SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Zafiris v. Surette*, 2019 NSSM 18

Date: 2019-05-02
Docket: SCCH - 484952
Registry: Halifax

Between:

Alexander Zafiris

Claimant

- and -

David Surette

Defendant

Adjudicator: Eric K. Slone

Heard: April 2, 2019 in Halifax, Nova Scotia

Appearances For the Claimant, self-represented

For the Defendant, Stephen A. Russell, Counsel

BY THE COURT:

Introduction

[1] This case is another in a long line of cases testing the potency of a Property Disclosure Statement (PCS) given in connection with a real estate transaction. The PCS (formerly known as a Property Condition Disclosure Statement or PCDS) is a set of answers to questions where the seller of real property is intended to disclose a great deal of relevant information about the condition of the property, especially (but not limited to) so-called latent or hidden defects that might never be picked up in a routine property inspection.

[2] There is no legal requirement for sellers to provide a PCS, but there is a prevailing expectation that they will do so, and understandable suspicion if they refuse.

[3] The PCS is not a warranty that the property is free of defects. It simply states what the seller knows. For the seller to be held responsible after the fact when something arises that is at odds with what the seller stated, there is a requirement to prove that the seller knowingly gave a false or misleading statement. When a court is faced with sellers who testify that the statement was true to the best of their knowledge, there must be some evidence that convinces a court to draw the inference that they were lying (or being grossly negligent in their statement) when they made it.

[4] These are not easy cases to prove, though some cases succeed.

The Facts

[5] The Defendant, David Surette and his wife purchased this older, 2-unit property in question in west end Halifax in 2012. They occupied the upper unit, while the lower unit (including the basement) was tenanted for part of the time. At all times the Defendant and his family had access to the basement to use the laundry facilities but did not use it for much more than that, plus a bit of storage.

[6] Mr. Surette testified that he seldom went down to the basement, which was mostly-unfinished, even rough space. On those few occasions, he says he never

saw water coming in, though there was some water staining (mostly at the rear of the house) that suggested some amount of water had leaked in at some point in the past. He also testified that he never had a complaint from a tenant about leaking into the basement.

[7] He testified that the front of the basement included some built-in units that obscured the foundation walls, and he decided before putting the property up for sale in late 2017 to remove those structures to make sure that the foundation walls were all visible to a potential purchaser.

[8] Mr. Surette is himself a realtor and is familiar with the PCS and issues that can arise from it. He and his wife knew that the basement had some degree of dampness, and accordingly made the following disclosures in the PCS:

> **a.** Are you aware of any structural problems, unrepaired damage, dampness, or leakage? **Yes. Dampness and potential minor water penetration in basement.**

[9] The PCS was originally signed in October 2017 and renewed in January 2018 while the sale to the Claimant was being negotiated. There were no changes between the versions signed in October and the one in January.

[10] A provision was also put in as part of Schedule B to the agreement, wherein the sellers warranted *"that during their ownership they have had no problems with water leakage or seepage in the walls, or any part of the property, except for basement dampness and potential minor water penetration no flooding"*

[11] Accordingly, the representation respecting the basement can be found in two places, although it is not clear that either one is stronger than the other.

[12] After some negotiation, the sale was finalized at a price of $497,450.00, and closed on May 30, 2018.

[13] As is common practice, the Claimant had a property inspection done before the agreement became firm and binding. I will say more about that later.

[14] On October 28, 2018, the Claimant became aware of significant water

leaking into the basement during a time of heavy rains. He had the presence of mind to take a video of the event, which graphically shows water coming in at an alarming rate in several places. In the following days he had several companies in to provide quotes and get opinions on what it would take to seal the basement. He eventually settled on a company known as Ridgeback Basement Systems. The work, as described in the invoice, involved installing a *"WaterGuard sub-floor drainage system .... install[ing] a SuperSump pump system with cast iron pump, liner, airtight lid with airtight floor drain, ClearPumpStand and WaterWatch alarm system ...."* Simplistically stated, the system catches water under the floor and directs it out through pipes, with the help of sump pumps. This appears to be the preferred type of system where it is impossible or impractical to prevent water from passing through the foundation or coming up through the floor due to hydrostatic pressure.

[15] The cost for this system was $12,132.50, which the Claimant seeks to recover from the Defendant in this claim.

[16] When the Claimant first contacted the Ridgeback company, he was advised that this was not the first time that they had been out to the property. It just so happened that in December 2017 they had been contacted by Mr. Surette to provide a quote on a similar, but less elaborate system than the one that they installed on behalf of the Claimant. The quote that they had provided to Mr. Surette was for $6,343.40.

[17] The fact that the Defendant had obtained a quote on a drainage system convinced the Claimant that the Defendant perhaps knew more than he and his wife had disclosed on the PCS. This emboldened him to make the claim that is now under consideration.

[18] Mr. Surette explained that at the time the home was listed for sale, he anticipated that a potential purchaser might have a concern about even the small amount of leakage that he knew about. He thought it would be wise to know how much it would cost to have a system installed that would deal with this leakage. He anticipated that a potential purchaser might raise the issue, and that he could show them the estimate and negotiate a purchase price that took into account this contingency.

[19] He testified that he was a bit surprised that the Claimant did not raise any objection or try to negotiate a reduction in light of the dampness problem.

[20] Which brings us to the inspection that the Claimant had done by the inspection company, Inspector Clue So Home Inspections.

[21] As stated, the Defendant had actually removed structures to ensure that the basement walls were all visible to potential purchasers. The Claimant's inspector wrote the following after having examined the basement and seen evidence of water incursion:

> ... as discussed, older basements were never designed to be finished. They usually would experience at least dampness and often seepage, and were generally built to be unfinished utility areas. This basement does experience seepage/dampness. Leave this basement as is, do not bunch stored goods together, extend the downspouts away from the foundation, install window wells in areas, remove a strip of pavement in contact with the foundation and attain positive grades away from the foundation; 0-1 years. See sketches in mail out. It may not be possible to cost effectively completely stop dampness and possible occasional seepage here. You can reduce it. If the basement seepage is worse than it appeared today, it is possible the roof and groundwater upgrades noted in the report may not be sufficient. It is possible you may need to install a deep sump pump; $1500+ possible. There are other more expensive options to try to reduce the risk of basement flooding. One example is an internal seepage tile $3-5000 plus.

[22] The Claimant did not invoke the condition that would have permitted him to back out of the agreement, based on an unsatisfactory inspection.

[23] It is the Claimant's position that what he experienced in October 2018 was nothing like what he understood may have occurred in the past.

Property Condition Statements

[24] I had occasion some years ago in *Moffatt v. Finlay*, 2007 NSSM 64 (CanLII) to comment on what were then called Property Condition Disclosure Statements, and this bears repeating:

> [28] I will observe at the outset that the PCDS is at most a modest

exception to the principle of caveat emptor or "buyer beware" which is alive and well in this jurisdiction, as observed in the reported cases to which I was referred, including the recent decision of Associate Chief Justice Smith in *Gesner v. Ernst*, 2007 NSSC 146 (CanLII) at paragraph 44:

> [44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she finds it unless the purchaser protects him or herself by contractual terms. Caveat emptor. *(McGrath v. MacLean et al.* (1979), 1979 CanLII 1691 (ON CA), 95 D.L.R. (3d) 144 (Ont. C.A.)).

[29] Generally, sellers of real property make no warranties as to its condition. It is for buyers to perform their own inspections and, for the most part, take their chances. I believe that most buyers of resale homes appreciate that there may be flaws or imperfections that they will inherit, and they anticipate having to deal with them as and when they arise or as resources permit.

[30] The difficulty with such a system has always been in the area of latent or hidden defects that only the sellers know about and no inspection, no matter how rigorous, could be expected to reveal. Although the PCDS does not restrict itself to questions about latent defects, in my view it is the potential presence of a known latent defect that the statement is designed to address.

[31] Even so, the PCDS form is somewhat limited, being expressly qualified as something only to the "best of [the seller's] knowledge," and quite grudging in what it asks and reveals. For example, the question "are you aware of any problems with water quality, quantity, taste or water pressure?" might have been worded quite differently and more helpfully. It might have asked "are you aware of any problems that have ever manifested with water quality, quantity, taste or water pressure, or that might point to such a problem manifesting in the future? In an arguably more perfect system, such a question would be asked.

[32] The limited effect of the PCDS was considered at some

length in the *Gesner* case (above). It is worthwhile to quote at some length from the reasons of Smith A.C.J., which I endorse (and which are binding on me):

> [54] A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property (see for example: *Arsenault v. Pedersen et al.*, [1996] B.C.J. No. 1026 and Davis v. Kelly, [2001] P.E.I.J. No. 123.)
>
> [55] Support for this conclusion is found in the Disclosure Statement itself. While the top of the document indicates that the seller is responsible for the accuracy of the answers given in the Disclosure Statement, just above the signature line for the seller is the following statement "….information contained in this disclosure statement has been provided to the best of my knowledge.". Further, after the seller's signature is the following "NOTICE: THE INFORMATION CONTAINED 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 THIS INFORMATION…." [Emphasis in the original]. Finally, above the purchaser's signature line is the following statement "Buyers are urged to carefully examine the property and have it inspected by an independent party or parties to verify the above information."

[25] In the last ten years the law has not changed. The PCS remains a

statement by the vendor of his or her knowledge as to the condition of the property. A claim based on the PCS must allege that the maker of the statement was either fraudulently or negligently making such a statement. Absent such a finding, the Claimant cannot succeed.

[26] The Claimant here must prove that Mr. Surette knew that his basement was in worse condition than he represented, and that his statement *"Yes. Dampness and potential minor water penetration in basement"* was a deliberate or negligent understatement. The same considerations would be true in the case of the warranty that essentially echoed the PCS.

[27] It is by no means impossible for a claimant to succeed in a PCS case. Several such cases have succeeded before me, including *Crann v. Hiscock*, 2012 NSSM 9 (CanLII) and *Fiddes v. Beattie*, 2018 NSSM 21 (CanLII). Both of those cases involved wells that proved inadequate to supply the home with water, where the PCS made no such disclosure. The factual circumstances in both cases were such that I was able to infer that the vendors must have known that their wells were underperforming. The reason such an inference was possible is that the sellers must have experienced water shortages, since everyone uses water. These wells did not stop performing all of a sudden. In both above instances, I found that the sellers had most likely gotten used to rationing water, knew that this was not normal, and they ought to have disclosed how their wells were barely meeting their own needs.

Discussion and conclusions

[28] So, I must ask: what inferences can be drawn about the state of Mr. Surette's knowledge at the time of giving the PCS?

[29] Mr. Surette admits that he knew there had historically been water leakage into the basement, though he had never seen it actively leaking. He rarely visited the basement and saw only what was there to be seen: staining and dampness. This he disclosed. He stated, and I accept, that he knew this might raise questions with a potential purchaser and he wanted an appreciation of the amount that it might cost to damp-proof the basement. The estimate that he obtained was barely more than 1% of the purchase price of the home - not a hugely significant matter.

[30] It is entirely possible that the water incursion being experienced in

October 2018 was unlike anything that had occurred in the five plus years of the Defendant's ownership. We live in a time of unusual weather events. It is also possible that water had on occasion entered the basement but had mostly dissipated by the time the Defendant or his wife next went down there on one of their infrequent trips. It is quite possible that the porous quality of this basement allowed water to drain out quickly after coming in, and the only evidence that it had been there was the staining and dampness that the Defendant knew about and fully disclosed.

[31] I cannot infer on these facts that the Defendant made a false or misleading statement, much less that he did so intentionally.

[32] I accept the position of the Defendant and his counsel that this is a classic buyer beware case. The Claimant had in his possession knowledge that the basement was damp, and the presence of visible water staining ought to have alerted him to the risks that he was taking. His own inspector directed him to take certain steps to minimize the risk of major water incursions, namely *"extend the downspouts away from the foundation, install window wells in areas, remove a strip of pavement in contact with the foundation and attain positive grades away from the foundation*." There was no evidence that the Claimant did any of these things. He was also alerted to the possible need for a sump pump and internal seepage tile, which are similar to what he eventually did.

[33] In all of the circumstances, I find that there is no basis for a finding that the Defendant misrepresented the state of his knowledge, and as such the claim cannot succeed.

[34] The claim will accordingly be dismissed.

Eric K. Slone, Adjudicator