In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 439

BETWEEN:

WAKEFIELD QUIN

Plaintiff

- and -

TANISHA RAMPERSAD

1st Defendant

and

RICARDO RAMPERSAD

2nd Defendant

Dates of Hearing: 21st September 2010
Date of Judgment: 20th October 2010

Mr. Richard Horseman for the Plaintiff; and
The Defendants in person.

RULING

INTRODUCTION

1. The plaintiff is a law firm suing its former clients ('the Rampersads') for fees. The sum claimed is $40,778.18 plus interest at 7.25% for services rendered between 27th October 2006 and 10th December 2009[1] in respect of a Partition matter which was conducted by a lawyer with the firm, Ms. Burgess-Howie. The defence is that the firm, through Ms. Burgess-Howie, agreed to waive the amount now claimed. It is not disputed that the work was done, and it is not said that the charges are unreasonable.

[1] That is the date in the Statement of Claim. In fact, the last properly claimable item is dated 18th December 2008.

2. The partition application concerned a residential property on Cobbs Hill Road. Mrs. Rampersad's grandmother had conveyed this to the Rampersads as to one half share, and to Mrs. Rampersad's mother and brother as to the other half share, the recipients holding as joint tenants in fee simple. Everyone lived in the property, which was divided into separate apartments that they occupied. There were various improvements which were paid for by mortgages, and there were issues over who contributed how much to what. Eventually the parties fell out over various differences which had arisen between them. Each side wanted to buy the other out. There was an agreed valuation of $825,000. The trial of the partition action was preceded by lengthy negotiations. At one point the respondents to the partition action offered to buy out the Rampersads for half of the agreed value, but the Rampersads decided to reject that as they wished to live in the property, which had a sentimental value for Mrs. Rampersad. They resolved, therefore, to take the matter to trial. Unfortunately, the trial did not go well for them. The learned trial Judge preferred the evidence of the other side, holding that the Rampersads were not as forthcoming as their adversaries and indeed "in some instances were evasive." In her judgment of 7th November 2008 the Judge held that the Rampersads were only entitled to a 35% share in the property, and should be bought out for that proportion of the agreed valuation less the cost of the outstanding mortgage over the property. This was financially disastrous for the Rampersads, who had three children to house and feed and now needed to find alternative accommodation.

3. In the end the net amount due to the Rampersads was $214,732.10. By that time they had found a house to buy, and the bank needed confirmation that the settlement would meet the down payment. It is their case that at that point Ms. Burgess-Howie agreed to take $10,000 for the legal fees. The firm then released a cheque for $200,000 from the proceeds of the settlement, which went straight to the Bank and was used for the property purchase.

4. There was no initial engagement letter. Ms. Burgess-Howie said that she first met the Rampersads at "the Centre", which is a *pro bono* legal clinic, and that they later came to her office. Throughout the active part of the engagement the firm submitted regular

invoices, showing the work done in the billing period, the amount carried forward from the previous bill, and the total amount due. These began on 30th November 2006, when the amount billed was $593.75. By 2nd November 2007 this had reached $11,513.27. The next invoice was 31st January 2008, when it had climbed to $19,454.40. The invoice of 29th February 2008 was in the sum of $24,541.90. By 2nd July 2008, with the trial underway, the total had reached $50,599.65. That of 9th September was for $55,088.40, and that of 10th December 2008, the final one issued during the active part of the retainer, was in the total sum of $55,650.90. Up to this point there is no dispute that the invoices were received by the Rampersads. There is then an invoice for 29th May 2009, which Mrs. Rampersad says that they did not receive. That brought the billing up to 18th December 2008 and shows two payments deducted by the firm from the amount retained from the settlement, being $10,000 on 16th January 2009, and $3,532.10 on 2nd April 2009. There is then a final invoice of 6th January 2010, which purports to include the cost of starting these proceedings, and which shows a further payment of $1,809.37, some or all of which is said to have come from the unused balance of a retention for Stamp Duty.

THE ISSUES

5. It is the plaintiff's case that it was agreed that $200,000 from the net proceeds of sale would be put towards the purchase of the Rampersads' new home, and that the balance of the proceeds would go towards the part-payment of the outstanding legal fees. Ms. Burgess-Howie says that there was "an understanding" that the balance of the fees would be satisfied in about six months time, after the defendants had become settled. She also says that "in order to hasten the payment" it was agreed to take off $10,000 from the then legal fees, but she denies that there was ever any agreement to waive the remainder of the fees. In cross-examination she said that she had gone to one of the partners who had approved this reduction, and she then reported to the Rampersads that she had been given permission to take $10,000 off the bill, and that she thinks that is what they keep referring to when they speak of her waiving the balance of the fees.

6. Ms. Burgess-Howie also says that in June 2009, which would we at the end of that six month grace period, she had an appointment with Mrs. Rampersad to determine what

payments could be made against the outstanding balance, and at that time the latter requested a further grace period. In cross-examination Ms. Burgess-Howie added that she spoke to Mrs. Rampersad who said that she had had difficulties getting people out of the new house, and had asked for more time, and that they were then given an additional grace period. There was then a telephone conversation on 9th November, when Mrs. Rampersad said that her husband would be getting back to Ms. Burgess-Howie soon. The defendants then failed to attend two appointments that were made in November 2009, and on 25th November 2009 Ms. Burgess-Howie sent them a letter before action saying that if they could not come to a "satisfactory arrangement" by 9th December then the plaintiffs would sue. There was then a meeting on 7th December, following that letter before action, when Mrs. Rampersad offered $100 - $200 per month, and Ms. Burgess-Howie responded by requesting evidence of income. That was not provided, and the writ was issued on 17th December 2009.

7. The defendants file identical witness statements, which appear to be that of Mrs. Rampersad, with which her husband agrees. She says that there were two meetings with Ms. Burgess-Howie after receipt of the judgment of 7th November 2008. At the first, immediately after it, she was very emotional and crying. Ms. Burgess-Howie told them that after deductions they would be left with approximately $230,000 and agreed that the case had gone terribly wrong, and they discussed an appeal, but at that point Ms. Burgess-Howie said that she would take only $10,000 for her legal fees, upon hearing which they decided not to appeal. That version is disputed. Ms. Burgess-Howie says that she said that the Judge had not found in their favour, not that it had gone terribly wrong. She denies any offer to reduce the fees, or that that led to the decision not to appeal. At this point I should note that the decision not to appeal was conveyed by Mrs. Rampersad in an e-mail of 20th November 2008, and there is nothing in that about any agreement to waive fees, nor anything to suggest that the decision was contingent upon such a waiver. It simply says:

> "Subject: Settlement
> Good day Ms Howie we will accept the settlement which was made by the courts.
> Thanks."

8. According to the Rampersads, the second meeting was after they had found a property that they liked. Mrs. Burgess-Howie then told them that the settlement figure would be even less than she had previously estimated, and would only be $214,732. This caused further upset, but the Rampersads allege that Ms. Burgess-Howie said "go get your house, we will only take $10,000 for the legal fees – it's really up to me", and she reassured them that they would walk away with $200,000.

9. At some point in this Wakefield Quin issued a letter, dated 17th November 2008. That was after judgment and before the e-mail of 20th November communicating the decision not to appeal. The letter read:

> "TO WHOM IT MAY CONCERN
>
> We act for Ricardo and Tanisha Rampersad in respect to a property matter.
>
> We estimate that we will be receiving approximately two Hundred Thousand Dollars ($200,000) net from the proceeds within 30 days of the transfer of the said property to the other parties, namely 8th December 2008."

10. The Rampersads allege that that letter was issued because they needed to know what they would get free and clear after everything had been deducted, including legal fees. That is what they say the inclusion of 'net' means. Mrs. Burgess-Howie says that it was issued at the Rampersads' request to show to the bank that was to advance the purchase price of the new property. It was the amount that the bank would get, but it had nothing to do with legal fees, which it had been agreed to defer.

11. As to the allegation that they had only agreed to defer rather than waive payment, Mrs. Rampersad says that they would not have agreed to that given their other commitments and the mortgage they were taking on, in the light of which there was no way that they could afford to pay the full sum. She does accept that she met with Ms. Burgess-Howie on 22nd June, and says that at that time she was told that Ms. Burgess-Howie's partners were putting pressure on her to get more money, and that she would accept a reduced fee of $20,000 - $24,000, and she agreed to wait until they moved into

their new home before meeting and discussing the matter further. That offer of a further deduction is not accepted by Ms. Burgess-Howie. Mrs. Rampersad also accepts that they met on 7th December, when she indeed offered $100 - $200 per month, which she says Ms. Burgess-Howie rejected. Mrs. Rampersad offered to prove that they could not pay more, and at that stage Ms. Burgess-Howie requested the proof of income, but she then instituted proceedings, the implication being that she did that before they could provide that evidence.

12. In cross-examination Mrs. Rampersad accepted the terms of the engagement and the receipt of the invoices, with the exception of that of 29th May 2009, when she says she was no longer living at that address. It was suggested that she had agreed to have the $14,732 balance of the proceeds applied to her bill, but she said that Ms. Burgess-Howie had agreed to accept the $10,000 and she did not know what had happened about the remainder. She said she had called Ms. Burgess-Howie about it, but had decided to leave it alone. She accepted it was their decision not to accept the offer to buy them out, but also asserted that they did not get the guidance they felt they should have and that the case was not presented well on their behalf. She accepted that they had also failed to pay their half-share of the valuation costs. She was shown e-mails from February and June 2008 promising to pay that forthwith, but accepted that they had failed to do so. However, she denied that she was avoiding her financial obligations, but protested that they lived pay-check to pay-check. When asked why she had offered to make installment payments in December 2009 she said that she just thought that she had to do it, and that she was just trying to be compliant, and then she got advice from Legal Aid that she did not need to do that.

13. Mr. Rampersad added little. He had not been involved in the dealings in late 2009, and had not seen the letter before action of 25th November 2009, leaving all that to his wife. A friend of Mrs. Rampersad's gave evidence for the defendants. She had been present as moral support at one of the meetings in 2008 after the judgment when the questions of how much the Rampersads would get and whether to appeal had been discussed. She had taken notes at the meeting, but had since disposed of them. Although

she recalled the decision not to appeal, she did not recall what specifically had been discussed about legal fees. She did not, therefore, support the defendants' case.

FINDINGS

14. The fee agreement is evidenced by the invoices, which were submitted regularly when the account was active, without complaint or demur, and I accept that that establishes the necessary contractual arrangement. Nor is there any argument that the work was not done, or was done so badly that the plaintiffs are not entitled to payment. The matter turns solely upon whether the agreement alleged by the Rampersads can be made out. The burden of proof of such an agreement is on them, and it is not for the plaintiffs to prove that it did not occur.

15. There is no documentary evidence of such an agreement, unless the letter of 17.11.08 can be construed as such. Indeed, there is very little documentary evidence either way. On the one hand Ms. Burgess-Howie does not appear to have been in the habit of minuting her meetings with the client in file notes. Nor are there any written instructions to the accounts department (at least none have been disclosed) about the arrangements which led to the invoice of 29th May 2009. On the other hand, there is nothing from the Rampersads to record the alleged agreement to defer payment.

16. At the end of the day, I think that the absence of documentation is against the Rampersads. I also think that the e-mail conveying their instructions not to appeal does not support their version that that was only done because of the offer to waive the fees. I also consider that the retention of $14,732.10, rather than simply $10,000, from the settlement sum tells against the agreement that the Rampersads assert, as does Mrs. Rampersad's initial reaction on being chased up for payment in June 2009. Had there been such an agreement, I would have expected her to assert it. Similarly, for the events in December 2009, when Mrs. Rampersad accepts that she offered a small monthly payment. Indeed, the allegation that there had been an agreement to waive fees did not appear in a written form until March 2010, when the defendants applied to set aside the default judgment which they had by then allowed to go against them.

17. On balancing the probabilities, therefore, I find that the defence fails, and I give judgment for the plaintiffs. In doing so, I give the defendants credit for the $10,000 deduction, which Ms. Burgess-Howie accepts (and indeed asserts) that she offered. It is accepted that the cost of initiating these proceedings, which was billed to the Rampersads in the invoice of 6th January 2010, is not properly claimable. Deducting that from the sum then otherwise due, after giving credit for all sums attributed to the debt out of the remaining retention from the settlement proceeds, is where the principal sum of $40,778.18 claimed in the statement of claim comes from. That leaves $30,778.18 after the credit for $10,000. I give judgment in that amount.

18. The plaintiffs claim interest at the rate of 7.25%. As there is no engagement letter, there is no specified contractual rate of interest. In such a case the plaintiff is only entitled to interest at the rate of 7% from the period beginning 6 months after the date of delivery of the account: see s. 4 of the Interest and Credit Charges (Regulation) Act 1975[2]. In calculating interest the $10,000 waived by Ms. Burgess-Howie should be attributed to the earliest billings, and the payments deducted from the sale proceeds (being $15,341.47) to the next earliest billings. The plaintiff should recalculate interest on that basis, and submit the calculation when they lodge the final judgment for signature.

19. I will hear the parties on costs.

Dated this 20th day of October 2010

Richard Ground
Chief Justice

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[2] **Interest on accounts rendered etc**
4 (1) Where an account has been rendered of moneys owing then in the absence of any agreement providing for the payment or non-payment of interest thereon the unpaid balance of such account shall bear interest at the statutory rate from the expiration of six months from the time of the first rendering of such account until the debt is satisfied.
(2) For the purposes of this section an account sent by post shall be deemed to have been rendered at the time when it would be delivered in the ordinary course of post until the contrary is proved.