Claim No: 357442

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Crann v. Hiscock, 2012 NSSM 9

BETWEEN:

NANCY LOUISE CRANN

Claimant

- and -

DAVID HISCOCK and BEVERLY HISCOCK

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 29, 2011

Decision rendered on January 3, 2012

APPEARANCES

For the Claimant   self-represented

For the Defendants   Jason Cooke, Counsel

BY THE COURT:

[1] The Claimant bought a home from the Defendants. She performed considerable due diligence, which included a home inspection and a water test. The water test disclosed high levels of arsenic, which necessitated the installation of a reverse osmosis purification system, at the Defendants' expense. One thing the Claimant did not do was a test to determine how much water the well produced, namely a flow test. It is conceded that she could have done so. It is also a fact that she could have inserted a condition in the agreement, to the effect that the well produced a minimum amount of water. Instead, she relied on the statement in the Property Condition Disclosure Statement (PCDS) to the effect that the Defendants were not aware of any issues with the quantity of water being produced by the well.

[2] On the evening of the date of closing on August 11, 2011, the well essentially went dry. Over the next several days, the ability of the well to recover (i.e. produce water) proved to be extremely limited. All other possible explanations, such as problems with the pump or other mechanical issues, were eliminated. A flow test done by professionals confirmed that the well only produced water at a rate that would be insufficient to sustain one person living in the house, let alone a family of two (such as the Defendants) or three (the Claimant and her family).

[3] In the result, the Claimant had to have a new well drilled and spent the first ten days of her ownership of this home without water, at least most of the time.

[4] The Claimant seeks to recover the approximately $12,000 that she was obliged to spend. Not surprisingly, this was an expense that she had not expected.

[5] The main issue for me to decide is whether or not there was a misrepresentation in the PCDS, either fraudulent or negligent, that had the effect of misleading the Claimant.

[6] Against the uncontested fact that the well was seriously deficient in its ability to produce water, which is its only purpose, I must measure the testimony of the Defendants to the effect that they (almost) never had any issues with their quantity of water.

[7] They both testified that they lived a "normal" life, each showering daily and doing things such as washing dishes and clothing. They claimed that on two occasions over the past twenty five years in which they have lived in the house, the well had gone dry during a party or large gathering when there were as many as fifteen people using the toilets and running water. They were adamant that at all other times the water supply was adequate.

[8] The Defendants came across as decent people. Their testimony was given in a straightforward manner. There was nothing in their demeanor which would have led to a belief that they were lying, although I must take note that the cross-examination to which they were subjected was far from rigorous. The Claimant did a good job generally presenting her case, but she is not a lawyer.

[9] How can the version of the facts presented by the Defendants be reconciled with the fact that the well ran dry the day of closing? It is theoretically

possible that something happened on that day which fundamentally changed the amount of water flow. But I have to regard that prospect as extremely improbable.

[10] This case demonstrates the difficulty with assessing credibility purely on the basis of demeanor and apparent internal consistency. Certainly, in some cases that is all that the court has to go on. But here, the problem with the credibility of the Defendants' evidence is its inconsistency with the incontrovertible fact that the well was barely producing any water within hours of their ceding possession. The Defendants had to have known. It is unlikely in the extreme that they did not know. As such, the statement in the PCDS was misleading.

[11] The most credit I can give the Defendants is to theorize that they had lived with this well for so long, that they developed the ability to ration water carefully and always leave time for the well to recover. There were certain statements made by Mr. Hiscock that suggested to me that he knew he had a stingy well. He spoke about how you have to remember always that you are on a well, and that it is not the same with city water. He specifically said “being on a well, people have to learn how to conserve water.”

[12] Even so, it is unimportant to speculate on the Defendants' motives or try to get too much inside their heads. My job as an adjudicator is to make findings on a balance of probabilities, and I am driven to conclude that the Defendants knew they had an underperforming well and ought to have made this disclosure on the PCDS.

[13] There is no need to cite the well known case law. The PCDS is not a warranty. And buyer beware is still an underlying principle in the law.

[14] However, if the PCDS is to have any purpose at all, it must be given effect when a statement turns out to have been untrue, under circumstances where it is more probable than not that the person making the statement knew or ought to have known that the statement was misleading and that the person receiving the statement would be actively misled. It is no answer to say that the Claimant might have asked for a flow test or a warranty. She didn't. If the law is going to excuse breaches of the PCDS on the basis that there are more stringent terms that can be extracted, we might as well stop using the PCDS.

[15] The Claimant's damages consist of expenses incurred to investigate the problem, excavate to expose the well (which was buried four feet underground and difficult to find), plus the cost of the new well. The Claimant did not go with the first estimate that she obtained. She was trying to be cost conscious. In the end it cost more than she originally had hoped, because the well drillers had to go down 382 feet in order to get an adequate water flow. She now has plenty of water. I cannot fault her for failing in any respect to mitigate her loss.

[16] The only basis to reduce her damages would be because of what the law refers to as “betterment.” In other words, if she ends up with something better than she had a right to expect, then the Defendants should not be held fully responsible.

[17] The old well here was many years old, but there was no evidence before me as to precisely how old, nor what is the normal life expectancy of a well. It stands to reason that mechanical parts such as pumps will wear out over time

and need to be replaced. Hoses may corrode. Electrical wires may break. But a drilled hole into the bedrock, designed to capture water, is not subject to such factors.

[18] Nevertheless, I do allow for the fact that the Claimant now has a much better well system than she had reason to expect. Her water flow is superior, and all of the parts involved with delivering that water are in excellent shape. She should have years ahead of her without problems. Perhaps it may seem arbitrary, but I am prepared to allow a one-third reduction on account of betterment. As such, the damages will be reduced accordingly.

[19] The total amount claimed was $12,251.96. Two-thirds of this is $8,167.97.

[20] The Claimant shall have judgment against the Defendants in the amount of $8,167.97 plus $182.94 for her costs of commencing this claim, for a total of $8,350.91.

Eric K. Slone, Adjudicator