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Mortgage fraud fallout working way through courts

Mortgage fraud may no longer be on the front pages, but the fallout from hundreds of past fraud cases is still wending its way through Ontario courts.

The most recent decision in this area of law was released in June by the Ontario Superior Court of Justice, and involved a mortgage fraud perpetrated on the Royal Bank of Canada.

The story begins in a Tim Hortons back in October, 2004. Angela Isaacs was having a coffee with her then-common law husband, Dexter Abrams, discussing the sorry state of their finances. Another customer overheard their conversation and introduced himself as Mike. He said he could help them and left his phone number if they wanted more information.

A couple of weeks later the couple contacted Mike, who offered to pay $4,000 if one of them would co-sign a mortgage for an acquaintance who had trouble getting financing on a house.

Ultimately, Isaacs reached an agreement with a woman who identified herself as a mortgage broker named Marcia Briggs. She agreed to pay $6,000 to Isaacs for co-signing mortgage documents on a house being purchased by someone named Mark Forrest.

Briggs and Mike told Isaacs she would only be liable as a guarantor for six months and that during that time Forrest would be making all the payments.

Briggs later went to a Royal Bank branch and signed some bank forms, including a mortgage application for a house on John Stoner Dr., near the Toronto zoo.

Later she met with a secretary in a law office and signed a mortgage for $279,451.29 and other documents without any explanation or discussion.

The fraudsters never made any payments on the mortgage. Upon investigation, Isaacs discovered the true extent of the fraud:

The property was listed in October, 2003, at $239,900 but did not sell.

It was re-listed in July, 2004 for $285,000.

The property was supposedly sold in October, 2004, for $284,900, but was in a dilapidated condition and its real value at the time was about $220,000.

Royal Bank advanced mortgage funds believing the house was worth $284,900.

The mortgage went into default and the bank subsequently sold the property under power of sale for $225,000, suffering a loss of about $95,000.

Isaacs bank account statement and T4 form submitted to the Royal Bank by the mortgage broker were fraudulent.

The fraudsters vanished with the mortgage funds.

The lawyer involved has been administratively suspended by the Law Society. Isaacs later sued the bank to compensate her for the losses sustained in attempting to carry the mortgage after it went into default. In turn, the bank sued Isaacs to recover its losses. The issue for the court to decide was which of the two innocent parties the bank or Isaacs would bear the bank s $95,000 loss.

In June, Justice Anne Molloy dismissed Isaacs case and awarded the bank damages of $94,756 and costs of $13,500 against her. The judge had no sympathy for Isaacs. She was foolish to rely on strangers to the extent she did, wrote the judge. She was foolish to sign documents she did not read and did not understand. But she cannot have believed this transaction was completely risk free to her . . . she took the risk and she got stung. That is her responsibility, not the fault of the bank.

Molloy noted that Isaacs was in the best position to avoid the fraud and did nothing to protect herself. The bank had no obligation to investigate the transaction or explain the documents to Isaacs and was not required to protect her from others who were deceiving her without the bank s knowledge.

Two lessons emerge from the Isaacs case: If a real estate deal seems too good to be true, it probably is. Never sign anything in the office of a bank, mortgage broker or lawyer unless it is fully explained to you.

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Isaacs v. Royal Bank of Canada, 2010 ONSC 3527 (CanLII)

Print:	PDF Format
Date:	2010-06-17
Docket:	06-CV-316836PD3
URL:	http://www.canlii.org/en/on/onsc/doc/2010/2010onsc3527/2010onsc3527.html
Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Decisions cited

- Alymer v. HMQ and AGC, 2010 ONSC 649 (CanLII)
- Baldwin v. Daubney, 2006 CanLII 32901 (ON C.A.) 83 O.R. (3d) 308 275 D.L.R. (4th) 762 20 B.L.R. (4th) 204 216 O.A.C. 72
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- Brown s Cleaners and Tailors Ltd. v. Omers Realty Corp. et al., 2010 ONSC 1073 (CanLII)
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- Reviczky v. Meleknia, 2007 CanLII 56494 (ON S.C.) 88 O.R. (3d) 699 287 D.L.R. (4th) 193

CITATION: Isaacs v. Royal Bank of Canada, 2010 ONSC 3527

COURT FILE NO.: 06-CV-316836PD3

DATE: 20100617

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ANGELA ISAACS	)	Avrum Slodovnick for the Plaintiff (Responding Party on motion)
Plaintiff	)	Leigh Ann Sheather, for the Defendant (Moving Party)
and	)	
ROYAL BANK OF CANADA	)	
Defendant	)	
	)	
AND BETWEEN:	)	
ROYAL BANK OF CANADA	)	
Plaintiff by Counterclaim	)	
and	)	
ANGELA ISAACS and MARK ANTHONY FORREST	)	
Defendants by Counterclaim	)	
	)	**HEARD:** April 13, 2010

MOLLOY J;

REASONS FOR DECISION

-

A. INTRODUCTION

[1] Royal Bank moves for summary judgment on a residential mortgage that went into default. The Bank sold the property, but there was a shortfall of approximately $95,000, which the Bank now seeks to recover from Angela Isaacs, a co-signor on the mortgage. There is no issue with respect to the amount owing and no issue that Ms Isaacs was a signatory to the mortgage as well as a joint owner of the property secured by the mortgage.

[2] This is not, however, a run-of-the-mill claim on a mortgage. This mortgage was obtained by fraud and both Ms Isaacs and the Bank were victims of the fraudsters (who have long since vanished). The question is who, as between Ms Isaacs and the Bank, should bear the loss.

[3] Ms Isaacs argues that the Bank should take the loss because the Bank was in the better position to detect, and therefore avoid, the fraud.

[4] The Bank argues that Ms Isaacs should be liable for the loss because she actively assisted the fraudsters to carry out the fraud, thereby misleading the Bank, even if unwittingly.

[5] In addition to its claim on the mortgage (which is made in its counterclaim), the Royal Bank seeks summary judgment dismissing Ms Isaacs claims against the Bank in the main action. In her action, Ms Isaacs seeks damages from the Bank to compensate her for the losses she sustained in attempting to carry the mortgage after it went into default and before the property was sold, as well as general damages and punitive damages.

B. FACTUAL BACKGROUND

The Origins of the Fraud

[6] In October 2004, Ms Isaacs was sitting in a Tim Horton s having a coffee with her then common-law husband, Dexter Abrams (they have since split up). They were discussing the sorry state of their finances. Ms Isaacs worked full-time, but earned only $35,000 a year. She had three young children and had recently purchased a house.

[7] A man sitting nearby overheard their conversation. He introduced himself to them as Mike , told them he could help them with their financial troubles, and left them his phone number if they wanted more information.

[8] A couple of weeks later, Mr. Abrams called the number. Mike said he knew someone who wanted to buy a house, but had trouble getting financing because of his poor credit rating. He offered to pay them $4000.00 if one of them would co-sign the mortgage. He promised this would only be for six months, at which point they could get off the mortgage. Ms Isaacs had a good credit rating and agreed to the proposal.

[9] Soon afterwards, Ms Isaacs received a call from a woman who identified herself as Marcia Briggs and said she was a mortgage broker. Ms Isaacs provided Ms Briggs with personal and financial information. However, she then had second thoughts about co-signing someone else s mortgage. She called Ms Briggs back and told her that she was no longer interested. Ms Briggs offered to pay her $6000.00 instead of $4000.00, and Ms Isaacs then agreed to go ahead with it.

[10] Ms Isaacs went to Ms Briggs office and signed some documents. She testified that she did not read the documents, did not ask what they were, and did not ask for copies. She understood that Ms Briggs would be sending the documents to the Royal Bank. Both Ms Briggs and Mike told her that she would only be liable as a co-signor for six months and that during that time the real borrower would be making all the payments.

The Initial Involvement of the Royal Bank in This Mortgage

[11] On the instructions of Ms Briggs, Ms Isaacs went to a Royal Bank branch and met there with a mortgage specialist, Sabino Fiore. Mr. Fiore verified her identity by checking her health card and social insurance card. She signed some bank forms including a mortgage application. The mortgage application states that the borrowers are Angelita Isaacs and Mark Forrest, the property involved is 48 John Stoner Drive in Toronto and the principal amount of the mortgage is $279,451.29. Ms Isaacs claims that she did not read this document before she signed it and that Mr. Fiore did not explain it to her. She acknowledges she did not volunteer anything to Mr. Fiore about being paid $6,000.00 to put her name on this mortgage, but states that Mr. Fiore did not ask her any questions about the transaction or her involvement in it.

[12] Mr. Fiore does not recall his meeting with Ms Isaacs. However, he testified that his usual practise would be to review the documents with the customer.

[13] The Bank received directly from the mortgage broker:

a real estate listing showing the property listed for $285,000;

an agreement of purchase and sale dated November 10, 2004 in which Sharina Wynn and Diana Williams agree to purchase the subject property for $284,900;

an assignment of that purchase and sale agreement to Ms Isaacsa and Mr. Forrest dated November 15, 2004;

an AIM Trimark Investment Account Statement showing a balance in Ms Isaacs s account of $24,168 as of September 30, 2004;

a T4 form showing Hope Home Care Consulting Agency as employer, Angelita Issacs as employee, and employment income for 2003 of $56, 724.

[14] On Ms Briggs instructions, Ms Isaacs went to the office of a lawyer named Mark Kushner to sign legal documents. She said she met only with a secretary and that she signed whatever documents she was given without any explanation or discussion. Those documents included a disclosure statement with respect to the cost of borrowing, an acknowledgment of the receipt of the standard charge terms, various directions to Mr. Kushner, and a consent to Mr. Kushner acting for both the borrowers and the Bank. Mr. Kushner provided those documents to the Bank and the Bank agreed to Mr. Kushner acting for the bank as well as the borrowers.

[15] Based on these documents, the Royal Bank approved the loan and advanced the funds. The deal closed on November 30, 2004. Title was taken jointly in the names of Angelita Isaacs and Mark Forrest, and both were shown as borrowers on the mortgage in favour of the Bank.

Uncovering the Fraud

[16] At about the time of closing, Ms Isaacs was paid $6000.00 for her role in the transaction. She claims she did not know that the deed registered on title showed her to be a joint owner of the property with Mark Forrest. She had never seen the property prior to closing. She believed that Mark Forrest was the owner, that he would live at the property, and that he would pay the mortgage.

[17] The monthly payments under the mortgage were to be $1838.09, with the first payment due on December 26, 2004. It was not made. The Royal Bank contacted Ms Isaacs. She in turn tried to contact Mr. Forrest. He was not living at the property. Through her subsequent inquiries, Ms Isaacs discovered the extent of the fraud that had been perpetrated. As it turns out:

The property was in a dilapidated state and not worth the amount for which it had been appraised or sold. Its real value was approximately $220,000.

The owners from whom Ms Isaacs purchased the property had themselves purchased it in 1998 for $183,000. In September 2003, the then owners listed the property for sale at $252,000, and within a month dropped the price to $239,900. By the end of December, it had not sold and the listing expired.

On July 21, 2004, the property was again listed for sale, this time with a listing price of $285,000. After sitting on the market for 112 days, it was sold for the full asking price to Diana Williams and Sharina Wynn, without any conditions on financing or inspection. It was then flipped to Ms Isaacs and Mr. Forrest by assignment of the agreement of purchase and sale.

The AIM Trimark account statement and T4 form sent to the Bank by the mortgage broker were fraudulent; Ms Isaacs never had a Trimark account, never worked for the employer shown on the T4, and earned only $35,000 (not $56,724 as was shown on the T4).

The mortgage broker, realtor and lawyer involved all received exceptionally large fees.

The fraudsters appear to have vanished with the funds. The lawyer has been suspended by the Law Society and is facing disciplinary charges.

[18] Ms Isaacs began paying the mortgage, took over management of the property, and listed it for sale. She obtained an offer for $210,000, which she accepted conditional upon the Bank agreeing that the proceeds from that sale would completely extinguish her liability to the Bank on the mortgage. The Bank refused.

[19] The mortgage then went into default and was sold by the Bank in 2007 for $225,000.

C. THE TEST FOR SUMMARY JUDGMENT

[20] Although this motion was initially expected to be argued in 2008, it did not actually proceed until April 2010. By that time, Rule 20 had been substantially amended. It is well-settled that the amended Rule applies to any motion heard after January 1, 2010, when the amendment took effect.

[21] The new Rule provides that the court shall grant summary judgment if it is satisfied that there is no genuine issue requiring a trial. Under the previous wording of the Rule summary judgment could be granted where there was no genuine issue for trial. Under the current version of the Rule, the motion judge is expressly given the power to weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence unless it is in the interest of justice for such powers to be exercised only at a trial. The Rule also specifically provides that where the only issue is a question of law, the motion judge may determine the question and grant

judgment accordingly.

[22] On the approach I have taken to this motion, and indeed as was advocated by counsel for the Bank, it is not necessary for me to make any findings of fact or credibility. For purposes of this motion, I am prepared to accept that Ms Isaacs had no knowledge and no suspicions with respect to the fraud being perpetrated against the Bank. I also accept that the Bank s representative did not ask Ms Isaacs any questions about the transaction, did not explain any of the transaction documents to her, and did not ask her to verify the accuracy of the documents sent by the mortgage broker. Accordingly, this motion turns on a question of law.

D. ANALYSIS: MS ISAACS S LIABILITY ON THE MORTGAGE

Ms Isaacs Was in the Best Position to Discover the Fraud

[23] I do not accept the submission by Ms Isaacs s counsel that the Bank was in the best position to discover the fraud and should therefore bear the financial loss occasioned by it. That argument is based solely on casting the Bank in the role of sophisticated commercial lender and Ms Isaacs as uneducated, unsophisticated victim.

[24] Ms Isaacs is an adult, competent person, and is able to read. If Ms Isaacs had taken the trouble to read the documents she signed, she would have immediately known that the transaction was not what she understood it to be. She not only did not read the documents, she did not ask for them to be explained to her by the mortgage broker or the lawyer, and she did not obtain copies of them. Nobody prevented her from reading the documents. She simply failed to do so.

[25] On the other hand, the documents as presented to the Bank appear on their face to be exactly what they are normal documents for a standard mortgage transaction. Simply reviewing the documents submitted by or on behalf of Ms Isaacs could not, and did not, reveal any fraud to the Bank.

[26] I therefore conclude that, as between Ms Isaacs and the Bank, Ms Isaacs was in the best position to notice something was amiss.

[27] Although Ms Isaacs has not formally pleaded the doctrine of *non est factum*, she is seeking to avoid the legal effect of documents she freely signed based on the argument that she did not understand what she was signing. In my view, the principles developed in case law dealing with the defence of *non est factum* are applicable here.

[28] The leading case on point is the 1982 decision of the Supreme Court of Canada in *Marvco Colour Research Ltd. v. Harris* , which both parties rely upon for different reasons. The Court held in *Marvco,* at pp. 785-786:

> . . . As between an innocent party (the appellant) and the respondents, the law must take into account the fact that the appellant was completely innocent of any negligence, carelessness or wrongdoing, whereas the respondents by their careless conduct have made it possible for the wrongdoers to inflict a loss. As between the appellant and the respondents, simple justice requires that the party, who by the application of reasonable care was in a position to avoid a loss to any of the parties, should bear any loss that results when the only alternative available to the courts would be to place the loss upon the innocent appellant. In the final analysis, therefore, the question raised cannot be put more aptly than in the words of Cartwright J. in *Prudential, supra,* at p. 929: which of two innocent parties is to suffer for the fraud of a third . The two parties are innocent in the sense that they were not guilty of wrongdoing as against any other person, but as between the two innocent parties there remains a distinction significant in the law, namely that the respondents, by their carelessness, have exposed the innocent appellant to risk of loss, and even though no duty in law was owed by the respondents to the appellant to safeguard the appellant from such loss, nonetheless the law must take this discarded opportunity into account.
>
> (emphasis added)

[29] Ms Isaacs relies on this decision for the general proposition that where there are two innocent victims of a fraud, and one of them has been careless thereby exposed the other to risk, the loss should be borne by the party that was careless. As a general proposition, that is a valid point. Ms Isaacs argues that because the Bank was careless, it should bear the loss. However, that is not what *Marvco* stands for. The carelessness to which the Court refers in *Marvco* is the carelessness of the parties who signed a mortgage without reading it, relying upon false representations by a third party as to its contents. That is precisely the situation now before this court, which is why the Bank relies on the decision.

[30] In *Marvco*, the respondent Harris executed a mortgage and guarantee in favour of the appellant lender. Harris did so based entirely upon the assurances of his son-in-law that the document being signed was merely to correct a minor discrepancy in a prior mortgage he had signed. Harris did not read the document before he signed it. He later sought to avoid liability on the basis that he did not understand the nature of what he had signed due to the fraudulent misrepresentation of his son-in-law.

[31] The Supreme Court held that where a person carelessly fails to read a document before signing it, and the document permits a fraud to be perpetrated on an innocent third party, the doctrine of *non est factum* does not apply. The careless party is bound by the document he or she signed. The Court held, at p. 786:

> The defendants, in executing the security without the simple precaution of ascertaining its nature in fact and in law, have nonetheless taken an intended and deliberate step in signing the document and have caused it to be legally binding upon themselves. In the words of *Foster v. Mackinnon* this negligence, even though it may have sprung from good intentions, precludes the defendants in this circumstance from disowning the document, that is to say, from pleading that their minds did not follow their respective hands when signing the document and hence that no document in law was executed by them.

[32] The principle defined in *Marvco* has been applied in other cases very similar on their facts to Ms Isaacs s situation.

[33] In *Baldwin v. Daubney* , a group of customers borrowed money from various financial institutions to finance the purchase of mutual funds recommended by their own financial advisers. The bank loans contained margin requirements, such that if the mutual fund fell below a certain value, the bank could call on the customer to pay down the loan to bring it within margin, in default of which the bank could call the loan. The funds fell below margin and all the customers were called upon to pay. The customers argued that they were not bound by the loan documents because they had not read them and did not understand the margin requirement. They took the position that the lending institutions owed them a duty to ensure they had been advised of and understood the margin mechanism and the associated risks. The lending institutions moved successfully for summary judgment, which was upheld by the Court of Appeal. As discussed in more detail below, the Court of Appeal held that there was nothing about the relationship between a creditor and debtor that required the lender to explain the terms of a document to the borrower. The Court also dismissed the argument that the borrowers were somehow excused from liability because they had not read the documents, describing this point (at para. 11) as settled law.

[34] In *Bank of Montreal v. McCabe* the defendant had been asked by her husband to go into the Bank of Montreal and sign some documents, which he told her were merely a formality and would not result in any liability to her. She went into the bank and signed the documents given to her without question and without reading them. What she signed was a promissory note, a loan proceeds cheque and an acknowledgment and direction. Murphy J. held that there was no obligation on the bank to explain the documents to the defendant and no obligation to ensure she had independent legal advice. Relying on *Marvco,* he found the defendant to have been careless in signing documents meant to have legal effect without reading them and granted summary judgment to the bank.

[35] Southin J. of the British Columbia Supreme Court reached a similar result in similar factual circumstances in *Toronto-Dominion Bank v. San-Ric Developments Ltd.* In that case, at her husband s request and on his representations that the documents were standard account matters, the defendant signed, without reading, two unlimited continuing guarantees for the husband s company. Southin J. held that the wife was careless in not reading the documents and that she was therefore liable to the bank on the guarantees, notwithstanding the misrepresentation by her husband and the fact that the bank did not send her for independent legal advice. She stated, at para 27:

> In the case before me, Mrs. Loren was, on her evidence, the victim of a misrepresentation by her husband. I do not consider that, in this day and age, a woman of adult years and understanding who is literate can avoid the consequences of her executing an instrument by saying, I relied completely on my husband. Such reliance is not careless .

[36] Also very similar on its facts is the decision of this court in *Scotia Mortgage v. Galo* , in which Mr. Galo was paid $5000 in exchange for allowing his name to be used as the purchaser in a real estate transaction. He signed the documents he was asked to sign without reading them and without asking for an explanation. As a result, he became the mortgagor on property, the value of which had been grossly inflated in order to increase the amount of mortgage money advanced. When the mortgage went into default, the bank looked to him for payment. Mr. Galo argued that he had been the victim of fraud and that the bank was at fault for failing to obtain a proper appraisal, failing to check the particulars in the mortgage loan application, and failing to verify Mr. Gallo s financial ability to service the mortgage. All of these arguments were rejected by the motion judge, who held (among other things) that Mr. Gallo was careless in signing documents without reading them and could not use his ignorance of their contents to avoid liability.

[37] The root of Ms Isaacs s problem is that she signed numerous documents without taking any care about their content. She knew that these documents would be relied upon by the Royal Bank in advancing mortgage funding. If she had taken the simple precaution of reading the documents she was signing, she would have realized that she was being lied to and she could have backed out of the deal. She is in the position she is now because she allowed her name to be used without any consideration for what she was actually agreeing to. She was, at the very least, careless and because of that carelessness cannot avoid liability for what she signed. She was in the best position to avoid the fraud and did nothing to protect herself.

The Bank Did Not Owe a Duty to Ms Isaacs

[38] Counsel for Ms Isaacs alleges that if the Bank had properly done its due diligence, it would have learned of circumstances that would have exposed the fraud. In particular he points to: the Bank s failure to consider the history of transactions involving this property over a short period of time even though the Bank had previously granted mortgages to prior owners; the lack of a proper appraisal; the failure to explain documents to Ms Isaacs when she signed them; and the failure to verify information provided about Ms Isaacs from the mortgage broker. He argues that the Bank s carelessness and failure to follow its own established procedures means the Bank should absorb the loss here, not Ms Isaacs. I disagree.

[39] There is no fiduciary duty owed by a Bank to a borrower their relationship is strictly that of debtor and creditor. Here, there was no special relationship between the Bank and Ms Isaacs, no special knowledge held by the Bank, and no exceptional circumstances that would change the nature of that relationship.

[40] Therefore, there was no obligation on the Bank to explain the documents to Ms Isaacs or verify that she knew what she was getting into. The Bank was not required to protect Ms Isaacs from others who were deceiving her without any knowledge of the Bank. It was not the Bank s role to provide advice to Ms Isaacs or to protect her interests. The Bank made no misrepresentations to Ms Isaacs and Ms Isaacs placed no reliance on the Bank. Theirs was a contractual relationship in which Ms Isaacs sought to borrow money and the Bank agreed to lend it to her.

[41] A lender has no obligation to obtain an appraisal before it extends mortgage financing. If it obtains an appraisal, it does so for its own protection, not for the protection of the borrower.

[42] In *Fort William Credit Union v. McKillop,* J. deP. Wright J. of this court firmly rejected the argument that a borrower can avoid liability for a loan based on a lender s failure to exercise due diligence by obtaining an appraisal. The trial judge held:

> I have similar reservations about the argument that the credit union failed to obtain a proper appraisal. Leaving aside the

fact that the credit union did obtain an appraisal and that it was perfectly proper for the purpose for which it was intended, there was no requirement from CMHC that any form of appraisal be obtained and there was no requirement that the credit union obtain an appraisal for purposes of warning the borrowers that their security might not cover the loan. Whether the credit union chose to obtain an appraisal was up to the credit union. They chose to do so, simply as a fraud avoidance measure, not as a loan-security measure.

[43] The evidence in this case is far from establishing that the Bank failed to follow its own internal policies for mortgage lending. However, even assuming that to be the case, this does not provide a remedy to Ms Isaacs, nor excuse her from the mortgage. A loan is not rendered unenforceable merely because a bank does not follow its established internal procedures.

[44] In short, the Bank was entitled to rely on the documents signed by Ms Isaacs. It had no obligation to investigate the background and no obligation to ensure Ms Isaacs understood the transaction. Although the Bank could certainly have been more careful in protecting its own interests, it had no duty to Ms Isaacs to do so and no responsibility to protect the interests of Ms Isaacs. A failure by the Bank to detect the fraud does not excuse Ms Isaacs from her liability when it was apparent on its face on the documents Ms Isaacs signed and provided to the Bank a fact that would be known to Ms Isaacs if she had read them, but would not have been known to the Bank.

The Bank Is Not Fixed with the Knowledge or Omissions of the Lawyer

[45] Counsel for Ms Isaacs argues that the solicitor, who acted for both the borrowers and the Bank, never met with Ms Isaacs, never explained any documents to her and was in breach of his duties to her. Further it is alleged that the solicitor knew the property was being flipped and that larger than normal commissions were being paid. Counsel argues that this may have constituted misrepresentation by omission by the lawyer, which may be attributed to the Bank because he was acting as agent for the Bank.

[46] I fail to see the logic in that argument. If the knowledge of the solicitor is attributed to the client, it is attributed to Ms Isaacs as well as to the Bank.

[47] There is no allegation that the solicitor in this case actually said or did anything to induce Ms Isaacs to enter into the transaction. All that is alleged is that he failed to explain the transaction to her and failed to adequately protect her. In these circumstances, the fact that the solicitor acted for both the Bank as well as Ms Isaacs cannot operate to make the Bank vicariously liable for the solicitor s omissions.

Ms Isaacs Was Not a Completely Innocent Victim

[48] Ms Isaacs seeks to characterize herself as the completely innocent victim of a fraud. Although there is nothing to suggest that Ms Isaacs was herself privy to the fraud and no reason to disbelieve her assertion that she did not know the true nature of the transaction, it is not completely accurate to portray her as a stranger to the fraud. In truth, she assisted the fraudsters to perpetrate the fraud, even if she did not know the particulars of the transaction. For this reason, her situation is quite different from cases relied upon by her counsel in which negligent lenders were disentitled from relying upon mortgages obtained on property without the knowledge of the owners.

[49] In *Rabi v. Rosu* the owners of a condominium were the victims of identity theft and fraud. Unknown persons fraudulently passed themselves off as the owners, purported to sell the condominium to another fictitious person, and obtained mortgage funding from the Toronto Dominion Bank. The funds were advanced and the mortgage registered on title without the owners knowing anything at all about it. There was nothing at all the owners could have done to avoid the fraud. The Bank, however, if it had exercised more care, would have been able to discover it. Accordingly, Echlin J. held that as between the innocent owners and the TD Bank, it was the bank that must bear the loss.

[50] The homeowner in *Reviczky v. Meleknia* found himself in a similar situation, although the fraud was accomplished in a different manner. In that case, the fraudster, using a fictitious Power of Attorney, purported to sell property owned by Mr. Reviczky to Mr. Meleknia. Mr. Meleknia financed the purchase through the HSBC Bank Canada and the bank registered a mortgage on title. The real owner of the property, the purchaser and the bank were all victims of the fraud. The person who presented the Power of Attorney to the bank was not known to the bank and the bank took no steps to confirm the validity of that document. Macdonald J. held that the bank s mortgage was not a valid charge as against the true owner of the property and ordered it deleted from title.

[51] In *Lawrence v. Wright* an imposter posed as Ms Lawrence, the owner of a residence in Toronto. A forged agreement of purchase and sale, showing a purchase price of $318,000, was presented to a lawyer retained to handle the sale. Another imposter played the role of purchaser, using the name Thomas Wright. Mr. Wright applied for and obtained mortgage financing from Maple Trust Company. The funds were advanced and a mortgage placed on the property in favour of Maple Trust. Ms Lawrence knew nothing about it until months later when she discovered the mortgage on her title. The Court of Appeal held that Maple Trust, as the party that dealt with the fraudster, had an opportunity to avoid the fraud if it had been diligent. Ms Lawrence had no such opportunity. Therefore, the loss should be borne by Maple Trust.

[52] All of these cases turned on the theory of deferred, as opposed to immediate, indefeasibility under Ontario s land titles system. All three courts held that the doctrine of deferred indefeasibility applies. Under an immediate indefeasibility system, as soon as a document obtained by fraud is registered on title it becomes enforceable and indefeasible (other than against the fraudster). However, the deferred indefeasibility principle leaves some risk with the immediate parties to the fraudulent transaction, such that the fraudulent document only becomes indefeasible when it is transferred to a *bona fide* purchaser for value without notice of the fraud. On the theory of deferred indefeasability, there are three classes of parties: the original owner (who has no knowledge or involvement in the fraud); the intermediate owner (who dealt with the fraudster); and the deferred owner (who subsequently acquired the property from the intermediate owner without knowing anything about the fraud). It is central to this theory that as between these three classes of owners, it is only the intermediate owner who has any opportunity to detect or avoid the fraud. As a question of policy, it makes more sense to

place the burden on the party which, although innocent of wrongdoing, had some opportunity to prevent the fraud.

[53] That is not this case. Ms Isaacs is not in the position of the completely unwitting homeowner whose house is sold out from under her without her knowledge or involvement. She did know about this transaction and was actively involved in it. She did not know everything about it, but that was largely because she failed to read the documents she was signing.

[54] The cases more on point are those like *Royal Bank of Canada v. Cammock*, N*ational Bank v. Meneses* and *Scotia Mortgage v. Galo*, all of which involved parties who were found liable on loans obtained in circumstances where, although not complicit in fraud, they had accepted a fee in exchange for allowing their names to be used in a transaction. In each case, the actions of these borrowers caused the lender to advance funds to its detriment. In each case, the courts rejected arguments that the lender should have been more careful and should not have relied on the documents signed by the borrowers. As was stated by Lofchik J. at para 15 in *Royal Bank of Canada v. Cammock:*

> The moment the defendant signed the mortgage documents knowing she was not the beneficial owner of the property and knowing the purpose was to induce the bank to advance money on the mortgage, she lost her innocence. The fact is that she was part of a contrived scheme to place a mortgage on the property. In essence what occurred was that the plaintiff participated in a fraudulent scheme to obtain a mortgage for her friend, Rose Gibson, also known as Cynthia Gibbs.

[55] Indeed, although Ms Isaacs did not appreciate the fraudulent nature of this transaction, she effectively got exactly what she bargained for. She was offered $6000 to act as a guarantor on a mortgage. She was told that the owner had a bad credit rating and could not obtain mortgage financing unless she lent her good name and credit rating to the transaction. She was told that she only needed to be on title for six months. She agreed to do so for a fee. She had the opportunity to tell the Bank the true nature of her involvement, but did not do so. She was paid the $6000. The mortgage went into default immediately, which was during the six month period she knew she was a gurantor. Why should she not be held liable? She was foolish to rely on strangers to the extent she did. She was foolish to sign documents she did not read and did not understand. But she cannot have believed this transaction was completely risk free to her. She was not prepared to take the risk for $4000, but changed her mind when she was offered $6000. She took the risk, and she got stung. That is her own responsibility, not the fault of the Bank.

E. ANALYSIS: THE BANK S LIABILITY IN DAMAGES

[56] Ms Isaacs s claim for damages against the Bank is based on: (a) the failure of the Bank to exercise due diligence and thereby save her from being the victim of fraud; and, (b) the failure of the Bank to agree to discharge its mortgage so that Ms Isaacs could sell the property in August 2005 and avoid additional costs of carrying the property.

[57] With respect to the former, as I have already held above, the Bank was under no duty to Ms Isaacs. She has no claim in damages against the bank for failing to protect her from the fraudsters.

[58] As for the latter, Ms Isaacs did have a purchaser ready to buy the property and it is true that the sale could not proceed without the discharge of the Bank s mortgage. However, what Ms Isaacs sought from the bank at the time was not only the discharge of its mortgage, but also a release of all claims the Bank had against Ms Isaacs on the mortgage. The Bank had a valid claim against Ms Isaacs for the full amount of the mortgage. It was not required to release her from liability for anything less than full payment.

F. CONCLUSIONS

[59] Neither the claim nor the counterclaim raise any issues requiring a trial.

[60] The claims made by Ms Isaacs against the Bank in the main action are without legal foundation and are dismissed.

[61] The mortgage upon which the Bank s counterclaim is based is valid and binding against Ms Isaacs. The Bank shall have judgment against Ms Isaacs in the amount of $94,756.22, plus interest at the rate of 6.3 % per annum from June 26, 2008 to the date of payment.

[62] The Bank has been wholly successful and is entitled to its costs. I do not see this case as a situation warranting substantial indemnity costs, notwithstanding the terms of the mortgage.

[63] Ms Sheather submitted that if she was successful, the appropriate award for full indemnity costs would be $14,500 for fees up until the date of the argument, plus a counsel fee of $750.00 for the argument, plus $3500.00 for disbursements.

[64] Mr. Slodovnik argued that the Bank should only have partial indemnity costs. He submitted that if Ms Isaacs was successful on the motion, he would be seeking $15,000.00 in fees on a partial indemnity basis plus $3500.00 for disbursements.

[65] If Ms Isaacs partial indemnity costs would be $15,000, the fees claimed by the Bank are surely within her reasonable expectation. I am reducing the fee claimed somewhat in order to make reflect a partial indemnity scale. I have no difficulty with the time spent, the disbursements or counsel fee at the hearing. All are reasonable in the circumstances. In the result, costs are fixed at $13,500.00 inclusive of tax and disbursements, payable by Ms Isaacs to the Bank within 30 days.

MOLLOY J.

Released: June 17, 2010

CITATION: Isaacs v. Royal Bank of Canada, 2010 ONSC 3527

COURT FILE NO.: 06-CV-316836PD3

DATE: 20100617

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ANGELA ISAACS

Plaintiff

and

ROYAL BANK OF CANADA

Defendant

AND BETWEEN:

ROYAL BANK OF CANADA

Plaintiff by Counterclaim

and

ANGELA ISAACS and MARK ANTHONY FORREST

Defendants by Counterclaim

REASONS FOR DECISION

MOLLOY J.

Released: June 17, 2010

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