

CITATION: Lacerda. v. Benmor, 2010 ONSC 3707
COURT FILE NO.: CV-10-1444-CW
DATE: 20100628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Evelyn. Lacerda
v.
Steven Benmor

Applicant
Respondent

BEFORE: L. Ricchetti, J.

COUNSEL: E. Lacerda, self represented
W. Abbott, for the Respondent

ENDORSEMENT

[1] This is an application by Ms. Lacerda under the *Solicitor's Act* seeking to have the Respondent, Mr. Benmor's legal accounts assessed and to seek reimbursement of fees paid to Ms. Lacerda's new counsel to become familiar with her four year-old family law matter.

[2] Let me briefly deal with the second part of the application, the claim for reimbursement. This court has no jurisdiction to require Mr. Benmor to reimburse Ms. Lacerda's fees payable to her new counsel in a proceeding such as this. If Ms. Lacerda wishes to make such a claim, it should be made by way

of an action. Accordingly, the claim for reimbursement is dismissed without prejudice to Ms. Lacerda's right to commence an action to seek such damages.

[3] The sole remaining issue is the request by Ms. Lacerda that Mr. Benmor's legal accounts be assessed.

[4] Ms. Lacerda believes the accounts are excessive and contain errors. Ms. Lacerda extensively praised the legal work performed by Mr. Benmor during the family law proceeding in question. It is clear that the results of the family law proceeding far exceeded Ms. Lacerda's settlement offer and expectations. She expressed her desire that she would want Mr. Benmor to complete the work on the matter. As a result, the quality of Mr. Benmor's legal services is not an issue in this application.

The Facts

[5] Stephen Mr. Benmor is a solicitor. Ms. Lacerda retained Mr. Benmor on October 10, 2007 in connection with a family law dispute. A written retainer was executed by Ms. Lacerda. The retainer expressly provided that there was no guarantee as to the time or cost that would be involved in the retainer. Ms. Lacerda's evidence that Mr. Benmor had provided a significantly lower estimate than the final amount charged is not a relevant consideration for me particularly since the retainer signed by Ms. Lacerda stated "I further acknowledge that

Steven Mr. Benmor, Family Lawyer, has not provided me with an estimate of the total fees or disbursements that will be charged to me to complete this matter.”

[6] It is impossible for me, based on the information before me, to determine whether the legal fees rendered by Mr. Benmor were reasonable. The only issue for me is whether there are “special circumstances” which would cause me to exercise my discretion to have Mr. Benmor’s legal accounts assessed after the period set out in the *Solicitor’s Act*.

[7] As sometimes happens in family law disputes, the legal costs involved for Ms. Lacerda is a substantial portion of or exceeds the amounts at issue between the parties. This is one of those cases. At one point, the parties appeared to be \$15,000 apart in resolving the matter. There is no doubt Mr. Benmor strongly encouraged Ms. Lacerda to settle this matter before trial. Ms. Lacerda was at all times fully aware of the mounting legal costs involving in her taking the matter through trial.

[8] Mr. Benmor was retained just before mediation in October 2007. Ms. Lacerda had had a number of previous solicitors representing her in the family law matter. The matter did not settle at the mediation. The parties decided to proceed to an arbitration hearing. Despite numerous emails from Mr. Benmor urging settlement (which is fully documented in writing), Ms. Lacerda decided to proceed to the arbitration hearing. The arbitration commenced on March 3,

2008. It began a very lengthy and expensive process. There were numerous motions, exhibits, written arguments, facta and so on. There were some 16 lengthy days of hearing (many from 9 a.m. to 6 p.m.) with the hearing completed in September 2008.

[9] During the arbitration, in April 2008 Ms. Lacerda asked Mr. Benmor for a discount on her legal fees. Mr. Benmor's evidence is that he agreed to this on the understanding Ms. Lacerda would honour future accounts and pay them from her own resources or her recovery in the family law proceeding. Ms. Lacerda's evidence is that she raised the issue due to numerous errors in Mr. Benmor's legal accounts. The parties met. There is an email from Mr. Benmor which confirmed the agreement to reduce his April 10, 2008 account by \$9,679.02. There is no mention of "numerous errors" in the email. Mr. Benmor did bring to Ms. Lacerda's attention the provision of the *Solicitor's Act* regarding the assessment of accounts within 30 days.

[10] Everything appeared to be resolved between Mr. Benmor and Ms. Lacerda. Mr. Benmor continued to act for Ms. Lacerda in the family law matter.

[11] Mr. Benmor issued the following accounts – July 14, 2008, September 29, 2008, January 7, 2009 and March 6, 2009. Mr. Benmor suggests that the March 6, 2009 account was to be a final account. I reject this. There was no doubt the issue of costs would have to be dealt with. Further, there were monies

in trust to be dealt with after the arbitrator's decision. The March 6, 2009 legal account was an interim account.

[12] The arbitration decision was released on July 9, 2009. The arbitrator also awarded Ms. Lacerda costs. There was no time period. However, the costs submissions remain outstanding and Ms. Lacerda would prefer Mr. Benmor to do the costs submissions rather than the new counsel that she retained.

[13] Ms. Lacerda points to two interim costs motion awards by the arbitrator as evidence of the excess billing by Mr. Benmor. The arbitrator, in awarding partial indemnity costs on interlocutory motions, reduced the hours of Mr. Benmor and used words such as "not reasonable" and "excessive". Clearly, these were partial indemnity cost awards payable by Ms. Lacerda's husband to her for interlocutory motions. Very different considerations apply to costs awards on a partial indemnity basis and a solicitor and his own client's legal account. I disagree with Ms. Lacerda that the arbitrator's comments in reducing Mr. Benmor's hours on a partial indemnity assessment are relevant to the issues in this application and whether Mr. Benmor's legal accounts are reasonable on a solicitor and his own client basis.

[14] Subsequent to the arbitral award, Mr. Benmor brought a motion for a preservation order and was successful. Ms. Lacerda's husband appealed the arbitral award. Mr. Benmor moved to strike the appeal and obtain judgment for

Ms. Lacerda. The appeal was heard on December 16, 2009. Mr. Benmor was successful and was awarded costs of the appeal.

[15] On December 18, 2009, after the appeal was successful, Ms. Lacerda expressed reservations to Mr. Benmor about his legal fees, not just the outstanding March 2009 legal accounts but all of Mr. Benmor's legal accounts. Mr. Benmor responded to Ms. Lacerda reminding her of the agreement entered into in April 2009 and enclosing his account for the appeal in the amount of \$14,430.15. Mr. Benmor asked Ms. Lacerda to confirm that the real estate lawyer holding monies in trust for the family law dispute was authorized to release the funds to Mr. Benmor for his outstanding accounts and the arbitrator's outstanding accounts. Mr. Benmor proposed to defer payments of the December 18, 2009 account. That same day, Ms. Lacerda emailed the real estate lawyer and authorized him to pay the trust monies directly to Mr. Benmor for his outstanding account of approximately \$85,000 (relating to the March 2009 and earlier legal accounts). This did not include payment of the December 18, 2009 account.

[16] On December 21, 2009 Mr. Benmor prepared a formal Direction and Authorization and emailed it to Ms. Lacerda. On December 22, 2009 Ms. Lacerda executed the Direction and Authorization and forwarded it to the real estate lawyer and Mr. Benmor.

[17] Ms. Lacerda had not raised any questions regarding the March 2009 or earlier accounts before December 18, 2009. On December 18, 2009 Ms. Lacerda asked for a “hard copy” of the December 18, 2009 legal account. Mr. Benmor provided this on December 21, 2009 and said: “Please let me know what questions or concerns that you have regarding this or past accounts”.

[18] The costs submissions on the arbitral award remained outstanding and needed to be completed, the appeal having been dismissed.

[19] On December 30, 2009 Ms. Lacerda provided to Mr. Benmor a 69 page fax seeking modifications to invoices 1619, 1655, 1722, 1753 and 1944 (which are all old accounts which include the March 2009 and earlier legal accounts and legal account #1944 which is the December 18, 2009 account).

[20] Mr. Benmor responded on January 5, 2010 by email advising Ms. Lacerda that “Moreover, as I mentioned to you many times, the limitation period to review a solicitor’s account is 30 days. That expired many months ago. I did however, generously offer to provide you with a period of up to one hour to review same and then make any adjustments, if any, to the account delivered to you in December for the motion that you instructed me to bring (sic) to seek a dismissal of the ...I am open to sorting out any mathematical correction within the December account, as aforementioned.

[21] Ms. Lacerda responded the same day saying “the other portion of my email was to clarify your direction to me regarding addressing billing issues within 30 days” Clearly, Ms. Lacerda was aware of the 30 day period to assess legal accounts but somehow sought to question accounts which were many months, in some cases, years old and had been paid.

[22] Mr. Benmor and Ms. Lacerda continued to work on the costs submissions.

[23] On February 1, 2010 Mr. Benmor wrote to Ms. Lacerda and dealt with the 69 page fax from Ms. Lacerda regarding questions in all the prior legal accounts. In an effort to resolve the matter, Mr. Benmor agreed to reduce his December 18, 2009 account to \$7,500 and waive any interest on the old accounts. There is no doubt that a review of Mr. Benmor’s email suggested an overall resolution of all disputes regarding his legal accounts by the proposed reduction of the December 18, 2009 account.

[24] Ms. Lacerda wrote back on February 8, 2010 at 8:46 a.m. and said “I accept this offer with thanks”. She went on to seek an estimate of legal fees for the arbitral costs submissions. Unfortunately, while Ms. Lacerda accepted the offer, it was clear that she still felt she had been overcharged by Mr. Benmor and disputed Mr. Benmor’s claim for interest which he had agreed to waive in his February 1, 2010 correspondence.

[25] One would have expected this matter to be over and there would be no need for an assessment of Mr. Benmor's accounts.

[26] Mr. Benmor wrote the same day on February 8, 2010 at 12:37 p.m., advising that his offer was a comprehensive offer and not just for the December 18, 2009 account. Mr. Benmor decided he was terminating the solicitor client relationship. It does appear that Mr. Benmor received payment of the outstanding accounts that day (not including the December 2010 account) and decided it was the appropriate time to terminate the relationship.

[27] The parties continued to exchange emails until February 23, 2010. Ms. Lacerda wanted to maintain the solicitor client relationship and was prepared to attend at Mr. Benmor's office to pay the \$7,500 for the December 18, 2010 legal account. Ms. Lacerda stated "I have met and agreed to all of your payment conditions; You have been paid over 95% of amounts owed to you; We are now currently arranging for final payment; I don't see any reason why you will not finish the job...."

[28] On February 24, 2010 Ms. Lacerda paid the \$7,500 for the December 18, 2009 account. On February 25, 2010 Ms. Lacerda wrote to Mr. Benmor asking that he continue to act for her in completing the cost submissions.

[29] There is nothing in the correspondence which suggests any continuing issue over legal fees. Ms. Lacerda seems content with the resolution of the

amounts on the outstanding accounts. It appeared that the legal issues were resolved between the parties.

[30] However, Mr. Benmor refused to continue representing Ms. Lacerda.

[31] As a result, Ms. Lacerda wrote to the LSUC on February 26, 2010. Despite the extensive complaint, Ms. Lacerda does not complain regarding Mr. Benmor's legal accounts. Quite the opposite – she suggested that Mr. Benmor was fully paid on his legal fees. The only complaint was Mr. Benmor's decision to terminate their solicitor client relationship which Ms. Lacerda wished to maintain.

[32] While not in the evidentiary record, Ms. Lacerda advised the court that she spoke to the Assessment Office on December 29, 2009, January 4, 5 and 11, 2010 and February 15 and 16, 2010. She also acknowledged that she knew about the 30 day period to assess legal accounts.

[33] On March 24, 2010 Mr. Benmor served materials on Ms. Lacerda removing himself from the record as her counsel.

[34] Ms. Lacerda admits there is no document where there is any admission of errors in the accounts by Mr. Benmor.

[35] Ms. Lacerda filed this application on April 19, 2010.

Analysis

[36] Ms. Lacerda said that she did not have the legal accounts assessed because she was afraid that if she did, Mr. Benmor would cease to act for her. She fails to explain why she didn't have that concern back in April 2009 or regarding her 69 page fax raising questions about all of Mr. Benmor's legal accounts. Instead, it appears from the evidence that Ms. Lacerda was content with the resolution of the legal accounts in that she:

- a) Signed the Direction and Authorization;
- b) She accepted Mr. Benmor's offer to settle the account issues raised by reducing the December 18, 2010 account; and
- c) Paying the December 18, 2010 account.

[37] There are several major problems I have with Ms. Lacerda's position.

[38] First, Ms. Lacerda clearly knew she could have Mr. Benmor's legal accounts assessed within 30 days of receipt. She was expressly told of this in writing by Mr. Benmor in April 2009. Ms. Lacerda could have asked for an assessment on the first four dates she went to the Assessment Officer. She admits she didn't do so. I am not sure what Ms. Lacerda did when she went to the Assessment Office.

[39] Secondly, I have reviewed the “questions” Ms. Lacerda has regarding Mr. Benmor’s accounts, not to determine if the accounts are reasonable but to understand the type of issues Ms. Lacerda wishes to raise with an Assessment Officer. Let me repeat a few of Ms. Lacerda’s comments that she made next to the invoice entries;

- “Ex husband to pick up roller blades only. I should not be financial responsible for his actions.”
- Ms. Lacerda questions that emails were not sent on days she is billed for the email.
- “should only be .1 other email re retainer”
- “7H 2:30-9:30 overcharged .5”
- “Many hours of research considering these are standard in his daily practice and I am paying the high rate of an experience solicitor”
- “ a charge for this motion seems very high but I am satisfied to accept whatever Madam Rogers decides is reasonable”

[40] In summary, Ms. Lacerda now has questions regarding the overall amount of the legal accounts which were rendered in 2007, 2008, 2009 and

2010. There is no fraud or evidence that the legal accounts contain serious errors, mathematical or otherwise.

[41] Thirdly, and perhaps more importantly, Ms. Lacerda appeared to have resolved all of the legal account issues when she had gone through the legal accounts very carefully and had put together 69 pages of questions. She provided a Direction and Authorization to the real estate lawyer in December 2009. These amounts were paid to Mr. Benmor. Then Mr. Benmor offered to settle the December 2009 legal account, which offer was accepted by Ms. Lacerda. Then Ms. Lacerda paid the reduced account.

[42] Ms. Lacerda simply wants to go back over four years of legal accounts and have Mr. Benmor justify each entry. The fact the legal accounts have been paid is an indication that the “client accepts the amount of the account as being proper”: see *Randell and Robins & Robins* (1979), 22 O.R. (2nd) 642 (H.C.) and *Macdonald and Partners LLP and Peter Benevides*, (2009) unreported.

[43] I am satisfied that there are no special circumstances which would justify this court extending the period for Ms. Lacerda to assess these accounts. They were resolved by her. Now that Mr. Benmor does not want to do any future work for Ms. Lacerda, she wants to re-open all the accounts for review. This does not constitute special circumstances.

[44] The Application is dismissed.

Costs

[45] If the parties cannot resolve the issues of costs, either party seeking costs may make submissions on entitlement and quantum within 14 days, which submissions are limited to three pages with attached authorities and costs outline. Any responding submissions to be made within seven days thereafter with the same limitation on length.

L.Ricchetti, J.

DATE: June 28, 2010

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BEFORE: Ricchetti J.

COUNSEL: Evelyn Lacerda, in person,
W. Abbott, for the Respondent

ENDORSEMENT

Ricchetti J.

DATE: June 28, 2010