Claim No: 284859

Date:20071130

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Marier v. Lalonde, 2007 NSSM 95

BETWEEN:

Name Philippe Marier and Isabelle Forcier Claimants

Name Benoit Lalonde and Edith Lafleur Defendants

Revised Decision: The text of the original decision has been revised to remove addresses of the parties on March 26, 2008. This decision replaces the previously distributed decision.

DECISION

FACTS

(1) This proceeding was heard on October 9, 2007.

(2) The Claimants, Philippe Marier (Marier) and Isabelle Forcier (Forcier), claim the sum of $5,671.50 plus costs from the Defendants, Benoit Lalonde (Lalonde) and Edith Lafleur (Lafleur).

(3) The Claimants purchased a single family residential property from the Defendants known as 10 Hemlock Street, Dartmouth, Nova Scotia, (the property) in the month of September 2006.

(4) The parties entered into an Agreement of Purchase and Sale dated July 28, 2006. The Agreement of Purchase and Sale incorporated a Property Condition Disclosure Statement (PCDS) which provided in part as follows:

> "10. A. Are you aware of any limitation with the property such as: Restrictive or Protective Covenants, Easements and Rights-of-Way, Shared Wells, Driveway Agreements, Encroachments on or by adjoining properties. If yes give details: NO"

(5) The Defendants had purchased the property in December 2002. Shortly afterwards, the neighbor of the adjoining property, Steve MacLeod (Mr. MacLeod), complained to them about the slope of the property along the boundary. After some further discussion, the Defendants agreed that they would build a retaining wall to resolve any potential dispute. Accordingly, in the spring of 2003, the Defendants built a retaining wall using the survey markers to locate the boundary line. The retaining wall consists of Allen blocks and a Gabion fence.

(6) After this, the Defendants thought that the issue was resolved and the MacLeods did not complain to them about the retaining wall until the Defendants proceeded to place the property for sale approximately three and one-half years later.

(7) On August 31, 2006, Mr. MacLeod spoke to Lafleur's father and told him that he was going to stop the sale of the house. Lalonde called him, and he stated to Lalonde a number of things, including that the wall was encroaching on his property. He threatened to stop the sale of the house. Later that same day, he cut some of the wire along the Gabion fence.

(8) The next day, September 1, 2006, Lalonde spoke to Mr. MacLeod's wife, Joan MacLeod (Ms. MacLeod). She gave evidence in this proceeding.

(9) Ms. MacLeod confirmed that she was not aware of any actual encroachment of the wall, although it was bulging in one part. She was not aware that Mr. MacLeod had threatened to stop the sale of the house until Lalonde told her of this on September 1, 2006. She informed Lalonde on that date that Mr. MacLeod felt the wall was ugly and from time to time, some rocks would spill onto their property.

(10) Ms. MacLeod wanted to smooth things over, and it was discussed that Lalonde would dig up the wall at the point where the rocks were falling in and move the wall back slightly and fix the bulge. He proceeded to do this over the next couple of days.

(11) After this, both Mr. and Ms. MacLeod were satisfied and Lalonde felt that the issue had been resolved.

(12) There is no evidence that either Mr. or Ms. MacLeod or Lalonde were aware of any actual encroachment of the wall onto the MacLeods' property.

(13) After the closing, Marier and Forcier moved into the property and within a week, Mr. MacLeod informed them that he felt that the retaining wall was encroaching over onto his lot, and he asked them to correct it.

(14) Marier and Forcier were unsure whether there was an actual encroachment. They retained the services of a surveyor. According to the Survey Plan which was prepared on September 15, 2006, it was confirmed for the first time that there was a slight encroachment of the wall onto the adjoining property. The encroachment was along most of the wall and ranged from between two inches and nine inches.

(15) Upon learning of the encroachment, Marier and Forcier contacted their lawyer and there were further discussions. As the parties were unable to reach a resolution, the Claimants commenced this proceeding.

(16) I accept the survey evidence confirming the fact that there was a slight encroachment of the retaining wall onto the adjoining property.

(17) I find, however, that this information was not known to any of the parties prior to the closing of the purchase transaction.

(18) Although a copy of the Agreement of Purchase and Sale Agreement was not entered into evidence by either party, the Defendants do not dispute that the PCDS forms part of the Agreement of Purchase and Sale.

ISSUE

(19) The issue is whether the statements contained in paragraph 10.A. of the PCDS constitute a negligent misrepresentation which either induced the Claimants to enter into the Agreement of Purchase and Sale or were acted on to the prejudice of the Claimants leading to liability on the part of the Defendants.

THE LAW

(20) The legal principles relating to the purchase and sale of real property are succinctly stated by Warner J. in the case of Thompson v. Schofield:

> "16 Generally transactions involving the sale of real property are subject to the principle of caveat emptor with respect to the physical amenities and condition of the property. Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he or she finds it unless the purchaser protects himself or herself by contractual terms. This is set out in several important decisions, some of which were included in the defendant's memorandum, such as McGrath v. MacLean (1979), 22 O.R. (2d) 784 (Ont. C.A.) ,and Edwards v. Boulderwood Development Co. (1984), 64 N.S.R. (2d) 395 (N.S. C.A.). It is referred to in Nesbitt v. Redican (1923), [1924] S.C.R. 135 (S.C.C.).
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> 17 In Edwards , our Court of Appeal found that the defendant had made an innocent misrepresentation and was not liable to the seller with regards to the condition of a vacant lot of land and further found that the innocent misrepresentation had been made after the contract had been entered into and therefore could not have influenced the entering into of the agreement.
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> 18 A second legal question requiring clarification, for the purposes of this decision, is, what is a patent defect and what is a latent defect? A patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection. A latent defect, as it relates to this case, is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. For the purposes of the decision, it is not disputed that whatever the defect was that caused the flooding in the basement, that it was a latent defect, that is, a defect which was not apparent on an ordinary inspection of the property. The defendants claim that because it was latent, they also were not aware of it. My understanding of the defendant's memorandum is that they acknowledge that, because the basement was finished and because neither building inspector nor the plaintiffs had the right, before the closing, to take the basement apart, their ability to determine any defects in the property was limited to those defects which would be apparent without taking apart the walls or the floors or the panelling that covered the cement walls.

19 A third legal question requiring clarification is what constitutes negligent and fraudulent misrepresentation.

20 Fraudulent misrepresentation is dealt with, among other cases, by a decision of Saunders, J., as he then was, in Grant v. March (1995), 138 N.S.R. (2d) 385 (N.S. S.C.). At paragraph 20 of that decision he says:

> With respect to the first allegation, that is, that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in **Charpentier v. Slaunwhite** (1971), 3 N.S.R. (2d) 42. In that case, which involved problems with a well, Jones J. (as he then was) cited [at p. 45 N.S.R.] G.S. Cheshire and C.H.S. Fifoot, The Law of Contract, 6th ed. (London: Butterworths, 1964), at page 226:
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> > A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year.

And again on page 241, as follows:

> Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of the common law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind". Influenced by this consideration, the House of Lords has established in the leading case of **Derry v. Peak**, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in **Derry v. Peak**, saying that it meant a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge

> himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent representation is a false statement which, when made, the representor did not honestly believe to be true.

21 At paragraph 21, Justice Saunders quotes the (sic) The Law of Vendor and Purchaser, 3d ed. by V. DiCastri (Carswell,1988), as saying that to found a claim for false misrepresentation one must do the following:

> In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it.
>
> The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.

22 On the facts in Grant v. March , the trial judge was not satisfied that the defendants knew of the water problems that existed and he further found that any representations that they did make were not made before the contract was entered into.

23 Another relevant decision cited in the defendants' memorandum is Jung v. Ip, 1988 CarswellOnt 643 (Ont. Dist. Ct.) , where the Court, in finding liability against the vendor for failing to disclose a termite infestation, said at paragraph 18:

> It is now clear that the law of Ontario is such that the vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive. In the case before this Court, there was nothing innocent about the withholding of

> the information. It was done intentionally. This was not an innocent misrepresentation.

24 In finding liability against the vendor for failing to disclose a sediment problem with the well and sewer system in a property disclosure statement, the Court in Ward v. Smith, 2001 CarswellBC 2542 (B.C. S.C.) discussed the application of the principles of negligent misrepresentation at paragraphs 33 to 39; quoting from paragraphs 33 to 35 of that decision (not as an authoritative decision but simply as one of the many that set out in summary nature what a negligent misrepresentation is), Gotlib D.C.J. said:

> . . . The requirements to establish a claim in negligent misrepresentation were summarized by Mr. Justice Iacobucci in **Queen v. Cognos Inc.**, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.), at 643:
>
> > (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
> >
> > (2) the representation in question must be untrue, inaccurate, or misleading;
> >
> > (3) the representor must have acted negligently in making said misrepresentations;
> >
> > (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
> >
> > (5) the reliance must have been detrimental to the representee in the sense that damages resulted.
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> In their pleadings, the plaintiffs used the expression "reckless misrepresentation" which was understood, during the course of argument, to be negligent misrepresentation. I am satisfied that, in fact, the defendants did negligently misrepresent the quality of the available water by stating that they were not aware of any problems with the quality of the water. . . .
>
> The defendants owed a duty of care to the plaintiffs to not negligently misrepresent either the quality or quantity of the water supply.

The Court went on to make a determination that the defendants negligently misrepresented the state of the water. He was satisfied that they knew the nature of the problem with the well, even though they may not have known the extent of the problem.

25 The Court's analysis in Swayze v. Robertson, 2001 CarswellOnt 818 (Ont. S.C.J.) , a case involving a flooding problem caused by a defect in the foundation, is similar.

26 The plaintiffs rely upon the decision of Wright J. in Desmond v. McKinlay (2000), 188 N.S.R. (2d) 211 (N.S. S.C.); which decision was upheld by our Court of Appeal at (2001), 193 N.S.R. (2d) 1 (N.S. C.A.). In Desmond v. McKinlay , Mr. Justice Wright, like the Court in Jung v. Ip found that silence could constitute a negligent misrepresentation. At paragraph 43, he says:

> In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment so as to create an actionable misrepresentation at law.

27 If this court finds that the answers given in the disclosure statement, which was incorporated in the agreement, were either negligent or fraudulent misrepresentations, there is no doubt that (a) they were material, (b) they were made at the time of the entry into the contract or the agreement of sale and were relied upon, and (c) based on the law as set out in Desmond v. McKinlay at paragraphs 48 to 51, they would constitute, in addition to negligent misrepresentations, a breach of a collateral warranty and thereby constitute a breach of the agreement of sale.

37 Although all three witnesses were reluctant, subpoenaed witnesses, they gave their evidence in a straightforward and impartial manner. While it is dangerous to assess the credibility of each witness in isolation, they had no affiliation with any of the parties and where

their evidence differed with that of Mr. Schofield, this Court preferred their evidence. O'Halloran J.A. of the British Columbia Court of Appeal in Faryna v. Chorny (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) described the proper approach that a trial judge should take to determine credibility. This approach has been approved by many courts. At page 356 he says:

> If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of the witness. . . .
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. . . .
>
> . . .The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses and a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all of the elements by which it can be tested in the particular case."

ANALYSIS

(21) The issue in this particular case is whether the PCDS contains a misrepresentation of the facts or a deliberate concealment of latent defects which induced the Claimants to purchase the property or upon which they relied to their detriment thereby entitling them to damages.

(22) When interpreting the statements in the PCDS, it is necessary to examine the state of knowledge of the vendors. The relevant portion of the statement in the PCDS can be summarized as follows:

> "Are you aware of any... Encroachments on or by adjoining properties."

(23) The question must be answered "Yes" or "No". Answering "Do not know" is not an option according to the form provided as this area is blacked out.

(24) The PCDS contains a provision above the signature line as follows:

> "I further agree to provide prospective buyer(s) with a further disclosure of any changes in the condition of the property that have occurred since completion of this statement."

(25) This places a further obligation upon the vendors to disclose changes in the condition of the property occurring subsequent to the completion of the PCDS.

(26) I find that the vendors in this case had no actual knowledge of an encroachment. Even considering the discussions between Mr. MacLeod and Lalonde which occurred on September 1, 2006, there was no new information provided to Lalonde at that point by Mr. MacLeod which would have caused him to believe that there was or might be an encroachment. According to the evidence, Mr. MacLeod was acting in a bizarre fashion and made a number of statements and allegations on that date. I construe from the evidence, particularly the evidence of Lalonde and Ms. MacLeod, that Mr. MacLeod found the wall ugly and from this evidence and the actions of Mr. MacLeod on that day, including the cutting of the wires, I conclude that his efforts were directed at trying to get a new wall built. His actions subsequent to the closing tend to confirm his intentions.

(27) The wall was constructed by Lalonde under the supervision of Mr. MacLeod, and I find based on the evidence that all parties believed at that time that the wall was constructed within the boundary lines.

(28) I also accept Lalonde's evidence that as a result of the efforts which he made to fix the problem a few days prior to the closing, both he and the MacLeods were satisfied that there was no encroachment of the wall upon the adjoining property based on the information which they had before them at the time.

(29) In order to ascertain the state of the knowledge of the vendors at the time that they signed the PCDS, I must also consider whether the statement concerning the lack of knowledge of an actual encroachment was made recklessly or carelessly and, also, it must be taken into consideration as pointed out by Justice Wright in Desmond v. McKinlay (supra) that silence can in fact constitute negligent misrepresentation.

(30) I accept Lalonde's evidence that as far as he knew on September 1, 2007, the problem had been resolved, and it was accepted by all concerned that there was in fact no encroachment.

(31) I have considered that the Defendant admitted in cross-examination that it was possible that the wall, when constructed, was over the boundary line but simply recognizing this possibility does not place the vendor, in my view, with a knowledge or awareness of an actual encroachment.

(32) The onus is on the purchaser of a property to obtain a current Surveyor's Location Certificate or, where appropriate, a current boundary survey when purchasing a home or to arrange title insurance. Vendors are not, in my view, obligated to advise purchasers that there could possibly be an encroachment. The word "aware" in the PCDS encompasses a state of mind which includes actual knowledge or knowledge that could reasonably be imputed to the person making the statement. All of the circumstances must be considered.

(33) As it turned out in this case, the actual encroachment was in fact a very minor one as far as the distance from the adjoining lot as it varied between two inches and nine inches from the property line.

SUMMARY

(34) Based on the above findings, I conclude that the Claimants have not proven that the Defendants are liable to them.

(35) When considering the factors set out in the case of The Queen v. Cognos Inc. (supra), while there is a duty of care based upon a special relationship between a buyer and seller of real property and while there actually was an encroachment, I am unable to conclude that the vendor, when stating that there was no encroachment, acted negligently or recklessly.

(36) The law of negligent misrepresentation is an exception to the *caveat emptor* principle. The *caveat emptor* principle must always be considered first and foremost. A reasonable inspection in this case would certainly have disclosed to the buyers the location of the survey stakes along the side of the property and it could have easily been ascertained by them that the wall was close to the boundary line thus alerting the buyers to a potential problem. In this case, they chose to rely upon old survey evidence and did not have their own Survey Certificate prepared. I have also concluded, as outlined above, that based upon all of the evidence, that the Defendants in this case have not made a negligent or reckless misrepresentation as that term is interpreted in the applicable case law.

(37) For all of these reasons, the claim is dismissed.

DAMAGES

(38) The Claimants state that they were unable to locate a contractor to build a Gabion wall. They claim for the cost of a dry stack blue stone wall. They provided various quotes for this type of wall and have chosen the lowest quote.

(39) The Defendants state that a Gabion wall is, by nature, a wall which is a "do-it-yourself" option. It is a very low cost option. I accept their evidence that the cost of replacing a Gabion wall in this case would be $1,168.00 plus two days labour.

(40) I do accept as well, however, based upon the survey evidence that there is also some encroachment along the area where the Allen blocks were laid, however, there was no actual estimate of the cost of moving or replacing the Allen blocks that form the actual encroachment, although it is recognized that there would be some additional cost.

(41) If the Defendants were liable to the Claimants in this case, I would fix the total damages at $2,500.00 plus costs.

COSTS

(42) The Claimants' proven costs are $427.50 for the costs of the survey and $170.88 for the filing fees, for a total of $598.38.

(43) I find that the costs are reasonable and that the survey work that was done was both necessary and reasonable.

(44) However, since the claim is dismissed, I will not award any costs to the Claimants.

Dated at Dartmouth, Nova Scotia,
on November 30, 2007.

Patrick L. Casey, Q.C., Adjudicator

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