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A New Test for Partial Summary Judgment?

By Marco P. Falco

One of the tools parties use to shorten the length of civil actions is to resolve their disputes by way of summary judgment. The Supreme Court of Canada's clarion call for timely and affordable justice in *Hyrniak v. Mauldin*, 2014 SCC 7, promoted the use of summary judgment as a way to dismiss or allow actions that could be resolved in the context of a "mini-trial".

But motions for summary judgment may have become the victim of their own success.

A recent trend in Ontario appellate case law has repeatedly questioned the value of motions for "partial" summary judgment, where one issue in an action can be resolved by the Court, with the remainder of the action to be adjudicated at trial. Since *Butera v. Chown Cairns LLP*, 2017 ONCA 783, Ontario Courts have made it clear that partial summary judgment motions should be granted in only the rarest of circumstances.

A recent decision of the Ontario Court of Appeal, *Malik v. Attia*, 2020 ONCA 787, establishes a legal test every judge must consider in deciding whether to entertain a partial summary judgment motion. The strict requirements of the test may very well have sounded the death knell for these types of motions.

A Sale Gone Wrong

Malik involved an aborted real estate transaction.

The Seller owned two abutting properties in Mississauga and listed them for sale in August 2016.

The Buyers entered into two agreements of purchase and sale for each property (collectively, the "APS"). The APS had no mortgage financing conditions and included a standard clause providing that the APS would only be effective if the Seller complied with the usual control provisions under Ontario's *Planning Act*.

After the Buyers tendered a deposit, the Buyers failed to close the transaction on the required date. They did not have firm mortgage financing in place. The closing date was extended, but ultimately the transaction failed. The Buyers admitted that they did not have the funds or mortgages and were not able to close.

The Sellers took the position that the Buyers forfeited their deposit.

The Seller was unable to resell the two properties and commenced an action against the Buyers for forfeiture of the deposit and breach of contract. The Sellers then moved for partial summary judgment in their action, requesting an order declaring that the Buyers had breached the APS.

The motion judge granted partial summary judgment.

He held that there was no genuine issue requiring a trial regarding the breach of the APS and rejected the Buyers' argument that the Sellers' proposal in selling the two properties contravened the *Planning Act*.

Although the motion judge held that the Buyers had breached the Agreements, he then ordered the issues of damages and the forfeiture of the deposits to advance to trial.

On appeal, the Court upheld the motion judge's ruling granting partial summary judgment, but only because it was not in the interest of justice to delay the action further.

The Test for Partial Summary Judgment

In effect, the Court in *Malik* agreed with the Buyers' position on appeal that the motion judge should not have granted partial summary judgment.

The Court began its analysis by rejecting the Buyers' argument that the motion judge's findings regarding breaches of the APS would unfairly bind the trial judge who had to consider forfeiture and damages. The Court noted that there was little risk of inconsistent findings as between the motion judge adjudicating liability and the trial judge adjudicating damages.

However, citing *Butera, supra*, the Court observed that inconsistent findings were not the only criterion a Court should consider when faced with a motion for partial summary judgment.

Broadly speaking, on such a motion, the Court had to "determine whether, in the circumstances, partial summary judgment will achieve the objective of proportionate, timely and affordable justice or, instead, cause delay and increase expense".

On this basis, the Court in *Malik* articulated a three-part test every motion judge must consider in deciding whether to entertain a motion for partial summary judgment.

The parties must:

1. demonstrate that dividing the determination of the case into several parts will prove cheaper for the parties;
2. show how partial summary judgment will get the parties' case in and out of the court system more quickly;
3. establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

Notably, the Court did not expressly articulate that the onus was on the moving party seeking partial summary judgment to prove each of the elements above; this conclusion, however, can be presumed.

The Court further recommended that "triage processes must be put in place so that judges end up determining a case once and for all on the merits, instead of slicing determinations into a series of partial summary judgments".

Applying the three-part test above to the facts of this case, the Court noted that it “strongly disagreed” with the Seller’s decision to pursue partial summary judgment for the following reasons:

1. partial summary judgment increased the overall costs of litigating the case. The action involved a modest amount of money (\$100,000, plus damages) and should have been pursued as a simplified procedure action; and
2. partial summary judgment caused delay. The action was delayed two years after being set down for trial and still had not been subject to a final adjudication on the merits. There was “every prospect” that the action “will have languished in the Ontario civil court system for four to five years”.

Despite the Court’s clear message that partial summary judgment ought not to have been pursued or granted in this case, the Court nonetheless refused to set aside the motion judge’s ruling on liability for fear that to “set aside the [partial] judgment solely on the basis that the process added cost and delay would, in its own turn, only add more costs and delay”.

The Highest of Thresholds

The three-part test in *Malik* ensures that successful motions for partial summary judgment will become ever more rare in Ontario Courts.

It is difficult to envision circumstances where a moving party can show that there is little to no risk of inconsistent findings and that a motion for partial summary judgment would be both cheaper and promote the efficient administration of justice.

Recall that the moving party in *Malik* sought judgment on what is arguably a discrete issue, i.e. liability, with damages to be assessed at trial. If partial summary judgment is unavailable in this context, it is likely unavailable in most cases.

Underlying the Court’s decision in *Malik* is a fundamental concern for the litigation “culture shift” heralded by *Hryniak, supra*. That culture shift necessarily entails the efficient use of civil procedure to reach a timely adjudication of an action on the merits.

To the extent that motions for partial summary judgment threaten the Court’s efficiency, they ought not to be entertained.

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