SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Kellogg v. Frantel*, 2024 NSSM 13

Date: 20240305
Docket: 528812
Registry: Annapolis

Between:

Paul J. Kellogg

v.

Corinne Frantel, Sharon Hall, Aaron Daniels, Paul Jackman

Adjudicator:	Sarah A. Shiels,
Heard:	February 21, 2024 by teleconference
Decision	March 12, 2024
Counsel:	Paul J. Kellogg, Claimant (self-represented) Michael Curry, for the Defendants Corinne Frantel and Sharon Hall Liza Myers, for the Defendants, Aaron Daniels and Paul Jackman

By the Court:

Factual Background

[1] On October 27, 2021, the Claimant, Paul Kellogg, purchased a building located at 223 St. George Street, Annapolis, Nova Scotia. The building had a known history of roofing trouble. The property had been described in the listing as having “a new roof”; however, around the time of purchase, an inspector informed Mr. Kellogg he was wary of the new roof and could not say whether it would last five years.

[2] Within weeks of acquiring the property, Mr. Kellogg observed what he described as “telltale signs of problems” revealing the gradual appearance of water. He was baffled by the fact there was water intrusion through two layers of roofing.

[3] The situation escalated when, during a wind and rain storm in late January 2022, water started pouring into the kitchen from the roof and large pieces of the roof lifted off and landed around the building. The full extent of the problem was confirmed in the summer of 2023, when the layer of the roof that hadn’t blown off was removed and Mr. Kellogg discovered ongoing water damage, soaked insulation, and potentially structural wood dry rot.

[4] On November 29, 2023, Mr. Kellogg proceeded to file a claim with the Small Claims Court of Nova Scotia for the amount of $25,000. As Defendants, he named the vendor, Corinne Frantel, along with Sharon Hall, and realtors Aaron Daniels and Paul Jackman. Mr. Kellogg confirmed that his claim was based on a defective roof and the condition of the roof.

[5] Mr. Kellogg expressed the view that the roof should have been repaired before the building changed hands, especially given a long history of roof leaks due to a previous inadequate roofing job. He also took issue with the fact that the listing description referred to “a new roof”.

[6] Included in the claim materials was a copy of an e-mail from Mr. Kellogg to the defendant Sharon Hall dated February 16, 2022. In this email, Mr. Kellogg recounted the following observations:

> I noticed the leak soon after the closing on October 27th. If memory serves me correctly it was just a few days; first I noticed a mark in the ceiling which I was trying to remind myself if it'd been there before (although I knew the ceiling had recently been completely redone). Then there seemed to be a faint straight line appearing, which made me believe it to appear along the edge of a drywall sheet. A short time after that the first real drip started appearing over the floor, closer to the sink (where the first mark or stain showed up.
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> Then another person and I saw water coming down through the first pot light fixture as one enters the kitchen. Soon after a third leak started not far from the stove. Then, that became the worst source of leaks, sometimes a very steady drip as that part of the ceiling bubbled and opened somewhat. I got my drill to put in a few holes, trying to direct water out and into buckets. At one point I had six buckets on the floor (see pics of that and ceiling) sent earlier).

Limitations Defence

[7] At a pre-hearing teleconference, the defendants pre-emptively raised a limitations defence and the parties were given an opportunity to make written and oral submissions regarding this issue. The defendants and Mr. Kellogg proceeded to file written materials. Brief oral submissions were heard by teleconference on February 21, 2024.

[8] The parties agreed that Mr. Kellogg's claim materials could be deemed admissible for the purpose of considering the limitations issue. As such, the court makes its factual findings based on Mr. Kellogg's claim materials along with his subsequent written and oral submissions.

[9] The court accepts that the condition of the roof worsened following Mr. Kellogg's purchase. The court also accepts that the severity of the underlying problems with the roof became more apparent during the rainstorm that occurred in late January, 2022 and then upon inspection in July, 2023.

[10] When questioned as to the nature of a continuous act or omission, Mr. Kellogg stated that he was trying to find out how much damage was done and trying to get a professional to assess damage. He argued the concept known as discoverability runs once you know the harm to you. In his view, knowledge of the extent of the damage was a pre-condition to filing a claim and he did not know the extent of the harm until July, 2023.

[11] By contrast, the defendant realtors rely on *Thompson* v. *Scotia Capital Inc*. 2023 NSSC 409 [*Thompson*] at paragraph 24, which cites the test for

discoverability provided by Justice Moldaver in *Grant Thornton LLP* v. *New Brunswick*, 2021 SCC 31 at paras 42-46. A portion of that test is excerpted here:

> [42] […] a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. […]
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> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. […]
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> [44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd.* v. *McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).
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> [45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. […]
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> [46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal* v. *Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (De Shazo, at para. 31; see also the concept of "perfect certainty" in *Hill* v. *South Alberta Land Registration District* (1993), 1993 ABCA 75 (CanLII), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc.* v. *Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing Peixeiro, at para. 18). [emphasis added]

[12] In Nova Scotia, the *Limitation of Actions Act*, SNS 2014, c 35 ("the *Act*") is the applicable limitation statute. Section 8 of that legislation provides as follows:

> 8 (1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
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> (a) two years from the day on which the claim is discovered; and
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> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
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> (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

> (a) that the injury, loss or damage had occurred;
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> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
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> (c) that the act or omission was that of the defendant; and
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> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.
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> (3) For the purpose of clause (1)(b), the day an act or omission on which a claim is based occurred is
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> (a) in the case of a continuous act or omission, the day on which the act or omission ceases; and
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> (b) in the case of a series of acts or omissions concerning the same obligation, the day on which the last act or omission in the series occurs.

[13] The defendant realtors also referred to the following comments in *Smith* v. *Parkland Investments Limited*, 2019 NSSC 74, para 64 [*Smith*] cited in *Jesty* v. *Vincent A Gillis Inc*., 2019 NSSC 320 at para 31 [*Jesty*]:

> Discoverability means the knowledge of the facts that may give rise to the action. The knowledge required to start the limitation period running is more than a mere suspicion but less than exacting knowledge. […] The limitation period runs from when Dr. Smith had or ought to have knowledge of a potential claim. The discovery of additional facts at a later date does not postpone the discovery of the claim.

Analysis

[14] Given that Mr. Kellogg asked the court to accept the materials filed with his claim as his evidence, the court accepts the statement contained in the email cited above, and finds that Mr. Kellogg observed a leak within a few days of October 27, 2021. The court also accepts that Mr. Kellogg did not appreciate the full extent of the problems with the roof until July, 2023.

[15] During the hearing, Mr. Kellogg acknowledged that within weeks of the purchase he started noticing a drip that slowly expanded but said it was difficult to get anyone to even look at it and he didn't know what the damage would be. He stated that when a leak starts to appear you don't know initially whether it has been caused by a pipe or plumbing issue. He stated that he didn't know well into 2022 that it was the roof. With respect to his claim for lost rental income from October 2021, he stated you could not expect someone to live where you started noticing a drip weeks later.

[16] Even if the court was to accept Mr. Kellogg's statement that he didn't know well into 2022 that the roof was the cause of the leak that he had observed in his kitchen, the court finds Mr. Kellogg had constructive knowledge the roof was to blame. Further to the reasoning cited in *Thompson*, the evidence showed that Mr. Kellogg ought to have discovered the material facts by exercising reasonable diligence.

[17] Mr. Kellogg included the following statement in his written evidence:

> I wasn't happy with the way the "new" roof looked and had a home inspector look at it, who also said he was wary of it. Even professional home inspectors can only guess; they cannot (and their reports emphasize this in part of a common disclaimer) open up walls, ceilings or roofs to inspect under the "skin;" they point out POTENTIAL problems and/or signs of historic faults. As far as the roof was concerned, there were no interior tell-tale signs of kitchen ceiling staining (a sign of leakage). When I asked if the new roof at least could get me through five years, the Inspector replied "it might; visually it's hard to tell." My (common, logical) assumption was that the (now) TWO roof layers would hold for a number of years to come.
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> […]
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> Within weeks of my acquiring the property, I started noticing telltale signs of problems; first the appearance of lines that delineate the edges of ceiling gyproc (drywall). That was followed by wet stains in those same areas but no steady drip or torrent. It seemed that ensuing days and weeks brought the variables of no change, then slowly more water gradually appeared. I was baffled by the two layers of roofing that EACH should have prevented any water intrusion.
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> [emphasis added]

Considering the home inspector's express reservation, the court does not accept it was logical for Mr. Kellogg to assume the roof layers would hold for a number of years to come. In any event, after Mr. Kellogg purchased the property and began observing leaks, he could have discovered the materials facts by exercising reasonable diligence.

[18] As provided in *Smith* and cited in *Jesty*, the operative question for the court to consider is when a claimant had or ought to have knowledge of a potential claim. The discovery of additional facts does not restart the time of discovery of the claim for the purpose of calculating a limitation period.

[19] Mr. Kellogg had more than a mere suspicion that the roof was defective at the time of purchase. His apprehension was shared by his home inspector. Then,

after he purchased the property and began to observe “telltale signs of problems” he was able to draw a plausible inference of liability from the material facts known to him. His claim was not rendered undiscoverable by his difficulties in retaining professional assistance. Accordingly, the court finds that Mr. Kellogg had actual or constructive knowledge of a potential claim with respect to a defective, leaking roof within weeks of his purchase on October 27, 2021 and, in any event, well prior to November 29, 2021.

[20] Any interpretation of legislation by the Nova Scotia Small Claims Court is governed by previous findings made by higher courts including the Supreme Court of Nova Scotia and the Supreme Court of Canada. In light of the applicable jurisprudence, this court cannot accept Mr. Kellogg’s argument that his claim became discoverable once he understood the full extent of the issue.

[21] Finally, Mr. Kellogg’s assertion that he was delayed in ascertaining total roof damage, continuing roof damage through water penetration, and opening up the roof does not extend his claim period pursuant to section 8(3) of the *Act*. While damages or harm to Mr. Kellogg’s property may be ongoing, there is no evidence of any continuous act or omission on the part of the defendants that would survive the limitation period.

Conclusion

[22] The court finds that Mr. Kellogg had real or constructive knowledge of a defective, leaking roof at 223 St. George Street, Annapolis, Nova Scotia within weeks of purchasing the property on October 27, 2021 and that his claim for damages for the condition of the roof at the time of purchase was discovered prior to November 29, 2021. As such, by November 29, 2023, the two-year limitation period provided by section 8 of the *Act* had expired.

[23] The COVID-19 pandemic, lack of available roofing companies, and limited initial evidence of harm do not excuse Mr. Kellogg from compliance with the provisions of the *Act*. Mr. Kellogg’s claim for damages is statute-barred and is hereby dismissed.

Costs

[24] As provided by section 15(2) of the Small Claims Court Regulations, no agent or barrister fees of any kind shall be awarded to either party. However, the

defendants are entitled to any fees incurred in serving their respective defences and may submit a request for these costs in writing.

[25] I thank counsel and Mr. Kellogg for their helpful written submissions.

Sarah A. Shiels, Small Claims Court Adjudicator