

In the Small Claims Court of Nova Scotia
Citation: *Willison v. Robertson*, 2021 NSSM 12

SCT 495886

Matthew Ernest Willison
[address deleted]

Claimant

AND

Troy Robertson
[address deleted]

Defendant

Order

On March 1, 2021 a hearing was held of the above matter, with the Claimant representing himself and Shawn Dempsey representing the Defendant. The Claimant sought costs to replace a broken pellet stove in the dwelling purchased from the Defendant in 2019. The Defendant was also sued on the basis of representations made about a basement that has ongoing issues with water seepage during storms.

For the reasons attached to this order, I am dismissing the Claim against the Defendant. Each party shall bear their own costs for this proceeding.

Dated at Truro, in the County of Colchester, in the Province of Nova Scotia, this 30th day of April 2021.

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)

Shelly A. Martin
Adjudicator, Colchester County

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Reasons for Decision

Before

Shelly A. Martin, Adjudicator
Hearing held at Truro, Nova Scotia on 1 March 2021
Decision rendered on April 30, 2021.

Appearances

For the Claimant: Self Represented

For the Defendant: Shawn Dempsey

[1] This Claim stems from the Claimant's purchase of a 150-year-old home from the Defendant in 2019. Two issues are at the heart of this dispute. The first is a pellet stove that the Defendant discovered was broken days before the closing. The second issue is the basement that first flooded during a violent storm in July of 2019, but now regularly experiences water seepage after rain events.

[2] On June 11, the Defendant discovered the pellet stove was malfunctioning. He informed the Claimant and offered the choice of selecting a credit toward purchasing a new stove or having him facilitate the repair of the malfunctioning stove on the Claimant's behalf. Noting the striking appearance of the stove and its functionality the Claimant chose to "take the chance" and have the stove repaired. In subsequent months, the Defendant spent \$1108.75 in several attempts to fix the

stove, but ultimately, he was informed by technicians it could not be fixed. The Claimant felt the Defendant should “make it right” and claimed \$3800.00 would be the costs to replace the Pellet stove. However, under oath the Claimant testified that the stove he purchased to replace the broken one, actually cost \$1500.00.

[3] When the Defendant brought the malfunction to the Claimant's attention, the Claimant had options other than those presented to him by the Defendant, particularly, the option of requesting a holdback through his legal counsel. Instead, the Claimant took the risk and repeatedly chose to pursue the repair which unfortunately could not be effected. In reliance of the Claimant's choice, the Defendant spent over \$1100.00 to fix it. Though the Claimant suggested it would cost approximately \$4000 to replace the stove, on questioning he admitted he spent \$1500.00. For all of these reasons, I am dismissing this aspect of the claim.

The Leaky Basement

[4] The Defendant moved into home in 2010 and lived there for almost nine years. Now more than 150 years old, the basement of the home is divided into two: a “new” part with a concrete foundation and an a “old” foundation made of stone with what is described as a concrete between the stones. Floor in basement is a mix of concrete and sand.

[5] The Claimant first testified he received the Property Disclosure Statement prior to the first of three visits to the home prior to closing. On receiving the Property Disclosure Statement, the Claimant noted that section 1, which asks the seller to state to the best of their knowledge whether there are structural problems unrepaired damage, dampness or leakage, was not completed. The Claimant visited the home with his Realtor and asked about water. The Claimant testified the Defendant alluded to dampness in the basement but that it had “never leaked.” The Claimant acknowledges the extraordinary nature of the storm that occasioned the first flood in July 2019. The Claimant and his partner lost a significant number of Christmas decorations in what they thought at the time a was freak storm and extraordinary occurrence. The Claimant testified that the basement now leaks “most times that it rains.”

[6] The Defendant acknowledges the Property Disclosure Statement was completed by his wife, Theresa, who stated she did not complete section 1 because of the dampness that was present in parts of the basement at certain times per year. In her testimony, she likened this dampness as “like a sidewalk when it is drying, but never running water.” She testified that she was unsure how to complete

section 1 because of the dampness that was present in the basement. Mrs. Robertson then spoke to her Realtor, who asked if there was running water that ever inundated the basement. When Mrs. Robertson answered in the negative, she was advised by her Realtor to “not worry about it.”

[7] The Defendant's memory of the walk though is different from the Claimant. He testified that when they walked downstairs, he pointed out a bucket located near the chimney clean-out and indicated sometimes rain would get in the basement when the chimney cover was displaced by the wind. Farther into the building, he also pointed out dampness at the site of the electrical panel that occurred in the spring. The Defendant testified to no dampness beyond those issues he identified to the Claimant on the walk though. Upon hearing the Defendant's testimony, the Claimant did clarify that he recalled that discussion with the Claimant.

[8] The Latin maxim *Caveat Emptor* – “let the buyer beware” is widely understood and accepted as part of the law with respect to real estate transactions in Nova Scotia. A prospective purchaser of a property must examine, judge, and test the suitability of their purchase for themselves in order to reveal any obvious defects or imperfections. As a general rule, the purchaser of a property will take the property “as is” unless the purchaser uses contractual terms to protect themselves. There are cases in which courts have found exceptions to *Caveat Emptor* and have found liability where a contract for sale of a property has been induced by fraud or the property contains undisclosed latent defects (defects not discovered by conducting a reasonable inspection and making reasonable inquiries about the property) that render a property dangerous, or unfit for its intended usage.

[9] The Claimant's suit seems to be based on a belief that the Defendant was either deliberately or negligently dishonest in his statements about the water situation in the respect in the basement. In order for the Claimant to recover he has the onus of demonstrating to me, on a balance of probabilities that there was a fraudulent misrepresentation or, in the alternative, a breach of warranty.

[10] On a reading of *Lewis v. Hutchinson*, 2007 NSSM 4 (Canll) NS, and *Grant v. March*, 138 N.S.R. (2d) 385, to prove a contract was induced by false and fraudulent misrepresentation, the Claimant bears the onus of proving, with clear and convincing evidence that the misrepresentation - which the Claimant suggested was that the basement “never leaked” was:

- a) Made to the Claimant by the Defendant;
- b) False in fact;
- c) That when the Defendant made the statement that the basement never leaked he did so knowing it was false or did it recklessly, whether knowing it was true or not;
- d) That the Claimant was induced into buying the home because of the representation that the basement never leaked and has done so to his prejudice; and
- e) And that within a reasonable time after the discovery of the falsity of the representations the Claimant elected to avoid the contract and accordingly repudiated it. (see *Lewis v. Hutchinson*, 2007 NSSM 4, at para 21)

[11] Alternatively, to prove negligent misrepresentation the claimant must prove:

- a) There was a duty of care based on a special relationship between the Claimant and the Defendant
- b) The representation in question must have been untrue, inaccurate, or misleading;
- c) The representor must have still acted negligently in making said misrepresentations;
- d) The representee must have relied on the negligent misrepresentation;
- e) The reliance must have been detrimental to the Claimant. (see *Lewis v. Hutchinson*, 2007 NSSM 4, at para 24.)

[12] I accept the testimony of the Defendant and Mrs. Robertson, who lived in the home for approximately 9 years, that there was dampness at times in the basement, but that it was seasonal and not as Counsel for the Defendant suggested “water that had to be cleaned up.” Both parties acknowledged before me that Mr. Robertson was the first to raise potential issues with the basement and later, the stove with the Claimant. Although the building inspector was not called, I also note that the Defendant reported he found the basement to be dry. On the whole, I am not convinced that the Claimant has shown the Defendant was dishonest about the extent of water in the basement. I cannot find that Defendant misrepresented – whether intentionally or negligently – the fact that the basement did “not leak.”

[13] The Defendant provided an incomplete property disclosure statement to the claimant. Can we consider this as evidence the Defendant was attempting to conceal facts about water seepage in the basement? On the contrary, an incomplete section of a Property Disclosure Statement would prompt any reasonable purchaser of a home to immediately inquire on the items that are not completed. That is in

fact the effect the incomplete sections of the PDS had on the Claimant, who asked his real estate agent, Don Peppard, for advice and inquired further. I think it is important to recognize a PDS is not a warranty on the condition of the property. It simply asks Vendor to disclose facts of the property to the best of their knowledge (*Arsenault v. Pedersen et al.*, [1996] B.C.J. No. 1026 and *Davis v. Kelly*, [2001] P.E.I.J. No. 123.).

[14] The Claimant could have protected himself in contract by requesting a warranty or indemnity with respect to the basement from the Defendant but did not. Nothing in the evidence before me in the case displaces the principle of *Caveat Emptor* and accordingly, I dismiss this aspect of the claim as well.

Dated at Truro, in the County of Colchester, in the Province of Nova Scotia, this 30th day of April 2021.

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Shelly A. Martin
Adjudicator, Colchester County