Court Of Appeal Overturns Reverse Summary Judgment

June 04, 2019

Drummond v. Cadillac Fairview Corp., 2019 ONCA 447

On May 30, 2019, the Ontario Court of Appeal (the Court) released its decision in *Drummond v. The Cadillac Fairview Corp. Ltd*., 2019 ONCA 447. On the underlying motion, the defendant brought a motion for summary judgment to dismiss the plaintiff's action. The motion judge granted summary judgment, but in favour of the plaintiff, leaving only the assessment of damages to proceed to trial. On appeal, the Court set aside the "reverse summary judgment" granted to the plaintiff and instead granted summary judgment dismissing the action.

Reverse Summary Judgment

Any party contemplating a motion for summary judgment must always consider the possibility of a court granting "reverse summary judgment," *i.e.* granting judgment in favor of the responding / opposing party. In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, the Supreme Court of Canada held that a court hearing a motion for summary judgment has the jurisdiction to render judgment in favor of the responding party even in the absence of a cross-motion for judgment. But as the Court of Appeal notes, there must still be procedural fairness.

Background

The *Drummond* action arose from a trip and fall over a skateboard in the food court of a commercial shopping centre. The skateboard had been brought onto the premises by a 12-year old boy who was not a party to the litigation. The plaintiff commenced an action solely against the property manager of the shopping centre pursuant to the *Occupiers' Liability Act*.

The defendant shopping centre moved for summary judgment after examinations for discovery. The motions judge declined to render judgment in the defendant's favor and instead granted judgment to the plaintiff on the issue of liability, leaving damages to be assessed at trial.

Appeal

The defendant appealed on two grounds: (1) that the judgment was the product of an unfair process; and (2) that the motion judged relied on inadmissible hearsay evidence.

On the first issue, the Court noted that summary judgment is appropriate when the record permits the motion judge "to reach a fair and just determination on the merits." The Court then determined that the grant of judgment in the plaintiff's favor was not fair and just for several reasons:

1. **The plaintiff did not bring a cross-motion for judgment**. Although this is not dispositive of the issue, the plaintiff's primary position at the motion was that there were genuine issues requiring trial.
2. In particular, **the plaintiff argued that summary judgment was inappropriate because a trial, with further evidence from additional witnesses, was required**. A finding of judgment in the plaintiff's favor was contrary to the plaintiff's argument at the motion.
3. **The motion judge did not consider the defence of contributory negligence**. Although the judge did not need to make a finding of contributory negligence in order to render judgment, a "fair and just determination on the merits" would have required a consideration (and rejection or application) of contributory negligence.
4. Finally, the motion judge failed to provide the defendant with an opportunity to address its litigation risk and **should have warned the defendant that he might grant reverse summary judgment**.

The Court considered the first error alone to be sufficient to set aside the judgment. After making this finding, it then considered the evidentiary record after excising the hearsay evidence adduced by the plaintiff in response to the motion.

Upon considering the corrected evidentiary record, the Court determined that the defendant had proven that it had met its statutory duty under the *Occupiers' Liability Act* and granted judgment in the defendant's favor.

Commentary

Practically speaking, reverse summary judgments are relatively rare as most courts dismissing such a motion will usually do so on the basis that there are genuine issues requiring trial. However, this decision should give some comfort to any party contemplating summary judgment.

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