

CITATION: Ballestin and Ballestin v. 1304478 Ontario Inc, 2018 ONSC 2969
COURT FILE NO.: CV-17-572665
DATE: 20180511

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
MICHELE BALLESTIN AND)
GUILLAUME BALLESTIN) Ryan Breedon, for the Plaintiffs
)
Plaintiffs)
)
– and –)
) Allan Mohammed, for the Defendant
)
1304478 ONTARIO INC.)
)
Defendant)
)
)
)
) **HEARD:** May 7 and 8, 2018

2018 ONSC 2969 (CanLII)

REASONS FOR JUDGMENT

H. MCARTHUR J.:

Introduction

[1] Michele Ballestin and her husband, Guillaume Ballestin, are suing 1304478 (a corporation set up by Domenico Zentena) for breach of contract over the sale of a house.¹

[2] Ms. Ballestin first saw the property at an open-house. She decided that she would like to renovate the house and sell it for a profit. But she had a problem: she and her husband could not afford the second mortgage they would need to purchase the property. A solution was proposed by the owner of the house, Mr. Zentena. Mr. Zentena suggested that the Ballestins buy the house for \$600,000, but with an extended closing date. They could then renovate the house before the

¹ For ease, I will generally refer in these reasons to Mr. Zentena, rather than the corporate entity.

closing date and sell the property to a third party. Once the home sold, the Ballestins would get the money from the sale of the home, minus \$600,000.

[3] On September 16, 2016 the Ballestins and Mr. Zentena, on behalf of his corporation 1304487, signed the contract. The agreement took effect upon the Ballestins providing a deposit of \$25,000. The agreement provided that although the closing date for the sale would be March 21, 2017, the Ballestins had the right to begin making improvements to the property before closing. The contract further specified that the “balance owing to 1304478 Ontario Incorporated remains \$605,000 less \$25,000 deposit, any gain above \$605,000 less deposit is payable to the Purchasers (Michele Ballestin & Guillaume Ballestin).”

[4] The \$5,000 over the originally discussed price of \$600,000 was to cover all “associated legal costs incurred to the sellers”. The agreement provided that the Ballestins were to be credited for the difference between the \$5,000 and the “real costs paid” for legal fees. The agreement also provided that the Ballestins would be responsible for all costs associated with the property before it sold, including utilities, property taxes and insurance.

[5] The property sold on March 9, 2017 for \$825,000. Based on the agreement, counsel for the Ballestins argues that they are entitled to \$247,184. Counsel for Mr. Zentena counters that after the initial signed agreement, the Ballestins agreed to vary the deal. He argues that on March 13, 2017, they agreed to accept \$150,000 instead. Alternatively, he argues that any money owed to the Ballestins should be reduced to account for various items. Once the deductions are taken into account, the Ballestins are owed only \$140,222.75.

[6] For the reasons that follow, I find that the Ballestins are entitled to \$212,224.63 from the proceeds of the sale of the home. I have determined that the original agreement was not varied on March 13 as there was no meeting of the minds and the Ballestins received no consideration for any such a variation. If I am wrong, then any agreement on March 13 is void because it was extracted through economic duress. Moreover, apart from the real estate commission fees, I have concluded that the deductions claimed by Mr. Zentena are without merit.

[7] I do not intend to outline the evidence at the outset, but will refer to it as necessary in my analysis. I will first consider whether a new agreement was reached on March 13, 2017. I will then turn to consider the various deductions claimed by Mr. Zentena.

Analysis

Was a new agreement reached on March 13, 2017?

[8] Counsel for Mr. Zentena argues that on March 13, 2017, Ms. Ballestin spoke with his son, Mike Zentena. At that time, he argues, she agreed to accept \$150,000 from the sale of the home.

[9] The sole evidence about the conversation between Mike Zentena and Ms. Ballestin on March 13 came from Ms. Ballestin. Mike Zentena failed to testify.

[10] According to Ms. Ballestin, Mike Zentena called her on that date and told her to grab a pen and paper to write some things down. He told her that the final amount owing to the Ballestins was going to be adjusted to account for property management fees, liability fees, accounting and legal fees. This meant, Mike Zentena told her, that she and her husband were entitled to \$150,000. Ms. Ballestin protested, and said that was not the deal. She told Mike Zentena that she never would have entered into the agreement on those terms; it would not make sense. Mike Zentena told her she could “take it or leave it”.

[11] Ms. Ballestin said she was upset and shocked and began to cry. Things seemed to be falling apart. She owed money to her contractor and creditors; if the Zentenas refused to give her the money from the sale of the property, she would be unable to honour her obligations. Finally, she told him she would take it.

[12] Counsel for Mr. Zentena thus argues that Ms. Ballestin agreed to vary the contract on March 13, such that she would be entitled to receive only \$150,000. I disagree for the following three reasons.

1) No meeting of the minds

[13] First, in my view there was never a meeting of the minds between the parties; Mike Zentena never saw the effect of the agreement in the same way as did Ms. Ballestin. Ms. Ballestin understood that if she agreed to the “take it or leave it” deal, she would get the \$150,000. She did not. Instead, Mike Zentena sought to extract a further concession. Before he would give her the money, she was required to sign a release form promising that she would not sue. As of April 3, when the Statement of Claim was filed, the Ballestins still had not been paid any money out of the proceeds of the sale of the home. This highlights that there was no meeting of the minds as to the effect of agreeing to take the \$150,000.

2) No consideration

[14] Second, the Ballestins received no consideration for agreeing to take only \$150,000. Both sides agree that consideration would be required in order for the agreement to be varied: *Gilbert Steel Ltd. v. University Construction Ltd.*, [1976] O.J. No. 2087 (C.A.). Counsel for Mr. Zentena argues that the Ballestins received consideration. The consideration, he argues, was that the Zentenas took on the responsibility of selling the home.

[15] I disagree. The property sold on March 9. Mike Zentena sought to vary the deal, with his “take it or leave it” proposition on March 13. In my view, work undertaken by the Zentenas to sell the home before March 13 cannot amount to consideration for a variation of the contract on March 13.

3) Economic duress

[16] Third, in the event that I am wrong, and there was a new agreement on March 13, in my view the agreement is void for economic duress.

[17] At the outset, I note that counsel for Mr. Zentena argues that that the Ballestins should not be able to rely on economic duress since it was not pleaded in their Statement of Claim. The difficulty with this position is that the submissions on duress directly relate to the position of the defence that a new agreement was reached on March 13. The defence, however, failed to plead in their Statement of Defence that a new agreement had been reached on that date. Despite the failure of the defence to advert to the March 13 discussion in their pleadings, counsel for the plaintiff was content to make submissions as to whether the March 13 discussion amounted to a new agreement. In my view it is open to the Ballestins to argue economic duress for the first time at trial; it is in response to the argument of the defence in relation to the March 13 discussion, raised for the first time at trial.

[18] I turn now to an assessment of whether any agreement by Ms. Ballestin is void for economic duress.

[19] There are four factors to consider when assessing whether a contract was entered into under duress: 1) did the plaintiff protest; 2) was there an alternative course available; 3) did the plaintiff obtain independent advice; and 4) after entering the contract, did the plaintiff take steps to avoid it. An assessment of all four factors supports a finding that if Ms. Ballestin did agree to vary the agreement on March 13, she did so only under duress. I will address each factor in turn.

1. Did Ms. Ballestin protest?

[20] Ms. Ballestin's uncontradicted evidence is that she protested when Mike Zentena confronted her with his "take it or leave" proposal. She told him that was not the deal. She said she would never have entered into the agreement if those were the terms. She cried. Ms. Ballestin clearly opposed the variation being put forward by Mike Zentena.

2. Was an alternative course open to Ms. Ballestin?

[21] Ms. Ballestin's financial situation at the time was such that she had no alternative course available but to acquiesce to the offer of \$150,000. She owed money to her contractor and creditors; the house had sold and they expected payment. As she said, things were falling apart; she felt she had no choice. She needed the money and, understandably given the context, was afraid that if she disagreed with Mike Zentena, she might not get anything. This would have put her in an untenable financial situation.

3. Did Ms. Ballestin get independent advice?

[22] During the initial call, Mike Zentena did not suggest that Ms. Ballestin seek independent advice. Nor did she seek independent advice. Instead, in the heat of the moment, afraid of what would happen if she continued to object, she agreed to the "take it or leave it" deal being offered.

[23] It was only after that initial call, that Mike Zentena called her back to tell her to get a lawyer. This was not to seek advice as to whether or not to accept the revised offer; that had been done. Rather, Mike Zentena wanted her to speak to a lawyer for help in drafting a release, in which she and her husband would agree not to sue the Zentenas.

4. *Did Ms. Ballestin take steps to avoid the contract?*

[24] After the March 13 discussion with Mike Zentena, Ms. Ballestin quickly took steps to avoid any new agreement. Ms. Ballestin retained counsel, and, on April 3, filed a Statement of Claim.

[25] The rapidity with which the Ballestins acted to recover the money that they were owed under the original contract, highlights that, to the extent that Ms. Ballestin agreed to the “take it or leave it” proposal, she did so under duress.

Conclusion on whether there was a new agreement on March 13

[26] Looking at the totality of the evidence, I find that on March 13 there was no agreement to vary the original contract: there was no meeting of the minds and no consideration. If I am wrong and there was an agreement, it is void as it was extracted under economic duress.

[27] I now turn to consider the alternative argument being advanced, that is, that Mr. Zentena is entitled to deduct various amounts from the money owed to the Ballestins, which thus reduces the amount owed by Mr. Zentena to the Ballestins to \$140,222.75.

Is Mr. Zentena entitled to deduct various amounts from the money owed to the Ballestins?

[28] According to paragraph 21 of the Statement of Defence, the Ballestins are only entitled to approximately \$140,000. In response to a request for particulars, counsel for Mr. Zentena provided a spread sheet, which suggests that the Ballestins are entitled to only \$140,222.75 because of six amounts that should be deducted from the proceeds of the sale. Counsel for Mr. Zentena maintained in oral argument that any calculation of money owed to the Ballestins must take the six amounts into consideration. The six amounts he asserts should be deducted are as follows: 1) legal costs of the present action; 2) legal costs to close the sale; 3) land transfer tax holdings savings; 4) property management fees; 5) sale proceeds in excess of \$800,000; and 6) real estate commission fees (including HST).

[29] In my view, the only valid issue raised by the defence relates to the real estate commission fees. Apart from that, the position of the defence lacks merit. I will address each of the six amounts that counsel for Mr. Zentena argues should be deducted from the money owed to the Ballestins in turn.

1) Legal Costs of the Present Action

[30] According to the particulars provided by counsel for Mr. Zentena, \$3,200 should be deducted from the money owing to the Ballestins from the sale of the property, in order to cover the legal costs of the present action. In oral submissions, counsel for Mr. Zentena did not abandon this claim. On the other hand, he advanced no real argument in support. Perhaps this is because the claim is untenable.

[31] There is no basis to assert that \$3,200 should be deducted from the money owed to the Ballestins because of the costs of this action. Costs of this action will be determined in the regular course, having regard to the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Costs will be fixed in an amount that is fair and reasonable for the unsuccessful party to pay.

2) *Legal Costs to Close the Sale*

[32] As set out above, the original agreement provided that Mr. Zentena would credit the Ballestins for the difference between the \$5,000 anticipated legal costs and the “real costs paid” for legal fees. The lawyer’s account shows that the fee was discounted by \$899 by the lawyer. As a result, the real costs paid by Mr. Zentena for the legal costs of the sale amounted to \$191.25. Despite that, and despite the clear agreement that the Ballestins would be credited for any difference between the \$5,000 and the real costs paid, counsel for Mr. Zentena took the position that \$940 should be deducted from any amounts owed to the Ballestins to account for legal costs to close the sale.

[33] It is unclear to me on what basis counsel asserts that the Ballestins should have \$940 for legal fees *deducted* from any money they are owed from the sale of the home. Even if the discount provided by the lawyer should have been taken into account that would amount to a total of \$1099.25. According to the original agreement, that would mean that the Ballestins were entitled to a *credit* of \$3909.75.

[34] In any event, the agreement clearly stipulated that the Ballestins would be credited with the difference between the \$5000 anticipated legal costs and “the real costs paid”. The real costs were \$191.25. As a result, the Ballestins are entitled to a credit of \$4,808.75 for the legal costs to close the sale.

3) *Land Transfer Tax Savings*

[35] Counsel for Mr. Zentena argues that the Ballestins benefited from the way that the deal was structured. Since title never officially passed into their name, they were not required to pay the land transfer tax. Thus, he argues that the land tax transfer savings of \$16,400 should be deducted from any money owed by Mr. Zentena to the Ballestins.

[36] I disagree. The original contract did not address the land transfer tax at all. Moreover, at no time did Mr. Zentena or Mike Zentena discuss with the Ballestins varying the original agreement so that the land transfer tax savings would be deducted from the money that the Ballestins were owed.

[37] There is simply no basis upon which a deduction for the land transfer tax savings from the money owed to the Ballestins is justified.

4) *Property Management Fees*

[38] Counsel for Mr. Zentena argues that any money owed to the Ballestins should be reduced by \$10,000 to account for property management fees. In my view this argument fails for two reasons. First, there was never any agreement with respect to property management fees. Second, there is no evidence that Mr. Zentena, Mike Zentena, or anyone on their behalf, undertook any work that would justify a property management fee.

[39] Turning to the first point. The original contract did not refer to property management fees in any way. On the evidence before me, the first time that property management fees were raised was on March 13, when Mike Zentena called Ms. Ballestin with his “take it or leave it” deal. I do not intend to repeat the analysis set out above with respect to the March 13 meeting, but rely on it here. Suffice to say that I find that no true agreement was reached on that day, or if one was, it is void for duress.

[40] Second, on the evidence before me, Mr. Zentena did nothing to justify payment of a property management fee. The Statement of Defence said that the renovations undertaken by the Ballestins were deficient, which required Mr. Zentena to step in and assume a supervisory role.

[41] That, however, was not the evidence at trial. The Ballestins testified that there were no problems with the renovations and that Mr. Zentena was not involved in the renovations. Mr. Zentena did not contradict their position. I heard no evidence to suggest that there were any issues with the renovations. I heard no evidence that Mr. Zentena, or anyone on his behalf, became involved in supervising the renovations. I heard no evidence that Mr. Zentena, or anyone on his behalf, had to become actively involved in managing the property. At most, Mr. Zentena testified that he had to remove snow and garbage from the property. But he did not say how often he did so, nor did he testify that he had any discussions with the Ballestins in this regard. In my view, there is no basis to justify deducting a property management fee from the money owed to the Ballestins.

5) Sale Proceeds Exceeding \$800,000

[42] Counsel for Mr. Zentena argues that the Ballestins agreed to vary the original agreement such that Mr. Zentena would be entitled to any money paid for the property in excess of \$800,000. Counsel for the Ballestins counters that while it was discussed, there was never an agreement that Mr. Zentena would receive any sale proceeds over \$800,000. I agree.

[43] Ms. Ballestin testified that in January 2017, she spoke with Mr. Zentena, who told her that he knew a young couple who were interested in buying the home. If that sale went through, there would be no real estate commission fees. Ms. Ballestin said she agreed to forgo any proceeds from the sale in excess of \$800,000 because of the potential savings on the commission. The sale to the couple, however, never came to fruition. Any new agreement was contingent on that sale. That sale fell through. In the absence of that sale, there was no agreement with respect to sale proceeds exceeding \$800,000.

[44] I find support for my conclusion in texts between Mike Zentena and Ms. Ballestin on February 9, 2017. Mike Zentena texted Ms. Ballestin to ask her what her “target price” was for the sale of the home. She responded that she wanted a minimum of \$800,000, but that more

would be “excellent”. This exchange makes no sense if there had been, as argued by counsel, a new agreement a month earlier, in which Ms. Ballestin agreed that Mr. Zentena would be entitled to any money from the sale over \$800,000. Why would she care if the selling price exceeded \$800,000 if she was not entitled to that money? And why would Mike Zentena ask her what her target price was, if a deal had already been arranged where his father would get any proceeds over \$800,000?

[45] Ms. Ballestin’s uncontradicted testimony was that the issue of Mr. Zentena getting any sale proceeds in excess of \$800,000 was not raised again until March 10. Ms. Ballestin testified that on that date, Mike Zentena called her and told her that she had agreed that Mr. Zentena would get any sale proceeds over \$800,000. Ms. Ballestin replied that that was not the agreement. Mike Zentena, however, was insistent. Ms. Ballestin said that by this date, the house had already sold. She needed her money. As a result, she said that she would forgo the \$25,000 in order to ensure that she got the rest of the money owed to her.

[46] Counsel for Mr. Zentena points to this evidence, as well as a text and email sent by Ms. Ballestin on March 10, in which she references Mr. Zentena getting the \$25,000 from the sale proceeds because it was in excess of \$800,000. This evidence, he argues, establishes that Ms. Ballestin agreed on March 10 to vary the contract on those terms. I note that this was not pleaded in the Statement of Defence. That said, counsel for the Ballestins was content to address this point, and as a result, I will consider the argument advanced by counsel for Mr. Zentena.

[47] I find that the argument must fail for similar reasons to those set out in my analysis with respect to the discussion on March 13. First, in my view there was no meeting of the minds as to the effect of agreeing to forgo the money. Ms. Ballestin testified that she was willing to agree to let the \$25,000 go because she understood that the effect of that agreement would be that she would be paid the bulk of the money owed to her. The evidence establishes that Mike Zentena did not have the same understanding, as Ms. Ballestin did not get her money. Instead, Mike Zentena kept coming back with new demands, attempting to extract new concessions. Second, the Ballestins received no consideration. The efforts of Mike Zentena to sell the property occurred before the March 10 discussion. Finally, if Ms. Ballestin did agree, in my view the agreement is void because of economic duress. By this time she had tried in vain to get the money owed to her. Her efforts had been futile. She desperately needed the money to pay her contactor and creditors. She was left with no choice. Again, while economic duress was not pleaded in the Statement of Claim, neither did the Statement of Defence assert that there had been a new agreement on March 10. It was thus open to the Ballestins to respond as they did to the defence position regarding March 10.

[48] Thus, I find that the amount of the sale proceeds in excess of \$800,000 should not be deducted from the money owed to the Ballestins.

6) *Real Estate Commission Fees*

[49] Counsel for Mr. Zentena argues that a 5% real estate commission fee should be deducted from any money owed to the Ballestins from the sale of the property. The contract is silent on

the issue of real estate commissions. Arguably the Ballestins are not required to account for any such fees.

[50] That said, counsel for the Ballestins fairly conceded that the Ballestins should be responsible for some of the real estate commission fees. I agree. The parties clearly spoke about real estate commission fees, agreed that the Ballestins would be responsible for a portion of the fees, and in consideration, the Zentenas undertook the responsibilities associated with the sale.

[51] The real issue is what the real estate commission fee should be. In my view, the 5% sought by counsel for Mr. Zentena is not justified on this evidence. There was never a true agreement that the fee would amount to 5%. Any discussion that the fee should be 5% was only raised after the sale had been concluded. Instead, I find that the Ballestins agreed that they would be responsible for real estate commission fees of 3.75%. This agreement is reflected in the first spread sheet Ms. Ballestin sent to Mike Zentena on March 7. Considering HST, this amounts to \$34,959.38. This amount should be deducted from any money owed to the Ballestins from the sale of the property.

Conclusion

[52] The Ballestins did not agree to vary the original contract on a “take or leave it” basis on March 13. With the exception of the real estate commission fees, I find that the amounts claimed by Mr. Zentena should not be deducted from the sale proceeds owed to the Ballestins. With respect to the real estate commission fees, I find that 3.75%, plus HST is appropriate and \$34,959.38 should be deducted from the proceeds of the sale of the property owed to the Ballestins.

[53] Thus, I find that the Ballestins are entitled to recover from 1304478 Ontario Inc. (Mr. Zentena’s corporation) the amount of \$212,224.63, plus pre-judgment interest as of March 10, 2017.

Costs

[54] I encourage the parties to see if they can agree on costs. If the parties are unable to agree on costs, the Ballestins shall serve and file with my office written costs submissions within 15 days. 1304478 shall serve and file with my office any responding costs submissions within 15 days thereafter. The written submissions shall not exceed three pages in length, excluding the Costs Outline.

Released: May 11, 2018

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHELE BALLESTIN AND GUILLAUME
BALLESTIN

Plaintiffs

– and –

1304478 ONTARIO INC.

Defendant

REASONS FOR JUDGMENT

Justice Heather McArthur

Released: May 11, 2018