IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Owen v. Boudreau, 2015 NSSM 45

Claim: SCY No. 440988
Registry: Yarmouth

Between:

NATHAN OWEN AND KIMBERLY KENNY

Claimant

– and –

KATHLEEN JOYCE BOUDREAU

Defendant

Adjudicator: Andrew S. Nickerson, QC

Heard: August 20 and September 29, 2015

Decision: October 29, 2015

Appearances: Kiel Mercer for the Claimants,
Matthew Fraser, for the Defendant

DECISION

[1] The case involves the question of whether a vendor made a misrepresentation which induced the purchaser to acquire real property.

[2] I note at the outset that Mr. Colin Fraser, who at that time was associated with my law office, represented the purchasers in respect of the closing when they acquired the property. I raised this question with Mr. Mercer and Mr. Matthew Fraser, both of whom unequivocally agreed for me to adjudicate this dispute and stated they were waiving any potential conflict and both were satisfied of my impartiality, both actual and perceived.

[3] Exhibit 1, which is the agreement of purchase and sale and amendments and schedules as well as the property disclosure statement, was entered by consent. Exhibit 2, which was the deed conveying the real property from the defendant to the claimants was admitted by consent as Exhibit 2.

[4] The crucial portions of Exhibit 1 are clause 3 of schedule A which relates to water and septic. The clause which is of concern in this matter reads as follows:

> "The agreement is subject to the Buyer, at the Buyer's expense conducting testing on the sewer, septic or well systems that the buyer deems necessary such as visual/video inspections, flow

testing, dye testing etc., on or before Feb 25/15. The results shall be deemed satisfactory unless the Seller or the Seller's agent is notified in writing on or before the Feb25/15. If notice to the contrary is received, either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer."

[5] Also of relevance in the Exhibit 1 is section 4 of the property disclosure statement, which poses the questions:

> "have any repairs or upgrades been carried out to the system in the last five years (or since you have owned the property for less than five years)." Answer: no
>
> "is there a septic system certificate available." Answer: no
>
> "are you aware of any problems with the plumbing system?" The handwritten response is "smaller than normal septic pump more frequently." (The writing was quite small and was on a somewhat unclear photocopy. Upon my inquiry the parties agreed that this was the correct wording of the handwritten note.)

[6] I found all of the witnesses to be credible. I have not found it necessary to make any credibility finding for or against any of the witnesses. I found that they were all sincerely and diligently attempting to tell the truth, albeit naturally from their perspective, but I found no problems of recollection or understanding and I perceived no attempt to mislead the court from any of them. Neither do I find any substantial contradictions in their evidence. It appears to me that in large measure the facts upon which I must decide this matter are essentially common ground between the parties.

NATHAN OWEN

[7] Nathan Owen testified that he lives in Ontario, and works as a commercial cleaner. He had his sister search for properties as she knew the kind of recreational property that the claimants wanted. His sister had taken a video of the property and sent it to him. His sister had looked at the house but his first attendance at the property was in March of 2015. The Agreement was dated February 10, 2015 and a minor amendment on February 16, 2015. The closing of the transaction was to take place on April 21, 2015 and he was at the property for two days at that time. On that occasion he used the taps and the toilets without problems.

[8] The claimants did engage a home inspector but Mr. Owen does not recall any reference in the report to septic system. He says there was a lot of snow on the ground when the inspection was done and he cannot say whether the inspector was qualified to examine the septic system or if he did so.

[9] Mr. Owen was cross-examined as to clause 3 on schedule A, quoted above. He admitted that he had not sent any notice to the contrary, nor had he done any testing of the septic system prior to closing. He admitted that he had had the opportunity to inspect or to seek an extension of the date for such inspection.

[10] Mr. Owen also acknowledged that he was aware that the disclosure statement had indicated the smaller than normal tank. He said he didn't know much about septic systems but since the seller had lived there year round and he intended seasonal use, it seemed reasonable to him that there would not be a problem.

[11] Mr. Owen had a conversation with his realtor Ms. MacDonald at the time of signing the agreement. Ms. MacDonald reported to him that she had talked to Kyle Boudreau (the defendant's real estate agent) and based on that information he did not perceive that there would be any problems and he decided not to conduct any further tests or examinations of the septic system.

[12] On May 23 and 24 2015, Mr. Owen and his partner Ms. Kenny attended at the property. At that time, after Ms. Kenny flushed the toilet, Mr. Owen's sister noticed "grey stuff" and bubbling in the area of the septic system. He then called his agent Ms. Diane MacDonald. He also called Robicheau's Pumping who pumped the tank on May 28. He says that by May 29 the tank was full again.

[13] The claimant engaged David A. Trefry Excavating Ltd. to repair the system, which was done in July of 2015. Exhibit 4 consisted of photos of the septic system on May 29th as it appeared after being dug up. I find the photographs do show some grey material, but I am unable to determine its source.

[14] Exhibit 3, testified to by Mr. Owen, was the invoice of Mr. Trefry's company in the amount of $13,690.75

KIMBERLY KENNY

[15] Kimberly Kenny testified that she did not have a lot to do with the dealings with respect to the purchase and had not really turned her mind to the provisions of the agreement of purchase and sale. I do not find this to be detrimental to her case as she had a young child with her and was visibly very near her due date for another child when she testified in August. It is not surprising that she would rely on her partner to attend to the details of the purchase but she did acknowledge that they had had an opportunity to obtain inspections.

DIANE MACDONALD

[16] Diane MacDonald is a real estate agent conducting business in and around Yarmouth County. She says that the property was viewed on or about February 7, 2015 from her notes. She says that she did not see a septic tank. She states that she did speak to the seller's agent Kyle Boudreau, who also happens to be the defendant's son. Ms. MacDonald specifically questioned Kyle Boudreau about the septic tank and the oil tank. Ms. MacDonald says that Kyle Boudreau told her that the defendant had owned the property since 2009, the septic tank had only been pumped three times in the last six years (as a precaution), that he was a former plumber and assured her there were no problems with the septic system. Ms. MacDonald said that it is common in her profession to rely on the word of other agents. As there were no "red flags" she was not concerned. Ms. MacDonald said that in February of 2015, she had the impression that, since someone was living there and it appeared to be a well-maintained property

with the water being in use year round, septic problems were not anticipated. She also stated that it was a very unusual to do a flow test and she had only seen it done once in her 23 years in the profession.

[17] She acknowledged that the clauses from the property disclosure statement were read to the Claimants. She acknowledged that there was no discussion of extending the testing time. In cross examination she was challenged as to whether testing would have been appropriate. She stated "it was not a question," "it was not a perceived issue." and "there was no red flag". She said she did not consider it unusual for a small tank to be pumped three times in six years. She did acknowledge that the buyer certainly had ample opportunity to test. She also stated that she had never seen a seller voluntarily pump the septic system prior to closing. The first she heard of any problems was on May 28, 2015 when she received a call from Mr. Owen.

WILLIAM THURSTON

[18] William Thurston is a professional engineer who has been employed in the public health sector. He holds a Master's degree in environmental health and has been engaged in this type of work for 33 years. However, the court was not asked to qualify him as an expert and he did not testy as such. His evidence was that he was consulted by the contractor Mr. Trefry as to how to properly design a replacement system. He stated when he examined the site, there was in fact sewage lying around on the ground but the site had been opened by the contractor, at that time. He noted that upon excavation, you would likely see sewage or smell odor. He thought that the old septic system could sustain a family but potentially would have problems. He was concerned about the closeness to the lake of the existing system and expressed that it was likely that you would have problems with that system at some point. He acknowledged that the photos showing damage to the tank and showing the sewage on the ground could have occurred during the excavation.

KATHLEEN JOYCE BOUDREAU

[19] The defendant testified that she had bought the property in question in October of 2009. She says that she was told at that time that the septic tank was smaller than normal and would need to be pumped every 1.5 to 2 years. She says that she did pump it out just before it was sold. She says that she pumped the tank just prior to closing as a courtesy. She says that she was not at the property much in March, as by March 25 she was completely moved out. She said she tried to make everything immaculate when she moved out.

[20] The defendant acknowledges that she was the author of the responses to the property disclosure statement and she was the one who wrote the note "smaller than normal septic pump more frequently."

[21] She says that she did not hide anything and that during her ownership, she had no smells, no bubbling and no problems. According to her, everything worked as it should. She says she lived there normally and used the sink, shower and toilet in the normal manner. She had nothing really to do with the maintenance of the septic system as that was all done by her husband. She says nothing of concern about the septic system was raised prior to closing or any other time. She says that by April 20 there was

no snow on the ground; the ground was possibly frozen but examinations could have taken place. She says she disclosed what she knew about the septic system and never refused any inspections. She testified that she did not, and did not intend, to mislead anyone.

SUBMISSIONS

[22] Mr. Fraser asserts that Mrs. Boudreau's obligation is a subjective one, in that she is only required to disclose what she knows to the best of her knowledge. He suggests the purchaser did not conduct investigations and did not seek an extension of time to perform investigations. On that basis, he argues that the principle of "buyer beware" applies and his client is not liable. He says his client was clearly disclosing that the system was smaller than usual. He says Mr. Owen was not diligent. He argues this was a patent defect which could have been found by diligent inspection on the part of the claimant. Since the system was not deep it could have easily been examined. Alternatively, if I were to consider this to be a latent defect, there is no evidence that the problem existed while his client owned property. He says that Mr. Thurston's evidence does not assist us as the sewage on the ground could reasonably have come from the contractor's work. He argues that the claimant is a businessman who should be quite familiar with deadlines, investigations and promises. He argues that whatever problem was with the septic system could have happened after closing.

[23] Mr. Mercer stresses that the claimant only saw the property briefly in March and on April 21 and had no real ability to examine the property until May 23 and 24th. He urges me to accept the principles adopted in Caren v. Hiscock where a well went dry, immediately after closing and an inference that the problem was pre-existing was made by the Adjudicator. There was no test of the well but the court held there was a misrepresentation based on the disclosure provided.

[24] Mr. Mercer stresses that Kyle Boudreau said he was a plumber and assured the claimant through Ms. MacDonald that there were no problems. He submits that this is highly misleading and results to a failure to disclose because it would give the potential buyer the clear impression that everything was in good working order.

[25] He argues that given the conditions on the ground, the septic system was not easily examinable and the problem was not easily discoverable therefore not making it patent defect. He also said suggests the fact that we are dealing with a buried tank and system that by its nature is not a patent defect. He also invites me to infer from the evidence that the septic system must have been defective as it would not have simply malfunctioned instantly.

[26] At the conclusion of counsel's arguments I posed the question to Mr. Fraser as to whether the claimant was bound in law by the representations, if any, made by Kyle Boudreau. Mr. Fraser acknowledged that as the defendant's agent, the defendant would indeed be bound by the representations of her agent.

LAW

[27] The parties have submitted to me various cases decided in this court:

Lewis v Hutchenson 2007 NSSM 4
Curran v Grant 2010 NSSM 29
Cran v. Hiscock 2012 NSSM 9
Young v. Clahane 2008 NSSM 16

[28] These cases rely on a number of cases in the Supreme Court and higher levels. I have reviewed the jurisprudence in the decisions of the high-level courts, particularly the key ones cited in the decisions provided by counsel. I will not cite them individually. I will however, state what I consider to be the essential principles which arise from the jurisprudence which I must apply to the subject matter of this case:

1. The basic proposition and starting place with respect to the sale of used residential real estate is the well-known principle of *caveat emptor*.
2. A property condition disclosure statement is not a warranty but does require a seller to truthfully disclose their knowledge of the state of the premises.
3. *Caveat emptor* is tempered by situations where negligent misrepresentation can be found to have induced a buyer to enter an agreement.
4. The applicable legal basis for a finding of liability with respect to a negligent misrepresentation is the fivefold test set out by Justice Iacobuchi of the Supreme Court of Canada in **Queen v. Cognos [1993] 1 SCR 87**
    - a duty of care based on the special relationship
    - the representation in question is untrue, inaccurate or misleading
    - the representor acted negligently in making the misrepresentation
    - the representee must have relied in a reasonable manner on the negligent misrepresentation
    - the reliance was detrimental in the sense that damages resulted

ANAYSIS

[29] I will say at the outset I believe that my task would have been easier if Mr. Trefry had testified. In saying this I am in no way critical of counsel. Counsel have the duty to present the cases of the ir clients in the manner they consider the best interest of the client. Counsel always have their reasons and I have no place in criticizing the choices they make. I am required to make a decision solely on the evidence the parties choose to provide. Having made that clear, it would have been helpful to know what Mr. Trefry found as he excavated the ground to undertake the repair.

[30] I also note that Mr. Kyle Boudreau did not testify. I wish to make it clear to the parties I must therefore as a matter of law accept Ms. MacDonald's evidence as to what statements Mr. Kyle Boudreau made. I am required by law to do this as I have found Ms. MacDonald to be a credible witness and it is the only evidence I have as to what Mr. Kyle Boudreau said.

[31] I agree with Mr. Fraser's submissions that Mrs. Boudreau is an honest and reliable person. I find that she did not intentionally misrepresent anything. I believe that she placed in the property disclosure statement information which was in fact to the best of her knowledge. I am deliberately not ruling on

the question of what she ought to have known for reasons that will become apparent. However that is not the end of the matter.

[32] I also find that Mr. Owen and Ms. Kenny did have the opportunity to perform such inspections as they chose. I find that on a purely contractual basis that they are deemed by clause 3 of schedule A to the agreement (Exhibit 1), by virtue of not communicating to the seller or seller's agent in writing, to have accepted pursuant to the contract, the acceptability of the septic system. However, I do not think that is the end of the matter either because there is one more aspect of misrepresentation that must be considered.

[33] As will be seen from the analysis that I will embark upon shortly, I have not found it necessary to examine the question of whether the defect was patent or latent, nor have I found it necessary to determine precisely when the septic system malfunctioned and make a decision with respect to the inference that the malfunction must have existed prior to the agreement and closing as Mr. Mercer urges me to make. I therefore make no finding on that point.

[34] What is problematic for the Defendant in this case are the representations made by Mr. Kyle Boudreau. I hold that he is the agent of the seller and the seller is bound by, and must accept the consequences of the representations made by him. Indeed Mr. Fraser quite fairly conceded this point. I find that Mr. Kyle Boudreau did represent that he had the knowledge to make an informed and intelligent assessment of the septic system by stating that he was a former plumber. I find that Mr. Kyle Boudreau did say that the septic system was functional and working properly. I find that Mr. Kyle Boudreau did state that the septic system was only pumped about three times during the ownership of the defendant. I am satisfied that any reasonable buyer would take from his representations that further consideration of the fitness of the septic system was not necessary and that was the reason that no further examinations were made by the Buyers.

[35] I must apply the **Queen v. Cognos** principles to Kyle Boudreau's representations:

1. a duty of care based on the special relationship
    - I find that the relationship between an agent representing the seller on the one part and a buyer or buyer's agent, on the other part to be a relationship of the nature which qualifies it as a special relationship for the purposes of the test.

2. the representation in question is untrue, inaccurate or misleading
    - I find that Kyle Boudreau's representations were at the very least, misleading, inaccurate on a balance of probabilities and probably untrue.

3. the representor acted negligently in making the misrepresentation
    - I find that Kyle Boudreau was negligent in making the representations because he either knew them to create a false impression in the mind of the potential buyer or he did not adequately consider his duty of care to ensure that what he was saying was not

misleading. Since I don't have his evidence I am unable to make an assessment of what he actually did or did not know. Suffice to say he either knew or ought to have known that his statements were likely to induce a buyer to waive the requirement of the test.

4. the representee must have relied in a reasonable manner on the negligent misrepresentation
    - I have no hesitation in finding that the claimant did in fact rely on Mr. Kyle Boudreau's representations. It was clear that Ms. MacDonald was asking him questions about the septic system for the purpose of ascertaining what, if any, testing may be required. I find that the claimant's reliance on Mr. Kyle Boudreau's representations was reasonable. The claimant would have known that Mr. Kyle Boudreau was a real estate agent who is bound by certain ethical obligations. In this case, the claimant would have also known that Mr. Kyle Boudreau was the son, or at least a relative of, the seller and would be in a special position to have actual knowledge about this particular property. Therefore, the claimant's reliance on this representation is entirely reasonable under the circumstances.

5. the reliance was detrimental in the sense that damages resulted
    - This is where the analysis is somewhat more difficult. Had the representation not been made, we cannot be 100% sure that the claimant would have proceeded to do a test or further examinations. However, I have concluded that he did waive his right to further examinations on the basis of this representation, thus depriving him of the rights that he might have otherwise exercised. It is clear that this did result in loss. I believe it is a reasonable inference from the evidence that if these assurances had not been given by Mr. Kyle Boudreau, Ms. MacDonald would have encouraged further investigations. It is always hard and somewhat danger fought territory to get into what would have happened but I have concluded on a balance of probabilities that at least some further investigation would have been made. Had that been done we would not be here because the parties would have had better knowledge of the true situation. That may have resulted in the transaction not proceeding or it may have resulted in a reduced purchase price or some other outcome. Nevertheless I think it can be fairly said the Claimant has lost something of an economic nature by relying on these representations. I therefore find that damages did result from relying on those representations.

[36] Then I come to the problem of what damages were suffered. I wish to make it clear to the parties that the fundamental principle of our law is that damages are to be compensatory. What this means is that damages are intended to fully compensate the injured party but no more. An injured party can only get what they lost. They cannot improve their position by litigation.

[37] The claimant had an older septic system with a small tank with the potential of the need to replace it at some point due to its age, size of the tank and proximity to the lake. They now have a new modern

septic system which fully complies with all applicable environmental standards and will have an operable life considerably longer than the older system.

[38] Adjudicator Sloan was faced with a similar problem in respect of a well in the case of **Cran v. Hiscock** cited above. In that case the adjudicator reduced the claimants claim by one third for betterment as a result of having a better well. As he points out, deductions of this nature for betterment do have an arbitrary character to them; however I consider that I would not be correct in law if I did not make an assessment of betterment and reduce the damages accordingly.

[39] This indeed is not an easy part of this decision. Again, it would have been helpful to have had Mr. Trefry's evidence. I expect he would have been able to tell me the condition of the older system, the nature of the new system and the expected life of each of the systems. This would have given me a much better basis to determine what was appropriate as betterment. I repeat that I am not critical of the parties or counsel in this regard, but I want the parties to understand that it reduces my ability to be precise. Nevertheless I am obligated to determine an allowance for betterment with what I have before me as best I can.

[40] Fairness is the touchstone of all decisions which must be made with some degre e of arbitrariness or discretion. The evidence does not give me much guidance so I regret I cannot give the parties as solid an analysis of an appropriate figure as I might have wished. There is an old maxim of equity, which says that in the absence of other principles, equality is equity. This also accords with my sense of what the relative values of the old and new septic systems are likely to be. I therefore award the claimant one half of the cost of the new septic system. The cost was $13,690.75. I award the sum of $6,845.38 to the claimant.

[41] I am aware that to some it may appear that I have simply "split the difference". I have reviewed my reasoning with that in mind but have concluded that the decision is, to the best of my ability, one based on principle and reasoning and the result just happens to come out that way.

[42] Mr. Mercer did not provide me with evidence of the cost of service. Since the parties have each had partial success I exercise my discretion and award one half of the filing fee in the amount of $99.68. The Claimant will have judgment on the total amount of $6,945.06.

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ANDREW S. NICKERSON Q.C.
Adjudicator