

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Pettipas v. Dorion, 2006 NSSM 35

2005

Claim No. 255525

Date: 20060130

BETWEEN:

Name: **Victor Pettipas & Tracy Oickle**

Claimants

- and -

Name: **John Dorion**

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:

Claimants: Self Represented

Defendant: Self Represented

D E C I S I O N

[1] This matter was heard in Halifax Small Claims Court on November 10, 2005. It is a claim relating to the sale of a house and a subsequent replacement of the septic system by the Purchasers who are the Claimants herein. The Vendor is the Defendant herein.

[2] I will briefly review the evidence. Mr. Victor Pettipas gave evidence about the purchase of the property at 37 Mahar Drive, Shad Bay. The closing took place on July 14 2004 and the Claimants moved in at that time. Mr. Pettipas indicated that in September 2004, sewage backed up into the "slop sink" in the basement. In November 2004 the septic tank was pumped out. It was again pumped out in January 2005. Mr. Pettipas indicated that sewage would come into the slop sink when the shower was on.

- [3] In April 2005, Mr. Alvin MacDonald was called to the site and he indicated that the septic field was saturated. Mr. MacDonald installed a new system in June 2005.
- [4] John Dorion, the Defendant, testified. He purchased the house in 1987 and was the original owner. He said that he had the septic tank pumped every three years. In the fall of 2003 Bob Edwards (now deceased) advised Mr. Dorion that there was water in the tank. It was clear and therefore he concluded it was surface water. Mr. Edwards apparently used divining rods and found where the water was coming from. He suggested building a trench to divert the surface water.
- [5] In early May 2004 Mr. Dorion had the trench built by Alvin MacDonald. Two days later he had the septic pumped. The property condition disclosure statement was signed on May 10, 2004. Mr. Dorion stated that septic fields do have a life expectancy. Mr. Dorion stated that he paid \$816.00 to have the trench built and that it was done in early May. He indicated that things were tight financially and that he was living week to week and that he borrowed the money from a family member to pay Alvin MacDonald to have the trench built.
- [6] The property condition disclosure statement was dated May 10, 2004. In the section dealing with "sewage disposal" Mr. Dorion answered "No" to the question "Are you aware of any problems with existing system?". In the question asking "Have any repairs or upgradings been carried out to the system in the last five years (or since you have owned the property if less than five years)?", the answer was "Yes". The explanation states: "...drained to carry surface water away from the field". In the same section it is also indicated that the septic was last pumped in May 2004.
- [7] Cheryl Boudreau who is a close friend of Mr. Dorion and has stayed at the home before it was sold also testified. She stated that Alvin MacDonald indicated that he did not see a problem with the septic itself, it was the hill and the water off the side of the hill which was causing the problem. Further, he apparently stated that the trench should fix the

problem. There was no mention of needing a new septic system. She also indicated that all the times Alvin MacDonald pumped the septic there was no problem. Ms. Boudreau also stated, apparently in response to the evidence of Mr. Pettipas that there was backup into the slop sink that her own observations was that it was not septic backing up into the laundry basin but water.

- [8] Carol Konesky was the realtor for the sale and she also testified. As part of the exhibits, the Defendant tendered an e-mail from Ms. Konesky in which she says “As a precaution Mr. Dorion had a drain installed to revert surface water away from the septic system to prevent water from standing near the septic”. A similar comment was made by Mr. Dorion’s lawyer in a May 5, 2005, letter: “During Mr. Dorion’s occupancy (a family of four) he never had problems with the septic system and the french drain was installed as a precaution”.

Findings

- [9] I find that Mr. Dorion misrepresented the condition of the septic system by what is in the property condition disclosure statement and what was not in it.
- [10] First, I find that by answering “No” to the question “No problems”, that this was a misrepresentation. By Mr. Dorion’s own evidence he confirms that Mr. Edwards had advised him that there was water in the septic tank. Ms. Boudreau also testified that there was backup in the laundry tub and that Mr. MacDonald said there was water off the side of the hill and that the trench should fix the problem.
- [11] Even accepting that these issues related to the surface water getting into the system - as opposed to a failure of the septic system itself - they still, in my view, constitute a problem with the sewage disposal system. As such, they should have been disclosed.
- [12] Secondly, what has not been disclosed can also constitute a misrepresentation. In this regard I refer to the comments of Justice Wright in *Desmond v. McKInlay* (2000), 188

N.S.R. (2d) 211 which is quoted at paragraph 26 of the case of *Thompson & Martin v. Schofield & White*, a January 27, 2005, decision of the Honourable Justice Gregory M. Warner:

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.

[13] In my respectful view, the statement: “drain to carry the surface water away” should have been qualified by saying that that drain was built by Alvin MacDonald on a date in early 2004. By omitting that evidence, I conclude that the statement would lead to the misleading impression that the construction of the french drain remedied any potential issues that had previously existed. In fact, at that stage, it would have been too early to know whether the french drain would remedy any existing issues since it was done within a week or less of the signing of the property condition disclosure statement. In my view, that information, that is, the date of the construction of the french drain, would be highly relevant to a prospective purchaser in the position of the Claimants here.

[14] I would also comment on the indication of Mr. Dorion's evidence which is explicitly stated in some of the written materials that the french drain was installed as a “precaution”. It is simply not tenable to accept that an expenditure of \$816.00 was made which, on Mr. Dorion's evidence, was by way of a family loan as he was living on a very tight financial budget at that time from week to week, according to his words, that it would be done as a “precaution”. In my view it is only reasonable inference to conclude from that fact is that the drain was constructed at this late date to remedy problems which Mr. Dorion had been experiencing. The methodology of building a french drain had apparently been suggested

by both Mr. Edwards and Mr. MacDonald who thought this would remedy the problem. It did not.

[15] It strains credulity to the breaking point to accept that Mr. Dorion did not have some signs that there were problems with the septic system prior to May 10, 2004.

[16] I find that Mr. Dorion is liable to the Claimants.

Damages

[17] Had the problems been properly disclosed and the date of the french drain installation been disclosed, the agreement would not have been signed on the same terms as it was. However, it does not follow from that that the Claimants are entitled to cost of a new septic system. I again refer to the case of *Thompson v. Schofield* and the comments of the Honourable Justice Gregory M. Warner at paragraph 55 as follows:

*Where there will be an enhancement of the value of the property as a result of the required repairs it is recognized that a deduction for that betterment should, in many instances, be allowed. The defendant is liable to the plaintiffs for the loss that would not have occurred but for their negligence or breach of contract. If the plaintiffs carry out the System Care renovations they will end up with a basement better than that they had bargained for when they bought the home. Mr. Justice Wright deal with this issue in **Desmond v. McKinlay** and in that case, at paragraph 62 and 63, based on the evidence before him, which is not dissimilar than the evidence before this Court, he allowed a betterment deduction equal to one-third of the estimated cost of repair. I apply the same allowance and grant damages for this item in the amount of \$8,025.50.*

[18] In this present case Mr. Dorion purchased the home in 1987. In this present case and circumstances I would conclude that an appropriate betterment deduction is two-thirds, or to put that another way, I will allow one-third of the cost of the new septic system and the

total amount for the two Spryfield Sanitation pumpings of \$200.00 each. The figures follow:

New Septic System (Alvin MacDonald)	\$14,597.53
Consulting Work (Mac Williams)	<u>1,786.24</u>
	\$ 16,383.77
Time One-Third	\$ 5,461.26
Tank Pumping (Spryfield Sanitation)	<u>400.00</u>
	\$ 5,861.25

[19] The Claimants are also entitled to their costs which only appears to be the filing fee of \$160.00.

Disposition

[20] It is hereby ordered that the Defendant pay to the Claimants the following:

Debt:	\$5,861.26
Costs:	<u>160.00</u>
Total:	\$ 6,021.26

DATED at Halifax, Nova Scotia, this day of January, 2006.

Michael J. O'Hara
Adjudicator

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