

CITATION: Clark v. 1650336 Ontario Limited (McIelwain Construction), 2010 ONSC 6120
COURT FILE NO.: 227/06
DATE: 2010-11-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WENDY JOAN CLARK, WAYNE
BRUCE CLARK, and TAYLOR CLARK, a
Minor by her Litigation Guardian, Wendy
Joan Clark

Plaintiffs

- and -

1650336 ONTARIO LIMITED c.o.b. as
McIELWAIN CONSTRUCTION, JAMES
CECIL McIELWAIN, THE
CORPORATION OF THE TOWN OF
HUNTSVILLE, MICHAEL GOOCH,
DAVID GROOMS, KENT TRUSSES
LIMITED, TARION WARRANTY
CORPORATION, STEWART TITLE
GUARANTY COMPANY, DAVID ROY
CURRIE, JOHN DAVID THOMS, PAT
ZWALL, BOWES AND COCKS
LIMITED, TREVOR DOCHERTY,
THOMPSON REAL ESTATE LTD. c.o.b.
as COLDWELL BANKER THOMPSON
REAL ESTATE and VERONICA LYNN
MURCHISON-BURLEIGH

Defendants

)
)
) Patrick Sloan, for the Plaintiffs
)
)

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) Gregory W. Banks, for the Defendant,
) Tarion Warranty Corporation (the defendant
) of this motion)
)

)
)
) HEARD: November 2, 2010

WOOD J.:

- [1] This was a motion for summary judgment brought by the defendant Tarion Warranty Corporation seeking dismissal of the plaintiff's claim and of the cross-claim of the defendant Stewart Title Guarantee Company. Stewart Title does not oppose the motion.

Findings

- [2] The plaintiffs purchased a single family home in 2004. The home was built by the defendant Mclellain for the defendant Murchison- Burleigh who sold the property to the plaintiffs.
- [3] Soon after moving in, the plaintiffs discovered what they believed to be a number of defects in the home. They made a claim against Tarion in October 2005. As the home had never been registered under the Ontario New Home Warranty Program, Tarion conducted some initial investigation to determine whether it was eligible for a warranty. The outcome of this investigation was that the home remained eligible for a portion of the warranty pertaining to major structural defects. Accordingly Tarion inspected the property on July 25th 2006. As a result of the inspection Tarion determined that none of the defects of which the plaintiffs complained qualified for the statutory warranty remaining to the plaintiffs under the *Ontario New Homes Warranties Plan Act* (the Act). The plaintiffs were advised of this on August 16th, 2006. However they failed to avail themselves of the right to appeal this decision to the Licence Appeal Tribunal as required under the Act, electing instead to include a claim against Tarion in this action which was commenced on July 28, 2006.
- [4] The plaintiffs left the property in March 2006 as a result of an order issued by the Municipality. At some subsequent date they ceased making mortgage payments. As a result the mortgagee took power of sale proceedings resulting in a final sale which closed on December 19, 2008. The mortgagee also claimed against the defendant Stewart Title for the deficiency left after the sale. Stewart Title has paid \$250,000 to the mortgagee. Its cross-claim against Tarion is for indemnification for this payment.

Discussion

- [5] Rule 20.04(1) provides that a court shall grant summary judgment if it is satisfied that a claim raises no genuine issue for trial. Facts which are not material to a proceeding cannot be relied upon to create an issue for trial. Where the sole issue raised is one of law then the motions judge can and should proceed to determine that issue. (*Aguonie v. Galion Solid Waste Material Inc.*, 1998 CanLII 954 (Ont. C.A.)).
- [6] The only issue here is whether the plaintiffs have any claim against Tarion now that they no longer own the property. This issue was squarely before the Divisional Court in the recent decision of *Liddiard v. Tarion Warranty Corporation*, [2009] CanLII 65801 (Ont. Div. Ct.).
- [7] In that case the appellants sought the reversal of a decision of the Licence Appeal Tribunal denying their claim because the property in question was sold by a mortgagee


during an adjournment of the tribunal hearing. In a two to one decision following an unbroken line of Licence Appeal Tribunal and Superior Court decisions, Low J. for the majority, held that any warranty under *Ontario New Homes Warranties Plan Act* (Tarion's enabling legislation) runs with the land not the person who owned the land at the time the claim arose. Therefore where title to land changes while a claim remains undetermined the right to pursue that claim passes to the new owner. No residual right of action of any kind remains with the former owner.

[8] I do not intend to quote or paraphrase the thorough and well reasoned reasons for judgment of Low J. Suffice it to say that I agree with both her reasoning and her conclusions which can be summarised as follows:

- a) The primary remedy sought to be conferred where there is a breach of warranty is rectification of the construction defect *Liddiard* supra para 37.
- b) The present and successive owners of a property are the intended beneficiaries of remedial work that puts the property right... (para 39).
- c) The emphasis in the *Act* and in the regulation on putting the property right through remedial work in conjunction with the elimination of the requirement for privity for purposes of warranty enforcement suggests that the focus of the legislation is on ensuring the property's compliance with the minimum statutory standards and not on monetary compensation for breach of warranty. (para 40).
- d) The key lies in my view in the statute's focus on putting the property right. The warranty is attached not to the owner but to the property.....(para 45).
- e) The applicant's seek damages for the diminution in the value of their property said to result from breach of warranty.....Under section 13(2)(b) of the Act "secondary damage caused by defects such as property damage and personal injury" are exclusions under the Act.the drafters intended the term "secondary" to mean that which is derivative. Accordingly the immediate result of the breach of warranty is covered and all that is derivative is not. (para 47 - 50).

[9] The plaintiffs argue that I should ignore this Divisional Court decision despite the fact that it follows an unbroken line of precedent, and follow instead the dissenting reasoning of Matlock J. who would have allowed the appeal in *Liddiard* on the ground that the plaintiff's rights vested when they made their initial claim in the prescribed manner. They also argue that they are entitled to damages from Tarion for breach of warranty in failing to honour the claim or investigate it further.

- [10] Both arguments founder on the plaintiff's failure to appeal Tarion's initial refusal to the Licence Appeal Tribunal within 15 days as required under the *Act*. Even if making the initial claim gave the plaintiffs some vested right (a proposition with which I do not agree) those rights were lost when they failed to file an appeal from the initial decision. Similarly any claim for damages from that initial decision was lost when the plaintiff's deliberately failed to follow the statutory procedure for protecting their claim.
- [11] Where consumer protection legislation such as the *Act* creates a remedy which did not exist before, it is not open to a claimant to choose his or her forum to make a claim. The procedures set out in the *Act* for claims and appeals from a refusal thereof must be followed.
- [12] In argument counsel for the plaintiffs raised the issue of delay by Tarion in commencing its investigation and argued that it had caused damage to the plaintiffs. He based this on the fact that although the initial complaint was made in October 2005, the inspection was not undertaken until July 2006. Counsel for Tarion correctly points out that this ground was not included in the statement of claim and had never been raised before today. He further pointed to the fact that as the house had not been registered, Tarion had first to determine whether the property was eligible for a warranty before investigating the actual complaint.
- [13] Upon review of the material I am satisfied that although some time passed between the initial complaint and the inspection, the results thereof would have been the same in any event, and coverage would have been denied. I am also satisfied that much of the delay was due to the actions or lack thereof of the plaintiffs or their predecessors in title in failing to register the home under the New Home Warranty Program and to provide documentation requested by Tarion. In these circumstances I find no claim for damages based on delay lies against Tarion.
- [14] For the reasons set out above I allow the defendant Tarion's motion and strike the plaintiff's claim against it. The defendant Stewart Title has not opposed Tarion's motion to strike out its cross-claim. It cannot stand in a better position than could the plaintiffs. Therefore its cross-claim against Tarion is also struck. Counsel may arrange to make costs submissions through the trial co-ordinator.


Justice T.M. Wood