SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Wells v. Fong,* 2024 NSSM 44

Date: 20240429
Docket: 529022
Registry: Halifax

Between:

Dale Wayne Wells

Claimant

v.

Gregory D. Fong and Garden View Restaurant Limited (now Ezypzy)

Defendant

Adjudicator: Eric K. Slone

Heard: April 19, 2024, via teleconference

Decision: April 29, 2024

Counsel: Claimant, self-represented
Breagh MacDonald, for the Defendants

By the Court:

[1] The Claimant in this case, Dale Wayne Wells, sues the Defendants, Gregory D. Fong and Garden View Restaurant Limited (now Ezypzy Arts Ltd.), for $25,000.00 in damages arising out of the purchase by the Claimant and his spouse Guylaine Rioux (not named in the claim, but a co-claimant for all intents and purposes) of a two unit residential rental building at 114 Tacoma Dr. in Dartmouth. This property was on the same land as a building that formerly housed Garden View Restaurant, something of a bygone fixture for Chinese food lovers in Dartmouth.

[2] The claim is succinctly worded by the Claimant in his originating document:

> We purchased a two unit residential rental building from Garden View Restaurant on December 9, 2021. Within days of the purchase, we discovered water entering the lower unit following moderate rainfall. This was a frequent occurrence, rendering the lower unit unrentable until the source of water entry could be located and repaired. Correcting the water entry required extensive investigation and monitoring. Excavation and repair of multiple areas of the foundation as well as landscape grading was required to solve the issues. Costs included excavation, foundation repairs, installation of drainage tile, replacement of exterior stairs and entrance steps, changing the grade of surrounding areas to create proper slope for directing water away from the foundation. In addition, a loss of rental revenue for the unit during winter and spring created additional financial losses.

[3] The real issue before the court is not the quantum of damages. I believe Mr. Wells has amply supported his claim to have spent well more than $25,000.00 on repairs, which doesn't even include the rental income that he lost by being unable to rent one of the units as early as he had hoped. There is no point nitpicking the damages.

[4] The more live question for me is whether there is a basis to fix liability on either Mr. Fong directly, or on the company which sold the property to Mr. Wells.

[5] The evidence includes a number of iterations of the Agreement of Purchase and Sale. When the original offer was put in, it contained a provision that the seller would provide a Property Disclosure Statement (PDS). While I am slightly simplifying the sequence of back-and-forth offers, the bottom line is that a counteroffer was made by the seller which struck out any references to a Property Disclosure Statement. In other words, the seller did not want to provide one, and the buyers had to have vividly understood that the seller was not willing to make any specific representations about the condition of the property, whether in the PDS

or otherwise.

[6] The Agreement did allow for the buyers to have a inspection performed, and in fact such an inspection occurred. While the actual report is not in evidence before me, Mr. Wells concedes that his inspector made no reference to any evidence of significant water incursion. The buyers waived the condition and proceeded to closing, having evidently been satisfied that the inspection report was satisfactory.

[7] Most of the negotiations and communications concerning this purchase and sale occurred between agents and lawyers. Mr. Wells conceded that he met Mr. Fong only once (for about 5 minutes) before he and his spouse put in the offer, at which time they discussed a zoning issue which is immaterial to this case. There were no statements made nor any questions asked about the condition of the property, and especially nothing about the basement.

[8] Mr. Fong testified that he was aware of occasional minor leaks into the basement that had occurred over the years, but nothing that had rendered the lower unit uninhabitable. He stated that most of his tenants had been restaurant employees, who never complained about water incursion. The photos show a concrete floor that is stained in many areas, presumably by water but also possibly by oil.

[9] The building had been empty for a couple of years when it was put on the market.

[10] The evidence does show that water leaking began to occur after the closing that, while not initially catastrophic, was at least worrying and became even more significant within several months. At one point in or about February 2023 the water had to be literally shovelled off the floor of the bottom unit. (The bottom unit is on the same level as the basement.)

[11] The court accepts the submission that this was not what Mr. Wells signed up for. A tremendous amount of work had to be done by Mr. Wells and his spouse themselves, as well as by contractors. The experience has been difficult, expensive and stressful. However, this does not in itself answer the question of what legal theory would hold Mr. Fong or his company responsible.

[12] As for the company itself, as the legal seller or vendor, it undertook the covenants that are contained in the Agreement of Purchase and Sale. On its face, there is nothing in that agreement that promises anything with respect to the condition of the property. No restrictions were placed on the ability of the Claimant to inspect the property, which was uninhabited at the time and fully accessible to the

inspector. The only restriction was that the inspection had to be done within a particular period of time, which is understandable, given that the parties needed to know where they stood in order to proceed either to terminate the agreement or close on it.

[13] I cannot see how the company can be said to have breached its contract, or to have misrepresented anything. Companies do not have minds or memories, or speak other than in written form. People do. Which brings us to Mr. Fong. Although he was not the seller, he was admittedly the principal owner of the limited company and its spokesperson.

[14] So, what did Mr. Fong represent, or more importantly, misrepresent? He explicitly declined to provide a PDS. He made no statements directly to the Claimant whether himself or through an agent, that spoke to the condition of the property.

[15] The theory that Mr. Wells appears to be floating, is that Mr. Fong knew or ought to have known that the basement was prone to flooding, and that he remained silent about it.

[16] Assuming for a moment that Mr. Fong had such knowledge, and that is by no means proved, it brings us to the question: What is the obligation of an owner (or the principal of a corporate owner) to disclose what they know about latent defects, when there are no contractual obligations placed on them to make that disclosure?

[17] In *Bray v. Sergio*, 2022 NSSM 41, I distilled the law as I then understood it:

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

[18] In British Columbia and Ontario there is a line of cases which flesh out and arguably expand the duty to disclose. The following excerpt from *Nixon v. MacIver*, 2016 BCCA 8 (CanLII) is a leading example:

> [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. See *McCluskie v. Reynolds* (1998), 1998 CanLII 5384 (BC SC), 65 B.C.L.R. (3d) 191 (S.C.), and *Cardwell et al v. Perthen et al*, 2006 BCSC 333 [Cardwell SC], aff'd 2007 BCCA 313 [Cardwell CA].
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> [35] In McCluskie, the plaintiffs had purchased a waterfront property from the defendants. Two years later, during a rainstorm, a steep slope behind the house collapsed causing significant damage to the house. The plaintiffs brought a claim against the defendants alleging, in part, that the defendants had breached their duty to disclose the condition of the slope.
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> [36] In her reasons for judgment, Madam Justice Bennett (as she then was), relying on *McGrath v. MacLean* (1979), 22. O.R. (2d) 784 (Ont. C.A.) and *Tony's Broadloom & Floor Covering Ltd. v. NMC Canada Inc.* (1997), 1996 CanLII 680 (ON CA), 141 D.L.R. (4th) 394 (Ont. C.A.), reviewed the law of caveat emptor and its various exceptions:
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>> 46 The rule that the buyer must beware is not unassailable, however. For example, it has repeatedly been noted that the doctrine of caveat emptor will not apply in cases of fraud or reckless disregard for the truth of representations. *In Allen v. McCutcheon* (1979), 1979 CanLII 280 (BC SC), 9 R.P.R. 191 (B.C. S.C.) for example, the court stated:
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>>> The rule of caveat emptor does not apply where, as here, the latent defects were actively concealed by the vendors.
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>> …
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>> 49 Between innocent misrepresentation, however, and active concealment, there lie the possibilities of negligent misrepresentation, or reckless disregard for the truth. The authorities also indicate that where the vendor fails to disclose a latent defect that could prove dangerous, he will be found liable.
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>> …
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>> 53 In conclusion on this point, the authorities with which I have been presented suggest that the doctrine of caveat emptor will not operate to deny the plaintiff's recovery in the following situations:

> 1. where the vendor fraudulently misrepresents or conceals;
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> 2. where the vendor knows of a latent defect rendering the house unfit for human habitation;
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> 3. where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
>
> 4. where the vendor has breached his duty to disclose a latent defect which renders the premises dangerous.
>
> 54 In conclusion, I find that although the law of vendor and purchaser has long relied on the principle of caveat emptor to distribute losses in real estate cases, the rule is not without exception. Two major exceptions are in the case of fraud, and in cases where the vendor is aware of latent defects which he does not disclose. The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist. It is up to the plaintiff to prove this degree of knowledge or recklessness.

Discussion

[19] I cannot see how this case checks any of the boxes that would bring it out of *caveat emptor*.

a. Mr. Fong did not fraudulently represent, let alone misrepresent anything, and there is no evidence that he actively concealed anything. Being silent does not in itself amount to active concealment.

b. Mr. Fong did not know of a defect that rendered the house unfit for human habitation. The house had been fit for habitation, and occupied, for decades. Minor water leaks at ground level are very common in older buildings, and people live with them.

c. Mr. Fong was not reckless as to the truth or falsity of statements relating to the fitness of the house for habitation. He made no statements, and by declining to offer a PDS made it clear that he did not intend to make representations.

d. Mr. Fong did not fail disclose a latent defect which rendered the premises dangerous. The premises cannot be said to have been dangerous.

[20] The Claimant has not produced any evidence that this property ever previously experienced water incursions of the seriousness that occurred after closing. Perhaps more importantly, he has not proven that Mr. Fong knew of any such instances. Mr. Fong never resided in the property.

[21] It is true that Mr. Fong knew of some instances of water incursion that had occurred many years prior to this sale. He admitted as such in a trial concerning an insurance claim for an oil spill, which is reported at *Garden View Restaurant Ltd. v. Portage La Prairie Mutual Insurance Company,* 2014 NSSC 447. Mr. Fong's evidence is summarized by the trial judge:

> [19] Mr. Fong identified where water had entered the basement on a few occasions prior to the January 2011 oil spill. The water entered the furnace room, filling the southeast corner, extending a third of the way along the interior north wall and along almost the entire south exterior furnace room wall. According to Mr. Fong, the last time there had been water in the furnace room was years before the January spill. He did not know whether the water on those occasions had come through the floor, wall or window.
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> [56] ... Mr. Fong advised that the basement furnace room had flooded on a number of occasions. During his October 18, 2011, site visit, some nine months after the oil spill, Mr. Carey saw evidence of previous ingress of ground water, in the form of staining and mineralization along the wall and floor slab immediately adjacent to the outside oil tank. He did not see actual cracks, pathways or openings. Although Mr. Fong acknowledged on cross-examination that there were several occasions when water entered the basement, he did not know how it got in and could not dismiss other possibilities such as entry through a window.

[22] It is not enough to suspect that Mr. Fong may have known more than he let on. In order to impute that knowledge to him, more would need to be shown.

[23] Even then, I believe it would be contrary to the legal principles set out above to hold a seller liable for latent defects that are not dangerous nor render the unit uninhabitable.

[24] In summary, there is no principled basis to hold either of the Defendants liable for the cost of repairing defects that came to light after closing.

ORDER

[25] In the result, the claim must be dismissed.

Eric K. Slone, Small Claims Court Adjudicator