DECISION AND ORDER

SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Skinner v. Crowe, 2010 NSSM 66

Claim No. 315628
Date: 20101116

CLAIMANTS:

Name: **Lloyd Skinner and Stephanie Skinner**

DEFENDANTS:

Name: **Michael Crowe and Dwan Crowe**

SMALL CLAIMS COURT OF NOVA SCOTIA

Claim No. 332326

CLAIMANT:

Name: **Michael Crowe and Dwan Crowe**

DEFENDANTS:

Name: **Century 21 Trident Realty Ltd. and Barbara Killen**

DATE OF HEARING: October 26, 2010

Editorial Notice

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

DECISION

[1] In July 2007, Lloyd and Stephanie Skinner purchased a home from the Defendants, Michael and Dwan Crowe. The basement of the home flooded a few months after the purchase. Mr. and Mrs. Skinner sued for the cost of work to ensure no flooding occurred again, and for furniture and furnishings lost as a result of the first flood after their purchase

[2] The Crowes had the home built for them. In the spring of 2005, during construction or shortly after completion, the basement flooded twice. After the second flood, they trenched the front of the house to create drainage away from the house. They had no more flooding during their tenure. The Crowes, in turn, sue their real estate agent, Barbara Killen and their broker Century 21 Trident Realty Ltd.

[3] In my view, this is primarily a case of breach of contact. The contract is the agreement of purchase and sale between the Skinners and the Crowes. The relevant terms are as follows. Clause 3 of the agreement states:

> This Agreement is subject to the Seller providing to the Buyer, within 24 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, on or before May 23/07. 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. If notice to the contrary is received, then either party shall be at liberty to terminate this contract. Once received and accepted, the Property Condition Disclosure Statement shall form part of this Agreement of Purchase and Sale. (emphasis added)

[4] The preamble to the Property Condition 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. (emphasis added)

[5] At its end, the Statement says:

> The information in this Property Condition Disclosure Statement has been provided by the seller of the property and is believed to be accurate; however it may be incorrect. It is the responsibility of the Buyer to verify the accuracy of the information. The brokerage, salesperson and members of the Nova Scotia Association of REALTORS assumes no responsibility or liability for its accuracy.
>
> Buyers are urged to carefully examine the property and have it inspected by an independent party or parties to verify the above information.

[6] The Property Condition Disclosure Statement in paragraph 6C says:

> 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.)?

[7] The box in the "Yes" column of the Statement is ticked with a check mark, and in hand writing are added the words:

> Crack in foundation filled by Allcrete.

[8] In fact, the basement had flooded twice in the previous five years. The crack in the wall had nothing to do with these floods. The statement in 6 C of the Property Condition Disclosure Statement is a term of the contract. Clause 3 of the agreement itself provides the buyer with the right to terminate the contract. The Crowe's failure to state that they had constructed a substantial drainage trench across the front of the house because the basement had twice flooded is a breach of the term of the contract. The consequence of the breach is that Mr. and Mrs. Skinner did not have the opportunity to terminate because of the floods. I am satisfied that, if they had known of the extensive work and the floods, then they probably would have terminated the agreement. Mr. Skinner testified that they would have.

[9] The term “flood” was used throughout the hearing to describe the incursions of water. The term flood was used advisedly; this was no mere seepage. The evidence is clear that the water rose, in one case, perhaps as high as six inches. Creating the front drainage was a substantial undertaking. Mr. Crowe described the trench and submitted that Ms. Killen, who lives in the neighbourhood, would have been able to see the extent of the work at the front of the house and the time it took from the road as she came and went. The question in the Property Condition Disclosure Statement is clear. The answer to it was dead wrong. If the statements contained in these things are to have any meaning and effect at all, then surely responding to a clear question of repairs “carried out to correct leakage or dampness problems” must include the declaration of the extensive work done to prevent further floods.

[10] The contract was breached. The damages that ensued are, in my opinion, the cost to install an inside diversion system as billed by CWC Systems Corp. In the amount of $14,595.00 and the cost of Plan-it Earth’s excavation and installation of a dry well in the amount of $5,237.42. Mr. Slaunwhite’s work was too far from the house and was work to solve a problem of drainage on the lot generally. I am also satisfied the damage to the Skinner’s personal property is too remote from the cause, particularly in contract.

[11] Mr. Skinner was reluctant to spend money to remedy the flooding unless he was assured that the remedy would work. Mr. Hagan was prepared to make those assurances if he was contracted to install the drainage system in the house. Mr. Skinner and Mr. Hagan then knew that there were trenches to the front and to the rear. Those trenches had not solved the problem. Trenching and creating a drain may well have involved tearing off the front end of the house to get at the foundation.

[12] If the water persisted on getting in and creating a new drain involved tearing off and then rebuilding the front verandah and roof extension, then it was reasonable to resort to a system which would ensure the water was taken out. In the event, there was so much water coming into the home that the sump pump ran continuously and a further investigation ensued revealing a water source very near to the house. Plan-It Earth’s solution was simple, cheap and effective, but I am not persuaded that the Skinners’ decisions are unreasonable and can be second guessed now. Furthermore, the interior drainage will serve as a back-up and fail safe. I accept Mr. Crowe’s evidence that the basement did not flood after he created the drainage at the front of the house. The subterranean flow of water changed somehow to create a new source of flooding. The flow of water is fickle and insidious. One could never be sure that it would not change again.

[13] The hearing, however, addressed itself in tort based on alleged misrepresentations made by or on behalf of the Crowes. First of all, I must say that I found Mr. Crowe's evidence to be frank and truthful and I am far from persuaded that there was any fraudulent intent. He was, however, careless in his response to 6C of the Property Condition Disclosure Statement. He testified that he thought that since he had constructed the front drainage trench which had functioned well for the rest of his tenure, he had no need to disclose the work or the floods. Ms. Killen, by her testimony, accepted this rationale. I am satisfied that he carelessly read the question he was asked; ie. "Have any repairs been carried out to correct leakage or dampness..... ?" and did not address himself to it.

[14] In my opinion, the misstatement in 6C does constitute a negligent misrepresentation. The Skinners and the Crowes were in a special relationship. The representation in question was not only untrue, but it was made significantly worse by being directed to the crack in the wall. Mr. Crowe was negligent. I am satisfied that the Skinners relied upon it to their detriment.

[15] The Crowes try to blame Mr. Skinner, saying he and Mrs. Skinner must accept responsibility for a failure of due diligence. As I have said, this is a contract matter. The Crowes made it a term of the contract and the term was breached. Mr. Skinner's diligence, in that context, is irrelevant. He and Mrs. Skinner can look to and are protected by the contract.

[16] I am satisfied, just the same, that they were reasonably diligent. I found Mr. Skinner credible too and I accept his evidence. Mr. Skinner and his father, now deceased, inspected the premises. He says his father was experienced with building, that he himself had worked with his father, had built a home of his own and was now engaged as a safety consultant on work sites. I am satisfied they together would be as competent to look at a home as professional home inspectors generally.

[17] Mr. Skinner noted the crack and in line with the crack rust and signs of water damage on the floor. He was concerned about the crack and possible leaks. He sought assurance that the crack was covered by the home warranty program in the offer to purchase. He was provided with a false and misleading Disclosure Statement which he relied on.

[18] The Skinners and the Crowes never met. Negotiations were carried on by the agents, Michelle Zareski for the Skinners, and the third party Defendant, Barbara Killen, for the Crowes. Mr. Skinner asked Ms. Zareski after he had reviewed the disclosure statement to find out the cause of the crack, and how

was it fixed. He says Ms. Zareski told them that water was pooling in the back, and they trenched to get rid of the water. The contractor, he was told, cracked the foundation with a piece of equipment while doing this work. Mr. Skinner says this information was a concern, but he felt it explained the excavation and the crack through the machine hitting it.

[19] I am satisfied that the Skinners were misdirected by the representation about the crack. The crack never did leak water from first to last. Mr. Skinner saw the crack, associated it with a leak, and then was reassured that the rear trenching and the crack repair had addressed any problem. I find that reasonable. He knew nothing, of course, about the front trenching which had been the actual remedy attempted for the floods.

[20] In fact, as Mr. Crowe testified, the crack in the foundation had been caused by a rock coming up hard against it during back filling, not during the creation of the trench at all. In fact, the purpose of the trench at the back was not for drainage to protect the basement, but rather to protect the sand in the septic system from being washed away. In fact, the rear drainage ditch to remedy the flooding installed by the Skinners ran across the front yard of the home. None of this information got to the Skinners.

[21] Ms. Zareski did not testify, and while that is indeed a concern to me, I am not satisfied that any adverse inference can be drawn from it. Ms. Killen herself, the Crowe's agent, thought the ditch to the rear was to drain water away from the home, and so could not speak of the extensive work done at the front. The mistake was passed on to Mr. Skinner. I am satisfied that Ms. Zareski's information from Ms. Killen was passed along to the Skinners. The information was, however, incomplete and misleading. Furthermore, I cannot imagine that Ms. Zareski would not have told the Skinners that there had been two significant floods during the Crowe's tenure if she had been informed of them.

[22] The Crowes commenced a separate action against Ms. Killen and her broker, Century 21 Trident Realty Ltd. The Crowes did not press their claim at the hearing, but I am satisfied the action is well founded. Sellers put their trust in their agents. Agents are professionals. They are entrusted with the purchase or sale of people's most important asset. As in this case, buyers and sellers did not meet and did not speak. The realtors do the talking between the parties. Realtors have a contractual duty to their sellers to perform their duties in a reasonably competent manner.

[23] In my view, the floods in the basement during the Crowe's tenure demanded disclosure. Even if spontaneous disclosure was not said to be required, the

inquires about the crack then demanded it. As much as Ms. Killen could say was that if the Skinners had asked about floods, then she would have been sure to tell them. The Skinners, however, had been misdirected to the cracks. The crack was linked to leaks, if not through common sense, then most clearly in 6C of the Disclosure Statement. Inquiries about the cracks begged and demanded disclosure of the floods. It was Ms. Killen's responsibility as the Crowe's agent to make that disclosure to the Skinners through Ms. Zareski. She in her testimony does not assert that she did, and I am satisfied that she did not.

[24] I found Mr. Crowe very credible. I am satisfied that Ms. Killen lead him to believe that his answer to the question in 6 C was acceptable. In my opinion, the statement was dead wrong and in exacerbation seriously mislead the Skinners about leaks to the basement. She ought, as a reasonably competent real estate agent, to have insisted on disclosure of what she knew to be the facts; the basement had twice flooded to a depth of inches during the Crowe's tenure within the previous five years, and the Crowes had constructed a drainage ditch as a result.

[24] The Disclosure Statement of course has disclaimers, but in my view the obligation of Ms. Killen to tell Ms. Zareski about the floods existed independently of the Disclosure Statement. In any event, the fundamental contractual obligation of competent service and concurrent duty of care, in my view, prevails over the disclaimers. Ms. Killen, by failing to spontaneously disclose the floods to the Skinners and by facilitating and condoning the misstatements contained in the disclosure statement, failed to meet the standard of reasonable competence. Ms. Killen is liable to the Crowes, and Century 21 is vicariously liable to them as well.

ORDER

[25] I order Michael Crowe and Dwan Crowe to pay to Lloyd Skinner and Stephanie Skinner the sum of $20,011.77 inclusive of the costs of beginning this action.

[26] I order Century 21 Trident Realty Ltd. and Barbara Killen to pay to Michael Crowe and Dwan Crowe the sum of $20,011.77 inclusive of the costs of beginning this action.

Dated at Halifax, Nova Scotia

this 16th day of November, 2010.

J. WALTER THOMPSON, Q.C.
ADJUDICATOR

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