Jacklyn COUCH v. Scott CAIRNS and Carla CAIRNS *T-0001-CV2005000026*

2005 NWTTC 09

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

Jacklyn COUCH

Plaintiff

and

Scott CAIRNS and Carla CAIRNS

Defendents

REASONS FOR JUDGMENT
of the
HONOURABLE JUDGE Bernadette SCHMALTZ

Heard at:	Yellowknife, NT May 30, 2005 and June 27, 2005
Date of Decision:	August 4, 2005
Counsel for the Plaintiff:	Self-represented
Counsel for the Defendents:	Glenn Tait Barrister and Solicitor

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[1] The Plaintiff seeks judgment against the Defendants in the amount of $4,265.50. The Plaintiff claims that the Defendants did not disclose pre-existing water damage to a trailer home the Plaintiff purchased from the Defendants. The Plaintiff claims that repairs to the home have cost her, or will cost her, $4,265.50.

[2] This trial began on May 30th, 2005, and continued on June 27th, 2005, in Yellowknife. The Plaintiff testified, and called two further witnesses, Francois Thibeault and Michel Lanteigne. The Defendants did not call any evidence.

THE EVIDENCE

[3] In early June 2004, the Defendants were offering their home at 580 Catalina Drive, Yellowknife[1] (the Property), for sale. In early June, 2004, the Plaintiff and Francois Thibeault viewed the Property, and the Plaintiff entered into negotiations with the Defendants to purchase the Property. These negotiations in large part occurred via an exchange of e-mails between the Plaintiff and the Defendant Scott Cairns. Copies of several e-mails were entered as exhibits on the trial. The e-mails have a very friendly tone to them.

[4] On June 3rd, 2004, at 10:56 a.m., the Plaintiff sent an e-mail to the Defendant Scott Cairns offering to purchase the Property for $110,000.00 (Exhibit 3). In that e-mail, the Plaintiff stated that the offer was subject to

[1] Some of the e-mails entered as exhibits on this trial refer to 58 Bellanca Avenue, Yellowknife. This discrepancy was not explained during the trial, however, it was clear throughout the trial, that only one property was involved, and all parties were referring to the same property, i.e. 580 Catalina Drive, Yellowknife.

financing approval, and mentioned other requirements relating to the condition of the appliances, the need to install a new oil tank, and that the Property must be cleaned and cleared of all garbage. There is no mention in that e-mail of the state of repair of the Property. On June 3rd, 2004, at 1:49 p.m., in an e-mail from the Defendant Scott Cairns to the Plaintiff, this offer was countered; the Defendants appear to have agreed to everything with the exception of the price, and counter-offered at $117,500.00 (Exhibit 4).

[5] On June 3rd, 2004, at 6:08 p.m., the Plaintiff sent a further e-mail to the Defendant Scott Cairns, explaining how she had arrived at the price of $110,000.00 (Exhibit 4). In this e-mail the Plaintiff mentioned the need to upgrade the windows, to lay some gravel, and to possibly have one side of the trailer jacked up. There is no counter-counter offer in this e-mail, though it appears that the parties were still negotiating. Again, there was no mention of any water damage, or possible necessity for repairs other than those referred to above.

[6] It appears that the parties met personally on June 6th, 2004, and reached an agreement. On June 7th, 2004, at 10:26 a.m., the Plaintiff e-mailed the Defendant Scott Cairns and referred to the meeting and the agreement reached; in this e-mail the Plaintiff also stated that the Defendants agreed to “look after” legal fees, and incorporated all “conditions on the original offer that was perversely [sic] agreed.” (Exhibit 5)

[7] On June 8th, 2004, at 9:03 a.m., the Plaintiff sent an e-mail to the Defendant Scott Cairns setting out the body of an Offer to Purchase for the Property (Exhibit 11). This writing has several clauses, and, among other matters, made reference to the Purchaser being able to cancel the agreement if she is unable to obtain financing, the Vendor’s assurance that all appliances are clean and in good working order, the Vendor agreeing to install and fill a new fuel tank, and the list of appliances and fixtures to be included in the purchase price.

This writing also stated: "The purchaser has inspected the property and agrees that there are no other factors, other than those herein described in writing affecting this offer." (my emphasis). This writing, being contained in an e-mail message, is not signed, though does end with what appear to be signature blocks for the purchaser, owners, and witnesses.

[8] On or about June 8th, 2004, at 4:06 p.m. (the date and time generated by the fax machine that appears across the edge of the paper), the Plaintiff received a fax message from her lawyer with attached instructions respecting the purchase of the Property (Exhibit 12). On page 2 of the message, the first instruction to the purchaser is to review the offer prepared by the lawyer (my emphasis). On page 3 of the message, instructions with respect to "Signing an Offer to Purchase" are set out. Among other points on the page, it states:

> Before signing an offer, both vendor and purchaser are encouraged to read the Offer to Purchase carefully to ensure they understand and agree to the terms therein (my emphasis).
> …
> If you have any questions on the Offer to Purchase, please direct them to your lawyer before you sign. It is very hard for your lawyer to protect you after you have signed an Offer you didn't understand.

The page ends with "We trust the above will assist you in signing your offer! Please feel free to call our office if you have any further questions on signing the offer."

[9] On June 9th, 2004, the Plaintiff made an Offer to Purchase the Property, and this offer was accepted by the Defendants (Exhibit 1). Clause 2A of the Offer to Purchase set out the conditions that had to be met or waived by the Purchaser (the Plaintiff) prior to June 18th, 2004, failing which, the agreement could have been cancelled by the Purchaser. These conditions were:

a) The Purchaser is unable to obtain Bank financing on terms satisfactory to the Purchaser, for this purchase.
b) The Purchaser obtaining a satisfactory Inspection Report and Appraisal of the property to be performed at the Purchasers' expense by an Inspector/Appraiser of the Purchasers' choice.

Such Appraisal must value the property at no less than the Purchase Price in paragraph 1.

c) The Purchaser is unable to obtain property insurance (as required by his lender)

[10] Clause 2B of the Offer also sets out the conditions that the Vendor (Defendants) had to comply with. Those conditions were:

a) all appliances included in paragraph 5 and all mechanical, electrical, and plumbing systems shall be clean and in working condition as at Closing;
b) all carpets throughout must be cleaned and the property and home left in clean condition;
c) the Vendor shall provide a survey of the property.
d) The Vendor shall provide a Family Law Act Declaration with respect to the property.
e) The Vendor shall agree to replace and fully fill the fuel tank, at Vendor cost, and meet insurance company specifications.
f) Vendors agree to pay for all Purchaser[']s legal fees, disbursements and Purchaser closing adjustments (taxes).

[11] Clause 2C of the Offer states:

> At Closing, the Vendors shall allow a "walk-through" inspection of the property, and if there are deficiencies in items 2B above, or other deficiencies or damage to the property (which were not visible to the Purchaser at the time of the Offer), then the parties agree they shall instruct their lawyers to holdback funds or to adjust the Purchase price to deal with such issues.

[12] Clause 6 of the Offer states:

> Subject to paragraph 2, the Purchaser has inspected and agrees to purchase the property as it stands, and <u>it is agreed that there is no representation, warranty, collateral agreement, zoning, municipal permit or license, or condition affecting the property in this Offer, other than is expressed herein in writing</u>. (my emphasis)

[13] Clause 9 of the Offer set out other representations and warranties of the Owner (Defendants) with respect to the purchase of the Property. The matters contained in Clause 9 are not relevant to this claim.

[14] The Plaintiff took possession of the Property on June 30th, 2004, and, presumably, all conditions were met or waived and the closing went smoothly, as there was no evidence before me that any problems arose with respect to the closing of this sale.

[15] Though the Plaintiff purchased the Property on her own, both the Plaintiff and Francois Thibeault reside in the Property.

[16] The Plaintiff testified that one evening in November, 2004, she felt a draft coming from underneath the washing machine. The washing machine was moved, and the source of the cold air was found to be an 18 inch hole in the floor underneath the bathtub. I assume the washing machine was in the vicinity of the bathtub. Further investigation was done, and some emergency repairs were done to prevent the home from freezing. Several pictures were entered (Exhibit 14) showing prior water damage underneath the foundation of the home. Presumably these pictures were taken after the problems had been discovered in November, 2004. The Plaintiff testified that the Defendants told her that there was no water damage to the Property, and told her more than once that they had never had a “freeze-up”.

[17] In cross-examination she admitted that she had not had a professional property inspection done as the Defendants told her they were giving her their “honest word and honest opinion”. The Plaintiff further agreed in cross-examination that her lawyer had explained the Offer to Purchase to her, and specifically agreed that Paragraph 6 of the Offer to Purchase had been explained to her. She testified that her lawyer explained that she was allowed to get an inspection report on the Property. Again, the Plaintiff never did get a professional inspection done on the Property before she purchased the Property, and waived condition 2A(b) of the Offer to Purchase.

[18] The Plaintiff agreed that she had viewed the Property approximately 3 times before she made an offer on the Property. She had viewed the Property with Francois Thibeault, and Mr. Thibeault had also viewed the Property with an engineer, prior to the Plaintiff purchasing the Property. The Plaintiff agreed that the Defendants had given her full access to the Property, and had not told either her or Mr. Thibeault that they could not look at any part of the Property.

[19] Francois Thibeault testified that he had viewed the Property with the Plaintiff, and had asked the Defendants “how the trailer was”, and was told that everything in there was sound. He testified that he knew he had to take a good look. Mr. Thibeault testified that he had been given a “guarantee” by the Defendant Scott Cairns that the trailer had no water damage; Mr. Thibeault testified that he was told this when the Defendant Scott Cairns was helping him up when he had attempted to look under the trailer. Mr. Thibeault had recently had back problems, was wearing a back brace at the time, and was not able to get under the trailer to inspect underneath. Mr. Thibeault testified that the Defendant Scott Cairns had “guaranteed” that the floors and skirting were insulated, and there was no need to go underneath the trailer – “everything was fine.”

[20] Mr. Thibeault testified that he had looked at the trailer with an engineer prior to the Plaintiff offering to purchase the trailer.

[21] Mr. Thibeault further testified that both faucets from the washer had leaked after the Plaintiff and Mr. Thibeault had moved into the trailer; there had also been leaks underneath the kitchen sink since they had moved in.

[22] In cross-examination, Mr. Thibeault agreed that the Defendants had invited him to look under the trailer, but being in a body brace at the time, Mr. Thibeault was not able to.

[23] Michel Lanteigne also testified on behalf of the Plaintiff. Mr. Lanteigne is a civil engineer, employed primarily in the area of road, bridge, and infra-structure works. Mr. Lanteigne was not qualified nor called to give expert evidence. Mr. Lanteigne testified that in November, 2004, he had seen evidence of water damage underneath the Plaintiff's trailer. He described the damage he had seen; he could not tell how old the damage was, but did testify that he did not believe it was only a year old. Mr. Lanteigne testified that he had looked at the Property before the Plaintiff purchased the Property. He testified that Mr. Thibeault had asked him to look at the addition that had been put on the Property. He did not go there in any professional capacity, nor did he go there to do a home inspection. Mr. Lanteigne testified that though he had "peeked" underneath the trailer when he had attended to look at the addition, he was not equipped at the time to go underneath the trailer, and had not gone underneath. Mr. Lanteigne did agree that he was given free access to the trailer, and the Defendants had not hidden anything.

ANALYSIS

[24] Exhibit 1, the Offer to Purchase, signed by the Plaintiff, and accepted by the Defendants, governs the agreement between the two parties. That agreement specifically states:

> Subject to paragraph 2, the Purchaser has inspected and agrees to purchase the property as it stands, and it is agreed that there is no representation, warranty, collateral agreement, zoning, municipal permit or license, or condition affecting the property in this Offer, other than is expressed herein in writing.

[25] The Plaintiff claims the Defendants should be responsible for the damage to the Property she discovered in November, 2004. She claims that this damage was caused by pre-existing water damage to the Property that the Defendants must have known of, and failed to disclose to her.

[26] I do not accept this assertion. First, Francois Thibeault testified that both faucets from the washer had leaked after the Plaintiff and Mr. Thibeault had moved into the trailer; there had also been leaks underneath the kitchen sink since they had moved in. I do not know if these leaks in fact resulted in water damage underneath the trailer, but one would expect that the leaks that had occurred after the Plaintiff and Mr. Thibeault had moved into the trailer may well be indicative of plumbing problems, and could have caused water damage to the trailer. There is no evidence that the Plaintiff took any steps to have the Defendants repair this damage, or to hold the Defendants responsible for these leaks that had been discovered after the Plaintiff moved in.

[27] Mr. Thibeault testified that the Defendant Scott Cairns had “guaranteed” to him that there had been no prior water damage to the Property. First, Francois Thibeault is not a party to this action, and any guarantees, warranties, conditions, or agreements that may have been expressed between him and the Defendants cannot be relied on by the Plaintiff.

[28] That being said I am not satisfied that such a “guarantee” was made. First, I would find it surprising when so many matters were addressed in the written agreement between the parties, that something as important as this type of “guarantee” would not be included in the written contract. Second, the written contract specifically states that no other representations, warranties, collateral agreements, or conditions besides those contained in the agreement exist. There is no agreement, guarantee, condition, warranty, or any mention at all of prior water damage to the Property. Further, no such “guarantee” is alleged to have been made by the Defendents to the Plaintiff. If such a guarantee was ever made by the Defendants, then it would appear that when the parties entered into the written contract, both parties abandoned it, or appear to have decided not to rely on it, which again I would find highly unusual.

[29] The written Offer to Purchase (Exhibit 1) allowed the Plaintiff to have the Property professionally inspected and should such inspection not be satisfactory, then the Plaintiff could have taken steps to adjust or cancel the agreement. The Offer to Purchase was conditional on the Plaintiff receiving a satisfactory inspection report on the Property. The Plaintiff agreed that this clause was explained to her by her lawyer. I would expect that a professional inspection of the Property may have revealed any pre-existing problems with the Property. The Plaintiff also agreed to purchase the Property "as it stands". The inclusion of the satisfactory inspection condition in the Offer to Purchase was a prudent step on the part of the Plaintiff, and would be included in the agreement for her protection. For some reason, the Plaintiff chose to waive this condition without having an inspection of the Property done. Having addressed the issue of unforeseen or un-seen problems by including this condition, and then having waived the condition and the protection it provided to the Plaintiff, it is very difficult for the Plaintiff to now assert the claim that this damage pre-existed her purchase of the Property and was concealed from her by the Defendants.

[30] As I said earlier, it appears from e-mails entered as exhibits, and from the testimony of the Plaintiff during this trial, that the tone of this entire transaction was very friendly, and the Plaintiff trusted the Defendants completely. I accept that the Plaintiff is very hurt by what she perceives was non-disclosure by the Defendants of pre-existing damage. However, I am not satisfied by the evidence called on this trial, including the pictures that were entered, that the Defendants did know or must have known of any pre-existing water damage. Nor am I satisfied by the evidence called that even if there was pre-existing water damage, that any damages, or repair costs, that may have resulted to the Plaintiff were specifically caused by, or even connected to such pre-existing damage.

[31] I find that the case against the Defendants has not been made out, and the Plaintiff's claim is dismissed. The Defendants are entitled to costs and reasonable disbursements.

[32] The issue of costs and reasonable disbursements may be addressed in Court upon notice by the Defendants to the Plaintiff and to this Court. Notice of the hearing into the issue of costs and reasonable disbursements is to be given to the Plaintiff no later than 30 days from the filing of this judgment, though the hearing may be held later than 30 days from the filing of this judgment. The hearing shall be on a Monday, at 9:30 a.m. or as soon thereafter as the Court may hear the matter, and shall be scheduled for a date when I am presiding. If the Defendants fail to comply with the notice provision, the Defendants will be allowed costs of $100.00 plus any filing fees.

Bernadette Schmaltz
J.T.C.

Dated at Yellowknife, in the Northwest Territories,
this 4th day of August, 2005

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