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What You Need to Know About “Boomerang” Summary Judgment Motions

By Marco P. Falco

In 2014, the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, issued a clarion call requiring civil actions to be resolved by way of summary judgment, where possible.

This “culture shift” has led to a plethora of motions for summary judgment in Canada.

It has also led to what are known as “boomerang” summary judgment motions - in which the judge, in the absence of a formal cross-motion, grants judgment in favour of the party resisting the motion.

A recent decision of the Ontario Court of Appeal, *Graham v. Toronto (City)*, 2022 ONCA 149, illustrates the due process concerns that inform a Court’s decision to grant reverse summary judgment.

A Reversal of Fortune

Graham involved a personal injury action against the City of Toronto.

The City brought a summary judgment motion to dismiss the action on the basis of the plaintiff’s failure to give the City notice of her action within the required time limit under the *City of Toronto Act, 2006*, S.O. 2006, c.11, Sched. A. (the “*Act*”).

The motion judge dismissed the City’s motion, ruling that the failure by the plaintiff to provide notice under the *Act* was not fatal to her claim.

The motion judge went one step further, however, and granted the plaintiff summary judgment dismissing the City’s “notice” defence and declaring that the plaintiff’s action was not barred by the *Act*. Notably, the plaintiff, as the responding party on the motion, had not brought a cross-motion seeking this latter relief.

On appeal by the City, the Court of Appeal upheld the motion judge’s order.

Advising of the Litigation “Risk” of Reverse Judgment

The Court began its analysis by citing its previous decision in *Drummond v. Cadillac Fairview Corporation Ltd.*, 2019 ONCA 447. If a responding party to a summary judgment motion has not filed a notice of cross-motion seeking summary judgment against the moving party and the motion judge intends to grant judgment against the moving party through a reverse or boomerang motion, the Court:

...must give the moving party some notice of that litigation risk so that the moving party can address it. The lack of such notice may render any resulting reverse summary judgment unfair.

The duty on the Court to provide notice to the responding party of the risk of boomerang judgment can be fulfilled in a variety of ways, including:

- By inquiring on the motion scheduling request form as to whether the responding party intends to ask for reverse judgment;
- By having the motion judge ask at the outset of the summary judgment motion if the responding party intends to seek reverse judgment;
- By requiring the motion judge who may wish to grant reverse judgment mid-way through the hearing to warn the parties that such an order may be possible; or
- By requiring the motion judge, when drafting reasons for decision, to inform the parties of the intention to grant a boomerang order and afford them the opportunity to make further submissions.

In *Graham*, the latter circumstance applied.

The motion judge emailed counsel during the course of writing her reasons for decision to advise them of four decisions on summary judgment which she usually referred to and to which the parties may have wished to respond.

Both lawyers advised that they did not want to make submissions.

In the circumstances, the Court of Appeal held that this inquiry by the motion judge was sufficient to address any fairness concerns arising from her decision to grant reverse judgment:

The motion judge was communicating with counsel for parties, not a self-represented litigant. Her reference to para. 17 of [*Meridian Credit Union Ltd. v. Baig*, 2016 ONCA 150] clearly put counsel on notice that she was considering granting a reverse summary judgment; there was no other possible reason for that reference. By doing so, the motion judge put the parties on notice of the litigation risk of a reverse summary judgment and afforded them an opportunity to make submissions, which they declined. In those circumstances, we see no unfairness in the procedure followed by the motion judge.

The Due Process Concern

Graham provides a good illustration of the due process concerns that guide a judge’s decision to grant a boomerang order.

The duty to inform the parties of the “litigation risk” of such an order clearly remains on the part of the Court, particularly the motion judge.

Given the unfairness that could result in having an order granted against a responding party who never had the opportunity to make submissions on the issue, the motion judge is required to alert the parties of that possibility and afford them an opportunity to respond.

The duty on the motion judge to advise the parties of the litigation risk is not onerous - a mere reference to case law that addressed reverse summary judgment principles was sufficient in *Graham*. Counsel declined to put in further submissions, and so the decision was by all metrics reasonable.

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