

CITATION: 474294 Ontario Ltd. v. Robert Green Equipment Sales Ltd., 2023 ONSC 3134
COURT FILE NO.: CV-20-00645016-0000
DATE: 20230421

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 474294 Ontario Ltd. o/a Northern Machinery Services

AND:

Robert G. Green Equipment Sales Ltd. and Road-Ex Contracting Ltd.

BEFORE: Justice Chalmers

COUNSEL: *M. Mason* for the Plaintiff/Responding Party

A. Cole for the Defendant/Moving Party, Robert Green Equipment Sales Ltd.

G. Bushi, for the Defendant Road-Ex Contracting Ltd.

HEARD: By video conference on February 15, 2023

ENDORSEMENT

OVERVIEW

[1] This action involves a 2012 Kobelco 350LC Excavator (the Excavator), which was damaged by a fire that occurred on August 7, 2019. On that date, Barry Wood, one of the owners of Northern Machinery Services, was operating the Excavator in the usual manner when it stopped functioning. A fire had occurred at the rear area of the Excavator. According to the engineer retained by the Plaintiff, the fire was caused by a DPF temperature sensor that was out of position from the threaded muffler point.

[2] The Plaintiff brings action against both Defendants in negligence, breach of contract/breach of warranty and negligent misrepresentation. The Defendants brought crossclaims against each other for contribution and indemnity.

[3] Green Equipment brings this motion for summary judgment dismissing the Plaintiff's claim and the crossclaim brought by Road-Ex Contracting Ltd. (Road-Ex). Green Equipment argues that the Plaintiff has not proven on a balance of probabilities that it was negligent and that its negligence caused the Plaintiff's damages. Green Equipment also denies that it sold the Excavator to the Plaintiff and denies that there is any liability for breach of contract or breach of warranty.

[4] For the reasons set out below, I am not satisfied that this is an appropriate case for summary judgment. I find that there are genuine issues requiring a trial. I dismiss the summary judgment motion brought by Green Equipment.

FACTUAL BACKGROUND

Sale of the Excavator

[5] Green Equipment sells and services excavators. In 2013, Green Equipment sold the Excavator brand new to Road-Ex. After the sale, Green Equipment performed warranty and service work on the Excavator. Regular maintenance was performed by Road-Ex's in-house technicians.

[6] The last invoice issued by Green Equipment to Road-Ex for servicing of the Excavator is dated June 11, 2018. At that time, Green Equipment sold an exhaust gas recirculation (EGR) valve to Road-Ex, at a cost of \$4,975.99, inclusive of H.S.T. An EGR valve recirculates gas for emissions. The invoice for the sale of the EGR valve does not include a charge for labour.

[7] In April 2019, Road-Ex decided to sell the Excavator and placed an advertisement on Kijiji. Barry Wood, along with his spouse, are the owners of 474294 Ontario Limited o/a Northern Machinery Services (Northern Machinery). Mr. Wood saw the ad and was interested in purchasing the Excavator, for use at one of his properties.

[8] Mr. Wood approached his business friend Robert Green, the owner of Green Equipment. Mr. Wood had known Mr. Green for about 25 years. He knew that Mr. Green, through his company Green Equipment, sold and serviced new and used Kobelco equipment. Mr. Wood had bought vehicles from Green Equipment. He also had his equipment serviced by Green Equipment, particularly the Kobelco machines he had owned.

[9] Mr. Green was familiar with the Excavator having sold it to Road-Ex in 2013. Green Equipment had also performed warranty and service work on the Excavator after it was sold to Road-Ex. Mr. Green told Mr. Wood that the Excavator was in "great shape".

[10] After speaking with Mr. Green, Mr. Wood went to Road-Ex's property to inspect the Excavator. He was satisfied that the Excavator was "in beautiful shape." According to Mr. Wood, Mr. Campoli, the principal of Road-Ex, told him that the Excavator had been recently serviced and the muffler and catalytic converter had been replaced at a cost of \$5,000. Mr. Campoli told Mr. Wood that the Excavator was in excellent condition. Following his inspection and while still at the Road-Ex property, Mr. Wood told Mr. Campoli that he will buy the Excavator. On discovery, he testified at Q. 105, "the machine was excellent, so I said to him, 'I'll buy it,' and that was it". They agreed on a purchase price of \$150,000, plus H.S.T.

[11] Mr. Wood wanted immediate delivery of the Excavator however, Mr. Campoli was concerned about Mr. Wood's cheque clearing. Mr. Green, who knew both Mr. Wood and Mr. Campoli, agreed to assist. Green Equipment wrote a cheque to Road-Ex and took a cheque in the same amount from Northern Machinery. In this way the Excavator could be immediately

delivered to Mr. Wood. The parties agree that Green Equipment made no profit on the transaction.

[12] By invoice dated April 29, 2019, Road-Ex sold the Excavator to Green Equipment for \$150,000 plus H.S.T. of \$19,500 for a total of \$169,500. By invoice dated May 2, 2019, Green Equipment sold the Excavator to Northern Machinery for the same price. Northern Machinery paid the Green Equipment invoice in full. A couple of days later the Excavator was delivered to Mr. Wood's property in Uxbridge.

[13] On discovery, Mr. Wood was asked about Mr. Green's involvement with respect to the sale of the Excavator. At Q. 109, Mr Wood testified, "well, Bob didn't really do anything. All he did was he said, 'Well, what I'll do is I'll buy the machine off Road-Ex, or Ernie and then I'll sell it to you to give you clear title.' That's all he did."

[14] After purchasing the Excavator, Mr. Wood used it about 2-3 days a week. He was the only person who operated the Excavator. He stated that the Excavator operated "perfectly fine".

The Fire

[15] On August 7, 2019, Mr. Wood was operating the Excavator to clear the roadway on his property. He noticed that the hand controls went dead. He looked behind him and saw a fire about three to four feet in the air coming from the back right-rear corner of the Excavator. He attempted to use his pressure washer to extinguish the fire. He called 9-1-1. The fire was extinguished. The Excavator was significantly damaged. The damages claimed are in the amount of \$153,000.57.

Origin and Cause of the Fire

[16] The Plaintiff retained Russ Colosi of Vehicle Forensics Inc. to prepare a report on the origin and cause of the fire. In his report dated March 31, 2022, he provides the opinion that the fire originated on the surface of the Excavator's muffler. He observed that the exhaust/DPF sensor located on the muffler was out of position and hanging by its wire.

[17] Mr. Colosi also noted that during the week of July 23, 2019 (two weeks before the fire), Mr. Wood was operating the Excavator and making a road on his property. There was a small ditch beside the road. Mr. Wood slid the Excavator into the ditch. After he pulled the Excavator out of the ditch, Mr. Wood inspected it and found no issues. Mr. Colosi does not state what part of the Excavator was inspected by Mr. Wood. There is no evidence as to whether Mr. Wood specifically inspected the muffler/DPF after this incident.

[18] With respect to the cause of the fire, Mr. Colosi states that the most likely source of ignition was the failure of the diesel particulate filter (DPF). Mr. Colosi makes the following findings, opinions and conclusions:

- a) **Background:** “The excavator was purchased from Road-Ex Contracting of Concord, ON. We understand that Road-Ex refurbished the muffler and diesel particulate filter (DPF) prior to the sale of the excavator to Mr. Wood. We also understand that the muffler/DPF refurbishing took place at the same time the exhaust gas recirculation (EGR) valve was replaced, which was on or around June 11, 2018. Soot deposits produced during normal operation of the engine commonly disrupt the operation of the EGR valve and the DPF together. As such, statements from Road-Ex that the components were serviced together were consistent with most industry best practices.
- b) **Service History:** “Prior to Mr. Wood’s purchase of the excavator from Road-Ex, we understand that Road-Ex purchased a new EGR valve from a local Kobelco dealer, Robert Green Equipment Sales in Gormley, ON. We also understand that replacement of the EGR valve was part of a larger repair that also included refurbishing the muffler/DPF. Refurbishing the muffler/DPF requires removal and disassembly of the entire component, which requires removal of the DPF sensors from the sensor fittings”.
- c) **Cause:** “Examination of potential ignition sources in that area [muffler/DPF components] indicated that the most likely source of ignition was the hot surfaces of the muffler/DPF assembly. Potential first fuel sources for the fire were the rubber fuel hoses located nearby, or leaking fuel from compromised fuel hoses. Absence of the sensor from the DPF combustion chamber would cause a stream of pressurized hot gas to escape through the sensor fitting and damage rubber fuel hoses 6-inches away. The likely outcome of such directed heat would lead to degradation of the rubber hoses and eventual loss of connection. Subsequent fuel leaks would then become a fire hazard in the presence of the hot exhaust surfaces”.
- d) **Mode of Failure:** “Given the secure design of NPT threaded fittings, it is my experience that the sensor was left loose or never reinstalled after the cleaning was performed on or about May 18, 2018 [the invoice was dated June 11, 2018]. There are no situations of normal or even severe use that would cause the sensor to fall out of the combustion chamber if installed properly. Furthermore, there were no indications of physical impact to the area of the muffler/DPF or the rear portion of the engine compartment that would have compromised the components in the area of origin”.
- e) **Conclusion:** “The fire originated on the surface of the muffler/DPF after fugitive hot gases damaged nearby fuel hoses, which led to subsequent fuel leaks. The root cause of the fire was operation of the excavator while the DPF sensor was out of position from the muffler/DPF combustion chamber.

[19] Green Equipment did not deliver an origin and cause expert report.

THE ISSUES

[20] In this endorsement, I will address the three theories of liability advanced by the Plaintiff as against Green Equipment:

- a. that Green Equipment is liable to Northern Machinery under the *Sales of Goods Act* for the sale of the Excavator;
- b. that Green Equipment is liable for pre-contractual negligent misrepresentations as to the fitness and merchantability of the Excavator; and,
- c. that the fire was caused by the negligence or breach of duty of Green Equipment in its servicing of the Excavator.

[21] I will also address whether this matter is appropriate for summary judgment.

ANALYSIS AND DISCUSSION

1. Is Green Equipment liable to Northern Machinery under the Sales of Goods Act?

Did Green Equipment Sell the Excavator to the Plaintiff

[22] In the Statement of Claim, the Plaintiff alleges that it “entered into a contract with the Defendants, or each of them, or was a Third-Party beneficiary of a contract for the purchase, sale, delivery, handling, servicing and inspection of the Excavator.”

[23] Green Equipment denies that it sold the Excavator to the Plaintiff. Mr. Green states that he only agreed to facilitate the transaction to allow the delivery to be made immediately. The parties agree that Mr. Green did not do anything other than advance the money to allow for the immediate delivery of the Excavator. Green Equipment did not make a profit on the sale of the Excavator.

[24] The Plaintiff argues that Green Equipment is a seller of the Excavator as that term is defined in the *Sale of Goods Act*, R.S.O. 1990, c. S.1. A seller is defined as a “person who sells or agrees to sell goods”. The Plaintiff states that on April 29, 2019, Green Equipment purchased the Excavator from Road-Ex. At that point, Green Equipment was the owner of the Excavator. A few days later, on May 2, 2019, Green Equipment transferred ownership to the Plaintiff.

[25] The Plaintiff argues that at the time the ownership of the Excavator was transferred to it, Green Equipment met all requirements of a seller. It had title to the Excavator. It agreed to sell the Excavator to the Plaintiff. The Plaintiff argues that the fact that Green Equipment did not make a profit on the transaction is irrelevant. A seller can meet the requirements of the *Sale of Goods Act* even if it is a gratuitous exchange or the goods are sold at a loss: *S.M. Waddams, Products Liability*, 5th Ed. (Carswell).

[26] In the Statement of Claim, the Plaintiff also alleges that Road-Ex was a seller of the Excavator. The parties agree that the Excavator was owned by Road-Ex when the ad was posted on Kijiji. Mr. Wood saw the ad and expressed an interest in purchasing the Excavator. He arranged to see the Excavator at Road-Ex's premises. After seeing the Excavator and speaking with Mr. Campoli, he decided to purchase the Excavator. The parties agreed on a price. The decision to purchase was made when Road-Ex was the owner and before Green Equipment purchased the Excavator.

[27] The issue of whether Road-Ex was also a seller of the Excavator was not before me on the motion. Road-Ex did not bring a summary judgment motion and took no active role in the motion brought by Green Equipment.

[28] It seems to me that in the unique circumstances of this case there may have been two sellers. Road-Ex when Mr. Campoli and Mr. Wood met at the Road-Ex yard and agreed that the Plaintiff would purchase the Excavator and agreed on the price, and a second sale contract a few days later, when Green Equipment transferred ownership to the Plaintiff.

Implied Conditions

[29] If the relevant conditions of the *Sale of Goods Act* are met, the implied warranties and conditions of fitness and merchantability under section 15 of the *Act* are triggered. The implied warranties and conditions apply only to sellers of goods. The *Act* provides that there is no implied warranty or condition as to the quality or fitness for any particular purpose for which the goods are supplied, except where the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment.

[30] For the implied warranty or condition of fitness to be triggered, there must be evidence of actual reliance. If the purchaser relies on his own skill or judgment, then the implied condition as to fitness for a particular purpose will not operate. The buyer's reliance on the seller's skill and judgment must be a "substantial and effective inducement for the buyer to make the purchase": G.H.L. Fridman, *The Sale of Goods in Canada*, 6th ed., Toronto, Carswell, at p. 166-7.

[31] Here, the Plaintiff met with Mr. Green before he went to inspect the Excavator. Mr. Green stated that the Excavator was "in great shape". When Mr. Wood met with Mr. Campoli at the Road-Ex premises, Mr. Campoli is reported to have said that the Excavator had been recently serviced and the muffler and catalytic converter had been replaced. Mr. Campoli told Mr. Wood that the Excavator was in excellent condition.

[32] On the motion for summary judgment, Green Equipment takes the position that any statement made by Mr. Green was made before Green Equipment had made the payment to Road-Ex and therefore could not have been made when Green Equipment was a seller. Green Equipment also argues that the Plaintiff did not rely on Mr. Green's statement that the Excavator was in great shape when the Plaintiff decided to purchase the Excavator. Mr. Wood did not decide to purchase the Excavator until after he spoke to Mr. Wood and saw the Excavator at Road-Ex's yard.

[33] Mr. Wood states that he did in fact rely on Mr. Green's statement. He knew Mr. Green was familiar with the Excavator and would have known if there were any mechanical or other issues with the machine. The issue of whether Mr. Wood also relied on Mr. Campoli's statement that the Excavator was in excellent condition was not before me on the motion. As noted earlier in these reasons, Road-Ex did not bring a summary judgment motion.

[34] The issue of whether Mr. Wood relied on Mr. Green's skill or judgment when he purchased the Excavator is in dispute. The issue of whether Mr. Wood relied on Mr. Campoli's skill and judgment is also in dispute. This issue will turn on an assessment of Mr. Wood's credibility.

2. Is Green Equipment Liable to the Plaintiff in Negligent Misrepresentation?

[35] The Plaintiff argues that Green Equipment is liable in negligent misrepresentation. The parties agree that the test for negligent misrepresentation is as follows:

- a) There must be a duty of care based on a "special relationship" between the representor and the representee;
- b) The representation must be untrue, inaccurate or misleading;
- c) The representor must have acted negligently in making the misrepresentation;
- d) The representee must have relied in a reasonable manner, on the negligent misrepresentation;
- e) The reliance must have been detrimental to the representee in the sense that damages resulted: *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC).

[36] The Plaintiff argues that all five aspects of the test are satisfied in this case. The Plaintiff states that Mr. Green made a pre-contractual negligent misrepresentation when he advised Mr. Wood that the Excavator was in "great shape". Mr. Colosi provided the opinion that the Excavator was defective at the time it was sold and therefore Mr. Green's statement was untrue. The Plaintiff also states that he relied on the representation when he decided to purchase the Excavator. He also argues that it was reasonable to rely on Mr. Green's representation. He knew the Mr. Green was very familiar with Kobelco excavators and that his company had serviced the Excavator in question.

[37] It is my view that the liability of Green Equipment in negligent misrepresentation will turn on whether Mr. Wood relied on Mr. Green's statement. Mr. Wood states in his affidavit that based on "Bob's recommendation, I went to Road-Ex's yard in Bolton to look at the Excavator." Further representations were made to Mr. Wood when he was at Road-Ex's yard, by Mr. Campoli who reportedly stated that the Excavator was in excellent condition.

[38] The role that each statement had in Mr. Wood coming to his decision to purchase the Excavator is in dispute. Mr. Wood's credibility with respect to his evidence that he relied on the statements of one, or both of the Defendants, will be a significant factor.

3. Was the fire caused by the negligence or breach of duty of Green Equipment in its servicing of the Excavator?

Sale and Installation of the EGR Valve

[39] The onus is on the Plaintiff to prove on a balance of probabilities that the fire was caused by the negligence or breach of duty of Green Equipment. In argument, Plaintiff's counsel states that the evidence as to the servicing of the Excavator is difficult to resolve. He states that the evidence is contradictory and recently changed.

[40] Green Equipment concedes that it sold an EGR valve to Road-Ex in May-June 2018. The invoiced amount is \$4,975.59. Although the invoice does not include a charge for labour, Green Equipment admits in its Statement of Defence that it installed the EGR valve:

[...] Green Equipment, at the request of Road-Ex, had serviced the Excavator about a year before the fire. At that time, Green Equipment replaced the EGR valve assembly. This service did not involve any work on or about the thermal sensor.

[41] On the motion, Green Equipment sought to withdraw the admission in its pleading. I am not prepared to grant leave to allow Green Equipment to withdraw the admission. There was no motion before me for leave to withdraw the admission. Even if such a motion were brought, I am not satisfied that the withdrawal of the admission is meritorious: *Phillips v. Disney*, 2018 ONSC 1021, at para. 25.

[42] After the Statement of Defence was delivered, the parties attended on the Examination for Discovery. Again, Mr. Green admitted that his company installed the EGR valve assembly. He testified on the Examination for Discovery that his company installed the EGR valve assembly on May 18, 2018, after Green Equipment received a call from Road-Ex with respect to an EGR malfunction. The evidence was as follows:

19. Q. Would you agree that Green Equipment serviced the excavator for the last time on June 11th, 2018? I believe there was a document in your AOD [affidavit of documents] with respect to that service.

A. We invoiced him June –

20. Q. I see.

A. We did the service on May the 18th, 2018. We invoiced him on June the 11th, when we knew that fixed the problem.

21. Q. Understood. Thank you.

MR. BUSHI: Sorry, Robert. Can you repeat when you serviced it? I didn't catch the date.

THE DEPONENT: We -- on May the 18th, we had a call, May the 18th, 2018. We had a call that a code came up on the machine. The code was P1458, EGR malfunction. We went out and we installed an EGR valve, which recirculates the gas for the emissions, and on June the 11th, we invoiced Road-Ex for that call.

MR. BUSHI: Thank you.

THE DEPONENT: So, the work was done May the 18th and it fixed the problem. The code went away.

[43] The evidence of Mr. Green that Green Equipment installed the EGR valve in May 2018, is consistent with the evidence of Jim Pasquin of Road-Ex. He testified that Road-Ex only performed regular maintenance such as the replacement of oil and air filters and that Green Equipment did the more significant work.

Servicing Work on the Muffler, DPF and Catalytic Converter

[44] The Plaintiff argues that at the same time Green Equipment installed the EGR valve in May 2018, it also performed servicing work on the muffler, DPF and/or catalytic converter. This is disputed by Green Equipment.

[45] Mr. Campoli on behalf of Road-Ex testified on Examination for Discovery that Green Equipment performed the catalytic converter servicing work on the Excavator on May 18, 2019. He testified that the item on the invoice "replace EGR valve" includes work on the catalytic converter.

107. Q. No. That's the one I know about. There's the EGR valve. When you say replacing the converter, is that what you're referencing?

A. Yeah. It was checked, and replaced, and we didn't like what was -- yeah, he didn't feel -- we didn't have it repaired, so Bob Green replaced the whole valve converter slash-muffler, but not muffler, that whole emissions control thing.

108. Q. To your best knowledge -- you can see here, I've now just scrolled down to the actual invoice, --

A. Yeah. 109.

Q. -- and it's

Q. Sorry. Ernie, for the record, we're looking at Invoice -- we're still on Tab 5, third page, June 11th, 2018, valve assembly, EGR, \$4,403.00. When you were talking before about a converter and a muffler, this is the valve assembly EGR work that was done? That's what you were ---

A. Correct. Correct, correct. That's the invoice.

112. Q. Okay.

A. Yeah, and most of these equipment, at that time of hours and years with this new emissions, a lot of them need replacing at the time. Not all of them, but some.

[46] I do not find Mr. Campoli's evidence that the catalytic converter was repaired or serviced by Green Equipment to be very clear or precise. He states that Green Equipment replaced the "whole valve converter slash muffler, but not muffler, the whole emissions control thing." It is not clear from this statement whether the muffler was replaced or not. There is no reference to the DPF.

[47] Mr. Campoli states that he concluded that the catalytic converter work was performed based on the invoice from Green Equipment dated June 2018. That invoice refers only to the EGR valve and does not refer to the muffler, DPF sensor or catalytic converter. There is no evidence on this motion as to the cost of the EGR part or the typical cost of labour to install an EGR valve or the cost to replace the muffler or catalytic converter.

[48] Although Green Equipment admits in the Statement of Defence and on discovery that it installed the EGR valve, it does not concede that it carried out any work on the muffler, DPF or catalytic converter. In fact, Green Equipment specifically denies doing this work. There is no documentation that provides that Green Equipment performed work on the muffler or DPF.

[49] Mr. Colosi, in his report, states that he understands that Green Equipment refurbished the muffler and the DPF at the same time the EGR valve was replaced. He seems to come to this understanding on the basis of information received from Mr. Campoli. Mr. Colosi also refers to the fact that deposits produced during normal operation of the engine commonly disrupts the operation of the EGR valve and DPF and the servicing of both together is consistent with most industry best practices. However, he also notes in his report that there is no documentation that provides that Green Equipment performed any servicing work on the DPF or muffler.

Cause of the Fire

[50] Mr. Colosi concludes that the fire originated on the surface of the muffler. The DPF sensor was not in its proper position and instead was hanging by a wire. This allowed hot exhaust gases to escape and damage nearby fuel hoses. This led to fuel leaks. The fuel ignited when it came into contact with the surface of the hot muffler. Mr. Colosi states that the "root cause of the fire was operation of the excavator while the DPF sensor was out of position from the muffler/DPF combustion chamber".

[51] Mr. Colosi does not provide the opinion that the installation of the EGR caused the fire. I note that the installation of the EGR occurred in May 2018; approximately 11 months before the Excavator was sold to the Plaintiff and 15 months before the fire. There is no evidence as to how often Road-Ex may have serviced the Excavator after the EGR was installed. There is also no evidence that if the DPF was out of position, it would have been readily observed on an inspection of the engine. There is no evidence as to how long the Excavator could have operated with the DPF being out of position before a fire would have occurred.

Summary

[52] The issue as to whether Green Equipment performed any work on the DPF sensor is in dispute. Mr. Campoli testified on his discovery that Green Equipment replaced the “whole valve converter slash-muffler, but not muffler, the whole emissions control thing.” Green Equipment admits that it installed the EGR but denies doing any work on the muffler, catalytic converter or DPF. Although Mr. Colosi provides the opinion that EGR valves and DPF may be serviced at the same time, he also notes that there is no documentation that Green Equipment performed work on the DPF or muffler. I note that the EGR is located in a different part of the engine from the muffler and DPF.

[53] Also, there is an issue as to whether Road-Ex may have been responsible for the work on the muffler, catalytic converter and DPF. Mr. Pasquin provided evidence that Road-Ex carried out regular maintenance on the Excavator, including the cleaning of oil and air filters. I note that Mr. Colosi states in his report that if the DPF becomes clogged, it would be necessary to remove the DPF to clean the filter. It is not clear from this statement whether the removal of the DPF to clean a filter would be considered regular maintenance.

[54] It is also unclear from the evidence as to when Road-Ex may have performed regular maintenance. If the DPF sensor was “hanging by a wire” it may have been observed by Road-Ex technicians. The fact the sensor was not in position may have also been apparent to Mr. Wood during the period of time he owned the Excavator and before the fire. Mr. Wood was an experienced owner and operator of excavators, and he may have inspected the engine area after he purchased the Excavator and before the fire.

4. Appropriateness of Summary Judgment

The Legal Principles

[55] Summary judgment shall be granted if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. There will be no genuine issue requiring a trial when the summary judgment process:

- a) allows the judge to make the necessary findings of fact;
- b) allows the judge to apply the law to the facts; and

- c) is a proportionate, more expeditious and less expensive means to achieve a just result:
Hryniak v. Mauldin, 2014 SCC 7, at para. 49

[56] The Supreme Court in *Hryniak* recognized that some cases will require a trial to allow for a just and fair determination of the issue in dispute. The Supreme Court at paragraph 50 stated as follows:

These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives a judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[57] In *Bang v. Sebastian*, 2018 ONSC 6226, Sanfilippo, J. summarized the “Roadmap” laid down by *Hryniak*:

[20] In *Hryniak*, at para. 66, the court sets out a two-part test for considering summary judgment under Rule 20.04(2)(a), termed the “Roadmap”. The first step is that the motion judge must determine whether there is a genuine issue requiring trial based only on the evidence contained in the motion record, specifically without using any of the powers set out in Rule 20.04(2.1). There will be no genuine issue requiring trial where the evidentiary record on the motion provides the judge with the evidence necessary to reach a fair and just determination in a process that is timely, proportionate and affordable, as is stated in *Hryniak* at paras. 4, 28, 66 and specifically at 49. Paragraph 49 states:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[21] The second step in the “Roadmap” is activated when a judge finds that there is a genuine issue requiring a trial. The court should then determine whether the issue can be decided using the powers set out in Rules 20.04(2.1) and (2.2). These powers are to be employed where they will lead to a fair and just result but not where they do not serve the goals of affordability and proportionality, as stated in *Hryniak* at para. 66:

She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[58] The Supreme Court in *Hryniak* observed that it may not be in the interests of justice to use the fact-finding powers against a single defendant if the claims against other parties will proceed to trial in any event. This runs the risk of duplicative proceedings or inconsistent findings: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at para. 25.

[59] The Court of Appeal provided further direction with respect to the use of the summary judgment procedure.

With respect, the cultural shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. The shift recommended by *Hryniak* was away from the very restrictive use of summary judgment, that had developed, to a more expansive application of the summary judgment procedure. However, nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to “a fair process and just adjudication”: *Hryniak* at para. 33. Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule: *Mason v. Perras Mongenais*, 2018 ONCA 978, at para. 44.

Discussion

[60] I am of the view that this case is not appropriate for summary judgment.

[61] With respect to the issue of the breach of contract/breach of warranty claim, there is a genuine issue as to whether Green Equipment, Road-Ex, or both were sellers of the Excavator. If the *Sale of Goods Act* applies to one or both of the Defendants, the next issue to be determined is whether the implied warranty of fitness applies. This will turn on whether the buyer expressly or by implication, makes known to the seller the particular purpose for which the goods are required. There must be evidence of actual reliance by Mr. Wood on the sellers. Mr. Wood takes the position that he relied on Mr. Green’s statement that the Excavator was in good condition. This is disputed by Green Equipment. The determination of the issue will likely turn on Mr. Wood’s credibility.

[62] Similarly, there is an issue of reliance with respect to the negligent misrepresentation claim. Two representations were made to Mr. Wood. Mr. Green stated that the Excavator was in great shape. Mr. Campoli told Mr. Wood that the Excavator had been recently serviced and was in excellent condition. The extent to which Mr. Wood relied on one or both of the statements in deciding to purchase the Excavator is in dispute. Again, Mr. Wood’s credibility will be in issue.

[63] The issue of the servicing of the Excavator is also in dispute and will depend on findings of credibility. Mr. Campoli testified on his discovery that Green Equipment replaced the “whole valve converter slash muffler, but not muffler, the whole emissions control thing.” Green Equipment denies doing any work on the muffler, catalytic converter or DPF. Road-Ex takes the position that it only carried out regular maintenance on the Excavator, such as cleaning the air and oil filters. It is not clear from the evidence whether it was necessary to remove the DPF to carry out regular maintenance. It is also not clear from the evidence as to how long the DPF may have been hanging by a wire, and whether this ought to have been observed by either Defendant or the Plaintiff before the fire.

[64] I conclude that there are genuine issues that require a trial. There are disputed facts and issues of credibility. As a result, I am unable to make the “necessary findings of fact or apply the legal principles to reach a just and fair determination”: *Hryniak*, at para. 51.

[65] Having found that there are genuine issues requiring a trial, I must go to the second step in the analysis and determine whether the issues can be decided using the powers set out in Rules 20.04(2.1) and (2.2). As noted by Sanfilippo J. in *Bang v. Sebastian*, 2018 ONSC 6226, “[T]hese powers are to be employed where they will lead to a fair and just result but not where they do not serve the goals of affordability and proportionality”: at para. 21.

[66] Given the many disputed facts and credibility issues involved in this case, I find that the use of the fact-finding powers set out in R. 20.04 (2.1) and (2.2) of the *Rules of Civil Procedure* will not lead to a fair and just result.

[67] I am also of the view that there is a real risk of inconsistent findings. If Green Equipment’s motion were to be granted, the action will presumably continue as against Road-Ex. There is a great deal of overlap in the claims against Green Equipment and Road-Ex. They both had a role in selling the Excavator to the Plaintiff. Mr. Green and Mr. Campoli both made representations to Mr. Wood as to the condition of the Excavator before the purchase. Road-Ex and Green Equipment both did servicing work on the engine. The extent of each Defendants’ liability is a genuine issue that requires a trial.

[68] I am of the view that the summary judgment is not the “more proportionate, expeditious or less expensive means to achieve a just result”: *Hryniak*, at para. 64. I conclude that the interests of justice are better served by having the matter proceed to trial in the normal course.

DISPOSITION

[69] The summary judgment motion brought by Green Equipment is dismissed.

[70] The Supreme Court in *Hryniak*, at para. 78, directs that in dismissing a summary judgment motion, I must consider whether there are any compelling reasons that I should not remain seized of the matter. As a result of hearing the motion and writing this endorsement, I am well aware of the factual and legal issues in the case. I am of the view that the time to get a new judge up to speed is not justified given the amounts in issue. There are no compelling reasons for me not to remain seized. Efforts should be made to schedule the trial before me.

[71] The Plaintiff was successful on the motion and is entitled to its costs. At the conclusion of the oral argument, I was advised that the parties had agreed that the successful party should receive costs in the amount of \$15,000, inclusive of counsel fee, disbursements and H.S.T. I award costs to the Plaintiff fixed in the amount of \$15,000. The costs are payable by Green Equipment within 30 days of the date of this endorsement.

Chalmers J

Date: April 21, 2023