Claim No: 332527

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Ranallo v. Ells, 2010 NSSM 59

BETWEEN:

MICHAEL RANALLO

Claimant

- and -

ROBERT STUART ELLS and
LAURA SUZANNE ELIZABETH ELLS

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on September 14, 2010

Decision rendered on October 14, 2010

APPEARANCES

For the Claimant	self-represented
For the Defendant	Stacey England Counsel

BY THE COURT:

[1] The Claimant seeks $25,000.00 in damages arising from his and his wife's[1] purchase from the Defendants of a luxury home in Fall River. Within weeks of the closing in July of 2009, the Claimant experienced water leakage and was forced to do significant repairs both to stop the leaking roof and repair damaged floor joists, drywall and other elements.

[2] The claim, as drafted, is based on three separate theories:

a. The Defendants gave a Property Condition Disclosure Statement in which they denied having any knowledge of leaks. If they knowingly made a false statement, they could be held liable for misrepresentation.

b. There was a specific provision written into the Agreement of Purchase and Sale where the Defendants disavowed any knowledge of (among other things) water leaks. If they could be shown to have misrepresented the facts, they could be liable for a breach of this contractual term.

c. The Defendants signed an Amendment to the Agreement of Purchase and Sale, agreeing to certain repairs before closing, arising out of a house inspection. If their failure to perform the repairs was a breach of the contract, they could be liable.

[3] Measuring the damages is not really an issue, in the sense that there is no question that the Claimant has spent, or will be spending, at least $25,000.00 to deal with the issue that he discovered within weeks of taking possession of the home. The real issue here is liability.

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[1]Strictly speaking the Claimant's wife ought to have been a party to the claim as she was a party to the Agreement of Purchase and Sale and is an owner on title. She was not present during the trial.

[4] The home in question is a luxury home with lake frontage, and it was approximately seven years old when the Claimant purchased it from the Defendants in July of 2009. The Defendants had purchased it only about a year earlier, although they had lived in it as tenants since July of 2006.

[5] The Defendants testified that in their time as tenants and owners, they had not been aware of any water leaking into the home. They also testified that they had not done any major work on the house that could perhaps lead to water entering the structure. The only thing that they did was to relocate a down spout which - because of inadvertent damage to some weeping tile - was causing water to pool in a garden bed. The Claimant ended up relocating the down spout to its original location during the roof repairs.

[6] Despite the considerable time spent talking about this down spout at the trial, I believe it is a red herring as I do not believe it has been shown to have anything to do with the leaks that the Claimant experienced.

[7] The Defendants explained - perhaps to answer an obvious if unspoken question to the effect of why they put the house on the market almost immediately after buying it - that they had to sell the property because of a business setback that placed them in financial difficulty. The property was actually listed in the fall of 2008, although it did not attract a buyer until the spring of 2009.

[8] The Agreement of Purchase and Sale was signed on the 26th of June 2009. Some weeks prior to that date the Defendants had signed and provided to their agent a Property Condition Disclosure Statement (“PCDS”) which stated that the sellers were unaware of any structural problems, unrepaired damage or leakage

in the foundation or roof, and which stated that there had been no repairs within the last five years to correct leakage or dampness problems.

[9] Beyond the PCDS, the agreement also contained a clause where the Defendants warranted that “during their occupancy there has been no seepage of water from any source through any part of the building or foundation, that the Seller is aware of.”

[10] As is common, the agreement was conditional upon a satisfactory inspection. Soon after signing the agreement the Claimant arranged for an inspection of the home. Unfortunately the Claimant did not have a copy of that inspection report with him at the trial and consequently did not enter it into evidence, but the Claimant testified that the inspector had raised a concern that there was an area in the basement which appeared damp, but which could not be closely inspected because there was no access. This area was near a “clean out site” in the exercise room in the basement. I understand this to be an area typically behind a wall where the central drain pipe for the domestic water and sewage moves toward the outdoors where it connects with the septic or sewer system. That pipe has a removable part - the “clean out” - which allows the pipe to be cleaned out, in the event of a blockage or back up. Good construction practice would place a removable hatch so that the clean out can be accessed; otherwise, it would be necessary to break into the drywall.

[11] As a result of the inspection report, the Claimant asked for the Agreement of Purchase and Sale to be amended requiring the Defendants, among other things, to “fix leaking behind drywall at clean out site located in the lower exercise room and clean out to be left accessible.”

[12] The evidence of Mr. Ells was that he understood that the real problem was that the clean out was inaccessible, and that there might be some leaking from the clean out itself that the inspector thought might be creating some dampness. He testified that he cut out the drywall himself and inspected the clean out site. He said that the drywall itself and the entire area appeared to be dry, and he then left the newly created hatch accessible, using a piece of MDF to cover it. Believing that any dampness might be as a result of leaking through the clean out itself, he took a wrench and tightened it. The thought that there might be leaking from the roof two stories above, and that water might be finding its way down to this area, did not appear to cross his mind.

[13] The Defendants both testified that the room in question had been rarely used, as their best intentions to establish an exercise routine had not come to fruition.

[14] The Claimant did a walk through of the house before closing, but did not apparently look very closely at the area where the new hatch had been created. I am not sure if he even looked at all. He had been informed by his real estate agent that the Defendants had informed their agent that the necessary work had been done.

[15] The closing took place on July 21, 2009.

[16] Some time thereafter, the Claimant brought in painters to repaint the exercise room. To prepare for their work they removed a large wall mirror and removed the MDF hatch. When they did that, a quantity of water came through that had apparently been trapped behind the hatch.

[17] The Claimant was concerned and reported this to his real estate agent. He also made arrangements for contractors to come in and inspect the problem area. That took several weeks.

[18] Over the next few weeks there were several severe summer storms that brought significant rainfall to the area. The leaks became worse.

[19] To make along story short, it was not until early September that the source of the problem was identified and repaired. It appears that leaking was occurring in a part of the roof close to the front, in what the Claimant referred to as a "dead valley." Water was getting in at that level and working its way down, doing damage along the way. When all of the damage was finally assessed and repaired, there was a large job that, when finished, will exceed $25,000.00. The Claimant has already spent about $20,000.00.

Legal principles

[20] In the case of *Moffatt v. Finlay* 2007 CarswellNS 470,2007 NSSM 64, [2007] N.S.J. No. 439,161 A.C.W.S. (3d) 503, I had occasion to comment on the effectiveness (or lack thereof) of the PCDS as a device to place liability on the vendor of real property for defects that are discovered after closing:

> 28 I will observe at the outset that the PCDS is at most a modest exception to the principle of caveat emptor or "buyer beware" which is alive and well in this jurisdiction, as observed in the reported cases to which I was referred, including the recent decision of Associate Chief Justice Smith in *Gesner v. Ernst*, 2007 NSSC 146 (N.S. S.C.) at paragraph 44:
>
> > [44] As a general rule, absent fraud, mistake or misrepresentation, a purchaser of existing real property takes the property as he or she

> finds it unless the purchaser protects him or herself by contractual terms. Caveat emptor. (*McGrath v. MacLean et al.* (1979), 95 D.L.R. (3d) 144 (Ont.C.A.)).

29 Generally, sellers of real property make no warranties as to its condition. It is for buyers to perform their own inspections and, for the most part, take their chances. I believe that most buyers of resale homes appreciate that there may be flaws or imperfections that they will inherit, and they anticipate having to deal with them as and when they arise or as resources permit.

30 The difficulty with such a system has always been in the area of latent or hidden defects that only the sellers know about and no inspection, no matter how rigorous, could be expected to reveal. Although the PCDS does not restrict itself to questions about latent defects, in my view it is the potential presence of a known latent defect that the statement is designed to address.

31 Even so, the PCDS form is somewhat limited, being expressly qualified as something only to the "best of [the seller's] knowledge," and quite grudging in what it asks and reveals. For example, the question "are you aware of any problems with water quality, quantity, taste or water pressure?" might have been worded quite differently and more helpfully. It might have asked are you aware of any problems that have ever manifested with water quality, quantity, taste or water pressure, or that might point to such a problem manifesting in the future? In an arguably more perfect system, such a question would be asked.

32 The limited effect of the PCDS was considered at some length in the Gesner case (above). It is worthwhile to quote at some length from the reasons of Smith A.C.J., which I endorse (and which are binding on me):

> [54] A Property Condition Disclosure Statement is not a warranty provided by the vendor to the purchaser. Rather, it is a statement setting out the vendor's knowledge relating to the property in question. When completing this document the vendor has an obligation to truthfully disclose her knowledge of the state of the premises but does not warrant the condition of the property (see for example: *Arsenault v. Pedersen et al*., [1996] B.C.J. No. 1026 and *Davis v. Kelly*, [2001] P.E.I.J. No. 123.)

[21] The same principles are applicable here. On the evidence I am unable to find that the Defendants had knowledge of any seepage or leakage through any

part of the structure or foundation. The Defendants appeared to me to be quite sincere in their testimony and I found nothing in their evidence *per se* to challenge their credibility. Of course, an inquiry into credibility goes beyond the superficial aspects of testimony; it requires consideration of whether or not the testimony is consistent with the known facts or inherent probabilities. I heard nothing in the evidence that is inconsistent with the Defendants' statements that they did not observe any water. It is noted that the Defendants were occupiers for only about three years, and the area where water was later discovered was behind a wall in a room that the Defendants rarely used.

[22] It is also not improbable that when Mr. Ells cut into the drywall to expose the clean out, there was no water in evidence. On all of the evidence I am not prepared to make a finding that he was aware of and/or discovered the leak and just covered it up with a piece of MDF and hoped to pull a "fast one" over on the Claimant.

[23] The evidence supports a finding that the leak, like many, started small and was likely starting to admit water when the Defendants were still in occupation, but that it became much worse under the pressure of severe tropical storms bringing heavy rainfall and wind. The Claimant appears to be a victim of bad timing.

[24] To the extent that the claim is based on deliberate misrepresentation by the Defendants, it fails on the facts in the sense that the Claimant has not proved that the Defendants had knowledge of any leaking. I might have a suspicion that they knew, but that is not enough. I would have to find it more probable than not that they knew.

[25] The part of the claim that is more promising for the Claimant is the amendment clause where the Defendants promised to “fix leaking behind drywall at clean out site located in the lower exercise room and cleanout to be left accessible.” This promise by the Defendants is not a warranty as to the state of their knowledge. It is a promise to do a particular thing. It is also the type of promise that probably survived the closing.

[26] Even so, the difficulty that the Claimant has with this aspect of his claim is that the parties did not really know what was expected of them. If it is true, as I have found, that the serious leaking only began after the closing, and if on breaking into the drywall to create the hatch Mr. Ells did not see any actual leaking, it is difficult to say that he failed in his obligation. He understood that the inspector had made a very limited inspection of this area and that the bigger problem was that the clean out was not accessible. Mr. Ells believed that he was addressing the real problem.

[27] No one at the time appreciated the type or magnitude of problem that would eventually surface. Had the Claimant thought there was a real issue, he would have inspected the repair work before closing to satisfy himself that the problem had been addressed. He might well have had the inspector back to check on the outstanding issues. None of that happened.

[28] On the evidence, viewed at the time the Defendant did the minor repair, the Defendant did all that he could reasonably be expected to do. He opened up the area of the clean out, saw no obvious leak, tightened the clean out in case it might be leaking, and fashioned a removable hatch.

[29] The Claimant implicitly accepted what the Defendants had done.

[30] I am not satisfied that the Defendants were in breach of any of their contractual obligations, nor am I satisfied that they misled the Claimant in any of the statements that they made. In the result, the Claimant has not made out a case to hold the Defendants responsible and the claim should be dismissed.

Eric K. Slone, Adjudicator