
CANADA / JUDGMENT

Zemtsova v. MacLean

2019 BCSC 975

COURT

Supreme Court of British Columbia

DECIDED

17 June 2019

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2019 BCSC 975 MacLean v. Zemtsova

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacLean v. Zemtsova,

2019 BCSC 975

Date: 20190617

Docket: S151129

Registry: Vancouver

In the Matter of the Legal Profession Act, S.B.C. 1998, c. 9

Between:

Lorne N. MacLean

Solicitor

And

Larisa Zemtsova also known as

Larisa Ivanovna Zemtsova

Client

Before: Master Tokarek

(As Registrar)

Reasons for Decision

Counsel for Solicitor:

A. Morrison

Counsel for Client:

G. Fahey

Place and Date of Hearing:

Vancouver, B.C.

April 29-30, 2019

May 1-3, 13, 23-24, 2019

June 4, 2019

Place and Date of Judgment:

Vancouver, B.C.

June 17, 2019

- [1] The Client initiated this review pursuant to the provisions of the Legal Profession Act S.B.C. 1998 c.9.
- [2] The accounts in issue include fees of \$469,260 and disbursements of \$47,281.31 for a total, with tax, of \$572,090.71. The Client has paid \$513,972.51. The Solicitor claims the balance with contractual interest at the rate of 18% for an outstanding balance of \$130,387.00. The billed fees represent legal services provided over a period of approximately three years, from mid-May 2012 until late January 2015.
- [3] The Client does not challenge the amount of time spent by any of the lawyers who worked on the file, nor their hourly rates. Disbursements are not in issue.
- [4] The Client confines her position to challenging the value of the Solicitor's services, based in part on the quality of the Solicitor's work and what the Solicitor accomplished. The Client claims the Solicitor did not adequately advise her with respect to the terms of a settlement agreement, nor the potential adverse consequences of subsequently incorporating the terms of the settlement in a Consent Order. The Client claims that as a result of not receiving a proper explanation, she was subsequently required to undertake costly arbitration proceedings. The Client submits that the fees charged should be reduced by half.
- [5] Because of the nature of an LPA review, specifically the absence of pleadings, discovery, or other process pursuant to which the parties are able to delineate or narrow the issues, considerable evidence was presented by the Solicitor on what turned out to be peripheral issues including, but not limited to, complaints that Ms. Kinney, who assisted Mr. MacLean, took on too much responsibility on the file and Mr. MacLean did not take on enough. None of those issues are substantiated by any documentation and, to the contrary, all the documentation, including the retainer agreement and several emails, completely confirm

the Solicitor's position.

- [6] As it turned out, the focus of the review was with respect to one key term in the settlement agreement.
- [7] In dividing the assets with her then husband, the Client agreed to accept the husband's interest in 12 unfinished condominiums in Dubai. In order to secure her husband's obligation to transfer his interest in those condominiums to her, the Client initially proposed that no money from the sale of a \$10 million Vancouver property on Osler Street would be released to her husband unless and until the Dubai properties were transferred. The Client's position was that upon sale of the Osler property, she should receive her half interest while her husband's half interest should remain in trust as security for the Dubai property transfer. The Dubai properties were owned through a complex structure controlled entirely by her husband.
- [8] After adjusting the trial date, the parties engaged in a four-day mediation which resulted in a settlement agreement, subsequently confirmed by a Consent Order. After several drafts, the final settlement agreement contained a different term with respect to the Osler Street property, specifically that the entire proceeds from the Osler sale would be held in trust until the Dubai properties were transferred.
- [9] It is that term of the agreement that the Client takes exception to. She now claims that she did not know that change had been made, nor was it ever explained to her. She submits that the value of the Solicitor's work should be reduced because she did not get a clear, written explanation. The Client alleges that the change requiring the mutual holdback occurred immediately before or during a lawyers only meeting on the third day of the mediation and was without her knowledge or input. The Client further claims that there was never any discussion of that change with Mr. MacLean or Ms. Kinney. Her evidence was to the effect that upon receipt of the minutes of settlement after the lawyers only meeting, she was tired and did not read the draft that evening prior to signing the same the next morning.
- [10] The email exchange between Ms. Kinney and the Client makes it abundantly clear that the Client did in fact read at least part of that settlement agreement and was attentive enough to pick up details she wanted changed. The Client's explanation for those emails and requested changes was to the effect that she only scrolled through the minutes of settlement on her computer looking for key words and issues that had mostly to do with adequate provision for her son's needs.
- [11] The Client claims that had she known or been made aware of the change requiring a mutual holdback of the Osler funds, she never would have signed the agreement.
- [12] In my view, the evidence is overwhelmingly against the Client's allegation that she was not made aware of nor understood the change in that term of the agreement, which everyone acknowledged was fundamental.

- [13] Mr. MacLean gave evidence that the mutual holdback change originated with the Client's husband during the mediation, and was the subject of discussion with the Client, as it involved tying up a substantial amount of the Client's funds.
- [14] Ms. Kinney, who attended the mediation with Mr. MacLean and the Client, confirmed that the change was discussed, although she had no recollection of the specifics of the conversation regarding the Osler proceeds.
- [15] Mr. Kahn, the mediator, testified that this mediation was longer than most because amongst other reasons, it had a number of complications, especially the Dubai property. He explained his role as a mediator, which included looking for any power imbalance and ensuring that the parties knew what they were signing. The way in which the mediation was conducted involved Mr. Kahn shuttling from one room to another to present various proposals or offers made by the Client or her husband. He also made it clear that his practice was to make sure the lawyers went over each term of the agreement with their Clients. It was his practice to step in if that practice was not being followed to ensure nothing was overlooked. It is understandable that Mr. Kahn does not have a detailed recollection of every occurrence during the mediation given the passage of time, but he did recall that the parties knew there was a difficulty with respect to transferring the Dubai property. He also remembers that the Client had no lack of understanding, but lacked trust in her husband. He describes the Client as being fully engaged, participating, willing and able to raise concerns, paying attention and that she fully understood what she would be getting and when. He also recalls that the drafts of the minutes of settlement were reviewed in detail and that the Client asked questions and stood up for herself when she disagreed.
- [16] The Client and the Solicitor agree that Mr. Kahn was present during the lawyers only meeting during the afternoon of the third day. Given Mr. Kahn's evidence, it is inconceivable that the lawyers, in Mr. Kahn's presence, would substantially change such a fundamental term with respect to the holdback and that the same would never have been explained to the Client by Mr. MacLean, Ms. Kinney or Mr. Kahn.
- [17] Furthermore, the emails and Exhibit 14 make it abundantly clear that the version of the minutes of settlement, which included the mutual holdback provision, existed before the lawyers only meeting. In fact, not only did the Client have possession of that draft, but she commented on it, including that the extraordinary expenses clause did not contain a provision for eye care for her son. She also commented on the need for a compensation clause in the amount of \$103,500 in Clause 1(h), which is the clause immediately above the mutual holdback provision for the Osler property.
- [18] Ms. Kinney not only gave evidence that the Client was very involved, more so than many of her Clients, but also testified that the Osler holdback would have been discussed with the Client. She reviewed the emails regarding the several draft settlement agreements noting the comments by the Client with respect to things other than Osler. Exhibit 13 is a contemporaneous note from Ms. Kinney referencing the Dubai security. That note refers to

all of Osler being held in trust until Dubai completes. The word "all" is circled . As well, Ms. Kinney's notes refer to a mutual incentive and that there would be no CPL on the Shaw property, also a change included in the final agreement. It is not surprising that neither Ms. Kinney nor Mr. MacLean kept extensive contemporaneous notes given the way the changes to the agreement were tracked on the several drafts.

- [19] Mr. MacLean, Ms. Kinney, Mr. Kahn and Mr. Kovalyov, a Russian-speaking accountant the Client hired to assist her with the financial and accounting aspects of this litigation, all spoke in glowing terms with respect to the Client's abilities. The various adjectives used to describe the Client included smart, educated, formidable, detail oriented, keenly interested, highly engaged, unafraid to voice her opinions and clearly able to express her disagreement. Mr. Kovalyov said that the Client's lawyers were well prepared and answered thoughtfully during the two days of mediation he attended.
- [20] The Client is indeed well educated. On the witness stand the Client had an impressive knowledge of detail and on several occasions accurately corrected both her and the Solicitor's counsel. She was fully aware of the details, difficulties and complexities involving the ownership structure of and requisite action to transfer the Dubai properties. The Client had previously parted ways with another solicitor, who she described as too passive, before settling upon Mr. MacLean. Despite her impressive attention to detail and her evidence that it was important to be accurate, when cross-examined the Client displayed a far less impressive demeanour. On several occasions she refused to admit the most straightforward propositions put to her. For example, she had difficulty in agreeing as to the difficult relationship she had with her husband, even though she documented the same at length. Nor would she initially agree with the proposition that she knew that she would be in for a tough fight. Despite her own emails admitting the same, she refused to admit that she was in good hands with Ms. Kinney. She had some considerable difficulty in agreeing she read or understood certain exhibits, even though she had made notes on them. She even had some difficulty acknowledging that she read and understood the retainer agreement. She made a number of serious claims, including that Mr. MacLean never gave her the full picture, but despite hundreds, if not thousands of emails, she did not raise that complaint until much later.
- [21] On balance, the evidence of Mr. MacLean, Ms. Kinney and Mr. Kahn completely satisfies me that the Client knew and understood the changes to the various draft agreements, that she willingly and knowingly executed the final version, and that the Solicitors acted on her instructions.
- [22] Although the focus of the review was to determine the value of the work done in light of the alleged failure on the part of the Solicitors to apply the skill and judgment expected of them, and despite there being little, if any, evidence with respect to other issues, the Registrar is nevertheless required to consider certain provisions governing a review under the Act, those being:

71 (1) This section applies to a review or examination under section 68 (7), 70, 77 (3), 78 (2) or 79 (3).

- (2) Subject to subsections (4) and (5), the registrar must allow fees, charges and disbursements for the following services:
 - (a) those reasonably necessary and proper to conduct the proceeding or business to which they relate;
 - (b) those authorized by the Client or subsequently approved by the Client, whether or not the services were reasonably necessary and proper to conduct the proceeding or business to which they relate.
 - (3) Subject to subsections (4) and (5), the registrar may allow fees, charges and disbursements for the following services, even if unnecessary for the proper conduct of the proceeding or business to which they relate:
 - (a) those reasonably intended by the lawyer to advance the interests of the Client at the time the services were provided;
 - (b) those requested by the Client after being informed by the lawyer that they were unnecessary and not likely to advance the interests of the Client.
 - (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.
 - (5) The discretion of the registrar under subsection (4) is not limited by the terms of an agreement between the lawyer and the lawyer's Client.
- [23] I will address these circumstances in summary form as no submissions were made with respect to them.

The Complexity, Difficulty or Novelty of the Issues Involved

[24] I accept and agree with the opinions of Mr. MacLean, Ms. Kinney, Mr. Kahn and Mr. Kovalyov, largely uncontested by the Client, that this matter was difficult and complicated for any number of reasons, including the investigation of substantial assets throughout various jurisdictions, the manner in which those assets were held or controlled, the distrust the Client had for her husband, the strongly held belief by the Client that her husband was hiding assets, and the instructions to the Solicitor to leave no stone unturned in discovering those assets.

The Skill, Specialized Knowledge and Responsibility Required of the Lawyer

[25] The Client retained Mr. MacLean and his firm after doing her own research and finding a new lawyer with the requisite specialized skills, knowledge and experience, who she considered to be at or amongst the top in their profession, to replace her previous counsel. She recognized the issues were important and that her husband was a very formidable foe. The issues in this litigation required the specialized skills of Mr. MacLean and Ms. Kinney.

The Lawyer's Character and Standing in the Profession

[26] Mr. MacLean and Ms. Kinney were very experienced. Mr. MacLean has been designated Queen's Council and has been recognized for his achievements.

The Amount Involved

[27] The amount involved was substantial, the family assets being valued at approximately \$20 million.

The Time Reasonably Spent

[28] The parties have agreed that the time records of the Solicitors accurately reflect the time actually spent by the lawyers and staff undertaking the tasks described, and have further agreed that the hourly rate charged by Mr. MacLean and the other lawyers at his firm were reasonable.

[29] Both Mr. MacLean and Ms. Kinney testified that all of the work they performed was required and all pursuant to the instructions of the Client. Neither Mr. MacLean nor Ms. Kinney were challenged with respect to the amount of time they spent on any one or more tasks, nor were they asked to justify any of their time spent.

[30] The Client received a courtesy discount in the fees charged of more than \$21,000.

The Fee Rate

[31] The parties have agreed the hourly rate charged was reasonable.

The Importance of the Matter to the Client

- [32] It is agreed that the outcome of the family law dispute was of significant importance to the Client. The degree of significance is perhaps reflected by the amount of time and effort spent by the Client working on her file not only with the Solicitor, but with lawyers in other jurisdictions, hiring and working with Mr. Kovalyov, searching out the best lawyers she could find, and corresponding with Ms. Kinney and Mr. MacLean to an extent one seldom sees in LPA reviews.

The Result Obtained

- [33] Putting aside the Osler Street issue, the assets had been located and divided equally. The search for hidden assets was thorough, with none found. At the time the Client was of the opinion that she benefitted by the value ascribed to the Dubai property in that she believed that asset would be worth substantially more in the future. As it turned out, she was wrong. Through subsequent arbitration she still received compensation for that asset. On the evidence, I am unable to describe the result achieved as being other than what the Client was content with at the time.

DISPOSITION

- [34] I have concluded that the accounts rendered are fair fees for work that was reasonably necessary and proper in the conduct of this litigation. I allow the same in full.
- [35] The parties have agreed that the interest charged or claimed by the Solicitors is an accurate calculation. The retainer agreement provides that interest would be charged at the rate of 18% per annum. Interest must be awarded on overdue accounts, although the Registrar has a discretion whether to apply interest at the contractual rate.
- [36] I can see no justification for reducing the contractual rate of interest on the Client's unpaid account. The Solicitor continued acting for the Client even though she had stopped paying the fees. Within a few months, Mr. MacLean negotiated an agreement that would have provided the Client with \$2 million and her husband \$1 million from the Osler proceeds regardless of the Consent Order. The Client refused that offer, but shortly thereafter negotiated her own settlement with her husband pursuant to which each of them agreed to take \$1 million from the Osler proceeds. The Client could have had funds from which to pay her debts, including her legal fees. The contractual interest is allowed in full.
- [37] Given that the Solicitor was entirely successful, he should be awarded the costs of this review. However, if the parties wish to present further submissions on that issue, I am prepared to entertain the same.

"Master Tokarek"

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