Alberta Court of Queen's Bench
Daviduk Montgomery v. Northern Alberta Institute of Technology Students Association
Date: 1988-10-31

Lefsrud (Coulter & Kerby), for the plaintiffs;

Lucas (Bishop & Fraser), for the defendants.

(Action No. 8803-18093)

October 31, 1988.

[1] FUNDUK, Master in Chambers: — This is an application by the plaintiff for summary judgment.

One

[2] Counsel for the defendant submits that the plaintiffs had commenced an action in Provincial Court, Small Claims Division, and had abandoned that part of their claim over $2,000.00. Presumably counsel relies on s. 36(2) of the **Provincial Court Act.**

[3] First, that is not pleaded in the statement of defence. The most basic rule of pleading should be etched in any counsel's mind, that rule (which is found in rule 104) being that the pleading shall state the material facts on which the party relies for his claim or defence.

[4] There is nothing in the **Rules,** or any judicial decisions, which say that submissions of counsel are an acceptable alternative to pleadings. They are not.

[5] This is not a mere matter of procedure. A trial court's jurisdiction is limited to giving a decision based on the issues raised by the parties in their pleadings: **Creditel of Canada Ltd. v. Terrace Corporation (Construction) Ltd. and Terrace Inn** (1983), 50 A.R. 311 (C.A.).

[6] Second, there is no evidence to support that submission. Submissions of counsel are not evidence. Counsel are not witnesses.

[7] If it is a material fact, plead it and prove it with proper evidence.

[8] I ignore the submission under this heading.

Two

[9] There are four invoices by the plaintiffs to the defendant, as follows:

(a) invoice 5015 - $ 281.90

(b) invoice 5016 - $ 733.00

(c) invoice 5017 - $ 803.40

(d) invoice 5018 - $ 3,202.00

[10] The evidence on behalf of the defendant is by a chartered accountant who had been with the plaintiffs until the end of August, 1987. The witness had, while he was with the plaintiffs, been doing the accounting work for the defendants.

[11] The evidence by the witness is in part as follows:

6. I have reviewed the plaintiff's invoice numbers 5015, 5016, 5017 and 5018 which are attached as Exhibit "A" to the affidavit of E. Michael Daviduk sworn on September 21, 1988 (hereinafter called the plaintiff's invoices).

7. Attached as Exhibit "G" to this affidavit is a copy of a letter I sent to the Assistant Dean of NAITSA, concerning the plaintiff's invoices.

8. Based on my assessment of the value of the services provided by the plaintiff to NAITSA, I believe that reasonable fees for the advice and services for which the plaintiff billed NAITSA in the plaintiff's invoices would not exceed the following amounts:

(a) invoice 5015 - $140.00;

(b) invoice 5016 - $240.00;

(c) invoice 5017 - $400.00; and

(d) invoice 5018 - $700.00

Exhibit G reads in part as follows:

"NAITSA - General - Invoice No. 5018

Analysis of the activity report shows that time charges of $1,800.00 for work done in January and February, 1987, is applicable to your June 30th, 1986, year end audit. You have been billed $4,170.00 for this audit, which compares to $4,130.00 for the 1985 audit. There was no intention of billing you further for the 1986 audit. An adjustment to write-off the $1,800.00 was shown on the billing records for August 31st, 1987, but it appears that this adjustment was not recorded.

The balance of $1,402.00 is for work done in August and September, 1987, and is applicable to work of preparing bank reconciliations and adjustments for the year ended June 30th, 1987. You have recently received an invoice from Zelazo & Company for similar work, which was discounted by approximately 50%. Consideration should be given to calculating fees to Daviduk Montgomery on the same basis, which would be $700.00

NAITSA - Athletic Board	-	Invoice No. 5015
NAITSA - Games Room	-	Invoice No. 5016
NAITSA - Store	-	Invoice No. 5017

These invoices are primarily for work done in August and September, 1987, and is applicable to the work of preparing bank reconciliations and adjustments for the year ended June 30th, 1987. As discussed above, we suggest you calculate the fees to Daviduk Montgomery at approximately 50% of the standard rates.

In conclusion, we feel the following are reasonable fees for the work done by Daviduk Montgomery.

Invoice #5015	$ 140.00
Invoice #5016	240.00
Invoice #5017	400.00
Invoice #5018	700.00
TOTAL	$1,480.00”

(emphasis mine)

[12] The $1,800.00 dispute is part of invoice 5018.

[13] There is a dispute about whether that was “written off” by the witness before he left the plaintiffs. That will have to be decided by a trial.

[14] Deducting the $1,800.00 from that invoice still leaves $1,402.00.

[15] The $1,402.00 and the remaining three invoices total $3,220.00.

[16] In December 1987, the defendant made the following payments to the plaintiff:

Invoice 5015	$140.00

Invoice 5016	$240.00
Invoice 5017	$400.00
Invoice 5018	$700.00

[17] Those payments are as recommended by the witness: Exhibit G.

[18] It should be noted that invoice 5016 is for $733.00. The witness says that the fees should be 50% of the “standard rate”. The witness does not quarrel with this invoice being the standard rate. He merely says that it should be paid by 50% only, which he apparently thinks is $240.00.

[19] I do not know what kind of simple mathematics this particular witness, who is a chartered accountant, espouses. I do know that 50% of $733.00 is not $240.00.

[20] As I have already said, carving out the $1,800.00 leaves a balance of $3,220.00. The defendant paid $1,480.00 on this balance.

[21] Aside from the arithmetic miscalculation as to what 50% of invoice 5016 is, the defendant has misjudged its position, no doubt because of the advice given to it by its witness.

[22] The defendant’s position is anchored on the evidence of its witness, whose opinion is found in Exhibit G.

[23] It is clear from the exhibit that the fees charged by the plaintiffs are “standard fees”, which I take to mean what would be a reasonable fee for the services rendered by a member of that profession. The exhibit concedes that.

[24] The sole ground relied on is that this particular witness would have given the defendant a 50% discount. Therefore, the reasoning goes, a reasonable fee would be 50% of the standard fee.

[25] Nonsense.

[26] The fact this particular witness is prepared to be a cut-rate Charlie for his fees is not a basis for saying that a reasonable fee by members of this particular profession is 50% of a standard fee.

[27] Just because this particular witness is prepared to sell his services for half their value is not a basis for saying that a reasonable fee by members of this particular profession is 50% of a standard fee.

[28] It is not pleaded, it is not suggested, and there is no evidence, that it is the practice in this particular profession that fees are discounted by 50%.

[29] The fact a member of a particular profession is prepared to sell his services at half price is not a basis for measuring what is a reasonable fee by members of that profession.

[30] After the witness left the plaintiffs, he managed to “attract” the defendant’s accounting business. One might reasonably conclude why this witness was prepared to give the defendant a 50% discount on his fees.

[31] Be that as it may, the ground relied on by the defendant, that cut-rate Charlie would have done it for half price, is untenable.

[32] The plaintiffs were entitled to be paid the $3,220.00. They received only $1,480.00. They are entitled to the difference, being $1,740.00.

[33] The plaintiffs will have summary judgment for $1,740.00 and costs on column one, limiting rule not to apply.

[34] Each invoice is a separate debt. However, even if it was just one debt, summary judgment can be granted for part of it, with a trial for the rest: **Mire v. Northwestern Mutual Insurance,** [1972] 2 W.W.R. 257 (Alta. C.A.); **Aristocrat Homes v. Jerry** (Alta. C.A., Edmonton 13239 and 13296, March 12, 1980).

Order accordingly.