IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: Burchell Hayman Parish v Sirena Canada Inc., 2006 NSSM 28

Date: 20061121
Claim: SCCH 269454
Registry: Halifax

Between:

Burchell Hayman Parish

Applicant

v.

Sirena Canada Inc

Respondent

Adjudicator: W. Augustus Richardson, QC

Heard: October 25th, 2006 in Halifax, Nova Scotia.

Appearances: Jason T. Cooke, for the Applicant
Allan Fownes for the Respondent

By the Court:

[1] This taxation came on before me on October 25th, 2006. I heard the evidence of Ms Anastasia Makrigiannis on behalf of the applicant. She was the solicitor who had carriage of the respondent client's file. No evidence was called on behalf of the respondent client.

[2] At the commencement of the hearing a request was made that the hearing be closed. I granted that order.

[3] The applicant submitted two accounts for review:

a. November 21, 2005, for a total of $2,698.22; and

b. November 30, 2005, for a total of $1,768.94.

[4] The respondent objects to the reasonableness of these accounts, on the grounds that the total claimed far exceeds the reasonable cost of the service that was to be provided under the retainer. The respondent does not dispute the retainer, or the fact that some amount is owed for the services rendered. Its position is simply that the total account should more properly have been in the range of $1,500.00.

Background

[5] The respondent Sirena Canada Inc is a fish company operating in Newfoundland. Its counsel there was Mr Philip Warren. On or about July 20th, it issued a statement of claim against Fins "N" Claws Seafoods Limited, a customer which operated in Nova Scotia. The claim was for $61,582.85, being the outstanding balance on a simple contract for the sale of fish product to the defendant. The Newfoundland rules of practice permit service by way of registered mail. The statement of claim was served in that fashion. No defence was entered, and Sierna obtained default judgment on September 19th. Since Fins "N" Claws had no physical or operating presence in Newfoundland the judgment, not surprisingly, can back from the Sheriff's office unsatisfied.

[6] Sirena then decided to attempt to register its judgment in Nova Scotia under the *Reciprocal Enforcement of Judgments Act*, RSNS 1989, c.388, as amended (the "Act"). Section 3(2)(a) of the Act provides that an *ex parte* application can be made to register a judgement where the judgment creditor "was personally served with process in the original jurisdiction."

[7] Mr Warren contacted the applicant firm and spoke to Ms Makrigiannis. He indicated that while his client was "not going to spend $30,000 for a $62,000 judgment" it was prepared to pay something in the range of $1,500 to $2,000 to get its judgment registered under the Act in Nova Scotia. Ms Makrigiannis responded that the firm had had experience with a similar file in the past, which had cost "about $3,000," adding however that that cost had included execution as well simply registration. She advised that she would consider what was involved in an *ex parte* application on the default judgment, and would provide an indication of how much it would cost.

[8] On September 29th, 2005 Ms Makrigiannis received from Mr Warren a copy of the Statement of Claim, affidavit of service, default judgment and statement of verification from the Newfoundland Sheriff's office. He asked her to have the judgment registered with the Supreme Court of Nova Scotia under the Act. He asked to be notified once it had been registered so that "we can commence enforcement proceedings if necessary."

[9] Ms Makrigiannis acknowledged receipt of these materials on the same day. She advised that she would be "in a position to advise you on the appropriate course of action in registering the subject judgment within the Province of Nova Scotia shortly."

[10] Ms Makrigiannis then spent a total of 16.5 hours over the period September 30th to October 6th researching the law; consulting with more senior practitioners in the firm; a call to the court regarding the procedures to be employed in registering under the Act; preparing draft application materials; and drafting her eventual opinion letter to the client to that effect that registration would in fact probably not be possible under the Act. The problem was that the original default judgment had been obtained after service that was not personal service within the meaning of the Act. Accordingly, even though the default judgment was valid within the confines of Newfoundland, it did not meet the requirements under the Nova Scotia Act necessary to support an *ex parte* application to register the judgment in Nova Scotia. Instead, an action in ordinary course was required.

[11] Ms Makrigiannis reported her conclusion to Mr Warren on October 7th. She advised that in her view Sirena would be better off commencing a new action. He advised her to proceed. She then spent a total of 6.3 hours to research the case law regarding the enforcement of foreign judgments; conferring with more senior members of the firm; and drafting and issuing the originating notice and statement of claim. I pause here to note that the statement of claim was one and a half pages long, and was to all intents and purposes an exact copy of the Newfoundland statement of claim.

[12] The statement of claim was served. Fins "N" Claws entered a defence and counterclaim. Mr Warren provided Ms Makrigiannis with sufficient (and fairly compelling) evidence to make clear that the defence and counterclaim was almost certainly bogus; and would probably not withstand an application for summary judgment. Ms Makrigiannis spent 2 hours to consult with senior members of her firm, and then draft a defence to the counterclaim. At this point she came to the view that her statement of claim should also include a reference to the fact that default judgment had been obtained in Newfoundland. The amendment, and the correspondence and consultation surround that amendment, involved a further 6 hours of work on November 22nd and 23rd. The amendment involved the addition of three paragraphs which simply recited the fact of the Newfoundland action and default judgment.

[13] In her email recommending the amendment Ms Makrigiannis also recommended a summary judgment application, based in part on the materials that had been provided to her by

Mr Warren. In his email of November 22nd in reply Mr Warren approved the amendment. With respect to the summary judgment application, he said "go for it. That is the kind of aggressive action my client is looking for, the worst that can happen is that a normal trial be ordered."

[14] Ms Makrigiannis then sent, on November 23rd, a copy of the first account above-noted. The actual time (all hers) was discounted by $982.00 from a total of $2,982.00. GST and disbursements brought the total account to $2,698.22.

[15] On December 1st Mr Warren asked her to "provide your November statement of account and hold all action pending further instruction." Ms Makrigiannis provided the second account. As with the first, it was discounted, with $148.50 being removed from an original total of $1,648.50, for a total account (including GST and disbursements) of $1,768.94.

[16] The accounts were not paid. In an email dated January 20th the client objected that the time billed "by the lawyer is unreasonable as it does not take 40 hours to file a judgment; that's one week." Mr Warren, in a letter dated Janaury 31st, 2006, echoed that view. He offered on behalf of the client to pay $1,567.16 of the bill. The applicant refused to accept any reduction of its accounts, resulting in this taxation.

The Law

[17] Ms Makrigiannis was called to the Bar in 2005. Her hourly rate at the time was $105.00. She was a junior associate, just embarking on her legal career. The relative inexperience of a junior lawyer does not in and of itself warrant discounting its value. It does, however, raise the possibility that the lawyer might spend more time than necessary (that is, more time than would be reasonable for a reasonably experienced lawyer in the field) on performing the work in question. In my opinion on a taxation the standard to be applied in evaluating the reasonableness of a lawyer's account includes an assessment of the amount of time it would take a reasonably competent lawyer with several years experience to perform the services in issue. That of course is not the only factor. One must also consider the factors noted in Civil Procedure Rule 63.16(1). But given the central importance of time in a lawyer's account, a client is in my view entitled to ask that the time spent be reasonable in all the circumstances.

[18] The time spent by Ms Makrigiannis as set out in the two accounts totaled 44.1 hours. In my opinion this figure is too high for the work that was done. In arriving at this conclusion I take into account the following factors:

a. the client already had a default judgment that had been returned unsatisfied;

b. the client was prepared to hazard a few more thousand dollars in the hope of being able to realize something on the judgment or the debt; but

c. the client was clearly not prepared to spend large amounts of money in respect of a claim against a customer who might prove to be insolvent;

d. the claim itself was based on a simple contract;

e. the issue of whether or not registration under the Act was possible required some legal research that would not have ordinarily been required had the matter involved simply issuing a statement of claim; although

f. the research was relatively straightforward, given the plain wording of the Act, and the firm's previous experience in the area;

g. the statement of claim that was issued was simply a copy of the claim that had already been issued (at the client's expense) in Newfoundland; and

h. the amendment of the statement of claim was to include facts that in my opinion ought reasonably to have been included in the original statement of claim.

[19] In my opinion no more than 10 hours should have been necessary to:

a. review the Act to arrive at the conclusion that an *ex parte* application to register the judgment would probably not work;

b. draft and serve a statement of claim that pleaded a simple contract and the fact of the default proceedings in Newfoundland;

c. prepare a defence to the counterclaim; and

d. consider the utility of making a summary judgment application.

[20] I do not fault Ms Makrigiannis for spending the time that she did. It is clear to me from the materials that were filed that she is a careful and meticulous lawyer, and that her advice to the client was appropriate. However, it is equally clear that the reason she spent so much time is that, as a young lawyer just starting out, she lacked the knowledge, experience and confidence that a more senior lawyer would have; that she was, as a result, learning as she went; and that she accordingly spent more time on the file than a more senior lawyer would have done in the same circumstances.

[21] This of course poses a problem to a client. A client is entitled to expect good work (which it received in this case). But it should not be required to pay for the learning experience of a junior: *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (3d) 169 (Ont Assessment Officer); see also *Canada Trustco Mortgage Co. v. Homburg* [1999] NSJ No. 382 (TD) at paras.17-18. The test is simply whether the charge for a new lawyer's time is "fair and reasonable and stand the test of taxation, if requested:" *Re Toulany* [1989] NSJ No. 99 (TD) at p.4.

[22] Much was made of the fact that the client (or at least Mr Warren) instructed Ms Makrigiannis to take the steps that she did. That however does not relieve me of the duty to assess whether the account in respect of those required services was reasonable. And in my opinion a lawyer with the necessary experience would not have required more than 10 hours to do the work in issue.

[23] Of course, to say that is to assume a higher hourly rate (since more senior lawyers invariably charge at a higher hourly rate). It would not in my opinion be right to say in this case that an experienced lawyer could perform the work in question more quickly without taking into account the fact that that work would have come at a higher hourly rate. In this case I propose to deal with this point by assessing the value of Ms Makrigiannis work at 15 hours at her regular hourly rate of $105.00, for a total of $1,575.00. To that must be added GST at 15%. The disbursements, which I have reviewed, are reasonable.

[24] I accordingly certify both accounts as one account as follows:

a. fees for professional services $1,575.00

b. GST thereon $236.25

c. Disbursements (including GST) $442.16

d. Total $2,253.41

[25] I will make an order certifying the accounts in the above fashion.

Dated at Halifax, this 21st day of November, 2006

Original: Court File)
Copy: Claimant)
Copy: Defendants)

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W. Augustus Richardson, QC
ADJUDICATOR