CITATION: Wallace v. J. Rivington Associates Inc., 2011 ONSC 4481
BROCKVILLE COURT FILE NO.: 05-0136; 05-0136A

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SHERRY WALLACE	)	Bryan D. Laushway for the Plaintiff
	)	(Applicant)
	)	
Plaintiff (Applicant)	)	
- and -	)	
	)	
J. RIVINGTON ASSOCIATES INC., PAULINE AUNGER REAL ESTATE LTD.	)	Jason Mangano for J. Rivington Associates Inc.; Serena Rosenberg for Pauline Aunger Real Estate Ltd.
	)	
Defendants (Respondents)	)	
	)	
- and –	)	
	)	
JOHN MONOGIOS and HELEN MONOGIOS	)	Richard Knott for the Third Parties
	)	(Respondents)
	)	
Third Parties (Respondents)	)	

AND BETWEEN

BROCKVILLE COURT FILE NO.: 06-0735

ONTARIO

SUPERIOR COURT OF JUSTICE

SHERRY WALLACE	)	Bryan D. Laushway for the Plaintiff
	)	(Applicant)
	)	

Plaintiff (Applicant)	)	
- and –	)	
	)	
JOHN MONOGIOS and HELEN MONOGIOS	)	Richard Knott for the Defendants (Respondents)
	)	
Defendants (Respondents)	)	
	)	
	)	
	)	**HEARD:** June 28, 2011

Endorsement on Motion for Stay

Aitken J.

Nature of Proceedings

[1] John Monogios and Helen Monogios ("the Monogios"), as Third Parties in action no. 05-0136 and as Defendants in action no. 06-0735 seek an order staying the two actions on the basis of a release signed by Sherry Wallace ("Wallace"), the Plaintiff in both actions, on August 6, 2004. The two actions have now been consolidated and are scheduled to be heard together at a trial in November 2011.

Background Chronology

[2] On May 19, 2004, the Monogios and Wallace signed an Agreement of Purchase and Sale pursuant to which Wallace agreed to purchase the Monogios' home at 10106 Dixon Road, Addison, Ontario for $154,000. The Defendant in action no. 05-0136, Pauline Aunger Real Estate Ltd. ("Aunger"), and more specifically Ken Hilton from that firm ("Hilton"), acted as agent for both the vendors and the purchaser.

[3] The Agreement of Purchase and Sale had a number of conditions, one being that Wallace at her own expense obtain a building inspection satisfactory to her, failing which the Agreement was to become null and void. Wallace retained J. Rivington Associates Inc. ("Rivington"), a Defendant in action no. 05-0136, to

conduct the building inspection. Terry Baker ("Baker") from that firm did the inspection on May 28, 2004.

[4] When she signed the Agreement of Purchase and Sale, Wallace knew that the roof on the Monogios' home needed to be replaced because this had been indicated in the MLS listing. Her evidence is that she advised Baker that she was concerned about potential water damage, and he assured her that he was qualified to inspect a home for water damage. Baker's report noted that there was "leaking/seeping observed at southeast corner near electrical panel" and he advised that this be monitored. He also noted in regard to the sewage ejector that there was a strong odor in the basement, and he recommended further review of the ejector by a qualified plumber. Baker reported only minor issues in the bathrooms. He noted that many window sills and frames were deteriorating and that they would have to be repaired or replaced as required. Baker did not report any water damage of concern or any mould in the home. Wallace accepted the report and on May 31, 2004 waived this condition in the Agreement of Purchase and Sale.

[5] Pursuant to the Agreement of Purchase and Sale, on July 31, 2004, Wallace attended the home with Hilton for a pre-closing inspection. At this time, the home was vacant. Wallace's evidence was that, during the inspection, Wallace removed a piece of wood that was against the wall in a closet and discovered that there was a piece of drywall with a square cut out of it. She and Hilton observed that the insulation behind the drywall was wet and there was mould present. They also observed mould on the baseboard and carpet in the bedroom closet. At that time, Wallace became concerned that the Monogios had been aware of the mould and water issues and had not disclosed these facts to her.

[6] These discoveries resulted in a flurry of telephone calls and faxes to and from lawyers, the real estate agent, contractors and insurance agents.

[7] On August 1, 2004, Wallace sent an e-mail to Hilton which stated in part:

> … I would like to give Helen & John the benefit of the doubt, but I also remembered that the ceiling in the kitchen had been painted, but other ceilings had not … more evidence that they were aware of the problem as well as the fact that somebody had to keep wiping up the water on the kitchen floor everytime it rained. It seems over welmingly obvious that they knew and concealed the fact from both of us.

> … I can't imagine how much the lawyer's bill is going to cost me, too. I'm not prepared to spend a whole bunch of money unnecessarily because of these people. I wouldn't have bought the house at all if I had known.
>
> I don't know the procedure here and I can't get any answers so I'm frustrated and worried. My Dad's response is … well, very clear. Not my problem, it's theirs. Withhold lots. I don't know how this even works. If you don't send all the money, how do you get the keys for closing? I have a million questions and no one is available to answer them.
>
> I'm hoping this will all work out as it is a problem for me, mine and the business.

[8] On August 3, 2004, Wallace's lawyer, Cindy Burrell ("Burrell"), telephoned the Monogios' lawyer, Dawn Dixon ("Dixon"), to advise her of the water damage. Dixon contacted her clients and then advised Burrell that Wallace could have unrestricted access to the property to conduct a further investigation of the damage. Dixon subsequently requested a change of the closing date to August 5th.

[9] On August 4, 2004, Burrell faxed Dixon stating in part:

> … I can advise that my client is not willing to close the deal without a holdback or abatement in light of the severe damage which may or may not have arisen after the inspection. That is a question of fact that can not be determined at this time.
>
> As the estimate provided by a contractor details the damage and your client's attempts to conceal said damage, I will not recount it here. However, it is apparent that this damage was wilfully concealed by the application of paint among other things and goes beyond the hole in the closet wall. The house is currently uninhabitable due to the extensive presence of mold and as such is not the thing which my client bargained for when she entered into the contract with your client. Accordingly, your client has fundamentally breached the contract. The wilful concealment of a latent defect and the uninhabitable nature of the house exclude the possibility of your client claiming caveat emptor.

[10] Later on the same date, Burrell faxed Dixon to advise that she was in funds to close; however, her client required a holdback of $45,000 to ensure the repairs to the house would be completed as required. In that CMHC required three quotes, an extension of the closing date would be required to allow adequate time for the process. In the letter, Burrell asked if Dixon's clients had canvassed other options available such as insurance protection for the damage.

[11] In response, on August 4, 2004, Dixon faxed Burrell stating in part:

> I contacted my clients by telephone this morning and they advise that the property is in exactly the same condition as when your clients inspected same and when the Building Inspector originally attended at the property. They advise that their dog had chewed the hole in the closet wall some time ago and it was certainly something that they were aware of and they were not attempting to hide anything from your client. They advise that the hole was there at the time of the building inspection and on the day that their furniture was moved they noticed the hole and requested their daughter to arrange to put a board over it for appearances only. They have also owned the property since May 1995 and have not been aware of any water damage.
>
> I note from a review of the Agreement of Purchase and sale that the Agreement was conditional on the buyer obtaining a building inspection on or before July 25, 2004 and this condition was waived without any amendment to the Offer.
>
> On the instructions of my clients, I wish to advise they are not prepared to authorize any holdback or entertain any abatement in the purchase price.

[12] In her affidavit sworn in support of this motion, Helen Monogios again stated that she had never been aware of any water damage prior to August 1, 2004.

> 21. The first we knew about the water damage was on or about August 1st, 2004, when Mr. Hilton advised us that there had been water damage. We were advised by Mr. Hilton and do believe him that He and the purchaser attended at the house for their final inspection before the closing, it was apparent that there was significant water damage. …

[13] Further telephone conversations between the lawyers' offices ensued.

[14] In an e-mail from Wallace to Hilton on August 5, 2004, Wallace stated:

> GOOD NEWS KEN:
> I CAN KEEP THE BUSINESS HERE. THE NEW OWNER IS GREAT. SHE SAID I CAN JUST USE THIS PLACE AND MY NEIGHBORS HAVE AN APARTMENT TWO DOORS DOWN AND CAN STAY THERE – NO PROBLEM. IF THE DEAL DOESN'T CLOSE TOMMORROW WITH THE ABATEMENT OR HOLDBACK I'M COVERED ON MY END. I CAN PHONE BELL ON FRIDAY AND CANCEL THE INSTALLATION ETC. …

> I FEEL SO MUCH BETTER NOW KNOWING I HAVE NO PRESSURE TO CLOSE AND NO PRESSURE TO BUY THE "MOLDY HOUSE". I GOT SOME INFO ON MOLD (BACTERIA & FUNGI) OFF THE INTERNET. MAJOR HEALTH ALEART. I TALKED TO A CONTRACTOR AS WELL TODAY AND HE SAID MOLD DOESN'T APPEAR THROUGH DRYWALL IN A WEEK AS WELL – JUST LIKE THE GUY THAT WAS ALREADY THERE. HE ALSO SAID THAT IF THE WATER HAS BEEN RUNNING FOR SOME TIME IT COULD HAVE AN ADVERSE EFFECT ON THE WOOD STRUCTURE AND THE WOOD WOULD DRY BUT BE ROTTEN. HE THOUGHT THE PRICE WAS LOW, BUT WHO KNOWS – CONTRACTORS ARE PESIMESTS. I'M TOLD THAT THE SELLER IS CALLING THE INSURANCE AGENT TO SEE IF THEY'LL COVER THE DAMAGE. WE'LL SEE TOMMORROW. BUY THE BEST NEWS IS I HAVE A PLACE FOR THE BUSINESS AND A PLACE TO LIVE NO MATTER WHAT HAPPENS. …

[15] In a responding e-mail from Hilton to Wallace later that day, he stated: "Helen again says that she did not repaint the kitchen ceiling and to my knowledge, since shortly before I had the listing, the ceiling had not been painted."

[16] On August 6, 2004, at 11:21 a.m., Burrell faxed Dixon referencing a telephone conversation she and Dixon had had late the previous day and confirming that she had been instructed to postpone closing until August 6, 2004 subject to the following conditions:

> 1. I will holdback $15,000 from the purchase price in my trust account to be applied towards the costs of repairing the water damage to the subject property.
> 2. Specifically, the repairs required including replacing drywall, insulation, removing carpet from the basement, repairing or replacing the kitchen ceiling and basement ceiling to the extent damaged by water. The repairs may also include replacing interior studs, repairing electrical wiring, and any and all other damage occasioned by the water influx to the house.
> 3. My client will obtain three written estimates of the costs to repair said damage.
> 4. The holdback will be disbursed to your clients if and when your clients' insurance forwards sufficient funds to repair the damage or completes the repairs to the satisfaction of my client. If the insurance company will only fund part of the repairs, the expense of the remaining repairs will be disbursed from the funds held back.
> 5. If the repairs are not covered by your clients' insurance and if the cost of the repairs exceeds $15,000.00, my client reserves the right to pursue all legal remedies available to her.

[17] At 12:54 p.m. on August 6, 2004, Dixon faxed Burrell that she had received instructions from the Monogios to close the transaction on August 6, 2004 with a $15,000 holdback that would only be released on the written consent of both parties or their lawyers. Wallace would obtain three estimates for the cost to repair the water damage. In the event that the Monogios' insurance company would cover the entire costs of the repair of the water damage, the $15,000 would be paid to the Monogios. In the event that the insurance company would not cover the claim and the costs were less than $15,000, the balance would be paid to the Monogios. The maximum amount that would be paid by the Monogios would be $15,000 and Wallace would provide a full and final release to the Monogios with respect to any and all future claims on closing. A copy of the Release was enclosed. The evidence of Wallace is that this was the first time she had been asked to provide a full and final release.

[18] Further telephone conversations ensued.

[19] Later on August 6, 2004, Dixon wrote to Burrell stating that her clients were prepared to close the transaction that day with a $20,000 holdback on the same conditions as set out in her earlier letter of the same date.

[20] Ultimately the transaction closed on August 6, 2004 with Wallace signing the following Release:

> IN CONSIDERATION of the payment or the promise of payment to me of TWENTY THOUSAND DOLLARS ($20,000.00), I, SHERRY WALLACE, do hereby release and forever discharge the said JOHN ANGELO MONOGIOS and HELEN BERTHA MONOGIOS, from any and all actions, causes of actions, claims and demands for damages howsoever arising, which heretofore may have been or may hereafter be sustained by me in connection with my purchase of that portion of Lot 35, Concession 10, Geographic Township of Elizabethtown, Township of Elizabethtown-Kitley, County of Leeds, designated as Part 1, on Reference Plan 28R-1655.
>
> FOR THE SAID CONSIDERATION I further agree not to make any claim or take any proceedings against any other person or corporation who might claim contribution or indemnity from the person, persons or corporation discharged by this Release.
>
> IT IS UNDERSTOOD AND AGREED that the said payment or promise of payment is deemed to be no admission whatever of liability on the part of the said JOHN ANGELO MONOGIOS and HELEN BERTHA MONOGIOS.

[21] Funds were subsequently disbursed from the $20,000 holdback to fund an inspection of the property by a qualified engineer to determine the extent and nature of the mould. By August 24, 2004, Wallace and her daughter, who were living at the property, were reportedly suffering ill effects from the mould infestation.

[22] A mould assessment report was completed on August 31, 2004. On September 17, 2004, Burrell wrote to Dixon to report as follows. According to the specialist, the damage to the property resulting from mould was extensive and was going to require significant work to remediate. Wallace had contacted three companies for quotes, and one advised verbally that the cost would be between $65,000 and $80,000. The mould specialist had advised, amongst other things, that the ceiling had been painted and patched, that there was mould on a two by two foot section of drywall removed from the closet, that this was the area of the roof where water had entered the interior of the house, that there was staining on new wallpaper installed by the Monogios, and that there were several signs of a recent flood. The percentage of toxigenic and pathogenic fungi was 78% compared to 2% outside. By letter of October 13, 2004, Burrell provided Dixon with an estimate for the removal only of the areas of the house affected by the water damage.

[23] On October 27, 2004, Dixon responded that the holdback of $20,000 was to be applied to the costs of repairing the damage to the kitchen ceiling caused by the excessive rainfall prior to the closing and the hole in the closet in the master bedroom. She stated: “As previously advised, my clients were not aware of any other water damage to the property other than damage caused by the ice storm in 1998 which was repaired at that time.” She went on to advise that the livingroom had been repainted and papered in June of 2003, the kitchen had been re-papered two years previously and the front hall more recently, and the basement had been repainted and re-wallpapered in April/May 2004 because of damage caused by children in foster care. That work had been paid for by the Children’s Aid Society. The Monogios would agree to a release of only $5,000 from the holdback.

[24] On December 14, 2004, Burrell provided Dixon with the last two written estimates for the cost of repairs, one of which estimated the cost of repairs at approximately $50,000. In her letter, Burrell voiced her disagreement that the

holdback to repair the damage caused by the water was limited to the kitchen ceiling.

Pleadings

[25] In her Amended Statement of Claim in action 05-0136, Wallace seeks damages of $225,000 against Rivington and Aunger based on negligent misrepresentation. In her Amended Statement of Claim in action 06-0735, Wallace seeks damages of $350,000 against the Monogios representing the cost of repairs and renovations to the property plus ancillary expenses. In both Amended Statements of Claim, Wallace states that the Release she signed on August 6, 2004 is void, invalid and unenforceable due to the fact that, at the time she executed the Release, she relied on the negligent and/or fraudulent misrepresentations of the Monogios (and/or Rivington and/or Aunger as the case may be) and she was under duress.

[26] Wallace's counsel has conceded that, if the Release is ultimately upheld, it will successfully defeat Wallace's claims against Rivington and Aunger, as well as the Monogios.

Test for a Stay

[27] Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 states: "A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just."

[28] The principles governing a stay of proceedings were summarized by McNair J. in *Varnam v. Canada (Minister of National Health & Welfare)* (1987), 12 F.T.R. 34 at para 7:

> A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of judicial discretion in determining whether a stay should be ordered in the particular circumstances of the case. The power to stay should be exercised sparingly and a stay will only be ordered in the clearest cases. In order to justify a stay of proceedings two conditions must be met, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are

> not sufficient special circumstances in themselves for the granting of a stay: *Communications Workers of Canada v. Bell Canada*, [1976] 1 F.C. 282 (T.D.); *Weight Watchers Int'l Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 419 (F.C.T.D.); *Baxter Travenol Laboratories Ltd. v. Cutter (Canada), Ltd.* (1981), 54 C.P.R. (2d) 218 (F.C.T.D.)

See also *Gruner v. McCormack* (2000), 45 C.P.C. (4th) 273 (S.C.J.); *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Gen. Div.) at para 6.

[29] The position advanced by the Monogios' counsel is simple: Wallace signed a full and final release of all of her claims against the Monogios arising in connection with Wallace's purchase of the Monogios' property. Any action now brought against the Monogios in regard to issues arising from that sale is vexatious and works an injustice on the Monogios. They relied on the Release when they closed the sale to Wallace on the basis of the agreed-upon terms. It is unfair to them to be subject to further claims by Wallace when Wallace has had the benefit of possession of the property since the closing date and the benefit of having $20,000 withheld from the agreed-upon sale price.

[30] Furthermore, argues the Monogios' counsel, Wallace would be subject to no injustice if her action were stayed. She had full information of all of the circumstances facing her when she signed the Release. She knew about the water damage and the mould, she knew it would be a costly endeavour to remediate the situation, and she knew she could refuse to close the sale. She made a conscious decision to close the transaction on the terms agreed to between herself and the Monogios. She does not have the right to go back on that agreement now that the cost of repairs is greater than what she may have anticipated. When the Release was signed and the transaction completed, there was no unequal bargaining power between Wallace and the Monogios. Both had legal representation. Although Wallace was a single mother supporting herself and her daughter, the Monogios were a retired couple with limited means. Just as Wallace was under pressure to make the sale happen because her business telephone lines had been disconnected and the movers had already started packing her belongings, so too were the Monogios under pressure for the sale to close because they had already moved out of the property and had relocated to Alberta. In short, there can be no challenge to the validity of the Release signed by Wallace, and that Release is a full answer to Wallace's claims.

[31] Wallace's counsel responds that prejudice would be caused to Wallace were her action stayed because there are two genuine issues for trial; namely: (1) whether the Monogios made a fraudulent misrepresentation to Wallace that was relied on by Wallace when she agreed to the Release drafted by the Monogios' lawyer, and (2) whether Wallace was in a situation of economic duress such that she had no option but to sign the Release.

Fraudulent Misrepresentation

[32] A misrepresentation is fraudulent when it can be said that its maker has an absence of an honest belief in its truth (*Francis v. Dingman* (1983), 43 O.R. (2d) 641 (C.A.) at para 28). Put another way, a fraudulent misrepresentation is one (1) which is untrue in fact, (2) which the defendant knows to be untrue or is indifferent as to its truth; (3) which was intended or calculated to induce the plaintiff to act upon it; and (4) which the plaintiff acts upon and suffers damage (*Kerr on the Law of Fraud and Mistake*, 7th ed. (1952), at 25 as quoted in *Francis v. Dingman* at para 50).

[33] A release obtained by a fraudulent misrepresentation is not a valid release and will be set aside (*Francis v. Dingman* at paras 30, 52).

[34] Evidence was tendered on the motion that could support the finding that the Monogios made a misrepresentation as to whether there had been water damage to the interior of their home prior to the time of the building inspection on May 28, 2004. I note the following evidence regarding representations made by the Monogios prior to the closing:

- In the Seller Property Information Sheet intended to be provided to potential purchasers, the Monogios answered that they were unaware of any damage caused by water.

- In her letter to Burrell on August 4, 2004, Dixon (as the Monogios' agent) said that the Monogios had told her – in response to concerns raised by Wallace – that they had owned the property since May 1995 and had not been aware of any water damage.

- In an e-mail to Wallace on August 5, 2004, Hilton (acting as agent both for the Monogios and Wallace) reported that Helen Monogios had told him that she had not repainted the kitchen ceiling.

- Wallace states in her affidavit that Burrell was advised by Dixon (the Monogios' lawyer) in a telephone conversation shortly before the closing that the Monogios' insurance adjuster, York, had told her that the water damage was "no big deal" and that it appeared that the Monogios' insurer would be covering the claim.

[35] Evidence was provided on the motion to the effect that at trial the following evidence would be tendered as proof that the above representations by the Monogios or their agents were not only untrue, but were also fraudulent.

- Wallace, her father, one or more contractors and the mould specialist observed the water damage and mould at the home and the experts would say that the water damage and the mould is not something that happens within a short period of time.

- Evidence will be tendered that the kitchen ceiling had been patched and repainted.

- York, the insurance adjuster, would state that at no time did he tell anyone that the water problem was "no big deal". He felt that the water problem was significant. At no point did he tell anyone that it was likely that the insurer would cover the claim as he was aware that the water damage was a longstanding issue.

- In a fax to Dixon's firm dated August 18, 2004, York stated:

> "As you are aware we were asked to investigate a possible water damage claim at the above premises on behalf of Pilot Ins. who insured your clients. The water damage to the kitchen ceiling and closet above has resulted from the insureds failure to repair the roof which has allowed water to enter on a repeated and ongoing basis. There is evidence of mould on the insulation & drywall. Persons have previously cut two openings in the closet wall.
>
> The mould & water damage in the basement is a longstanding problem. As early as one to two years ago, the insureds reported that they noticed that the subfloor was collapsing in some areas. They apparently did not investigate further.
>
> All indications are that there will be no coverage with the Pilot Insurance for these damages. …"

- During her examination for discovery, Helen Monogios acknowledged that during the ice storm, water had come up in the basement to at least a foot and bedding had been destroyed.

- Children's Aid Society records show that (1) in May/June 2003 a foster child had saturated the walls of the two bedrooms in the basement with a

water hose which caused drywall to disintegrate; (2) another parent in September 2003 had complained that her child's clothes were so full of mildew that they had to be thrown out, and (3) the foster child complained that her clothes and belongings were musty.

- Mary Young provided a signed statement that in September 2003, she was hired by the Monogios to wallpaper the basement. There was black mould on the basement walls. She advised Helen Monogios that it had to be cleaned before papering. Helen Monogios responded that she had tried and it would not come off. Young attempted to put up wallpaper, but it would not stick as a result of the mould and damp walls. The Monogios advised her to paint the walls and she eventually did but she told them the mould would come through the paint. At the time, there was a bucket in the basement catching water leaking from the ceiling above. There were water stains on the carpets and water and mould damage to the baseboards. There were water stains on the wall and baseboard in the main floor bathroom. Also, new carpeting was being placed over old wet underlay.

- Jeff Burnham provided a signed statement that in 2003 or 2004 he was asked by the Monogios to replace flooring in their home. He observed large water stains on the kitchen ceiling and said there must be a leak upstairs. He was asked to replace the floor in the mainfloor bathroom. There was significant water damage around the toilet and mould growing on the baseboards. He spoke to Helen Monogios about this. He advised her that the sub-floor in the bathroom was rotting due to water damage and suggested it be replaced. He was instructed not to replace it but to simply lay the new floor over the rotten sub-floor.

- Rich Bennett provided a signed statement to the effect that he had considered purchasing the Monogios' home prior to Wallace purchasing it; however, when he inspected it he noticed water damage in the basement and a strong musty smell, as well as several other shortcomings. He spoke to the Monogios, explaining that he would make an offer, but it was much lower than what they wanted due to all the work that would have to be done on the home – including repairing the water damage.

[36] In her affidavit sworn in response to the motion for a stay, Wallace states at para 22 in explaining why she signed the Release:

> 22. In addition, I felt somewhat reassured by the statements made by the Monogios that there had never been any water damage to the home and that it appeared their insurance company would be covering the damages. I wondered if I had overreacted to the water damage and that perhaps it was not as big of a problem as I had imagined, as if it was only a recent leak, perhaps the water damage was not too extensive. I was also somewhat encouraged by the reference in Ms. Dixon's letter to the insurance company covering the cost of repair.
>
> 23. Based on their representations and since I felt that I had no choice, I therefore signed the release, closed the transaction and moved into the home on August 6, 2010.

[37] Wallace has received a quotation from a mould remediation specialist that the cost of remediation to the property would be approximately $127,000.

[38] In summary, there is evidence that a misrepresentation was made, it was fraudulent in nature, Wallace relied on it in part when she signed the Release, and, as a result of signing the Release and concluding the sale, Wallace has incurred damages.

[39] The Monogios' counsel would have me weigh all of the evidence and conclude that Wallace ultimately would not be able to establish that she relied on any representations of the Monogios – whether negligent or fraudulent misrepresentations – when she signed the Release and closed the purchase. He emphasizes the following:

- Wallace knew from the listing agreement that the roof needed to be replaced.
- Baker advised Wallace that there was seepage into the basement in one corner and there was an odour in the basement.
- On July 31, 2004, Wallace observed the wet insulation and the mould in the bedroom closet, and she believed the kitchen ceiling had been repainted at some point.
- By this time, Wallace suspected that the Monogios were not being truthful with her in terms of how much water damage the house had suffered.

- On August 4, 2004, Burrell described the home as being uninhabitable due to the extensive presence of mould.

- Wallace had been told by more than one contractor that mould did not appear overnight and that likely there had been a longstanding water problem.

- Wallace was referring to the home as "the moldy house".

- Wallace knew that mould could be a major health problem.

- Wallace had been warned that the quote for repairs she had received by this time was likely low.

- By August 4, 2004, Wallace had the option to leave her business telephone lines in the property she was selling and to live in a neighbour's apartment for a few weeks.

[40] There is no doubt that this evidence could be a forceful rejoinder to the evidence relied on by Wallace. And as emphasized in such cases as *Bittman v. Royal Bank*, 2007 Carswell Alta 367 (C.A.), leave to appeal to S.C.C. refused August 16, 2007, the fraudulent misrepresentation must have been used by the Monogios to deceive Wallace into signing the Release. The following quote from *Radhakrishnan v. University of Calgary Faculty Assn*., 2002 ABCA 182 at para 71 is particularly apt:

> Any suggestion that one party could upset a contract freely entered into, because of prior failure to disclose to him a fact which he suspected and believed before the contract, is startling. The whole idea of misrepresentation as a ground to upset a contract is that one entered into the contract under a false belief induced by the other party to the contract. Relief from a contract for breach of a duty to disclose proceeds on similar reasoning. We have already seen that one could not upset a contract for failure to disclose a fact which the other party already knew.

[41] Wallace's evidence was that, when deciding whether to accept $20,000 as the amount to be withheld, she took into account the August 4, 2004 representation of the Monogios to the effect that any water damage was not the result of longstanding problems but was of more recent origin. It is possible that a trial judge could decide that the August 4th representation by the Monogios played

a role in reassuring Wallace that, despite her suspicions, the cost of remediating the water damage and mould might be adequately covered by the $20,000 holdback.

[42] In the face of the conflicting evidence, I cannot conclude that Wallace's claim that she is not bound by the Release due to the existence of a fraudulent misrepresentation is *clearly* without merit.

Duress

[43] Wallace's evidence on the motion was that in the summer of 2004, she was employed on a contract basis to provide administrative and a number of other services, including dispatch services, to two trucking companies. Her duties required her to deal with upwards of one hundred phone calls per day. Given the nature of the trucking business, Wallace understood that any interruption in phone communication for an extended period of time would be fatal to her business and would severely impact on the business of the trucking companies. Wallace believed that if she failed in her contractual duties to the companies, they could sue her for lost revenues. Wallace's financial circumstances at the time were such that she could not afford any interruption in her business income, as that was the only means of support for herself and her daughter.

[44] Wallace's evidence was that on August 5, 2004, she was advised by Burrell that the Monogios had changed their minds and they were prepared to close the transaction subject to a holdback. No mention was made of any final release. Subsequently Burrell confirmed to her that during the telephone conversation when Dixon advised Burrell of the Monogios' change of heart, no mention was made of a final release. On the basis of this information, Wallace contacted the purchaser of her home and advised her that she would not need use of her property for a few weeks in order to operate her business.

[45] Wallace's evidence was that during the same telephone conversation between Burrell and Dixon on August 5, 2004, Dixon advised that she had spoken with York, the insurance adjustor, and he stated that the water damages were "no big deal" and that it appeared the Monogios' insurer would be covering them.

[46] Following Wallace's telephone conversation with Burrell on August 5, 2004, she elected not to contact Bell to cancel the phone transfer to her new property. Therefore, on the morning of August 6, 2004, Wallace's business telephone lines were disconnected. The moving company arrived at her home and

started to pack her belongings. In the afternoon of August 6, 2004, Burrell arrived at Wallace's home with Dixon's letter of August 6, 2004 and a copy of the Release. This was the first time Wallace learned that the Monogios were demanding a release.

[47] According to Wallace, at that point Wallace panicked. Her phone lines had been disconnected. She understood that they could not be reconnected at a new address without a delay of up to six weeks. She was concerned about losing her income from her business and causing damage to her clients. Burrell confirmed to Wallace that she could refuse to close, but that could lead to a lawsuit by the Monogios.

[48] The evidence of Wallace was that she felt that she had no choice but to sign the release as, if she did not, she would lose her ability to earn an income and could be subject to three lawsuits.

[49] It is well established under Ontario law that economic duress may render a contract voidable in circumstances where there is coercion of a party's will which vitiates consent so that it cannot be said that the contract was entered voluntarily. The coercion exerted to get the party to enter the contract must not be legitimate. There are four factors to consider in determining whether a party's will has been coerced: (1) did the party protest? (2) was there an alternative course open to the party? (3) was the party independently advised? and (4) after entering the contract, did the party take steps to avoid it? (See *Gordon v. Roebuck* (1992), 9 O.R. (3d) 1 (C.A.); *Stott v. Merit Investment Corp.* (1988), 63 O.R. (2d) 545 (C.A.)).

[50] Have the Defendants shown that Wallace's reliance on economic duress to vitiate the Release is *clearly* without merit?

Did Wallace protest?

[51] There is some evidence that Wallace protested the signing of the Release in that there were further negotiations about the amount withheld after it became clear a release was being sought.

Was there an alternative course open to Wallace?

[52] There is evidence that, practically speaking, there was no alternative course of action open to Wallace. Her business telephone lines had been disconnected. Her understanding was that if she did not have them connected at the new residence in accordance with the contract she had with the provider, she may have had to wait six weeks for them to be reconnected. The evidence was that, by this time, she had given up the option of keeping the lines connected at her old residence. Without those telephone lines being open, she could not support herself and her daughter, the business of the truckers for whom she worked would have been seriously injured, and she may have been subject to a lawsuit.

Was Wallace independently advised?

[53] Wallace did have the benefit of legal advice, but the significance of this factor must be weighed against the other factors.

After signing the Release, did Wallace take steps to avoid it?

[54] There is evidence that, by the end of August 2004, Wallace's lawyer was already challenging the Monogios' lawyer about the accuracy of the representations that the Monogios had made prior to closing and was already putting the Monogios on notice that the damage to the property as a result of water and mould was far more extensive than the Monogios had let on. Wallace commenced an action against Rivington and Aunger on January 31, 2005 – just shy of six months from the date the Release was signed. The evidence is that Wallace was not idle during this period, but instead was trying to get a proper mould assessment and estimates of the cost of repairs. The evidence is that she was delayed in this endeavour through the intransigence of the Monogios in releasing the holdback funds. The action against the Monogios was not started until July 2006 – almost two years after the Release was signed. I cannot say that it is clear that Wallace did not take steps in a timely fashion to resile from the Release when the interconnectedness between the two actions has not been fully explained in the evidence tendered on this motion.

Was the coercion legitimate?

[55] Without a full consideration of the evidence, it cannot be concluded that the pressure exerted by the Monogios in refusing to close the transaction subject to a holdback unless the Release was signed was a legitimate exercise of their commercial rights. For example, it would not be a legitimate exercise of

commercial and contract rights to fraudulently misrepresent a critical fact underlying the contract and then rely on that fact to exert pressure on another party to sign a release.

Disposition

[56] The appropriate forum for a determination of the validity of the Release is at trial. Credibility will play a central role in this case and impacts on what representations were made by the Monogios or their agents, whether they were accurate, and whether they represented the Monogios' honestly held beliefs. Credibility will also play a role in the determination of the factors that led Wallace to sign the Release – whether she was under duress when she did so and whether she relied on any fraudulent representations of the Monogios, or their agents, when she did so. Finally, quantifying any potential damages will require a careful consideration of all of the evidence.

[57] The Monogios have not satisfied either precondition to the granting of a stay of Wallace's action against them. Sufficient evidence of misrepresentations on the part of the Monogios has been tendered at this stage to make it difficult to conclude that this litigation is oppressive or vexatious against them or is an abuse of the process of the court. Additionally, the Monogios have had the full use of the sale proceeds since the date of closing, aside from the $20,000 holdback. Although it may be inconvenient for this litigation to be outstanding, and it may be costly to have legal representation, the Monogios have had funds to finance the litigation, and in any event, a costs award will reimburse them at least partially if they succeed at trial.

[58] As to the other precondition, it is not clear that no injustice will be caused to Wallace if the action is stayed. It is not clear that her arguments based on fraudulent misrepresentation and economic duress are lacking in merit.

[59] Consequently, the Monogios' motion to stay these proceedings is dismissed. If the parties cannot agree, they may make written submissions on costs within 30 days of the release of this endorsement. Submissions will be limited to five pages plus any relevant exhibits.

_____

Aitken J.

RELEASED: July 22, 2011

CITATION: Wallace v. J. Rivington Associates Inc., 2011 ONSC 4481
COURT FILE NO.: 05-0136;05-0136A;06-0735

ONTARIO

SUPERIOR COURT OF JUSTICE

Endorsement on Motion for Stay

Aitken J.

RELEASED: July 22, 2011