



KEEPING CURRENT

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COLLECTION OF UNPAID LEGAL FEES IN SMALL CLAIMS COURT STYMIED

By **Stephen Thiele**

Last year the Honourable Justice Nordheimer rendered a significant decision regarding the ability of lawyers to utilize the Ontario Small Claims Court to sue for unpaid legal fees. In *Jane Conte Professional Corporation v. Smith*, 2014 ONSC 6009 (CanLII), Justice Nordheimer concluded that the Small Claims Court lacked jurisdiction to determine a lawyer's claim for unpaid legal fees billed pursuant to a written contingency fee agreement.

The unpaid bill was in the amount of \$26,051.59 and had been issued by the lawyer to the client following termination of the lawyer's legal services. At the time of hiring the lawyer, the client signed a Contingency Fee Retainer Agreement that obligated the client to pay 30% of any recovery together with any costs that might be awarded to her. However in the event the client terminated the services of the lawyer, which is what happened, the client was obligated to pay for the lawyer's services provided to that point based on the lawyer's hourly rates. When the client refused to pay the bill, the lawyer commenced a Small Claims Court action.

Justice Nordheimer carefully considered the provisions of the *Solicitors Act*, R.S.O. 1990, c. S-15, as amended, to assess whether the lawyer's claim was properly brought within the Small Claims Court. While the Act specifically contains provisions that deal with contingency

fee agreements, the judge noted that the general provisions contained in s. 23 of the Act were also relevant. This section provides as follows:

No action shall be brought upon any such agreement, but every question respecting the validity or effect of it may be examined and determined, and it may be enforced or set aside without action on the application of any person who is a party to the agreement or who is or is alleged to be liable to pay or who is or claims to be entitled to be paid the costs, fees, charges or disbursements, in respect of which the agreement is made, by the court, not being the Small Claims Court, in which the business or any part of it was done or a judge thereof, or, if the business was not done in any court, by the Superior Court of Justice.

Section 24 of the Act further provides:

Upon any such application, if it appears to the court that the agreement is in all respects fair and reasonable between the parties, it may be enforced by the court by order in such manner and subject to such conditions as to the costs of the application as the court thinks fit, but, if the terms of the agreement are deemed by the court not to be fair and reasonable, the agreement may be declared void, and the court may order it to be cancelled and may direct the costs, fees, charges and disbursements incurred or chargeable in

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respect of the matters included therein to be assessed in the ordinary manner.

Based on these sections, Justice Nordheimer concluded at para. 16 that the Small Claims Court had no authority to consider issues arising under a written fee agreement, including a contingency fee agreement. The Small Claims Court was expressly excluded from considering such matters.

To emphasize his conclusion, His Honour stated as follows at para. 20:

...[O]nce a lawyer chooses to enter into a written agreement with his or her client “respecting the amount and manner of payment for the whole or a part of any past or future services in respect of business done or to be done by the solicitor” then the lawyer is bound by the procedures set out in ss. 20 to 32 of the *Solicitors Act*. In particular, if the lawyer wishes to enforce the agreement then he or she must, as set out in s. 23, bring an application for that purpose in the court “in which the business or any part of it was done or a judge thereof, or, if the business was not in any court, by the Superior Court of Justice.” I repeat that s. 23 expressly excludes the Small Claims Court from this authority.

This case has sent shock waves through the legal community since it is not uncommon that when lawyers take former clients to court to recover unpaid bills, they do so in the Small Claims Court.¹

As a result of the decision in *Conte*, it has further been stated that virtually all lawyer unpaid fee actions which have been brought in the Small Claims Court have been or will be stayed.²

As a result of this decision, lawyers should beware that they will no longer be able to utilize the Small Claims Court to sue for unpaid legal fees where there is a written retainer agreement. Instead, the lawyer seeking to recover fees on an unpaid legal bill will be required to follow the procedure under the *Solicitors Act*.

The only time that a lawyer will be able to utilize the Small Claims Court to sue for an unpaid legal bill is when there is an absence of a written retainer agreement between the lawyer and his or her client. The absence of a written retainer agreement between a lawyer and a client, however, is not ideal.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)

1. Taus Shah, “Using a Written Bars Lawyers from Suing in Small Claims Court”, CanLII Connects
2. “*Solicitors Act* needs to be amended: Hanuka”, AdvocateDaily.com

