

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: MacKinnon v. Prudential Woods Realty, 2007 NSSM 88

Between:

AMBROSE A. MACKINNON

CLAIMANT

-and -

PRUDENTIAL WOODS REALTY and ROSS KENNEDY

DEFENDANTS

DECISION AND AMENDED ORDER

Adjudicator: David T.R. Parker

Heard: October 23, 2006

Decision: January 5, 2007

This decision and Order is Amended as to the final amount only instead of \$2,225.00 Total the Order shall now read \$2,250.00 Total.

This matter came before the Small Claims Court in Truro, Nova Scotia, on the 23rd day of October, 2006.

The pleadings of the Claim are fairly succinct. The Claimant pleads that the Defendant, Prudential Woods Realty" sold me a piece of land stating that there was a drilled well. There was no drilled well on the property as it turned out.

The Defendant Prudential Woods Realty defended the action by saying, "We Prudential Woods Realty believe that upon discussion, and prior to you completing

your Agreement of Purchase & Sale, that you were aware this property (533 Pictou Road) did not have a drilled well. If not, why did you ask the vendor to give you 15 days to determine whether or not a well could be located on the property (clause 11(e) page #3, Purchase & Sale Agreement dated June 16, 2006?) Fact is, Mr. Ross Kennedy, our Vendor, at the time of signing a listing contract regarding 553 Pictou Road, believed his property had a drilled well; as he was told by the properties previous owner. Mr. Kennedy did disclose to us that the subject property contained a drilled well, something that could only be verified through excavation."

Facts

Both agents representing the Purchaser and Claimant in this case and the Defendant Ross Kennedy, the Vendor, worked as brokers for the Defendant Prudential Woods Realty.

The listing agent, Dave Uloth, completed the listing contract based on information provided to him by the Defendant Ross Kennedy. In the listing contract it has a notation beside water - "Drilled Well". There is an addendum to the listing contract which states in part that "there is currently a house on the property, however, its best use would be to remove existing dwelling and rebuild". It also states "No Property Condition Disclosure as owner has never lived there."

The listing agreement also states in Clause 21, "The foregoing representations respecting the said property are true to the best of the Seller's knowledge, information and belief, and the Seller agrees to indemnify and save the Brokerage or any Co-operating Brokerage from any claims arising from the Brokerage, or such Cooperating Brokerage acting in good faith, upon the representations of fact which the Seller has made in this agreement."

A Purchase & Sale Agreement was entered into by the Claimant Ambrose MacKinnon as Purchaser and Ross Kennedy as Vendor and the Vendor therein on June 16, 2006.

The Purchase & Sale Agreement, among other things, said in paragraph 11(e), "This agreement is subject to the Buyer satisfying himself that a well, providing sufficient quality and quantity of water for the Buyer's intended usage, can be located on the property. The Seller agrees to allow the Buyer to carry out a

reasonable amount of drilling on the property to determine this fact. This condition will be deemed satisfied unless the Seller or Seller's agent is notified to the contrary in writing within 15 days of acceptance of this offer. If notice to the contrary is received, then either party shall be at liberty to terminate this contract."

Analysis

The Defendant Ross Kennedy bought the property from Wells Fargo who apparently foreclosed on the property. Apparently the listing certificate said it was a drilled well. Mr. Kennedy, the Defendant, said in his testimony, "I never said it was a drilled well, I assumed there was. I checked it off."

Mr. Kennedy assumed it was a drilled well on the property, he never lived on the property and simply provided the listing agent with the same information he was provided when he bought the property through a foreclosure sale of the property. The listing agent, David Uloth, and the real estate company completed the listing contract on the basis of what they were told by the seller, Ross Kennedy.

The Claimant's agent asked the Defendant Seller's agent several times if the well was a drilled well and he was informed several times that is what he was told by the seller.

After the closing, the Claimant determined that the well was not a drilled well but rather a "spike point well" and had to pay \$2,070.00 to have a drilled well installed on the property.

There was no fraudulent misrepresentation by the Defendant Ross Kennedy in this case, nor was it pleaded.

In *Parker v Pierce* [1994] N.S.J. No. 404, the Court made a finding of negligent misrepresentation where a listing certificate inadvertently advertised a house as being nine years of age instead of nineteen.

In this case, it was not inadvertence; it was representation without qualification that the well was a drilled well. The listing certificate while not part of the contract was relied upon by the Claimant. It became part of what the Claimant was seeking to have, a piece of property at a low price with a drilled well on same.

The vendor and Defendant herein, Ross Kennedy, is bound to deliver to the purchaser property corresponding in extent and quality to the property which the vendor either contractually or by representation of fact makes to the purchaser. Mr. Kennedy by himself and through his agent David Uloth represented the property had a drilled well. As it turned out, it was not a drilled well, and of course the Claimant did not get what he was bargained to receive.

The next question here is whether the Defendant Prudential Woods Realty should also be responsible. I do not have to go down the road of whether a real estate company is vicariously responsible for acts of its agents. There is insufficient evidence before me that neither agent was negligent. David Uloth provided the information that he received from Mr. Kennedy in listing the property for sale. Does he have to go beyond that and make determinations if all what the seller tells him are true or accurate? That depends on the circumstances. If he knew or suspected some fact might be inaccurate, then he may well have to meet a higher standard of care. There is no evidence to support the idea that he knew that the well might not be a drilled well. In fact, the Purchase/Sale Agreement contemplated the Claimant satisfying himself the well provided sufficient quality and quantity of water, he may have well been under the impression that it was a drilled well. Certainly he would have noticed it was not a dug well.

I have also considered contributory negligence; however, that is not applicable in this case. There is nothing that requires a Purchaser to go out and prove a fact represented to him is not in fact true prior to his purchase of the property.

IT IS HEREBY ORDERED that the Defendant Ross Kennedy pay to the Claimant the following sums:

\$2,070.00	Cost of a drilled well
\$ 100.00	Service Costs
<u>\$ 80.00</u>	Court Costs

\$2,250.00 Total

Dated at Truro, Nova Scotia, this 25th day of January, A.D., 2007.

David T.R. Parker
Adjudicator of the Small Claims
Court of Nova Scotia