Claim No: 337164

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Bedash v. Integrity Homes 2000 Inc., 2010 NSSM 75

BETWEEN:

DMITRIY BEDASH

Claimant

- and -

INTEGRITY HOMES 2000 INC.

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on December 15, 2010

Decision rendered on December 21, 2010

APPEARANCES

For the Claimant	self-represented
For the Defendant	Rebecca L. Hiltz Leblanc Counsel

BY THE COURT:

[1] The Claimant, Dmitriy Bedash, is the owner of a townhouse on Woodhaven Close, in the Portland Estates area of Dartmouth. The home developed a water leak at the end of this past summer, which Mr. Bedash proceeded to have fixed at a cost of almost $5,000.00. In this Claim, he seeks to hold the original builder responsible for what he alleges to have been defects in the construction.

[2] Mr. Bedash represented himself at the trial of this matter, which was a fairly complex hearing and which took almost five hours to complete.

[3] At the conclusion of the hearing, the Defendant made a motion to dismiss on the basis that the Claimant had not made out a *prima facie* case which could form the basis of liability against the Defendant. I gave brief oral reasons at the time, explaining why in my view the Defendant was right, that the case could not possibly succeed, because there were certain critical facts which the Claimant had not proved.

[4] As I was explaining my reasons for dismissing the claim, the Claimant requested an opportunity to have the case continued on another date so he could bring to court evidence to attempt to establish the facts that I had found lacking. I explained that I could and would not do that. I further indicated to the parties that I would follow up my oral comments with some more fully developed written reasons to explain my ruling - both on the motion to dismiss, as well as my refusal to allow the Claimant to come back to court on another day, with further evidence.

The facts

[5] The Claimant purchased his home in 2006 from the original owners, a Mr. and Ms. O'Donnell, who had bought it new approximately two years earlier from the Defendant, which is an established builder in the Halifax Regional Municipality.

[6] In circumstances such as this, because they are not in a direct contractual relationship, a subsequent purchaser has limited rights against the original builder of a home. In the case of alleged deficiencies in the construction itself, and for any consequential repair costs, the subsequent purchaser will only have whatever rights are contained in the original purchase agreement, and which are expressly transferable to a third party. In the case of a "new home warranty," if there is one, such warranty rights are expressly transferable on a sale of the property.

[7] The subject home was covered by the Atlantic Home Warranty Program, which is one of a number of so-called third party warranties that the builder can purchase and make available to its purchaser. Under the terms of that warranty, the builder is responsible *"to repair defects in workmanship .... and to repair or replace defective materials .... which become apparent within one year after the Date of Possession."* In other words, the builder is personally responsible for any defects in materials or workmanship that surface within the first year, and which are duly reported within that year. For years 2 through 7, the Warranty Program will respond only to correct any major structural defects. After seven years, there is no further legal responsibility of either the builder or the warranty company, at least not on a contractual basis.

[8] The Claimant first experienced his water leakage problem approximately four years after buying his property, and six years after it was constructed. He is convinced that his vendors experienced similar problems during the first year, which (if true) might have kept alive a warranty claim for such problem. Unfortunately for the Claimant, he came to court with no proof in the form of admissible evidence, that any such problem had surfaced in the first year.

[9] The Claimant produced no documentation of any such problem, which would have been the best evidence, has there been any. Furthermore, he did not bring his vendors to court as witnesses, despite his stated belief that they would have verbally confirmed giving notice of the problem to the builder in the first year. I ruled that hearsay evidence of what his vendors would say, would not be admitted on such a critical point in the case.

[10] The Claimant seemed confident that he could prove this fact by another means. He had subpoenaed the construction manager of the Defendant and asked him the question directly. The answer he received, which was quite clearly not what he had expected or hoped for, was that the builder was not aware of any water leakage claims, or indeed any other claims, by the previous owner of this townhouse.

[11] I asked the Claimant if, when he had bought the property, his vendors had disclosed to him that they had experienced any water problem. This would have been something that vendors typically disclose in a Property Condition Disclosure Statement, which is fairly standard in residential transactions. Mr. Bedash did not have the documentation for his purchase, and essentially ducked my question by suggesting that he did not pay much attention to the details of the transaction at that time (2006) because he was very busy with other things.

[12] The only conclusion that I can draw is that there was no such disclosure, because I find it highly unlikely that someone like Mr. Bedash would have failed to notice such a fact at the time. Most reasonable purchasers being informed of a water leaking problem, even if repaired, would take the time to become fully aware of such problem and possibly seek further assurances that it had been properly rectified.

[13] When I later pointed out to Mr. Bedash at the conclusion of the trial, that he had failed to produce any admissible evidence of any reported water leakage in the first year, he requested leave to adjourn the trial in order to seek out such evidence. I declined to allow him to do this.

[14] In fact, his request was to be permitted to re-open his case to call two witnesses. The other witness that he sought to call was the contractor who had done the work repairing his house, Danny Chase.

[15] Mr. Chase had evidently dismantled part of the masonry over the living room window, and done some repairs to the flashing around the window before restoring the masonry, in his apparently successful effort to stop the water leaking problem. Mr. Bedash's theory was that the original construction was not according to the National Building Code in some respect, because there was a vapour barrier or some other membrane improperly installed. It is noted that the Atlantic New Home Warranty contains a specific warranty by the builder that the home has been constructed in conformity with the National Building Code of Canada.

[16] Mr. Bedash produced photos taken by Mr. Chase which supposedly showed this discrepancy, and he proposed to enter into evidence a written statement by Mr. Chase in which Mr. Chase purported to comment upon the propriety of what he saw when he opened up the affected area.

[17] The Defendant strenuously objected to this attempt to enter what would have amounted to expert evidence, without the author being present to be qualified as an expert and to be cross-examined. I sustained that objection, and explained to Mr. Bedash that I could not accept such a statement. I asked Mr. Bedash why he had not brought Mr. Chase to court, and his response was that Mr. Chase is a busy man.

[18] I have had occasion in other cases to comment on the problem of Claimants seeking to introduce expert opinions without producing the expert witness. In *Sparks v. Benteau* 2008 CarswellNS 42, 2008 NSSM 3, I said:

> 7 The other issue about which I will comment concerns the conduct of the trial. Mr. Benteau came to court with no live witnesses other than himself, and sought to have accepted in evidence a number of written statements by people — including an expert witness — who should have been brought as witnesses. Mr. Benteau claimed to have sought advice from court staff about whether or not he needed to bring witnesses, and was allegedly told that he could just bring statements. Although in the case here I find it hard to believe that our very knowledgeable court staff would have so misled Mr. Benteau, I do appreciate that people inexperienced in court processes could have a hard time understanding what is required of them.
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> 8 The basic problem with written statements is that they are pure hearsay. Put another way, they are second hand evidence, letters or documents stating what a person would say if he or she were in court.
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> 9 The Small Claims Court does have a more lenient standard for the admission of evidence, including hearsay, than do the higher courts, but when it comes to deciding crucial facts the only evidence that will suffice is

> sworn testimony by a live witness who can then be cross-examined. This is at least as true if not more so when it comes to expert evidence.
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> 10 To give an example here, Mr. Benteau sought to have the Court accept a "To Whom It May Concern" letter from a likely very qualified individual who was purporting to offer an expert opinion as to why paint was peeling on the Claimant's home. While such a letter might be accepted on a non-contentious point, the question of why the paint peeled is potentially central to the case, because the Claimant needs to prove that it was the result of faulty workmanship. It would be fundamentally unfair to the Claimant to admit such evidence and allow it to prove the contentious point, when he had no advance notice that it would be offered, and did not have the author of the letter present to cross-examine. The right to cross-examine has been a cornerstone of our system of justice for centuries, and while many self-represented litigants exercise this right sparingly, it is still a vital right. Having the witness in Court also would allow the Adjudicator to ask pointed questions that might help decide the issue.
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> 11 In the Supreme Court of Nova Scotia, as elsewhere, there are very strict procedural rules for admitting expert reports. They typically must be provided to the other party well before a trial, and the other party given the option both to demand that the expert be present for cross-examination and have time to arrange for his or her own expert report, in response. If these rules are not followed, the reports will not be admitted.

[19] After I ruled against admission of the written statements by Mr. Chase, Mr. Bedash then proceeded to cross-examine the Defendant’s construction manager at great length, in a futile effort to get him to agree that there was a discrepancy between what the photograph showed, what was in the original plan, and what the National Building Code requires.

[20] It was only later, after I had already given my oral reasons for dismissing the claim, that Mr. Bedash asked for a chance to re-open his case and call Mr. Chase. I refused to permit this.

[21] In my view, even had Mr. Bedash been able to prove that there was something defective about the original construction, which led to a leaking problem six years later, that would not in itself entitle him to relief. There was no suggestion that some minor defects in the application of the vapour barrier or in the flashing, could amount to a “major structural defect” that might engage some liability under the warranty. Nor was there any evidence that a deviation from the National Building Code, if it occurred, was the source of the Claimant’s problem.

[22] Indeed, it should be mentioned that Mr. Bedash had attempted right from the beginning to have the warranty company respond to his problem, but they had declined to do so in the absence of proof that the problem had been reported to the builder within the first year. It is clear that Mr. Bedash made no effort whatsoever to supply such evidence to the warranty program. Instead, he want ahead and had the work done, and immediately commenced this claim.

[23] Mr. Bedash called as a witness a woman, Barbara Archer, who has lived in the same development since 2004, who has experienced ongoing, serious water incursion problems in her unit from early on. This does not prove anything connected to Mr. Bedash’s property. At its highest, it would be a type of “similar fact evidence,” but it suffers from the inherent flaw that there is no proof that the presence of water leaking in another building, even if it follows a similar design, tends to prove that there is a similar problem in the subject unit. The evidence is prejudicious without being probative, and should therefore carry no weight.

[24] Nor can I give any weight to the second-hand or even third-hand, anecdotal evidence offered by Mr. Bedash to the effect that there have been other similar problems in the neighbourhood, which might suggest some common design flaw.

[25] Ms. Archer produced a photograph taken in the spring of 2005, which the Claimant attempted to introduce as evidence that there had been an early problem with his unit. This was one of a series of photos which Ms. Archer took of the entire development, in connection with her own case. The particular photo of the unit that the Claimant would eventually acquire shows a forklift with two men apparently working on the brickwork at the subject home. However, as was explained by the Defendant's construction manager, and which I find is borne out in the photo, the men were engaged in doing a routine acid wash to remove excess mortar residue on the bricks. There is no inference to be drawn that there were any repairs being carried out, let alone repairs for the very problem that would surface five years later.

[26] In the final result, all Mr. Bedash was able to prove was that his home experienced some water leakage some six years after being constructed by the Defendant. He was unable to prove that this was a continuation of a problem experienced in year one, or that it was a major structural defect. He was also unable to prove that there was a deviation from the National Building Code, nor that any such deviation (if it existed) was the source of the problem that he was experiencing in his unit.

[27] In other words, there is no admissible and probative evidence before me of a breach of warranty.

The request to re-open

[28] The Small Claims Court must strike a balance between adhering to a degree of legal rigour, and being a "people's court" that does not penalize people

for a lack of legal knowledge. In general, we strive to be very flexible in matters of procedure.

[29] However, the Small Claims Court is a court of law and justice is a two-way street. Defendants who come to court are entitled to fairness, as well, including procedural fairness. One of the tenets of procedural fairness is that they should not have to meet the same case more than once.

[30] This claim had a bit of a history prior to the trial. It had originally been placed on a regular docket, and was adjourned over the objections of Mr. Bedash, because counsel for the Defendant was unavailable. It came on before me on another regular sitting and did not get reached, whereupon I arranged a special date for the parties.

[31] On the very first date, as Mr. Bedash was leaving the court, I engaged him in a brief discussion to ascertain whether the case could be heard during a regular sitting. He was quite confident that it would not take very long, because he had all of the proof that he needed in his file folder. I tried to make sure that he understood the need for him to come prepared with all of his witnesses, which could increase the amount of time needed. Without knowing much about his case, but mindful of problems that often occur in construction cases, I told Mr. Bedash that bringing documents is often not sufficient; we need to hear from witnesses. Mr. Bedash appeared very confident and insisted that he was a knowledgeable marine engineer and that the case was very straightforward.

[32] At the eventual trial, the Defendant was represented by counsel, as is its right. Counsel for the Defendant cross-examined Mr. Bedash, and his witness Ms. Archer. Because Mr. Bedash had subpoenaed her client's construction

manager, Andrew Holley, she brought him to court and produced the documents that were referenced in the subpoena.

[33] Technically, Mr. Holley was the Claimant's witness. Had I simply allowed him to call Mr. Holley, he would have been restricted to examination in chief, and counsel for the Defendant would have been permitted to cross-examine him. Instead, I directed counsel to call Mr. Holley briefly, herself, and then turn him over to Mr. Bedash for cross-examination. This was a significant benefit to Mr. Bedash, which he may not fully appreciate. As it was, he cross-examined Mr. Holley at great length, certainly for well more than an hour, to very little effect other than to badger Mr. Holley and use his questions as a way to make statements and give evidence that he was not allowed to give in his own testimony, because they were either egregious hearsay or purported expert statements which he was unqualified to make.

[34] When it became clear that the Claimant had no more evidence to call, and the trial had gone for more than four and a half hours, I asked counsel for the Defendant if she intended to call any evidence. Instead, she moved for a non-suit and indicated that she did not propose to call any further evidence as there was no case to meet.

[35] I attempted to explain to Mr. Bedash that what the Defendant was saying, was that he had not established the necessary elements of a case. It was only at that point that he sought leave to have an opportunity to continue the trial another day, when he could, to put it colloquially, plug the holes in his case.

[36] In my opinion, to have allowed him to do that would have been fundamentally unfair to the Defendant.

[37] Mr. Bedash is a highly educated individual. Although English is not his first language, and he speaks with a pronounced Russian accent, his command of English is near-perfect. I believe that he had ample opportunity to know the case that he had to prove, and he simply chose to focus on other things that did not achieve what he hoped for. While I would not penalize him for failing to have legal advice, it is clear that even a small amount of advice might have steered him into a different trial strategy which might have been more productive.

[38] To have allowed him to come back to court, after I had already ruled against him, to attempt to prove the critical fact which he failed to prove, would have been tantamount to giving him two “kicks at the can.” That would have been grossly unfair to the Defendant.

[39] In the result, the Claim must be dismissed.

Eric K. Slone, Adjudicator