IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Curran v. Grant, 2010 NSSM 29

2010 Claim No. 319748

BETWEEN:

Name: **Andrew Curran and Christine Johnston** **Claimants**

- and -

Name: **Heather Grant** **Defendant**

Appearances:
Claimants - Self Represented
Defendant - Self Represented

Hearing Dates - January 5 & January 18, 2010

Editorial Notice

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

DECISION and ORDER

[1] In this proceeding the Claimants are claiming $24,900.00, plus general damages of $100.00, and costs. This is based on what is said to be numerous and serious problems with the property at Keystone Court, Halifax, which the Claimants purchased from the Defendant in November 2008. The Claimants say that the problems should have been disclosed on the Property Condition Disclosure Statement prior to the sale but were not and therefore the Defendant is responsible. The Claimants say that the damage includes a rotten rim-joist (mud-sill), leaking basement, mold, and numerous leaks.

[2] In the written Defence, the Defendant states that the Property Condition Disclosure Statement completed on September 7, 2008, was accurate and there were no misrepresentations as to the condition of the property.

Applicable Law

[3] As a very general statement, I start with the basic proposition that on the sale of a used home, the vendor does not warrant the fitness of the structure. The basis proposition is captured in the Latin phrase *caveat emptor* - "let the buyer beware".

[4] This general principle of law has been modified to some extent by the now common practice of including a property condition disclosure statements as part of the standard Agreement of Purchase and Sale in Nova Scotia. Under this regime, the seller is legally obliged to truthfully and accurately respond to the various items in the property condition disclosure statement ("PCDS").

[5] If a purchaser subsequently alleges that the seller has not accurately answered one or more questions on the PCDS and proceeds with a legal claim, the purchaser must prove what it alleges on a balance of probabilities. As with any civil case, the claimant bears the burden of proof throughout.

[6] In the recent Nova Scotia Supreme Court case of ***Gesner v. Ernst et al*** (2007), N.S.S.C. 146, Associate Chief Justice Smith made the following comment about a PCDS (para 54):

> *[54] A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property...*

[7] In ***Moffatt v. Findlay***, 2007 NSSM 64 (CanLII), Adjudicator Slone, makes the following comment about PCDS's, which I adopt:

> *[28] I will observe at the outset that the PCDS is at most a modest exception to the principle of caveat emptor or ""buyer beware"" which is alive and well in this jurisdiction, as observed in the reported cases to which I was referred, including the*

recent decision of Associate Chief Justice Smith in Gesner v. Ernst,...at paragraph 44:

> *[44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. Caveat emptor. (McGrath v. MacLean et al. (1979), 95 D.L.R. (3d) 144 (Ont. C.A.)).*
>
> *[29] Generally, sellers of real property make no warranties as to its condition. It is for buyers to perform their own inspections and, for the most part, take their chances. I believe that most buyers of resale homes appreciate that there may be flaws or imperfections that they will inherit, and they anticipate having to deal with them as and when they arise or as resources permit.*
>
> *[30] The difficulty with such a system has always been in the area of latent or hidden defects that only the sellers know about and no inspection, no matter how rigorous, could be expected to reveal. Although the PCDS does not restrict itself to questions about latent defects, in my view it is the potential presence of a known latent defect that the statement is designed to address.*

[8] In ***Desmond v. McKinlay*** (2000), 188 N.S.R. (2d) 211 (S.C.) Justice Wright pointed out that the applicable legal bases for an inaccurate or incomplete PCDS are collateral warranty and negligent misrepresentation. With respect to the latter, he states (para52):

> *[52] While it may be unnecessary, in light of the foregoing findings, I have concluded that liability can be ascribed to the defendant vendor in a parallel way under the tort doctrine of negligent misstatement. The general principles of this doctrine were recently referred to by Cromwell, J.A. in Barrett v. Reynolds et al.... (1998) 170 N.S.R. (2d) 201 who began his review of the law as follows (at p. 224):*
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> > *In **Queen (D.J.) v. Cognos Inc.,** [1993] 1 S.C.R. 87; 147 N.R. 169; 60 O.A.C. 1; 99 D.L.R. (4th) 626, at p. 110, Iacobucci, J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 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 the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.*

[9] Most of the recent case law follows the negligent misrepresentation approach of ***Cognos*** and I will follow that approach.

[10] I will proceed to review the various items of the Claimant's claim in accordance with the general principles of law to which I have referred. I will do so in the order presented in their Summary of Claim which was tendered as Exhibit C17.

Items of Claim - Analysis

[11] I start with a word about the first element of the ***Cognos*** requirements. In my view, there can be no question that there exists between a vendor and purchaser the type of "special relationship" that will support a claim in negligent misrepresentation and there is therefore a duty of care. There are a number of cases that would support this conclusion and I proceed on this basis without further analysis on this point.

1. Replace master bedroom window

[12] This claim relates to the leaking window in the master bedroom. The Claimant argues that this should have been disclosed under either 10(C) or 6(B) of the PCDS. These two read paragraphs of the PCDS read as follows:

> *10. - C. Are you aware of any damage due to wind, fire, water, wood rot, pests, rodents or insect? If yes , give details:*
>
> *6. - B. Are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls?*

[13] Both of these were answered 'No" by the vendor.

[14] The first question, to borrow the wording from the ***Cognos*** case, is whether the "...representation in question is untrue, inaccurate or misleading". This, it seems to be must be related to the wording used in the PCDS, quoted above. Viewed in that light, I

believe the statement is inaccurate, since clearly there was noticeable dampness and damage in or on the walls of the master bedroom and I would be compelled to conclude that the previous occupant, the Defendant, must have had knowledge of this. Indeed, Ms. Grant confirmed this in her testimony but she merely attributed this to leaving the window open when she slept. The fact is there was dampness and/or damage and it probably should have been disclosed. I would conclude that the Defendant was negligent in not so disclosing the dampness on the wall.

[15] Whether she can be attributed with the knowledge of a damaged window is another matter. I note here that Mr. Dube, the building inspector who gave evidence for the Claimant, acknowledged that the damage to the wall could have been caused by leaving the window open.

[16] Additionally, I must also consider the other elements of negligent misrepresentation and particularly the fourth item from ***Cognos*** - did the representee rely , in a reasonable manner, on the negligent misrepresentation.

[17] As noted, the wall near the window itself apparently showed signs of damage. It was, to use the language of the case law, a patent defect, not latent. There is evidence that the home inspector, Mr. Dube, had included information in his pre-closing inspection report about the “sag” in the paint in this upstairs bedroom. (For some reason, which was not made clear at the hearing, the inspection report was not included in the evidence of the Claimant and I did not have the benefit of seeing this report).

[18] In light of this evidence, it would seem that the Purchasers here had some awareness of the issue with the dampness and damage. Further, if their expert inspector could not link the wall dampness to the window damage, I would not be prepared to conclude that the Defendant was withholding this.

[19] Based on the foregoing, it seems to me that it cannot be said that there was reasonable reliance. For these reasons, the claim on this item fails.

2. Fix hole in wall/bay window/sliding door

[20] This relates the leaking which was first detected by the Claimants on Sunday, November 16, 2008. Mr. Curran's evidence was that the carpeting near the sliding door in the dining room was soaking wet. The video that he took on that day and at the time verifies this.

[21] It is also noteworthy that this was just two days after closing the property transaction of Friday, November 14, 2008, and was the first rainy day that had occurred since the Claimants purchased the home.

[22] As I have indicated, the evidence shows that the wetness was significant and the evidence was compelling in this regard. Based on this, I can come to no other conclusion but that the Defendant must have known about this wetness. In saying this, I would observe that the only other logical conclusion is that this was the first time this wetness manifested itself in the sliding door area and in the basement area below this. Given the significance and the extent of the wetness in light of the damage to the rim joist and the other evidence of damage, the likelihood of this being the first occurrence of the wetness is so remote that I would reject that.

[23] Therefore, I find that the Claimants have proven on a balance of probabilities that the Defendant would have known of this wetness issue. As such, it should have been disclosed in the Property Condition Disclosure Statement either in paragraph 6(a), 6(b), or possibly 10(c).

[24] This defect was both significant and latent. I recognize that the damage to the kitchen window was apparent and the Claimants knew about this. However, the extent of the leak

and the damage to the rim sill was very significant. While, I could accept that the Defendant did not know about this, I cannot accept that the Defendant did not know about the wetness by the sliding door or the puddling the basement below this. In my view the Defendant was at least negligent in not disclosing this wetness.

[25] Further, I would find that the Claimants did rely and relied reasonably on the representation. Had the Claimants known about the wetness by the sliding door or the puddling in the basement below they undoubtably would not have proceeded with the purchase of the property.

[26] The amount claimed is $12,754.31 which is from the Pelton Construction Services estimate of November 20, 2009 and which, according to Mr. Dube, is a reasonable amount. However, this includes the supply and installation of a new kitchen bay window. That item was subject to pre-contractual negotiation; Mr. Curran requested that it be replaced and Ms. Grant refused. It was patently defective but the vendor refused to remedy it prior to a final agreement being signed. It is not for me to re-write the contract at his stage. Some portion of this amount should therefore be deducted to account for the kitchen window.

[27] I do not have specific evidence regarding the value of the kitchen window but in reviewing the scope of the other work I'm going to deduct $1,287.00 from the pre- tax Pelton estimate which reduces it to $10,000.00 and which I gross up to $11,300.00 to include the HST component.

3. Waterproof basement

[28] This claim is to remedy generally the dampness of the basement which, primarily was manifest in the "cold room".

[29] In this regard, Mr. Curran points to paragraph 6(A) of the Property Condition Disclosure Statement which reads:

> *6 Structural*
>
> *A. Are you aware of any structural problems, unrepaired damaged, or leakage, in the foundation? - Checked off "No"*

[30] The evidence on this aspect was not nearly as compelling as that with respect to the leak of the bay window/sliding door. There was evidence of dampness in the basement generally, but that is not particularly remarkable and from what I understood, was known at the time of the purchase.

[31] The amount of the leaking in the cold room was not to such a degree that I would necessarily conclude that it must have been there in previous years or, more to the point, that it must have been observed by the previous owner, the Defendant herein.

[32] Again, referring to my previous comments about the burden of proof, I am not convinced to that degree to make a finding that the Defendant knowingly misstated or misrepresented when she answered the Property Condition Disclosure Statement.

[33] As well, there was evidence that the Claimant had some pre-closing knowledge generally of the dampness in the basement. This raises the question of whether there was reasonable reliance.

[34] I dismiss this part of the claim.

4. Clean Dry well

[35] I am dismissing this because I see nowhere where there is a specific reference in the Property Condition Disclosure Statement that can be seen as relating to the dry well. When asked on submissions, Mr. Curran pointed to 10(A) which reads:

> *Are you aware of any limitations with the property such as:*
>
> *Restrictive or protective covenants, easements and right of way, shared wells, driveway agreements, encroachments on or by adjoining property. If yes, give details.* [This was answered "No']

[36] I recognize that there is reference to a "shared well" but that is in relation to an adjoining property and that does not cover this situation. On the evidence, this well was for drainage and apparently was installed by the builder of the roads some number of years prior to the Defendant owning the property. The Defendant's evidence was that it was there when she purchased it and they never cleared it out except the leaves at the top.

[37] I see no misrepresentation on the part of the Defendant in respect of this matter. It is dismissed.

5. Assist with waterproofing basement

[38] This relates to item 3 and therefore, for the same reasons, is dismissed.

6. Sump pump and ***7. Plumber Fees***

[39] This relates to the sump pump and associated plumbing costs. The Claimants refer to item 7(A) in the Property Condition Disclosure Statement which reads as follows:

> *7 Mechanical*
> *A. Have there been any problems with pumps, purifiers, air conditioning systems, garborator, built-in appliances,*

[Answered "*No*"]

[40] Clearly, on the evidence, there was a problem with the sump pump shortly after the Purchasers/Claimants moved in. The question is whether the Defendant/Vendor was aware of that. On this item, I am not convinced that the Vendor would have been aware of it.

[41] There is no question that at some point the sump pump had worked and at some point it stopped working. It was not clear on the evidence as to how frequently the sump pump would come on when the Defendant owned the property. This I think is relevant because if, for example, it was a daily occurrence, it raises the likelihood that the Defendant would have known about it.

[42] However, if it was an occasional occurrence, then I do not think it stretches credibility to infer that the sump pump stopped working at some point when the Vendor still owned the property but she had no knowledge of it.

[43] The other thing that strikes me on this point is that if it had stopped working when she owned the property and she knew about , I would have expected that anyone, including the Defendant, would have replaced the pump, given the potential severe consequences of not replacing it. By this I mean that the sump pump malfunction would have resulted in flooding to the Defendant in the basement and could have been remedied with a relatively modest expenditure. That leads me to the conclusion that had the Vendor/ Defendant known about the sump pump not working, it would have been replaced.

[44] Applying these considerations, I find that the Claimants have not convinced me that the Defendant knew that the sump pump was not working. Therefore this aspect is dismissed.

8. Replace 600 sq. ft. of laminate flooring

[45] The "flooding" that caused the damages to the flooring was related to the sump pump not working. It follows therefore that since there is no liability for the sump pump issue there is to be no liability for this consequential damage.

Summary

[46] I allow the claim relating to the sliding door and sill plate as discussed under item 2. As indicated above I am allowing $11,300.00.

[47] The claims for the other items are dismissed.

[48] I am not allowing any cost for Mr. Dube's report or attendance. While I had the benefit of his oral evidence I was never provided with a copy of the inspection report he did. Why that was not tendered was never adequately explained. It should have been and since it was not I disallow any claim for costs in that regard.

[49] I will allow the filing fee of $179.35.

DATED at Halifax, Nova Scotia, this 4th day of April, 2010.

Michael J. O'Hara
Adjudicator
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Copy Claimant(s)
Copy Defendant(s)

ORDER

[50] I hereby order the Defendant pay to the Claimant as follows:

Debt	$11,300.00
Costs	179.35
Total	$ 11,479.35

DATED at Halifax, Nova Scotia, this 4th day of April, 2010.

Michael J. O'Hara
Adjudicator
Original Court File
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