Claim No. 318962
Date: 20100608

DECISION AND ORDER

SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: McDermott v. Allen, 2010 NSSM 65

BETWEEN:

Name: M. SHELLEY McDERMOTT

- CLAIMANT

Name: EARL ALLEN & LORRAINE ALLEN

- DEFENDANT

DATE OF HEARING: May 26, 2010

Editorial Notice

Addresses and phone numbers have been removed from this electronic version of the judgment.

DECISION

[1] At the end of August, 2009, Shelley McDermott bought a home on a two and a half acre lot from the Defendants, Earl and Lorraine Allen. The home is served by a drilled well. Ms. McDermott and her partner, Simon Creighton, testified that their well had gone dry very soon after moving in.

[2] They borrowed a water trolley from a neighbour. They filled it from a nearby stream and emptied it into their well several times. Each time, after four or five days, the well went dry again. They called a well drilling firm who ran a flow test on the well. The firm advised that the well was indeed dry and recommended hydro-fracturing as a remedy. This Ms. McDermott did at a cost to her of $2,853.25. The well has supplied adequate water since.

[3] Ms. McDermott and Mr. Creighton, while walking their property after their purchase, found a second, relatively shallow, but relatively broad well in an overgrown area of the lot. The well turned out to provide water to at least one neighbouring property. This well was covered by sheets of metal and sheets of wood which had deteriorated. It had no cap or raised covering. Ms. McDermott said the well presented a hazard. I agree. She has since had it fenced in. She proposes, in addition, to install a proper covering for it at an estimated cost of $508.50 for labour and $785.59 for materials. I accept their testimony.

[4] Ms. MacDermott, Mr. Creighton, and the real estate agents, Ms. Sheila Cashin for the buyers and Mr. Allister Read for the sellers, were not aware of this second well. Mr. Allen himself had forgotten about the presence of the well.

[5] Ms. McDermott says that she purchased a property subject to a possessory, unregistered easement for the use of the well which, if not in law then as a matter of living with neighbours, she has to accept. I agree.

[6] Mr. and Mrs. Allen, in recent years through 2007, used the property as a summer home and increasingly wintered in Florida. They moved out of it altogether in the summer of 2008. Mr. Allen said that except to mow the lawn, he did not return to the property afterwards.

[7] Mr. Allen testified that through the years they had little or no trouble with the supply of water and had only run it dry once; on his 60th birthday when there were 40 odd people in the house. I accept his evidence.

[8] The Allens, in August or September, changed real estate agents to Mr. Read. They completed and signed a Property Condition Disclosure Statement dated September 11th, 2008. This statement was delivered to Ms. McDermott in August 2009. No one, I find, pointed out to them that the statement dated from 2008. Neither Ms. McDermott, nor her agent, realized that the statement was then a year old nor was it ever pointed out to them.

[9] The preamble to the Disclosure Statement says:

> The Sellers are responsible for the accuracy of the answers on this disclosure statement… This disclosure statement will form part of the contract of purchase and sale if so agreed in writing by the Sellers and Buyers.

[10] In the Additional Comments section, the statement says:

> Water quantity has been sufficient for a family of two.

[11] The Agreement of Purchase and Sale provides the following with reference to the Disclosure Statement:

> This Agreement is subject to the Seller providing to the Buyer, within 48 hours of the acceptance of this offer, a current Property Condition Disclosure Statement …. and that statement meeting with the Buyer's satisfaction. The Buyer shall be deemed to be satisfied with this statement unless the Seller or the Seller's Agent is notified to the contrary, in writing, within 24 hours of receipt. The Seller warrants it to be complete and current to the best of the his/her knowledge, as of the date of acceptance of this Agreement, and further agrees to advise the Buyer of any changes that occur prior to the closing date.

[12] The statement was a year old. It was not current.

[13] The Agreement further provides in paragraph 4:

> The Seller warrants, which warranty will survive the closing, that to the best of their knowledge, acting as a prudent and knowledgeable property owner;
>
> (a) That during their ownership there has been an adequate supply of water for the normal household needs of a family of 2 .

[14] This warranty was not to the best of their knowledge, nor was it a statement of a prudent and knowledgeable property owner. The Allens had not been in the home for a year. They really had no knowledge. A prudent and knowledgeable homeowner, in my view, would not warrant the adequacy of a water supply when they had not lived in the premises for a year.

[15] Paragraph 5 of the agreement provides:

> The Seller agrees to mark the location of the well and the septic tank pump out, on or before the closing.

[16] I construe this clause to impose an obligation on the seller to disclose the location of any wells on the property. I am also satisfied that Mr. Creighton exercised reasonable diligence in walking the lands to determine the boundaries prior to the closing. Mr. Allen had forgotten about the second well. Mr. Creighton had no idea of what to look for. The second well is located in an overgrown area of the lot. It had no cover of a kind that would indicate the presence of a well. The covering was rough, and level with the ground. The boundary line itself was difficult to determine in part because an important corner pin was missing and because the neighbours mowed parts of each others property. The lot is a large one in a rural area. In my opinion, the well in its condition was an undisclosed latent defect. Furthermore, the well served at least one neighbour who had himself, or his predecessors in title, used for many years. The well was an undisclosed, unregistered possessory easement.

[17] Again, I do not question the Allen's good faith. I wonder whether they knew and understood the meaning and effect of what they were signing in the agreement or that they were providing a year old disclosure statement, but in any event they are responsible for their warranties and their statements. The Allens have breached their contract with Ms. MacDermott. They have also made negligent misstatements about the water supply. I accept the evidence of Ms. McDermott and her agent, Ms. Cashin, that Ms. McDermott relied on the disclosure statement and the warranty in the agreement and did not do their own flow test.

[18] Ms. McDermott, in my view, is entitled to the $2,853.25 cost of the hydro-fracture and the estimated cost of $1,294.39 to build a safe cover for the well. They are also entitled to $100.00 in general damages because of the failure to disclose the well easement and their costs of issuing and serving the claim in the amount of $247.88.

ORDER

[19] I order Earl Allen and Lorraine Allen to pay the sum of $4,495.52 to M. Shelley McDermott.

Dated at Halifax, Nova Scotia
this 8th day of June, 2010.

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J. WALTER THOMPSON, Q.C.
ADJUDICATOR

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