

ONTARIO
Toronto Small Claims Court

SC-06-40955-00 / D1

ROBERT WEINMAN AND KAREN WEINMAN (Plaintiffs)

v.

KATHLEEN BRINKMAN AND ANNE MCLAY (Defendants)

ENDORSEMENT

For reasons given below **This Court Orders:**

1. The Plaintiff's Claim is dismissed.
2. The Defendant's Claim is dismissed.
3. There will be no Order for the payment of Court filing or pleading preparation fees because of the divided result.
4. The Plaintiffs will pay the Defendants a Counsel Fee fixed in the amount of \$250.00.
5. The Plaintiffs will pay the Defendant Anne McLay additional disbursements for transportation between Ottawa and Toronto and return under rule 19.01(1) and O.Reg. 11/1990 fixed at \$250.00.

REASONS

This action arises out of a real estate transaction between the plaintiffs as purchasers and the defendants as sellers under an agreement of purchase and sale entered into on May 30, 2006, for the sale of a house located at 416 St. Clement's Avenue in Toronto. The transaction closed on July 4, 2006. Eight days later the plaintiffs noticed water leaking into their basement.

The plaintiffs take the position that the defendants were aware of the problem and were under an affirmative duty to disclose it to them. They seek to hold the defendants liable for the estimated cost of repair, (\$10,400.00 plus GST,) up to the limit of this Court.

The issues I have to decide are these:

1. At the time the agreement of purchase and sale was signed, were the parties aware of a water problem in the basement.
2. As a matter of law was this a "patent" or a "latent" defect and, if the latter, had the defendants sought to conceal it from the buyers.
3. In all the circumstances, are the plaintiffs entitled to recover from the sellers.

The facts are not seriously in dispute. The defendants bought the property in approximately 1994. The basement contained a storeroom at the northern (rear) end, a laundry room and a utility room to the south. Part of the basement was used as a study by Anne McLay. The defendants were aware that water could enter the basement at the north wall, at the north east corner and along the east wall. Their evidence was that this happened to a greater effect on an intermittent basis and the water drained away into a drain.

Some months before the house was listed for sale some of the basement wall and the floor was painted. I am satisfied that this was not done to conceal the problem.

In early May, 2006 in anticipation of listing the house for sale the defendants engaged James Hammond to inspect the property. Mr. Hammond noted:

Some staining/dampness from water penetration has been noted along foundation wall at north/east corner. Investigate to determine cause and correct as required.

When listing the house for sale Ms. Brinkman completed a Seller Property Information Statement, ("SPIS.") In response to the question, "Is the property subject to flooding?" Ms. Brinkman indicated "No." In response to the question, "Are you aware of any moisture/water problems?" Ms. Brinkman indicated, "Yes," and added "Some moisture in basement."

The plaintiffs viewed the house at an open house over the weekend of May 27, 2006. They were represented by Ms. Elaine Harris, a real estate agent with 26 years experience. An offer date had been set for May 30, 2006 and the plaintiffs were aware of the fact that there were multiple offers. For reasons that are completely unexplained, Ms. Harris did not provide the plaintiffs with a copy of the SPIS and it was not attached as a schedule to the agreement of purchase

and sale. The plaintiffs did not ask for it, even though its existence is specifically referred to in the Toronto Real Estate Board listing that had been provided to the plaintiffs.

Clause 13 of the Ontario Real Estate Association standard form listing agreement provides:

INSPECTION: Buyer acknowledges having had the opportunity to inspect the property and understands that upon acceptance of this Offer there shall be a binding agreement of purchase and sale between Buyer and Seller. **The Buyer Acknowledges having the opportunity to include a requirement for a property inspection report in this Agreement and agrees that except as may be specifically provided for in this Agreement, the Buyer will not be obtaining a property inspection or property inspection report regarding the property. (Emphasis in original.)**

After discussing the merits of including a condition as to an inspection in the offer, the plaintiffs waived their rights and submitted an unconditional offer that, after some further negotiation, was accepted.

At the time they bound themselves to the Agreement of Purchase and Sale the plaintiffs had not reviewed the SPIS that disclosed a basement water problem; they had waived the right to have an independent inspection that, given the findings of the James Hammond inspection, may well have revealed the problem and there is no evidence that they ever asked for the production of any existing inspection report, that was either refused or concealed.

There is contradictory evidence that after the contract was concluded there was some discussion as to whether there were leaks or flooding in the basement. I do not believe that Ms. Brinkman tried to dissemble during this conversation and, in any event, the contract was binding. In the same way, I do not think that the plaintiffs were entitled to seek an independent inspection after the agreement had been concluded in accordance with the clear terms of clause 13.

After discovering the water problem the plaintiffs obtained a quotation for repairs from JAGG Enterprises dated July 31, 2006. The description of the problem starts:

Based on my visual inspection of your residence here are my findings. There appears to be several leaking areas, efflorescence and staining was evident more towards the back half of the house. This is usually

caused by deteriorating damp proofing (tar) that was applied on the exterior of the foundation walls at the time of construction. Based on the age of the house the old clay weeping tile system (if any) may be clogged or damaged. In my opinion this problem appears to have been present for quite some time.....

The Law

The general rule in the purchase of land is that of ***Caveat Emptor***, "let the buyer beware." ***Jowet's Dictionary of English Law, (London: Sweet & Maxwell Limited, 1959,)*** explains it:

At common law this maxim meant.....that when the buyer had required no warranty he took the risk of quality upon himself, and had no remedy if he had chosen to rely upon the bare representations of the seller, unless he could show that representation to have been fraudulent,

and cites as authority law reports dating from the start of the 17th century.

Dickson J. succinctly stated the proposition in ***Fraser-Reid v. Droumtsekas***, [1980] 1 S.C.R. 720:

.....[N]otwithstanding new methods of house merchandising and, in general, increased concern for consumer protection, caveat emptor remains a force to be reckoned with by the credulous or indolent purchaser of housing property. Lacking express warranties, he may be in difficulty because there is no implied warranty of fitness for human habitation upon the purchase of a house already completed at the time of sale. The rationale stems from the laissez-faire attitudes of the eighteenth and nineteenth centuries and the notion that a purchaser must fend for himself, seeking protection by express warranty or by independent examination of the premises. If he fails to do either, he is without remedy either at law or in equity, in the absence of fraud or fundamental difference between that which was bargained for and that obtained.

The law in the common law provinces of Canada has been conveniently summarized in the following excerpts from Di Castri, ***The Law of Vendor and Purchaser***, 2nd ed. (Toronto: Carswell, 1988+).

§236 Patent and Latent Defects as to Quality

A patent defect which can be thrust upon a purchaser must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. . . .

A latent defect, obviously, is one which is not discoverable by mere observation.

In the case of a patent defect, as distinguished from a latent defect as to quality or condition, and where the means of knowledge are equally open to both parties and no concealment is made or attempted, a prudent purchaser will inspect and exercise ordinary care: *caveat emptor*. However, while inspection by a purchaser bars him from complaint as to matters patent, the mere means of knowledge, or the opportunity to inspect when he has relied solely upon a representation by the vendor, does not have this result. Neither is a purchaser who is unqualified to make an effective inspection, and where, in any event, an inspection could not be conclusive, necessarily barred from relief. .

But a purchaser may still be without a remedy as, on a sale of land, there is, generally speaking, no implied warranty as to its use for any particular purpose. The onus is on the purchaser to protect himself by an express warranty that the premises are fit for his purposes, whether that fitness depends upon the state of their structure, the state of the law or on any other relevant circumstances. In the case of a vacant lot, a purchaser takes its quality as he finds it, or he seeks his protection in the terms of the contract.

So, it has been held that a plaintiff cannot complain where he has ample opportunity and in fact does cross-examine the defendant's agent on a certain matter which, subsequently, the plaintiff alleges as the subject matter of a misrepresentation. But, of course, a purchaser can escape specific performance where there is an actionable misrepresentation as to use.

It would seem that in the case of a latent defect of quality, at any rate where unknown to the vendor, and not resulting in his purchaser being compelled to take something substantially different from what he contracted for, a purchaser has no remedy either in damages or by way of rescission, unless he pleads and proves fraud or breach of warranty. The conduct of the vendor in concealing the true nature of a patent defect will be treated as fraudulent where it has the effect of lulling the suspicions of the purchaser. Thus, damages are

recoverable in the same way as though there were a fraudulent misrepresentation. . . .

In **Crozman v. Ruesch** (1993), 87 B.C.L.R. (2d) 223, [1993] CarswellBC 397, the buyers had noticed problems with the floor of the subject property the sellers tried to minimize. Subsequent to closing the buyers had to spend in excess of \$12,000.00 to correct the deficiencies. The Court found that there was no evidence of deceit and that the defects were as evident to the buyers as they were to the sellers and that *caveat emptor* applied.

An opposite result was reached in **Whaley v. Dennis**, [2005] CarswellOnt 3288, a decision at trial of Quinn J. of the Ontario Superior Court of Justice. The sellers had failed to disclose septic tank problems in a SPIS and had placed drywall over damaged walls in order to conceal damage caused by longstanding problems that they had been unable to correct. The Court found that the problems were latent ones, which no ordinary person could reasonably have been expected to discover in the face of the defendant's efforts to conceal them.

Analysis

The defendants made no effort to conceal any water problems in their basement. The problem had been disclosed in the SPIS that the plaintiffs failed to review. It had been open to the plaintiffs to make their offer conditional on an inspection and they waived the right to do so. The inspection report of James Hammond makes it plain that water damage was visible, as does the quotation provided by JAGG Enterprises. There were no representations made by the defendants as to the condition of the basement.

While the defendants knew there was a water leak the ignorance of the plaintiffs can be directly related to their own lack of inquiry.

The problem was a patent defect not a latent defect. The entry of water into the basement was detectable on ordinary inspection. There was no attempt on the part of the defendants to mislead the plaintiffs by concealing the damage or by inducing the plaintiffs to limit their inquiries. Indeed, the repairs have never been made, the actual cause of the leaks remains open to speculation and it is impossible to conclude that the defendants were in any better position to know about the source of the problem than would have been the plaintiffs had they even known about the dampness or moisture.

The plaintiffs are entirely incorrect in their assertion that in the circumstances there was any duty whatsoever on the part of the defendants to bring the water problem to their attention.

It is impossible to see any basis on which the defendants could be held liable to the plaintiffs.

The action has to be dismissed.

The Defendants' Claim was not seriously put forward and it too will be dismissed.

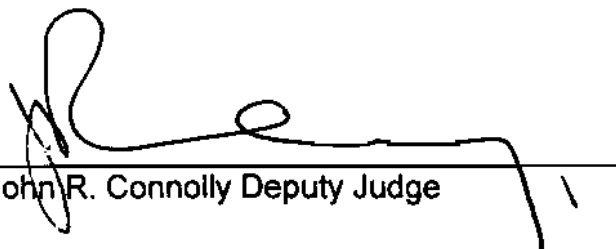
"John R. Connolly, Deputy Judge"

May 28, 2007.

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John R. Connolly Deputy Judge

May 28, 2007.

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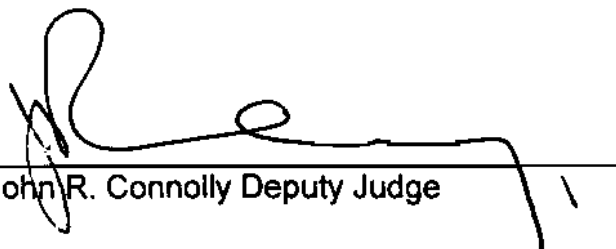
Counsel for the Defendants

Kathleen Brinkman and Anne McLay (Vendors)

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