IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Atwood v. Fullerton*, 2020 NSSM 22

Claim: SCY No. 497214
Registry: Yarmouth

Between:

CAMERON JASMES SCHONEVELD ATWOOD

-and-

CLAIMANT

GARY LAWRENCE FULLERTON and SHAWNA MARINDA FULLERTON

DEFENDANTS

Adjudicator: Andrew S. Nickerson, Q.C.
Heard: October 14, 2020
Decision: November 16, 2020
Appearances:
The Claimant, self-represented
The Defendant, self-represented

DECISION

Facts

[1] The parties agree that in the summer of 2019 the defendant sold real property at 16 Courtney placing Clark's harbour, Shelburne County Nova Scotia. I have not been provided with the agreement of purchase and sale, but I do not consider that crucial to my decision.

[2] The parties both further acknowledge that dated July 19, 2009 the Defendants signed a property disclosure statement on the approved Nova Scotia Real Estate Commission form (contained in the Claimant's exhibit package) which contained the following questions:

> "Are you aware of any structural problems, unrepaired damage, dampness or leakage?"

[3] The Defendants checked the box marked "No".

> “Are you aware of any repairs to correct structural damage, leakage or dampness problems?”

[4] The Defendants checked the box marked “No”.

[5] Jennifer Atwood, the Claimant's mother, gave evidence on his behalf. She stated that Mr. Atwood was at sea and unable to attend the hearing. She indicated that she wished to proceed in his absence and could provide the relevant evidence. She stated that she assisted her son and arranging for the purchase and examining the property. Her evidence was that they looked at the property and got the disclosure statement. She acknowledged that she had arranged for a friend, who was a carpenter, to inspect the property. She stated that the agreement of purchase and sale was entered into on the strength of the representations contained in the disclosure statement.

[6] The transaction closed on August 26, 2019. She said that five days after that there was a storm which resulted in the basement flooding. She says the flooding was so serious that the sump pump could not handle it. She acknowledged that the power had gone out, but testified that they had a generator which was hooked up promptly, and permitted the continued operation of the sump pump.

[7] She testified that the flooding kept happening throughout the fall on four or five occasions between September 7 and November 24, 2019, each time that it rained. In November of 2019 she engaged Eugene Newell & Sons Construction Ltd to correct the problem. The claimant's exhibit package contained an invoice from that company for $10,102.18 which details the remedial work.

[8] She spoke to an extensive package of photographs (contained in the Claimant's exhibit package), which showed extensive flooding and the work as it was performed by Eugene Newell & Sons Construction Ltd. After this work was done, they had no further problems.

[9] Erin MacIsaac testified. She lives with Mr. Atwood, and did so at the time the house was acquired. She confirmed that she and Mr. Atwood relied on the disclosure statement. She testified that shortly after closing, and each time there was a rainstorm in the fall of 2019, there was significant flooding in the basement that the sump pump could not handle. She referred to the water as "squirting up". She said the power to the sump pump was always on, as they had a generator which was used to ensure that the sump pump was functioning. She stated that the flooding in the basement was so severe that she had to wear boots in order to go

into the basement.

[10] Shawna Fullerton testified that she had had some problems with water in the basement while they owned the house, but that they had, well prior to selling the house, engaged Gary d'Entremont to repair the problems. She testified that the sump pump always took care of any water and that they had had no more issues when they lived there. She said that the water only came up in the drain and the sump pump took care of it. She stated that on September 7, 2019 the rains would have been very severe because that was the time of hurricane Dorian.

Analysis

[11] There are a significant number of cases in Nova Scotia which establish the law that I must apply in this case and many more could be cited. I find the analysis of Justice Arnold in **Apogee Properties Inc. v. Livingston, 2018 NSSC 143** to provide a good summary which I hope will provide the parties with an understanding of the law that I must apply. Beginning at paragraph 36 of his decision Justice Arnold states:

> [36] In general, the *caveat emptor* rule applies to real estate transactions and a buyer will take the property "as is" (subject to certain exceptions). The British Columbia Court of Appeal said, in *Nixon v. Maciver*, 2016 BCCA 8, [2016] B.C.J. No. 22:
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> > 31 The doctrine of *caveat emptor* was colourfully summarized by Professor Laskin (as he then was) in "Defects of Title and Quality: Caveat E111ptor and the Vendor's Duty of Disclosure" in Law Society of Upper Canada, *Contracts for the sale of land* (Toronto: De Boo, 1960) at 403:
> >
> > > Absent fraud, mistake or misrepresentation, a purchaser takes existing property as he finds it, whether it be dilapidated, bug-infested or otherwise uninhabitable or deficient in expect d amenities, unless he protects himself by contract terms.
> >
> > 32 The leading decision on the maxim is *Fraser-Reid v. Droumtsekas* (1979), [1980] I S. C.R. 720 at 723, in which Mr. Justice Dickson (as he then was) recognized the continuing application of the doctrine of *caveat emptor* to the sale of land:
> >
> > > Although the common law doctrine of *caveat emptor* has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. In 193I, a breach was created in the doctrine that the buyer must beware, with recognition by an English court of an implied warranty of fitness for habitation in the sale of an uncompleted house. The breach has since been opened a little wider in

> some of the states of the United States by extending the warranty to completed houses when the seller is the builder and the defect is latent. Otherwise, notwithstanding new methods of house merchandising and, in genera l, increased concern for consumer protection, *caveat emptor* remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems fi-om the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself , seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.
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> 33 The doctrine continues to apply to real estate transactions in this province, subject to certain exceptions: fraud, non-innocent misrepresentation, an implied warranty of habitability for newly-constructed homes, and a duty to disclose latent defects.
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> 34 A vendor has an obligation to disclose a material latent defect to prospective buyers if the defect renders a property dangerous or unfit for habitation. A latent defect is one that is not discoverable by a purchaser through reasonable inspection inquiries... [Emphasis in original.]

[37] Therefore, where there are defects that could have been discovered during a routine inspection by an ordinary purchaser (patent defects), the *caveat emptor* rule of "buyer beware" will apply. However, *caveat emptor* will not shield vendors who have made fraudulent or negligent misrepresentations with respect to latent defects. A latent defect is one that is not discoverable by a purchaser through reasonable inspection. Warner J. distinguished between patent and latent defects in *Thompson v. Schofield,* 2005 NSSC 38, [2005] N.S.J. No. 66:

> 18 A second legal question requiring clarification, for the purposes of this decision, is, what is a patent defect and what is a latent defect? A patent defect is one which relates to some fault in the structure or property that is readily apparent to an ordinary purchaser during a routine inspection. A latent defect, as it relates to this case. is a fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. For the purposes of the decision, it is not disputed that whatever the defect was that caused the flooding in the basement, that it was a latent defect, that is, a defect which was not apparent on an ordinary inspection of the property. The defendants claim that because it was latent, they also were not aware of it. My understanding of the defendant's memorandum is that they acknowledge that, because the basement was finished and because neither building inspector nor the plaintiffs had the right, before the closing, to take the basement apart, their ability to determine any defects in the property was

> limited to those defects which would be apparent without taking apart the walls or the floors or the panelling that covered the cement walls.

[38] See also *Gesner v. Ernst,* 2007 NSSC 146, [2007] N.S.J. No. 21l, at para 44, and *MacDonald v. Barbour,* 2012 NSSC 102, [2012] N.S.J. No. 142, at para. 26.

[39] The elements of negligent misrepresentation were set out in *Queen v. Cognos,* [1993] 1 S.C.R. 87. Cromwell J.A. (as he then was) summarized these elements in concurring reasons in *Barrett v. Reynolds* (1998), 170 N.S.R. (2d) 201, [1998] N.S.J. No. 344, leave to appeal refused, [1998] S.C.C.A. No. 501:

> 137 In *Queen v Cognos*, [1993] 1 S.C.R. 87 at 110 Iacobucci J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation : I. there must be a duty of care based on a "special relationship" between the representor and the representee; 2. the representation in question must be untrue, inaccurate or misleading; 3. the representor must have acted negligently in making the misrepresentation; 4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and, 5. the reliance must have been detrimental to the representee in the sense that damages resulted.

[40] LeBlanc J. summarized the elements of fraudulent misrepresentation in *MacIntyre:*

> 13 The test for fraudulent misrepresentation was set out by Palmeter C.J. Co. Ct. in *Webster v. Steeves*, [1987] N.S.J. No. 211. There must be proof of the following elements:
>
> 1. That the representations complained of were made by the defendant to the plaintiff;
> 2. That the representations made were false in fact;
> 3. That when made they were known by the representor or to be false, or recklessly made, without knowing if they were false or true; and
> 4. That by reason of the representations, the plaintiff was induced to enter the contract.

[12] The evidence does seem clear that the Defendants did have some prior problems with water or dampness in the basement. I am satisfied that this would in fact be a latent defect that the claimants would not have been able to ascertain in any kind of normal inspection. I have no evidence to support a conclusion that even the carpenter, who examined the house, would have been in a position to determine that there was a flooding problem at the time his inspection was done. In my view, the problem only became observable when the rains began in the fall of 2019, or at the very least I have no evidence to suggest otherwise. I conclude that this was not a defect, as Justice Warner put it, “readily apparent to an ordinary purchaser”.

[13] While it may be debatable, with respect to the first question that I have cited, that the Defendant was under an obligation to disclose any past problems in response to that question, it is absolutely clear that the answer "No" to the second question is simply not factually correct. The Defendant's evidence does not deny this.

[14] I am satisfied that all of the elements required by **Queen v Cognos** and all of the elements listed by Justice LeBlanc J. in **MacIntyre** are present in this case. The representation was clearly made by virtue of the disclosure statement. The representation that there were no past repairs is admittedly false. It had to have been known to the Defendants to have been false, since they admitted that there had been past repairs. In my view, it is a reasonable inference that had these facts been disclosed, that the Claimant would either not have into the contract, or would have required further investigation and possibly a negotiation of an altered purchase price.

[15] I wish to make it clear to the Defendants that I am not finding that they deliberately responded falsely and attempted to fraudulently mislead the claimants, however they are responsible for the answers which they gave. I consider that they indeed were negligent and failed to properly consider their answer and ensure that it was factually truthful.

[16] Therefore, when I apply the law applicable in this province to the facts before me in this case, I have no choice but to find in favour of the Claimant. I will grant judgement to the Claimant in the amount of $10,102.18. The Claimant will also have his costs in the amount of $199.35 for the filing fee and $276.00 for service of the notice of claim on the Defendants.

[17] I allow the claim as follows:

Claim	$10,102.18
Costs	$ 475.35
Total	$10,577.53

Dated at Yarmouth Nova Scotia this 16th day of November.

Andrew S. Nickerson Q.C., Adjudicator