

Seller misrepresented right to assign agreement of purchase and sale (*Qu v. Wang*)

Agreement of Purchase and Sale | Commercial Real Estate | Litigation & Dispute Resolution | Misrepresentation

27 March 2026

Buyers who agree to purchase a property from a builder may sometimes wish to assign their agreement to another buyer before the transaction has been completed. Before a buyer does so, however, they should ensure that they comply with any terms required by the agreement with the builder for an assignment. In many cases, the builder's written consent may be required in addition to payment of fees and other terms. Failure to obtain the builder's consent may be grounds for rescission of the assignment agreement.

The trial decision in *Qu v. Wang*, 2026 ONSC 1715 (CanLII), illustrates the potential consequences of a failure to obtain a builder's consent to an assignment.

In January 2017, the plaintiff agreed to buy a property in Richmond Hill, Ontario from a builder for \$2,888,000 under an Agreement of Purchase and Sale (APS) that provided for deposits of \$500,000, payable in three instalments. A tentative closing date was set for the end of June 2017.

The APS specifically required the builder's written consent for an assignment by the plaintiff to another buyer. To do so, payment of an assignment fee to the builder was required in addition to other conditions.

The plaintiff paid the first deposit but his cheque for the second deposit was returned due to insufficient funds (NSF).

In March 2017, the defendant saw an advertisement for the property on WeChat and contacted the plaintiff's real estate agent. The agent and plaintiff agreed to meet with the defendant at a Tim Hortons. The plaintiff and the defendant entered into an Assignment Agreement dated March 21, 2017, under which the defendant agreed to buy the property for \$3,130,000. The agent agreed to act for both parties.

After the agreement was signed, the parties and the real estate agent attended the builder's office and the defendant provided a cheque of \$150,000 to the builder, rather than to the plaintiff. Unbeknownst to the defendant, the cheque was provided as a replacement for the plaintiff's second deposit that was returned NSF.

Subsequently, after consulting with a lawyer, the defendant learned that she had no direct agreement with the builder to purchase the property since its consent to an assignment had not been provided. The defendant made no further payments to the plaintiff or the builder.

Litigation ensued. The plaintiff alleged that the defendant was liable for failing to complete the purchase of the property and was liable for damages of \$350,000, representing what he had paid to the builder.

The plaintiff also sued the builder. The action against the builder was dismissed before trial because the plaintiff failed to satisfy costs awards made in the builder's favour.

In her defence to the plaintiff's action, the defendant asserted that she was entitled to rescission of the Assignment Agreement due to the plaintiff's fraudulent misrepresentations. These alleged misrepresentations included whether the plaintiff had the right to assign the APS without having obtained the builder's consent.

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Of note, the plaintiff was a real estate broker. At trial, he was forced to admit that he had been disciplined by the Real Estate Council of Ontario (RECO) in respect of the transaction at hand for failing to hold the defendant's deposit cheque in a trust account and having knowingly made false representations to the defendant, among other things. The trial judge found it shocking that the plaintiff maintained his position vis-à-vis the defendant through trial notwithstanding RECO's decision.

In the facts of the case, the trial judge found that the plaintiff failed to demonstrate that he made an assignment of the APS with the builder. The original APS obliged the plaintiff to have the written consent of the builder. As the plaintiff did not have this consent, there was nothing that he could legally assign. While the builder accepted the defendant's cheque for the second deposit, this was not evidence of written consent to the assignment. The plaintiff's claim for breach of the assignment therefore failed.

The trial judge also found that the Assignment Agreement was voidable based on fraudulent misrepresentations made by the plaintiff based on the test affirmed by the Court of Appeal for Ontario in *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONCA 610, which requires proof of the following:

- The plaintiff made a false representation/statement of fact;
- b. The plaintiff knew the statement was false or was reckless as to its truth;
- c. The plaintiff made the representation with the intention that it would be acted upon;
- d. The representation was relied upon by the defendant; and
- e. The defendant suffered damages as a result.

In the trial judge's view, each of these criteria were met. In that regard, the plaintiff made several false statements to the defendant, including that he could assign the APS when he did not have written consent to do so and that he had paid \$250,000 in upgrades when he had not. The trial judge concluded that the plaintiff knew that these representations were false because of the terms of the APS. Further, based on his desire to assign the APS, the plaintiff made the representations so that the defendant would agree to his terms. He therefore knew they would be acted upon. The defendant suffered damages as she lost the \$150,000 paid to the builder relying on the plaintiff's representations.

As a matter of law, the Assignment Agreement was therefore unenforceable against the defendant and the plaintiff's action against her was **dismissed**. Costs for the action have yet to be determined.

The decision underscores that prospective assignors and assignees should review the terms of an APS before entering into any agreements to assign it. In many cases, the consent of the original seller may be required and any terms or conditions relating to the ability to assign the right to purchase the property should be disclosed, failing which the assignee may be entitled to rescission. A PDF version is available for download [here](#).

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