

therefore void. In the alternative he asserts that the release was procured through duress and is therefore voidable.

The material facts, viewed in the light most favorable to the plaintiff, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988), may be briefly summarized. The plaintiff bought a condominium unit at the Bellevue Motel and Cottages in April, 1988. Affidavit of Ronald F. Berton & 3. At the same time, he entered into two other separate agreements. Affidavit of Mark A. Kearns && 4-5. One was a lease agreement with Atlantic Hospitality, Inc. ("AHI"), a corporation owned and operated by Kearns and Waterman, by the terms of which AHI agreed to rent the unit from the plaintiff for a monthly rental which equalled the plaintiff's mortgage payment. Affidavit of Ronald F. Berton & 3; Exh. A to Affidavit of Mark A. Kearns. The other was a buyback agreement which conditionally obligated Kearns and Waterman to repurchase the unit for a stated price. Exh. B to Affidavit of Mark A. Kearns. Lease payments were made until approximately October, 1988 but ceased thereafter. Affidavit of Ronald F. Berton & 4. The plaintiff was then forced to use his own funds to cover his mortgage obligation to defendant First NH Banks Granite State. *Id.*

In the spring of 1989, Kearns and Waterman called a meeting with the Bellevue condominium unit owners. *Id.* & 5. At the time of this meeting AHI was in default on its lease payments to the unit owners and owed the Bellevue Inn approximately \$100,000. *Id.* At the meeting the owners were advised that the only way they could get some of the money owed them under the lease was to sign a release of all claims against Kearns, Waterman and their affiliates.¹ *Id.* & 6. According to the plaintiff, an AHI representative told the owners at the meeting

that there was an easy way and a hard way to deal with the situation; the easy way being to sign the release and get some . . . money back that

¹ Bellevue Condominium Development Corporation is an affiliate of AHI. Affidavit of Mark A. Kearns & 2.

was owed . . . and the hard way [was] to sue them . . . [but] if the matter resulted in a suit, they would drag it on in the courts for years and . . . Atlantic Hospitality Inc. would end up in bankruptcy, and . . . none of [the owners] would get anything.

Affidavit of Ronald F. Berton & 6. The plaintiff ``felt threatened that if [he] did not execute a release agreement and accept whatever money would be forthcoming after executing the release, [he] would get nothing back from Kearns and Waterman." *Id.* & 7. On or about June 5, 1989 the plaintiff and his wife executed the agreement.² *Id.* & 8. All contingencies in the agreement have been met.

² The relevant portions of the agreement state:

[I]n light of such actual and projected losses, AHI desires to terminate the Lease . . . and to resolve any and all claims arising out of, or purportedly arising out of, AHI's operation of the Bellevue, upon the terms and conditions of this Agreement.

. . . .

NOW THEREFORE, in consideration of the promises and mutual covenants set forth herein, the parties agree as follows:

1. Lease Termination. Owner and AHI hereby terminate the lease . . . and Owner and AHI agree that . . . Owner and AHI shall have no further rights or obligations arising out of, or related to performance under, the Lease.

. . . .

4. Release of AHI, AHI Principals, and Affiliates. For good and valuable consideration, the receipt, sufficiency, and adequacy of which are hereby acknowledged, the Owner and . . . his . . . assigns . . . do hereby forever release, discharge and acquit AHI, together with its . . . affiliates, and . . . officers, directors [and] shareholders . . . in said capacities and in their individual capacity, and MARK A. KEARNS and JAMES D. WATERMAN . . . (. . . collectively referred to [as] . . . ``AHI"), of and from any and all claims . . . relating in any way to AHI and arising out of, connected with, or relating in any way to the Lease and AHI's performance or non-performance of or under the Lease Notwithstanding the foregoing . . . the release of AHI shall be effective only upon: (1) payment by AHI to the Releasers of the outstanding lease amount of \$926.36, and real estate taxes in the

Affidavit of Mark A. Kearns & 8.

The Bellevue group contends that the claims asserted by the plaintiff against it in this litigation are within the scope of coverage of the release, and the plaintiff does not suggest otherwise. The plaintiff argues, however, that the release is ineffectual for two reasons: (1) the agreement lacks consideration because the defendants were legally obligated to make lease payments to the plaintiff, and (2) the agreement was signed under duress.

The plaintiff contends that the contract is not supported by sufficient consideration because he was already entitled to the past-due rent payments pursuant to the terms of the lease. *See Maynard v. Durham & S. R. Co.*, 365 U.S. 160, 163 (1961) (in Federal Employers' Liability Act case, court held that "[a] release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right") (citation omitted). However, mutual concessions are

amount of \$644.02; (2) payment by AHI to the Executive Board of the Bellevue Condominium Unit Owners Association of advance deposits in the amount of \$9,053.05, 1988 pool fees in the amount of \$3,750.00 and condominium fees through 12/31/88 in the amount of \$5,402.40; and (3) forgiveness by AHI of the sums due and payable by the Executive Board of the Bellevue Condominium Unit Owner's Association to Atlantic Maintenance, Inc., Ocean Management, Inc., and AHI in the amount of \$6,436.36, plus payment by AHI to the Association in the amount of \$259.74

Exh. C to Affidavit of Mark A. Kearns.

sufficient consideration to support a release. *Id.* Furthermore, in Maine "[m]utual promises to exchange releases and settle claims are, themselves, adequate consideration for a contract." *A.L. Brown Const. Co. v. McGuire*, 495 A.2d 794, 797 (Me. 1985) (citing *Dom J. Moreau & Son v. Federal Pac. Elec. Co.*, 378 A.2d 151, 153 (Me. 1977)). Here, it is uncontroverted that the agreement incorporating the release states that AHI agrees to terminate its lease with the plaintiff in exchange for a release of certain claims against itself, its affiliates and Kearns and Waterman. In addition, both parties to the agreement forgive additional debts and payments to which they are entitled. This exchange of releases clearly satisfies the requirements set forth in *A.L. Brown*-- each party has conceded legal obligations to the other in order to settle their dispute. Therefore, the lease termination agreement is supported by sufficient consideration. Accordingly, I conclude that there is no genuine issue of material fact on this claim.

The plaintiff next argues that the release is voidable because it was "induced by an improper threat by [the Bellevue group] that [left] the [plaintiff] no reasonable alternative." Plaintiff's Memorandum in Opposition to Defendants Kearns and Waterman's Motion for Summary Judgment at 4 (quoting *Restatement (Second) of Contracts* § 175(1) at 475 (1981)). In Maine, "[w]hile a *valid* release will extinguish a cause of action, the release will nevertheless be set aside if shown to be the product of fraud, misrepresentation, or overreaching." *LeClair v. Wells*, 395 A.2d 452, 453 (Me. 1978) (citations omitted) (emphasis in original).³ A contract is the product of overreaching if a party who is in an unfairly superior bargaining position imposes on the other party to the contract terms which are unreasonable. *See, e.g., Fluor Western, Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35, 38-39 (5th Cir. 1971) (cited in *Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135, 1139 n.3 (Me.

³ The plaintiff does not argue that the release should be set aside because it is the product of fraud or misrepresentation.

1978)); *Public Service Co. of N.H. v. Westinghouse Elec. Corp.*, 685 F. Supp. 1281, 1288 (D.N.H. 1988); *Leclair v. Wells*, 395 A.2d at 452; see also *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91 (1955); *Bither v. Packard*, 115 Me. 306, 314 (1916). In addition, the Law Court has recognized that an agreement is voidable if it is procured through duress. See *Estate of Lloyd J. Whitlock*, No. 5491, slip op. at 4 n.3 (Me. Jun. 21, 1990) (citing *Restatement (Second) of Contracts* ' ' 175 comment a; 176 comment f). However, a threat of legal action or a refusal to pay money will not constitute duress if reasonable alternatives to signing the contract are available. See *Restatement (Second) of Contracts* ' ' 175, comment b & illustrations 1, 7 at 476-78.

The plaintiff has the burden of proving at trial that the release is the product of overreaching or duress. The showing made by the Bellevue group in support of its motion for summary judgment is more than sufficient to shift to the plaintiff the obligation to go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(c)). This the plaintiff has failed to do. The plaintiff's overreaching argument fails because there is no evidence that the Bellevue group was in a superior bargaining position or that its demand for a release of all claims against it was unreasonable. The evidence in the record merely establishes that the Bellevue group threatened to withhold all past and future lease payments if the release was not signed and that if a law suit were filed it would last for years and AHI might not survive. The Bellevue group simply presented the plaintiff with a choice between settlement and legal action. Likewise, the plaintiff has failed to support his duress claim because the record is devoid of any evidence that the plaintiff was in a peculiar financial circumstance which would render the Bellevue group's refusal to pay a matter of duress. In short, there is no evidence that the plaintiff was placed in a position which left him no choice but to accept the Bellevue group's settlement

offer. On the contrary, he merely stated that he had to use his own funds to cover the unpaid lease payments. Accordingly, I conclude that the plaintiff has failed to establish an essential element of his claim that the release is voidable.

For the foregoing reasons I conclude that the Bellevue group is entitled to judgment as a matter of law. Accordingly, I recommend that the motion of defendants Kearns, Waterman and Bellevue Condominium Development Corporation for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 8th day of August, 1990.

David M. Cohen
United States Magistrate