Commercial Litigation

The Summary Judgment Analysis and Collateral Oral Agreements to Written Contracts

The Courts have recently provided significant guidance on summary judgment analysis in the form of three decisions which impact all summary judgment motions, with a particular emphasis on cases involving alleged misrepresentations or collateral oral agreements. *Royal Bank of Canada v. 1643937 Ontario Inc, 2021 ONCA 98 ("RBC"), Pomata Investment v Yang, 2021 ONSC 6786 ("Pomata Investment,")* and *Oxygen Working Capital Corp. v Mouzakitis 2021 ONSC 1907 ("OWCC")* together are instructive on the evidentiary and credibility analysis that judges ought to follow when faced with representations that, if accepted, would constitute a genuine issue requiring a trial. The courts have also provided a roadmap outlining how collateral oral agreements to written contracts will be analyzed by the Courts at each stage of the *Hryniak* test for summary judgment.

This article provides an overview of this recent guidance on the courts' summary judgment analysis, examines the increasingly nuanced evidentiary and credibility assessments the courts will engage in on summary judgment, and highlights the specific guidance on alleged misrepresentations and/or collateral oral agreements to written contracts set out in these cases.

But first, here are key takeaways for those in a hurry:

1. While a motion judge is given significant deference by the Court of Appeal on summary judgment, appellate intervention is appropriate where a judge improperly provides judgment at the first stage of the *Hryniak* test by failing to have regard for the entire evidentiary record.

2. Unchallenged material evidence, which if credible would constitute a genuine issue requiring a trial must be assessed by the Court either by using its enhanced fact-finding powers set out in Rules 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*, or by ordering a mini-trial or trial.

3. There is no imperative to use summary judgment in every case, but consideration should be given to summary judgment whenever appropriate. Partial summary judgment is not recommended unless the moving party can show that it will be cheaper and quicker than a trial and can be argued without the risk of inconsistent findings of fact.

4. When weighing credibility issues on a summary judgment motion, the Court will assess the context of the evidence including the timing and the circumstances under which the evidence was acquired, and the availability and possible omission of material evidence in the Court record in coming to their decision.

5. A mini trial is not intended to allow a party to buttress its deficient evidentiary record, is not intended as a "second kick at the can" and is a tool only available to the Court and not a party. Further, while mini trials may be useful, they are not necessary if credibility can be properly assessed based on the evidentiary record already before the court.

6. Allegations of collateral oral agreements and misrepresentations relied on by a party to alter or defeat an executed contract must be assessed by the court using its enhanced fact-finding powers and cannot be dismissed at the first stage of the *Hryniak* test. Conversely, the subjective intention or understanding of a party to a written contract does not interfere with the plain reading of the written contract.

Of particular interest is *Royal Bank of Canada v. 1643937 Ontario Inc, 2021 ONCA 98*, where the Ontario Court of Appeal found that there was a genuine issue requiring a trial, reversing the finding of summary judgment at the first stage of the *Hryniak* test. The Court of Appeal found that the motion judge erred in dismissing unchallenged material evidence at the first stage of the *Hryniak* test, granting summary judgment to the Plaintiff, without using the enhanced fact-finding powers set out in Rule 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. This case is helpful in assessing when a judge is required to exercise these enhanced fact-finding powers.

Pomata Investment v Yang, 2021 ONSC 6786 ("*Pomata Investment*") dealt with a dispute involving an executed agreement of purchase and sale and an alleged side oral agreement. Here, the Court granted summary judgment finding that there was no genuine issue requiring a trial despite the alleged side oral agreement. The court also rejected the Defendants' argument that this was a partial summary judgment motion given that the Defendants had advanced a third-party claim against their realtor. The Court engaged its enhanced fact-finding powers illustrating how a failure to produce available evidence can result in an adverse inference regarding credibility and that the existence of a third-party claim is not fatal to a summary judgment motion in the main action.

In *Oxygen Working Capital Corp. v Mouzakitis* 2021 ONSC 1907 ("*OWCC*") Justice Myers methodically sets out the test for summary judgment, providing a non-exhaustive list of considerations taken into account by the Court when ascertaining whether to engage in the second stage of the *Hryniak* test. He followed the guidance given by the Court of Appeal in *RBC* by using his enhanced fact-finding powers to weigh evidence, assess credibility, and grant summary judgment in spite of the allegation of a side oral agreement purporting to amend a written loan agreement.

In each of these cases the courts were faced with a summary judgment motion regarding a collateral oral agreement or alleged misrepresentation impacting a written contract. While the outcomes differ, the analytical process which the court engages in does not. These cases, analyzed together, provide clear insight into the courts' analysis of evidentiary and credibility issues raised during the motions and are highly instructive to parties considering or facing summary judgment.

Royal Bank of Canada v. 1643937 Ontario Inc, 2021 ONCA 98

In RBC v 1643937 Ontario Inc, ("RBC") Royal Bank of Canada ("RBC") made a loan to Ottawa Valley Glass Enterprises Ltd. ("OVG") which was personally guaranteed by the owners Lorraine, Patrick, Shawn and Beverly McHale. OVG was unable to meet its repayment obligations and ultimately went bankrupt. RBC then sought to recover the amount owing by OVG from the McHales on the personal guarantees. The issue in dispute was the value of the personal guarantees as the McHales alleged it was their understanding that they had signed a guarantee for a collective $600,000 while RBC alleged, and the guarantee stated, that Lorraine, Patrick, Shawn, and Beverly had each personally guaranteed $600,000.

The motion judge found that the personal guarantees were enforceable, that the appellants (Lorraine, Patrick, and Beverly, as Shawn made an assignment into bankruptcy and RBC's action against him was stayed) were each liable for $600,000 and further rejected the McHale's affidavit and discovery evidence that RBC had misrepresented the scope of their personal guarantees, without using her enhanced fact-finding powers pursuant to 20.04(2.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The McHales appealed the motion judge's finding on the basis that she did not properly apply the test for summary judgment.

The unequivocal and unchallenged evidence of the appellants was that they gave the guarantees on the understanding that their total obligation was $600,000, joint and several, and that this understanding came from the guarantees themselves and discussions with the respondent's representative Mr. Bossy. Further, according to Shawn McHale's affidavit, the understanding of the appellants was recorded in the year-end financial statements of OVG. While RBC's representative Mr. Gordon gave evidence regarding his interpretation of the guarantees in an examination for discovery, he was unable

to say whether the liability was properly explained to the appellants, as the account manager Mr. Bossy would possess that information. The Court of Appeal agreed with the appellants that the motion judge misapprehended this evidence by failing to give adequate reasons for rejecting the McHales' evidence where RBC had not cross-examined the McHales on their affidavits or provided evidence to challenge the McHale's understanding of the scope of the guarantees.

According to the Court of Appeal, this unchallenged evidence was enough to raise a genuine issue requiring a trial and that the motion judge should have moved to stage two of the *Hryniak* test and used her enhanced fact-finding powers set out in Rule 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*. The Court of Appeal also affirmed the well-established principle that the defence of misrepresentation is not precluded or diminished by an entire agreement clause in a written agreement.

Key Takeaways

In finding that the motion judge erred, the appeal panel, Justices Doherty, Roberts, and Harvison Young, reviewed current common law framework for summary judgment and distilled the following principles which are of use to legal professionals when considering summary judgment or when appealing a summary judgment finding:

1. The *Hryniak* framework is still as follows:
    a. The motion judge should determine whether there is a genuine issue requiring a trial based only on the evidence before her without using the enhanced fact-finding powers set out in Rule 20.04(2.1) and (2.2) of the *Rules of Civil Procedure*.
    b. If there appears to be a genuine issue requiring a trial, the motion judge should determine if the need for a trial could be avoided using these enhanced fact-finding powers allowing her to weigh evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence and to also order oral evidence under Rule 20.04(2.2) or a mini trial if required.
2. Absent an error of law, a misdirection, or the creation of an injustice through a decision that is clearly wrong, a motion judge's determination of these questions is generally entitled to considerable deference on appeal.
3. Unchallenged material evidence and the absence of contradictory evidence, should trigger the judge to engage in the second stage of the *Hryniak* test and use her enhanced fact-finding powers.
4. Rejecting a party's evidence without providing adequate reasons is an error and conclusory statements that the evidence "lacked particularity" do not qualify as adequate reasons for rejecting evidence.
5. If a party fails to tender evidence in response to an allegation and does not cross-examine an affiant on their affidavit evidence supporting the allegation, the motion judge ought to take this absence of evidence into consideration before rejecting the uncontroverted allegation and it's supporting evidence. The motion judge must also provide adequate reasons for rejecting this evidence.
6. A motion judge must go beyond the affidavit evidence and assess other evidence in the record that, if accepted, would support the party's version of events.
7. Where the motion judge is required to undertake a credibility analysis and cannot assess credibility solely on the written record, she must consider whether oral evidence or a trial are required.

Upon consideration of the unchallenged and uncontroverted evidence of the McHales that Mr. Bossy misrepresented the value of the guarantee to them, the Ontario Court of Appeal ordered that the parties proceed to a trial on this specific issue alone.

It is significant that the reason for the trial of this issue isn't necessarily the merit of this alleged misrepresentation but that absent contradictory evidence or a challenge from the opposing party it constitutes a genuine issue which requires weighing of evidence by the Court. *RBC* serves as a reminder that due regard must be given to the entire evidentiary record and that untested and uncontroverted material evidence cannot be dismissed without being tested by the court either via its enhanced fact-finding powers, a mini-trial, or a trial of the impugned issue alone.

Pomata Investment v Yang

In *Pomata Investment*, Justice Diamond heard a summary judgment motion brought by the seller of a property against a buyer who failed to pay the purchase price. The buyers

did not have enough capital to close the sale and planned to "flip" the property to a third party, through their realtor. When the closing date arrived, the realtor did not have the assignee lined up, the deal failed, and the buyers refused to forfeit their $100,000 deposit. The Plaintiff seller brought a motion for summary judgment on the terms of the executed agreement of purchase and sale for the deposit. The Defendant buyers made two major arguments, first that there was a side oral agreement regarding the assignment of the purchase to another party, and second that the Defendant buyers had a third-party claim against the realtor and therefore this would in fact be a partial summary judgment motion instead of a summary judgment motion.

Justice Diamond affirmed the direction from the Supreme Court of Canada that summary judgment ought to be granted unless the added expense and delay of a trial is necessary for a fair and just adjudication of the case. This preference for summary judgment is juxtaposed against the Court's reluctance to grant partial summary judgment, given the risk of inconsistent findings of fact and its tendency to actually increase litigation costs because the matter will still have to go to trial for the remaining unresolved issues.

Briefly, partial summary judgment is only used in situations where it will result in proportionate, timely, and affordable justice or, will reduce delay and expense.[1] To obtain partial summary judgment, counsel must:

1. Demonstrate that dividing 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; and
3. Establish that partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

This high threshold for partial summary judgment was confirmed by the Court of Appeal in *Malik v Attia*, 2020 ONCA 787.

Given the Court's aversion to partial summary judgment, it is not surprising that there have been a number of recent cases where counsel have defended a summary judgment motion by arguing that it was in fact a partial summary judgment motion. This occurred in *Pomata Investment* where the Defendants argued that the Plaintiff's motion was in fact a partial summary judgment motion as it did not address the Defendants' third-party claim against their realtor.

In support of this position, the Defendant buyers further argued that the Plaintiff seller had failed to produce evidence from the realtor or the Plaintiff's sales agent regarding the Defendants' alleged side oral agreement with the Plaintiff regarding the assignment. The Court disagreed and made it clear that a party who asserts an allegation is the party who must prove the allegation. The Defendants had used their own self-serving statements to support their position that there was a side oral agreement and there was no evidence in the record before the Court confirming the existence of any misrepresentations by the realtor or the sales agent and/or no outside evidence of this alleged oral agreement.

Justice Diamond, using his enhanced fact-finding powers, weighed the credibility of the evidence with respect to the alleged oral agreement and found that it was not credible given the opportune timing of the evidence, that the Defendants and the Plaintiff's representative did not speak the same language, there was no evidence that a translator was present, and if the realtor was acting as a translator, the Defendant buyers had failed to acquire affidavit evidence from the realtor to support the existence of a side oral agreement. Based on this omission, as well as the failure to plead the defence of misrepresentation, Justice Diamond found that the Defendants' affidavit evidence was not credible and that the Defendants had failed to meet the onus of proof to substantiate their claims of a side oral agreement. While the court did not engage in the second stage of the *Hryniak* test and weigh this evidence, Justice Diamond did comment that the Defendants' position was "head-scratching".

Justice Diamond drew an adverse inference against the Defendants for their failure to adduce evidence from the realtor or the sales agent given that they had a legal and evidentiary onus to lead trump or risk losing. Counsel at this stage requested a mini trial, which the Court refused given that it was a tool available to judges, not parties, and it was the Court's determination that there was no genuine issue requiring a trial regarding the agreement or alleged side oral agreement.

The Court made it clear that mere allegations of a collateral oral agreement to a written contract, without credible evidence, will not stop a summary judgment motion.

It is important to distinguish this finding from that of the Ontario Court of Appeal in *RBC*, where the Court of Appeal overturned the motion judge's summary judgment finding and sent the parties to a trial of the misrepresentation issue alone. In *RBC*, the Plaintiffs' evidence that Mr. Bossy misrepresented the value of the guarantee to them was unchallenged by RBC and RBC's representative at his examination for discovery gave evidence which did not controvert the Plaintiff's misrepresentation allegation. RBC could have produced evidence from Mr. Bossy regarding the alleged misrepresentation but did not.

Contrary to this in *Pomata Investment*, the Defendants had not pled misrepresentation or a collateral oral agreement in their statement of defence and there were credibility issues based on the failure of the Defendant buyers to acquire affidavit evidence from their realtor on the alleged collateral oral agreement. As a result, Justice Diamond drew an adverse inference against the Defendants and dismissed their collateral oral agreement defence. In *RBC* the issue of misrepresentation was found to be a live issue because RBC didn't provide contrary evidence and the Plaintiffs had pled misrepresentation. In *Pomata Investment*, the Defendant buyers failed to provide supporting evidence from their realtor who was present during the side oral agreement and had failed to plead misrepresentation or collateral oral contract. The courts have made it clear that failing to produce evidence which is available that would either support or derogate from a party's position can be fatal to a party's position on summary judgment.

The Existence Of A Third-Party Claim Does Not Force A Partial Summary Judgment Analysis

The final issue dealt with by Justice Diamond in *Pomata Investment* was whether summary judgment should be granted in the face of the Defendants' pending Third Party Claim against the realtor for contribution and indemnity. The Defendants argued that the Plaintiff's motion for summary judgment was in fact a motion for partial summary judgment as the Defendants' third-party claim would continue and there was a risk of inconsistent findings of fact given that the third-party claim was derivative of the main action.

Justice Diamond clarified that a Third-Party claim is a separate legal proceeding and that any findings of the Court on the summary judgment motion would not be binding on the third-party proceeding. He did not accept the argument that there was a risk of duplicative proceedings or inconsistent findings given that the third-party claim against the realtor was for alleged breaches of fiduciary duties and misrepresentations. Justice Diamond summarized the Defendants' position as attempting to create a new defence, that was not in their pleading, and seeking to defeat the Plaintiff's motion for summary judgment via an unsubstantiated promise to call evidence at a later date, which failed to meet their legal obligation to "lead with trump".

Oxygen Working Capital Corp v Mouzakitis

Oxygen Working Capital Corp v Mouzakitis, 2021 ONSC 1907 involved the Plaintiff company Oxygen Working Capital Corp ("OWCC") lending money to the Defendants' company Scoby Kombucha Inc. ("S Inc.") based on the security of the borrower's accounts receivable, also known as a factoring arrangement. OWCC entered into a master factoring agreement with S Inc, which was guaranteed by the Defendants Mr. and Mrs. Mouzakitis personally for all amounts owing. S Inc. received loans from OWCC for accounts receivable and one of the payors failed to pay S Inc's account. OWCC sued the Defendant owners of S Inc. for the unpaid account pursuant to the master factoring agreement. In dispute was whether the guarantees given in the agreement were for just the first loan or for all loans. Of particular importance were the continuing guarantee clauses in the agreement which were unlimited in scope wherein each guarantor promised to guarantee "all indebtedness, liabilities, and obligations… which [S Inc.] had incurred or may incur to [OWCC]". The Defendants' position was that it was their "understanding" that the guarantees applied solely to the first loan and not thereafter.

Justice Myers reiterated the common law ruling that the subjective intentions of parties are not admissible evidence for the interpretation of a contract "The subjective intention of a party is not admissible evidence for the interpretation of a contract. Under the parol evidence rule, oral evidence cannot contradict the plain meaning of a written contract. The personal knowledge, understanding, or expectation of one side of a negotiation does not form part of the objectively known factual matrix to which resort can be had to assist with interpretation of an agreement."[2]

As alluded to by Justice Myers in this quote, the Defendant Mr. Mouzakitis stated under cross-examination

on his affidavit that Mr. Ravalli of OWCC, told him that the guarantees did not apply to the second draw under the Master Factoring Agreement. This new revelation was not pled in the Defendants' Statement of Defence, nor detailed in the Defendant Mr. Mouzakitis' affidavit but was divulged for the first time under cross-examination. Mr. Mouzakitis further indicated that there was an email confirming this representation from Mr. Ravalli which he undertook to produce. Mr. Mouzakitis did not fulfill this undertaking. If Mr. Mouzakitis' allegation proved correct, this representation made by Mr. Ravalli on behalf of OWCC would potentially constitute a genuine issue requiring a trial, as outlined in *RBC*.

The Defendants argued that *RBC*, the Ontario Court of Appeal decision discussed above, supported their position as it also related to an alleged collateral oral agreement and the appellate court ordered a trial on issue of that issue alone. Justice Myers disagreed. He noted that the Court of Appeal directed motions judges to follow the analytical process set out in *Hryniak* and emphasized the need for motions judges to analyze carefully all evidence relied upon by the responding party to show that there is a genuine issue requiring a trial. Justice Myers also noted that the Court of Appeal directed judges to take particular care to explain any proposed rejection of unchallenged evidence using their enhanced fact-finding powers, as discussed in detail above.

After outlining the relevant guidance from the Ontario Court of Appeal in *RBC*, Justice Myers set out the following (non-exhaustive) list of questions for the Court to contemplate when it is considering the use of its enhanced fact-find powers available to a judge under Rules 20.04 (2.1), and (2.2):

1. Will making findings of fact on the evidence before the court provide a fair and just result as compared to a mini-trial or a trial?
2. Does the material before the court illuminate the factual issue sufficiently to allow the judge to make findings of fact and credibility?
3. Is there something missing that is needed for basic fairness despite the fact that the parties chose not to put that evidence forward?
4. Do considerations of the litigation as a whole mandate some further process before making factual or credibility findings?

Justice Myers then engaged in stage two of the *Hryniak* test and exercised his enhanced fact-finding powers. He noted a number of inconsistencies in Mr. Mouzakitis' cross-examination evidence including contradicting himself regarding the alleged representations made by Mr. Ravalli, his assertion that he had an email which substantiated this alleged representation which was never produced, and the fact that this key allegation was not pled in the Statement of Defence, nor provided as sworn evidence in an affidavit, and appeared for the first time under the pressure of cross-examination.

Given these discrepancies, Justice Myers weighed the evidence using his enhanced fact-finding powers and concluded that the Defendants' argument that OWCC, "… would agree to forgo its security in a simple, unrecorded, undocumented conversation, does not accord with my understanding of business common sense or lending logic."[3]

Justice Myers further found that a mini trial would not be of use in this case given that Mr. Ravalli's denial of the alleged conversation with Mr. Mouzakitis, although hearsay, is already recorded and the fact that Mr. Mouzakitis gave contradictory evidence regarding the representations and would therefore be impeached, rendering a mini trial unhelpful in this case. This is significant guidance on when a mini trial may or may not be useful in a summary judgment motion.

In considering whether summary judgment would be against the public interest and whether a trial would in fact serve the interest of the civil justice system as a whole, Justice Myers found that there were no issues of multiplicity, inconsistent verdicts, or missing evidence which would require a trial. He further found that he could fairly make the necessary findings of fact and credibility in light of the inconsistencies in Mr. Mouzakitis' evidence. These considerations outlined by Justice Myers in this decision constitute significant guidance to parties regarding arguments that can be made, or must be guarded against, on a summary judgment motion.

What Does This Mean For Summary Judgment Motions?

RBC, *Pomata Investment*, and *OWCC* provide significant guidance to legal professionals on the *Hryniak* analytical framework, how the court will assess evidence of alleged collateral oral agreements to written contracts, when and how credibility must be assessed in a summary judgment

motion, and further clarification on the impact of a third-party claim on a motion for summary judgment of the main action.

Together, these cases demonstrate that parties must not leave any stone unturned when acquiring available evidence to substantiate or contradict representations made by the opposing party as it could be fatal to their position. On summary judgment motions, one must lead trump or risk losing.

Further, alleged collateral oral agreements to written contracts will not be dismissed out of hand by the courts. That being said, the alleged existence of a collateral oral agreement does not automatically defeat a summary judgment motion. When faced with an allegation of a collateral oral agreement, the court will engage its enhanced fact-finding powers, weigh all available evidence, assess credibility, and make its determination if possible. The exist of a whole agreement clause does not automatically defeat the allegation of a collateral oral agreement. Conversely, the subjective intention of a party entering into a written contract will not defeat the plain wording of that contract. When determining whether a collateral oral agreement to a written contract will be enough to defeat a motion for summary judgment on a written contract, parties must be prepared for their entire evidentiary record and credibility to be assessed by the court with its enhanced fact-finding powers as it decides whether the case can be resolved on a summary basis or if a mini-trial or trial is required. Omitting material evidence, giving contradictory evidence, and/or making allegations of a collateral oral agreement at a late stage in the proceeding can all be fatal to a party's position on summary judgment.

These three cases do not derogate from the principles set out in *Hryniak*, but instead provide more nuanced insight into how the courts will deal with evidentiary issues and credibility claims in the context of summary judgment, as well as the analysis undertaken when confronted with allegations of collateral oral agreements or representations which if true, contradict the written contract.

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[1] *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 29-34; *Service Mold + Aerospace Inc. v. Khalaf*, 2019 ONCA 369, 146 O.R. (3d) 135, at para. 14.

[2] *Oxygen Working Capital Corp v Mouzakitis*, 2021 ONSC 1907 at para 23 citing Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53.

[3] *Oxygen Working Capital Corp v Mouzakitis*, 2021 ONSC 1907 at para 47.

Eric Blay

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eblay@pallettvalo.com
(289) 805-4461

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