SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Bray v. Sergio*, 2022 NSSM 41

Date: 20220726
Docket: SCCH 514299
Registry: Halifax

Between:

Angus Joshua Bray

Claimant

-and-

Antonio Manuel Sergio and Laurena Marie Fisher

Defendants

REASONS FOR DECISION AND ORDER

Adjudicator: Eric K. Slone

Heard: July 22, 2022 via zoom in Halifax, Nova Scotia

Appearances: For the Claimant, self-represented

For the Defendants, self-represented

BY THE COURT:

[1] The Claimant and his spouse Stephanie Francis (not named as a Claimant on the Claim form, but in essence a co-claimant) purchased a home on Beaver Bank Road in Beaver Bank, Nova Scotia from the Defendants in April 2021. They took occupancy on June 30, 2021.

[2] On the night of October 31, 2021 they experienced a minor flood in their finished basement, troubling enough that they had to take up the flooring, which exposed mould and rot and multiple areas where water appeared to be seeping in. The basement has been essentially gutted and they seek damages in the amount of $25,000.00 to cover part of the cost of waterproofing the basement and restoring its finished state.

[3] The Claimants say they were misled by the Defendants' failure to disclose the tendency of the basement to flood.

[4] The Defendants deny that they misrepresented anything.

The Law

[5] Cases of this nature are quite common, and curiously often involve leaky basements. Not surprisingly, the law in this area is quite developed, hasn't changed much in recent times and is fairly easy to apply.

[6] A good recent summary of the law was provided in the Nova Scotia Supreme Court case of *Apogee Properties Inc. v Livingston*, 2018 NSSC 143:

> [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 Emptor 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 expected

amenities, unless he protects himself by contract terms.

32 The leading decision on the maxim is *Fraser-Reid v. Droumtsekas* (1979), 1979 CanLII 55 (SCC), [1980] 1 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 1931, 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 general, 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 from 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.

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.

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. ...

[7] I will take the liberty to summarize and simplify the applicable legal principles:

a. A seller of real property is normally not responsible for defects that are obvious, and which could be revealed by an "ordinary" inspection. Such defects are called patent defects. In such cases the buyer beware principle applies.

b. Defects that would not be revealed by an ordinary, non-invasive inspection, so-called "latent defects," are not caught by "buyer

> beware," but the seller is only liable to the extent that they have fraudulently or negligently misrepresented the state of the property.

[8] It is also well known that some Agreements of Purchase and Sale contain express warranties about the condition of some aspect of the property, but in the absence of such warranty there is no implied warranty that assists a buyer. New homes are in a different category as there are warranty programs that typically provide some coverage.

Some relevant facts

[9] The Claimants were first-time home buyers. They were also buying at a time when the Covid pandemic was in full swing, which created certain limitations on their ability to spend time in the property prior to closing.

[10] The Claimants never personally met or even spoke with the Defendants prior to closing. They never met with or spoke to the Defendants' real estate agent.

[11] The property in question is at least fifty years old. The Claimants believe it is even older, though this does not really make any difference. This is an "older" home.

[12] The listing cut for the property mentions that it has a "full, fully developed" basement, but does not otherwise speak to the dryness or wetness of the basement.

[13] It would have been obvious to any inspector that the basement included a sump pump, which is only necessary where water is known to come up through the ground and need to be pumped away.

[14] The Agreement of Purchase and Sale contained a condition that the sale was subject to a satisfactory property inspection. But it did not promise that a Property Disclosure Statement (PDS) would be provided. The Claimants did not ask for a PDS and closed without ever seeing one. Even though it was not promised in the agreement, it is quite possible that one would have been available for the asking, but that never happened, probably because the Claimants were inexperienced.

[15] Curiously, the Defendants <u>did</u> fill out a PDS in early June 2020, about a year before this transaction, which may have been in contemplation of an earlier effort to sell the property. It is noteworthy that the Defendants did not actually reside in the property after 2018, but had a tenant living there (a friend of the

family). The relevant entries in the PDS are item 1.1 which asks "are you aware of any structural problems, unrepaired damage, dampness or leakage?" to which they answered NO, and item 1.2 which asked whether they were aware of any repairs to correct leakage or dampness problems, to which they also answered NO.

[16] The Defendant Ms. Fisher testified that she lived in the home for about 25 years and did some repairs in about 2006 to correct a problem with water entering the basement. This included excavating around part of the foundation to install what she believed to be a French Drain. She testified that after that she only had occasional minor wetness when the sump pump failed, which was always repaired and restored to working order. She testified that during her years living in the property they regularly used the basement as a rec room for her children, a TV watching area and as a home office. She did not experience a problem with wetness, though she kept a dehumidifier running to keep the humidity and associated musty odour down.

[17] The Claimants only saw this PDS after they had commenced this lawsuit and the parties were directed to exchange relevant documents. As such, it cannot be said that they relied on the truth of anything in the PDS at the time they closed the purchase.

[18] The Claimants had an inspection done by a reputable building inspector, whose detailed report was available to them before they made their decision to go "firm" on the purchase. They also had the opportunity to speak at some length to the inspector after she had done the inspection.

[19] The inspection did not reveal anything that would have alerted the Claimants to the issue that they would face several months later. The inspector did tell them that the basement was full of things that made it hard to navigate around and see everything, but she thought it looked "pretty good."

[20] I took the liberty of consulting rainfall statistics for the Halifax area during the months of July through October 2021. There was nothing unusual about October 31. There had been many days with heavy rainfall during those months. So October 31, though rainy, was not one of those legendary nights where basements would have flooded all over the city.

Conclusions and order

[21] The PDS signed in June 2020 is arguably misleading. The Defendants (or at least Ms. Fisher) knew of significant work that had been done in 2006 to address

"dampness or leakage" which was relevant information that probably should have been disclosed. But it cannot be said that the Claimants were misled by this PDS, because it was not shown to them at the relevant time. The Claimants did not base their purchase decision on anything that was represented by the Defendants. They never spoke or otherwise communicated directly. The Claimants could have bargained for a PDS in their purchase agreement, but did not do so.

[22] I do not mean to suggest that the Defendants were deliberately untruthful about their experience. Mr. Sergio did not reside in the property until much later. As for Ms. Fisher, I found her to be credible and I accept her evidence that between 2006 and 2018 she was able to use her basement without any real problem. But the answers she gave were incomplete.

[23] This is not a case where the basement flooded the first rainstorm after the new owners take possession. In such a case there is a suspicion that the previous owner must have known that there was a problem. Here, there were multiple rainy days over the four months prior to this event. It will have to remain something of a mystery as to why the basement flooded on October 31, and not earlier.

[24] Given that the Claimants did not rely on anything that the Defendants said or failed to disclose, there is no principled basis to hold them liable under the law as I have cited it above. In the event I am wrong about liability, the damages proved would easily exceed $25,000.00 and as such that amount is a reasonable estimate of their damages.

[25] However, for all of the above reasons the claim must be dismissed.

Eric K. Slone, Adjudicator