Claim No: 350734

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Barbour v. MacDonald, 2011 NSSM 55

BETWEEN:

LAURA BARBOUR and CHARLENE ROBICHAUD

Claimants

- and -

GARY MacDONALD and REBECCA JANE LEBLANC

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on August 9 and September 8, 2011

Decision rendered on September 27, 2011

APPEARANCES

For the Claimants	Peter Coulthard, QC Counsel
For the Defendants	Alex Embree Counsel

BY THE COURT:

[1] The Claimants have brought this claim against the Defendants on the basis of alleged misrepresentation in a Property Condition Disclosure Statement (PCDS). They seek the sum of $13,738.85, which they spent to rectify a significant problem of water leaking into the basement of the home that they had purchased from the Defendants several months previously.

The facts

[2] The property in question is an older single-family home at 86 Windmill Rd., in Dartmouth. The Defendants purchased the property as an investment in June 2007, with the intention of making some renovations and putting it back on the market for sale. Those renovations occurred through the summer and into the fall of 2007, whereafter it was listed for sale and apparently sold. When that sale of the property fell through, in December 2007 they decided to rent it out for a while until a better sale market arrived. It was rented to junior high teacher Jeff Gabriel and his fiancee from December 2007 until June 30, 2009. It was later rented to some other people who needed short-term accommodation, for about two months during the summer of 2009, pending sale to the Claimants.

[3] The Defendants never resided in the property.

[4] When the Defendants put the property back on the real estate market in mid-2009, they initially indicated in the listing that they would not be offering a PCDS. They took the advice of their agent, to the effect that they probably should not provide one since they had not lived in the property and their knowledge of it was limited. However, once some prospective purchasers

(including the Claimants) began showing an interest, the issue of a PCDS was raised and the Defendants reconsidered their position. On the 30th of May 2009, they filled out and signed a PCDS in the company of their real estate agent.

[5] Most of what is represented in the PCDS is not in question. However, there are several areas that feature in this case.

a. To the question 6A "Are you aware of any structural problems, unrepaired damage, or leakage in the foundation?" they answered **"no."**

b. To the question 6D "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?" they answered **"yes"** and added in handwriting ***"membrane/sump pump installed in basement to deal with previous leaks."***

c. In question 10D asking about warranties, they wrote in ***"warranty from watertight basement company for basement waterproofing - we were informed that warranty transferrable."***

[6] The Claimants received a copy of this PCDS as part of the process, and also had their own inspection of the home done on June 15, 2009. The inspection appears to have been fairly thorough, but did not raise any red flags in terms of water leakage into the basement.

[7] The transaction closed and the Claimants moved into the property on September 2, 2009.

[8] The basement of the home appears to be partially finished, in the sense that the walls are insulated and wall-boarded but the floor is just painted concrete. It does not appear that at any relevant time it has been used for anything but storage, or laundry. This is not to suggest that water is not a problem for those uses of the basement, but rather to posit that this would likely not involve anyone spending a lot of time in the basement, thus limiting the opportunity to make observations.

[9] A few short weeks after moving in, in early October 2009, the Claimants first noticed water coming into the basement, in fairly significant quantities. This prompted them to get in touch with the Defendants and also with the company that had supposedly warranted the basement as waterproof, as they had believed. Eventually they learned more about the history of this basement, about previous water issues and the efforts to repair it.

[10] On the evidence that came out before me, I make the following findings.

[11] When the Defendants first came to own the property, the basement was totally unfinished. They had an energy audit done which encouraged them to insulate the basement walls, to help avoid heat loss. I believe that with the totally unfinished state of the basement floor and walls, that some amount of water incursion would not necessarily have been noticed or even problematic. Moreover, there were two sump pumps running in the basement which clearly indicated that this was a potentially wet basement. It is well understood that sump pumps are primarily designed to deal with rising ground water that could

potentially flood basements if not restrained. It is also common experience that water table levels fluctuate depending (mostly) on the amount of rainfall and possibly the season.

[12] During the summer of 2007 when the Defendants were working on the basement and getting the home ready for sale, and through that fall when it was vacant, it appears that the sump pumps were doing their job and water was either not a problem or not being noticed. However, shortly after Jeff Gabriel and his fiancee moved in they started to experience water running along the basement floor. Naturally they called their Landlord, and the Defendant MacDonald came by to inspect and help with cleanup.

[13] After a few such occurrences, the Defendant MacDonald made contact with Tony Rossi of "Water Tight Basement Company," with whom he had dealt several years previously in connection with another property. Mr. Rossi came over and assessed the problem and proposed a solution.

[14] Mr. MacDonald signed an agreement with Mr. Rossi and his company, whereby the company agreed to do the following:

a. Supply and install water dry membrane system along all walls
b. Tie system to existing floor drain with backwater valve
c. Concrete all areas

[15] The document also provided that "all workmanship quality guaranteed." It is significant to note that nowhere on the document does the company warrant that the basement will be watertight, i.e. will not leak in the future, although it was

the testimony of the Defendant MacDonald that he understood he was getting such a guarantee.

[16] The work that Mr. Rossi's company did in early February 2009 - at a cost of $2,500.00 - consisted of the following (as I understand it). He installed an impermeable membrane on all of the walls, to deal with the foundation cracks which he suspected were allowing some water to get in. He created a channel around the perimeter, just beneath the walls, to allow any water to escape, and tied these channels into the floor drainage system so that the water would run out to the sewer system. He also removed the two sump pumps, which he thought would now be superfluous, and filled in the holes with concrete.

[17] Mr. Rossi testified to a number of observations and conversations that he had with Mr. MacDonald, some of which were disputed by Mr. MacDonald. Without at this point making any findings about this evidence, I will first set out what Mr. Rossi stated. He said that he believed that his solution would deal with the problem, but he also testified that there was clearly a problem with hydrostatic pressure; i.e. water rising out of the ground and exerting upward pressure on the floor slab and rising into the basement. He stated that he observed this problem before he did his work, but became more aware of it when he was called back a few weeks later because there was, once again, water coming into the basement. He testified that he told Mr. MacDonald that there was clearly a drainage problem on the outside, because he could see a buildup of ice on the back lawn, on the walkways and in front of the garage. He says that he told Mr. MacDonald that he should definitely put in a new drainage system once spring conditions allowed.

[18] On his second visit, he created a second floor drain in the basement to deal with what he saw as too much water for the one new drain to handle. He did this work at no charge. He also testified that Mr. MacDonald asked to borrow one of his pumps to deal with flooding in the garage which, I note, is not attached to the house; however, the fact that it was flooding appears to confirm that there was a problem with water on the property.

[19] The additional floor drain in the basement obviously did not solve the problem as, a few weeks later, there was water leaking again. Mr. Gabriel called Mr. MacDonald, who called Mr. Rossi.

[20] Mr. Rossi came and had a look and recommended that one of the sump pumps be reinstalled. He believed that his system was working, but that the hydrostatic pressure was simply too much for the system to handle. Mr. MacDonald asked him to do the work. He stated that he was too busy. In the end, Mr. Rossi lent Mr. MacDonald his jackhammer so that Mr. MacDonald could do the work himself, digging out one of the old sump pump wells and reinstalling the old sump pump. Mr. Rossi testified that he thought Mr. MacDonald might use another contractor to do this work, but it turns out that he did it himself.

[21] On this third visit, Mr. Rossi says that he made it very clear to Mr. MacDonald that his real problem was outside drainage. He says that he recommended reinstalling the sump pump because this might take some of the pressure off. He says that Mr. MacDonald asked him how much a new exterior drainage system might cost, to which he replied “twenty or thirty grand.” He says that Mr. MacDonald brushed that off, implying either that he did not accept that as the true cost, or simply indicating that there was no way he was going to do something that expensive. Nevertheless, Mr. Rossi testified that he believed that

Mr. MacDonald was undertaking to fix the drainage problem, and as such he stood by his warranty (such as it was).

[22] I am not willing to accept Mr. Rossi's evidence wholesale. There are problems with it. It was self-serving, and difficult to believe in some respects. The fact that he later charged the Claimants $200.00 to transfer the warranty, which soon thereafter proved to be of minimal value, also damages his credibility in my eyes. However, some aspects of his evidence ring true and Mr. MacDonald's version of these events also lacks complete credibility.

[23] It appears that in the several weeks following the reinstallation of the sump pump, and up to the point of the signing of the PCDS, there was no more obvious leaking. I am able to accept this because Mr. Gabriel was an entirely credible and disinterested witness.

[24] However, it strains credulity to believe that Mr. MacDonald truly believed that his water problem was permanently solved. It also strains credulity for him to believe, as he stated, that he had a warranty from Mr. Rossi's company to the effect that his basement was now watertight. I believe that Mr. MacDonald knew there was very likely a problem with drainage on his property, and that his problems were being contained - for now - by something of a stopgap solution.

[25] He also must have known that Mr. Rossi and his company would not be warranting the reinstallation of the sump pump, as they had not done all of the work. Granted this was Mr. Rossi's recommendation, and he might be accountable to some degree for his advice, but no trades person would warrant work done by the homeowner.

[26] Having seen Mr. Rossi's efforts to prevent water leakage fail on at least two occasions, Mr. MacDonald ought to have been a lot more cautious (in his own mind and with others) about declaring the problem solved. He also ought to have been more cautious given the fact that water was getting into the garage in sufficient quantities that he would have considered using a pump to remove it.

[27] It was against this backdrop that the PCDS was signed. I was not given a precise date for when the sump pump was reinstalled, but it would have been several (perhaps as few as four and as many as eight) weeks before the Defendants sat down with their agent to fill in the PCDS.

[28] It is not really disputed that the Claimants relied on the PCDS, and had it said something different they well might have acted differently. They might have walked away from the purchase or offered a different price. They might have insisted upon some stronger type of warranty from the Defendants. At the very least, they would have alerted their inspector to the potential problem and received his advice.

[29] I cannot fault their inspector for having failed to detect a problem, or from failing to predict what would happen in the fall after taking possession. He could not have been expected to know of the history; all he would have seen was a then-dry basement with a functioning sump pump. As far as the outside was concerned, there was no obvious problem with standing water. Had he inspected after a heavy rainstorm, he might have observed something different.

The legal effect of the PCDS

[30] There has been considerable discussion in cases, both in this court and in the Supreme Court of Nova Scotia, about the legal value of a PCDS. In a recent case *Paterson v. Murray*, 2011 NSSM 34, I had the following to say:

> [11] There is a well understood and ancient principle in real estate that says "buyer beware" or "caveat emptor." While arguably harsh, this principle has long recognized that once a property changes hands, the new owner is largely on his or her own and takes a property "as is." Both the law and real estate practice have sought to soften this principle, to an extent. The Property Condition Disclosure Statement is one modest initiative.
>
> [12] The limited value of the PCDS was commented upon in a 2007 decision of Associate Chief Justice Deborah Smith in *Gesner v. Ernst*, 2007 NSSC 146, where she observes 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.)).
>
> [13] She further notes in the decision that the PCDS is not a warranty:
>
> > [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.)
>
> [14] Rarely do sellers of real property make express warranties as to the property's condition, and there is no evidence of any such warranty here. It is generally understood in the real estate world that buyers should perform their own inspections and, for the most part, they must take their chances. I believe that most buyers of resale homes, and particularly of older homes such as the one here, 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.
>
> [15] The limitation 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. 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.
>
> [16] Because it is not a warranty, a claim based on the PCDS is for misrepresentation. Where the seller is alleged to have been knowingly untruthful, the claim is essentially for fraudulent misrepresentation, which is a very serious accusation. Where it is alleged that the seller ought to have known that the answer was incorrect, it is for negligent misrepresentation which is arguably less serious in the sense that it does not allege dishonesty, but merely a lack of due care.

[31] In light of this test, it is for me to determine whether the statements made by the Defendants in the PCDS were factually correct, and if not, whether the Defendants knew or ought to have known that the Claimants, as the ones relying on the statement, would be misled to their detriment.

[32] On its face the PCDS alludes to a past problem of “previous leaks” and describes the method of dealing with them, namely "membrane/sump pump installed in basement.” It denies knowledge that there is a current issue. It then goes on to state that there is in place a transferable "warranty from watertight basement company for basement waterproofing.” I believe that any reasonable person reading that statement would conclude:

a. There was once a problem with leaks;
b. The leaks have been repaired with a membrane and sump pump;
c. The leaks no longer exist, and

d. There is a warranty to the effect that the basement is and will be watertight.

[33] On the facts as I find them, this overstates the case. The Defendants knew, or ought to have known, that the repair was provisional at best. The basement still leaked after two procedures done by Mr. Rossi, and there was some indication of a problem with hydrostatic pressure and problems with the exterior drainage. The Defendants' hope that the reinstallation of one of the sump pumps would be a durable and permanent fix, was unreasonably optimistic.

[34] The reference to the warranty was also an exaggeration. No reasonable person reading the warranty could conclude that anyone was warranting that the basement was waterproof. I believe that Mr. Rossi was primarily warranting the work he did, and he may well have made statements initially to the effect that the problem was fixed, but by the time he was brought back a second and a third time, there is no way that he would have been so sanguine.

[35] Furthermore, he would not have warranted anything to do with the reinstallation of the sump pump, since he did nothing other than suggest that it be done and lend his jackhammer.

[36] As such, I believe that the Defendants made a negligent misrepresentation to the Claimants. I make no finding of dishonesty on their part; it is simply the case that their stated belief that the basement was now waterproof was unreasonably held.

[37] I find that the Claimants were misled by this negligent misstatement. They were lulled into a false sense of security and put off making deeper inquiries.

Had the statement said something to the effect “we had some leaks, we took some measures and we are crossing our fingers that they have been fixed,” any reasonable purchaser would have dug much deeper to determine whether or not there was a problem and to assess the risk of going forward with the purchase.

[38] The PCDS may be a “modest initiative” as I have observed, mostly because it only deals with the extent of the vendor’s knowledge. However, it is that knowledge uniquely held by the vendor, that is critical in situations like this where a problem that is intermittent and perhaps seasonal is concerned.

[39] I note that counsel for the Claimants, in his submission, was very sceptical as to the possibility that the basement did not leak in the weeks after the reinstallation of the sump pump, prior to the closing with the Claimants. I am more willing to accept the possibility that there was no significant leakage during that time, and/or that the very temporary tenants did not report any even if it occurred. It is consistent with common experience that the late winter and early spring can be very wet in Nova Scotia. That was when the problems peaked, leading to the work by Mr. Rossi. It is also common that tropical storms and hurricanes can bring huge amounts of water in the late summer and early fall. The spring of 2009 was notoriously very dry. Given all of the variables, it is quite possible that there were several months without water coming into the basement. The bigger question was: how well equipped was the basement to remain dry when the rainfall was heavy and the level of ground water rose beyond its average level.

Damages

[40] After the Claimants first experienced the problem, they had discussions with Mr. Rossi. He in turn referred them to Terry Redden, a very experienced contractor who is semi-retired and only takes on selected jobs. He observed the "system" in place and concluded that there was no way that it could deal with the problem of hydrostatic pressure. The sump pumps were inadequate because the wells were not collecting all of the water coming up through the brown shale which is the predominant bedrock in the area. This was because the concrete slab was poured directly on the rock, without a layer of gravel which is now the common practice, to allow water under the slab to move laterally. He concluded that Mr. Rossi's work was only designed to keep water from seeping through the foundation.

[41] It was his recommendation, accepted by the Claimants, that there be a trench dug to place a pipe connecting to the municipal sewer system, and that it be connected to new French Drain (weeping tile) around the perimeter of the home. He performed the work in early 2010 at a cost, taxes included, of $13,236.00. The Defendants did not seriously challenge this invoice.

[42] The evidence of the Claimants was that the basement has been free of water ever since.

[43] The additional amount claimed by the Claimants is $502.85 for sod. It was necessary to dig up a significant part of their yard. Rather than hire someone to re-sod the lawn, they had the sod delivered and placed it themselves.

[44] The expenses appear to me to be reasonable. The Claimants appear to be people of fairly modest means who did not overspend in the hope of recovering the cost from someone else. They spent what truly needed to be spent.

However, the measure of damages for negligent misrepresentation is not necessarily the cost to put the property into the condition you believed it to be in, although it may be. The real question is what you would have done, had you not been misled.

[45] The purchase price paid by the Claimants was about $230,000.00. They invoked their inspection clause to oblige the Defendants to do some unrelated work. I am satisfied that had these Claimants known the true state of the problem, they would have exercised due diligence and obtained estimates for repair. A leaky basement is not something that they might have lived with, as an issue to be dealt with somewhere down the line.

[46] Courts will sometimes deduct a “betterment” charge, because the Claimants would be getting something new when they have contracted for something that they knew was far advanced in its life span (though believed to be functioning). A good example is *Desmond v. McKinlay* 2000 CarswellNS 178, [2000] N.S.J. No. 195, 188 N.S.R. (2d) 211, 587 A.P.R. 211, where Wright J. deducted one-third of the damages because the Plaintiff would be getting something newer and more modern than she believed she would be getting:

> 62 Otherwise, I am satisfied that the costs of repairs and/or replacement of the water and sewage disposal systems were reasonably incurred and represent an appropriate measure of damages. However, I also conclude based on the evidence that a betterment allowance should be applied against the damages figure of $17,302.28. This is because the plaintiff now has brand new water supply and sewage disposal systems servicing her property in contrast to what was there before. These modern systems, which are in some respects customed designed for the property, represent a substantial betterment and it would be appropriate, in my view, to make an allowance for that betterment of one-third of the above referenced invoices which I have allowed.

> 63 I note that a similar approach was followed by the New Brunswick Court of Queen's Bench in the recent case of Domokos v. Phillips, [1996] N.B.J. No. 410 (N.B. Q.B.)where McLellan, J. made a betterment allowance of one-third of the contractor's charges for the cost of repairs to a home. .....

[47] I do not believe that logic applies here. The work that the Claimants had done is, in the end, invisible, and does no more than they believed was already happening. As such, I assess the Claimants' damages at $13,738.85, without deduction.

[48] The Claimants seek prejudgment interest, which I will allow at the rate of 4% from February 1, 2010 to the date of this order (September 27, 2011), which I calculate to come to $909.40.

[49] They also seek costs in the amount of $182.94 for filing, $106.25 for service of a subpoena and witness fees and $172.50 to serve the claim, for a total of $461.69, all of which is properly awarded.

[50] There will be an order for these amounts which total $15,109.94.

Eric K. Slone, Adjudicator