



# Civil Resolution Tribunal

Date Issued: November 19, 2018

File: SC-2018-000016

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Wiebe Wittman El-Khatib LLP v. Franklin*, 2018 BCCRT 739

B E T W E E N :

Wiebe Wittman El-Khatib LLP

**APPLICANT**

A N D :

Nancy Franklin

**RESPONDENT**

---

## REASONS FOR DECISION

---

Tribunal Member:

Shelley Lopez, Vice Chair

## INTRODUCTION

1. This dispute is about payment for legal fees. The applicant law firm, Wiebe Wittman El-Khatib LLP, claims \$3,988.04 plus contractual interest of 24% per year for 2 outstanding invoices.

2. The respondent client, Nancy Franklin, says she does not owe any money. The applicant is represented by Suzan El-Khatib, one of the respondent's partners and the lawyer who acted for the respondent. The respondent is self-represented.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
4. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. In the circumstances here, I find that I am properly able to assess and weigh the documentary evidence and submissions before me. Further, bearing in mind the tribunal's mandate that includes proportionality and a speedy resolution of disputes, I find that an oral hearing is not necessary. I also note that in *Yas v. Pope*, 2018 BCSC 282 at paragraphs 32 to 38, the BC Supreme Court recognized the tribunal's process and found that oral hearings are not necessarily required where credibility is in issue.
5. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under tribunal rule 126, in resolving this dispute the tribunal may: order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

7. The issue in this dispute is to what extent, if any, the applicant law firm is entitled to payment of \$3,988.04, plus 24% annual interest, for its outstanding invoices for legal services.

## **EVIDENCE AND ANALYSIS**

8. In a civil claim such as this, the applicant bears the burden of proof, on a balance of probabilities. The parties each provided a large volume of evidence, almost 200 items in total including multiple versions of lengthy affidavits. While I have read everything, I have only addressed the evidence and arguments to the extent necessary to explain my decision.
9. The applicant claims payment of its legal services account, based on the parties' retainer agreement. The respondent effectively says the applicant did not do the work properly and was negligent, and she did not receive value for it.
10. I find the applicant's evidence amounts to a partial 'file dump' with 114 pieces of evidence provided. Its submissions largely consists of a tally of the number of items and emails in the file. As discussed further below, I find the applicant does not adequately address the necessity, quality, or timeliness of the work provided.
11. Further, the applicant did not provide a reply to the respondent's allegations of delay and wasted efforts due to Ms. El-Khatib's failure to file the court applications on time and with adequate notice to opposing counsel. The applicant also did not provide a reply to the respondent's allegations of repeated delays and failure to communicate.
12. I accept that Ms. El-Khatib was delayed repeatedly in dealing with the legal matters and in responding to the respondent. She acknowledged some delay in February 2017. I also accept that Ms. El-Khatib knew from at least November 2016 that the respondent needed money and she wanted to press forward with her application for funds quickly.

13. The relevant legal test is whether the applicant's time was reasonably spent and authorized for the types of activities described, and to some extent whether the respondent received value for the work. This is similar to the approach used by the BC Supreme Court Registrar, as set out in section 71(2) and (4) of the *Legal Profession Act*, although I acknowledge such a review now appears to be out of time.
14. I turn then to the parties' agreement and the applicant's accounts. In its application for dispute resolution, the applicant stated the respondent hired it in October 2015 and signed a retainer agreement. However, there is no retainer agreement before me. I have no evidence about the agreed billable rate. I have no evidence about any agreement on interest on late payments.
15. Broadly speaking, the applicant's services related to the respondent's dispute with a third party over the dissolution of a company and access to money from that company. Based on the evidence before me, the applicant's legal work revolved around 3 things: a Response to Petition for Liquidation, the respondent's application for funds out of the company at issue in her litigation, and dealing with settlement offers with opposing counsel. While the applicant said the retainer began in October 2015, the evidence before me begins in around June 2016, with most of the emails and court documents being done between October 2016 and March 2017. The parties' relationship ended on March 24, 2017.
16. The applicant's 2 accounts at issue in this dispute are: 1) #9531, dated January 31, 2017, for \$4,431.26, and 2) #9743, dated April 25, 2017, for \$433.19. Invoice #9743 has 2 entries dealing with settlement offers, dated February 10 and March 7, 2017. Invoice #9531 has 12 entries between November 9, 2016 and January 23, 2017. The work describes meetings with the respondent, revising her affidavit, revising her notice of application, reviewing settlement offers, and corresponding with opposing counsel. There is no time breakdown in the accounts per entry or work description, so I have no evidence before me as to how much billable time was allocated to each task.

17. The 2 invoices total \$4,864.45, exclusive of any interest. However, on January 1, 2017, the applicant had applied the respondent's \$754.50 trust balance to invoice #9531, leaving a \$3,676.76 balance. Therefore, the net balance for the combined 2 accounts totals \$4,109.95, exclusive of interest. I am unable to reconcile the \$121.91 discrepancy between this \$4,109.95 and the \$3,988.04 (plus interest) claimed in this dispute.
18. I find the evidence shows the respondent made the following payments to the applicant, about \$1,400 of which was used to pay other invoices not at issue in this dispute. The respondent's evidence of payments was also not disputed, as the applicant chose not to provide a reply submission. Those payments were as follows:
- a) November 4, 2015: \$1,000 retainer
  - b) August 12, 2016: \$2,000
  - c) September 21, 2016: \$1,000
  - d) March 16, 2017: \$750, "more funds" was requested by Ms. El-Khatib on March 15, 2017 because "my firm wants additional funds to be received in order for me to attend" the March 31, 2017 application. Emails show the respondent sent "a deposit", and I find it is undisputed that it was \$750. The March 31, 2017 hearing did not take place.
19. There are different versions of the applicant's January 31, 2017 "statement of trust", with one showing a \$1,000 retainer from the respondent on November 4, 2015 and \$1,000 received on September 21, 2016, and the other does not. The applicant provided no explanation for this discrepancy, although it appears the balance comes out the same. I say this because the version that does not show those 2 retainers totaling \$2,000 shows an opening \$2,000 trust balance and a variety of small payments between December 15, 2015 and September 30, 2016 against other invoices, and \$754.50 from trust on January 31, 2017. In both versions, the January 31, 2017 statement shows this left \$0 in trust. However, neither version

shows the respondent's \$2,000 payment on August 12, 2016. I also have no explanation before me about this discrepancy.

20. The applicant's April 25, 2017 "statement of trust" shows an opening trust balance of \$2,165.67, with \$165.67 having been transferred into trust on January 25, 2017 from another file. Yet, that \$165.67 was accounted for in the January 31, 2017 trust statement and its net zero trust balance. The April 25, 2017 statement shows the same payments between December 15, 2015 and January 31, 2017, and does not show the \$1,000 September 21, 2016 payment nor the \$750 paid on March 16, 2017. The documentary evidence before me supports the respondent's position about her payments.
21. The applicant's May 29, 2018 "reminder notice" for the 2 outstanding invoices shows a net balance owing of \$3,359.95 plus \$983.78 in interest (at 24% per year), for a total balance owing of \$4,343.73. The net balance takes into account a payment of \$1,504.50 towards invoice #9531, but that figure does not match the evidence of the respondent's payments, as discussed above. I infer the \$1,504.50 is a total of the \$754.50 payment from trust and the \$750 paid by the respondent on March 16, 2017. However, the applicant has provided no other record of receiving that \$750, such as in the April 25, 2017 "statement of trust". Further, I am unable to reconcile the \$3,359.95 net balance (exclusive of interest) with the \$3,988.04 balance (exclusive of interest) that is claimed in this dispute. I find the discrepancy lies at least in part due to respondent's payments not being accurately reflected in the applicant's accounts. Also, the \$750 was arguably provided for the specific purpose of the March 31, 2017 hearing, which never took place. Yet, the applicant applied that sum to the respondent's account. Given these accounting discrepancies, I find the applicant's evidence unreliable in terms of monies owed.
22. I turn then to the applicant's evidence of the work it performed for the respondent.
23. The applicant submits that since November 1, 2016, it spent a significant amount of time on drafting pleadings and in communicating and meeting with the respondent. In particular, applicant says there were 3 filed affidavits, a filed notice of hearing and

notice of application. The applicant says it prepared 2 draft settlement response letters, 8 draft notice of application, an additional draft affidavit of a third party, 7 draft affidavits of the respondent, plus 6 “affidavits #2” of the respondent. However, I find the respondent drafted the bulk of the content of her affidavits #1 and #2, with Ms. El-Khatib providing suggested edits.

24. A central issue is that the respondent had only one substantive application (to seek funds) of her own. However, the first time Ms. El-Khatib served it in December 2016, I find she failed to provide adequate notice under *BC Supreme Court Rule 8-1(8)* and opposing counsel refused to shorten the time required for service. Therefore, the application did not proceed in December 2016. This then required the respondent’s affidavit #2, to set out her more dire financial circumstances. The application did not proceed in March 2017, because for a second time Ms. El-Khatib failed to provide sufficient notice to opposing counsel. Based on the evidence before me, the respondent’s application for funds was never heard.
25. I find the respondent received no value from the applicant’s efforts in preparing the application for funds and in drafting the related affidavits, because the application was never heard due to Ms. El-Khatib’s failure, twice, to provide sufficient notice.
26. The applicant also says it exchanged about 56 separate email threads with the respondent between November 2, 2016 and April 28, 2018. However, a large number of these emails appear to be the respondent repeatedly trying to obtain a response from Ms. El-Khatib. Because the applicant’s invoices do not have a breakdown for the items billed, I do not know how much of the applicant’s invoice relates to “attempts to contact” emails.
27. In addition, the applicant says it incurred disbursements for searches and filing the various pleadings and applications, for a total of about \$460. This is in addition to the applicant’s various disbursements for courier charges and \$581.30 in photocopying charges in invoice #9531. While the applicant generally submits these charges were necessary and valid, as noted above the applicant chose not provide a reply submission to the respondent’s submission that the court applications did

not proceed due to Ms. El-Khatib's delay and failure to give adequate notice. Further, it is unknown to what extent the photocopying charges are related to those court applications that never proceeded. I say the same about the filing expenses and searches. The applicant has also provided no explanation for why there was such a high photocopying charge.

28. As referenced above, I find that the applicant failed to communicate with the respondent in a timely fashion. I note Ms. El-Khatib's February 9, 2017 apology for her delay and that she was going to offer the respondent a discount because of it. However, given the respondent had terminated her services that morning, Ms. El-Khatib wrote she would have to bill the respondent to date and not release the work product until she was paid. In response, the respondent asked to see the various court documents she had been requesting for a few weeks. The parties then continued their prior working relationship. The discount never was applied.
29. On March 1, 2017, not having received a response as requested from Ms. El-Khatib for a couple of days, the respondent emailed not to spend any time on a counteroffer, as the respondent had sent it herself. This is some evidence that the applicant's work on the settlement negotiations was of little value to the respondent, because the respondent ended up sending a counter-offer herself.
30. On March 11, 2017, the respondent sent corrections to her application for funds, and asked that it be filed as soon as possible. On March 14, 2017, Ms. El-Khatib advised she was successful in obtaining a hearing date for May 23, 2017. However, the weight of the evidence before me indicates that the May 23, 2017 date was set for the hearing of the opposing party's Petition for Liquidation, rather than the respondent's application for funds. It is not clear to me whether the error was the applicant's or the other party's, but I accept that the mix-up was a surprise to the respondent. Again, the applicant chose not to provide a reply submission. From the respondent's perspective, this was now the 3<sup>rd</sup> lost court date for her application for funds.



31. In all of the above circumstances, given the absence of a retainer agreement in evidence, the accounting discrepancies, the lack of value in the applicant's work relating to the respondent's application for funds, I find the applicant has not proved it is entitled to the outstanding balance claimed. I also note I have no evidence before me that the parties agreed to 24% annual interest on outstanding accounts, as claimed by the applicant.
32. Given my findings above, I find the applicant has not proved it is entitled to payment of the outstanding balance as claimed. I note that even if I had found at least some of the invoice amounts were payable, I would not have awarded the 24% contractual interest claimed, as there is no evidence before me that the parties agreed to that interest rate. As noted above, there is no retainer agreement. As set out in *MacAdams Law Firm v. Truong*, 2014 BCSC 184, agreements for interest on outstanding legal fees must be unequivocal to be enforceable.
33. The applicant was unsuccessful. In accordance with the Act and the tribunal's rules, I find the applicant is not entitled to reimbursement of tribunal fees or dispute-related expenses.

## **ORDER**

34. I order the applicant's claims and this dispute dismissed.

---

Shelley Lopez, Vice Chair