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Article

Litigation

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The end of partial summary judgment?

By Marco P. Falco

Litigation is costly. Canadian courts have a number of weapons in their arsenal to address this issue. One of them, the summary judgment motion, has been reducing the length and expense of trials since the Supreme Court of Canada's landmark decision, *Hryniak v. Mauldin* 2014 sec 7.

In *Hyrniak*, the court promoted the use of summary judgment motions to dispose of actions in a single forum, where no genuine issue requiring a trial exists. The use of "mini trials" promotes access to justice for all Canadians.

But is summary judgment the most efficient tool where a specific issue can be resolved by way of "partial" summary judgment, with the remainder of the case proceeding to trial?

In recent years, Ontario courts have shown an almost-universal reluctance to employ partial summary judgment as a method of resolving disputes.

Noting that such motions should be rare, the Ontario Court of Appeal has, since *Butera v. Chown, Cairns LLP* 2017 ONCA 783, expressed skepticism about the use of partial summary judgments as a way to achieve timely and affordable justice.

A recent decision of the Court of Appeal, *Way v. Schembri* 2020 ONCA 691, echoes this theme.

A partial judgment for two actions

Way involved two actions arising in part from a shareholders' agreement between the appellant and respondent. The shareholders' agreement was executed in order to pursue a real estate development venture.

The agreement included a right of first refusal. Broadly speaking, it required the respondent to present the appellant with all real estate development opportunities in Waterloo, Ont., after which the respondent had the right to accept or refuse the opportunity (the first refusal clause).

After the relationship between the parties deteriorated, the appellant started an action against the respondent for breach of the first refusal clause (the breach action). The breach action was a companion action to a larger action started by the respondent in which the respondent claimed damages in connection with the joint venture as a whole (the joint venture action). The parties agreed to try the two actions together.

The respondent then brought a motion for summary judgment to dismiss the appellant's breach action on the ground that the first refusal clause was unenforceable.

The motion judge granted judgment and dismissed the breach action.

On appeal, the Court of Appeal reversed and reinstated the breach action. In so doing, the court held that the breach action should not have been dealt with by way of summary judgment. The two actions were far too intertwined to be separated using the summary judgment mechanism.

A partial judgment by any other name

The court in *Way* noted that, in effect, the motion judge had granted partial summary judgment because of the continued existence of the joint venture action and the "factual linkage between the two [actions]".

Having made this key finding, the court launched into its policy discussion, citing its 2018 *Butera* decision, supra, as to why partial summary judgment "is a rare procedure that should be sparingly invoked."

The court gave a number of reasons for why partial summary judgment was inappropriate:

1. Relying on *Hyrniak*, supra, the court noted that partial summary judgment in this case would cause delay, increased expense and pose a danger of inconsistent findings with those made at trial on a complete record.
2. Because of the factual connection between the breach action and the joint venture action, there was a "very real possibility" of inconsistent findings between the trial judge's ruling in the joint venture action and those reached on the summary judgment motion in the breach action.
3. On the summary judgment motion, the motion judge's critiques of the first refusal clause as ambiguous and commercially absurd, amongst other findings, required a full factual foundation. This evidentiary foundation was lacking on the summary judgment motion.
4. There was no legal basis on the summary judgment motion for the motion judge's conclusion that the appellants had no claim for damages for breach of the first refusal clause just because the appellants were "otherwise financially successful in their business affairs."

The court held:

"[The] concerns regarding partial summary judgment are fully engaged in this case because, as the appellants correctly point out, the two actions are factually intertwined. Indeed the motion judge acknowledged the overlap in the facts of the two cases numerous times in the course of his reasons.

"As a result, there is a very real possibility that conclusions reached by the trial judge could conflict with the result reached by the motion judge. There is also the possibility that the trial judge will reach a better understanding of the relationships between the parties that would give a more informed view of the meaning and purpose behind [the first refusal clause]."

Does the bell toll for partial summary judgment?

The combined effect of decisions like *Way, Butera* and others (see, for example, *Service Mold + Aerospace Inc. v. Khalaf* 2019 ONCA 369) is that while motions for partial summary judgment are not yet dead, they are on life support.

It is becoming progressively more difficult to envision circumstances where a factual or legal dispute can

be severed and finally adjudicated from the main action without additional expense, delay and the risk of inconsistent findings.

Ontario courts' reluctance to adopt partial summary judgment as a way to resolve actions is very much of a piece with the litigation clarion call in *Hyrniak*.

Summary judgment motions, especially for partial judgment, are no longer to be perceived as a perfunctory gamble to be pursued at all costs. Rather, parties and their lawyers must carefully consider the merits and risks of bringing such motions - with the goal of efficient justice in mind.

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