Commercial Litigation

Boomerang Summary Judgment – the Latest Evolution in Ontario's Ever-Changing Summary Judgment Regime

Over the past decade, there are few areas of litigation which have undergone as much change as Ontario's summary judgment regime. During that time, the test for granting summary judgment has been set out, re-stated and re-invented, and has undergone a number of developments along the way, some of which were not necessarily intended. Please see our previous newsletters here and here for breakdowns of such developments.

In the latest development, the Ontario Court of Appeal tackled a motion judge's use of the "boomerang", or reverse summary judgment. Essentially, a "boomerang" summary judgment arises where the party responding to a summary judgment motion is granted judgment in their favour, even though they were not the one seeking it.

In *Graham v. Toronto (City)*, 2022 ONCA 149 an individual plaintiff became injured after tripping in a pothole on City property and commenced a lawsuit. The City brought a motion for summary judgment to dismiss the action on the basis that the plaintiff failed to notify the City within 10 days of the injury, as required by the *City of Toronto Act* (the "***Act***").

The motion judge dismissed the City's motion, finding that the failure to provide the 10-day notice did not bar the action, as the plaintiff had a reasonable excuse for her delay in notification, and the City was not prejudiced in its defence. The plaintiff did not bring a cross-motion, but the motion judge granted summary judgment in her favour, dismissed the City's notice defence and declared that the action was not statute-barred.

The City appealed the decision on a few grounds. Most notably, it argued that the motion judge acted procedurally unfairly by granting a reverse summary judgment in the absence of a notice of cross-motion seeking this relief, or a notice to the City of the judge's intention to grant such a motion.

The Court of Appeal disagreed with this argument. It held that summary judgment motions are intended to achieve a fair and just result and it was acknowledged that reverse summary judgment is unfair without any kind of notice. However, the court listed four ways that such notice can be given to ensure, absent a formal cross-motion, that a moving party has notice of the risk of a reverse summary judgment:

1. In regions where scheduling a summary judgment motion must pass through a triage or practice court, the motion scheduling request form can inquire whether the responding party intends to ask for a reverse summary judgment;

2. At the start of the motion, the judge may ask whether a reverse summary judgment will be sought;

3. If, during the course of the motion, the judge thinks he or she may grant reverse summary judgment, the judge should inform the parties to allow them to respond; or

4. If, during the preparation for reasons disposing of the motion the judge forms the view that granting a reverse motion may be appropriate, the judge should inform the parties and afford them an opportunity to make submissions.

In this case, the motion judge had used the last approach – having emailed the City's counsel while her decision was under reserve advising that she referred to "some well-established precedents in my summary judgment decisions". In her email, the motion judge identified decisions and used pinpoint citation to specific paragraphs. One such pinpoint directly spoke to reverse summary judgment and a motion judge's authority to grant such an order. Additionally, she asked counsel for the City to inform her if they wished to make submissions and they declined to do so.

The Court of Appeal found that the motion judge therefore fairly put the City on notice of her intention to grant reverse summary judgment. In particular, the court noted the motion judge's referral to the citation with reference to reverse summary judgment and the fact that the request was made to counsel rather than a self-represented litigant. Because of this, it was held that there was no procedural unfairness as the City advanced, and the decision was allowed to stand.

The *Graham* decision marks yet another interesting development in Ontario's ever-evolving summary judgment regime. Those bringing a summary judgment motion would be well-advised to keep this in mind and be on alert for any notice that such an order may be possible. Ignoring or missing such a notice could deny the opportunity to make submissions and may lead to an unwanted and unexpected outcome.

Daniel Waldman would like to acknowledge the assistance of Cassie Wasserman in writing this article.

Daniel Waldman

Pallett Valo Commercial Litigation Practice

Our firm has the largest Commercial Litigation department in Peel Region, with the depth and expertise to provide legal advice and representation in complex litigation matters. Our clients are served with advice that is designed to minimize and avoid risks and business disruption through alternative dispute resolution mechanisms, and decisive and aggressive action in the courts when necessary.

dwaldman@pallettvalo.com
(289) 805-4609

PALLETT VALO LLP
Lawyers

2021-22 TOP 10 ONTARIO FIRMS
Canadian Lawyer Magazine

GGI INDEPENDENT MEMBER