation course" and adjourned the matter to May 26, 2014, by which time it was hoped the criminal proceeding would be resolved.
- [14] Prior to the May 26, 2014 hearing date, the lawyer was advised by the client's criminal counsel that the criminal matter had not been resolved and it was likely that the client would be convicted. As a result, the lawyer recommended to the client that he agree to adjourn the

May 26, 2014 hearing and accept the offer of supervised access. The client was also facing an application for a civil restraining order which the ex-spouse agreed to hold in abeyance, pending the outcome of the criminal charges. The client refused, in part, due to the belief that having completed the "parenting after separation course", the court would grant him unsupervised access to his child irrespective of whether the criminal charges had resolved. The lawyer advised the client that this was highly unlikely given the court's prior reluctance to resolve the parenting issues in the face of the unresolved criminal charges. Nevertheless, the client instructed the lawyer to press the client's application for unsupervised access at the May 26, 2014 hearing.

- [15] At the May 26, 2014 hearing, the court declined the client's application once again and the matter was adjourned to July 11, 2014, in the hopes that the criminal charges would be resolved by then. Regretfully, the criminal proceedings did not resolve and the lawyer advised the client, in no uncertain terms, that it would be a pointless exercise to appear on July 11, 2014, to seek an order for unsupervised access given the circumstances. The client steadfastly disagreed and instructed the lawyer to once again appear and press the client's application for unsupervised access. The lawyer refused and wrote to the client on July 4, 2014, stating:

The other side has made an application for July 11 that you be restrained from seeing your ex and child - they felt that they wanted to adjourn that application without having to go to court to adjourn it. I agreed that it was in your best interest that you not attend as it is the other side's application and it would save you legal costs and the heartache again of you attending court and being told you cannot see the child without supervision. You want to again go to court and ask the court for you to see the child. So you can go to court on July 11, 2014 and ask the court for the latter and I will tell the other side that we no longer have an agreement. I will return the file to you. The court has given you the option to see the child with supervision but you have steadfastly refused. You can continue to act on your own with the other side to try and force the issue. I will not act for you any longer.

- [16] On July 4, 2014, the lawyer and the client parted ways. The lawyer returned the complete file to the client by cover letter dated July 9, 2014.
- [17] By letter dated June 20, 2014, the lawyer sent the client a bill dated June 10, 2014, for \$5,596.15 for his work between February 12, 2014 and June 4, 2014.
- [18] The lawyer did not charge the client for the initial consultation, or his work between June 4, 2014 and July 4, 2014. In addition, the lawyer waived the \$595.15 balance on his June 18, 2014 bill.

Legal Principles

[19] In the absence of an express retainer agreement, there is an implied term that the lawyer will be remunerated for his or her work based on a fair fee assessed on the basis of s. 71(4) of the Legal Profession Act, which provides:

71(4) At a review of a lawyer's bill, the registrar must consider all of the circumstances, including

- (a) the complexity, difficulty or novelty of the issues involved,
- (b) the skill, specialized knowledge and responsibility required of the lawyer,
- (c) the lawyer's character and standing in the profession,
- (d) the amount involved,
- (e) the time reasonably spent,
- (f) if there has been an agreement that sets a fee rate that is based on an amount per unit of time spent by the lawyer, whether the rate was reasonable,
- (g) the importance of the matter to the client whose bill is being reviewed, and
- (h) the result obtained.

Application of the Principles

- (i) Complexity, difficulty or novelty of the issues involved

[20] There was an element of complexity and difficulty surrounding the issues involved. The lawyer was retained primarily to obtain unsupervised access and full guardianship of the child for the client. The matter had a complicated history involving the client and his former common-law spouse, as well as a corresponding criminal case which added a veil of difficulty. In addition to the client's application, there were corresponding applications by the former common-law spouse, including a civil restraining order.

- (ii) Skill, specialized knowledge and responsibility required of the lawyer

[21] The nature of the matters involved required skill and a general knowledge of the law to navigate a successful application. The client's language difficulties and emotional investment in the case also required management by the lawyer.

[22] The lawyer has 24 years at the bar and bills at a rate of \$300 to \$325 per hour. Given the client's limited means, he billed at the lower rate of \$300 an hour. The lawyer's rate, given his experience, is reasonable.

[23] At issue in this case was not a specific amount of money, but rather the issues of unsupervised access and guardianship which were extremely important to the client. The client had been a stay-at-home dad and was invested in this role. He had very limited means, being on a fixed pension income arising from a disability.

(iii) The time reasonably spent

- [24] The bill presented by the lawyer totalled \$5,596.15, inclusive of taxes and disbursements. The bill spans the time period between February 12, 2014 and June 4, 2014. The \$5,000 retainer was applied to the bill, leaving a balance owing of \$596. The lawyer has advised he is waiving the balance of the bill. The lawyer did not charge the client for the initial consultation, nor did he charge for his work between June 4, 2014 and July 4, 2014, when the lawyer and client parted ways.
- [25] The bill involved the investment of 23.4 hours of work by the law firm. The bill shows that the lawyer made appropriate use of paralegals in order to keep the cost down. The lawyer billed 8.8 hours at \$300 an hour and the paralegal billed 14.1 hours at \$150 an hour.
- [26] The bill summarizes what was done, why it was done, and the time which was taken in completing the various tasks.
- [27] Considering the amount of time provided to the client at no cost, and the fact that the bill encompasses the preparation and attendance at two court hearings, the mustering of the required affidavit evidence for each, and all the communications along the way, I consider the amount billed to be exceedingly reasonable.
- [28] The client takes issue with the fact that much of the preparatory work was done by the lawyer's legal assistant. Although the client did not specifically authorize this work to be done by a legal assistant either verbally or through a formal retainer agreement, a legal assistant's time that contributes to the client's overall objectives may be considered a reasonably necessary and proper charge. See *Clark Wilson v. Information Highway.com Inc.*, 2002 BCSC 407 and *Morrie Sacks Law Corp. v. Korbin*, 2005 BCSC 396.
- [29] The work performed by the lawyer's legal assistant provided the evidentiary basis for the client's applications and was the only evidence relied upon by him in the subsequent application where he represented himself. The legal assistant's time was reasonable and reduced the client's overall costs.

(iv) The importance of the matter to the client

- [30] The matter was important to the client. The client had been the primary caregiver to the child and took on the role of a stay-at-home dad while his common-law partner worked outside the home. The documents in evidence indicate the importance of unsupervised access and guardianship to the client.

(v) The result obtained

- [31] The efforts of the lawyer did not result in a satisfactory conclusion for the client from his perspective. However, supervised access was offered at the initial hearing but the client refused. In my view, given the difficult circumstances faced by the client, the offer of supervised access was a favourable result overall, and arguably, given the outstanding criminal allegations against the client, the best possible result that could have been achieved in the circumstances.
- [32] I have not particularized the nature of the criminal charges against the client in order to protect his privacy; however, they were of a serious nature and would have made an order for unsupervised access highly unlikely. In the circumstances, it would have been reasonable for the client to have accepted the offer of supervised access, particularly given the prior and repeated reluctance of the court to do otherwise, until the criminal charges were resolved.

conclusion

- [33] In all the circumstances, I consider the bill subject to review to be entirely reasonable and it is allowed for the full \$5,000 claimed.
- [34] As there is no outstanding balance owed by the client, there is no need to address court order interest pursuant to s. 73(3) of the Legal Profession Act.
- [35] In circumstances where a bill is not reduced by one-sixth pursuant to s. 72(1) of the Legal Profession Act, costs are ordinarily awarded to the lawyer. However, pursuant to s. 72(2) of the Legal Profession Act, the Registrar has discretion, in special circumstances, to depart from that rule.
- [36] In the present case, I find special circumstances and order that both parties bear their own costs. This is a situation where an express retainer ought to have been entered into given the client's limited communication skills, as evidenced in his oral testimony and his emails. An express written retainer would likely have prevented the misunderstanding which arose in this case.

"District Registrar Nielsen"

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