07 274 009

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Lawlor v. Currie, 2007 NSSM 60

2007 Claim No. 279003
Date:20070926

BETWEEN:

Name: **Sharon Lawlor** **Claimant**

- and -

Name: **Michael Paul Currie and Shelly Nicole Currie** **Defendants**

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers of the parties on September 28, 2007. This decision replaces the previously distributed decision

Appearances:
Claimant: Kelly Mittelstadt
Defendants: Kevin C. MacDonald

D E C I S I O N

[1]This is a claim for damages based on an alleged breach of warranty and misrepresentations in an agreement of purchase sale and the related property condition disclosure statement. The subject property is a condominium known as Unit #307 in Halifax County Condominium Corporation No. 48 which is located at 110 Farnham Gate Road, Halifax. Both counsel submitted pre-hearing submissions and, as well, I was provided with post- hearing submissions from counsel for the Claimant under date of August 8, 2007, and from counsel for the Defendants under date of August 20, 2007. The hearing of evidence took place on July 17, 2007.

Evidence

[2]The Claimant, Sharon Lawlor, testified that she and her husband purchased the condominium from the Defendants in August 2006. Shortly thereafter she learned that there was a

misstatement on the disclosure statement. She referred to paragraph 11(c) of the signed Agreement of Purchase and Sale which reads:

> *The seller represents and warrants to the buyer as follows:*
>
> *(c) that there are not special assessments contemplated by the Condominium Corporation, and there are not legal actions contemplated by or against the Condominium Corporation.*

[3]As well, she referred to paragraph 3(b) of the Agreement of Purchase and Sale which, among other things, states:

> *Once received and accepted, the Property Condition Disclosure Statement shall form part of this Agreement of Purchase and Sale.*

[4]In respect of the Property condition disclosure statement, she referred particularly to paragraphs 6(b) and (c) which reads:

> *(b) Are you aware of any structural problem, unrepaired damage, leakage or dampness with the roof or walls? No.*
>
> *(c) Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the property if less than five years?*
> *No.*

[5]She stated that these statements satisfied her that this was a sound property. She stated that at the time of the purchase she had no so knowledge of problems. She stated that if information was disclosed about leaky windows she would not have purchased.

[6]She was referred to the Estoppel Certificate which was dated July 26, 2007, and introduced as Tab 10 in Exhibit 1. In that certificate she was particularly referred to item (1) on page 3 which reads:

> *Special assessments that are known to be forthcoming in the current fiscal year - see reserve fund. The Board of Directors will be calling a special general meeting before the end of 2006 to discuss with owners the possibility of funding for windows and siding.*

[7]Ms. Lawlor stated that the closing date was August 21, 2006, and she moved in on August 25th. Shortly after that her husband found out from neighbours that there was a special assessment and that it was going to cost in the range of $8,000.00 - $10,000.00. She indicated that she initially thought that her husband was joking. As a result of this information she had a meeting with Kim Madden at Citi Financial who manages the property. At this meeting Ms. Madden provided Ms. Lawlor with the copies of the Board meetings and general meeting minutes and Ms. Lawlor indicated that every meeting indicated that there were discussions with respect to replacement of windows and siding.

[8]Ultimately a special assessment was levied and the portion attributable to Ms. Lawlor's unit was just under $5,000.00. The actual amount is contained in the spreadsheet tendered as Tab 11 in Exhibit 1 and is in the amount of $4,902.72. As well, there was an increase in her monthly condominium fees. She indicated that she would not have closed the deal if she had known of the problems and the potential for a special assessment.

[9]On cross- examination she acknowledged that the Property condition disclosure statement was signed after the Agreement of Purchase and Sale and therefore while it did not have a bearing on whether she signed the agreement, it did have a bearing on her completing the agreement. Ms. Lawlor was shown photographs which purported to be from the subject unit and taken during spring of 2006. The photographs clearly showed the window was rotting with possibly black mold. Ms. Lawlor said there was not mold or rot in the unit that they purchased.

[10] Ms. Lawlor further acknowledged that she was aware that the Estoppel Certificate was an important document. She indicated that her lawyer said that the Estoppel Certificate looked satisfactory to her. She stated that the reserve fund study referred to in the Estoppel Certificate did not come with that certificate and that they did request it. They were only provided a summation of it and they closed without getting a copy of the reserve fund study but they did have the reserve fund certificate.

[11] Kerry White was also a resident at 110 Farnham Gate Road. She testified that in early 2006 she had discussions with Michael Currie and he told her that his windows were rotting.

[12] Kim Madden is with Citi Group Properties which manages the condominium and she attends the Board meetings and is familiar with the property and the affairs of the Corporation. With respect to the windows at Unit 307 she indicated that a contractor named "New Life Renovations" looked at them and said that it was not rot. They suggested that it was due to condensation and recommended that they be washed off with a solution.

[13] She was asked about the annual meeting which took place in June 2006, and stated that she was aware that Mr. Currie was present but he did not sign the sign-in sheet. She could not say for sure whether Mr. Currie was at the meeting during the portion dealing with the discussions of the options for the windows. She stated that Mr. Currie would have been aware of the possibility of the special assessment. She is also aware that Estoppel Certificates are used by purchaser of the condominium units and she stated that in many instances they get requests from lawyers for further information. She understands that it is important to be accurate in the Estoppel Certificate and states that she takes great care with them.

[14] She stated that the reserve fund study would be with the Board and at Citi Group's office. She stated that to her knowledge she was not requested to provide a copy of it by Erin O'Brien's office (the solicitor for Ms. Lawlor on the property transaction). She recalls meeting with Ms. Lawlor although she was not sure of the date. She referred her to the Estoppel Certificate. Ms. Madden stated that Mr. Currie did not go to Board meetings after he resigned although she believes she gave him one meeting's minutes at the direction of the new Board. She told him that he could come in to see the minutes. She did give Sharon Lawlor a copy of the Board meetings at the direction of the Board. She does not recall saying to Mr. Currie anything to the effect that special assessment would be in the Estoppel Certificate.

[15] The solicitor for Ms. Lawlor, Erin O'Brien-Edmonds, was called by the Defendants under subpoena. She indicated that she has been practising law since 1984, focusing particularly on real estate transactions. She confirmed that she did do the work for Ms. Lawlor on this closing and that she reviewed the documents.

[16] She confirmed that there was very little discussion with respect to the Property condition disclosure statement. She stated that she did not specifically recall any discussions regarding the purchaser having an inspection done.

[17] She confirmed that she did receive the Estoppel Certificate on or about July 27th. Ms. O'Brien-Edmonds indicated that in her experience practically all the Estoppel Certificates include the statement "see reserve fund". She emphasized that this Estoppel Certificate referred to the "possibility of funding for windows and siding" in item 1 on page 3. She stated that there was nothing in the document to alert the reader that there was a real problem which was going to be addressed. She states that she believes there should have been. With respect to the issue of the actual reserve fund, her advice to her client was that you would have to be an engineer and an accountant to express an intelligent opinion on

the reserve fund. She is familiar with reserve fund studies and indicated that they tend to be extremely complicated and not very meaningful to the average reader.

[18] Ms. O'Brien-Edmonds also stated that she did not know anything about issues of windows or siding and further, that when she read item 2 on page 3, where it refers to the "Reserve Fund Study Details" it refers to expenditures over the long term. She understood that there was sufficient funding and money available for those planned expenditures.

[19] The Defendant, Michael Currie, gave evidence. He indicated that he was on the Board of directors at the Condominium Corporation until February 4, 2006. He indicated that the Board thought that there was a need for special assessment for windows given the age and condition and that some windows were leaking. Mr. Currie indicated that he resigned from the Board because he was of the view that a special assessment was required and it appeared that no one was accepting of that. He felt he had done all he could do.

[20] He was questioned with respect to the specific items in the Property condition disclosure statement and in particular item 6(b) regarding roof and walls. Mr. Currie responded that he took that to mean his unit and not the common elements. With respect to 6(c) and the work that was done on the deck, he stated that the deck was also a common element and not part of his unit.

[21] Mr. Currie stated that he had a copy of the reserve fund study and gave it to his real estate agent. He stated that in the section dealing with windows there was no amount indicated.

[22] Mr. Currie was questioned with respect to paragraph 11(c) in the Agreement of Purchase and Sale and after initially stating that, yes, he did read it, he corrected himself and said, no, he did not. He acknowledged that it is not accurate.

[23] He spoke about the window photographs which were entered as Exhibit D2. He stated that these were exactly the way the looked when they were viewed by the purchasers and that he did not paint them because he knew they were going to be replaced.

[24] He again stated that the property disclosure statement was not answered affirmatively in item 6(c) because they did not relate to the unit but related to what are common elements. He did acknowledge that it would perhaps have been more appropriate if 6(b) and 6(c) stated "does not apply".

[25] He acknowledged that he knew that there was a possibility of a special assessment but stated that he did not deem it necessary to disclose that possibility in the Property condition disclosure statement.

Issues

[26] This case raises the issue of whether either or both the of the provision in paragraph 11(c) of the Agreement of Purchase and Sale and clauses 6B and 6C of the Property condition disclosure statement have been breached, and if so, what is the legal effect of those breaches. Also, to be considered is the legal effect of the Estoppel Certificate and the physical appearance of the windows. Further, if there is a breach or breaches, what is the legal remedy and is it to be adjusted by considering "betterment" deductions.

Analysis

Express Warranty

[27] I start with paragraph 11(c) of the Agreement of Purchase and Sale.

[28] Paragraph 11(c) of the Agreement of Purchase and Sale is a contractual warranty signed by the Defendants. As a general principle, the law deems a person to have agreed to every provision in a written contractual document which they have signed. Whether or not Mr. Currie actually read that when he signed the agreement is, therefore, immaterial.

[29] It is clear that as of the point that the Agreement of Purchase and Sale was signed - July 17, 2006, that there was a special assessment being contemplated by the Condominium Corporation. Further, this would have been known by Mr. Currie as he had been one of the primary proponents that a special assessment be levied to deal with the issue of windows and siding.

[30] Thus, on its face, that warranty has been breached by the vendors.

[31] On behalf of the Defendants, Mr. MacDonald argues that reliance is an issue when determining whether there has been a breach of an express warranty. Against that, Mr. Mittelstadt, for the Claimant, submits that the issue of reliance only applies to the breach of collateral warranty in the Property condition disclosure statement and does not apply to the express warranty in the Agreement of Purchase and Sale which is contained in clause 11(c). In support of that he refers to the Ontario Court of Justice of case of ***Monarch Construction v. Axidata Data Inc.,*** [2007] O.J. No. 816.

[32] Before examining the Defendants' contention in more detail, I do note that as a matter of general principle, I certainly would be of the view that the issue of reliance is not relevant to the question of whether or not there has been a breach of an express contractual warranty.

[33] In Mr. MacDonald's submission he quotes from the decision of Dickson, J. (as he then was) from ***Fraser-Reid v. Droumtsekas,*** [1980] 1 S.C.R. 720, as follows (p. 8):

> *The provision in the agreement in the case at bar is, in my opinion, neither a representation nor innocent. It was a promise as to a certain state of affairs and collateral to the main purpose of the contract, which was the transfer of the property in the land. It was knowingly breached by the builder. There was an infraction of the building by-law, affecting a vital part of the building, the*

> *foundation. The breach was one which could not possibly have been discovered by ordinary inspection for the foundation had been covered up, and the defect hidden, before the sale agreement was entered into. The infraction was not disclosed to the purchase. The words in question, in my view, constituted a warranty.*

[34] Mr. MacDonald then contrasts that with the current case by stating that here the "*defects with the windows were not hidden, but disclosed to the claimant on visual inspection and through the Estoppel Certificate*". Further he states that the court in ***Fraser-Reid*** was saying to a vendor that if you provide a warranty and the purchaser does not have the opportunity to confirm the representation set out in the warranty then you are potentially liable.

[35] With all due respect, I do not think the decision in ***Fraser-Reid*** supports that proposition or can be taken that far. In my view, the statement of Dickson, J. quoted above must be understood in the context of what was being advanced on behalf of the vendor. In the paragraph previous to that quoted above Dickson, J. states:

> *It was also contended that the words in question constituted a representation, not a warranty, and that the misrepresentation was innocently made, and therefore, not actionable...*

[36] As will be seen, in the last quoted statement Dickson, J. appears to be commenting on the argument that firstly, the words in question constituted a representation not a warranty and, secondly, that the misrepresentation was innocently made and therefore not actionable. He then finds that it is a warranty and not a representation. Further he finds that it was not innocent and that it was knowingly breached by the builder. In effect, he is rejecting both arms of the argument.

[37] In my view, he was not purporting to say that in order to find a breach of an express contractual warranty that there must also be evidence of reliance by the innocent party.

[38] For these reasons I do not accept that the issue of reliance is relevant in determining whether there has been a breach in express warranty. Therefore, the express warranty in this case that there were not special assessments contemplated by the Condominium Corporation was breached.

Property Condition Disclosure Statement

[39] As noted above, the Claimant also alleges a breach of the statements in the Property condition disclosure statement and, in particular paragraphs 6(b) and 6(c) which I again set out:

> *6B. Are you aware of any structural problems, unrepaired damage, leakage or dampness with the roof or walls?*
>
> *Reply: NO*
>
> *6C. Have any repairs been carried out to correct leakage or dampness problems in the last five years (or since you owned the property if less than five years)?*
> *Reply: NO*

[40] On the issue of the actual condition of the windows in the subject unit, the evidence is somewhat contradictory. On the one hand, Mr. Currie has introduced photographs which appear to show rot and mold on the windows in his unit. However, he testified he did not experience leakage. There was other evidence that clearly indicated that the windows in Mr. Currie's unit were rotting and in fact there is a document from him under date of March 19, 2006, in which he states that a window in his unit is quite rotten. I believe it is a fair inference that if the windows were rotting there must have been some dampness if not leakage. And, in my view, that would fall under item 6B.

[41] In his evidence Mr. Currie stated that he believed the Property condition disclosure statement only related to his specific legal unit in the condominium complex. As he

explained, the windows and the deck were not legally part of his unit but were part of the common elements. Therefore, in his view, he did not have to disclose it on the Property condition disclosure statement.

[42] While I am of the understanding that Mr. Currie's explanation is technically correct, I do not accept this distinction in the context of the Property condition disclosure statement. For one thing, it is not reasonable to expect that a purchaser of a condominium would have any appreciation of the legal distinction between the unit and the common elements. To the contrary, most individuals purchasing a condominium, at least first time purchasers, would consider that the windows were part of their unit. The fine legal distinction offered in the Defendants' submission would be unknown to them at that stage.

[43] In addition, in the case of ***Desmond v. McKinlay*** (2000), 188 N.S.R. (2d) 211, upheld at (2001) 193 N.S.R. (2d) 1 (C.A.), Justice Wright found that silence could constitute negligent misrepresentation, or breach of collateral warranty. In paragraph 41 Justice Wright quoted from ***The Law of Contract*** as follows:

> *Silence upon some of the relevant factors may obviously distort a positive assertion. A party to a contract may be legally justified in remaining silent about some material fact, but if he ventures to make a representation upon the matter it must be a full and frank statement, and not such a partial and fragmentary account that what is withheld makes that which is said absolutely false. A half-truth may be in fact false because of what it leaves unsaid, and, although what a man actually says may be true in every detail, he is guilty of misrepresentation unless he tells the whole truth.*

[44] To similar effect is a statement from the English Court of Appeal in the case of ***Curtis v. Chemical Cleaning and Dying Co.***, [1951] 1 All E.R. 631, which is quoted at paragraph 24 of ***Alevizos v. Niuroa***, [2003] M.J. No. 433 (Man. C.A.):

> *A representation might be literally true but practically false, not because of what is said, but because of what is left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation.*

[45] It would seem to me that if there is a representation in a property condition disclosure statement that there has been no dampness in the roof or walls that this includes, or at least implies that it would include, the windows and, further, if the windows are being excluded because they are not legally considered part of the unit but a part of the common elements, that should also be disclosed.

[46] In the circumstances, I find that the property condition disclosure statement was breached with respect to the dampness and rot problems in the windows.

[47] The further issues that need to be addressed however are the Estoppel Certificate and the actual condition of the windows. Mr. MacDonald argues, and I accept, that to find negligent misrepresentation (or collateral warranty), there must be reliance and that reliance must be reasonable. In that regard he refers to the physical condition of the windows as shown in the photograph and states that this condition was patently obvious.

[48] The photographs of the windows do indeed indicate a degree of deterioration and in light of Ms. Lawlor's evidence that she did not see anything, one is left to wonder whether she even looked at the windows during her inspection. If this was purely a claim for the costs to remedy the windows, then I would have some difficulty in allowing such given the apparent and rather obvious condition of the windows as disclosed in the photographs. However, this is not such a case. Here, the claim essentially relates to the special assessment for some $5,000.00. It seems to me that that means there has to be a clear link between the physical condition of the windows and the special assessment and, with respect, I do not think that link has been satisfactorily established. In other words, even if a prospective purchaser in the shoes of Ms. Lawlor had viewed the windows, it does not

necessarily follow that she would be given the "heads up" that a special assessment was contemplated.

[49] I turn then to the Estoppel Certificate. When one reviews that document there is a schedule which shows certain work which is scheduled to be done and, the dates indicated are well into the future. I think a review of that document by the average reader would lead to a reasonable conclusion that nothing imminent was contemplated.

[50] In light of the above, I would find that there was a breach relating to the property condition disclosure statement with respect to the dampness and rot problems in the windows. Because of that the purchaser was led to the conclusion that the property was sound and, would not have had any basis to pursue the issue further. That, coupled with the somewhat equivocal information in the Estoppel Certificate, would have given the purchaser the inaccurate impression that there were not any special assessments being contemplated.

[51] In the previous section dealing with the breach of the express warranty, I concluded that the issue of reliance was not relevant to a breach of an express warranty. At this point, I would add that even if such were relevant, for the reasons given here, I would not find that the issue of reliance (or even that of the patent obvious nature of the windows themselves) would defeat the claim in any event.

[52] For all these reasons I believe that the Claimant's claim is well founded and the decision should issue in favour of the Claimant.

[53] The Defendants submit that there should be a deduction from any damage award since the Claimant has new windows and siding as a result of the special assessment. Relying on Nova Scotia case law, the Defendants suggest that two-thirds should be reduced from the damages.

[54] In ***Thomson et al v. Schofield***, [2005] N.S.S.C. 38, Justice Warner allowed a deduction for betterment in respect of repairs to a basement. At paragraph 55 he states:

> *...Where there will be an enhancement of the value of the property as a result of the required repairs it is recognized that a deduction for that betterment should, in many instances, be allowed.*

[55] As I understand it, this approach is consistent with the general theory of damages which, to the extent money can, is intended to put the aggrieved party in the position they would have been in but for the breach of contract or the breach of the duty of care in negligence. A damage award should not put the aggrieved party in a better position than they would have been in but for the breach.

[56] Thus, where some part of a dwelling is replaced with a brand new and improved system as compared to what was there, a deduction can be made for the resulting betterment.

[57] As noted in the submission from Claimant's counsel, the burden rests with the Defendants to prove the betterment (see ***Decoste Manufacturing Limited v. A & B Roofing Limited*** (2004), N.S.J. No. 250, paras. 159 - 161).

[58] Based on the comments of Justice Warner in ***Thomson,*** there must be evidence or a fair inference from the evidence that there is an enhanced value to the property. Here, I do not think the evidence establishes that there is an enhanced value to the condominium unit because of the payment of the special assessment. I accept that theoretically the unit would have some intrinsically greater value as a result of new windows and siding as part of the common elements. However, what is unknown is whether there are other parts of the common elements which will have to be substantially repaired or replaced over the next few years and thus potentially attract further special assessments. It would be speculation for me to try to engage in that type of analysis. I would think to establish that there was an enhanced value would require expert evidence dealing with the reserve fund study and

condition of the common elements. Unlike a case with a single dwelling, stand-alone house, there are simply too many variables in this situation to conclude that a deduction for a betterment is appropriate.

[59] Accordingly I find that the damages for the special assessment of $4,902.72 should be allowed. On the other hand, the increase in the condominium fees which is claimed does not, in my view, flow from the breaches demonstrated here and I will not allow that amount.

[60] I do not believe it an appropriate case to allow prejudgment interest. I will allow costs which, from what I have in the file only constitute the filing fee.

Disposition and Order

[61] It is hereby ordered that the Defendants pay to the Claimant the following sums:

Debt:	$4,902.72
Costs:	170.88
Total:	$5,073.60

DATED at Halifax, Nova Scotia, this 26th day of September, 2007.

Michael J. O'Hara
Adjudicator

Original Court File
Copy Claimant(s)
Copy Defendant(s)

ISP