Claim No: 307993

Date:20090707

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Spiteri v. Singleton & Associates, 2009 NSSM 41

BETWEEN:

Name Mark Spiteri Claimant

Name Singleton & Associates and Tom Singleton Defendant

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

DECISION

(1) This proceeding involves a Claim and a Counterclaim.

(2) The Claim is by Mark Spiteri (Spiteri) against Singleton & Associates and Tom Singleton (Singleton) for the amount of $1,000.00 plus Court costs. The reason for the claim is stated as follows:

> "Money owed from Retainer - work not done
> fails to respond to requests"

(3) The Counterclaim is by Singleton against Spiteri for an alleged outstanding balance due on an invoice rendered to Spiteri of $552.40 plus costs.

(4) In essence, this proceeding involves the taxation of a legal account by Singleton against Spiteri.

(5) At the heart of the dispute is a factual disagreement.

(6) According to Singleton, who produced his file materials to the Court, he had a conversation with Spiteri upon being retained, at which time, the issue of legal fees was discussed and he states that he provided an estimate of legal fees to Spiteri and, at the same time, advised Spiteri of his usual hourly rate and the fact that he was offering a 25% deduction which was standard for Military clients. There was no written Retainer Agreement entered into between the parties.

(7) Singleton dictated a Memorandum to the file which he says was completed on November 10, 2008, in which he makes reference to the details of the aforesaid conversation with Spiteri. According to Singleton's recollection and the Memorandum, he told Spiteri that it would be difficult to estimate the legal fees but typically the fee would range from between $2,000.00 and $4,500.00 and sometimes more, depending on what is involved.

(8) He proceeded to render services on Spiteri's behalf and, again, according to his recollection and the invoice which he says he subsequently rendered on January 12, 2009, the bulk of the services were performed between November 10 and November 20, 2008, with the exception of a brief telephone conference with Spiteri and the preparation of a letter to Spiteri regarding the termination of the retainer, a total of 0.4 hours only for services rendered on that date.

(9) Singleton acknowledges having receiving the sum of $1,000.00 from Spiteri which he says was a retainer and which was applied against the aforesaid invoice rendered on January 12, 2009, leaving a balance owing of $552.40.

(10) At the time that the invoice was rendered, although Singleton had spent 6.9 hours of time according to his records and the invoice, he only billed Spiteri for a total of 5 hours using the discounted rate for legal services.

(11) Spiteri's recollection is different in several material respects. He recalls that Singleton provided him with a quotation for legal fees as follows, namely, he would be charged $1,000.00 if the matter was dealt with outside of Court, however, if there was a need for a Court hearing, he would be charged $2,500.00. Despite this fixed fee quote, Spiteri recalls that he was also quoted an hourly rate by Singleton, the hourly rate being $325.00 per hour (not $350.00 per hour as recollected by Singleton and eventually applied on the invoice).

(12) Spiteri also claims to have sent two e-mails to Singleton on November 24 and November 26, 2008, respectively. Singleton denies having received those e-mails until re-sent to him on January 12, 2009, following the conversation with Spiteri. In those e-mails, he was

concerned that Singleton had requested an additional $1,000.00 retainer as he recalled having been provided with a quote of $1,000.00 to deal with the matter increasing to $2,500.00 if it went to trial. He implies in the e-mail that it was not necessary for Singleton to have appeared in Court personally as all that was accomplished was an adjournment and that he could have appeared on his own behalf. In the second e-mail, he requested that the file be ready for pick up together with any monies owed to him from the retainer. Singleton does recall having received an e-mail from Spiteri dated February 11, 2009, in which he refers to a phone conversation which occurred on January 12, 2009, and in which Spiteri states that he was filing a complaint with the Barristers' Society on the grounds of inaction by Singleton.

(13) In the February 11, 2009, e-mail, Spiteri makes no reference to Singleton's invoice dated January 12, 2009.

(14) He also threatened Court action "where I will be seeking all Court costs and additional costs."

(15) This action was commenced by Spiteri against Singleton on February 27, 2009.

(16) This case unfortunately involves an issue of poor communication between the parties. The issue for the Court to decide, however, is the terms of the contract between Spiteri and Singleton.

(17) As noted, there is no written Retainer Agreement. In Ross, Barrett & Scott v. Simanic, 163 N.S.R. (2d) 61, 487 A.P.R. 61, 15 C.P.C. (4th) 399, 1997 CarswellNS 347 (Ross Barrett), the Court stressed the importance of a written retainer or some type of written record outlining the scope of the lawyer's retainer and the anticipated remuneration as such Agreements provide an important justification of the fee or cost that is being taxed.

(18) In Ross Barrett, the Court held that the onus is on the lawyer to establish that the client's version is mistaken where there is a difference in recollection.

(19) The Court states as follows at paragraph 24 of the Ross Barrett case:

> "A rule has developed because of that duty: where there is no written retainer, and there is a conflict in

> the evidence of the lawyer and the client as to a term of the retention, weight must be given to the version advanced by the client rather than that of the lawyer."

and, further, at paragraph 25:

> "This is sometimes called a "rule of practice". It is not a rule of contract or of fiduciary obligation by which one party's version of the contract always prevails. The first part of Lord Denning's formulation is wrong. He said "... the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it." On the contrary, the ordinary rules of contract apply to a contract for legal services. The terms are to be found in the ordinary ways: by finding the intention of the parties through their contracting expressions understood in context, or by finding terms through implication according to the law of implied terms. The difference in this class of contract is that the lawyer asserting an unclear, parol retention is under an evidentiary disadvantage on account of his or her failure in duty. The lawyer bears a "special onus"."

(20) I conclude therefore that there is a heavy onus on a lawyer to disprove the client's version of events where a conflict exists and there is no written Retainer Agreement.

(21) If I accept Spiteri's version of events, then that is the end of the matter as I must conclude that there was a contract for a fixed price. If, on the other hand, I accept Singleton's version of events, then the issue becomes what is the reasonable and lawful fee that Singleton can charge for his services, that is to say, should he be paid any additional amount from Spiteri once the bill has been taxed and, if so, how much.

(22) With respect to the first question, I accept that Singleton has discharged the heavy onus to disprove the client's version of events in this case.

(23) Spiteri was not an unsophisticated consumer of legal services. He understood the concept of a retainer. He understood the cost of legal services. He knew the range of the hourly rate

that Singleton was going to apply (he thought it was $325.00 per hour). It was unrealistic for him to expect that this case with the complexity of issues involved could competently be resolved out of Court in three hours or so of Singleton's time. He knew or should have known that this would not be possible. His expectations were unrealistic. Also, it is not clear how he could believe that there was a fixed quote and yet at the same time, an hourly rate would be applied to the services being rendered.

(24) I conclude from all of the circumstances that Singleton explained to Spiteri, and Spiteri understood that the $1,000.00 initial payment was a retainer only and would be applied against future legal services. I accept Singleton's version of events that Spiteri understood that even if the matter were settled out of Court, the fee would likely exceed this amount. I conclude that Spiteri's recollection is colored by the fact that he was upset over the way that the retainer subsequently transpired and the manner in which he perceives he was dealt with by Singleton once the retainer was concluded.

(25) I do not doubt that Spiteri was willing to do some of the leg work himself if that would cut down on his legal costs. Singleton felt that there were reasons why he should attend Court with Spiteri on November 20, 2008, although Spiteri second guessed this in a subsequent e-mail to Singleton. Singleton explained his reasons to Spiteri on November 20, 2008, and I have reviewed the contents of that letter and conclude that Singleton was acting in Spiteri's best interests by appearing in Court as, among other things, it provided him with an opportunity to meet with the Crown Attorney to discuss the possibility of a conditional discharge, which would be of great advantage to Spiteri as he would not be left with a criminal record so, despite the fact that the ultimate result on that day was simply an adjournment of the case, the contact between Singleton and the Crown was ultimately of benefit to Spiteri. I conclude that Singleton's actions were reasonable and consistent with those of a competent solicitor in the advancement of Spiteri's interests.

(26) In his evidence, Spiteri was critical of the time that Singleton spent gathering information to provide to the Crown Attorney in regards to the possible disposition, however, again I accept Singleton's explanation that it was necessary to review the Crown disclosure materials provided by Spiteri and to summarize for Spiteri the matters which the Crown wanted to have before consenting to a conditional discharge. I believe all of these steps were advantageous to Spiteri and it is not reasonable for him to criticize Singleton in retrospect. Ultimately, Spiteri was able to obtain a beneficial disposition for himself, but I do not believe that the initial work done by Singleton on his behalf can be discounted in ultimately having matters favorably resolved.

(27) At the end of the day, what we are left with is Singleton who was preforming valuable services in the best interests of his client as any competent solicitor should and a client who wanted to cut costs and cut corners not being able to see the benefits that were being generated by virtue of those services.

(28) I do believe that it would have been a more prudent practice for Singleton to follow to have a written Retainer Agreement in place so as to avoid any confusion with the client but, as indicated, I do find that he has met the high burden on him in this case of disproving Spiteri's version of events.

(29) As for any alleged inaction by Spiteri after the fact in rendering an account and responding to Spiteri's request to release file materials, it is not necessary for the Court to weigh on these matters as they are matters which occurred after the rendering of the services and are not of assistance in determining the terms of the contract between the parties. It is, of course, open for Spiteri to pursue any possible breach of ethical duty that he believes may exist in this case, however, this is not the proper forum in which to pursue those issues.

(30) I will discount the account by a $24.30 for a Quicklaw charge added to the disbursements. I accept Singleton's explanation that he quickly reviewed the Quicklaw database to see if there were any recent cases dealing with conditional discharges at the time of the Court attendance in November 2008, however, he also added a charge to the bill of .4 hours for this service. The $24.30 Quicklaw charge was not an actual disbursement pertaining to the file and is duplicitous since there was a separate charge for the actual research performed. I reduce the account by the amount of the Quicklaw charge plus the HST applicable to this disbursement, for a total reduction of $27.46.

(31) I tax the account for the reasons provided at $524.94, inclusive of fees, disbursements and HST.

Dated at Dartmouth, Nova Scotia,
on July 7, 2009.

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Patrick L. Casey, Q.C., Adjudicator

Original Court File
Copy Claimant(s)

Copy Defendant(s)

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