Claim No: SCCH - 467375

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as; Beaver v. Home Depot Canada GP ULC, 2017 NSSM 59

BETWEEN:

EMILY BEAVER and DAVID BEAVER

Claimants

- and -

HOME DEPOT CANADA GP ULC and
MASONITE INTERNATIONAL CORPORATION

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on October 24, 2017

Decision rendered on November 7, 2017

APPEARANCES

For the Claimants	Self-represented
For the Defendants	Brittany Larsen Counsel

BY THE COURT:

[1] The Claimants bought a front-entrance system for their home from the Defendant Home Depot Canada ("Home Depot") at their store in Halifax. The unit, which consists of a fibreglass door with glass inlays and two sidelights, was manufactured by the Defendant Masonite International Corporation ("Masonite.") The Claimants contend that the unit is defective because it fails to keep water out from the home. Despite many attempted repairs, the door still leaks.

[2] The Claimants seek "return of their purchase price of the door ($2,244.75), the exterior pediment trim that will have to be replaced with replacing the door ($343.40), the original install cost ($900), [plus] the cost to repair the water damage caused by the leaks ($300)", all of which totals $3,788.15.

[3] The unit was bought in July of 2015. The Claimants had seen it at the Halifax store, and intended to contract Home Depot also to provide installation. They were told that Home Depot did not at that time have any qualified subcontractors who could install this unit, and suggested that they could hire their own qualified carpenter. The Claimants did just that, contracting with a local house builder, David Dingwall of Dingwall Construction Inc. Mr. Dingwall installed the unit on November 18 and 19, 2015.

[4] Mr. Dingwall was not called as a witness at the hearing.

[5] Some weeks after the door was installed, during the first serious rainfall, the Claimants noticed water leaking in over the door sill. The Claimants reported the issue to Home Depot who in turn contacted Masonite. To make a

long story short, more than two years later the problem has not been resolved. The Claimants believe the unit is defective. The Defendants blame faulty installation.

[6] I do not consider the Claimants' evidence to be controversial, as far as it goes.

[7] They testified that Mike Sousa, an expert hired by Masonite, made the first visit to the premises in January 2016. Mr. Sousa created a written report to Masonite, which was in evidence before me, and he also testified.

[8] Mr. Sousa is employed by a company called UTS, which provides technical service for Masonite. In his initial report he defined the issue and gave his preliminary findings, in the following terms:

> **Homeowner Concern: Water and air infiltration.**
>
> **Tech Findings**
>
> **The current conditions are as follows: 1/8" variance in square, 1/8' variance in level, 1/16" variance in plumb, and 3/16" variance in true. The reveals are inconsistent and the exterior of the unit was not properly caulked. The rail cap was not adjusted to the proper height and the wedge pads are missing. The weather stripping was not cut to the proper length and the insert frames are missing screw plugs. UTS properly adjusted the rail cap.**
>
> **Able To Repair - No**
>
> **Restore the install to the manufactures specifications. Replace the weather stripping, screw plugs, and wedge pads upon manufactures discretion.**

[9] After having obtained Masonite's authorization to effect a repair, some months later (the date is not clear from the documents) Mr. Sousa reported as follows:

> **We arrived at site and replaced the door weather stripping, slab door sweep, and performed a water test which failed. The water was entering from the top of the door at both LH and RH top corners (see optional pictures) then entering the rough opening, showing up on the sill. We also inserted our flat bar under the sill to confirm there was no caulking from the sill of the sub-floor, resulting in additional water infiltration. The door is also racked in the opening as per the previous report 3/16 causing the door slab to not touch the weather stripping top striker side. We installed wedge pads to allow the weatherstripping to have better reach. After the installation of the wedge pad it helped to seal however is not the permanent solution.**
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> **Additional Notes**
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> **When we did the water test the customer was present and was on the steps with us to see the water was leaking because of the flashing detail. We would recommend that the door be re-installed to proper specifications and the exterior details repaired to allow water to properly shed the water away. Please also note that the customer had asked if the UTS tech could return to re-install the door however we UTS Tech instructed the customer we could however would need proper authorization from the proper authority to proceed.**

[10] This is how matters stood. Based on Mr. Sousa's recommendation, Masonite recommended that the door be removed and reinstalled. The Claimants brought in another home builder, Tom Foster of Fosterbuilt Construction to take this step. Mr. Foster was not called to testify. Nor was there anything in writing from him. According to the Claimants, Mr. Foster refused to uninstall and reinstall the unit because he believed that this would be futile and a waste of money.

[11] As matters now stand, the easily fixable deficiencies have been repaired. Specifically, the minor deviance from plumb has been attended to. The weatherstripping has been adjusted. But no one has removed the unit to allow it to be reinstalled tighter and with caulking in all of the places that can only be reached by removing the unit.

[12] I have a great deal of sympathy for the Claimants and the situation that they find themselves in. They bought an expensive item and were forced to find their own installer because Home Depot did not have anyone available. The instructions should not have been that hard to follow. Any qualified carpenter or house builder should have been able to install the unit.

[13] The minor variances that Mr. Sousa found seem on their face to be minuscule, though I did not have any specific evidence on what effect those minor variances might have done to the performance of the unit.

[14] Doors and windows should not need a rocket science level of qualifications to install. However, the most plausible explanation for all that has gone wrong is that something was wrong with the installation, and in particular at the bottom where the door unit frame fits into the opening. The evidence suggests that it was supposed to have been seated on a bead of caulking, and that this may not have been done.

[15] The Claimants have not presented an alternate theory to explain the leaking, beyond suggesting that it must be defective. Clearly in some cases it is enough merely to show that something is not performing properly, for the inference to be drawn that it is defective. Here, everything that is visible without

removing the door has been inspected and adjusted. The only things that have not been inspected are the hidden elements that would be revealed by uninstalling the unit to see what might explain the leaking, for example a lack of proper caulking. Although some additional caulking appears to have been added by Mr. Sousa, he would not have been able to gain access to the area underneath the frame where it is specified that there should be caulking.

Legal principles

[16] The case is one for breach of contract. Although not specifically pleaded by the Claimants, they are entitled to rely upon the implied warranties under the *Sale of Goods Act* and the *Consumer Protection Act*, which includes the warranty that goods sold for a particular purpose will be “reasonably fit” for the intended purpose. Such warranties apply against the seller, and not the manufacturer of goods. The claim against Masonite would have to be based on the express warranty supplied with the product, which is fairly limited. In a practical sense, it makes no difference when a reputable seller is involved, as the seller can engage the manufacturer in what would be referred to as a third party proceeding.

[17] In the case of an item that stands alone, in the sense that it does not need to be installed, such as a car, the Claimant may not have to prove anything more than that the item does not work, casting the onus back on the seller to show that the item is not defective. But in the case of an item that requires installation by a skilled worker, the Claimant would have an onus - perhaps not a difficult one - to prove that there was nothing about the installation that could explain why it is not performing as intended.

[18] The law in this area is discussed in *Muskoka Fuels v. Hassan Steel Fabricators Limited*, 2011 ONCA 355 (CanLII), where an oil leak resulted from an allegedly faulty tank. The court stated:

> [18] The Supreme Court of Canada has indicated that s. 15(2) of the Sale of Goods Act may apply in circumstances where the cause of the defect cannot be established. In *Schreiber Brothers Ltd. v. Currie Products Ltd.*, 1980 CanLII 11 (SCC), [1980] 2 S.C.R. 78, Laskin C.J., writing for the court, held that while the buyer bears the onus of proving the existence of a defect on a balance of probabilities, the actual cause of the defect need not be proven. In that case, the plaintiff roofing contractor purchased asphalt from the defendant, which was manufactured by a third party. The plaintiff installed a roof which then failed due to a previously unencountered type of blistering that could not be explained. The trial judge had allowed the plaintiff's claim for damages, concluding that on the balance of probabilities, there were no possible causes of the failure of the roof, other than a latent defect in the asphalt. The Court of Appeal set aside the trial judgment, holding that the plaintiff had failed to show that the defect existed when the asphalt left the manufacturer's plant.
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> [19 In restoring the trial judgment, the Supreme Court did not agree with the Court of Appeal that "there must be a credible theory to account for the defect". Once other probable causes had been excluded, the court was left "with the fact of a defect in respect of a product emanating from the [defendants]." **Once the buyer proved that the defect of the asphalt was not attributable to anything that he did or failed to do**, an inference could be drawn from the evidence as a whole that the defect existed at the time the product was delivered to him.
>
> [20] The circumstances of this case are much the same. The trial judge found that the tank was only used as intended, **that it was properly installed**, that it was not damaged during or after installation by some external mechanism, that it did not fail due to a problem with a weld and that it did not fail due to improper maintenance. The trial judge also noted that the evidence was inconclusive on the ultimate explanation for the internal corrosion that caused the tank's failure. The examination of the tank at the time of its purchase would not have revealed the unknown defect. As such, I conclude on the findings of the trial judge that the implied condition of merchantability under s. 15(2) of the Sale of Goods Act was breached. **(Emphasis added)**

[19] I take from this case that there must be some proof that the installation was proper, and the Claimants cannot simply rely on the fact that they hired a qualified installer. At the very least, they ought to have had Mr. Dingwall present to testify, so that he could have been cross-examined by the Defendants about the details of what he did and did not do. Also, Mr. Foster might have been called to shed light on why he dismissed the idea of removing and reinstalling the door. His opinion that it would just be a waste of money seems, with respect, somewhat cavalier, though he perhaps might have had something useful to add had he testified.

[20] In the final analysis, I am unable to place liability on either Defendant and the case must be dismissed.

Eric K. Slone, Adjudicator