

Claim No: 306647

Date:20090828

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: *Crawley v. Kearney*, 2009 NSSM 43

**BETWEEN:**

Name Crystal Lee Crawley Claimant

Name Terry and Linda Kearney Defendants

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

**BACKGROUND**

- (1) This is a claim by Crystal Lee Crawley against Terry and Linda Kearney for the sum of \$20,000.00 plus interest and costs.
- (2) Ms. Crawley purchased a home at 20 Millside Drive, Porters Lake, Nova Scotia, in August 2003 from Mr. and Mrs. Kearney.
- (3) Subsequently, she discovered that there were some serious issues with the condition of the home, including rot within the exterior walls extending along the master bedroom, kitchen, and other areas of the house.
- (4) Ms. Crawley claims that the Kearneys provided a Property Condition Disclosure Statement which contained false statements and that she relied upon those statements when agreeing to purchase the home.
- (5) She now seeks damages from the Defendants to cover the cost of repairs.
- (6) The Defendants, Mr. and Mrs. Kearney, take the position that all statements made in the Property Condition Disclosure Statement were truthful to the best of their knowledge and belief at the time that the statements were made.
- (7) They deny having made any false or misleading statements.
- (8) They ask that Ms. Crawley's claim be dismissed.

### **MOTION FOR NON-SUIT**

- (9) At the end of the Claimant's case, the Defendants made a motion for non-suit.
- (10) After receiving written submissions from the Claimant (the Defendants chose not to provide written submissions) and hearing the oral submissions of both parties, the motion for non-suit was dismissed by a decision given on July 8, 2009.

### **LEGAL BASIS FOR CLAIM**

- (11) I conclude from the pleadings, in particular the Notice of Claim Form, that the claim is framed in essence in fraudulent and/or negligent misrepresentation.
- (12) Justice Saunders (as he then was) in Grant v. March (1995) 138 N.S.R. (2d) 385 stated as follows with respect to fraudulent misrepresentation:

*"20 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. Slauenwhite (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:*

*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. Peek 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*

*Herschell, indeed, gave a more elaborate definition of fraud in Derry v. Peek, saying that it means 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 misrepresentation is a false statement which, when made, the representor did not honestly believe to be true.*

21 I also refer to V. Di Castri's *The Law of Vendor and Purchaser*, 3d ed. (looseleaf) (Toronto: Carswell, 1988), as accurately describing the basis of any claim for fraudulent misrepresentation:

*In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the representations 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. (At pp. 7-2 and 7-3.)*

22 *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.*"

- (13) The test for negligent misrepresentation is contained in the case of Queen v. Cognos Inc. (1993) 1 S.C.R. 87 wherein the Court provided as follows:
- (a) There must be a duty of care based on a "special relationship" between the representor and representee.
  - (b) The representation must be untrue, inaccurate, and misleading.
  - (c) The representor must have acted negligently in making the representation.
  - (d) The representee must have relied in a reasonable manner on said negligent misrepresentation.
  - (e) The reliance must have been detrimental to the representee in the sense that damages resulted.

- (14) I also refer to the case of Lewis v. Hutchinson, 2007 CarswellNS 35, a decision of Adjudicator Parker of the Nova Scotia Small Claims Court and, in particular, the various phases of analysis as outlined therein applicable to the issue of misrepresentations made in respect to the purchase of the home.
- (15) The burden of proof is on the Plaintiff on the civil balance of probabilities.

## **ANALYSIS**

### **Property Condition Disclosure Statement**

- (16) The Claimant's position is that the Defendant either fraudulently or negligently made misstatements of facts in the Property Condition Disclosure Statement, in particular, the following questions or answers:

**“5. HEATING SYSTEM**

- A. *Have there been any problems with heating system? - NO*
- B. *Have any repairs or upgradings been carried out to the heating system in the last five years (or since you owned the property if less than five years)? - NO*

**6. STRUCTURAL**

- B. *Are you aware of any structural problems, unrepaired damages, leakage or dampness with the roof or walls? - NO*
- C. *Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the property if less than five years)? - NO*
- D. *Is there insulation in the exterior walls? (Type: Pink) - YES*

**10. GENERAL**

- C. *Are you aware of any damage due to wind, fire, water, wood rot, pests, rodents or insects? If yes, give details - NO”*

- (17) I will deal with each of these allegations separately.

## **Section 5**

- (18) The Claimant alleges that the Defendants misstated the nature of the heating system since, although there is a forced air oil heating system, there is an electric baseboard heater in the master bedroom.
- (19) According to the Defendants, the baseboard heating in the master bedroom is used primarily as a back up. I accept the evidence of the Defendants that they did not feel the need to use the heater during their occupancy of the home. I accept their evidence, as well, that the heater was there at the time that they commenced occupation of the home and was not a repair or upgrading carried out to the heating system in the five years prior to the sale.
- (20) The Claimant alleges that the vents for the forced air oil heating system are not in use, however, this has not been proven on a balance of probabilities through her evidence or the evidence of the witnesses.
- (21) There is no evidence that any repairs or upgrades were carried out to the heating system in the last five years.
- (22) The electric baseboard heater in the master bedroom would have been apparent upon a reasonable inspection having been performed by the Claimant.
- (23) The mere existence of the electric baseboard heater in the master bedroom is not a sufficient basis from which it can be concluded that there have been any problems with the heating system.
- (24) There was no misrepresentation of the total cost to heat the home as alleged by the Claimant as I conclude from the evidence on a balance of probabilities that the amounts provided for total electricity usage included the cost of the electric space heater in the master bedroom.
- (25) I conclude, therefore, that there is no basis on a balance of probabilities for the Claimant's allegations in regards to the heating system.

**Section 6B.**

- (26) The Claimant alleges that there was an area of the ceiling in the master bedroom which had previously been patched. In her written statement submitted to the Court, she states "The leak in the roof was evident above the window in the master bedroom, in photos taken on October 3, 2003 - the date we moved in..."
- (27) I conclude from the evidence and from the Claimant's own statement that the area of the ceiling in the master bedroom where previous repairs had been undertaken would have been evident upon a reasonable inspection. The principal of caveat emptor applies. There is no evidence that the Claimant, either through the home inspection process or during the

inspections of the home prior to entering into the Agreement of Purchase and Sale or the pre-closing inspection by the Claimant or her real estate agent, pursued this evidence further to determine whether in fact there had been actual leakage issues in the past.

- (28) The Defendants deny that there were any issues of leakage while they resided in the home. The home was Mr. Kearney's family home as a boy, however, he moved out when he was a teenager and lived in various other places, only returning to Nova Scotia and his former family home when his mother was ill in the year 1986. He and Ms. Kearney resided in the home for over 20 years after his mother passed away.
- (29) In submissions on behalf of the Claimant, it was put forward that the Defendants must have known of water problems in the house due to the extent of the damages and the existence of a sump pump in the crawl space under the house. I find, however, that neither the extent of the damage in the house nor the existence of the sump pump are sufficient factors from which one could reasonably conclude that there was obvious leakage of water in the property through the area in the master bedroom or any other area in the home prior to the sale.
- (30) The wall in the closet in the master bedroom adjacent to the outside wall of the home was covered with a sheet of plywood (masonite) loosely secured by a screw and essentially held up by the clothes pole in the closet. The Claimant asked the Court to attribute knowledge to the Defendants of the fact that the masonite was covering up the rotten wood in the exterior wall, as behind the masonite there was no insulation or vapor barrier.
- (31) The Defendants state that they used the clothes closet, however, made no particular notice of the masonite and, in any event, they were not aware of any damaged area behind the masonite and the repairs to the closet must have been done sometime long before they began to occupy the property.
- (32) Although the Defendant had sided the entire exterior of the house and reshingled the roof, no problems with the exterior wall were noted at that time, and this is primarily due to the fact that Mr. Kearney, in order to save costs, used a method whereby the siding was nailed over the existing material.
- (33) The Claimant herself stated that there was no evidence of mould on the ceiling until at least several months after the closing date and the water damage to the carpeting in the closet of the master bedroom did not take place until approximately one year after the closing date.
- (34) I conclude from the totality of the evidence on a balance of probabilities that the Defendants had no prior knowledge of any issues with respect to the rotten wood behind the masonite and accept their evidence that they paid no particular attention to the wall in the closet and noticed nothing unusual when it was being painted prior to the sale. There is no evidence from which it can be concluded that they were trying to hide or cover up any problems as

suggested by the Claimant. I am not able to draw this inference from the fact that the shelves in the wall closet and the kitchen cupboard were painted with a darker shade of paint, and I accept the Defendants' evidence that they simply used a combination of different paints which they had left over.

- (35) I conclude, therefore, that when the Defendants answered "NO" to whether they were aware of any structural problems, unrepaired damage, leakage or dampness within the roof or walls, the question was answered truthfully to be best of their knowledge at the time and not negligently.

**Section 6C.**

- (36) I find based on the evidence that there were in fact no repairs carried out by the Defendants to correct leakage or dampness problems in the last five years. I do not accept the Claimant's contention that since there was an odor of fresh paint, the Court should draw an inference from this that repairs were being covered up nor am I prepared to draw the inference suggested by the Claimant that there were recent repairs to the ceiling area in the master bedroom. It is not unusual that people who are trying to sell their house will apply a coat of fresh paint, and there is insufficient evidence which would allow the Court to draw the inferences being suggested by the Claimant in this case.

**Section 6D.**

- (37) The Defendants answered that there was insulation in the exterior walls and wrote in the word "Pink".
- (38) There are three categories of answers, "YES", "NO", and "DO NOT KNOW", and the Defendants chose to answer the question YES.
- (39) I find, however, that there was no pink insulation in the master bedroom, and I accept the evidence of the Claimant and her witnesses in this regard. The kitchen was insulated with seaweed.
- (40) The area of the master bedroom was the original part of the house and the rest of the house was built around this years ago by Mr. Kearney's father. It would appear that although pink insulation was installed in the newer areas, that insulation in the older areas was never upgraded.
- (41) The Defendants state that they based their answers on their knowledge. Their evidence is that they made very few changes to the home during their years of occupation, aside from attaching new siding to the home, reshingling the roof, and renovating the bathroom on the upper floor. It was during this latter renovation that Mr. Kearney noticed pink insulation in

the walls and attic. There was also pink insulation visible in the basement area. The Defendants assumed from this that all of the areas in the home contained pink insulation. This was an assumption on their part based on their limited knowledge.

- (42) I conclude that the Defendants were negligent in responding to the question in this fashion. By responding “YES”, they represented to the buyers that the home was insulated throughout with pink insulation when in fact this was not the case. This was an assumption on the part of the Defendants. It would have been more prudent for them to check off “DO NOT KNOW” on the Property Condition Disclosure Statement.
- (43) I conclude that the actions of the Defendants were negligent.

### **Section 10**

- (44) The Claimant alleges that the access to the attic was covered up by the Defendants which required a large rectangle to be cut out in the ceiling to inspect for insulation, at which time, a large bag of rat poison was found above the living room ceiling.
- (45) The Defendants state that there was attic access from the exterior of the home. I accept the evidence of the Defendants in this regard.
- (46) Once again, the Claimant is making assumptions of the knowledge of the Defendants. There is no other evidence to support the Claimant’s assumptions. While rat poison was found, there is no evidence of any damage to the home due to rodents.
- (47) There is no basis for liability under this section.

### **SUMMARY**

- (48) The mould problems began to surface primarily in the early part of 2004 after Ms. Crawley had settled into the home. The carpeting in the closet became completely soaked and there arose recurring mould issues in parts of the home, including the kitchen cupboards. She and her family members have been subjected to extreme inconvenience and cost to remedy the problem.
- (49) It is not difficult to conclude that the problems with the home originated long before it was purchased by the Claimant.
- (50) There was no evidence, however, of mould issues until several months after the Claimant had moved into the home.



- (51) The full extent of the problem was not discovered by the Claimant until a full year after moving in.
- (52) The Claimant has been unable to offer any reliable evidence to support her position that the Defendants knew or ought to have known about the problems. I am unable to place a great deal of reliance on the evidence of the expert witness as he formed his opinions only from photographs and listening to some of the evidence. He did not actually examine the home or the rotten wood.
- (53) With the exception of the insulation issue, therefore, there is insufficient evidence to prove that the Defendants made false or negligent misrepresentations. The law is buyer beware. Except for the insulation issue, no legal basis has been established whereby the Claimant can claim damages against the Defendant.

### **DAMAGES**

- (54) The Claimant obtained a quote from New Age Construction which contained an estimate of the cost of re-insulating and installing vapor barrier for the outside wall and part of the ceiling of \$315.10, including HST.
- (55) There is also an estimate from K.B. Clarke Restoration which sets out the cost of the insulation for the various rooms, including \$285.00 for the insulation and \$222.65 for vapor barrier for the kitchen and \$291.57 for the insulation and \$150.41 for the vapor barrier for the bedroom.
- (56) There is a further estimate from Pro Experts Group, but it provides a global estimate and not a breakdown of the individual components.
- (57) Trim and Arrow Construction and Restoration quoted \$500.00 for the insulation in the kitchen on the price breakdown and payment schedule document, however, their original quote did not provide any further breakdown of the cost of the insulation and vapor barrier.
- (58) I find the sum of \$1,000.00 to be reasonable to cover the cost of replacing the insulation and vapor barrier in the rooms in the home in places where there is no pink insulation.
- (59) The Defendants shall pay the sum of \$1,000.00 to the Claimant.

### **COSTS**

- (60) As success is divided, each party shall bear their own legal costs.

Dated at Dartmouth, Nova Scotia,  
on August 28, 2009.

---

Patrick L. Casey, Q.C., Adjudicator

