CITATION: McDevitt v. Pedlar, 2015 ONSC 1758
DIVISIONAL COURT FILE NO.: DC-14-00685-00
SMALL CLAIMS COURT FILE NO.: SC-12-00001515-0000
DATE: 20150319

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
Jason Douglas Pedlar and Mary Janet Kalbfleisch Plaintiffs/Respondents	Jordan Farkas, for the Plaintiffs/Respondents
– and –	
Daniel McDevitt and Elizabeth Jakobczak Defendants/Appellants	Mario Middonti, for the Defendants/Appellants
	HEARD: March 2, 2015

RULING

VALLEE J.:

[1] The plaintiffs/respondents (purchasers) brought an action in Small Claims Court in December 2011 to recover the costs of installing a new sewer pipe. They alleged that the defendants/appellants (vendors) had previous problems with the sewer pipe, that this was a latent defect and it should have been disclosed to them before they bought the property. The trial judge found that the vendors were aware of a structural problem with the sewer pipe, the blockage rendered the premises unfit for habitation and the vendors ought to have disclosed this latent defect to the purchasers.

[2] The trial judge awarded the purchasers $10,500 in damages for their cost to fix the pipe.

Issues

[3] The vendors appeal the trial judge's decision on several grounds:

(a) Did the trial judge err in concluding that the vendors were aware of a defect which rendered the property unfit for habitation when the evidence was that the vendors resided in the subject property and had not experienced problems with the sewer pipe for approximately fifteen months prior to the sale?

(b) Did the trial judge fail to properly consider that the onus was upon the purchasers to prove that there was a latent defects known to the vendors which rendered the property uninhabitable and to find that the vendors (1) purposely concealed the defects in order to sell the property; or (2) the vendors were reckless or falsified representations regarding defects known to them?

(c) Did the trial judge err in failing to consider the responsibility of the purchasers who had obtained a home inspection before submitting an offer to purchase the property when the report noted that there was no floor drain visible and that one should be installed?

(d) Did the trial judge err in concluding that the sewer pipe obstruction, which occurred sixty days following the sale of the property, was a defect which rendered the property unfit for habitation for thirty days, when the purchasers voluntarily undertook extensive repairs to the basement which were not necessary to remedy any sewer pipe obstruction?

(e) Did the trial judge err in admitting in to evidence, a video of a plumbing inspection when the purchasers did not present the videographer as a witness, thereby prejudicing the vendors who were unable to cross examine the videographer with respect to whether the video inspection followed the route of an earlier inspection commissioned by the vendors?

The Test for Determining the Issues

[4] The standards of review applicable to questions of mixed fact and law fall along a spectrum. Where an error of fact can be isolated, the appropriate standard of review is palpable and overriding error. With respect to a question of fact, the trial judge is accorded significant deference because he or she is in the best position to determine the facts based on the evidence at trial. Accordingly, an appeal court should only interfere with a trial judge's finding of fact if the trial judge had made a palpable and overriding error, which has been described as "so obvious that it can easily be seen or known." (see: *Housen v Nikolaisen*, [2002] 2 S.C.R. 235 par 5) When an error of law can be isolated, the appropriate standard of review is correctness.

[5] With respect to questions of mixed fact and law, a trial judge is accorded less deference because the law must be applied correctly to a set of facts. On a pure question of law, an appeal court may substitute its own opinion for that of the trial judge.

Analysis

(a) Did the trial judge err in concluding that the vendors were aware of a defect which rendered the property unfit for habitation when the evidence was that the

vendors resided in the subject property and had not experienced problems with the sewer pipe for approximately fifteen months prior to the sale?

[6] The trial judge's finding that the vendors were aware of a defect is a finding of fact. Accordingly, the test on review is whether the trial judge made a palpable and overriding error in making this finding of fact.

[7] The vendors state that the trial judge made such an error because although they had previous problems with sewage backup, they did not experience any problems for fifteen months prior to the sale. The vendors rely on *Jarvi v. Stansa*, 1988 CarswellOnt 755. In considering whether the vendors should have known of the existence of a problem with their sewer line at the time of the sale, the court quoted the trial judge's comments in paragraph 5,

> The plaintiffs allege that the defendants...knew or should have known of the existence of the problem with the sewer line at the time of the sale and should have provided such information to the plaintiffs at that time. There was evidence that there had been prior sewage back up difficulties prior to the sale to the plaintiffs not revealed to them. In that respect, after considering the history of the property, even prior to ownership by the [vendors], and the length of occupation of the property by the plaintiffs, and the cause of the blockage, I am satisfied that the [vendors] even though they may have had prior sewage problems, would not have been aware of the specific problem, that is the broken lateral connection, which caused the damage that is the subject matter of this action. I have already indicated that the blockage resulted from the broken, lateral pipe, the cause of which is unknown. However, the plaintiffs had used the toilets, sinks and bathtubs and therefore the sewage line for six months after the completion of the sale. Accordingly, the breaking of the lateral sewer line must have occurred relatively close in time to the discovery of the sewage in the crawl space. I am therefore satisfied that regardless of whatever prior difficulties that may have existed before the sale, the problem in question did not exist in August of 1990 and could therefore not have been revealed to the plaintiffs.

[8] In the instant case, the trial judge noted that in January and July of 2010, the vendors had plumbing problems. On these two occasions, the basement toilet was not draining properly and in fact backed up. At the vendors' request, the Region of Peel came to inspect and clear the drain. Following the July 2010 inspection, the Region sent a letter to the vendors commenting that it was not able to proceed past 8.89 metres in the pipe "due to shifted pipe." The letter went on to say "the clean out could not be located in your basement and we would recommend you have it located before repairs are completed." The fact that the vendors knew that the sewer pipe had shifted distinguishes this case from the facts in *Jarvi.*

[9] The vendors' evidence was that on these two occasions, they had experienced a blockage in the pipe; however, the Region was able to clear the blockage and after that the toilet worked fine. In fact, the vendors did not have any further problems with the sewer pipe for eighteen months, at which time the property was sold to the purchasers. The vendors stated that a technician from the Region told them that if the problem did not reoccur within a certain period of time, they should have no further concerns about it.

[10] In reaching his conclusion, the trial judge noted that both parties agreed that the problem with the sewer pipe was a latent defect. In other words, it was one that could not be seen on a visual inspection. It was below the ground.

[11] In this appeal, the vendors state that the trial judge did not take this fifteen month problem free time into account. Based on the evidence in the record before me, it seems to me that the vendors and the purchasers are addressing two different issues. When Peel Region attended to remove blockages caused by grease and paper products, the Region was addressing a symptom rather than the underlying problem. The underlying problem was that the sewer pipe had shifted or had a dip in it, which was allowing water to stand. This was not appropriate. The trial judge noted that the Region commented in its letter to the vendors that the pipe had shifted and that this needed to be addressed before repairs could be completed.

[12] The trial judge noted that Mr. McDevitt, the vendor, gave evidence that he was aware of the ponding in the pipe. Based on this evidence before him, the trial judge concluded that the vendors were aware of some structural problem with the sewer pipe which was a defect. The trial judge then went on to state that the problems experienced by the purchasers, being the sewage back up, rendered their premises unfit for habitation. The trial judge referred to *Swayze v. Robertson*, [2001] O.J. No. 968, when he considered the meaning of "premises unfit for habitation." In that case, the court stated that, "decisions regarding habitability of the premises must be made on common sense and reasoned approach based on the facts of each case." A court ought to consider, "whether the latent defect has caused any loss of use, occupation and enjoyment with any meaningful or material portion of their premises or residence." The trial judge followed the reasoning in *Swayze* and found that a complete blockage of the sewer pipe would render the premises unfit for habitation.

[13] As noted above, the factual findings of a trial judge are awarded significant deference. The trial judge did not make a palpable and overriding error in reaching his conclusion that the vendors were aware of a defect which rendered the property unfit for habitation. Furthermore, the trial judge relied on the appropriate test for "fit for habitation" and applied it correctly to the facts.

(b) Did the trial judge fail to properly consider that the onus was upon the purchasers to prove that there were latent defects known to the vendors which rendered the property uninhabitable and to find that the vendors (1) purposely concealed the defects in order to sell the property; or (2) the vendors were reckless or falsified representations regarding defects known to them?

[14] In order to find liability on the vendors' part, the trial judge had to find that the vendors purposely concealed the defects in order to sell the property or that the defendants were reckless or that they falsified representations regarding defects known to them. As noted above, the trial judge found as a fact that the vendors were aware of the latent defect, being the shift or dip in the pipe which allowed water to pond in the pipe. As noted above, Mr. McDevitt stated in evidence that he was aware of this. The trial judge did not find that the vendors purposely concealed the defect in order to sell the property; however, he was satisfied that the vendors had a duty to disclose the latent defect. Since they knew about the defect and they did not disclose it, it could be said that the vendors were reckless regarding the defect. The trial judge did not use the term reckless; however, he did not need to. The vendors knew of a persisting problem which they were passing along to the purchasers who were unaware of it. Accordingly, based on the record before me, I find that the trial judge did properly consider that the onus was on the purchasers to prove this and they did. Determining an onus is a determination of law. The trial judge correctly determined the issue.

(c) Did the trial judge err in failing to consider the responsibility of the purchasers who had obtained a home inspection before submitting an offer to purchase the property when the report noted that there was no floor drain visible and that one should be installed?

[15] The vendors rely on *Hoy v. Lozanovski*, 1987 CarswellOnt 660. The court commented on purchasers who obtain home inspection reports and how their reliance then shifts from the vendor to the home inspector. At para 16, the court stated,

> If the purchaser chooses to not rely on the vendor and requests inspections, including professional inspectors (eg. home inspection service), then reliance for completion of the deal (the waiver in this case) is shifted to the inspector whom the purchaser has chosen. The purchaser has relied on the inspector's report, not the vendor's silence, to formulate his decision whether or not to complete the deal. In that case, responsibility of the vendor is released and assumed by the purchaser or transferred to his agent, the home inspector, at the time of making the deal...

[16] The issue of the floor drain is irrelevant to the latent defect. The trial judge did not consider this aspect of the home inspection report and was not required to do so. The floor drain is a completely separate matter from the damaged sewer pipe. The vendors argued in this appeal that once a purchaser obtains a home inspection report and relies on it when there are no representations from a vendor, the purchaser's issue is with the home inspector. This argument is untenable. Home inspectors inspect what they can see. This limitation was included in the home inspection report that the purchasers obtained. The purchasers could not rely on the home inspector's report on this issue. The home inspector could not be expected to comment on the sewer pipe when he could not see it.

(d) Did the trial judge err in concluding that the sewer pipe obstruction, which occurred sixty days following the sale of the property, was a defect which

rendered the property unfit for habitation for thirty days, when the purchasers voluntarily undertook extensive repairs to the basement which were not necessary to remedy any sewer pipe obstruction?

[17] The trial judge addressed this issue in awarding the purchasers less than the amount of damages that they claimed because he found that the repairs to the pipe and the basement included some betterment. The purchasers did install a floor drain while they were having the sewer pipe repaired because in order to repair the sewer pipe, the concrete floor to be removed. This provided a convenient opportunity for the purchasers to install the floor drain. The trial judge made a finding of fact that the property was unfit for habitation for 30 days during the repairs. He did not make a palpable and overriding error on this issue. His finding of fact is owed deference.

(e) Did the trial judge err in admitting into evidence, a video of a plumbing inspection when the purchasers did not present the videographer as a witness, thereby prejudicing the vendors who were unable to cross examine the videographer with respect to whether the video inspection followed the route of an earlier inspection commissioned by the vendors?

[18] In his decision, the trial judge noted that the defect "was confirmed" by the video, report, photos and "testimony." The video was only part of the evidence that confirmed the defect. Counsel for the vendor stated that he was prejudiced in his ability to deal with the video at trial because he could not cross examine the videographer on certain issues.

[19] The rules of evidence in Small Claims Court are more relaxed in comparison to the Superior Court of Justice. Rule 18.02 of the Small Claims Court rules provides that an audio or visual record must be served thirty days prior to trial. This video was actually served along with the statement of claim. Rule 13.03 requires the parties to exchange lists of proposed witnesses. The videographer was not on the purchasers' list of proposed witnesses. Accordingly, the vendors knew in advance that the videographer would not be attending to give evidence at trial.

[20] Section 27(1) of the *Courts of Justice Act* states that the test for admitting evidence in Small Claims Court is that it must be relevant and not unduly repetitious. In the appeal, the purchasers referred the court to *Grover v. Hodgins*, 2011 ONCA 72 para 47, in which the court stated "procedures are simpler in the Small Claims Court; matters are decided in a summary way under relaxed rules of evidence." The trial judge did not make an error in law when he decided to admit the video evidence. Given the relaxed rules of evidence in Small Claims Court, the trial judge's decision to admit the video was correct

Conclusion

[21] As stated above and based on the record before me, I conclude that the trial judge did not make any palpable and overriding errors in his determination of the facts, nor did he incorrectly apply the law. Accordingly, the appeal is dismissed.

Costs

[22] The purchasers were successful in defending this appeal. Their counsel has ten years of experience. His partial indemnity rate is $250 per hour. He requests $7,625 for fees, plus HST and disbursements. This totals $9,036.45. The appellants stated that if they were unsuccessful in the appeal, they would expect to pay between $5,000 and $7,500.

[23] The court's discretion to fix costs is found in section 131 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43. Rule 57.01 of the *Rules of Civil Procedure* sets out factors that the court should consider in assessing and fixing costs. While those factors provide guidance, ultimately, in fixing an amount for costs, the overriding principles are fairness and reasonableness. See: *Boucher v. Public Accountants*, 71 O.R. (3d) 291.

[24] In my view, a fair, reasonable and proportionate costs award for this motion is $9,036.45, which the vendors shall pay to the purchasers within thirty days.

Madam Justice M.E. Vallee

Released: March 19, 2015