

Goodmans^{LLP} Update

Masters Cannot Use “Enhanced Powers” to Decide Motions for Summary Judgment

Introduction

In *R & V Construction v. Baradaran*¹ (the “**Baradaran Decision**”), the Ontario Superior Court of Justice ruled that masters cannot weigh evidence, assess credibility, or draw reasonable inferences when determining motions for summary judgment. Parties to construction litigation should be mindful of the Baradaran Decision and its implications.

Summary Judgment and Construction Litigation

A motion for summary judgment is a procedure that allows a judge or master to make a final determination of a claim or defence by way of a motion, rather than a full trial. When properly used, motions for summary judgment can reduce the time required to complete the litigation process, reduce the costs associated with trial, and save judicial resources.

The test for summary judgment is straightforward. Under Rule 20 of the *Rules of Civil Procedure*, a judge or master is required to grant summary judgment if either:

1. the court is satisfied that there is no genuine issue requiring a trial; or
2. the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

To determine whether there is a genuine issue requiring a trial, a judge may exercise any of the following powers (the “**Enhanced Powers**”):

1. weighing the evidence;
2. evaluating the credibility of a deponent; and
3. drawing any reasonable inference from the evidence.

Importantly, motions for summary judgment can be brought before either a judge or a master. This is significant for construction cases, which are often referred to construction lien masters pursuant to Section 58(1) of the *Construction Act*. In the past, despite the fact that Rule 20 specifies that only judges can use the Enhanced Powers, construction lien masters occasionally used the Enhanced Powers to decide motions for summary judgment. In doing so, they typically relied on Section 58(4) of the *Construction Act*, which gives masters all the jurisdiction, powers, and authority of the court to dispose of actions:

58(4) Powers of master on reference – A master or a case management master to whom a reference has been directed has all the jurisdiction, powers and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleadings and the giving of directions to a receiver or trustee appointed by the court.

¹ *R & V Construction v. Baradaran*, 2019 ONSC 1551.

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In addition, section 50(3) of the *Construction Act* provides that actions shall be as far as possible of a summary character:

50(3) Summary procedure – The procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question.

Baradaran Decision

The Baradaran Decision involved a dispute about a 2016 home renovation project between R&V Construction Management Inc. (plaintiff) and Manoucher Baradaran (defendant). The plaintiff commenced a construction lien action in the Superior Court of Justice, claiming \$78,573.70 in unpaid contract amounts. Pursuant to Section 58(1) of the *Construction Act*, the action was referred to a construction lien master for trial.

Prior to trial, the defendant brought a motion for summary judgment before a construction lien master. The Master dismissed the motion and awarded the plaintiff the full amount claimed for the balance owing on the project. In doing so, the Master used the Enhanced Powers – weighing evidence, assessing credibility, and drawing reasonable inferences from the evidence filed on the motion.

To challenge the Master's decision, the defendant brought a motion before Justice Belobaba of the Superior Court of Justice. The only issue before the Court was whether the Master had jurisdiction to use the Enhanced Powers to decide the motion for summary judgment.

In overturning the decision of the Master, the Court concluded that only judges can use the Enhanced Powers. Importantly, the Court noted that masters can still decide matters by way of summary judgment if they are satisfied that there are no genuine issues requiring a trial. However, the Court ruled that masters cannot weigh evidence, assess credibility, or draw reasonable inferences in coming to that determination. Justice Belobaba returned the matter to a construction lien master for trial.

Although the Court noted that the *Construction Act* was designed to provide a relatively inexpensive and efficient way to solve construction disputes, it concluded that a clear legislative amendment would be required if masters are to be given the Enhanced Powers. Although major amendments were made to the *Construction Act* in 2017, those amendments did not address the Enhanced Powers.

Implications

Now that it has been determined that Masters are not able to use the Enhanced Powers on motions for summary judgment, the utility of summary judgment motions before masters in Ontario construction cases is limited: they will only succeed where there are no evidentiary or credibility issues. Yet construction lien masters are specialized triers of fact with expertise in construction claims, and frequently conduct trials with full fact-finding powers. Moreover, the *Construction Act* is remedial legislation that was designed to provide a faster and more affordable avenue to resolve lien disputes. Providing masters with the ability to use the Enhanced Powers on motions for summary judgment would better align with those procedures and goals.

Moving forward, when bringing a motion for summary judgment before a master, the moving party will need to consider whether the Enhanced Powers will likely be necessary to determine the motion. If so, the moving party should consider alternative options to avoid further expense and delay.

The Baradaran Decision also raises interesting questions about Ontario's new adjudication regime. As noted above, a number of substantive amendments were made to the *Construction Act* in 2017. One of the most significant changes is an adjudication regime to resolve disputes on construction projects as they arise in the course of the project, rather than at the end of a project. The adjudication provisions will come into effect on October 1, 2019.

Pursuant to Section 13.5(1) of the *Construction Act*, parties will be able to adjudicate disputes relating to:

- i. the valuation of services or materials provided under the contract or subcontract;
- ii. payment under the contract or subcontract, including under approved, unapproved, and proposed change orders;
- iii. disputes that are the subject of a notice of non-payment under the new prompt payment regime;
- iv. amounts retained as set-off;
- v. non-payment of holdback; and
- vi. any other matter the parties to adjudication agree to.

Pursuant to Section 13.12 of the *Construction Act*, adjudicators will have the power to:

- i. take the initiative in ascertaining the relevant facts and law;
- ii. draw inferences based on the parties' conduct;
- iii. conduct onsite inspections of the improvement (subject to the owner's consent); and
- iv. obtain the assistance of an expert (with the adjudicator able to order that one or both parties pay the expert's fees).

As a result, adjudicators will be equipped with some of the Enhanced Powers that are now unavailable to masters in motions for summary judgment. It will be interesting to see how the overlap between the adjudication regime and the summary judgment procedure will impact the prosecution of construction claims in Ontario.

To read Goodmans' primer on the new adjudication regime, please click [here](#).

For further information concerning these developments, please contact either of the authors or any other member of our [Construction Law Group](#).