Claim No: 354169

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Oderkirk v. Crittenden, 2011 NSSM 65

BETWEEN:

DONALD ODERKIRK and HEATHER ATKINS

Claimants

- and -

JAMES CRITTENDEN and MARGARET CRITTENDEN

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on October 4, 2011

Decision rendered on October 12, 2011

APPEARANCES

For the Claimants	self-represented
For the Defendants	William J. Chisholm Counsel

BY THE COURT:

[1] The Claimants purchased a mini-home from the Defendants in April of 2009. Some two years later, they experienced trouble with their septic system resulting in a very unwelcome expense of more than $17,000.00 to have a new system installed. They blame the Defendants for having misled them into believing that the septic system was in good working order.

The evidence

[2] The Defendants had owned the property since about 1993. They both testified that they had the septic routinely pumped out maybe three or four times during their ownership. They stated that they never had a problem with it.

[3] The Defendants signed a Property Condition Disclosure Statement, which is fairly common practice in the real estate business. In that PCDS they represented that they were not aware of any problems with the septic system, and it was this statement upon which the Claimants say they relied.

[4] The Agreement of Purchase and Sale gave the Claimants the right to have the septic system inspected and tested by someone of their choice (at their expense), but they decided not to take this step. One thing they did was to request a copy of the invoice from the last time the system had been pumped out. An invoice from Pettipas Septic was produced, which indicated that the system was pumped out in July 2008 at a cost of $300.00 plus HST. The Claimants did not contact Mr. Pettipas before purchasing the property, to see if he had anything to say about the septic system.

[5] The problems that the Claimants experienced began in the spring of 2011. They noticed a smell in their back yard, which was worst when the washing machine had just gone through a rinse cycle. After several months, they decided to have the septic dug out and exposed, to see if there was an issue that could be seen. This was done on July 23, 2011. As the testimony and photographs demonstrate, the tank appeared to have been covered with decomposing wooden planks, rather than a concrete cover. When the tank was ready to be pumped out, it was found to contain a great deal of debris that could not be pumped out because it would have damaged the machinery. There also appeared to be missing an internal baffle that would have been necessary for proper functioning. The result was that when the tank filled up, not only liquid but solids were sent out to the septic field. The advice that the Claimants got was that the whole system was not salvageable, and it had to be replaced. This was not only expensive, but inconvenient as there was a delay getting it done and the Claimants could not use their shower or washer for some six weeks until the new system was fully installed.

[6] The Claimants started this claim and made a number of allegations. They say that the septic system should have been condemned by Mr. Pettipas in 2008. They accuse the Defendants of selling the property because they did not want the expense of replacing the septic system. They accuse the Defendants of knowing that the system was malfunctioning, and deliberately misleading them on the PCDS.

[7] Mr. Guy Pettipas was subpoenaed as a witness by the Defendants. He testified that he has been in the business of pumping out septic tanks for about twelve years. He said that he does not look for trouble; when he is asked to pump out a tank, that is what he does. He normally does not investigate to see if

there might be problems. In any event, he stated that he is not qualified to work on septic systems; only an engineer can do that.

[8] In this particular case, he did not remember much. He recalled that the tank was using wooden planks for a cover, which he said was very common with older systems in Nova Scotia. He admitted that this was not proper practice, but he does not think it is his job to tell people what to do. He stated that if he had become aware of an actual problem, he would have said something to the homeowners but he did not notice anything unusual.

The claim

[9] The Claimants essentially base their claim on their suspicions and what they believe must have happened. Unfortunately for them, this is not good enough.

[10] Claims based on an alleged misstatement in a PCDS fall under the law of misrepresentation. Essentially, the Claimants must prove that the Defendants made a statement that they knew to be false (in which case it would be fraud) or that they ought to have known was false, in which case it would be negligence. The Claimants then have to prove that they were misled, and suffered damage.

[11] Here I have no trouble accepting that the Claimants relied on the PCDS.

[12] What the Claimants have not proved is that the septic system was not in good working order at the time, or that the Defendants knew, or ought to have known, that they were making a misleading statement.

[13] It is significant that for two years after taking possession of the property, the Claimants experienced no problems. A lot can happen in two years. They conceded on cross-examination that septic systems have a finite lifespan, and this system was approximately thirty years old.

[14] More to the point, given that the Claimants did not notice any problem for two years after taking possession, it is highly probable that the Defendants were also not experiencing problems. The Claimants' theory would require me to believe that the Defendants had a malfunctioning system, to their knowledge, which then miraculously operated properly for two years before acting up again. This is highly improbable.

[15] I find that the overwhelming likelihood is that the Defendants did not experience any actual problems with their septic system, and believed that having it pumped out every few years was what kept it going. There is no evidence that they knew much about septic systems, nor that they gave it any particular thought. I find that when they said that they were unaware of any problems, they were telling the truth.

[16] It is also most probable that this was an old system reaching the end of its usable lifespan. There is no evidence that the Defendants knew how little life it still had in it, because it was still working for them.

[17] Had the Defendants actually known about problems with the system, it seems unlikely that they would have agreed to allow their purchasers to have the system tested by an expert, because they would have risked having the problem surface.

[18] Under all of the circumstances, the claim cannot succeed. The Claimants are entitled to their suspicions, but suspicions do not count for much in a court of law. There is simply no evidence to support their suspicions. In fact, on all of the evidence I do not believe that their suspicions are well-founded. Of course I understand that the Claimants did not budget for this large expense, and their distress is understandable, but the Defendants are not responsible. The Claimants took the property on an “as is” basis and are caught by the legal principle of “buyer beware.”

[19] The claim is accordingly dismissed.

Eric K. Slone, Adjudicator