COURT OF APPEAL FOR ONTARIO

CITATION: MBM Intellectual Property Law LLP v. Drizen, 2022 ONCA 766
DATE: 20221110
DOCKET: C70126

Simmons, van Rensburg and Favreau JJ.A.

BETWEEN

MBM Intellectual Property Law LLP

Applicant (Respondent)

and

Kevin Drizen

Respondent (Appellant)

Kevin Drizen, acting in person

Daniel Lanfranconi, for the respondent

Heard: October 28, 2022, by videoconference

On appeal from the order of Justice Adriana Doyle of the Superior Court of Justice, dated December 15, 2021, with reasons reported at 2021 ONSC 7937.

REASONS FOR DECISION

[1] The appellant, Kevin Drizen, appeals an order confirming that he was the party to a retainer agreement with the respondent, MBM Intellectual Property Law LLP ("MBM"). Mr. Drizen submits that the application judge erred and that the agreement was not with him but with his company, GlycoBiosciences Inc. ("Glyco").

[2] We see no error in the application judge's decision.

[3] Mr. Drizen signed an Engagement Agreement with MBM on November 28, 2015. The agreement is in the form of a letter addressed to Mr. Drizen. The letter states that MBM is "pleased to be working with you, and any of your associated companies which you direct us to work with" (emphasis added). The letter also explicitly states that: "In the event of a termination you will be responsible for our fees and disbursements to the date of termination" (emphasis added). The signature line only includes Mr. Drizen's name and does not state that he is signing on Glyco's behalf. The Scope of Work document attached to the agreement refers to the client as "Mr Kevin Drizen". There is no mention of Glyco in the agreement.

[4] Following the termination of the retainer, MBM sought payment of approximately $50,000 in outstanding legal fees. At an assessment of MBM's accounts, Mr. Drizen claimed that he was not a party to the agreement and that, instead, Glyco was the party to the agreement and therefore responsible for paying any outstanding fees. The assessment officer suggested adding Glyco as a party to the assessment, but Mr. Drizen did not agree to this suggestion on the basis that the limitation period had passed for claiming outstanding fees against Glyco. Given that the assessment officer did not have jurisdiction to decide the issue of whether Mr. Drizen or Glyco was a party to the agreement, she referred the issue to the Superior Court for determination. The matter proceeded as an application pursuant to r. 14.05(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[5] In her decision, the application judge concluded that Mr. Drizen was a party to the agreement, based primarily on her review of the terms of the agreement.

[6] Mr. Drizen submits that the application judge erred in reaching this conclusion. He argues that the legal work MBM performed was for Glyco's benefit and that the use of his name in the agreement, rather than Glyco's name, was a typo.

[7] The interpretation of the agreement is an issue of mixed fact and law, to which this court owes deference on appeal. We see no error in the application judge's finding that Mr. Drizen was a party to the agreement. As reviewed above, the agreement was on its face between Mr. Drizen and MBM, and explicitly stated that Mr. Drizen was responsible for paying all fees. Glyco is not even referred to in the agreement. While the work MBM did may have been for Glyco's benefit, this does not preclude the parties from entering into an agreement that required Mr. Drizen to pay the legal fees. Also, we agree with the application judge's finding that the identity of the parties is an essential term of the agreement and that the use of Mr. Drizen's name can therefore not be characterized as a typo.

[8] Mr. Drizen argues that MBM's evidence on the application was deficient and that the application judge should have accepted his evidence that Glyco, and not he, was MBM's client. MBM's evidence consisted of an affidavit sworn by a paralegal who was not at the firm at the time the agreement was formed. Notably,

the application judge found that the paralegal's evidence was of no assistance because she had no firsthand knowledge of the file, and the application judge did not rely on this evidence in her decision. However, contrary to Mr. Drizen's submission, this does not automatically lead to the conclusion that he should have been successful on the application. As held by the application judge, Mr. Drizen's own affidavit evidence was not helpful because he "makes assertions regarding his position rather than providing the court evidence of the circumstances at the time of the formation of the agreement." Ultimately, the application judge's decision is primarily based on her interpretation of the agreement. There was no ambiguity in the agreement. In the circumstances, the fact that MBM's evidence on the formation of the contract was inadmissible does not detract from the plain wording of the agreement, which states that Mr. Drizen is a party to the agreement and responsible for paying legal fees.

[9] Besides the issue of whether Mr. Drizen or Glyco was a party to the agreement, Mr. Drizen asks this court to stay the assessment on the basis that the assessment officer was biased. In making this request, Mr. Drizen relies on statements made after he left the Zoom hearing by the assessment officer to MBM's counsel. Mr. Drizen raised the same issue before the application judge. The application judge did not decide the issue, but instead stated that, if Mr. Drizen believed there was an apprehension of bias, he should raise the issue with the assessment officer. We agree. The application was brought for the purpose of

determining the parties to the retainer agreement. The issue of bias was not properly before the application judge nor is it properly before this court.

[10] The appeal is dismissed.

[11] The parties are to make submissions on costs in writing. MBM's submissions are due seven days following the release of this decision and are not to exceed two pages, excluding the bill of costs. Mr. Drizen is to respond within seven days of receiving MBM's submissions, and his submissions are not to exceed two pages.

"Janet Simmons J.A."

"K. van Rensburg J.A "

"L. Favreau J.A."