IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Roman v. Bryant, 2009 NSSM 39

2009 Claim No. 309777
Date:20091005

BETWEEN:

Jason and Vanessa Roman	**Claimants**
- and -	
Sandra Bryant and Bryant Realty Atlantic	**Defendants**

2009 Claim No. 311527

BETWEEN:

Sandra Bryant and Bryant Realty Atlantic	**Claimants**
- and -	
Allison Savoury and Realty Connect Limited	**Defendants**

Appearances:
Jason & Vanessa Roman - Self Represented
Sandra Bryant & Bryant Realty - Richard Bureau
Allison Savour & Realty Connect Limited - Debbie Brown

DECISION

[1] These two proceedings were heard together under Section 25 of the Nova Scotia *Small Claims Court Act*, over three nights, June 8, 9, and 29, 2009. As well, post-hearing submissions were filed by the Claimants (Romans) on July 8, the Defendants (Bryant and Bryant Realty) on July 29, the Defendants in 311527 (Allison Savoury and Realty Connect) on August 4th, and a rebuttal brief was filed by the Claimants (Roman), on August 17th.

[2] In SCC No. 309777, the Claimants Jason and Vanessa Roman claim against Sandra Bryant and Bryant Realty Atlantic in respect of a listing prepared and issued by Bryant Realty which indicated the property at 788/790 McLean Street, Halifax, had a total living area of 2951 square feet. The actual total living area was 2,486 square feet and the Romans state that this constituted a misrepresentation by the Defendants and as a result of that they suffered significant damages.

[3] In SCC No. 311527, Sandra Bryant and Bryant Realty claim against Allison Savoury and Realty Connect, who were the agents for the Romans in respect of the purchase of 788/790 McLean Street. It is alleged that these Defendants had a duty to insert a condition regarding confirmation of the total square footage of the building in the Agreement of Purchase and Sale, and that there was otherwise breaches of duty by Savoury and Realty Connect. In effect, SCC No. 311527 is a third party claim.

Facts

[4] I adopt the following from the July 29th submission of Mr. Bureau as an accurate statement of the basic facts:

> *In September of 2008, the Claimants Jason and Vanessa Roman ("the Romans") viewed the property at 788/790 McLean Street ("the property") with their agent Allison Savoury. The property was listed on the Multiple Listing Service (MLS) by the Defendants, real estate agent Sandra Bryant and her brokerage Bryant Realty Atlantic, for the vendor Ms. Hilda Jackson. The property was initially listed for $469,000.00 and at the time of purchase was listed for sale for $429,000.00. On September 11, 2008, the Romans submitted an offer to purchase the property for $415,000.00 to Sandra Bryant and this offer was accepted by the vendor, with a closing date of October 1, 2008.*
>
> *The house located on the property is a 3 level dual address home and includes a finished basement apartment. The house has an "R2" zoning to allow for the separate address and basement apartment. The main level consists of a kitchen, dining room, living room, laundry room, powder room and one bedroom. The top level has four bedrooms and a large bathroom. The basement apartment has two bedrooms, a kitchen, a living room and a bathroom.*

The Claimants purchased the property as a investment property and upon acquiring it performed renovations costing approximately $85,000.00. These costs included but were not limited to labour such as painting and building-waste removal and materials such as new windows, wiring, and siding. The Claimants re-listed the property for sale after completing these renovations. At that time, the Claimants' agent Allison Savoury measured the property and discovered that the house, which had been listed by Sandra Bryant to have a total living area (TLA) of 2951 square feet, actually had a TLA of 2486 square feet.

The discrepancy in the TLA between the listing sheets prepared by the Defendants and the actual TLA of the house as measured by Allison Savoury and listed by the Claimants on the MLS in re-selling the property is 465 square feet. All measurements of the house were taken by Ethan Michaels, an agent and employee of the Bryant Realty Atlantic, prior to the sale of the house to the Claimants. There was an error in arithmetic on the part of Allison Godsoe, an employee at the offices of Bryant Realty Atlantic, when preparing and inputting the listing information for electronic submission. Further, the vendor had a relative who was living in the basement apartment of the house on the property and this person was in the state of moving out when Ethan Michaels was asked to take the measurements of the property by Sandra Bryant. As a result, Ethan Michaels was never able to enter the basement apartment and take measurements. All version of the listing sheet included the remark "Basement apartment approx 500 square feet."

Square footage of the house was never mentioned by the Claimants to Allison Savoury or to the Defendants prior to the complaint in December 2008 after the renovations were complete and the house was to be listed by the Claimants for sale. There were no discussions at all about the TLA, MLA or dimensions of the property prior to the Agreement of Purchase and Sale of September 11, 2008.

Analysis

[5] All parties agree that the legal principle applicable in this case is negligent misrepresentation. The Romans had no contractual relationship with Sandra Bryant and/or Bryant Realty Atlantic (which I will refer to hereinafter individually and collectively as "Bryant"). The only potential claim the Romans against Bryant would be in tort and, as I have said, the parties are agreed that it would be in negligent misrepresentation.

[6] The leading Canadian case in negligent misrepresentation is the case of ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 37. The Court states at p. 110:

> *The required elements for a successful Hedley Burne claim have been stated in many authorities, sometimes in varying forms. The decisions of this court cited above suggested five general requirements: (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 misrepresentation; (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.*

[7] I will deal with each of those five in turn.

[8] ***(1) "There must be a duty of care based on a 'special relationship' between the representor and the representee"***.

There is little question that a real estate agent does have a duty of care towards a third party potential purchaser.

[9] In ***Risley v. Moren et al***, [1989] N.S.J. No. 410, Kelly, J. states at p. 22, "*It now appears clear that there is a duty of care owed by a real estate broker to a third party potential purchaser*". It would appear that there is other case law as well in this and other jurisdictions holding that such a duty of care does exist in Canadian law.

[10] I note that in the case relied on by the Claimants, ***Walls v Ross,*** 2001 B.C.P.C. 187 (CanLII), Associate Chief Judge Stansfield stated as follows:

> *[60]* ***No doubt it will be unusual for a listing agent who has had no dealings with a purchaser ultimately to be liable to the purchaser, because typically there will have been intervening acts of others, and there will have been opportunity for the purchaser to discharge their responsibility to inspect for themselves. But the potential for such intervening events or circumstances in***

> ***particular cases does not relieve listing realtors from a threshold duty to take care their actions do not harm potential purchasers of the properties they list****.*
>
> *[61] Having said that, it is apparent that the duty of a listing realtor who has no direct contact* ***with purchasers is different and less than that of a selling realtor****. So in Flandro v Mitha and others, unreported, June 5, 1992, Vancouver No. C892488, Mr. Justice Holmes said that:*
>
> > *"the listing realtor's obligation, where there was little or no direct contact with the purchaser, is less than that of the selling realtor"*
>
> *and in Pellatt v Collis, unreported, November 16, 1984, Penticton No. 343/P/81, Mr. Justice Locke found that a listing realtor escaped liability because of lack of a "nexus" even though His Lordship thought that certain aspects of the listing:*
>
> > *"amounted to commercial dishonesty and helped set the stage for the ultimate (mistaken) belief of the plaintiffs".*
>
> *[62] Having considered all the foregoing, I am satisfied the Listing Realtor owed a duty of care, the standard of which remains to be considered, to that class of persons who reasonably may have been expected to read the Listing Realtor's advertised information about the Property, most especially in the "feature sheet".* [Emphasis Supplied]

[11] I will return these concepts in subsequent discussion.

[12] ***(2) "The representation in question must be untrue, inaccurate, or misleading***".

There is no question that the statement as to the total square footage in the listing cut was inaccurate. This is acknowledged by Bryant.

[13] ***(3) "The representor must have acted negligently in making said misrepresentation"***.

The Claimants asserts that a listing realtor is responsible to ensure accuracy of the information in the listing cut and by failing to do so, acted negligently. The Defendant Bryant however denies negligence. The Defendant Bryant states that the bylaws referred to by the Claimant, while instructive, do not determine the threshold that must be met in the law of negligent misrepresentation which is the "*standard of a reasonable real estate agent possessed of the skill and knowledge appropriate to their profession*".

[14] While I accept the description of the standard, in this case I believe that the misstatement that has been made does not meet the standard and , therefore, was made negligently in law.

[15] The evidence indicated that there was nothing inaccurate about the measurements performed by Mr. Ethan Michaels. The error however appears to have primarily related to the arithmetic calculations done in the office by one of the employees of Bryant Realty Atlantic. I certainly recognize that everyone makes mistakes from time to time and that this was simply an innocent arithmetic mistake; however, that does not mean that in law there is no negligence. I would suggest that the law is replete with instances of defendants whose attention in any number of endeavors, was briefly diverted and a "simple mistake" occurred. To so characterize it does not change its legal status as negligent.

[16] One would expect that if the numbers are considered important enough to be placed on the listing sheet that the real estate agent would apply an appropriate degree of rigor in the calculation of those figures. I recognize that sometimes the raw data relied on by the real estate agent is at varying quality. This seems to be reflected in some of the case law referred to by Mr. Bureau. Here the case did not involve any issues with the raw data but, as already stated, was a mere arithmetic error in the office. While it perhaps goes beyond

my proper role here, I would observe that in some areas, there is a double check on arithmetic calculations and another person "signs off". Sometimes in business applications, calculating machine tape is stapled to the raw data to confirm the correctness of the aggregation. These are mere observations to illustrate the point I make.

[17] I conclude that the inaccurate statement of the total living area was made negligently by the Defendant Bryant.

[18] ***(4) "The representee must have relied, in a reasonable manner, on said negligent misrepresenation***".

It seems to me that this item is actually two items: was there reliance; and, was the reliance reasonable.

[19] The evidence of Vanessa Roman was that in late July 2008 she and her husband contacted Allison Savoury indicating that they wished to purchase a property in the south end of Halifax for under $500,000.00 which needed renovations. Those were the three criteria communicated to Ms. Savoury. A number of properties were identified by Ms. Savoury and apparently after some review the Romans narrowed it down to a short list of four: 788 McLean Street, 554 Tower Road, 5900 Pinehill Drive, and 589 Tower Road. Ms. Roman indicated that they looked at all four and all four required some renovation. She said that they preferred the Pinehill Drive property.

[20] She indicated that the total living area indicated for the McLean Street property was 2951. By early September the 554 Tower Road property had been sold. She indicated that they were focused on the McLean Street and Pinehill Drive properties. She stated that her and her husband did a price per square foot calculation.

[21] Ms. Romans submitted as Exhibit C2 calculations showing the price per square foot for the four properties that were on their short list. The calculations were as follows:

Address	Asking Price	Total Living Area (TLA)	Price Per Square Foot	Difference in Value
790 McLean	$429,000	2951 sq. feet	$145.37	
554 Tower Road	$339,000	1850 sq. feet	$183.73	$38.36 More
5900 Pinehill Dr	$399,000	2063 sq. feet	$193.41	$48.04 More
589 Tower Road	$359,900	1413 sq. feet	$254.71	$109.34 More

[22] Also, in the same exhibit are the figures **if** the square footage had been accurately represented:

Address	Asking Price	Total Living Area (TLA)	Price Per Square Foot	Difference in Value
790 McLean	$429,000	2486 sq. feet	$172.56	
554 Tower Road	$339,000	1850 sq. feet	$183.73	$11.17 More
5900 Pinehill Dr	$399,000	2063 sq. feet	$193.41	$20.85 More
589 Tower Road	$359,900	1413 sq. feet	$254.71	$82.15 More

[23] Ms. Romans states that if the correct TLA had been represented they would not have purchased 790 McLean Street.

[24] In Exhibit C2 the Romans state:

- *Had we been given the accurate square footage information, there would not have been a clear winner. Other factors such as curb appeal,*

renovation work required and actual purchase price would have had significant more weight.

- *Given this, we would have then offered on the Pinehill Drive property which had far superior curb appeal, required less renovations work, was on a slightly better street and was asking a lower price.*

[25] I have some difficulty accepting these statements. Such statements are not evidence in the traditional sense which normally involves something that has happened as an historical fact. Here, the statement, while made under oath, is a statement as to what somebody ***would*** have done had the situation been difference. It seems to me that in a case such as this, I am not to blithely accept that evidence, but am required to examine and test it in light of the other circumstances.

[26] These include that the Tower Road property had then been sold, so that one was in effect off the table. The evidence of Ms. Roman is they would have not purchased the McLean Street property yet in Exhibit C2 they state that "*had we been given the accurate square footage information, **there would not have been a clear winner***", and goes on to state that other factors would have had more weight. I do note that the Pinehill Drive property would still have been $20.85 more at the correct square footage as from McLean Street. It is unclear to how the Romans would have "weighted" the other factors such as curb appeal, renovation work, and actual purchase price had the TLA been accurate in the first place.

[27] I am struck with the statement that there would have been "no clear winner". On the information which they were presented (with the inaccurate TLA) I would infer that the clear winner was the McLean Street property. However, I am not convinced that the decision definitely would have been to not go with McLean Street had the TLA had been

originally accurately stated. It would have been a closer call but it could still have been the decision to go with McLean Street.

[28] There is no question that when applying a price per square foot, the McLean Street property was not as good a deal at 2486 square feet as compared to 2951 TLA. That is not the issue however. The issue is whether the misrepresentation was a determining factor in making that decision as opposed to another decision. Given that the price per square foot was still $20.85 better, I am left unconvinced that McLean would not have been the decision at the time.

[29] So far I have only dealt with the question of whether there was reliance. I turn now to the question, assuming there was reliance, was that reliance reasonable. As I have stated, I consider to be a distinct consideration.

[30] Counsel opposite make a great deal of the fact that at no time did Ms. Roman communicate the significance of the square footage issue to her own agent, Allison Savoury, or anyone else in the transaction. I agree that this is a notable feature of the evidence.

[31] If, as is advanced by the Claimants, the TLA figure was of such a paramount importance then it would seem to follow that would have been (a) communicated to their own real estate agent; and perhaps (b) made a condition in the Agreement of Purchase and Sale. Neither of these things took place.

[32] I now refer back to the statement made by Associate Chief Judge Stansfield in the ***Walls*** case. He states that "*No doubt it will be unusual for the listing agent who has had no dealings with the purchaser ultimately to liable to the purchaser because typically there will have been intervening acts of others and will have been opportunity for the purchaser to discharge their responsibility to inspect for themselves"*.

[33] Here, the evidence is that the Romans did not do any inspection to confirm the total living area issue. That certainly would have been available to them.

[34] Certainly it is well recognized that important warranties and conditions regarding physical aspects of a property would typically be contained in the Agreement of Purchase and Sale and/or ancillary documents such as Property Condition Disclosure Statement. No attempt was made by the Romans to incorporate the TLA figures into the agreement with the vendor of the property. I also add at this junction that it would appear the Romans have not taken any claim (certainly not in these proceedings), against the vendor of the property or against their own real estate agent. Those were the parties one would expect due diligence to be directed towards by the Romans.

[35] In summary, it seems to me that there was enough opportunity and intervening ability to exercise due diligence here that if indeed there was reliance, it was not reasonable in these circumstances.

[36] Accordingly, I find that the Claimants have not satisfied this aspect of the requirements of the negligent misrepresentation.

[37] ***(5) "The reliance must have been detrimental to the representee in the sense that damages resulted***".

I accept the statement of law about damages in such cases as presented by Ms. Brown in her brief of August 4, 2009. She quotes from the Nova Scotia Supreme Court case of ***Risley v. Moran*** (1989), N.S.J. No. 410 where Justice Kelly states at p. 24:

> *The measure of damages in such a situation was discussed in Hauck et al. v. Dixon et al. (1975), 64 D.L.R. (3d) 201, Lieff, J. (Ont.H.C.), which states that the measure of damages for which a real estate broker is answerable in the event that he or she have acted fraudulently or*

> *negligently in giving advice and information to a third party is as follows:*
>
> > *(a)* ***In the event of the purchase of a property by a third party the difference between the price paid and the actual value of the property****;*
> >
> > *(b) On the sale of a property by a third party the difference between the price received for the property and its actual value at the time of sale.*
> >
> > [Emphasis supplied]

[38] The question then is, what is the actual or fair market value of the McLean Street property at the time of purchase by the Romans. The Montaque report (which has the correct square footage noted for the property) found that the fair market value in September 2008 was $415,000.00, the exact purchase price. This report was not prepared for the purpose of litigation and Mr. Montague was not hired by either of the parties herein. His report was prepared at the request of the Royal Bank in connection with the placing of the mortgage at that time.

[39] The report of Paul Fennel which was put in by Mr. Bureau on behalf of Bryant determined that the value of the property was $410,000 and in fact that was the value of the property without the building since the building in Mr. Fennel's view was functionally obsolete.

[40] The value of the property at the time of the purchase according to Cherie Gaudet who is a registered appraiser was in the rage of $385,000 to $392,000. Ms. Gaudet's report was entered as Exhibit 16 and she was qualified to give expert testimony. Her report is not an appraisal per se but is in effect a critique of the appraisal report of Terry Montague. At the bottom of page two she states her conclusion as follows:

> *Its location, on same street, on which there was an ongoing controversial road widening project.*

> *All sales had superior upgrades. Concentration should have been on sales in the neighbourhood of similar quality avoiding subjectivity.*
>
> *Overall impression of this report is that it was not in compliance with CUSPA, it had significant absence of detail. Also, better selection of comparables could have avoided substantial adjustments requiring subjectivity. It is also my opinion that the $30,000 adjustment for room count combined with the adjustment made for size is not reasonable in the market place and if correct would have provided a more realistic positioning of the subject in the market place at that time i.e. $185,000 to $392,000.*

[41] I have some difficulty with this conclusion of Ms. Gaudet. Firstly, she critiques Mr. Montague's appraisal but then uses his figure of $415,000 as a starting point and adjusts it by $30,000 to arrive at $385,000 from the $415,000. This strikes me as somewhat inconsistent.

[42] Secondly, her report is not a stand-alone appraisal. She uses only one comparable. I would have much preferred to have had a stand-alone appraisal report done effective as of September 2008. As it is, I have one only that satisfies that and it is the Montague report. It seems to me that I am compelled to give most weight to the Montague report.

[43] That being the case, there is no loss since the Montague report indicated a fair market value of $415,000 which is the price that was paid. That factor in the analysis of negligent misrepresentation has not been proven and for that reason as well the claim must fall.

Summary on Misrepresentation

[44] While I find that there is a duty of care in this case and that there was an inaccurate representation negligently made I find that the Claimants in SCC No. 309777, Vanessa and Jason Roman did not rely on that representation and even if they had such reliance was not reasonable in the circumstances. Further, I find that there was no loss in any event. For these reasons the claim is dismissed.

[45] The claim in SCC No. 309777 having been dismissed, I also find that the claim in SCC No. 311527 must also fail.

Order and Disposition

[46] The Claim in SCC No. 309777 is hereby dismissed.

[47] The Claim in SCC No. 311527 is hereby dismissed.

[48] Under Section 15(1) of the *Small Claims Court Forms and Procedure Regulations*, N.S. Reg. 17/92, an adjudicator may award the enumerated costs to the successful party. I will retain jurisdiction to consider submissions (including reasonable proof of costs) should the successful parties in each of these actions wish to claim for allowable costs.

DATED at Halifax, Nova Scotia, this 5th day of October, 2009.

Michael J. O'Hara
Adjudicator

Original Court File
Copy Claimant(s)
Copy Defendant(s)