Citation: *Mollet v. Craven,* 2014 YKSM 6

Date: 20140618
Docket: 13-S0024
Registry: Whitehorse

SMALL CLAIMS COURT OF YUKON
Before: His Honour Judge Chisholm

PHILIPPE MOLLET AND
SYLVAIN BELMONDO

Plaintiffs

v.

BRYAN ROY CRAVEN AND
BRENDA L. DION

Defendants

Appearances:
Philippe Mollet and Sylvain Belmondo — Appearing on their own behalf
Bryan Roy Craven and Brenda L. Dion — Appearing on their own behalf

REASONS FOR JUDGMENT

Nature of the Claim

[1] The Plaintiffs bought a house from the Defendants in a country residential area of Whitehorse in July 2009. They are now seeking $25,000 in damages due to water infiltration resulting from an improperly built addition to the house, commissioned by the Defendants in 2005, and as the result of a discovery that the size of the property is 1.2 acres smaller than they understood at the time of purchase.

Relevant Evidence

[2] As in many cases, the parties felt strongly that certain information should be

conveyed to the court during the course of calling evidence. The evidence led was significant and it is not my intention to review it all in detail. I have considered the evidence as a whole and have dealt with the legal issues that arise in relation to that evidence.

Plaintiffs' Case

[3] The Plaintiffs moved from France to Whitehorse in 2009 at which time they engaged the services of a real estate agent to assist them in finding a home.

[4] The Plaintiffs visited 6 Soapberry Lane on July 9, 2009, which was listed as a house on a 3.8 acre lot. They signed a Contract of Purchase and Sale the same day for a purchase price of $369,000. In a property disclosure statement, the Defendants indicated they were not aware of any moisture and/or water problems in the walls and that they were not aware of any roof leakage or unrepaired roof damage.

[5] The house was inspected by an inspector hired by the Plaintiffs. Nothing unusual was discovered.

[6] The sale closed and the Plaintiffs took possession on August 7, 2009.

[7] The first winter, the Plaintiffs noticed some condensation and water infiltration. Some water entered the kitchen area and initially the Plaintiffs believed it was coming from the upstairs bathroom. This, however, only lasted a couple of days after which it resolved itself.

[8] The Plaintiffs again experienced water infiltration the following winter and spring

(2010/2011), by which time water was entering a number of rooms. They brought in a contractor to remove ice and snow from the roof and to install heat lines in the eaves.

[9] The following winter and spring (2011/2012), there was again ice build-up on the roof and water infiltration. The Plaintiffs hired another contractor to remove snow and ice from the roof, to repair the flashing around the chimney, and to repair worn shingles.

[10] The next winter (2012/2013), the problems had not diminished. The Plaintiffs brought in the building inspector, Kevin Neufeld, whom they had hired for the initial inspection in 2009. He identified the construction of the addition in 2005 as the root cause of the water infiltration.

[11] In the summer of 2013, the Plaintiffs hired Saul Turner to remedy the problems with the roof noted in the inspection report. Both Mr. Neufeld and Mr. Turner testified at trial.

[12] Mr. Neufeld operates a home inspection company in Whitehorse. Although not qualified as an expert at trial, he has significant experience in this area. In his opinion, the problems experienced by the Plaintiffs in their home are the result of poor design and workmanship when an addition was made to the house in 2005.

[13] Prior to the addition, the chimney enclosure was on the outside of the house where there was no need for it to be insulated, but the addition to the house went around the chimney. At roof level, the former exterior chimney chase was not properly insulated nor was a vapour barrier installed. Warm moist air in this area was therefore not properly contained. During the winter, this led to warm air rising and becoming

condensation which then froze upon contact with the underside of the roof. As the weather warmed, the melting of this frost led to water running down wall cavities to the kitchen ceiling.

[14] Mr. Neufeld also noted that the construction allowed warm air to heat the roof surface, causing the over lying snow to melt. The melted snow would then flow to the eaves where it would freeze and pool, leading to the creation of an ice dam. This build-up would ultimately melt and penetrate the structure, by working its way under shingles and entering the ceiling and wall cavities.

[15] As indicated, Mr. Neufeld did the initial home inspection for the Plaintiffs in 2009. Although a copy of the report was not entered into evidence, it is clear that he noted no patent defects or indications that latent defects existed.

[16] Saul Turner, a journeyman carpenter, testified to the work that he did for the Plaintiffs in August of 2013 to remedy the water infiltration problem. He described essentially the same construction deficiencies, and consequences to the structure, as outlined by Mr. Neufeld.

[17] As far as the lot size, it was only in 2012 when the Plaintiffs were considering putting the house up for sale that they discovered that the lot size was not what they had understood. It turned out to be 2.6 acres as opposed to the 3.8 acres represented to them at the time of purchase.

Defendants' Case

[18] The Defendants say that they never experienced any issues with the roof or with water infiltration. They were proud home owners who kept good care of the house. If they had experienced a problem with water infiltration, they would have remedied it.

[19] When they bought the property in 2005, they decided to have an addition built and this was done prior to their moving into the house. Mr. Craven testified that he and Ms. Dion were both working at this time. They would leave the property each morning for work and observe progress on the addition on their return home in the evening. He was aware that the City of Whitehorse required inspections be done at various stages of the project. According to the reports he saw, all stages of construction had been completed to satisfaction, including the installation of insulation and a vapour barrier. The Defendants had no reason to believe there were problems in the manner in which the addition was constructed.

[20] In the four years that the Defendants lived in the house, Mr. Craven testified they experienced no problems with respect to water infiltration. As done at his previous residence, his practice in the spring was to keep the eaves and gutters clear. He placed roof pellets in the gutters and sprinkled salt along the eaves. His goal was to prevent snow and ice from building up, while allowing the melt to flow freely. Mr. Craven indicated that they never experienced the type of ice build-up described by the Plaintiffs and evident in some of the photographs entered as evidence.

[21] In terms of the issue with respect to the lot size, Mr. Craven acknowledges making a mistake when calculating the overall size of the lot. He made use of a

photocopy of a survey to determine the dimensions of the lot and in two instances he erred in the appropriate figure. He determined the dimensions to be 82.62 metres by 186.48 metres, when they were in fact 62.62 metres by 166.48 metres. This resulted in a difference of approximately 4856 square metres between the actual lot size and what was represented to potential buyers.

[22] Mr. Craven listed the property on an internet site named Property Guys for several weeks, prior to hiring a real estate agent to sell the property. Mr. Craven provided the incorrect dimensions to the real estate agent and the property listing with that agent displayed the erroneous figures.

Issues

[23] Are the Defendants liable to the Plaintiffs, either in contract or tort, for damages caused by water infiltration at 6 Soapberry Lane?

[24] Are the Defendants liable for an actionable misrepresentation made with respect to the size of the lot?

Analysis

[25] The Plaintiffs must prove their case on the balance of probabilities.

[26] I find that all witnesses generally gave credible evidence, except where otherwise noted.

Overview of the Law

[27] The starting point with respect to the sale of used homes is the rule of *caveat*

emptor or ‘buyer beware’. As stated by the Supreme Court of Canada in *Fraser-Reid v. Droumtsekas,* [1980] 1 S.C.R. 720:

> Although the common law doctrine of caveat emptor has long since ceased to play any significant part in the sale of goods, it has lost little of its pristine force in the sale of land. … [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. …

[28] Generally, four exceptions exist with respect to the application of *caveat emptor* to the sale of land:

> (1) where the vendor fraudulently misrepresents or conceals;
>
> (2) where the vendor knows of a latent defect rendering the house unfit for habitation;
>
> (3) where the vendor is reckless as to the truth or falsity of statements relating to the fitness of the house for habitation;
>
> (4) where the vendor has breached his or her duty to disclose a latent defect that renders the premises dangerous.
>
> (see *Cardwell v. Perthen* 2007 BCCA 313; *McCluskie v. Reynolds* (1998), 65 B.C.L.R. (3d) 191 (S.C.))

[29] Latent or hidden defects are those which cannot be discovered by means of a reasonable inspection and reasonable inquiries. On the other hand, patent defects would be discoverable through a reasonable inspection and/or as a result of reasonable inquiries.

[30] Non-disclosure of a latent defect could lead to a finding of breach of contract with respect to the sale of the property in the case at bar, as the Defendants had prepared a property disclosure statement in which they represented being unaware of any water problems in the walls, any water damage or any roof leakage. The property disclosure statement dated July 8, 2009 became part of the contract of purchase and sale.

[31] The caselaw is clear that representations by a vendor in a property disclosure statement may be the basis for a finding of liability *(Kaufmann v. Gibson,* [2007] O.J. No. 2711 (S.C.J.)*; Krawchuk v. Scherbak et al.,* 2011 ONCA 352*).*

[32] As stated in *Lyle v. Burdess* 2008 YKSM 5, the purpose of the property disclosure statement is 'to disclose latent defects that would not be easily discoverable by a prospective purchaser' prior to the purchase and sale transaction.

Whether the defective construction was a latent defect

[33] The defective construction of the 2005 addition caused the build-up of ice on the roof and condensation in the cavity around the chimney chase. The amount of ice build-up during any given winter would depend on the amount of precipitation. The results of the 'hot roof' problem caused damage to the roof over a period of time as the melt water worked its way under the shingles and into the house. There was also condensation in the chimney chase area as a result of warm air rising and becoming frost upon contact with the roof.

[34] The defective construction was not visible without an intrusive inspection. Neither the Plaintiffs nor the building inspector they hired observed signs of water damage inside the home or indications of damage to the roof. Therefore, the defective construction which ultimately led to water infiltration (the 'roof defect') was a latent defect.

The Defendants knowledge of the latent defect

[35] I have concluded that the Defendants were not aware of the existence of the roof defect.

[36] The Defendants had hired a construction company in good standing to construct the addition to the house. Mr. Craven testified that as both he and Ms. Dion were working at the time, they were not at the house supervising the work being done. In fact, there was no indication the Defendants had any expertise which would have enabled them to properly supervise the construction work. The City of Whitehorse issued inspection reports indicating the work was being properly done, including a report on August 9, 2005 that indicates approval for the insulation and vapour barrier.

[37] The Defendants testified they were unaware of any defects arising from the construction of the addition. For the four winters they lived there after the construction of the addition, they experienced no water infiltration.

[38] The Plaintiffs experienced minimal water infiltration the first winter they lived in the residence, but the situation deteriorated over the course of the following winters. Saul Turner stated that he could not say how long it would take for the signs of water

infiltration to appear. The reason for this is that the amount of time it could take for the melt water to work its way into the house is difficult to predict. Water infiltration and corresponding damage might occur over the period of a number of winters, but may not be visible to the occupants.

[39] Kevin Neufeld also could not comment on how long it would take for the water issues to become noticeable in the interior of the property. For the water to work its way into the walls, there would be a number of variables, including: the amount of temperature change; the amount of snowfall; whether enough water had accumulated in the soffit to reach the top of the wall. Depending on seasonal factors, it could take some time for the water to penetrate the walls.

[40] Therefore, on a balance of probabilities, I am unable to conclude that Mr. Craven and Ms. Dion were aware of what was occurring. There is no indication they tried to cover up water damage that had previously occurred. There were no indications that water damage had occurred or was occurring prior to the sale.

[41] It should be noted in this regard that the Plaintiffs remembered – after this claim was commenced - having seen a stain in the ceiling area of the laundry room (close to the chimney chase) at the time of the purchase. If the Plaintiffs recent memory of such a stain is accurate, it should also have been visible to and noted by the home inspector who would have undoubtedly asked questions about it. The Plaintiffs would likely have been concerned to see a stain on the ceiling and would have posed questions of either the Defendants and/or the home inspector. This did not occur. I find that the Plaintiffs are mistaken in believing they observed such a stain at the time of purchase.

Were the Defendants reckless as to the existence of the latent defect?

[42] The Defendants may still be found liable if they are found to have been reckless with respect to whether there was a latent defect (*Cardwell v. Perthen* 2006 BCSC 333). In *McCluskie v. Reynolds*, *supra,* the Court stated, at para. 54:

> In conclusion, I find that although the law of vendor and purchaser has long relied on the principle of caveat emptor to distribute losses in real estate cases, the rule is not without exception. Two major exceptions are in the case of fraud, and in cases where the vendor is aware of latent defects which he does not disclose. *The law also supports the imposition of a duty to disclose latent defects on the vendor where he is not subjectively aware of those defects, but where he is reckless as to whether or not they exist.* It is up to the plaintiff to prove this degree of knowledge or recklessness. [Emphasis added]

[43] It is evident from the testimony of Mr. Craven, that he and Ms. Dion were conscientious home owners. For example, prior to the spring melt, Mr. Craven would clear the gutters and the edges of the eaves of snow. He would also place roof melt tablets in the gutters and sprinkle salt on the roof eaves to prevent the build-up of ice. The Plaintiffs submit the fact Mr. Craven did so reveals, at the very least, that he should have been aware there was a problem with the roof. However, on cross-examination Mr. Craven testified to having used such tablets on the roof of his previous house as well.

[44] Although neither Mr. Turner nor Mr. Neufeld had ever heard of this practice, and did not necessarily believe it would remedy ice build-up caused by the ‘hot roof’ phenomenon, these tablets were marketed for the purpose of removing snow and ice from roofs. The fact that Mr. Craven employed the tablets for this purpose does not

support an inference either that the Defendants knew a problem existed or that the Defendants were reckless as to whether water infiltration was occurring. I find Mr. Craven's use of these tablets was a preventative measure to inhibit ice build-up. Mr. Craven did not try to hide his use of these tablets from the Plaintiffs. In fact, he gave them his remaining roof tablets and explained how and where he applied them. I do not find that Mr. Craven made use of them at the property to combat a suspected water infiltration issue.

[45] The Plaintiffs submit that the Defendants must have been aware of ice damming on the roof, which would have been an indicator of a more serious problem. Mr. Craven denies having encountered this issue. He did not perform roof maintenance regularly during the winter, but did preventative maintenance, as described, just before the spring melt. I am not convinced on a balance of probabilities that Mr. Craven observed ice damming on the roof on the rare occasions he performed such preventative maintenance.

[46] It should be pointed out that the Plaintiffs hired a contractor during their second winter at the property to deal with the issue of water infiltration which was, by then, apparent. The contractor's response was to install heat lines to melt the ice. This did not remedy the problem. Neither did the work of a second contractor who was hired the following winter to investigate the roof leak. Neither contractor suggested that extensive work on the roof was required. I make this observation to highlight the difficulties professionals had in finding a solution to the roof defect, once it became apparent something was awry. If contractors had such a dilemma in finding a solution, I cannot say that Mr. Craven, as a lay person, should have known there was an internal problem

caused by the construction of the addition, which would ultimately result in the water problems that developed.

[47] Based on the factual findings, the Plaintiffs have not established liability in tort. The findings equally preclude the Plaintiffs from establishing liability in contract. Therefore, I dismiss the Plaintiffs' claims in both tort and contract with respect to the roof defect.

Negligent Misrepresentation as to the lot size

[48] Mr. Craven made a mistake in calculating the lot size and this error made its way into the listing sheet that the Plaintiffs viewed. The Plaintiffs question his diligence in calculating the lot size, as they point out he had a more legible survey plan that he could and should have used for this calculation.

[49] The Supreme Court of Canada in *Queen v. Cognos* Inc., [1993] 1 S.C.R. 87, at para. 33, set out the test for finding liability in negligent misrepresentation. The necessary requirements are:

> ...
>
> (1) there must be a duty of care based on a "special relationship" between the representor and representee;
> (2) the representation in question must be untrue, inaccurate, or misleading;
> (3) the representor must have acted negligently in making said misrepresentation;
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted. ...

[50] Based on the vendor/purchaser relationship, I find the Defendants owed a duty of care to the Plaintiffs.

[51] In terms of the second and third prongs of the test, the representation of the lot size was inaccurate and the Defendants acted negligently in making the misrepresentation.

[52] At the fourth step, it must be evident that the Plaintiffs relied on the said misrepresentation. Although the Plaintiffs believed they were buying a home on a 3.8 acre lot, was the size of the lot an important factor for them? I am unable to find that it was. The Plaintiffs viewed the property on two occasions prior to the closing date and should have known where the boundaries were. They made no mention as to a size requirement upon which a specific reliance could be based. This is not a case, for example, in which the Plaintiffs were looking for a lot of a specific size and would not have bought the property having been apprised of the actual lot size (see *Taggart v. No. 236 Seabright Holdings Ltd.,* 2008 BCSC 1412). There is no evidence that the lot size was even discussed. The Plaintiffs only discovered the miscalculation in lot size in July 2012 when they were considering selling the property.

[53] It is important to note that the real estate listing information sheet included a disclaimer stating that 'Information herein, while believed correct, is not warranted or guaranteed and should not be relied upon without independent verification'. Based on this disclaimer clause, the Plaintiffs could not reasonably rely on the accuracy of all the information in the listing information sheet (see *Saberi v. Angell Hasman & Associates Realty Ltd.,* 2008 BCSC 680; *Sleightholm v. East Kootenay Realty Ltd.,* [1999] B.C.J.

No. 462 (S.C.); *Meagher v. Telep,* 2005 BCSC 1932).

[54] It is also significant that the Plaintiffs had a survey plan prepared and it was in the possession of their lawyer by the end of July 2009, before they took possession.

[55] Even if the Plaintiffs had been able to establish their reliance on the misrepresentation, they have not proved they suffered damage as a result. Although they led evidence that in one country residential development in Whitehorse, the price of lots increases based on lot size, this does not necessarily hold true after development of the lot (i.e. when a house is constructed). There is no evidence before me that the price the Plaintiffs paid for the property was not fair market value.

[56] I find that the Plaintiffs' claim for negligent misrepresentation with respect to the size of the lot has not been proved.

[57] I have sympathy for the plight of the Plaintiffs. They did not end up with the house for which they bargained. However, based on the facts of this case, the Defendants are not liable.

[58] This case involved complicated legal issues. In all the circumstances, the parties shall bear their own costs.

_____

CHISHOLM T.C.J.