Enhanced Fact-Finding Powers Used to Grant Summary Judgment in Fraud Claim

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In a September 4, 2018 decision, Justice Sally Gomery used enhanced fact-finding powers under Rule 20 of the *Rules of Civil Procedure* to grant summary judgment in a fraud claim, despite the existence of an unresolved counterclaim. BLG represented the plaintiff, Noreast Electronics Co. Ltd, in this case.

Facts and History of Proceedings

In March 2017, Noreast Electronics Co. Ltd. (Noreast), an electronics manufacturer based in Hawkesbury, Ontario, discovered that its long-time Director of Sales, Eric Danis, had been defrauding the company for several years through a false invoicing scheme. Danis had been marking-up supplier invoices from China, submitting falsified invoices to Noreast for payment and then retaining the mark-up. Danis' wife, Anya Watson, was found to be significantly involved in the fraud as she assisted with the forgery of the marked-up invoices and the recordkeeping.

In June 2017, Noreast brought an action against Danis, Watson, and two companies owned by Danis, EAJ Technical Corporation (EAJ) and 8339724 Canada Inc. (833 Inc.) (collectively, the Defendants). Noreast also obtained an *ex parte* Anton Piller order and Mareva injunction, preventing the Defendants from disposing of their assets and allowing Noreast to search the Defendants' premises in order to preserve documents and other relevant evidence.

In conjunction with service of the orders, Noreast terminated Danis' employment for cause. The Defendants vigorously defended the fraud claim, arguing that it was a legitimate middleman business, and also brought a counterclaim alleging wrongful dismissal.

In May 2018, Noreast brought a motion for summary judgment against the Defendants for damages and other relief arising from the false invoicing scheme.

Fact-Finding Powers on Summary Judgment

In deciding whether this was an appropriate case for summary judgment, Justice Sally Gomery considered the 2010 amendments to Rule 20 of the *Rules of Civil Procedure*. On a motion for summary judgment, the court must consider whether there is a genuine issue requiring a trial.1 Pursuant to the amended rules, judges are empowered to weigh evidence, evaluate the credibility of deponents, and draw any reasonable inferences from the evidence.2

In applying the amended rules, Justice Gomery held that:

[J]udges hearing summary judgment motions gained new fact-finding powers [in 2010]. Where they find that there is a genuine issue for trial, they may resolve it by weighing evidence, evaluating the credibility of a deponent, and drawing any reasonable inference from the evidence, 'unless it is in the interest of justice for such powers to be exercised only at trial.' A judge hearing a summary judgment motion may also order that oral evidence be presented by one or more parties.3

Justice Gomery further held that since *Hryniak v. Mauldin*, the determination of whether a case should go to trial involves a two-stage analysis:

The judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2).4

Justice Gomery reasoned that on a motion for summary judgment, a judge's first question should be: "How much more (if anything) would I need to resolve this case?"5

In following this two-stage analysis, Justice Gomery first found that there was a genuine issue for trial. Despite the fact that the evidence of the Defendants' fraud was overwhelming, she found that there was conflicting evidence in respect of whether EAJ was a reseller that provided legitimate services to Noreast, and whether the invoicing scheme was justified, or at least not outside of Danis' terms of employment. Justice Gomery found that all of these issues gave rise to genuine issues for trial.

Justice Gomery then considered whether she could resolve these genuine issues without the need for trial by using her enhanced fact-finding powers under Rule 20. Justice Gomery found that even though there was a genuine issue for trial, she could decide the case fairly and justly on the evidence before her, and it was in the interests of justice for her to do so. She found that the parties had tendered a significant amount of evidence including two reports from Deloitte Forensic and the key players, as well as additional witnesses, had been cross-examined. The collective result of the affidavits, examinations, and evidence arising from the Anton Piller order resulted in an extensive record on the summary judgment motion. Although there was some contradictory evidence, Justice Gomery found that the record allowed her to make the necessary findings of fact and law, and that summary judgment was a proportionate, more expeditious, and less expensive means to achieve a just result.

Summary Judgment Granted Despite Remaining Counterclaim

On the motion, the Defendants' principal argument was that summary judgment could not be granted without deciding whether Danis had acted fraudulently, which they argued would unfairly impact Danis' claim for wrongful dismissal. Justice Gomery ultimately found that she could grant the motion for summary judgment despite the Defendants' arguments that she could not do so given the unresolved counterclaim.

Although some case law suggests that granting partial summary judgment in the face of a counterclaim may not be in the interests of justice due to the risk of duplicative proceedings or inconsistent findings when the balance of the action eventually goes to trial, Justice Gomery held that the case at hand was distinguishable because the claims were not so "inextricably tied" that they could not be heard separately. Justice Gomery was not convinced that the adjudication of Noreast's claim would predetermine the outcome of the counterclaim, as she did not make any determinations regarding the scope of Danis' employment or the terms of his relationship with Noreast. Justice Gomery held that this was not a case of "partial summary judgment" because Noreast's claim would be decided in its entirety.

Justice Gomery held further that while the existence of a counterclaim might diminish the efficiency and cost-saving goals of summary judgment, this did not prevent her from deciding Noreast's claim. She found that the parties' interests would still be advanced by an efficient resolution of the main claim and that summary judgment was a more expeditious and less expensive means to achieve a just result.

Proving the Case against the Defendants

After deciding that this was an appropriate case for summary judgment, Justice Gomery found that Danis, Watson, and EAJ were all liable for fraud as a result of the false invoicing scheme as a result of the following:

- Danis, Watson, and EAJ made false representations to Noreast through the invoices. Additionally, Danis had made verbal misrepresentations to Noreast about the payment instructions for the Chinese suppliers. Danis, EAJ, and Watson knew that the misrepresentations were false. The invoices were not isolated billing errors; they were a deliberate scheme to overcharge Noreast.
- Danis deliberately chose Wyoming as the place of incorporation for EAJ because it permitted him to conceal his involvement with EAJ. The name EAJ was also chosen to mislead Noreast.
- The Defendants' misrepresentations caused Noreast to overpay and Noreast's reliance on the invoices delivered by Danis was not unreasonable. The false invoices caused Noreast to make payments for marked-up prices. There was no evidence that Noreast knew that it was dealing with a middleman or reseller.
- Danis had taken steps to discourage others at Noreast from communicating with the Chinese suppliers and discovering his fraud. Justice Gomery rejected the Defendants' argument that, since Noreast had the means to verify the information on the invoices, it was unreasonable for Noreast to trust them. No one at Noreast had any reason to second-guess the reliability of the invoices delivered by Danis, given that he was a long-time employee and shareholder.

- The EAJ invoices, along with Danis' other misrepresentations, resulted in a loss to Noreast. The misrepresentations had caused Noreast to make payments of US$1,882,885 to EAJ. Many of these payments were a loss to Noreast because the prices and, in some cases, the customs taxes, were marked up.

The primary defence of the Defendants was that Danis was effectively authorized by Noreast to act as a middleman for purchases from Chinese suppliers based on a conversation he had with the principal of the company in 2009 in which the Danis was told that he would not be paid extra for dealing with the Chinese suppliers. Justice Gomery rejected this argument as unsupported by evidence and invalid in law.

The Judgment

On September 4, 2018, Justice Gomery granted the motion for summary judgment and awarded Noreast US$864,238.75 in compensatory damages; $25,000 in punitive damages; and $173,180.91 in special damages (for investigation costs incurred by Deloitte).

Justice Gomery also granted Noreast pre-judgment interest on the compensatory damages and special damages from June 15, 2017 to the date of her judgment. She further granted post-judgment interest on the entire award as of the date of her judgment.

Justice Gomery also held that the Mareva injunction and Certificate of Pending Litigation over the Defendants' residence should remain in place pending satisfaction of the judgment.

Significance of the Case

This is a significant decision in two respects:

- obtaining summary judgment even when there is a genuine issue for trial based on the use of the enhanced fact-finding powers; and
- obtaining summary judgment the face of a counterclaim.

The case demonstrates the robust fact-finding powers available to judges under Rule 20. Even in the face of countervailing arguments about the facts, Justice Gomery used these powers to determine credibility and ultimately find liability. Moreover, it demonstrates that if a plaintiff can successfully establish that that claim is not so inextricably tied to the counterclaim, so as to render the summary judgment inefficient, a motions judge can still hear, and grant, summary judgment.

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1 *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 20.04 (2).

2 *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 20.04 (2.1).

3 2018 ONSC 5169 at para. 26.

4 *Hryniak v. Mauldin*, 2014 SCC 7 at para. 66; cited by 2018 ONSC 5169 at para. 27.

5 2018 ONSC 5169 at para. 28.

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