SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Mizrachi v. MacEwen*, 2019 NSSM 49

Date: 2019-07-24
Docket: SCCH 489075
Registry: Halifax

Between:

Danny Mizrachi and Melissa Mizrachi

*Claimant*s

- and -

Patrick K. MacEwen on behalf of MacEwen McGuigan Giacomantonio Trial Lawyers

Defendant

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: in Halifax, Nova Scotia on July 23, 2019

Appearances: For the Claimants, self-represented

For the Defendant, self-represented

BY THE COURT:

[1] The Claimants are a husband and wife who found themselves charged with criminal offences in about September of 2018. They were in need of a good defence counsel. On the recommendation of a neighbour, they decided to contact the Defendant, Patrick MacEwen, whose personal cell phone number they were given.

[2] Ms. Mizrachi sent a text to Mr. MacEwen asking if he would be willing to speak to them. Although it was a weekend, he agreed and took her call. Both of the Claimants participated in the call on speaker phone. In a conversation that may have lasted as much as 45 minutes, they explained their situation. Mr. MacEwen suggested that they come into his office on September 17, 2018 for a meeting.

[3] The pivotal question for this court is whether the ensuing meeting was something for which Mr. MacEwen was entitled to charge. During the course of this meeting, further information was given to Mr. MacEwen, papers were signed designating him as counsel, disclosure documents were reviewed, and correspondence initiated with the Crown's office. A retainer was requested and provided, in the amount of $3,000.00. Mr. MacEwen testified that the meeting took about one and a half hours. The Claimants did not seriously disagree with that time estimate but suggested that much of the time was taken up by chit chat, rather than substantive matters. They figured that the business phase of the meeting was only about a half hour.

[4] Mr. MacEwen told the Claimants that he would bill them monthly for all time that had been spent, at a rate of $325.00 per hour plus HST. Mr. Mizrachi suggested that it was his understanding that billing would only occur if Mr. MacEwen had attended court, which is a proposition that I reject. That is simply not how lawyers operate, and Mr. Mizrachi is experienced enough to know that.

[5] As September came to a close, Mr. MacEwen issued a bill totalling $600.88, for his docketed time, plus HST plus a $35.00 one-time file administration charge. This bill was deducted from the retainer. When Mr. Mizrachi learned about this, he became very angry and ultimately the Claimants decided to terminate the retainer of Mr. MacEwen. Attempts to work out a compromise failed, and the balance of the retainer was refunded to the Claimants.

[6] The Claimants seek the return of the $600.88 they were charged. Their theory, as expressed in their claim, was that they were never told by Mr. MacEwen that he would be charging for their initial meeting/consultation.

[7] There is a vague understanding among members of the public that initial consultations with lawyers are (or should be) offered free. Indeed, I take notice that many lawyers (most prominently in personal injury matters) offer a free first consultation, usually limited in time to a half hour or, perhaps, an hour. Such arrangements are explicit, and they are a promotional tool for the lawyer as well as something of a public service. However, no lawyer is obliged to offer a free consultation. Mr. MacEwen says that he never told the Claimants that there would

be a free consultation, and that as a general practice he does not extend free consultations. He notes that his initial phone conversation with the Claimants was not charged. As far as he was concerned, when the Claimants came to meet with him and agreed to retain him, he was on the clock.

[8] I believe that the Claimants ought to have known that they had hired Mr. MacEwen to represent them, and they had no reason to expect him to volunteer his time. To the extent that they were mutually considering whether a retainer would occur, that phase was exhausted in their phone call prior to having the meeting.

[9] Mr. MacEwen testified that indeed there was a lot of "chit chat" on September 17, 2018, because Mr. Mizrachi (in particular) was very talkative. Mr. Mizrachi's demeanour in court bears that out, and Ms. Mizrachi did not dispute that her husband talked a lot.

[10] The Claimants had no reasonable basis to assume that Mr. MacEwen would spend time gratuitously during his workday just listening to their chit chat. Clients sometimes learn the hard way that they risk running up their legal bill by talking too much during meetings or writing lengthy letters or emails, all of which the lawyer must spend the time to digest.

[11] The onus was not on Mr. MacEwen to advise the Claimants that he would be charging for time spent during their initial meeting. The onus would have been on the Claimants to clarify that this was a free consultation, had they so believed.

[12] In the result I am satisfied that the Defendant was justified in billing the Claimants for his time, and that the time spent was reasonable under the circumstances. Although the matter was not launched as a taxation, I still have the obligation to assess the reasonableness of the account and I am satisfied that it was a reasonable account. I note that Mr. MacEwen spent time not only during the initial phone call, but in the days and weeks after the account was rendered, responding to texts from Ms. Mizrachi and dealing with a few outstanding issues, which time was (quite properly) not billed.

[13] Lastly, I want to address two criticisms that the Claimants levelled against Mr. MacEwen. One was to the effect that he ought to have advised them that he could not act for both of them, and that they needed to have separate counsel. It is far from clear on the facts that Mr. MacEwen had enough information at the outset to make that assessment. I have no doubt that an experienced defence counsel like Mr. MacEwen would have eventually had to consider whether separate representation was required. Secondly, they criticized him for allegedly misleading them about their prospects for qualifying for legal aid. Mr. MacEwen may not have been fully or currently informed on the subject of what income levels exceed the threshold for legal aid, but I do not believe it was a serious topic of conversation, but was rather something touched on in passing that did not change the fact that the Claimants had retained Mr. MacEwen to represent them.

[14] In the result, the claim is dismissed.

Eric K. Slone, Adjudicator