IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Giles v. Boissonneault, 2014 NSSM 12

Claim No: SCCH 411149

BETWEEN:

Name Richard Alan Giles **Claimant**

Name Guy Oscar Boissonneault **Defendant**

Editorial Notice: Addresses and phone numbers have been removed from this judgment.

Date of Hearing: October 29, 2013.

Date of Decision: March 14, 2014.

Donald L. Shewfelt represented the Claimant.

Dillon P. Trider represented the Defendant.

DECISION

The Claimant and Defendant were parties to the purchase and sale of 319 Myra Road, Porter's Lake, Nova Scotia. The property is a parcel of land with a mobile home on it. The Claimant, Richard Giles, was the purchaser and the Defendant, Guy Boissonneault, was the vendor. The closing took place on June 1, 2012. Title to the property and mobile home were conveyed, respectively, by Warranty Deed and Bill of Sale each dated May 14, 2012. The purchase price was initially to be $145,000 but during their negotiations, the parties agreed to an additional $6000, making the purchase price $151,000. The sale of the property and mobile was on an "as is where is" basis. Following the closing, the Claimant discovered significant rot in the wooden support beams of the mobile home. He has commenced this claim alleging fraudulent misrepresentation and seeks damages from the Defendant. Mr. Giles' submits the damages are in excess of $40,000 but has reduced the amount sought to $25,000 to bring it within the jurisdiction of the Small Claims Court.

Both parties were represented by legal counsel throughout the course of the transaction, each of whom had prepared a separate Agreement of Purchase and Sale. The lawyers sent the Agreements to their respective clients. It is not clear if the purpose was for their client's review or to have their clients arrange for execution of the documentation. Regardless, when the parties met, they signed both agreements. The agreements contain a number of differences which, fortunately, do not have any bearing on this matter. However, certain of the details are inconsistent and at times, confusing as a result.

Neither agreement treats the land and mobile home as separate items. As a result, I have treated the mobile home as a fixture and this claim as one arising from the sale of real property, rather than as a sale of goods. Due to the nature of this action, the legal effect is of no consequence.

Issues

Is the Defendant liable to the Claimant for fraudulent misrepresentation?

The Evidence

Richard Giles testified that he met the Defendant approximately five years ago while working on vehicles. He described Mr. Boissonneault as a neighbourhood friend. On several occasions, Mr. Giles and a friend approached Mr. Boissonneault about purchasing the property. Approximately, April 2012, Mr. Boissonneault advised Mr. Giles that he was getting close to selling the property. He and another gentleman met with Mr. Boissonneault and identified several work items which needed to be done. These included reroofing and replacing the skirting, back deck and gutters. The parties negotiated a deal, and following an appraisal, they settled at $151,000. Pursuant to the Agreements of Purchase and Sale, $145,000 of the purchase price was subject to financing and $6000 was secured by a promissory note. As noted, the property was to be accepted "as is, where is".

Rather than hiring a property inspection service, Mr. Giles conducted his own property inspection with Mr. Boissonneault present. At the time, Mr. Boissonneault indicated that he owned the property for three to four years. He advised Mr. Giles that he replaced an old tub enclosure with a new shower; a new hot water heater and pressure tank were also installed. In addition, he installed skirting and a deck. He noted that the back door was a normal steel door and not a screen. He indicated that he installed a new main door.

In examining the property, Mr. Giles noted that the door was "off-kilter" and asked if there were any other issues. Mr. Boissonneault replied that there were "quirks", but nothing serious. He testified that he relied on these assertions. The property closed on June 1 and the keys were exchanged. As a result, he made arrangements to remove a few things from the property and lined up several contractors to do any necessary work.

Mr. Giles hired Scott Osmond to begin the first week of June to make repairs to the roof and the skirting. He began removing the skirting and Mr. Osmond discovered rot. He moved the power mask and found rot all the way along the support beams. To document the rot, Giles hired Joe Bezanson to take photographs.

Mr. Giles tendered into evidence a book of photographs taken by Mr. Bezanson. They reveal what appears to be darker colored wood underneath where the skirting used to be. Photograph #3 is a shot taken underneath the front door revealing a rotten piece of wood. The wood next to the door also shows darker areas alleged to be rotten wood. Photograph #6 identified several pieces of new wood that were not mentioned by Mr. Boissonneault in their initial discussions. Photograph #19 shows darker wood near where the door is located, as do photographs # 20, 21 and 22. The power mask which was installed with new wood is shown in # 25 and it is adjacent to boards that are apparently rotten. In both photographs, there are boards made up of wood that is rotten and others while not new, appear to be sound and not rotten.

As a result of the discovery, Mr. Giles instructed Osmond Property Maintenance to replace the rotten wood along the undercarriage of the mobile home and to make other repairs. The process took approximately two months requiring replacement of two I-beams and the outer rim joists. He also noted that water had soaked the insulation. Mr. Giles tendered into evidence an invoice for the work in the amount of $40,662.02.

Mr. Shewfelt tendered into evidence a second package of photos which were provided to him by Mr. Trider prior to the hearing. Photograph #6 of that package once again reveals the power mask and a strip of siding which had covered the rot. Mr. Giles did not know these photos existed prior to that date. Most the photos do not reveal rot, simply that work was done. In one of the photographs, Mr. Boissonneault's father is seen performing work on the skirting and near the beams.

Under cross examination by Mr. Trider, Mr. Giles acknowledged including the provision "as is, where is" and believed that that covered the rest of the deficiencies. He did not insist upon a Property Condition Disclosure Statement or an inspection. He acknowledged that the vapour barrier seen in the photographs covered the support beams and would not have been visible to the naked eye on an inspection. He reiterated that he was told the door was new and noticed something was not quite right but accepted the property in any event.

Mr. Osmond is a regular contractor. Mr. Giles paid him approximately $1000 to have yellow insulation blown back into the vapour barrier. He replaced two doors, including the front door and a sliding patio door. He acknowledged that he made the mobile home better than he had bargained for. He had no to choice but to improve it, even if there had not been any rot. He took a quick walk through the house before purchasing it. He also took a quick look around the interior and discussed replacing the kitchen floor.

He testified that vapour barrier is usually not green in color but made of white or clear plastic. He is of the view that the green underneath the mobile home are garbage bags.

Scott Alexander Osmond is the owner-operator of Osmond's Property Maintenance Limited. He grew up in the construction business and has owned his own business for the past 25 years. He described his business as general construction and maintenance. He testified to attending to the property and performing work for Mr. Giles. He identified the invoice prepared for him describing the various work performed. He testified to observing a lot of rot in the undercarriage of the mobile home. He noted in the invoice the mobile home needed to be raised and supported to perform the work. The skirting, steps, support beams and joists were removed and replaced. He described that his work was to fix the skirting, but found that it was completely rotten and required additional work on his part. He reviewed the photographs and confirmed the evidence of Mr. Giles indicating that it accurately describes the condition of the property when he worked on it. Specifically, he identified the power outlet and the rotten sill plates throughout. He also testified to seeing garbage bags being used for vapour barrier.

Under cross-examination, he acknowledged that he has not been qualified to provide expert testimony at any level of courts in Nova Scotia. He is not an engineer or carpenter but performed labour on occasion. He did not provide a breakdown of the time required to perform work on Mr. Giles' property.

Guy Oscar Boissonneault is an employee of the Halifax Regional Municipality, where he works in maintenance of the sports fields and playgrounds in the summer, and as a labourer performing snow removal in the winter. In addition, he owns and operates a small landscape business. His educational background suggests no particular specialization in home construction. Specifically, he has taken technology courses at Dalhousie University followed by one year at Nova Scotia Community College. He is married to Heather Boissonneault, who also gave evidence.

Mr. Boissonneault testified to buying the property and mobile home in August 2008. At the time, he hired a home inspector as the report was needed to enable him to obtain a mortgage. At the time he and the inspector went through the property thoroughly and noted repairs that had to be done. Specifically, they identified that spindles were needed for the back deck for compliance with the Building Code and a 12 V plug extension required for the pressure tank. He did not observe any of the issues indicated by Giles or Osmond. He did not recall them being noted in the report. The report was not tendered into evidence.

With respect to the work he performed, he indicated that there was a draft around the front door as a result of weather stripping falling off, so he replaced the original in the fall of 2011. He also caused damage to the subfloor in the main entry while affecting some repairs. He was required to remove the material as a result. Mr. Boissonneault testified that he is not a carpenter. His father helped him and his wife with the carpentry work including removing the old door frame and cleaning underneath the threshold to remove a rotten piece of joist. When making repairs, he removed a portion of the front deck and a section of skirting. He removed the old wood back as

far as the sound wood and spliced it onto the joist. He testified emphatically that he did not see any further rot. His father can be seen in photograph #6 of exhibit C-8 performing some of the carpentry work.

Mr. Boissonneault testified to meeting Mr. Giles in the neighborhood and having had him visit his home over the course of four years. From time to time, Mr. Giles would raise the possibility of selling him the house. In the winter of 2012, Mr. Boissonneault showed the property to Mr. Giles and one other. Mr. Giles discussed purchasing the property on three occasions before actually viewing it. At the time they discussed the work to be done and indicated that the front door will need to be repaired. He identified some minor repairs and indicated the need for a new hot water tank, septic and shower unit all of which he replaced. He testified that he advised Mr. Giles that he purchased a new front door and left the frame in the wood. He removed some of the vapour barrier to have a look during the inspection and did indeed replace it with garbage bags. He did not see any rot the time. He looked at the photographs and indicated emphatically that the rot did not exist when he purchased the house.

Under cross examination by Mr. Shewfelt, he testified that he deferred to his father in making the determination whether the wood was rotten. He acknowledged that he would not consider the the mobile home in good working order as a result of the rot. In making the repairs in the fall of 2011, he testified that he and his father only went as far as the electrical outlet in changing the wood. He did not go any further into the frame. Throughout the cross examination he denied seeing any rot underneath the mobile. In reviewing the photographs, specifically #25 of Exhibit C-8, he was asked by Mr. Shewfelt if he agreed all of the dark areas were rot. He denied this testifying that it was actually vapour barrier. A careful view of the photograph reveals both rot and pieces of dark green/black plastic, mostly found to the left on the ground. There is other black substance on the ground which is impossible to determine which it is.

Heather Elizabeth Boissonneault testified that she and her husband lived in the property for approximately one year from June 2011-2012. The rest of the time, I presume the property was a rental property. She recalls Mr. Boissonneault replacing the front door. In addition, her husband and her father-in-law replaced the floor and the tile bringing it flush to the wood trim. When the he was selling the property, she recalls her husband taking Mr. Giles through the bedroom and took photographs. She recalls Mr. Giles viewing the property again when it was empty. She had not noticed any rot or smells when she lived there and was shocked when she saw the condition of the wood in the photos.

Under cross examination, she acknowledged that the door was installed in October of 2011 and that the agreement of purchase and sale was signed April 2012. The photographs tendered in exhibit C-8 were kept on a flash drive. She did not offer to show them to Mr. Giles. She recalled Mr. Giles being told by her husband that the door was replaced and the garbage bags were used over the repaired area of the vapour barrier. She acknowledged that she did not know the full extent of the rot.

Through redirect evidence from her counsel, she testified that she had not returned to the property or seen Mr. Giles' repairs. She had no idea of the extent of the rot.

The Law

When real property is purchased or sold in Canada, the law with respect to its condition is governed by *caveat emptor*, or "buyer beware". The Supreme Court of Canada addressed the issue in *Fraser-Reid v Droumtsekas*, [1980]1 S.C.R. 720 where Dickson J (as he then was), stated the following in the opening paragraph:

"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." (emphasis mine)

There are exceptions to that rule. For example, the law will provide relief in the event of a finding of fraudulent or negligent misrepresentation.

The law in Nova Scotia pertaining to the sale and purchase of real property has been summarized by Justice Warner in the case of *Thompson v Schofield* (2005), 230 NSR (2d) 217. He stated the following at pp.221 –224:

[16] Generally transactions involving the sale of real property are subject to the principle of *caveat emptor* with respect to the physical amenities and condition of the property. Absent fraud, mistake or misrepresentation, a purchaser takes an existing property as he or she finds it unless the purchaser protects himself or herself by contractual terms. This is set out in several important decisions, some of which were included in the defendant's memorandum, such as *McGrath v. MacLean*, (1979) 22 O.R. (2d) 784 (OCA), and *Edwards v. Boulderwood Development Corporation*, (1984) 64 N.S.R. (2d)395 (NSCA). It is referred to in *Redican v. Nesbitt*, [1924] S.C.R. 135.

[17] In *Edwards*, our Court of Appeal found that the defendant had made an innocent misrepresentation and was not liable to the seller with regards to the condition of a vacant lot of land and further found that the innocent misrepresentation had been made after the contract had been entered into and therefore could not have influenced the entering into of the agreement.

[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.

[19] A third legal question requiring clarification is what constitutes negligent and fraudulent misrepresentation.

[20] Fraudulent misrepresentation is dealt with, among other cases, by a decision of Saunders, J., as he then was, in *Grant v. March*, (1995) 138 N.S.R. (2d) 385. At paragraph 20 of that decision he says:

With respect to the first allegation, that is, that Mr. March fraudulently misrepresented the facts, the law on this subject was canvassed in *Charpentier v. Slaunwhite* (1971), 3 N.S.R. (2d) 42. In that case, which involved problems with a well, Jones J. (as he then was) cited [at p. 45 N.S.R.] G.S. Cheshire and C.H.S. Fifoot, *The Law of Contract*, 6th ed. (London: Butterworths, 1964), at page 226:

> A representation is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes that induces the contract. Examples are a statement that certain cellars are dry, that premises are sanitary, or that the profits arising from a certain business have in the past amounted to so much a year.

And again on page 241, as follows:

> Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action or deceit have been narrowed down to rigid limits. In the view of the common law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any Court unless it is shown that he had a wicked mind". Influenced by this consideration, the House of Lords has established in the leading case of *Derry v. Peak*, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in *Derry v. Peak*, saying that it meant a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent representation is a false statement which, when made, the representor did not honestly believe to be true.

[21] At paragraph 21, Justice Saunders quotes the *The Law of Vendor and Purchaser*, 3d. ed. By V. DiCastri (Carswell,1988), as saying that to found a claim for false misrepresentation one must do the following:

In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it."

> The onus is on the plaintiffs to establish fraud on the part of the defendant. Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.

[22] On the facts in *Grant v.March*, the trial judge was not satisfied that the defendants knew of the water problems that existed and he further found that any representations that they did make were not made before the contract was entered into.

[23] Another relevant decision cited in the defendants' memorandum is *Jung v. Ip* 1988 CarswellOnt 643 (ODC), where the Court, in finding liability against the vendor for failing to disclose a termite infestation, said at paragraph 18:

It is now clear that the law of Ontario is such that the vendors are required to disclose latent defects of which they are aware. Silence about a known major latent defect is the equivalent of an intention to deceive. In the case before this Court, there was nothing innocent about the withholding of the information. It was done intentionally. This was not an innocent misrepresentation.

[24] In finding liability against the vendor for failing to disclose a sediment problem with the well and sewer system in a property disclosure statement, the Court in *Ward v. Smith* 2001 CarswellBC 2542 (BCSC) discussed the application of the principles of negligent misrepresentation at paragraphs 33 to 39; quoting from paragraphs 33 to 35 of that decision (not as an authoritative decision but simply as one of the many that set out in summary nature what a negligent misrepresentation is), Gotlib D.C.J. said:

. . . The requirements to establish a claim in negligent misrepresentation were summarized by Mr. Justice Iacobucci in *Queen v. Cognos Inc.*, 1993 CanLII 146 (S.C.C.), [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 (S.C.C.), at 643:

> (1) 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 said misrepresentations;
>
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
>
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

In their pleadings, the plaintiffs used the expression "reckless misrepresentation" which was understood, during the course of argument, to be negligent misrepresentation. I am satisfied that, in fact, the defendants did negligently misrepresent the quality of the available water by stating that they were not aware of any problems with the quality of the water. . . .

The defendants owed a duty of care to the plaintiffs to not negligently misrepresent either the quality or quantity of the water supply.

The Court went on to make a determination that the defendants negligently misrepresented the state of the water. He was satisfied that they knew the nature of the problem with the well, even though they may not have known the extent of the problem.

[25] The Court's analysis in *Swayze v. Robertson*, 2001 CarswellOnt 818 (OCJ), a case involving a flooding problem caused by a defect in the foundation, is similar.

[26] The plaintiffs rely upon the decision of Wright J. in *Desmond v. McKinlay* 2000 CanLII 2201 (NS S.C.), (2000), 188 N.S.R.(2d) 211, which decision was upheld by our Court of Appeal at 2001 NSCA 24 (CanLII), (2001) 193 N.S.R. (2d) 1. In *Desmond v. McKinlay*, Mr. Justice Wright, like the Court in *Jung v. Ip* found that silence could constitute a negligent misrepresentation. At paragraph 43, he says:

In the present case, the essential question in my view comes down to this. Was it an actionable misrepresentation for the vendor Joan McKinlay to have held out to the purchaser through her realtor's listing cut (with information provided by her) that the property was only 14 years old without further disclosing the fact that the water supply and sewage disposal systems servicing the property were in excess of 40 years old by an indeterminate length of time? I have concluded that such partial disclosure of the true facts did create such a misleading impression to the plaintiff, on which she relied to her detriment so as to create an actionable misrepresentation at law.

[27] If this court finds that the answers given in the disclosure statement, which was incorporated in the agreement, were either negligent or fraudulent misrepresentations, there is no doubt that (a) they were material, (b) they were made at the time of the entry into the contract or the agreement of sale and were relied upon, and (c) based on the law as set out in *Desmond v. McKinlay* at paragraphs 48 to 51, they would constitute, in addition to negligent misrepresentations, a breach of a collateral warranty and thereby constitute a breach of the agreement of sale.

In addition, the British Columbia Supreme Court stated the following recently in the case of *0817967 B.C. Ltd. v. 0343936 B.C. Ltd.,* 2013 BCSC 824:

"Clearly, a statement in a contract of sale that says the subject matter is purchased "as-is, where-is" is not a defence to a fraudulent misrepresentation: see *Sanghera v. Danger Figure Centre (Burnaby) Ltd.,* 2007 BCSC 1308, 2007 BCSC 1308 at para. 7, where Garson J. said:

> ... As well, neither an exemption or exclusion clause, nor a disclaimer, can preclude an action for fraudulent misrepresentation: *1018429 Ontario Inc. v. Fea Investments Ltd.* 1999 CanLII 1741 (ON CA), (1999), 179 D.L.R. (4th) 268 (Ont. C.A.). Even a term in the contract that each party will rely on his own judgment will not excuse a fraudulent party: *Campbell v. Hamill*, [1925] 4 D.L.R. 958 (Sask. C.A.). Furthermore, a clause which purports to exclude liability for fraud is not operative; fraudulent statements vitiate the whole contract, including the exclusion clause: *Ballard v. Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.). Thus where fraud is established, the fault lies squarely on the guilty party.

[87] Such a provision, however, put the plaintiffs on notice that if there were representations on which they intended to rely, it was necessary to put those representations into the written contract. In other words, in these circumstances it is not reasonable for the plaintiffs to rely on oral representations made in pre-contractual negotiations which turn out to be erroneous, provided they are only innocently or negligently made.

The courts have stated repeatedly that there must be more than simple negligence to constitute fraudulent misrepresentation. Shortly after the leading case of *Derry v. Peek*, cited by counsel for the Defendant, the House of Lords decided *Angus v. Clifford* which was cited and applied in Canada by the Ontario Supreme Court in the decision of *Chapman v. Warren et al* [1936] OR 145, where Justice Kingstone stated the following:

"Ever since the decision in *Derry v. Peek* (1889), 14 App. Cas. 337, the law has been settled that carelessness, however gross, is not fraud. Where the word "careless" is used in the cases the expression does not mean "without taking care" but "not caring". Very gross and culpable carelessness is not enough to constitute fraud: *Angus v. Clifford*, [1891] 2 Ch. 449. The element of moral turpitude must be present, as put by one learned Judge, to constitute fraud. The statement must be "with a wicked indifference, immorally not caring whether the thing is true or not."

The British Columbia Court of Appeal put it more succinctly in *BG Checo International Ltd. v. British Columbia (Hydro and Power Authority)*, [1990] 3 WWR 690; 44 BCLR (2d) 145:

"The early cases, such as *Derry* v. *Peek* (1889), 14 App. Cas. 337 and *Angus* v. *Clifford* (1891), 2 Ch. 449, dealt with the requirement of a conscious intention to deceive as a necessary element in the tort of deceit."

The preceding statements of law can be summarized as follows:

- In general, the law respecting any defects for the sale of real property is *caveat emptor* meaning "buyer beware" or simply, a purchaser takes real estate as he or she finds it.

- To determine if there is an exception to this principle, one must determine if the defect is a latent or patent defect.

- Notwithstanding the nature of the defect, if the property is sold on an "as is, where is" basis, the purchaser accepts the risks of any defects in the property not specifically warranted in the contract.

- If a specific warranty as to condition or defects does not exist, then the purchaser takes the property as he finds it, unless he has successfully proven fraudulent misrepresentation.

- The five elements of fraudulent misrepresentation cited by Justice Saunders in *Grant v. March* must be proven.

- Silence as to a condition can constitute a misrepresentation, but it must be done with an intention to deceive in order to be fraudulent.

- The proof of fraudulent misrepresentation must be proven on a balance of probabilities using the ordinary standard of proof rather than a varying standard dependent upon the nature of the civil liability asserted. (*FH v. MacDougall* [2008] 3 S.C.R. 41; *Coltsfoot Publishing Ltd.* v. *Foster-Jacques*, 2012 NSCA 83).

Findings

In reviewing the evidence, there is no question the Claimant received something less than he had anticipated. Indeed, I find there was considerable rot along the support beams and throughout the structure. It is clear from many of the photographs. Further, while there are plenty of areas where

the wood appeared sound, there was more rot than one can expect to find in the purchase of the property.

The parties contracted to take the property on an "as is, where is" basis. There is no reference whatsoever to any written or verbal disclosure of the rotten wood, that it incorporates a Property Condition Disclosure Statement or that the contract is subject to a visual or formal inspection. Indeed, the evidence establishes and I find that Mr. Giles waived the opportunity to incorporate any of these measures into the contract.

The question remains is if the Claimant has proven fraudulent misrepresentation. Before applying the test stated by DiCastri and cited with approval by Justice Saunders and Justice Warner, I find the misrepresentation if one were to exist, is the presence of rot is of such an extent that it could eventually render the property unsound. The fact that nothing was asserted to the contrary is irrelevant. I find as a fact that the Boissonneaults' silence is sufficient to constitute a representation, which was false.

I restate the legal test of fraudulent misrepresentation:

> In order to succeed on the ground that a contract was induced by false and fraudulent representations, a plaintiff must prove: (1) that the misrepresentations complained of were made to him by the defendant; (2) that they were false in fact; (3) that when made, they were known to be false or were recklessly made, without knowing whether they were false or true; (4) that by reason of the complained-of representations the plaintiff was induced to enter into the contract and acted thereon to his prejudice; and (5) that within a reasonable time after the discovery of the falsity of the representations the plaintiff elected to avoid the contract and accordingly repudiated it."

I have no difficulty in finding parts (1), (4) and (5) to be present. Further, I find that it is an inherent element of the sales contract that the mobile home is to be reasonably sound, thus number (2) is proven as well. The remaining question is whether the Boissonneaults knew that the property was not in a proper condition. In other words, were the representations (or silence) known to be false or recklessly made without any regard to their truth?

I had the opportunity to hear the witnesses on the stand. I found all witnesses to be believable and truthful. I had few concerns of credibility of any of the witnesses.

In reviewing the photographs, it is clear that there was rot in various places on the wooden beams. Some beams were quite large and rotten all the way through. There are also photographs depicting wood apparently sound without rot. Mr. Boissonneault is not a trained carpenter. I find that he did not know that much of the rot depicted was a sign of larger, more extensive issues of rot. He watched his father affect repairs on the property, and assisted him. I find it probable that he did see wood darkened from rot. I have no evidence to suggest that it occurred to him to inspect further. This decision was negligent and ill-advised. However, there is nothing in evidence or argument to suggest that Mr. Boissonneault's decision his decision not to investigate the rot further and remaining silent when dealing with Mr. Giles was tantamount to recklessness. Indeed, I find it was not.

Mr. Shewfelt submitted that I should accept the presence of green plastic and garbage bags as evidence that the Defendant was attempting to cover up rot. I do not believe that to be the case. First of all, I have only Mr. Giles' evidence that vapour barriers are always clear or beige in colour. The entire underside of the mobile home was sealed with green plastic. I find it highly unlikely that Mr. Boissonneault went to such an effort to crawl under the mobile and attach the plastic. I find the vapour barrier was green/black when Mr. Boissonneault bought the property and, subsequently patched with garbage bags. I accept the Boissonneaults' evidence that they advised Mr. Giles of that fact. As a result, he could have asked to see the repairs performed before making an offer but he did not.

When he and his father discovered rot, perhaps Mr. Boissonneault should have investigated further before putting the property on the market. There was no evidence that he suspected further difficulties. There was no evidence of any such discussions with his father. I am unable to find on a balance of probabilities that Mr. Boissonneault was being deceitful. He was not showing the moral turpitude or wicked indifference required. At worst, he may have exhibited, as stated in *Angus v. Clifford*, "very gross and culpable carelessness".

If it were not for the "as is, where is" condition, I would have had no difficulty on these facts to find his silence to have been negligent misrepresentation and ordering damages. However, as stated, the evidence does not show an intention to deceive or mislead Mr. Giles. As a result, this claim must be dismissed.

Damages

If I am wrong in the finding of liability, I have made a provisional assessment of damages. The mobile home is a 1995 Maple Leaf, Model CSA Z240 #61280. The purchase price included real estate. No evidence was provided as to the separate value of the land and mobile home.

Mr. Osmond prepared an invoice for $40,662.02 which was marked paid as of August 28, 2012. The claim is reduced to $25,000 to bring it within the jurisdiction of the *Small Claims Court Act*. I accept Mr. Giles' evidence that the property was repaired to a state better than originally contracted. Further, there was additional work to be done about which he already testified, such as skirting and steps. The invoice is sparse on details. A purchaser would not expect these extras or the support structure to be like new. The mobile home is 17 years old.

The amount sought by the Claimant is approximately 61.5% of the invoiced amount which I find to be excessive. In the circumstances, I would have awarded 50% of the invoice or $20,331.01.

Summary

Having found that the Claimant, Richard Giles, has not proven fraudulent misrepresentation, the claim is dismissed without costs. An order shall issue accordingly.

Dated at Halifax, NS,
on March 14, 2014;

_____

Gregg W. Knudsen, Adjudicator

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