

**SUPERIOR COURT OF JUSTICE**

Case Name: Soobrian v. Belair Insurance Company Inc.
Court File No. : 05-CV-300599

Case Name: Soobrian v. Belair Insurance Company Inc.
Court File No. : 06-CV-306940

Counsel:

Name	Party	Fax
R. Naimark	Garnishment Creditor, Belair Insurance Company Inc.	416-777-2050
R. Brent	Thomson Rogers and the plaintiffs	416-868-3134

REASONS FOR DECISION

These are my reasons for decision in relation to a refusals motion by Belair Insurance Company Inc. ("Belair") in relation to the cross examination of Craig Brown ("Brown"), a representative of Thomson Rogers on his affidavit sworn in support of Thomson Rogers' motion for, among other relief, a charging order (the "Brown affidavit").

Upon hearing submissions of counsel for the parties, I endorsed the record as follows:

"For reasons to follow, order to go:

1. Q. 11, 14 and 112 are to be answered.
2. Q. 137 and 143 are to be answered.
3. The FLA questions remain under reserve.

Costs are reserved."

These are my reasons in relation to paras. 1 and 2 and my ruling, with reasons, in relation to para. 3.

Background Facts

The two actions relate to a statutory accident benefits ("SAB") claim and a tort claim arising from a motor vehicle accident in September 1999.

The primary plaintiff, Philip Soobrian ("Soobrian") received SABs from Belair, which SABs included income replacement on the basis of Soobrian's claim that he was unable to work from the date of the accident. Belair later learned that Soobrian was in fact working and sought repayment of the income replacement benefits, on the basis of fraud. The matter proceeded to arbitration in March and May, 2005, the result of which Soobrian was ordered to repay approximately \$37,000 plus costs of \$9,884.

The tort action proceeded to mediation. At mediation, the tort action settled for the sum of \$75,000. The settlement was structured on the basis that Soobrian would receive \$20,000, his parents would receive \$10,000, his children would receive \$5,000 and Thomson Rogers would receive \$20,000.

Belair obtained a garnishment order and served it on Thomson Rogers. Thomson Rogers did not make any payment on the garnishment and, accordingly, Belair brought a garnishment motion for an order compelling Thomson Rogers to pay the settlement funds owing to Soobrian to Belair.

In response to the garnishment motion, Thomson Rogers moved for broad relief, including:

1. a direction from the court in relation to the garnishment;
2. an order declaring that Thomson Rogers does not owe a debt to Soobrian;
3. an order declaring that the monies recovered on behalf of Soobrian in the tort action cannot be garnished by Belair;
4. an order determining whether Thomson Rogers is obligated to return a portion of the funds to Gilbert, Wright & Kirby LLP;
5. an order that Thomson Rogers is entitled to a charge on any monies recovered by Soobrian in his tort action for fees, costs, charges and disbursement incurred in the tort action on behalf of Soobrian, as agreed upon or as assessed; and
6. an order declaring that Thomson Rogers has priority over Belair on the monies recovered by Soobrian in the tort action.

I refer to Thomson Rogers' motion as the "motion for the charging order", although it is clear from the notice of motion that Thomson Rogers seeks far reaching relief.

On the garnishment motion and the motion for the charging order, the court will be required to consider the following issues, among others:

1. Is Thomson Rogers indebted to Soobrian?
2. Is Soobrian indebted to Thomson Rogers for fees, costs, charges and disbursements in the tort proceeding? What fees, costs, charges and disbursements did Soobrian agree to pay?
3. If Soobrian is indebted to Thomson Rogers for fees, costs, charges and disbursements in the tort proceeding, is Thomson Rogers entitled to a charging order?
4. If Thomson Rogers is entitled to a charging order, in what amount?

Dockets/Retainer Agreement (Q. 11, 14, 112)

By these questions, Belair seeks production of Thomson Rogers' dockets, with redactions as to solicitor and client privilege and production of the retainer agreement between Soobrian and Thomson Rogers. Belair submits that these documents and information contained therein are relevant to the motions as Belair is entitled to know what fees and disbursements are properly charged by Thomson Rogers to Soobrian, what fees and disbursements – or portions thereof - pertain to the SAB claim, since Thomson Rogers is not entitled to a charging order for fees incurred in relation to the SAB claim and what fees and disbursements are properly charged by Thomson Rogers to the FLA plaintiffs. Belair relies upon s. 34 of the *Solicitors Act*, R.S.O. 1990, c. S.15, which provides:

“Where a solicitor has been employed to prosecute or defend a proceeding in the Superior Court of Justice, the court may, on motion, declare the solicitor to be entitled to a charge on the property recovered or preserved through the instrumentality of the solicitor for the solicitor's fees, costs, charges and disbursements **in the proceeding.**”

[emphasis added]

Counsel for Belair suggests that the words “in the proceeding” limits Thomson Rogers' charge, if it is entitled to one, to the fees incurred in the proceeding, being the tort proceeding. Counsel for Belair referred to *Siskind, Cromarty, Ivey and Dowler v. Ross, Bennett & Lake*, [1994] O.J. No. 1807 (Ont. C.J.) per Misener J. at para. 22 and 23 where it was said:

“23. It is clear from the words of the subsection that the conditions precedent for a charging order are proof that the solicitor applying was (1) at some time employed to prosecute or defend a proceeding in the Ontario Court (General Division), (2) that property was recovered or preserved in that proceeding, and (3) that the solicitor applying was instrumental in that recovery or preservation. If all of that is proved then the Court should make a charging order against the property so recovered or preserved unless there is good reason for refusing to do so, and the quantum charged against the property should be confined to fees and disbursements reasonably incurred in the pursuit of recovery or the preservation in that proceeding.”

Comments to a similar effect are found in *Canadian Bank of Commerce v. Crouch* (1881), C.L. 437 at p. 443 to 444, as follows:

“It appears to me, from a consideration of these cases,

1. That as against an attaching creditor a Court of Law will protect an attorney's lien for costs of the action in which, or by means of which, the debt attached has been recovered.

2. That a Court of Equity will do so, and will also restrain a creditor who has obtained an attaching order at law from enforcing it against a fund recovered through the medium of a suit in equity, to the prejudice of the attorney's lien for costs in that suit.
3. That such lien extends only to the costs incurred in that particular suit or proceeding, and not to the attorney's general costs against his client in other matters..."

In response to the motion, Thomson Rogers claims that questions concerning the fee arrangement have been answered on the record. It points to the breakdown of fees at Q. 7 and states that between \$40,000 and \$45,000 were the fees that related to the tort action. Additionally, Thomson Rogers is prepared to make the dockets available to the court such that the court could then determine the issue, as opposed to Belair.

Thomson Rogers claims that the questions need not be answered on the basis of privilege. It is submitted that the dockets contain references to communications with the client.

I do not accept that dockets are necessarily privileged. It is commonly accepted that dockets can be, and in many instances are, required to support a claim for costs on a motion or in an action. Additionally, they may be disclosed for the purposes of collection of an account. For example, the Rules of Professional Conduct, section 2.03 recognizes the right of a lawyer to disclose confidential information in order to establish or collect the lawyer's fees, subject to a caveat that the lawyer not disclose more information than is required. The fact that Belair has asked for redacted copies is consistent with the Rules of Professional Conduct.

Doubt as to whether privilege attaches to dockets can be found in *Azon Canada Inc. v. Edwards*, [1995] O.J. No. 1130 (Ont. Ct. G.D.) at para. 13 where Gibson J. said:

"While I am not clearly satisfied that the dockets here are privileged (on the basis of the exception pointed out in *Susan Hosiery v. M.N.R.* (1969) 2 Ex.C.R. at 27, assuming for the purposes of the appeal that these dockets are privileged, in my view it has not been demonstrated that Master Garfield's decision that the privilege has been waived is "clearly wrong"."

I am persuaded that the questions have a semblance of relevance or are relevant to the issues to be determined on the garnishment motion and the motion for the charging order and that privilege does not apply.

It is necessary for the judge hearing the motions to know the fee arrangement between the plaintiffs and Thomson Rogers and whether the fees charged are consistent with that fee arrangement. There was evidence given on cross examination that the original agreement provided for a 25% fee but that there were subsequent and unspecified discussions concerning the fee arrangement.

It is also necessary for the judge hearing the motions to know which of the fees pertain to the accidental benefits claim, since Thomson Rogers cannot obtain a charging order in relation to those fees.

It seems to me that, even if privilege did apply, Thomson Rogers, having claimed the charging order and disclosed the breakdown of the fees attributable to the tort claim, must in fairness disclose the support for that conclusion or statement. Thus, I would order the questions on the basis that any solicitor client privilege that may apply (and I do not accept that one does apply for the reasons given above) has been waived or alternatively, on the basis that the documents and information sought go to the heart of the issues on the motions. Support for this approach can be found in *1273368 Ontario Inc. v. Pharmx Rexall Drug Stores Ltd.*, [2002] O.J. No. 3220 (Ont. S.C.) at paras 11 to 14 and *Azon, supra*, at paras. 10 and 13 to 15. Such production would permit Belair the ability to test the veracity of Brown's statements.

It is notable that in at least one account, Thomson Rogers claims a disbursement relating to the SAB arbitration.

Thomson Rogers submitted that Belair had no standing in the motion for the charging order and, as a result, Thomson Rogers ought not be required to answer Belair's questions. I do not agree. Belair claims an interest in the very funds over which Thomson Rogers seeks a charging order. Thomson Rogers, in subparagraph (b)(v) of its notice of motion claims a declaration that it is entitled to priority over Belair. Belair would have been entitled to notice of the motion for a charging order as an affected party. Thomson Rogers has filed a cross motion in response to Belair's garnishment motion and has filed the Brown affidavit in support of that motion. Belair has cross examined on the Brown affidavit. There has been no suggestion, so far as I could discern, until the hearing of the motion that Belair was not entitled to cross examine on the Brown affidavit or did not have standing to question Thomson Rogers' entitlement to a charging order. As I see the cross motion, the foundation for Thomson Rogers' position that it is not indebted to Soobrian thereby triggering any obligation to pay the settlement funds to Belair is the fee arrangement and its entitlement to the charging order. I fail to see how Belair would now have no standing.

These questions are to be answered.

Instructions as to the disposition of Settlement Funds (Q. 137, 143)

In the Brown affidavit, Thomson Rogers denies that any funds are payable to Soobrian.

I agree that the questions regarding the disposition of funds do not comprise legal advice but a factual matter relevant to the issues on the motions.

For the reasons given in relation to the dockets and retainer agreement, these questions are to be answered.

FLA Questions (Q. 150, 152, 159, 168, 183, 194)

These questions are aimed at ascertaining the validity of the structure of the settlement funds and whether any of the disbursements claimed as against Soobrian's "share" of the settlement funds are properly attributable to the FLA claimants. In my view, these questions must be answered to allow a proper attribution of the fees and disbursements claimed by Thomson Rogers in relation to the motion for the charging order. These matters have been put in issue by Thomson Rogers as a result of its claim that Soobrian is not entitled to any part of the settlement funds. The reasons stated above similarly apply to the instructions in relation to the structure of the settlement and the scope of the work performed by Thomson Rogers for the FLA claimants.

ORDER TO GO that questions 11, 14, 112, 137, 143, 150, 152, 159, 168, 183 and 194 are to be answered by Thomson Rogers.

Costs

If the parties cannot agree on the issue of costs, I am prepared to entertain written submissions as to costs, in accordance with the following timetable:

1. from Belair, a costs outline, maximum three pages in length inclusive of schedules and appendices, shall be delivered by May 30, 2008;
2. responding costs submissions, maximum three pages in length inclusive of schedules and appendices, shall be delivered within 15 days of receipt of the costs outline; and
3. a reply, if needed, maximum two pages in length inclusive of schedules and appendices, shall be delivered within 7 days of receipt of the responding submissions.

Written submissions as to costs shall be delivered by no later than 10 days following the delivery of the responding costs submissions, by Belair in one complete package, directly to me, through my registrar, Heather Strange, in the Case Management Office, 393 University Avenue, 6th Floor, Toronto, Ontario. Thomson Rogers shall provide a second copy of its submissions to Belair so that the second copy is available for filing with the court.

In the event that I do not receive materials on the issue of costs in accordance with the above timetable, the motion shall be deemed to be dismissed with no costs to any party.



Master Sproat
May 1, 2008