CITATION: 1420041 Ontario v. 1 King West, 2015 ONSC 252
COURT FILE NO.: 05-CV-300372PD3
DATE: 20150127

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
1420041 ONTARIO INC.	*Paul Guy*, for the Plaintiff
Plaintiff	
– and –	
1 KING WEST INC.	*Megan Mackey*, for the Defendant
Defendant	
	HEARD: October 24, 2014

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REASONS FOR DECISION

FIRESTONE J.

[1] The defendant, 1 King West Inc. (“1 King West”), brings a motion for summary judgment under rule 20.01(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (“the Rules”) dismissing the claim of the plaintiff, 1420041 Ontario Inc. (“142”). During oral argument 1 King West advised the court that if it is successful on this motion its counterclaim would be abandoned.

[2] 142 brings its own motion for an order lifting the partial stay imposed by order of the Divisional Court on December 9, 2010, under rule 21.01(3)(c) of the Rules.

[3] The parties during their oral submissions confirmed that they are in agreement that the issues raised in these motions may be determined by way of summary judgment under rule 20.04(2), which provides that “The court shall grant summary judgment if … (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.”

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Background

[4] The factual background of this matter is reviewed in the reasons of the Divisional Court (2010 ONSC 6671 at paras. 6-11), and the Court of Appeal (2012 ONCA 249, 110 O.R. (3d) 241 at paras. 1-9).

[5] 142 purchased eight condominium units in 1 King West from the defendant. Four of those units were to be furnished for participation in the condo's short-term rental program, while the other four were to be custom designed and constructed to serve as 142's head office. Upon completion the units were not to the satisfaction of 142.

[6] 142 disputed the adequacy of the construction regarding elements that constitute "common elements" of the condominium (windows, doors, and exterior walls, for example, which 142 alleges were not installed in the correct places). Common elements are owned jointly by all unit owners as tenants in common. 142 also disputed the adequacy of the elements properly belonging to its own units, such as finishes on various counters and backslashes.

[7] In 2005 the plaintiff commenced this action ("the Individual Action") seeking specific performance of its contract of purchase and sale, and in the alternative abatement of the purchase price, and in the further alternative, damages.

[8] In 2007 the condominium corporation, Toronto Standard Condominium Corporation No. 1703 ("TSCC 1703") commenced its own action ("the Condo Action") on behalf of itself and the individual unit owners, pursuant to s. 23 of the *Condominium Act*, S.O. 1998, c. 19 ("the Act").

[9] In that action several defendants were named, including 1 King West, the building's construction manager and general contractor, the architect, various engineers involved in the construction, and the City of Toronto. In that action damages were sought in the sum of $16 million for deficiencies to certain common elements (HVAC system, parking garage, foundation, etc.) and to all individual units. 1 King West alleges that all of 142's claims are also contained in the Condo Action; however, it is noted that both the Divisional Court (at paras. 45-46) and the Court of Appeal (at paras. 25-27) held otherwise.

[10] Prior to commencing its action, TSCC 1703 sent a notice to unit holders, in accordance with s. 23 of the Act. That notice was dated August 1, 2006. It informed unit holders that TSCC 1703 would be seeking damages for deficiencies in common elements. TSCC 1703 sent another notice dated September 1, 2006, which informed unit holders that it would also be seeking damages with respect to the individual units. That notice informed unit holders of their right to opt out, and that any settlement of claims made on behalf of units "shall be subject to ratification by a majority vote of unit owners present in person or by proxy at a special meeting of unit owners."

[11] 1 King West brought a motion to stay 142's claim with respect to the individual units until it opted out of Condo Action, and as well to strike the plaintiff's claims with respect to the common elements on the grounds that it had no legal capacity to assert such a claim. They argue that under s. 23 of the Act, only the condo corporation bring such an action.

[12] 1 King West was unsuccessful at first instance, but was successful on appeal to the Divisional Court. As a result, the Divisional Court stayed the claims relating to 142's unit deficiencies, with leave to lift the stay if 142 opted out of the Condo Action. Regarding the common elements, the Divisional Court held that s. 23 of the Act prevents individual unit owners from bringing claims for damages to common elements. Those claims were therefore struck.

[13] 142 appealed the latter issue, regarding the common elements and the statutory interpretation of s. 23 of the Act, to the Court of Appeal. The Court of Appeal held that s. 23 does not preclude individual unit owners from maintaining actions for damages to their own units or to their share of the common elements, if there is a contractually unique problem or other unit-specific wrong raising a discrete issue. The Court of Appeal was satisfied that 142's action represented a unique contractual claim, and that the major items of the plaintiff's claim regarding the common elements pertain immediately to the plaintiffs units. While the complaints may overlap with those contained in the Condo Action, they are largely unique to the plaintiff.

[14] The Condo Action settled on July 19, 2011. TSCC 1703 sent a notice dated May 25, 2011, advising unit holders of the proposed settlement and that the settlement terms had been approved by the Board. The unit holders were informed that the proposed settlement details were included in their Annual General Meeting ("AGM") packages, and further that the unit owners would be voting on approval of the settlement at the AGM.

[15] The minutes of that AGM held on June 6, 2011, reveal that the general terms of the proposed settlement were explained, and that the unit owners had an opportunity to ask questions about the settlement. In the vote that followed, 161 ballots were cast; 148 were in favor of the settlement and 13 were opposed to it.

[16] The settlement required the execution of a "Full and Final Release," which specified that TSCC 1703 on its own behalf and on behalf of all unit owners, collectively referred to as the "Releasor," released 1 King West,

> of and from any and all claims made, or which could have been made:
>
> 1. In the Action;
>
> 2. In respect of or in any way relating to the design and construction of the condominium building located at 1 King West, Toronto, Ontario, M5H 1A1 ("the Building"); and

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3. In respect of any and all constructions and/or design deficiencies associated with or in any way relating to the Building which exist now or which may arise in the future.

> AND FOR THE SAID CONSIDERATION, THE RELEASOR HEREBY AGREES it will not commence or maintain any claim, action or proceeding against any individual, partnership, proprietorship, corporation, the Crown, or other entity arising out of or relating to the subject of this Full and Final Release…

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[17] The release specifies that the Releasor hereby "AGREES that this Full and Final Release shall be a complete defence against any action commenced by the Releasor, a third party or a unit owner of the Releasor in respect of the subject matter of this release."

[18] The Full and Final Release was signed by TSCC 1703 but not the unit owners. 142 did not attend or vote its eight votes at the 2011 AGM. 142 benefited financially from the settlement by receiving a "fee holiday" from its condo fees for a brief period of time; approximately one or two months. The precise time period is in dispute.

[19] The Condo Action settled several months prior to the January 2012 Court of Appeal hearing. As a result of the settlement, the Court of Appeal considered the issue regarding the stay to be moot. Counsel agreed that the only issue for determination on the appeal was whether the applicant/plaintiff had standing to sue in relation to the common elements. It would appear that while the court was aware that the Condo Action had settled, no submissions were made relating to the effect of a release on 142's ability to continue with the individual action.

Issues for Determination

(a) Whether the terms of settlement of the Condo Action, and specifically the release entered into by the parties, precludes 142 from continuing the Individual Action.

(b) Whether 142's motion to lift the stay should be granted.

Positions of the Parties

1 King West Inc.

[20] The moving party argues that the Individual Action is now an abuse of process, and that 142 is bound by the release signed by TSCC 1703. As a result it seeks an order dismissing the plaintiff's claim in its entirety, or in the alternative, an order permanently staying the action.

[21] 1 King West's position is that, notwithstanding the Court of Appeal's ruling that 142 had the right to bring and maintain its own separate action, 142 had an obligation to choose one action before the settlement agreement was signed.

[22] 142, like all unit holders, would have received a notice that the Board had ratified the proposed settlement. 1 King West argues that at that point, 142 had an obligation to inform itself of the settlement terms and to opt out of the Condo Action if it wanted to maintain the Individual Action. 1 King West argues that there was a window of time after the settlement terms were available before the settlement was binding, during which time 142 could have opted out of the Condo Action.

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[23] 1 King West argues that the release is valid, binding, and a complete defence. The condo corporation has the ability, pursuant to s. 23 of the Act, to settle an action on behalf of itself and unit owners and to execute a release on those parties' behalf. 142's unit was part of the Condo Action. By remaining silent and failing to opt out of the settlement, 142 opted into the settlement and the release signed on its behalf.

[24] 142 received consideration in exchange for the release in the form of the holiday and is therefore bound by that release. There was no fraud, misrepresentation, or unconscionability. 1 King West argues that 142 is putting at stake the ability of parties to resolve legal disputes before trial and that it would be unfair to permit this claim to proceed when the parties, in good faith, negotiated a settlement to end the dispute about the alleged deficiencies in the design and construction of 1 King West.

[25] Regarding 142's motion to lift the stay, 1 King West argues that where an action is duplicative, it must be permanently stayed as an abuse of process: *Browne v. McNeilly c.o.b. St. Clair Dufferin-Medical Centre*, [2001] O.J. No. 970 (S.C.) at para 13.

[26] Section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides the court with jurisdiction to stay "any proceeding in the court on such terms as are considered just." 1 King West submits that 142 is attempting to re-litigate a construction deficiency claim that has been settled, and from which settlement it has already received a benefit. 1 King West relies on the Divisional Court's statement at para. 49 that both actions claim damages for "the same thing."

[27] The Divisional Court was concerned about the real possibility of inconsistent findings and double recovery. 1 King West argues that throughout, 142's position has been that there is no risk of double recovery because relief awarded in one action could be pleaded in the other action. This is exactly what 1 King West is attempting to do, it submits: to rely on the settlement of one action to bar the second action and thereby avoid double recovery.

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[28] 142's main argument is that a finding that the release is binding on the plaintiff would be inconsistent with the Court of Appeal's decision on this matter. It argues that the Court of Appeal held that s. 23 of the Act does not prevent it from commencing and maintaining its own action when the condo corporation also brings an action.

[29] The Court of Appeal held at paras. 37-38 that it would be absurd if an individual unit owner's right to sue regarding its own unit was foreclosed by the statutory grant of a right of

action to the condo corporation. To allow a condo corporation's settlement to terminate the plaintiff's right to sue in this case would be, it argues, similarly absurd. Such a finding would permit an end run around the Court of Appeal's decision.

[30] 142 also argues that the issue of the release is *res judicata*, and if 1 King West wanted to rely on the release or the consequences of it, it had an obligation to raise this issue at the Court of Appeal. The Court of Appeal was asked to determine the extent of 142's right to sue, and the impact of a condo corporation suit on the unit owner's individual right to sue.

[31] The position being taken by 1 King West on this motion, if raised at the Court of Appeal, would have rendered the appeal moot. The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting before the court in an earlier proceeding but did not. 142 relies on *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d), at para. 8, in support of this proposition. 142 submits that the parties must bring forward their whole case. 1 King West did not bring the release forward before the Court of Appeal. As a result it cannot rely on it now.

[32] 142 further argues that the issue of double recovery is separate from that of the release of liability, but that the defendant confuses these two concepts, and attempts to argue that because there is a possibility of double recovery, the release in one action is a bar to the other action. 142 highlights that the Court of Appeal, at para. 44 of their decision, found that assets recovered by the corporation, if corporate assets, may not be duplicative of any damages recovered by the individual unit owner regarding common elements. 142 submits that it will be a live issue at trial whether any damages 142 may be entitled to are in fact duplicative and constitute double recovery. The trial judge will be well positioned, it submits, to both assess and prevent any double recovery.

[33] It is further argued that the release is not binding on 142 regarding the Individual Action because one party cannot release claims belonging to another party. The releaser, TSCC 1703, was not a party to the Individual Action and did not have the ability to extinguish the Individual Action.

[34] 142 submits that all of the cases cited by 1 King West in support of its position that a release in one action is a bar to further proceedings involve situations in which the plaintiff personally signed a release. If 1 King West wanted the release to apply to the Individual Action, which was an ongoing proceeding of which they were aware, it had an obligation to make this clear by referring to the Individual Action specifically in the release, and bringing the release to the attention of 142. 1 King West did neither.

[35] Even if 142 had been aware of the terms of the release and that such terms were intended to include the Individual Action, it had no opportunity to change the terms at that point. Attending the AGM and voting against the settlement would not have, 142 argues, changed the result.

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[36] Regarding the stay, 142 argues that it should be lifted because the conditions that justified its imposition, the existence of duplicative proceedings, no longer exist. Where there are duplicative proceedings the court will stay one temporarily, pending the outcome of the other, in order to prevent inconsistent findings and double recovery. 142 submits that now that the Condo Action has settled, there is no risk of inconsistent findings, and double recovery is an issue which can be addressed by the trial judge when assessing damages.

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Analysis

(a) General Principles

[37] The relevant portion of s. 23 of the *Condominium Act* states as follows:

> 23. (1) Subject to subsection (2), in addition to any other remedies that a corporation may have, a corporation may, on its own behalf and on behalf of an owner,
>
> > (a) commence, maintain or settle an action for damages and costs in respect of any damage to common elements, the assets of the corporation or individual units; and
> >
> > (b) commence, maintain or settle an action with respect to a contract involving the common elements or a unit, even though the corporation was not a party to the contract in respect of which the action is brought.
>
> (2) Before commencing an action mentioned in subsection (1), the corporation shall give written notice of the general nature of the action to all persons whose names are in the record of the corporation maintained under subsection 47(2) except if,
>
> > (a) the action is to enforce a lien of the corporation under section 85 or to fulfil its duty under subsection 17(3); or
> >
> > (b) the action is commenced in the Small Claims Court.
>
> (3) Unless the board determines otherwise, the legal and court costs in an action that the corporation commences or maintains in whole or in part on behalf of any owners in respect of their units shall be borne by those owners in the proportion in which their interests are affected.

> (4) A judgment for payment in favour of the corporation in an action that the corporation commences or maintains on its own behalf is an asset of the corporation.

[38] Under s. 23, a condo corporation has the right to bring, maintain, and settle an action on behalf of individual unit holders. The Court of Appeal's decision at para. 55 makes it clear that such a right does not preclude the unit owner from bringing and maintaining a separate action with respect to either its own unit or the common elements, provided that the individual action relates to some contractually unique problem or other unit-specific wrong immediately pertaining to the owner's unit.

[39] It is undisputed that 142 had the right to maintain its action. TSCC 1703 also had the statutory right under s. 23 to settle an action on behalf of the unit holders. The terms of the settlement include a release that binds all unit holders and bars them from bringing any claims against the builder for deficiencies in the building.

[40] If a condo corporation such as TSCC 1703 cannot bind its unit holders in a settlement, then the condo corporation's ability to commence, pursue, and effect settlements is hampered, and the statutory right created by s. 23 is essentially nullified. Every unit holder could bring such claims. However, to allow the release to terminate 142's right to maintain its own action in this case, a right that the Court of Appeal specifically upheld on appeal, would be in my view contrary to the spirit of the Court of Appeal's decision and would lead to an injustice by depriving 142 of its substantive right to sue for breach of contract and specific performance.

[41] No case law has been presented on this aspect of s. 23, or how the individual unit owner's right to litigate is to or can co-exist with the condo corporation's right to settle an action on the unit owners' behalf. Although in this case 1 King West argues that the conflict between the Condo Action settlement and 142's right to sue could have been resolved by 142 opting out of the Condo Action, this assertion is in my view contrary to the Court of Appeal's decision. The Court of Appeal was aware that 142 had not opted out of the Condo Action and that the Condo Action has settled.

[42] In addition, this assertion appears to be at odds with the position being taken by 1 King West. 1 King West submits that the release is binding on unit holders because TSCC 1703 has authority under s. 23 of the Act to settle actions on the unit owners' behalf, and that there is no reason as a result of fraud, unconscionability, or otherwise not to give effect to the wording of the release.

[43] The release states that the Releasor "AGREES that this Full and Final Release shall be a complete defense against any action commenced by the Releasor, a third party or a unit owner of the Releasor in respect of the subject matter of this release." As a result, 142 opting out of the litigation would not, it appears, have changed the argument being advanced by 1 King West regarding the binding nature of the release. The issue of the release in this case is one which

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could occur in any case where a condo corporation reaches a settlement that includes a similarly broad release.

[44] In my view, in this case the answer to the apparent conflict between the condo corporation's s. 23 authority to settle an action on behalf of unit owners and the Court of Appeal's decision in this matter lies with an interpretation of the condo corporation's s. 23 authority and the scope of the release. When interpreted properly, the release does not in my view apply to the Individual Action.

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[45] The Court of Appeal held at para. 19 that an "underlying tenet of s. 23(1) is its objective of protecting the interests of the condominium community as a whole, not the interests of the individual unit owners in their capacity as individual unit owners." In the Condo Action, TSCC 1703 was representing and concerned with the interests of the owners as a group, not their interests as individuals. TSCC 1703 should not as a result be interpreted as releasing the rights to a separate action, unique to 142 as an individual, over which it has no authority.

(b) The Law of Releases

[46] The parties agree that when interpreting a release, the court must consider the language of the document itself, the circumstances surrounding its execution, as well as the evidence of the intention of the parties: *Taske Technology Inc. v. PrairieFyre Software Inc.* (2004), 3 B.L.R. (4th) 244, [2004] O.J. No. 6019 (S.C.) at para. 25.

[47] In the decision of *Abundance Marketing v. Integrity Marketing*, [2002] O.T.C. 731, [2002] O.J. No. 3796 (S.C.) the court at para. 23 summarized the holding of La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B.C.A.) that the words used in a release govern its interpretation, and the document must be read as a whole:

> This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to the recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of the general words. As Lord Westbury stated…in *Directors of London & South Western R. Co. v. Blackmore* (1870), L.R. 4 (H.L.) 610 at p. 623, "The general words in a release are limited always to that thing or those things which were specifically in the contemplation of the parties at the time when the release was given."

[48] As stated by Fred Cass in *The Law of Releases in Canada* (Aurora, ON: Cartwright Group Ltd., 2006) at p. 83, releases are often expressed in "the broadest possible words" and "there is often discord between the broad wording of a release and the apparent intentions of the parties." A release purporting to encompass all existing and future claims will be interpreted according to the objectively determined intention of the parties: *ibid.*, p. 100.

[49] On the record before me a reasonable inference can be drawn that 1 King West must have been well aware of the Individual Action, given that it was to be heard by the Court of Appeal a

few months later. It is likely that 1 King West intended the release to have the effect of terminating 142's action. There is no evidence in the record regarding TSCC 1703's intention.

[50] 1 King West makes submissions with respect to what the knowledge and intent of 142 could reasonably have been at the time release was signed. 142's knowledge and intention cannot properly be considered relevant to the interpretation of the release, given that 142 was not privy to the negotiation of its terms and had no ability to affect those terms, beyond possibly opting out of the settlement or voting against it.

[51] 142's evidence is that it had no idea of the specific terms of the release, and even if it had, it would not have assumed that the language of the release, no matter how broad in scope, intended to or could encompass the Individual Action. Even if it had notice of the scope of the release, the fact remains that it had no ability to alter the terms of that release.

[52] Based on the factual matrix of this case the issue of the release's applicability to 142's Individual Action has less to do with the intention of the parties than with their ability to deal with claims outside the scope of the litigation, whether they intended to do so or not. As stated by Cass at p. 100, "The broad wording of a general release does not extend to include a claim that the releasor had no interest in, and had no authority to deal with, when the release was signed." Cass cites the decision in *C.C. Petroleum Ltd. v. Steinberg, Morton & Frymer* (2003), 41 C.B.R. (4th) 10, [2003] O.J. No. 1126 (S.C.), which is illustrative of this principle.

[53] In that case C.C., a creditor of the bankrupt, gave a general release to the law firm in 1999 as part of a settlement. In 2002, a s. 38 order under the *Bankruptcy and Insolvency Act* ("BIA") allowed C.C. to prosecute a fraudulent preference claim against the law firm. The law firm brought a motion to strike the claim. It argued that the general release, which indicated it encompassed "any cause, matter, or thing," applied to the fraudulent preference claim.

[54] The court held that a fraudulent preference claim, pursuant to s. 95 of the BIA, belonged to the trustee in bankruptcy until it was assigned pursuant to the s. 38 order. As a result, the court stated at para. 4 of its decision that "it does not seem to me that again a fair reading of the Release could be said to incorporate the fraudulent preference claim as that was still a claim which belonged to the Trustee and as to which C.C. had no authority to deal with, one way or the other."

[55] A broad interpretation of the release, as suggested by 1 King West, would have 1 King West and TSCC 1703 release a claim they had no interest in. The Court of Appeal at para. 25 of its decision found that 142's claim was essentially "a contractual claim to compel specific performance of obligations pertaining uniquely to its own units and to common elements immediately pertaining to those units." The Court of Appeal at para. 22 held that the Divisional Court erred in treating 142's claim as primarily a claim for damages with respect to the common elements.

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[56] As previously indicated, the Court of Appeal at para. 19 specified that s. 23(1) is designed to protect "the interests of the condominium community as a whole, not the interests of the individual unit owners in their capacity as individual unit owners." The court at para. 21 stated that s. 23 of the Act is designed to empower a condo corporation to bring an action "where the real injury is to owners as a group rather than any individual." TSCC 1703 had no interest in 142's Individual Action given the limited purpose of s. 23 and the fact that 142's claim relates to its individual contract of purchase and sale.

[57] While damages for, or specific performance of, contractual obligations relating to the common elements pertaining to 142's unit might in some tangential way benefit TSCC 1703, this does not, in my view, equate with an interest in the Individual Action, or authority to settle that action on 142's behalf.

[58] 1 King West does not have an interest in the Individual Action. As indicated by Cass, a release "must not use the general words of a release as a means of escaping the fulfillment of obligations falling outside the true purpose of the transaction" (at p. 84, quoting the High Court of Australia in *Grant v. John Grant & Sons Pty. Ltd.* (1954), 91 C.L.R. 112 at para 14). The true purpose of the transaction, the negotiation pursuant to a claim under s. 23 of the Act, was, as the Court of Appeal stated, to benefit the owners as a group and to deal with their interests as a whole.

[59] I note that all of the cases referred to by 1 King West to suggest that the release is binding upon 142 deal with situations in which the plaintiff had personally signed a release previously. This is an important distinguishing characteristic between the facts in those cases and the factual matrix of this case. None of the cases relied on involve a situation where one party purported to release existing claims belonging to the other party, as is the case here.

[60] The release in question does not make mention of or refer to the Individual Action. TSCC 1703 had no authority pursuant to s. 23 to settle the plaintiff's distinct action for specific performance. As a result I find that the release should be interpreted narrowly and should not apply to 142's Individual Action. In my view such a narrow interpretation also respects the condo corporation's authority under s. 23 of the Act without infringing on or contravening the Court of Appeal's holding in its decision.

(c) *Res Judicata*

[61] *Res judicata* or abuse of process more generally is an alternative and narrower ground on which to decide this summary judgment motion. 142 argues that this case falls under the doctrine of *res judicata* as it is been broadly defined by the Supreme Court and the Court of Appeal.

[62] In *McQuillan v. Native Inter-Tribal Housing Co-Operative Inc.* (1998), 42 O.R. (3d) 46 (C.A.), the Court of Appeal describes the doctrine of *res judicata* as follows:

> The doctrine of *res judicata*, in its wider application, prevents a person from relying on a claim or defence which he or she had the opportunity of putting

before the court in the earlier proceedings but failed to do so. This principle was adopted by the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at pp. 358-59 (citing the often-quoted words of Wigram V.C. in *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.C.)):

> …The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

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[63] In *Boardman v. Pizza Pizza Ltd,* [2002] O.T.C. 437, [2002] O.J. No. 2553 (S.C.) at para. 43, the court held that *res judicata* applied to bar the plaintiff from asserting a different cause of action, namely in contract rather than tort, because he sought, on the same factual matrix, a remedy analogous to that which had already been sought and dismissed on a previous summary judgment motion.

[64] In this case 1 King West is essentially arguing a defense that was not presented to the Court of Appeal. The Court of Appeal was deciding the issue of whether 142 could bring and maintain its own action notwithstanding that the condo corporation had brought and settled a separate action on behalf of all unit owners. 1 King West argued that s. 23 barred 142's claim.

[65] On this motion, 1 King West argues that s. 23 in combination with the release bars 142's claim. In doing so, 1 King West argues a defence to the Individual Action that existed at the time the appeal was argued but which it did not raise. If in fact the release did apply, it would have rendered the appeal moot.

[66] If it is held that the doctrine of *res judicata* applies, the court retains discretion to allow re-litigation. In *Boardman* at para. 44 the court cites para. 77 of *Toronto (City) v. Canadian Union of Public Employees*, *Local 79* (2001), 55 O.R. (3d) 541 (C.A.), in which the Court of Appeal considered the factors pertaining to the court's decision to exercise that discretion and allow re-litigation:

> In deciding whether to permit re-litigation, a court or tribunal must decide whether finality concerns outweigh an individual litigant's claim that the justice of the specific case warrants relitigation. That determination is fact specific and requires that the court or tribunal weigh these competing considerations in the context of the facts of the particular case.

[67] 1 King West has not presented any exceptional circumstance that would indicate the need for such re-litigation. As stated in *Boardman* at para. 45, special circumstances might include any intervening change in the law; a situation where the view taken of a point of law in the prior decision is shown in an intervening action between different parties to have been erroneous; or

where additional material evidence has become available but could not have been discovered by reasonable diligence at the time of the prior proceedings. None of these factual scenarios exist in this case.

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(d) The Stay of Proceedings

[68] The Divisional Court ordered a stay of 142's Individual Action under rule 21.01(3)(c), which provides that a defendant may move to have an action stayed or dismissed on the ground that "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter." That condition is no longer met given that the other proceeding has now settled. There is therefore no longer any reason to uphold the stay. The Court of Appeal at para. 8 held that the issue of the stay was moot as a result of the settlement.

[69] In addition, as the Divisional Court outlined at para. 44, in order for a stay to be granted, the defendant has to satisfy the court that the stay would not cause injustice to the plaintiff. This is also no longer the case. Given that the release is found not to bar 142 from continuing its Individual Action, the stay would cause an injustice by preventing 142 from pursuing a claim that the Court of Appeal held was specific to its units and did not overlap with the now settled Condo Action.

(e) Summary Judgment

[70] In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 at para. 49, the Supreme Court states:

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

[71] On a summary judgment motion, the court can grant summary judgment for either party. "The court does not require a cross-motion for summary judgment when it can decide the issue that is the subject of the motion for summary judgment": *Landrie v. Congregation of the Most Holy Redeemer*, 2014 ONSC 4008 at para. 51. The parties agree that under rule 20.04(1)(b) summary judgment is an appropriate procedure to resolve the issues in dispute. I agree.

Disposition

[72] For the reasons set forth above I order that:

1. Partial summary judgment be granted declaring that the release entered into by the parties in the Condo Action does not preclude 142 from continuing this action.

2. The partial stay of this action is lifted.

[73] I wish to thank counsel for both their written and oral submissions which were of great assistance to the court. I encourage the parties to agree on the issue of costs. If they cannot, I may be contacted in order to set a timetable for the delivery of cost submissions.

2015 ONSC 252 (CanLII)

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Firestone J.

Released: January 27, 2015

CITATION: 1420041 Ontario v. 1 King West, 2015 ONSC 252

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

1420041 ONTARIO INC.

Plaintiff

– and –

1 KING WEST INC.

Defendant

REASONS FOR DECISION

Firestone J.

Released: January 27, 2015

2015 ONSC 252 (CanLII)