

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: MacMaster v. Stephen, 2006 NSSM 32

2006

Claim No. 257993

Date: 20060720

BETWEEN:

Name: **Craig MacMaster Joanne MacMaster**

Claimants

- and -

Name: **Thomas Stephen**

Defendant

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on December 13, 2006. This decision replaces the previously distributed decision

Appearances:

Claimant: Craig MacMaster and Joanne MacMaster

Defendant: Wallace Stephen

DECISION

- [1] This proceeding was heard on May 23, 2006. The Claimants were both present and gave evidence.
- [2] The Defendant, Thomas Stephen, was not present but his brother, Wallace Stephen was present and testified. Wallace Stephen had been the tenant in the premises up to the time it was sold to the Claimants. Apparently the house had previously been owned by Wallace Stephen and he had conveyed it to his brother, Thomas Stephen, approximately five years previous to the Claimant's purchase in 2001.
- [3] The claim involves an allegation of inaccurate statements on a property condition disclosure statement which was part of the Agreement of Purchase and Sale for the subject property and damages resulting thereon including damages for flooding in the basement, leakage in the interior house corner windows and damage to the nursery.

- [4] I start with the basic proposition that on the sale of a used home, the vendor does not warrant the fitness of the structure. The basis proposition is captured in the Latin phrase *caveat emptor* - “let the buyer beware”.
- [5] This general principle of law has been modified to some extent by the now common practice of including a property condition disclosure statements as part of the standard Agreement of Purchase and Sale in Nova Scotia. Under this regime, the seller is legally obliged to truthfully and accurately respond to the various items in the property condition disclosure statement (“PCDS”).
- [6] If a purchaser subsequently alleges that the seller has not accurately answered one or more questions on the PCDS and proceeds with a legal claim, the purchaser has the burden of proof and must prove, on a balance of probabilities, that this is the case.
- [7] Here the PCDS was signed by the owner of the house, Thomas Stephen. However, as was fully acknowledged by Wallace Stephen who gave evidence at the hearing, the answers were inserted by him. As he stated at the hearing, the “information was provided by me”. In such a case, I would find that the vendor (Thomas Stephen) has adopted the statements of his tenant and brother.
- [8] The question then is whether there are inaccuracies in the PCDS which relate to the alleged damages. I start first with item three - the damage to the nursery. As stated in Exhibit C-1 this damage was believed to be caused by a hole in the roof that was present before the house was re-shingled. The question is whether this damage was known by Wallace Stephen. In this regard I note that the PCDS states in item 6(3), the question:

“Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the property if less than five years)?”

- [9] And it is answered:

"Yes, see para. 11"

[10] Paragraph 11, hand-printed (by Wallace Stephen as he testified) reads as follows:

"Roof re-shingled with 30 year laminates and all suspect roof sheathing replaced. Insulation replaced as necessary. (Completed April, 2001). Repairs to flashing and framing around living room window. Insulation replaced as necessary."

[11] While this description may not have been complete, that alone does not establish that Mr. Stephen had knowledge of the damage to the structure in and around the nursery area. It was clear from the evidence that the damaged areas were concealed and, thus, not readily observable unless the work had actually been done by the individual in question.

[12] In light of these facts, I am not convinced on a balance of probabilities that either Mr. Wallace Stephen or Mr. Thomas Stephen had knowledge with respect to the area around the nursery which ought to have been disclosed on the PCDS or was otherwise inaccurately disclosed. Accordingly, I would dismiss this part of the Claim.

[13] With respect to the leakage at the "interior house corner windows" my comments would be similar to those in the previous item. In this case, the additional comments appear to speak directly to the flashing around the living room window which is one of the items referred to in Exhibit C-1 as a specific problem. It appears from this that the work may have been done incorrectly or incompetently. That does not mean that Mr. Wallace Stephen has misstated the matter on the PCDS. Again, I refer to my above comments that the vendor does not warrant the fitness of the house.

[14] Accordingly, I would not find in favour of the Claimant in respect of this matter.

[15] With respect to the flooding in the basement, I am of a somewhat different view.

[16] The evidence indicated quite clearly that the claimant suffered two significant “floods” in the basement areas before they remedied this problem through the building of a trench. Mr. Stephen attempted to answer this by stating that the level of rainfall at that time was one of the heaviest in history. The historical records do not support that and in fact are to the contrary.

[17] Further, the evidence shows that there was rot in the timbers and structural wood in the basement indicating previous water incursion.

[18] The evidence also indicates that tarring had been used in parts of the basement and there apparently was a bucket of tar being stored in an area of the basement.

[19] There was also hearsay evidence of a neighborhood youth referring to the previous floods in the basement. This evidence is admissible under s. 28 of the *Small Claims Court Act* although it would not, by itself be capable of supporting the conclusion it suggests. With other evidence, it can be acted on.

[20] The PCDS states in paragraph 6(a):

“Are you aware of any structural problems, unrepaired damage, or leakage, in the foundation?”

[21] It is answered with a “No”. As noted above, Mr. Wallace Stephen completed this and his brother, Thomas Stephen signed. I have already indicated that I believe that Thomas Stephen accepts the statements made by his brother.

[22] I conclude that this was misstated by Mr. Wallace Stephen. Accordingly, I find that the Defendant is liable in law for damages to remedy the issue relating to the claim.

[23] The claimed cost to remedy this was \$2,500.00 which came from KB Clarke Restoration. The actual work was done by Mr. MacMaster by hand. This involved a 100 foot trench which was approximately four feet deep and one foot wide. It cannot be doubted that this was a

significant undertaking for Mr. MacMaster to complete. There was also the parts and materials used to complete which would be part of the estimate he based his claim on. I believe the amount of \$2,500.00 is reasonable and I will allow that amount.

[24] The Claimants are also entitled to their costs and I will also allow costs in the amount of \$178.75 in respect of the filing fees and law stamp being incurred in the Supreme Court prior to the matter being transferred pursuant to Section 19 of the *Small Claims Court Act*.

[25] It is hereby ordered that the Defendant pay to the Claimants as follows:

Claim	\$2,500.00
Costs	<u>\$ 178.25</u>
Total	\$2,678.75

DATED at Halifax, Nova Scotia, this 20th day of July, 2006.

Michael J. O'Hara
Adjudicator

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