

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 Mouzakitidis 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.

If you are interested in the in depth review and analysis of these cases and their impact on summary judgment, please use the link to the full article [here](#) <https://tinyurl.com/59ebjvbf>.



Eric Blay

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.

eblay@pallettvalo.com

(289) 805-4461

PALLETT VALO LLP
Lawyers



GGI
INDEPENDENT MEMBER

This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information, contact us at 905.273.3300.

If you are receiving this bulletin by mail and you would prefer to receive future bulletins by email, visit www.pallettvalo.com/signup or send an email to marketing@pallettvalo.com. Pallett Valo LLP will, upon request, provide this information in an accessible format.

Copyright © 2021 Duplication and distribution of this material, in whole or in part, is permitted provided the name of Pallett Valo LLP and the authors’ names are not omitted.