2018 ONSC 1974
Ontario Superior Court of Justice

Hare v. Will Davidson et al

2018 CarswellOnt 4914, 2018 ONSC 1974, 290 A.C.W.S. (3d) 650

JANIS HARE (Applicant) and WILL DAVIDSON LLP and GARY R. WILL (Respondents)

Gibson J.

Heard: March 12, 2018
Judgment: March 26, 2018
Docket: 3681/17

Counsel: G. Levesque, for Applicant
G. Marsden, for Respondents

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Professions and occupations
IX Barristers and solicitors
IX.5 Fees
IX.5.b Agreements for fees
IX.5.b.iv Contingency fees
IX.5.b.iv.G Miscellaneous

Headnote

Professions and occupations --- Barristers and solicitors — Fees — Agreements for fees — Contingency fees — Miscellaneous
Client made claim for damages and accident benefits arising from two motor vehicle accidents — Client entered into retainer agreement with law firm on contingency fee basis which provided for fees of 33.3% of amount received — Client eventually accepted settlement of $350,000 in respect of accident benefits — Law firm ultimately charged client reduced contingency fee of approximately 27.8% — Client took position that law firm's fees were excessive — Client brought motion for order re-opening retainer agreement and for assessment of law firm's account — Motion dismissed — Client failed to demonstrate that there were special circumstances warranting reopening of contingency fee agreement and assessment of law firm's account — Client admitted that she understood and appreciated nature of contingency fee agreement — Given her financial circumstances client could not have paid lawyer on interim billing basis and contingency fee arrangement facilitated client's access to justice — Law firm assumed significant risk in accepting contingency fee arrangement — Retainer agreement included tort action and accident benefit claim — Based upon police investigation, client was liable for motor vehicle accident and were court to agree with that finding client would not be entitled to any compensation in tort action and law firm would not receive any payment for fees it incurred in advancing that action — Law firm was ultimately successful in advancing client's claim for accident benefits and authorization and direction to accept offer to settle that claim for $350,000 was reviewed by second independent lawyer and clearly communicated charge of $87,500 for legal fees plus HST — In end law firm charged reduced contingency fee at request of client.

Table of Authorities

Cases considered by *Gibson J.*:

Clatney v. Quinn Thiele Mineault Grodzki LLP (2016), 2016 ONCA 377, 2016 CarswellOnt 7878, 86 C.P.C. (7th) 1, 399

D.L.R. (4th) 343, 131 O.R. (3d) 511, 349 O.A.C. 286 (Ont. C.A.) — followed

Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP (2010), 2010 ONCA 709, 2010 CarswellOnt 8065, 92 C.P.C. (6th) 1, 325 D.L.R. (4th) 518, 269 O.A.C. 382, 104 O.R. (3d) 93 (Ont. C.A.) — considered

Henricks-Hunter (Litigation guardian of) v. 814888 Ontario Inc. (2012), 2012 ONCA 496, 2012 CarswellOnt 8969, (sub nom. *Henricks-Hunter v. 814888 Ontario Inc.)* 294 O.A.C. 333, 28 C.P.C. (7th) 227 (Ont. C.A.) — referred to

Raphael Partners v. Lam (2002), 2002 CarswellOnt 3077, 24 C.P.C. (5th) 33, 164 O.A.C. 129, 61 O.R. (3d) 417, 218 D.L.R. (4th) 701 (Ont. C.A.) — referred to

Statutes considered:

Highway Traffic Act, R.S.O. 1990, c. H.8
Generally — referred to

Solicitors Act, R.S.O. 1990, c. S.15
s. 25 — referred to

MOTION by client for order re-opening retainer agreement with law firm and for assessment of law firm's account.

***Gibson J.*:**

1 The Applicant Janice Hare made a claim for damages and accident benefits arising from two motor vehicle accidents, which occurred on October 17, 2005, and May 10, 2013. She signed a Retainer Agreement with Will Davidson LLP on February 10, 2010 in respect of the earlier accident on a contingency fee basis which provided fees of 33.3% of the amount received.

2 She subsequently accepted a settlement of $350,000 in respect of accident benefits pertaining to the October 17, 2005 motor vehicle accident.

3 By Account dated July 27, 2016, and Statement of Trust Funds, Will Davidson charged a reduced contingency fee of 27.78%. After payment of $4,987.50 to Fancy Barristers (the Applicant's prior counsel whose account Will Davidson had undertaken to protect), Will Davidson received a fee of $83,086.28. There was an additional amount of $10,531.61 as HST on the fees. Will Davidson is holding the sum of $83,196.43 in trust for reimbursement for Ontario Disability Support Plan (ODSP) payments received by the Applicant. By letter dated June 1, 2016, Will Davidson LLP forwarded to the Applicant a cheque for the sum of $167,928.57. The Applicant now contests that this is a fair and correct amount, and submits that the Respondent's fees are excessive.

4 The Applicant has expressed dissatisfaction regarding the services provided to her by the Respondents. Evidently, it was a difficult relationship. In 2017, the Applicant terminated her retainer with Will Davidson LLP in respect of the tort actions arising from the motor vehicle accidents on October 17, 2005 and May 10, 2013.

5 By Amended Notice of Motion dated February 9, 2018, the Applicant moves for an Order re-opening the Retainer Agreement, dated February 10, 2010, and that the costs, fees and disbursements of the Respondents detailed in their Statement of Account, dated July 27, 2016, be assessed; the whole or any part of the amount received by the Respondents be repaid to the Applicant; a sealing Order; and costs.

6 Where an amount has been paid under a retainer agreement, if it appears that special circumstances of the case require the agreement to be re-opened, the Superior Court of Justice may reopen it and order the fees and disbursements to be assessed: s.25 of the *Solicitors Act*.

7 "Special circumstances" are those in which the importance of protecting the interests of the client, and/or public confidence in the administration of justice demand an assessment: *Clatney v. Quinn Thiele Mineault Grodzki LLP*, 2016 ONCA 377 (Ont. C.A.) at para 86.

8 The Court has a broad discretion to reopen an agreement and order an assessment in regard to all of the circumstances of the case, but doing so is the exception rather than the rule: *Clatney* at paragraph 84.

9 At paragraph 88 in *Clatney*, the Court of Appeal identified that exercising that broad discretion involves consideration of the following non-exhaustive list of potential factors:

- the sophistication of the client;
- the adequacy of communications between solicitor and client concerning the accounts;
- whether there is evidence of increasing lack of satisfaction by the client regarding services relating to the accounts;
- whether there is overcharging for services provided;
- the extent of detail of the bills;
- whether the solicitor/client relationship is ongoing; and,
- whether the payments can be characterized as involuntary.

10 In *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP*, 2010 ONCA 709 (Ont. C.A.), at paras 30 and 31, the Court of Appeal held that generally the payment of an account implies that the client has accepted that the account was proper and reasonable. However, that presumption can be rebutted in one of two ways, either by showing that the account was not accepted as proper, or by showing that the account was excessive or unwarranted.

11 The Applicant submits that, in the present case, there are a number of factors which should incline the Court to find that there were special circumstances: she was not sophisticated; she says she did not receive the accident benefit account until December 11, 2017; she was vulnerable; the payment of fees was not voluntary; she was never advised of the effect of payment of the bill; there was a lack of communication; there was a lack of satisfaction by Ms. Hare regarding the services relating to the July 27, 2016 Statement of Account and the settlement of the accident benefits, as well as the tort actions; and, that in 2016 the relationship between Ms. Hare as client and Mr. Will as lawyer was ongoing. The Applicant also expresses dissatisfaction about the disbursements.

12 The Respondent contests that all these factors pertain here. Further, as the Respondent submits, the non-exhaustive list of potential factors regarding the finding of special circumstances identified in *Clatney* has developed primarily through disputes arising from interim accounts based upon hourly billing rather than from contingency fee arrangements. Consequently, the factors focus on circumstances regarding that type of retainer, which are less relevant in the context of contingency fee arrangements. Contingency fee arrangements do not require the same detailed accounts as interim billing. Contingency fee arrangements can only declared void or be cancelled and disregarded, where the court determines that it is either unfair or unreasonable: *Henricks-Hunter (Litigation guardian of) v. 814888 Ontario Inc.*, 2012 ONCA 496 (Ont. C.A.) at para 13.

13 Factors to be considered in making a determination whether a contingency fee arrangement is fair and reasonable ought to include: whether the client fully understood and appreciated the nature of the agreement; the time expended by the lawyer; the legal complexity of the matter at issue; the results achieved; and, the risk assumed by the lawyer: *Raphael Partners v. Lam*, 2002 CarswellOnt 3077 (Ont. C.A.) at paras 37 and 50.

14 In the present case, the Applicant admits that she understood and appreciated the nature of the contingency fee agreement. She had the option to pay hourly rates and chose the contingency fee agreement with the understanding that Will Davidson LLP would be paid one third of the recovered amount; if nothing was recovered, Will Davidson LLP would not be paid any fees. Given her financial circumstances, the Applicant could not have paid the hourly rates of an experienced lawyer on an interim billing basis. The contingency fee arrangement facilitated the Applicant's access to justice in this case.

15 As the Respondent submits, and I accept, Will Davidson LLP assumed a significant risk in accepting the contingency fee arrangement. The Retainer Agreement included the tort action and the accident benefit claim arising from the motor vehicle accident on October 17, 2005. Based upon the police investigation, the Applicant was liable for the motor vehicle accident. She was charged with a *Highway Traffic Act* offence (although this was ultimately dismissed). If a court agrees with the finding of the police investigation, the Applicant will not be entitled to any compensation in the tort action, or to a small amount, and Will Davidson LLP would not receive either any payment, or any substantial payment, for the fees it incurred in advancing that action.

16 Will Davidson was ultimately successful in advancing the Applicant's claim for accident benefits, achieving a settlement of $350,000. At the suggestion of the Respondents, the Applicant retained a second lawyer to review the Respondents recommendation to accept the offer to settle in this amount. The second lawyer opined that the file was well handled and agreed that the Applicant should follow the Respondent's recommendation to accept the offer. She ultimately did so.

17 The Authorization and Direction to accept the offer to settle for $350,000 clearly communicated to the Applicant the charge of $87,500 for legal fees plus HST.

18 The Respondents ultimately charged a reduced contingency fee. While the Retainer Agreement prescribed the contingency fee of 33.3%, at the request of the Applicant, the Respondents reduced the contingency fee to an amount that was approximately 27.78%.

19 By letter dated December 13, 2013, the Ministry of the Attorney General had advised the Applicant that she had the obligation of reimbursing the amount of $83,196.43 for benefits received since October 2005. I am satisfied that the Respondents acted properly in withholding the amount of $83,196.43 for reimbursement to the Minister of Finance of Ontario for payment of ODSP benefits. They had a statutory obligation to do so.

20 Ultimately, I consider that the Applicant has failed to demonstrate that there are special circumstances that should incline the court to exercise its discretion to reopen the contingency fee agreement and order an assessment of Will Davidson's account on an hourly basis. None of the particular circumstances of this case would adversely impact public confidence in the administration of justice.

21 The Applicant's motion is dismissed.

22 The Parties are encouraged to agree upon appropriate costs. If the Parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs). The Respondents may have 14 days from the release of this endorsement to provide their submissions, with a copy to the Applicant; the Applicant a further 14 days to respond; and the Respondents a further 7 days for a reply, if any. If no submissions are received within this timeframe, the Parties will be deemed to have settled the issue of costs as between themselves. If I have not received response or reply submissions within the specified timelines after the Respondents' initial submission, I will consider that the Parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

Motion dismissed.