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Bullman

NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

31/3

237

CP NO 416/94

BETWEEN

PHILLIPS FOX

Plaintiff

A N D

M P MILTIADES

Defendant

Hearing: 2 March 1995

Counsel: Ms Lawson for the plaintiff
Mr Williams for the defendant

Judgment: 2 March 1995

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitors for the plaintiff
Phillips Fox
P O Box 160, Auckland

Solicitors for the defendant
Shieff Angland
DX 230, Auckland

This is an application by the plaintiff for summary judgment against the defendant for liability only in respect of certain unpaid fee accounts. The work to which the fee accounts relate was apparently done partly for a partnership of which the defendant was partner, partly for a company of which he was a director. The accounts were rendered over the period November 1992 to April 1993. They were all in the same or similar form as follows:

To our professional services [to a stated date]

Our fee

Office services for photocopying, etc

Sub-total

GST

Total

The defendant made promises to pay the total amount of these invoices in the sum of \$50,000-odd. The defendant has paid some \$12,000 of the total amount. Over the period from April 1993 on the defendant has made repeated promises to pay but has failed to pay.

The plaintiff now seeks summary judgment. It supports its application for summary judgment by 2 affidavits, a brief affidavit by Mr M E Parker deposing to the outstanding amount and a longer affidavit by Mr D J Chisholm setting out the history of the matter as known to him. Mr Chisholm was the person who was involved in the matter but he is no longer a partner in the firm. His evidence is limited to stating what work was done only in the broadest terms and exhibiting the letter of instruction, relevant invoices and the correspondence relating to payment.

The defendant opposes the application for summary judgment on two grounds:

- (1) That he at no time accepted responsibility for legal fees related to work carried out for the company although he did for work carried out for the partnership and that it is impossible to tell how much of the amount outstanding relates to work done for the company as opposed to work done for the partnership because the plaintiff has failed to respond to his request to provide itemised accounts.
- (2) That in the circumstances there ought not to be judgment for liability either because of the absence of itemised accounts provides him with a defence or in the exercise of the Court's residual discretion.

Without going into the details, I have read the affidavits carefully.

I consider that the defendant has been less than forthcoming in discharge of his liabilities. I accept that he has not until recently taken the precise point which is now put before me, namely that there is a failure to distinguish between what is owed by the partnership and what is owed by the company, and that the plaintiff undoubtedly had to bring proceedings against him to obtain payment.

On the other hand I consider that the failure of the plaintiff to provide itemised accounts, as requested at an early stage, and to respond to the points that there are two clients and there is a need for differentiation as to what is owed by the one as opposed to the other, are matters of such weight that I could in the exercise of the Court's discretion decline to grant summary judgment.

Lest it be thought that Ms Lawson is to blame for the second of these points, on the information given to me by her, it is apparent that the failure to respond to the points made in Mr Miltiades' affidavit in opposition is not due

to her fault but to a breakdown in communication within the plaintiffs' office resulting in her receiving that affidavit only at a late stage.

I have, therefore, a situation in which I could refuse to grant summary judgment in the exercise of the Court's discretion. I am not going to do that at this stage because I consider that Mr Miltiades has, as I have already stated, been less than forthcoming in meeting his obligations. I propose to adjourn this application on the following terms.

The application for summary judgment is adjourned to the summary judgment list on 4 May 1995 at 2.15 pm for the hearing of it to be completed (if I am sitting on that day) and time permits, or otherwise for the hearing of it to be adjourned to a date to be fixed.

The plaintiff is to provide full itemised accounts to Mr Miltiades' solicitor by 31 March 1995 and is to give Mr Miltiades' solicitor such access to documents as he would be entitled to on discovery in relation to the itemised invoices, should he seek that. Mr Miltiades is to give a detailed response in writing to the itemised accounts by 27 April 1995. The parties are then, either by their counsel or personally, to meet and attempt by 2 May 1995 to resolve the matter of how much is to be paid by Mr Miltiades. If agreement is reached, there is to be payment by Mr Miltiades of whatever amount is due by 12 noon on 4 May 1995 unless, for good reason shown when the matter is called on 4 May 1995, he is granted an extension of time. I emphasise for good reason. He has had more than enough time to pay what is due, whatever that may be. If agreement is not reached the question of timetabling of further affidavits by Mr Miltiades in opposition and affidavits in reply will be dealt with on 4 May 1995.

I reserve the costs of today's hearing.

T Kennedy Grant

MASTER T KENNEDY GRANT