Claim No: 432145

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacLean v. LeBlanc, 2014 NSSM 77

BETWEEN:

DAVID STEWART MacLEAN

Claimant

- and -

GERARD LEBLANC and SHAWNA JONES

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 25 and December 4, 2014

Decision rendered on December 14, 2014.

APPEARANCES

For the Claimant	Self represented
For the Defendants	Self represented

BY THE COURT:

Introduction

[1] This case raises, once again, the difficult problem of what recourse, if any, a home purchaser has against former owners, for “latent defects” in the home structure.

[2] The issue of so-called “patent defects” is easily resolved on the basis that a purchaser is deemed to accept what is there to be seen. This is the reason that most prospective purchasers will undertake a home inspection. It is presumed that a home inspector will detect obvious (patent) defects, and the purchaser will negotiate the price, or an abatement to the price, accordingly.

[3] For some defects that may not be obvious to an outside observer, but which the owners know about, the modest answer to the issue is the Property Condition Disclosure Statement (PCDS). On this form, which is not obligatory in residential sales but is widely in use, the seller answers a series of questions about his or her knowledge of certain conditions, such as whether or not the foundation leaks when it rains. Where the PCDS reveals an undesirable condition, the defect is then patent and the purchaser knows what he or she is getting. Where a seller lies or is deliberately misleading on the PCDS, and that can later be shown, the unfortunate inheritor of a pre-existing (but not disclosed) problem may have recourse against the seller on the basis of misrepresentation. This is arguably cold comfort, because it is difficult to prove misrepresentation. But some cases succeed.

[4] But what of potential defects that have not yet manifested, in which case the seller has nothing negative to disclose on the PCDS?

[5] Sometimes there is a warranty, such as where a builder provides a new home warranty to an original purchaser, or where a subsequent purchaser inherits the unexpired portion of a transferable warranty.

[6] But what recourse, if any, is there otherwise? This is a case that raises this issue.

The Facts

[7] The home in question was built by the Defendants in Dartmouth, Nova Scotia in 2009 and 2010. It is fairly described as a luxury home, backing onto picturesque Russell Lake. It was to be the Defendants' dream home.

[8] The Defendants did not buy from a builder. They acquired the land and used a house design service to draw up the plans for the house they wanted. They hired a very experienced project manager, Dean Armsworthy, to coordinate the construction. The project manager arranged for most, if not all, of the trades who performed the actual construction.

[9] It is important to set out the status of the Defendants in this matter, because this figures into the Claimant's theory of the case. In his Claim, he refers to the Defendants as having been their own "general contractors." This status would arguably place a higher duty on the Defendants than if they were

simply homeowners, since they might be held to the standard of a reasonable general contractor.

[10] I will say at the outset that the Defendants did play a role in the construction that was larger than what a purchaser of a new home might play. But that does not make them general contractors. The term “general contractor” suggests a model of construction where a professional builder/contractor has the overall obligation for the construction, some of which may be delegated to subcontractors. It is not a legally defined term, but most closely resembles the term “contractor” which is defined by the *Builders’ Lien Act* as:

> 2(a) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or service or placing or furnishing materials for any of the purposes mentioned in this Act;

[11] Many homes are built by contractors. But this is not the only model, particularly in the residential sector. Most of the skill that a general contractor would provide is equally supplied by a project manager. The only real difference is that the general contractor typically seeks to make a profit on the contract, and undertakes financial responsibility to the subcontractors, while the project manager is paid a flat fee for his services and does not enter into a financial relationship with the trades, who are not subcontracting, but rather are contracting directly with the owners.

[12] The Claimant appeared to believe, at least when the claim was drafted, that general contractors are answerable to claims in warranty, in the sense that they warrant their work and, usually, provide some form of a new home warranty. The Claimant advised the court that in Newfoundland, where he grew up, it is

mandated by law that a new home warranty be provided. Even if that is true, which I doubt, the situation in Nova Scotia is that it is optional for builders to become members of one or other of the new home warranty companies that does business in the province. Many builders do belong and offer home warranties, in part because it is a selling point for the homes that they construct. These warranties may cost up to several thousand dollars, which amount will typically be built into the price to the homeowner.

[13] Where there is no such warranty, a builder or general contractor may still owe legal duties to his client, because construction contracts will typically contain a clause that holds the builder to building in a “workmanlike manner.” But this is a contractual duty, only applicable where there is a direct contractual relationship between the builder and the homeowner.

[14] I will return later to these concepts.

[15] After living in the home for about a year, the Defendants were forced prematurely to downsize because one of their children became seriously ill and needed full time care from one of her parents. Without two incomes, the Defendants could no longer afford the home. Reluctantly, they listed it for sale in early 2011.

[16] The Claimant (and his wife Ann Marie MacLean) decided to purchase the home, and signed an Agreement of Purchase and Sale in late June 2011. The agreement is unremarkable. It allowed for a home inspection, which did not disclose anything troubling. The sellers provided a PCDS which also did not reveal any problems. One thing of note was the area of the form which refers to

warranties. The question is asked: “are you aware of any warranties currently in force for the property, appliances and/or other components?” The Defendants indicated there that there was a warranty for the heating system, which was transferable.

[17] The heating system in question is a heat pump, forced air system.

[18] The Claimant must be taken to have known that no other warranties were being extended, either directly or by way of a transferable warranty.

The problems experienced by the Claimant

[19] The Claimant and his family have experienced two types of issues. First of all, they had significant problems with the heat pump breaking down during the air-conditioning season in 2012. Secondly, beginning in the winter of 2013 they began to experience roof leaks that did significant water damage to the interior of the home on more than one occasion.

The heat pump issue

[20] The problem, as described, was that ice was seen to build up around the bottom of the heat pump when it was in its air conditioning cycle, which interfered with its operation. Although the PCDS referred to a transferable warranty on the heating system, it appears that the Claimant did not receive any of the paperwork that would have allowed him to know who had supplied and installed the heat pump. Nor was there a tag or sticker in evidence that would have supplied that information. The Claimant described some efforts to locate and contact the Defendants, which were unsuccessful, and as a result he called

another contractor to have a look. That contractor, a reputable local firm, determined that the compressor was broken down and arranged to have it replaced by the compressor manufacturer, under warranty. Unfortunately, the compressor broke down again and a full replacement was necessary. The total repair cost was $4,138.85, which the Claimant seeks to recover from the Defendants.

[21] There is also a suggestion, which is pure hearsay (from my point of view) to the effect that the air ducts in the home may be too small, and which may prove inadequate over time. There are no financial estimates associated with this complaint.

[22] The original supplier and installer of the heat pump, Rick Cunning of Cunning Energy Inc., was called by the Defendants as a witness. He could not explain the problem that the Claimant described, and stated that he would have responded to look at the problem, had he been called. He believed that it should have been easy to trace him because the serial number on the compressor would have revealed who the supplier, Carrier, sold it to.

The roof problem

[23] The initial roof leak in about March 2013 was reported to the Claimant's property insurer, who sent out a roofing expert to respond. It was diagnosed as a case of ice damming. The damage to the interior of the home was repaired, under insurance, and the Claimant was responsible only for the deductible.

[24] There have since been two other incidents of leaking. The Claimant and his wife testified that it seems only to occur when there is a driving rain, and the wind is blowing in a particular direction. The Claimant's insurer has declined to pay for further repairs because the occurrences are not of the type that they cover under the policy. The logical conclusion is that there is a problem somewhere with the roof. Investigation by roofing experts has not revealed precisely where the problem lies. In order to fix the problem, major investigations and repairs will have to be undertaken. At present, there is only a vague estimate of what it will cost to get to the bottom of the problem.

[25] The Claimant seeks approximately $2,000.00 that he has already paid (which already accounts for what the insurer paid) plus a further $3,320 to $5,635 for the roof to be repaired, or (if necessary) fully replaced.

[26] The identity of the original contractor who shingled the roof in 2009 or 2010 is known, but he has left the region and cannot be contacted. It is doubtful, in any event, that he would recall anything of value that might shed light on the roof problem.

Findings - Heat pump

[27] The conclusion is inescapable that there was something wrong with the heat pump, in the nature of a latent defect. Notwithstanding Mr. Cunning's skepticism about the problem, as described, there is no doubt that it occurred and there is no reason to suspect that the Claimant or his family did anything to cause it. Had the Claimant known of the existence of Mr. Cunning he would have likely had some recourse under the warranty. It is pure speculation to say

what might have occurred, but there is no doubt that it was the parties' intention that Cunning Energy remain responsible for the heat pump, for some period of time likely specified in the documentation (which was not placed in evidence before me.)

[28] That being said, there was no expectation in the Agreement of Purchase and Sale between the Claimant and the Defendants that the Defendants themselves would be answerable for a latent defect.

[29] I appreciate that the Claimant may place blame on the Defendants for not passing on the documentation concerning the heat pump. I doubt that it was anything deliberate on their part, and I know they had a lot on their minds. There is more than enough blame to spread around. The Claimant arguably should have sought out this information while the sale was still pending. Also the real estate agents and lawyers arguably ought to have seen it as part of their job to make sure that such documentation was exchanged on closing.

[30] The Claimant believes that the Defendants were ducking his calls when he tried to contact them. The Defendants are insistent that they did not receive any messages. I do not know what caused this breakdown in communication, and I decline to make any finding because it makes no difference, from a legal point of view.

Findings - the roof

[31] The roof is more problematic. No one knows what the problem is. It might be something deficient in the original construction. It might also be a result of

damage from high winds or some other natural cause. This area is known to be prone to extreme weather, and the years since it was built have seen several severe storms. The Claimant has not proved that there was a latent defect at the time of his purchase. The fact that it began to leak a year or more later does not, in itself, prove the point.

Legal conclusion

[32] It should come as no surprise to the Claimant, given all of my comments to date, that there is no available legal theory that would hold the Defendants liable for the two issues raised.

[33] The heat pump was under some type of warranty from its original supplier, but not by the Defendants themselves. It is indeed unfortunate that the Claimant did not have better luck tracing the identity of Mr. Cunning.

[34] Even more so, there is no basis to hold the Defendants responsible for a roof that leaked more than a year, indeed almost two years, from the time of the purchase. And, as observed, the facts are inconclusive as to whether or not there was even a latent defect in existence at the time of purchase.

[35] The legal principle of *caveat emptor*, or “buyer beware,” is still alive and reasonably well - if not universally loved - in Nova Scotia. This phrase is shorthand for the cold truth that a buyer of any type of property has very limited protection available in the event that something goes wrong. While this may seem harsh, from a policy perspective it could be seen as equally or even more harsh that someone might sell property in good faith and yet have a potentially ruinous claim come back to haunt him or her, years later, because of a problem

that no one knew about. For better or worse, the law has provided only very limited recourse in such situations. People buying homes are deemed to understand the risks that they are running, and are left to negotiate their contracts from that starting point. There is no implied warranty of quality on the sale of a home from a homeowner to a purchaser, regardless of whether or not the selling homeowner used a general contractor.

[36] In the result, the claim must be dismissed.

Eric K. Slone, Adjudicator