

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)	
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JEAN SEBASTIEN AUGER)	Joseph R. Gouveia , for the Applicant,
Applicant)	Responding Party
)	
- and -)	
)	
JULIAN HELLER AND ASSOCIATES)	Julian Heller , for the Respondent, Moving
Respondent)	Party
)	
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)	HEARD: April 3, 2009
)	RELEASED: April 30, 2009

2009 CanLII 21489 (ON S.C.)

KELLY J.

REASONS FOR DECISION

[1] This is a motion by Julian Heller and Associates (“JHA”) to oppose the confirmation of the Report and Certificate of Assessment of Assessment Officer Moquin dated December 19, 2007. JHA seeks an order directing the proper amount to be assessed.

The Procedural Background

[2] The assessment in question arises from legal fees incurred in the forced sale of a condominium unit by York Condominium Corporation No. 46 (“YCC 46”) for non-payment of common area expenses and maintenance fees by the condominium owners, Mr. Jean Sebastian Auger and Ms. Nathalie Singh-Ryder.

[3] Extensive legal proceedings were required in order to take actual possession of and sell the condominium unit which included injunction proceedings, an appearance before the Divisional Court and the Ontario Rental Housing Tribunal.

[4] Following the sale of the unit on June 28, 2002, Mr. Auger brought an application for an assessment on March 26, 2004. It was heard by Pardu, J. on September 27, 2004 and granted. The Appointment for the Assessment was taken out by Mr. Auger in April, 2006.

[5] The Assessment proceeded on February 20 and 21, 2007. The Reasons for Decision were released on November 2, 2007. Further Reasons were released on December 19, 2007 regarding the costs of the Assessment together with the Certificate of Assessment.

[6] The Certificate of Assessment reduced the fees from \$37,743.79 to \$31,252.87. The Assessment Officer awarded costs of the assessment to Mr. Auger in the amount of \$2,915.00.

[7] The reduction of fees from \$37,743.79 to \$31,252.87 (\$6,490.92) represents a decrease of 17.2% of the original fees charged. As a result of the Order of Pardu, J. in 2004, there was also a further amount of \$3,500.000 owed to Mr. Auger for the costs of the motion to obtain the order for assessment, as the reduction of the Assessment Officer exceeded the 15% threshold set by Pardu J. on consent of the parties.

[8] JHA has brought this motion alleging that the following reductions by the Assessment Officer were improper:

Item	Amount
Legal Research of 23.3 hours at \$130 plus GST.	\$3,241.01
Attendance of Mr. Brett Rideout (an associate at JHA) at hearings also attended by Mr. Heller on October 10, 2001 and November 9, 2001 for two hours at an hourly rate of \$130 plus GST.	\$ 278.20
Travel time of Mr. Rideout for various matters.	\$ 208.65
“Write ups” on the accounts.	\$1,608.71
Work completed by Ms. Khan (an associate of JHA) for 0.8 hours at an hourly rate of \$120 plus GST.	\$ 102.72
Work completed by Ms. Kuze (an associate of JHA) for 2.5 hours at an hourly rate of \$165 plus GST.	\$ 444.37
Total:	\$5,883.66

The Issues

[9] The issues to be decided by the Court in this motion are as follows:

- (a) Did the Assessment Officer make any errors in principle that would result in this Court reversing her decision?

(b) Do the facts of the Assessment warrant the exercise of the Court's discretion to reverse the Decision of the Assessment Officer, or parts thereof?

a. Did the Assessment Officer make any errors in principle that would result in this Court reversing her decision?

[10] To be successful, the party opposing confirmation of the Assessment Officer's Report and Certificate needs to establish that:

- (i) the Assessment Officer made some error in principle;
- (ii) there was some excess or absence of jurisdiction; or
- (iii) there was some patent misapprehension of the facts.

In addition, where the award is not satisfactory on all of the evidence, it is open to the court to vary the award. (See: *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. S.C. H.C.J.) at para. 10.)

[11] Counsel for Mr. Auger submits that JHA has not established that the award is unsatisfactory in the circumstances. He takes the position that the Decision of the Assessment Officer was careful and balanced the interests of the solicitor with those of Mr. Auger to arrive at a reasonable fee. I agree with Counsel to a point.

[12] The bulk of the argument before me dealt with the reduction of legal research and Mr. Rideout's attendance at two motions with Mr. Heller. Counsel for Mr. Auger submitted that the Decision of the Assessment Officer regarding legal research was sound because:

- (a) JHA is a law firm that routinely acts in enforcement proceedings regarding condominiums;
- (b) The overall time spent on the file more than compensated JHA for the work completed on the file;
- (c) Assessment Officers are loathe to award research time unless the solicitor shows that it was complex;
- (d) Research will benefit other clients and the firm in the future; and,
- (e) The onus is on the solicitor to show that there was a need for the research.

[13] The proceeding that lead to the Assessment was not the standard forced sale of a condominium unit for non-payment of common area expenses and maintenance fees. This was acknowledged by the Assessment Officer.

[14] Two liens were registered on the property: one on June 28, 2000 for \$757.00 and one on October 31, 2000 for \$957.00. A Notice of Sale under Lien was registered on the property on January 5, 2001. A Statement of Claim for possession of the property was issued

on June 25, 2001 and Mr. Auger did not enter a defence. He was noted in default. This is when the Assessment Officer stated in her reasons that: “this simple action for possession and sale of a condominium unit took a bizarre run”.

[15] The simple proceedings took a “bizarre run” because notwithstanding the power of sale proceedings, Mr. Auger and Mr. Eddie McDowall, (the power of attorney for Ms. Ryder) advised JHA that they were going to rent the unit. Because of this, the Assessment Officer found that “Mr. Heller [of JHA] was compelled to bring a motion for injunctive relief to prevent the unit from being leased”.

[16] Although Mr. Auger had been noted in default, he attended the injunction proceedings and was allowed to speak on his own behalf. Notwithstanding his submissions, Dunnet, J. granted an interim injunction and gave an Order prohibiting the leasing of the unit to any third party pending the return of the motion.

[17] The motion for judgment scheduled for September 11, 2001 was adjourned at the request of Mr. McDowell for him to consult counsel and pay the arrears into Court. Mr. McDowell appeared without counsel and without having paid the arrears on September 21, 2001. At that point, McWatt, J. ordered Ms. Ryder and Mr. Auger to deliver possession of the unit for the purposes of sale and ordered costs payable to YCC 46 in the amount of \$7,500.00. The costs were to be paid from the proceeds of sale of the unit.

[18] After the locks were changed on the unit, it was learned that the unit had been rented to a Ms. Whitt in spite of the Court order of Dunnet, J. Ms. Whitt and Mr. McDowell brought an application to the Ontario Rental Housing Tribunal which was dismissed because it had no jurisdiction. JHA attended at this proceeding.

[19] On October 16, 2001, Mr. McDowall served JHA with his motion to set aside or vary the Order of McWatt, J. This motion was heard and dismissed by McWatt, J. who advised that her order had to be appealed.

[20] On October 25, 2001, Mr. McDowell served JHA with a motion to the Divisional Court for leave to set aside or vary the order of McWatt, J. On November 9, 2001, Lang, J. (as she then was) dismissed Mr. McDowall’s motion as the Divisional Court had no jurisdiction. It was an appeal from a final judgment and should have been appealed to the Ontario Court of Appeal. Costs were awarded to the Respondent in the amount of \$650.00.

[21] It was agreed by both counsel, during their submissions, that the following proceedings were unusual in a proceeding such as one involving a sale for non-payment of arrears: the injunction proceedings on July 25, 2001; the proceeding before the Ontario Rental and Housing Tribunal; the motion before McWatt, J. on October 19, 2001 to vary her own Order; and, the motion for leave to appeal on November 9, 2001. This seems to be confirmed by the Assessment Officer who described this simple action for possession and sale of a condominium unit as having taken a “bizarre run”.

[22] As a result of this “bizarre run”, legal research had to be done and facts had to be produced. Additional work was required because the opposing party was self-represented

and JHA needed to ensure that all proper facts and legal authorities were presented to the Court.

[23] There were five court appearances. Mr. Rideout was fully responsible for drafting materials and attending on the motions for the injunction, possession of the unit and the hearing before the Ontario Rental Housing Tribunal. Mr. Rideout drafted the materials with respect to the motion to vary the judgment for possession and the motion for leave to appeal; however, Mr. Heller attended at Court and argued both of these matters. Mr. Rideout attended with Mr. Heller.

[24] Despite the irregularity of the proceedings in this matter, the Assessment Officer found that “having two counsel [Mr. Heller and Mr. Rideout] prepare and attend at the same motions was not necessary”. The Assessment Officer then stated:

...neither motion was complex enough to warrant two counsel. There will be a reduction in Mr. Rideout’s time to reflect this, although he will be given credit for drafting the supporting material used and other work performed in relation to these motions.

Mr. Rideout docketed a total of 23.3 hours for research. I find this to be excessive for a law firm that does mainly this type of work. A client should not have to pay for a lawyer to educate himself about the law. Mr. Rideout’s time will further be reduced to account for this.

Thereafter, the Assessment Officer reduced the research time of Mr. Rideout on the JHA accounts to zero.

[25] As per *Jordan v. McKenzie, supra*, I am of the view that the reduction of the time spent by Mr. Rideout on research and attending the two motions is satisfactory on all of the evidence. The Assessment Officer’s reduction of these fees is not consistent with her Reasons for Decision on Assessment that state:

- a. “... the numerous legal issues created by Mr. McDowell, while not complex, complicated and certainly lengthened the proceeding unnecessarily”;
- b. “Regarding the degree of responsibility assumed by the solicitor, I find Mr. Heller supervised his juniors with just the right amount of “hands on” control. Enough to ensure the matter proceeded properly, but not so much so that the juniors were unable to learn and gain experience. Mr. Rideout also exercised an appropriate degree of responsibility and was respectful and even helpful to Mr. Auger, who was not, after all, his client”;

- c. “Mr. Heller and Mr. Rideout both demonstrated skill and competence during the course of the file. In consultation with their client, the condominium corporation, they determined what they felt to be the most effective course of action in order to deal with the manoeuvrings of Mr. McDowell. I am satisfied, on the evidence, that no other options would have been viable”.

[26] Accordingly, and although JHA may routinely act for condominium corporations in enforcement proceedings, this was not a standard proceeding. The conduct of Mr. Auger and Mr. McDowell, made the proceeding more complex. Because the matter was so unique, it may be that the research is not standard and as such, it may not benefit other clients or the firm in the future. The onus was on the Mr. Heller to show that there was a need for the research. It would appear from the Reasons for Decision of the Assessment Officer that the research was required and more than warranted in the circumstances.

[27] The Assessment Officer, herself, parsed out and denied the time spent on legal research and Mr. Rideout’s time spent at the two motions with Mr. Heller. Accordingly, it cannot be said that the overall time spent on the file more than compensated JHA for the time spent on the file.

[28] Based on all of the above, I am of the view that the Assessment Officer did not make an award that was satisfactory on all of the evidence. She should have allowed for the costs of the research and the attendance by Mr. Rideout at the two motions that he prepared and researched.

b. Do the facts of the Assessment warrant the exercise of the Court’s discretion to reverse the Decision of the Assessment Officer, or parts thereof?

[29] I am persuaded that the facts of the Assessment warrant the exercise of the Court’s discretion to reverse parts of the Decision of the Assessment Officer. I am varying the award of the Assessment Officer to allow JHA those fees in the amount of \$3,519.23 for legal research and Mr. Rideout’s attendance at the two motions with Mr. Heller. Accordingly, the assessed amounts should be in the amount of \$35,379.34.

[30] I am not persuaded that the Assessment Officer made any error in principle, or otherwise pursuant to the case of *Jordan v. McKenzie, supra*, regarding the issues of Mr. Rideout’s travel time, write-ups and the fees of Ms. Khan and Ms. Kuze. There will be no reduction in the assessment for these items which is in the amount of \$2,364.45.

Costs

[31] Costs of the Assessment in the amount of \$2,915.00 were awarded to Auger because the Assessment Officer found the accounts to be excessive but not patently so. It is argued that if I were to award the research costs and the fees for attending at the motions, which I

have done, the fees are patently reasonable. I agree and as such, there will be no costs order to be paid by JHA to Auger for the Assessment.

[32] In light of this decision, Mr. Auger has not succeeded in reducing JHA's total bill of costs by an amount of 15% or more. Accordingly, and pursuant to the order of Pardu, J. dated September 27, 2004, costs in the amount of \$3,500.00 shall be paid to JHA.

[33] This motion was originally scheduled to proceed before Trotter, J. on October 15, 2008. It was adjourned to allow counsel for Mr. Auger to file a factum. Trotter, J. ordered that "costs of today, in terms of Mr. Heller's costs thrown away as a result of Mr. Auger's adjournment request, [are] reserved to the judge hearing the motion". In light of this, I am awarding JHA costs fixed in the amount of \$1,500.00, including GST and disbursements.

[34] Counsel for JHA has submitted that because he was successful in obtaining certain fees on this motion, he should be entitled to costs in the amount of \$5,000.00 together with GST. Counsel for Mr. Auger submits that because there was divided success on the motion, no costs should be awarded. I agree that JHA was only partially successful on this motion and accordingly, I am awarding JHA costs fixed in the amount of \$2,000.00 inclusive of GST and disbursements.

Kelly J.

Released: April 30, 2009

COURT FILE NO.: 04-CV-266116 CM
DATE: 20090430

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