CANADA / JUDGMENT

Negat v. Rahmanian

2020 BCSC 2108

COURT
Supreme Court of British Columbia

DECIDED
18 December 2020

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2020 BCSC 2108 Negat v. Rahmanian

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Negat v. Rahmanian,

2020 BCSC 2108

Date: 20201218

Docket: L214362

Registry: New Westminster

Re: Legal Profession Act Review

Between:

Sebastian Nejat, also known as Homayoun S. Nejat,

doing business as Nejat Legal Counsel

Solicitor

And

Lida Rahmanian

Client

Before: Registrar Nielsen

Oral Reasons for Decision

In Chambers

Appearing on his own behalf by teleconference:

S. Nejat

Counsel for the Client appearing by teleconference:

K. Zhuang

Place and Date of Hearing:

New Westminster, B.C.

December 18, 2020

Place and Date of Decision:

New Westminster, B.C.

December 18, 2020

Introduction

[1] This is a client-initiated review of the lawyer's account in the amount of 44,800. The account was paid in full by the client. The client's evidence went by way of affidavit. The lawyer provided an affidavit, court materials and gave oral evidence.

Discussion

[2] The lawyer indicated in his affidavit sworn February 20, 2020, that he initiated a proposal in bankruptcy, however he did not produce the filed proposal or identify his trustee, nor did he address this issue in his oral evidence. The filing of a proposal under s. 62(1) of the Bankruptcy and Insolvency Act would result in a stay of proceedings pursuant to s. 69.1(1). However, without a copy of a filed proposal or identification of the trustee, the review proceeded.

[3] The client seeks a refund of 39,998 plus tax, on the basis of the terms of the contract. The client submits she did not get the contractual services for which she paid and seeks that amount plus tax, based upon the provision that the lawyer was to refund $2,857 per day for each day the trial ends up being fewer than 14 days, as provided by the retainer agreement.

[4] The retainer agreement dated November 24, 2017, reads in part:

THE CLIENT HEREBY AGREES to retain the Lawyer to represent her in respect of the subject family law matter in the Supreme Court of British Columbia - Vancouver Registry. In particular, the Lawyer will have full conduct of the file, which was transferred to him by the Client's previous counsel, Hossein Faramarzi, on November 16, 2017, including but not limited to any forthcoming court appearances and the trial of this matter, which presently has been set for 3 weeks commencing March 26, 2018.

The Client acknowledges and agrees that the Lawyer's fees for all services rendered in relation to the foregoing matter and her file shall be billed at the discounted hourly rate of $250.00 plus taxes (GST and PST) and disbursements (e.g. photocopying and court filing charges), but the total amount billed for legal fees (excluding taxes and disbursements) shall be capped at $40,000.00. For each day that the trial ends up being fewer than 14 days, the Lawyer shall refund the Client the sum of $2,857.00 per each day from the total sum of $40,000.00 that the Client shall pay on or before two weeks prior to the commencement of the trial.

[5] Pursuant to the retainer agreement, the client paid the lawyer a $5,000 retainer on November 24, 2017, and made a further lump-sum payment in the amount of 39,800 on March 8, 2018, immediately before the scheduled trial. The trial was ultimately adjourned at the lawyer's request because, in his view, there had not been sufficient document disclosure.

[6] The trial was set again for June 18, 2018, but did not proceed because of the lawyer's health issues. A further trial date was set by court order, peremptory on the client, for April 8, 2019. However, the lawyer was non-practising by this date and was therefore unable to do the trial. He did, however, attempt to negotiate a return to practice so that he could do the trial on behalf of the client. Despite his efforts, the Law Society would not allow his readmittance to the practice of law.

[7] The lawyer, who is presently non-practising, submits that he did considerable work for the client. He attended two and a half days of the client's examination for discovery, made eight court appearances and one where an interim distribution of family property in the amount of 25,000 was advanced to the client. The lawyer submits he attended meetings with the client and her brother and generated many correspondences and phone calls.

[8] The lawyer submits that if the work he did was billed at his $250-per-hour discounted rate, his bill would have been far in excess of the 44,800 at issue.

[9] The lawyer went through his files and created a bill with accompanying hours spent. As a result, he concluded his services could have been billed at $48,147.50 plus taxes. The bill was not recorded contemporaneous with the events; it was constructed long afterwards in order to respond to a complaint and a claim made by the client with the Law Society.

[10] The lawyer testified he simply did not anticipate the case taking as long as it did, or being as complex. The lawyer further submits that he is at a disadvantage on this review as his prior practice was taken over by a custodian on behalf of the Law Society and he has not been able to access copies of his complete file material from subsequent counsel.

[11] In this regard, I am not satisfied he has presented sufficient evidence of his efforts to obtain the materials he alleges would support his position. He was able to obtain those documents, which were added to the hearing record at Tabs 10 through 13, which include the notice of motion filed October 4, 2018, the affidavit of Ali Rahmanian filed October 4, 2018, the affidavit of Lida Rahmanian filed August 7, 2018 and the order of the Honourable Justice Groves dated October 16, 2018.

[12] Finally, no request was made for an order for the production of records within this proceeding. Orders of this nature are routinely made through the simple process of a prehearing conference.

[13] The lawyer also submits that even though he did not take the matter to trial, it is his belief that the matter settled, and therefore, a trial was not ultimately needed. The difficulty with this submission is that does not account for the fact that the client was forced to retain subsequent counsel to effect settlement. The bills of subsequent counsel are not before me. In any event, in my view, the lawyer entered into a fixed-fee or entire contract and did not fulfil his end of the bargain. The lawyer does not seriously dispute the fact that his retainer was an entire contract whereby he was to carry out the family law case to a conclusion. Further, the lawyer has not sought to set aside the retainer agreement.

[14] Section 68 of the Legal Profession Act provides for the examination and setting aside of an agreement, but those with standing to do so, do not include lawyers who drafted the very agreement in issue. Rather, to challenge the agreement pursuant to s. 68, you must be a person who entered an agreement with a lawyer, not the lawyer.

[15] The process envisioned by s. 68 also imposes limitation periods. An application for a review of an agreement must be made within three months after the agreement was made or the termination of the solicitor-client relationship. Here we are now years after the termination of the solicitor-client relationship.

[16] Even if s. 68 granted a lawyer the right to review his own contract, which, in my view, it does not, we are well beyond any reasonable time for doing so. Finally, the lawyer testified he made no attempts to renegotiate the terms of the retainer agreement with the client.

[17] The lawyer submits that the court ought to approach this matter on a quantum meruit basis, as is done where there is no written contract. Taking this approach would be contrary to the jurisprudence. In the present case, the lawyer drafted an agreement which was clearly for a fixed fee, but did not fulfil the terms of that agreement. The client seeks the return of the 39,998 plus tax on the basis of the contractual terms which provide the lawyer was to refund the client 2,857 for each day the trial ends up being fewer than 14 days. Tax included, this amounts to a refund of 44,797.76. I agree that the contract obligates the lawyer to refund this amount.

[18] The client is also entitled to a refund of the amounts paid on the basis that the lawyer's retainer was for a fixed fee or an entire contract. In the present case, the lawyer and the client entered into a contract where the lawyer was to see the matter through to a conclusion. Generally, a lawyer who withdraws, without cause, prior to the fulfilment of a fixed fee or entire contract retainer is not entitled to be paid for the work he has done to the date of the withdrawal.

[19] In Thompson v. Inmet Mining Corporation, 2009 BCCA 385, at para. 47, the B.C. Court of Appeal states:

[47] In the case of a retainer to conduct an action, it is an implied term that the solicitor will take all steps necessary to bring the action to an end. In other words, such a retainer is an "entire contract": Underwood, Son, & Piper v. Lewis [1894] 2 Q.B. 306 at 309-310, 313 (C.A.); Arctic, supra, at para. 48; Morrison Voss v. Smith, 2007 BCCA 296 at para. 32. It follows that unless the client agrees otherwise, the solicitor is not entitled to any fee under an entire contract until he or she has completed the work. This is explained in Frederic T. Horne, ed., Cordery's Law Relating to Solicitors (8th ed., 1988) as follows:

A retainer may be said to be an 'entire contract' where the client cannot receive the benefit of the consideration until the contract is completed. Thus, under a retainer to sue for damages for breach of contract the client cannot get any benefit until judgment has been obtained so that the solicitor should not be entitled to tax his costs until the client has either obtained judgment or lost the suit . . .

Disposition

[20] In the present case, there is no principled reason to depart from this line of authority, or the specific terms of the contract which directs the return of $2,857 per day for each day the trial ends up being fewer than 14 days. The lawyer entered into a fixed fee or entire contract retainer and did not fulfil his end of the bargain.

[21] The lawyer is entitled to his non-taxable disbursements in the amount of $1,220.40 and his taxable disbursements in the amount of $448.88, for a total of $1,669.28, but otherwise the fees and taxes paid to the lawyer are to be returned to the client in full. This amounts to a balance in the amount of $43,130.72 which is to be refunded to the client, together with interest under the Court Order Interest Act.

[22] For the purpose of the interest calculation, the client is entitled to interest on the $43,130.72 from March 8, 2018, to December 18, 2020.

[23] The client is also entitled to the costs of the review which I assess summarily pursuant to s. 73(2)(b) of the Legal Profession Act at $1,000 all inclusive.

[24] A certificate may be submitted through the registry for my signature. It must be submitted together with the interest calculations for my review. The certificate is to be sent to Mr. Nejat for his signature. In the event that he does not sign the certificate, it can be submitted for my signature after the expiry of 14 days.

"Registrar Nielsen"

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