

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA  
Cite as: Whitman v. Coles, 2004 NSSM 35

BETWEEN:

Name Heather Whitman Claimant

Name David Coles and Boyne Clarke Defendants

**DECISION**

**Revised Decision:** The text of the original decision has been revised to remove personal identifying information of the parties on August 22, 2007.

Appearances:

Heather Whitman on her own behalf, together with Cyril Michaud;  
Nicole Godbout and David Coles, on behalf of the Defendants.

- [1] This matter came on before me on June 1, 2004.
- [2] I heard the evidence of Mr. Michaud and Ms. Whitman on behalf of the Claimant and the evidence of David Coles and the submissions of Nicole Godbout, on behalf of the Defendants.
- [3] Ms. Whitman claims the return of \$9,000 paid to Boyne Clarke. The \$9,000 was to be payment for certain specific legal services that were to have been provided by the Defendants to Mr. Michaud. At the time of the payment (in October 2001) Mr. Michaud was a client of Boyne Clarke.
- [4] Ms. Whitman claims that the \$9,000 was not a payment on any outstanding account for legal services performed by Mr. Coles for Mr. Michaud; but that it was instead a specific amount paid on certain terms and, in particular, that it was paid to Boyne

Clarke on condition that a specific set of legal services be provided. Ms. Whitman claims that the services were not performed and accordingly she should be entitled to repayment of the \$9,000.

[5] The defence is twofold. First, the \$9,000 was not accepted on terms, but was rather a payment on the account owing by Mr. Michaud (who was a close friend of Ms. Whitman who lived with her). The second defence is that the services specified were in fact performed.

[6] It is necessary to understand a bit of the background to this matter.

[7] Mr. Michaud became a client of Mr. Coles in 1999. Mr. Michaud was involved in a complicated and contentious New Brunswick action that involved at least two lawsuits arising out of certain investments he had made in the past.

[8] Discoveries had been scheduled for October 2001. There was some urgency in respect to these discoveries because, as I understand it, they were subject to a court order and the expectation of the order was that the discoveries be completed in or about that time.

[9] There were apparently some delays on the part of Mr. Michaud in dealing with Mr. Coles' request for discovery materials or funds for the discovery, the upshot of which was that by the time that Mr. Michaud had instructed Mr. Coles to proceed with the discoveries it was too late; no one was available to prepare for and attend at the discoveries. Accordingly, it was necessary to obtain an extension of the time for the discoveries, but Mr. Coles refused to proceed because of what he perceived as delays in responses from Mr. Michaud and wanted \$9,000 before he would be prepared to proceed further with the discovery process.

[10] It was in this context that Ms. Whitman provided Boyne Clarke with a cheque for \$9,000. The cheque was provided pursuant to a letter dated October 29, 2001, which specified that the funds were to be applied only to the discovery proceedings and not to the outstanding accounts. The cheque itself was marked with the words of Ms. Whitman as follows:

“As per October 29, 2001 letter, only to be used for completion of Lourensse et al discoveries and Cyril Michaud. On behalf of Cyril Michaud.”

[11] The Defendants' position was that the cheque was not accepted pursuant to these terms. Evidence was given as to subsequent conversations and correspondence

between Mr. Coles, Ms. Whitman and Mr. Michaud, but I am satisfied on balance that the funds were accepted pursuant to these terms. The question accordingly becomes whether or not those terms were satisfied.

[12] Following acceptance of the funds, the Defendants were able to obtain an extension for the completion of the discoveries. However, there were other applications and negotiations with respect to potential settlement, all of which took place in the context of the looming discoveries. The evidence was that Ms. Whitman, in fact, extended another \$5,000 in December 2001 for more work, again subject to terms, although Ms. Whitman agreed that these terms had been satisfied and she had no complaint with respect to that payment.

[13] The Defendants' position was that if the \$9,000 had been accepted according to terms, then those terms were satisfied by:

- a. the \$1,500 associated with getting an extension for the discoveries; and
- b. further activities in the context of the Lourensse action.

[14] There was more evidence given at the hearing concerning the subsequent negotiations and legal wrangling, which ended in the settlement of one of the actions. It is not necessary for me to get into that evidence, other than to note that there was another \$500 extended by Ms. Whitman to the Defendants in April 2002 and again there is no complaint from her with respect to this payment.

[15] The first notice of any complaint concerning the \$9,000 came in August 2003 in a letter signed by Mr. Michaud, not by Ms. Whitman. The letter itself puts the \$9,000 in the context of a large number of other payments and complaints concerning the same by Mr. Michaud, suggesting that what was really at issue was Mr. Michaud's lack of satisfaction with the Defendants' legal services to him, not just Ms. Whitman's payment.

[16] I understood as well that there is currently a complaint by Mr. Michaud against the Defendants regarding their services and that this complaint is being heard by the Barristers' Society of Nova Scotia.

[17] Having heard the evidence and reviewed the documents, I am satisfied that:

- a. Ms. Whitman was not a client of the Defendants, Mr. Michaud was;

- b. however, the \$9,000 was paid according to specific terms and conditions, as outlined above and the Defendants accepted the funds pursuant to those terms and conditions;
- c. accordingly, the Defendants were bound to ensure that the \$9,000 was only to be used "for completion of Lourensse etal discoveries and Cyril Michaud;"
- d. on the evidence and on reviewing the account, I am satisfied that the Defendants did satisfy those terms, in that:
  - i. they obtained an extension for the Lourensse discoveries;
  - ii. the services provided subsequent to that extension were all part and parcel of the discovery process being conducted in the context of the overall complicated set of legal proceedings being run by Mr. Michaud; and
  - iii. the fact that Ms. Whitman did not complain, and indeed made further payments, indicates that she was satisfied at the time that the terms associated with the \$9,000 payment had been met.

[18] I accordingly dismiss the claim.

Dated at Halifax, Nova Scotia this  
11<sup>th</sup> day of June 2004

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**ADJUDICATOR**  
W. Augustus Richardson

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