Court File No. SC-12-0000-1515-0000

Ontario Superior Court of Justice
Small Claims Court
75 Mulcaster Street
Barrie, Ontario L4M 3P2

BETWEEN:

Jason Douglas Pedlar; Mary Janet Kalbfleisch

Plaintiffs

-and-

Daniel McDevitt; Elizabeth Jakobczak

Defendants

Representative for the Plaintiffs: Marc Levy, Paralegal
(JBF Law Firm)

Counsel for the Defendants: Mario Middonti, Barrister and Solicitor
(Michael A. Handler Professional Corporation)

REASONS FOR DECISION

Background and Nature of the Claim

1. The plaintiffs are husband and wife. On October 3, 201, they entered into an agreement of purchase and sale to purchase a property at 319 Dingle Court, Caledon, Ontario ("Property") from the defendants.

2. They had a home inspection completed on October 3, 2011 and they took possession of the Property on December 15, 2011. On February 20, 2012, the plaintiffs discovered water backing up into the basement bathtub. There was a problem with the sanitary line which required repair. They claim that the defendants were aware of the sewer problem and failed to disclose it to them.

3. The plaintiffs are claiming the cost of the repairs of $14,947.87 and general and aggravated damages of $5000.00.

4. The defendants maintain that they made no representations or warranties, and that the plaintiffs hired and relied upon a home inspector. In 2010 the Region of Peel did attend on two occasions to inspect and clear the drain of blockages, however, following this they experienced no further problems.

Plaintiffs' Evidence

5. Jason Pedlar ("Pedlar") gave evidence that the home inspection was done in advance of the offer to purchase so that they could make an offer without that condition. There were multiple offers on that day.

6. He advised that the home inspection was satisfactory with no evidence of any plumbing drainage problems. On cross examination he agreed that the report found that the drainage was "adequate" and that the home was 30 to 35 years old. There was no floor drain visible. He agreed he had not had any discussions with the vendors prior to the offer being made.

7. On Family Day, February 20, 2012 he found sewage backing up into the basement bathtub and sink. He called Roto Rooter who came out and cleared the drain, however, they were not able to get past a certain point in the pipe. The next day they put a TV scope down the line which showed some pooling in the pipe. He was given a quote to repair it of $6000.00 plus HST. He received two further quotes, one from Hero Plumbing for $5000.00 plus HST and one from Emergency Plumbing Ltd. for $5600.00 plus HST.

8. Emergency Plumbing Ltd. was hired to make the repair, however, the work took much longer than anticipated as the basement floor contained approximately 36" of concrete. The plaintiffs provided pictures of the work as it progressed. The work included installing a new floor drain and access clean outs. The total cost was $12,995 plus HST, much more than quoted due to the cost of removing the excess concrete.

9. Pedlar had contacted the Region of Peel with respect to the problem. They came out and told him that they had previously been to that address. He requested and received copies of the records of those previous visits.

10. The records indicated that Peel had been out to the Property on January 3, 2010 and again on July 13, 2010 to inspect and clean out the blockage. The records indicated that there was a problem with ponding in the pipe, likely due to the pipe shifting.

11. In March 2013 the Pedlar's insurance company hired LPI plumbing to inspect and report. LPI reported pooling in the sanitary line. They made a DVD of the inspection.

12. During this time, Pedlar's wife, the plaintiff Mary Janet Kalbfleisch ("Kalbfleisch") was pregnant and due on March 7, 2013. The both moved out of the house that day because the repairs were started. The water was turned off and due to the thickness of the concrete there was a lot of jack hammering and dust. They moved into a hotel. The insurance company paid for that stay. They also paid for expenses and refinishing the basement but not the repairs by Emergency Plumbing Ltd.

13. Kalbfleisch gave birth two weeks later and they stayed with friends for two weeks.

14. The plaintiffs called Paul Rastrullo ("Rastrullo"), a waste water treatment plant operator for Peel Region where he had worked for about eight years. He recalled being called to the Property on January 2, 2010 as a result of a blockage. He confirmed that he found pooling in the pipe due to some type of obstruction or dip in it. His evidence was that the pipe should have been empty.

15. Rastrullo tried to clean out the blockage with a 1" rod and 2 ½" spring but was unsuccessful. The spring was removed and he went about 20 metres and the blockage was released. He put a camera in but couldn't get past seven metres. He said the usual sewer pipe would have been 4" in diameter.

16. Rastrullo advised that he spoke with the homeowner and explained what was wrong. He had cleaned the blockage but the obstruction was still there. He did not know what the obstruction was. On cross examination said that he gave tips on how to prevent problems however the obstruction needed to be addressed because it will happen again. It needed to be corrected.

17. The plaintiff Mary Kalbfleisch gave evidence that she was home on medical leave when the sewer first backed up. This was their first child. She said it was the worst time possible for the repairs to be done. She was initially home when the work started but the noise and dust were too much and the water was shut off.

18. They moved into the hotel for 10 days but it was not comfortable for her. She missed the comforts of her home. She went into labour at the hotel. She felt it humiliating to have to go back and forth through the lobby while pregnant. She gave birth by C-section and spent the first week with in-laws. She would have much preferred to be at home. She stayed with a family friend for the second week and than back to the hotel to be with her husband.

19. Her son was born March 18, 2012 and it was very difficult dealing with the situation. She had made the ususal preparations to bring the child home but could not do so. She felt that she could not "nest" with the child right away.

20. Under cross examination she said that if they had known about the problem with the plumbing she would have negotiated a different price or cut their losses. She agreed that there had not been any discussion with the vendors before the purchase.

21. Dennis Newdick is also a waste water operator for Peel. He attended at the Property on July 13, 2010 due to a back up. He recognized the property and indicated he had been there on several dates. He cleared the clog and scoped it with the TV camera. He was only able to get the 1" rod through. His evidence was that there appeared to be ponding (debris and standing water) in the line. There should never be ponding and it can be caused by a bad grade or a collapsed pipe. In this case he suspected a shifted pipe as he hit an edge, but as it was under water he could not see clearly with the TV camera. The camera is also bigger than 1" so it could not go past the blockage.

22. He told the court that he did come back to the Property one further time when the repairs were underway by Emergency Plumbing Ltd. He understands that the pipe may have had concrete in it causing the blockage.

23. Under cross examination he stated that even if there was not an issue in the next six months the problem will eventually reoccur. He would normally recommend that something be done about it and he recalls recommending repairs to the homeowner.

24. Newdick confirmed that this was an older area and clay pipes were usual, however, the usual problem with clay pipes was not ponding, but with roots clogging the pipe.

25. His stated that repairs were necessary because there was an obvious break or other problem with the pipe.

Defendants' Evidence

26. Daniel McDevitt ("McDevitt") is a renovation consultant with Home Depot. He purchased the home with Elizabeth Jakobczak in November 2007. The basement was finished at the time and was about the same as when they sold it. There was a bathroom and office which were dated but in okay shape.

27. In January 2010 they noticed that the basement bathroom was running slowly. It eventually came up into the tub and they purchased some cleaning tools but they didn't work. The called Roto Rooter who told them the blockage was too far out for their equipment and may be close to the property line.

28. He then called Peel Region and they came out. He was told that there was a clump of grease clogging it and some hygiene products. He was told that the line showed a bit of a dip in it but does not remember anything about shifted pipe. After it was cleared he was asked to flush the toilet and put the tub on to see if it cleared.

29. He was told to avoid putting any grease or paper products down the drain.

30. In July 2010 the problem re-occurred but was less severe. The drains were slow but there was no sewage in the house. Peel Region came out again and cleaned the clog. He said the technician did not make any recommendations. He was told that if there were no more problems for six months he should be "good to go."

31. When he later received the letter from Peel it just clarified where the blockage was. He said that the inspector did not know what the cause was.

32. McDevitt told the court that they had no problem with the drainage since that visit. He did not call a plumber to inspect it nor had he called the Region again.

33. He advised that they had multiple offers when they sold the home. The plaintiffs had asked to do a home inspection prior to offers being received and did so the same day. The plaintiffs' offer had been the weakest of them all, had some conditions, including the home inspection and they initially rejected it. They made a revised offer, removing conditions and they accepted. They met with the plaintiffs following that acceptance, however, they did not talk about the house, more of a "meet and greet."

34. The deal closed on December 15, 2011 and they had no further problems with the drainage.

35. On cross examination he agreed that he felt the problem was not serious. Upon receiving the letter from Peel after the July 2010 problem he did not make any repairs. He did speak to a plumber friend who said that clay pipes sometime shift and to monitor it. He acknowledged on re-direct this was just a casual conversation.

36. McDevitt said he did not mention it to the plaintiffs because he felt it was no longer a problem. They had monitored it for the required time and it was okay.

37. He agrees the letter from Peel suggested they find the cause but he didn't because he followed the advice of the worker to monitor it for six months. At some point they became satisfied that it was okay and that Peel had gotten the entire blockage. If it happed a third time they may have had to investigate further.

38. Elizabeth Jakobczak ("Jakobczak") reiterated much of McDevitt's evidence with respect to purchasing the home and the sale to the defendants. She indicated that they used the basement and bathroom every day. She was not really involved with the technicians from the Region when they came to clean it out on either occasion but understood they had to watch what they put down the drain.

39. On cross she acknowledged receiving the letter from Peel after the July 2010 problem but could not remember if she opened it or not as it would have been handled by her husband. She relied upon what her husband told her rather than the letter and he called a plumber about it.

Plaintiffs' Position

40. The plaintiffs maintain that the problem with the plumbing was a deficiency which was not disclosed to them. The deficiency was confirmed by the video, report, photos and testimony.

41. The defendants were aware of the deficiency because they were told by the Region's technicians and they followed up with the letter after July 2010, which suggested repair and remedial action. They were reckless in disregarding the warnings.

42. The defendants had a duty to disclose the deficiency which was a latent defect. It was not able to be discovered by visual inspection by the plaintiffs nor by the home inspector. The plaintiffs rely on *Capel v Martin*, 2008 CanLII 13612 (ONSC) in its submission that this was a latent defect which was actively concealed by the defendants.

Defendants' Position

43. The defendants concede that this a latent defect, however, suggest that the they did not know about it either. They maintain there was no obligation on them to disclose it if they did not know it was a problem.

44. They submit that the plaintiffs are trying to impose some reasonableness standard which is not the law.

45. The defendants suggest that the issue may be the period of time that passed between the date of the problem and sale and when it was reasonable that the defect not be disclosed. He relies on *Cotton v. Monahan* et al, 2010 ONSC 1644 (CanLII) and says that the 15 month period prior to the sale without problem was reasonable.

Discussion

46. The ordinary rule in the purchase of real estate is Caveat Emptor, or let the buyer beware with respect to patent defects, those defects which are readily ascertainable upon inspection. The ordinary rule does not apply in some cases where the defect is not patent, but latent.

47. In *Capel and Martin,* (2008) CanLII 13612 (ONSC) a latent defect is described as follows:

> A "latent defect" as it relates to the case at bar is in effect some fault in the structure that is not readily apparent to an ordinary purchaser during a routine inspection. And ordinarily, if a vendor actively conceals a latent defect, the rule of caveat emptor no longer applies and the purchaser is entitled, at their option, to ask for a rescission of the contract or compensation for damages."

48. The parties agree that the problem with the sewer pipe was a latent defect, in that it was not readily apparent to a purchaser upon routine inspection.

49. The Ontario Court of Appeal in *McGrath v. MacLean*(1979) 95 D.L.R. (3d) 144 discussed the obligation to disclose a latent defect to the purchaser:

> " I am prepared to assume that, in an appropriate case, a vendor may be liable to a purchaser with respect to premises which are not new if he knows of a latent defect which renders the premises unfit for habitation. But, as is pointed out in the lecture above referred to, in such a case it is incumbent upon the purchaser to establish that the latent defect was known to the vendor, or that the circumstances were such that it could be said that the vendor was guilty of concealment or a reckless disregard of the truth or falsity of any representations made by him."

50. For the plaintiffs to be successful, they must show that:

A. the defendants were aware of the defect; and,
B. the defect rendered the premises unfit for habitation.

51. It is clear that, at a minimum, in January and July 2010 the defendants were aware of a defect in plumbing. They had two instances of their basement drains backing up, contacted a plumbing company and the Region to inspect and clear the drains. They received a letter from the Region following the July 2010 inspection. The relevant portions of that letter are as follows:

> "Our investigation indicates that the problem appears to be ponding at approximately 3.3m-7.4m and 8.2m-8.8m. Staff were able to rod out the lateral to 35 m however could not TV past the 8.89m distance due to shifted pipe. The cleanout could not be located in your basement and we would recommend you have it located before repairs are completed."
>
> "(The Town of Caledon) may be able to assist you in establishing the cause of the problem and the remedial action which can be taken to correct it"

52. Both of the technicians from the Region gave evidence that they discussed the potential problem with the sewer pipe with Mr. McDevitt. Mr. McDevitt himself gave evidence that he was aware of ponding. He also sought some advice with a plumber after receiving the letter. He admitted not following through in establishing the problem.

53. I am satisfied that the defendants were aware that there was some structural problem with the sanitary pipe which was more than just a build up of grease. I am further satisfied that they took precautions with what they allowed into the drains in order that it not become plugged.

54. Did the defect render the premises unfit for habitation?

55. Laforme J. in *Swayze v. Robertson* [2001] O.J. No. 968 (Superior Court of Justice) took the following view with respect to a wet basement that was discovered six months after closing:

"Furthermore, I am of the opinion that the term "premises unfit for habitation" does not mean that the defect must be such that the entire residence must be rendered uninhabitable. Rather, in cases such as this I am of the view that application of the principle can, and must mean something more qualified. I take the position that any decisions regarding habitability of the premises must be made on a common sense and reasoned approach based on the facts of each case. It seems to me that the correct approach must be to consider it in the context of whether the latent defect has caused any loss of use, occupation and enjoyment of any meaningful or material portion of the premises or residence that results in the loss of enjoyment of the premises or residence as a whole. That, I find has been established in the case at bar."

56. One of the issues in the Divisional Court appeal of *Guglielmi v. Russo* [2010] O.J. No. 1145 (Superior Court of Justice -Divisional Court) was whether a defect in a retaining wall rendered the premises unfit for habitation. In dismissing the appeal the court said:

> "In any event, the vendor is not liable for damages for a latent defect of which he has knowledge unless it renders the premises unfit for habitation or dangerous. Again, while the findings of the trial judge could have been clearer, it is implicit in her findings that the condition of the wall did not have the result that the premises were uninhabitable or unsafe. The trial judge made reference to the engineer's report, which had recommended remedial measures, but noted that the complete failure of the wall was not likely to result "in any significant personal or property damage". As well, she observed that the appellants did not have the wall repaired until June 2006, despite the recommendation to do so within one year."

57. I find that the instant case is different from *Guglielmi* and following the reasoning of Laforme J. in *Swayze* I find that a complete blockage of the sanitary pipe would render the premises unfit for habitation in that it caused a loss of use, occupation and enjoyment of a meaningful and material portion of the premises, namely the sewage system.

58. I am satisfied that the defendants therefore had a duty to disclose the latent defect in the sewage system to the purchasers and as a result they are liable for damages that follow.

Damages

59. The repairs, not covered by the insurance company totalled $14,947.87. While this was more than the estimates, I accept that the increased cost arose out the extra time required due to the unusual amount of concrete that had to be removed. I am also prepared to accept that there is a certain amount of betterment included in the repairs (*Cotton v. Monahan et al.,* 2010 ONSC 1644 (CanLII)). The plaintiffs received a new modern system, with a proper cleanout and drain rather than a 35 year old system with clay tiles. I would assess the plaintiffs' damages at $10,500.00.

60. The plaintiffs also claim $5000.00 in general and aggravated damaged based on the defendants conduct in not disclosing the defect and the resulting inconvenience as a result of being required to move out and in the circumstances of Ms. Kalbfleisch's pregnancy.

61. I am unable to grant this relief. While I have found that the defendants had a duty to disclose the latent defect, I am unable to attribute any particular bad motive to them that would justify increased damages. I have not been provided with any medical evidence related to mental distress nor authorities that would be helpful in determining this issue. It is recognized that the repairs caused considerable disruption and stress to the plaintiffs, however, this is not sufficient to award additional damages.

Conclusion

62. There will be judgment for the plaintiffs against the defendants in the amount of $10,500.00.

63. The plaintiffs may serve and file submissions with respect to costs and pre-judgment interest within ten days of the date of receiving these reasons and the defendants seven days thereafter.

May 13, 2014
Date

Rose, D.J.