

Andrew Parley
416-865-3093
aparley@litigate.com

February 26, 2019

Partial Summary Judgement: a tool used to simplify

In *Bisquip Leasing Corporation v Coco Paving Inc*, Bisquip Leasing Corporation [“Bishop”] brought a motion for summary judgment against Coco Paving Inc. [“Coco”] for unpaid invoices on various projects. Coco asserted a counterclaim against Bishop arising out of “deficient work” and an incident in which a gas line was allegedly struck by Bishop during excavation.

In opposing the motion for summary judgment, Coco argued that its claim for equitable set-off barred the claim for summary judgment and that s. 12 of the *Construction Act*, R.S.O. 1990, c. C.30 expressly permitted Coco to withhold the funds at issue.

More significantly, relying on the established jurisprudence around summary judgements, Coco submitted that partial summary judgment should not be ordered unless the claim and the counterclaim could be readily bifurcated. Coco argued here that the issues are "so closely connected" that it would be manifestly unjust to allow for summary judgement. Finally, a summary judgement would create a risk of duplicative proceedings and inconsistent findings, in respect of the claims that would remain to be adjudicated.

In dealing with Coco’s arguments, the Court concluded that the elements of equitable set-off were not established, and that s. 12 did not end the matter, as Coco’s ability to take that step was not an answer to Bishop's claim.

Interestingly, following an evaluation of the jurisprudence warning against partial summary judgment in most cases, the Court granted partial summary judgment against Coco. Relying on the guidelines set out in *Hryniak v Mauldin*, Lemon J. concluded that the principles informing the court’s approach in granting summary judgements did not prevent him from granting partial summary judgment in this case.

It was determined that granting summary judgement at this stage would effectively bring the trust claims against the other defendants to an end, given that the funds in issue were available to be paid. With respect to any counterclaim and third party actions, the number of the parties would be reduced as a result of the summary judgement, as Bishop would be out of those actions, also reducing cost and time.

Lemon J. further stated that while any negligence on the part of Bishop would be a triable issue which can't be determined on the record before him, those issues would arise only if a claim is made. A hypothetical claim should not hold up payment on the rest of the action.

Finally, it was determined that any risks of inconsistent findings would only occur if Coco continues with both its third party action and counterclaim, which it has control over resolving, without the need for the defendant to be dragged along for no good reason.

In short, Lemon J. held that even though a summary judgement will not end the litigation, it will simplify the action and lead to "a fair process and just adjudication". Granting summary judgement in respect of Bishop's claim for unpaid invoices would meet the objectives of summary judgment. Namely, it would bring some of the claims to an end, reduce cost, time and the number of the parties involved, with no risk of inconsistent results in the remaining litigation.

This is a signal from the court that even in instances where a summary judgement will not end the litigation, it can be used to simplify a larger set of claims. This case will provide a useful precedent to parties who have a relatively straightforward claim for liquidated damages, but are faced with a more complicated counterclaim.

With notes from Sahar Talebi