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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

KARLI NICOLE SMITH,	)	Appearances:
	)	
plaintiff,	)	SCOTT W. CANNON
	)	EVAN F.P. PODAIMA
- and -	)	for the plaintiff
	)	
	)	
SEAN LEHMANN, HARRISON LAW OFFICES,	)	TROY P. HARWOOD-JONES
JOHN HARRISON, LANDMHEL REAL ESTATE	)	ALLISON C. FEHR
SERVICES INC., LAURA TORMON and	)	for the defendant, Sean Lehmann
WINNIPEG CONDOMINIUM CORPORATION 505,	)	
	)	AARON W. CHALLIS (defence)
defendants.	)	SEAN R. RESTALL (counterclaim)
	)	for the defendant, Winnipeg
	)	Condominium Corporation 505
	)	
	)	JUDGMENT DELIVERED:
	)	July 28, 2022

***Notice**: Due to the COVID-19 pandemic, this matter was heard remotely, by teleconference.*

GRAMMOND J.

INTRODUCTION

[1] The defendants Sean Lehmann ("Lehmann") and Winnipeg Condominium Corporation 505 ("WCC 505") seek summary judgment dismissing the plaintiff's claim,

and WCC 505 seeks summary judgment granting its counterclaim. The claims against the remaining defendants have been discontinued.

[2] The plaintiff's claim arises from the purchase of a condominium in WCC 505 (the "Unit"), that was formerly a storage unit[1]. After purchasing the Unit from Lehmann, the plaintiff learned that no occupancy permit had been issued for the Unit, and that certain remedial work had to be performed to obtain an occupancy permit.

[3] The claim against Lehmann is based in breach of contract, negligence, negligent misrepresentation, and unjust enrichment, and the claim against WCC 505 is based in negligence and breach of contract.[2]

MOTION TO STRIKE

[4] At the outset of the summary judgment hearing, the defendants sought an order striking the affidavit of a legal assistant sworn and filed by the plaintiff less than two weeks before the hearing. The defendants submitted that pursuant to Court of Queen's Bench Rule 39.02(2)[3] the affidavit should not have been filed because cross-examinations were conducted approximately six months earlier.

[5] Attached to the affidavit as an exhibit were four Multiple Listing Service listings for the Unit, with colour photographs, from each of 2006, 2012, June 2014, and December 2014 (collectively the "Listings"). The defendants argued that the Listings

[1] The Unit is a studio style basement suite of approximately 581 square feet.
[2] The amended statement of claim does not reflect the proper elements of all of the causes of action listed above, but for the purpose of these motions I have assumed that appropriate amendments could be made.
[3] Court of Queen's Bench Rule 39.02(2) provides that a party who has cross-examined on an affidavit shall not subsequently file an affidavit for use at the hearing without leave or consent.

could have been obtained and filed by the plaintiff at any time during this proceeding, and well before cross-examinations or the contested hearing date. The defendants also submitted that they would have cross-examined on the affidavit had they been given the opportunity to do so, because the Listings and photographs reflect the condition of the Unit at particular points in time, which is an issue in this case.

[6] The plaintiff argued that the Listings are relevant to the condition of Unit, and since Lehmann testified on cross-examination that he had reviewed the Listings, there would be no prejudice in allowing the affidavit to remain on the record.

[7] After hearing submissions, I was satisfied that four of the colour photographs found within Exhibit "A", on "page 3 of 5" of the photo gallery from the June 2014 listing were merely better quality copies of photos already filed in evidence by WCC 505. Accordingly, I permitted those four photographs to remain in Exhibit "A" and struck the balance of the affidavit[4] because cross-examinations were completed long before the affidavit was filed, the Listings contained new evidence, and the plaintiff could have filed the Listings much earlier in the process. More particularly, this litigation has been ongoing since 2019, and permission to file the summary judgment motions was granted on March 30, 2021. Accordingly, if the plaintiff sought to rely upon the Listings, she could have filed them well in advance of the cross-examinations conducted in August 2021.

[4] To clarify, the balance of Exhibit "A" is struck. The body of the affidavit will remain on the record, as context for the four photographs.

[8] In addition, to allow the Listings to remain on the record would, in my view, prejudice the defendants because they had no opportunity to cross-examine, and there is no evidence that Lehmann reviewed either the 2006 or 2012 listings. Moreover, the affidavit provided no context relative to the source of the Listings or how they were obtained, so the appropriate evidentiary foundation was lacking.

BACKGROUND

[9] Many of the background facts in this matter are not in dispute. The timeline of relevant events is as follows:

(a) **July 7, 2014**: Lehmann bought the Unit from the Assiniboine Credit Union pursuant to a foreclosure proceeding;

(b) **February 26, 2015**: Lehmann sold the Unit to the plaintiff, after which she resided in the Unit;

(c) **September 5, 2017**: after an inspection, the City of Winnipeg (the "City") ordered that the Unit be brought into compliance with applicable by-laws on or before December 12, 2017, failing which enforcement action would be initiated. The two main issues identified by the City were that the Unit was constructed without permits, and that it did not comply with required fire separations pursuant to the Manitoba Building Code or By-law No. 4304/86 (the "Deficiencies"). In particular, the Unit required a new door, and walls and ceilings with a 45 minute fire separation[5].

[5] The order also referenced deficiencies in what appear to be common areas of the building, including the basement hallway and boiler room.

(d) **November 24, 2017**: the City issued a By-law Violation Notice to WCC 505 and the plaintiff relative to By-law No. 4555/87, which governs changes of occupancy and the need to obtain a Building Occupancy Permit;

(e) **December 13, 2017**: the City ordered that WCC 505 pay a $4,000.00 fine for non-compliance with the order;

(f) **January 10, 2018**: the City ordered that WCC 505 obtain a building permit for construction in the Unit, and pay an administration fee of $1,015.00;

(g) **January 26, 2018**: WCC 505, through counsel, demanded that the plaintiff comply with the City's orders;

(h) **March 21, 2018**: WCC 505 advised the plaintiff that since she had not complied with the City's orders, it would perform the necessary repairs to the Unit pursuant to the WCC 505 Condominium Declaration (the "Declaration");

(i) **August 1, 2018**: the City issued a building permit to WCC 505's contractor to rectify the Deficiencies, in connection with which WCC 505 claims from the plaintiff costs of $44,631.64 (the "Remedial Costs"), in its counterclaim;

(j) **October 25, 2018**: the City ordered that WCC 505 pay an additional $8,000.00 fine for non-compliance with the orders;

(k) **November 16, 2018**: WCC 505 filed a lien against title to the Unit[6]; and

(l) **May 10, 2019**: the City issued a Building Occupancy Permit for the Unit.

ISSUES

[10] The main issue in this action is who should bear responsibility for the Remedial Costs and the fines issued by the City. The question before me is whether the determination of that issue requires a trial.

THE LAW

[11] Motions for summary judgment are governed by Court of Queen's Bench Rule 20, the material portions of which provide:

> **Summary judgment motion**
>
> 20.01(1) A party may bring a motion, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings in the action.
>
> …
>
> **Responding evidence**
>
> 20.02 In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.
>
> **Granting summary judgment**
>
> 20.03(1) The judge must grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.
>
> **Powers of judge**
>
> 20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

[6] In May 2019, the plaintiff filed this claim and thereafter obtained an injunction preventing WCC 505 from foreclosing on the Unit.

(a) weighing the evidence;

(b) evaluating the credibility of a deponent;

(c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

[12] The leading case on summary judgment is ***Hryniak v. Mauldin***, 2014 SCC 7 (CanLII), where the court stated:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[13] In ***Dakota Ojibway Child and Family Services et al v. MBH***, 2019 MBCA 91 (CanLII), the court stated:

> [108] At the hearing of [a summary judgment] motion, the moving party must first satisfy the motion judge that there can be a fair and just determination on the merits (i.e., that the process will permit him or her to find the necessary facts and to apply the relevant legal principles so as to resolve the dispute, and that proceeding to trial would generally not be proportionate, timely or cost-effective). In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.
>
> [109] If those requirements are met, the responding party must meet its evidential burden of establishing "that the record, the facts, or the law preclude a fair disposition" (*Weir-Jones* at para 32; and *Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at para 22; see also *Stankovic* at para 29) or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required (see *Hryniak* at para 56). If the responding party fails to do so, summary judgment will be granted.
>
> [110] The analysis contemplated by Karakatsanis J in *Hryniak* is itself a two-step analysis (see para 66). First, the motion judge must determine if there is a genuine issue requiring a trial based only on the evidence, without using any additional fact-finding powers. If there is such an issue, the second step requires the motion judge to determine if the need for a trial can be avoided by

> weighing the evidence, evaluating credibility, drawing inferences and/or calling oral evidence (see r 20.07(2)).
>
> [111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

ANALYSIS

[14] The plaintiff argued as a general proposition that she should not be liable for the Remedial Costs and payment of the fines because at the time she purchased the Unit, she thought it was a residential condominium with an occupancy permit and without deficiencies. She submitted that the issuance of an occupancy permit is not usually an issue in residential real estate transactions, and that it was reasonable to assume that the appropriate permit was in place.

Claim against Lehmann

[15] Lehmann deposed that no one advised him that the Unit had been converted from a storage unit to a residence, and that he was not aware of any renovations done to the Unit to alter it structurally, to convert it from one by-law designation to another, or that required a permit to complete. He also stated that he was not aware of any building code or by-law violations to which the Unit was subject.

[16] The evidence is clear that Lehmann bought the Unit on an "as is, where is" basis, subject to "zoning and building code violations", in an unfinished state. Lehmann deposed that the renovations he did in the Unit included the replacement of flooring, bathroom fixtures, and kitchen appliances, the installation of cabinetry and other interior finishings, painting, tiling, and sandblasting a brick wall. He submitted that the

renovations were cosmetic in nature, did not alter the structure of the Unit, and did not require a building permit pursuant to By-law No. 4555/87. More specifically, Lehmann testified on cross-examination that when he purchased the Unit the plumbing and electrical infrastructure was already in place, and he did not perform any plumbing or electrical work that required a permit.

[17] Lehmann's evidence also reflects that he did not provide to WCC 505 the details of either his plans or of the work actually done in the Unit, but that it gave him a "verbal green light" to proceed. WCC 505 agreed that it did not oversee the renovations and was not aware of the details of the work done, except that Lehmann installed drywall on a large portion of the wall between the boiler room and the Unit, which was previously comprised of exposed studs. Both Lehmann and WCC 505 submitted, therefore, that only Lehmann has knowledge of the details of the work that he performed in the Unit.

[18] The plaintiff argued that her claim should not be dismissed because the nature and extent of the renovations performed by Lehmann is an issue that requires a trial. More particularly, appraisals prepared in 2014 reflect that the Unit required plumbing, electrical, and structural work, which contradicts Lehmann's evidence that the renovations were strictly cosmetic in nature. The plaintiff submitted that the independent appraisers should testify at trial regarding the state of the Unit in 2014 and the photographs they took of the Unit at that time. In other words, the court should not rely upon only Lehmann's evidence relative to the condition of the Unit when he purchased it, and the nature and extent of the renovations that he performed.

[19] The appraisals to which the plaintiff referred are three documents apparently obtained by Assiniboine Credit Union from third parties in the context of the foreclosure proceeding pursuant to which Lehmann purchased the Unit. One of the documents is an appraisal prepared by Sherrett Appraisals Inc. which reflects that the Unit is "inhabitable". The other two documents are opinions of value prepared by realty companies, one[7] of which reflects that the Unit "…needs electrical, plumbing … & mor[e] it has to be done up to code as per [C]ity of Winnipeg guidlines (sic)". These documents were attached to an affidavit sworn by a representative of WCC 505, which does not comply with Court of Queen's Bench Rule 39.01(4) relative to the deponent's information and belief about the documents and the source thereof. Moreover, in motions for summary judgment, expert opinion evidence is not properly before the court unless it is in the form of a sworn affidavit of the expert.[8] For these reasons, I am not prepared to attach any weight to the three valuation documents.

[20] Also in evidence are the minutes of a WCC 505 Board of Directors meeting from November 21, 2013, which reflect that the Unit "…is not rated or safetied for residential occupation". WCC 505 admitted that when Lehmann purchased the Unit in mid-2014, the Board continued to believe that the Unit was uninhabitable. There is no evidence, however, of whether any work was done in the Unit after November 2013 and before mid-2014 when Lehmann bought the Unit. Similarly, there is no evidence that Lehmann saw WCC 505's Board meeting minutes or was aware of their contents at any

[7] Prepared by Re/Max Executives Realty, dated August 28, 2014.
[8] ***Perth Services Ltd. v. Quinton et al.***, 2009 MBCA 81 (CanLII), at para. 33.

time prior to this litigation. The only evidence relative to Lehmann's knowledge of the Unit's history is his own evidence, which was unshaken on cross-examination.

[21] The evidence regarding Lehmann's knowledge of the Unit, therefore, is one-sided. In the absence of any admissible evidence that there were electrical, plumbing, or other issues requiring a permit when Lehmann purchased the Unit, or that Lehmann was aware of any such issues, there is no basis upon which to discount his evidence on those points. I am satisfied, therefore, that I can weigh the evidence on these motions and that there is no credibility issue requiring a trial.

[22] Similarly, there is no evidence before me of when the Unit was converted from a storage locker to a residence, who was responsible for that conversion, or whether Lehmann or someone else performed the work that was later found to give rise to the Deficiencies. I acknowledge that Lehmann installed some drywall in the Unit, and that the Deficiencies included issues with fire separations, but there is no evidence that the drywall which Lehmann installed offended the building code or any by-law. Similarly, I have not been provided with any evidence or authority that installing drywall on an existing stud wall constitutes structural work within the meaning of By-law No. 4555/87, such that a permit was required. Accordingly, I am not satisfied that the installation of drywall by Lehmann constituted structural work.

[23] I will add that if the plaintiff had any evidence on these points, she was required to advance it on these motions pursuant to Court of Queen's Bench Rule 20.02. The law is clear that on a summary judgment motion, each side must "put its best foot

forward" in terms of the existence or non-existence of material issues to be tried.[9] I reject the plaintiff's submission, therefore, that the appraiser and realty companies who viewed the Unit in 2014 should testify at trial. The time to submit their evidence was now, and the plaintiff did not do so. In fact, the plaintiff has advanced no evidence that undermines Lehmann's position relative to his knowledge of the Unit, the Deficiencies, or the nature of renovations that he performed. I do not accept, therefore, that *viva voce* evidence on these points would enhance the fact-finding process in this case.

Breach of Contract

[24] The plaintiff purchased the Unit pursuant to a form of offer to purchase prescribed under ***The Real Estate Brokers Act***, C.C.S.M. c. R20, which has since been repealed. The offer, on its face, was "for the purchase of completed condominium units", and was submitted through a listing agent and a selling agent (the "Contract"). The Contract included the following provisions:

a) "The Seller promises that at the time of possession: … (c) The Seller will be or be entitled to be rightfully in actual and personal peaceable possession and occupation of the whole of the [Unit] (except for any tenancies agreed to be assumed by the Buyer");

b) The plaintiff "…relie[d] entirely on [her] personal inspection of the [Unit] and of the Condominium Project and [Lehmann's] promises contained (and only those contained) in this Offer"; and

[9] ***Dakota,*** at para. 75.

c) "BUYERS ARE STRONGLY URGED TO CONSIDER MAKING THEIR OWN ENQUIRIES WITH RESPECT TO ISSUES OF IMPORTANCE TO THEM, KEEPING IN MIND THAT THE SELLER'S KNOWLEDGE OF THE PROPERTY MAY BE INCOMPLETE OR INACCURATE…".

[25] The plaintiff argued that pursuant to the term of the Contract referenced at paragraph 24(a) above, Lehmann promised that he was in occupation of the Unit at the time of the purchase, and that an occupancy permit was in place for the Unit or could be obtained. None of the parties provided me with any case authorities in which the Contract has been interpreted previously, but the plaintiff argued that the word "occupancy" as used in the Contract includes both physical possession and legal occupancy. The plaintiff relied upon ***Illingworth v. Evergreen Medicinal Supply Inc.***, 2019 BCCA 471 (CanLII), where the court stated:

> [116] In the context of commercial leases, occupancy has two aspects…
>
> 1. Legal possession; and
>
> 2. Physical occupancy.
>
> When premises are demised, a tenant takes legal occupancy. Usually, a tenant will take physical occupancy at the same time. However, the two aspects of occupancy do not always co-exist.

[26] The general rule on contractual interpretation was set out in ***Chandos Construction Ltd. v. Deloitte Restructuring Inc.***, 2020 SCC 25 (CanLII), where the court stated:

> [127] The overriding concern when interpreting a contract is to determine the objective intent of the parties and the scope of their understanding. The court must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at para. 47.

[27] Similarly, in ***Vesturland Development Ltd et al v. Gimli (Rural Municipality) et al***, 2021 MBCA 45 (CanLII), the court stated:

> [39] Evidence of surrounding circumstances should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting (see *Sattva* at para 58). Courts should not use surrounding circumstances to overwhelm the words of the contract or to effectively create a new agreement (see para 57).[10]

[28] I must interpret the Contract, therefore, by determining the objective intention of the parties and by reading the Contract as a whole. In this case, the parties utilized a standard form agreement and did not alter the terms at issue. Clearly, the objective intention of the parties was to transfer title to the Unit from Lehmann to the plaintiff upon payment of the purchase price, which was done. The circumstances surrounding the Contract are not of particular relevance in this case, because the Contract was in a prescribed form, the relevant clauses were not altered, and the plaintiff and Lehmann had no direct contact or discussions with one another at any time.

[29] The ordinary and grammatical meaning of Lehmann's promise to be "rightfully in actual and personal peaceable possession and occupation" of the Unit is that he would possess and occupy the Unit legitimately at the time of the sale. In other words, he promised the plaintiff that he was the owner of the Unit, that he could transfer legal title to the Unit, and that there would be no unauthorized tenants, squatters, or other occupiers in the Unit at the time of the sale. The ordinary meaning of the clause, including the word "occupation" does not contemplate whether there was a valid

[10] ***Vesturland*** was cited with approval in ***Rosenberg et al v. Securtek Monitoring Solutions Inc***., 2021 MBCA 100 (CanLII), at para. 81.

municipal occupancy permit for the Unit, and does not imply that Lehmann was in rightful occupation of the Unit pursuant to an occupancy permit issued by the City. The Contract is silent as to the existence of an occupancy permit and any other municipal approvals for the Unit, or the ability to obtain approvals. This approach is understandable in a statutory form contract, because the issuance of permits or approvals is controlled by municipal authorities, not vendors of property.

[30] I note that in ***Illingworth***, the court considered the intended meaning of the phrase "available for occupancy" in the context of a rent abatement clause in a commercial lease, and concluded that it related only to availability for physical occupancy, not legal possession. In this case, the issue was the lack of an occupancy permit in a residential real estate purchase transaction, which is clearly distinguishable from ***Illingworth*** on its facts.

[31] Moreover, in this case Lehmann occupied the Unit as its registered owner from mid-2014 until the sale to the plaintiff. In the interim he was in both legal possession and physical occupancy of the Unit, to the exclusion of all others, while renovations were performed. In other words, Lehmann fulfilled his promise to the plaintiff in the Contract referenced at paragraph 24(a) above.

[32] I have also considered the provisions of the Contract referenced at paragraphs 24(b) and 24(c) above, which provide that the plaintiff would make her own enquiries and rely upon her own inspections of the Unit. In other words, the Contract reflected that there could be facts about the Unit that were unknown to Lehmann, or that he believed in error, such that the plaintiff would rely upon her own actions.

[33] The plaintiff inspected[11] the Unit twice prior to the purchase, but she did not require or obtain a property disclosure statement, a building location certificate, title insurance, or a zoning or permit letter prior to closing, despite the Unit being newly renovated. Had she taken some or all of those steps, she may have learned about some or all of the issues later identified in the City's orders. The plaintiff did receive the Declaration and WCC 505's by-laws as required by ***The Condominium Act***, C.C.S.M. c. C170 (the "***Act***"), and the mandatory cooling-off period expired before the sale was completed.

[34] In ***Alevizos v. Nirula***, 2003 MBCA 148 (CanLII), the court stated that:

> 18 There can be no doubt that *caveat emptor* is alive and well in Manitoba despite its well-publicized deficiencies. In *Stotts v. McArthur* (1991), 1991 CanLII 12042 (MBCA), 75 Man.R. (2d) 212 at para. 18, this court considered with approval the following statement from V. DiCastri, Q.C., *Law of Vendor and Purchaser*, 3rd ed. (Toronto: Carswell, 1988), vol. 1 (at para. 239):
>
> > It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of the land which may be material to the purchaser's judgment. The purchaser must form his own judgment: *caveat emptor*. This principle, though much criticized, continues to demonstrate a disconcerting durability.

[35] The court in ***Alevizos*** also confirmed that the doctrine of *caveat emptor* applies unless there was a purposeful hiding of latent defects (fraudulent misrepresentation) by a vendor. The plaintiff's motion brief includes as an issue whether Lehmann "fraudulently/negligently misrepresented" to the plaintiff the status and legal occupancy of the Unit. Fraudulent misrepresentation has not been pleaded, however, in the plaintiff's claim, and accordingly that cause of action is not before me. Having said

[11] The plaintiff did not cause the Unit to be inspected by a third party.

that, there is no evidence that Lehmann knew about the various issues with the Unit, and I am not satisfied that he purposefully hid any of that information from the plaintiff.

[36] In conclusion, and for all of the foregoing reasons, I am not satisfied that the issue of whether Lehmann breached the Contract requires a trial.

Negligent Misrepresentation

[37] The plaintiff alleges that Lehmann did not disclose to her that the Unit was formerly a storage locker, or that non-compliant renovations were performed without the proper permits. In addition, Lehmann provided to the plaintiff a statutory declaration, which reflected that "I am rightfully in actual and personal peaceable possession and occupation of the whole of the said land…".

[38] In ***Queen v. Cognos***, [1993] 1 S.C.R. 87 (QL), 1993 CanLII 146 (SCC), the court set out the elements of negligent misrepresentation as follows:

> 33 The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the 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. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

[39] I have concluded that the language of the statutory declaration reflects a representation that Lehmann was the owner of the Unit, and that there were no unauthorized third parties in possession or occupation of the Unit at the time of the

sale, which was true. Lehmann did not represent in the statutory declaration that the City had issued an occupancy permit for the Unit.

[40] Accordingly, the statutory declaration did not contain a misrepresentation that was untrue, inaccurate, or misleading. In addition, the plaintiff's apparent reliance upon Lehmann's statement, to the exclusion of conducting her own due diligence, was not reasonable in the circumstances. The very purpose of conducting due diligence in a transaction is to learn information that is not in the possession of the other party, or that has not been otherwise disclosed, but there is no evidence that the plaintiff took any steps in that regard.

[41] For all of the foregoing reasons, I am not satisfied that the issue of whether Lehmann is liable in negligent misrepresentation requires a trial.

Other causes of action against Lehmann

[42] There is simply no merit to the plaintiff's claims in either negligence or unjust enrichment. I am not satisfied either that Lehmann breached any duty that he may have owed to the plaintiff, or that he was enriched unjustly, because he met his obligations pursuant to the Contract, and as such there is a juristic reason for any enrichment that he received.

Damages

[43] It is trite law that a plaintiff must have suffered damages for a claim to succeed. Here, the evidence is clear that WCC 505 paid the Remedial Costs and the fines issued by the City, such that as at the hearing of these motions, the plaintiff had suffered no damage relative to those amounts.

[44] Having said that, as set out below, I have determined that WCC 505's counterclaim against the plaintiff will be granted, so she will incur damages. I have already determined, however, that there is no cause of action against Lehmann that requires a trial and accordingly, there is no claim against Lehmann under which damages can be recovered.

[45] The plaintiff argued that she should be compensated for the costs she incurred while the remedial work was being performed as she could not live in the Unit, but the only specific expense to which she referred was property taxes. The evidence advanced in support of this submission consisted of bank statements that reflect withdrawals for "property taxes", but the plaintiff did not depose that those payments pertained to the Unit, so her evidence on this point is incomplete. Moreover, because the plaintiff was the owner of the Unit at all material times, she was responsible to pay the property taxes, and I am not satisfied that this would be a properly recoverable amount even if liability could be established.

Conclusion

[46] Lehmann has satisfied me that there is no genuine issue requiring a trial in this matter based upon the evidence before me. Conversely, the plaintiff has not established that a trial is required.

Claim against WCC 505

[47] The plaintiff alleged that WCC 505 owed her a duty of care to oversee the Unit, to ensure that Lehmann performed renovations in accordance with the Declaration and by-laws, and to ensure that the Unit could be occupied as a residence. She also alleged

that WCC 505 knew or ought to have known about the Deficiencies and failed to rectify them prior to her purchase of the Unit.

[48] WCC 505 submitted that while it did not oversee the renovations completed by Lehmann, and does not know exactly what work he did, its approval was not required. Rather, WCC 505 trusted Lehmann to do the renovations appropriately, and believed that he did so, or at least that the Unit was made to be inhabitable. WCC 505 argued that it had no authorization to enter the Unit without special circumstances, and that it would not be reasonable to expect it to supervise or inspect all renovations done by unit owners.

[49] When considering the claim against WCC 505, it is important to examine the nature and role of a condominium corporation, in contrast with that of a unit owner.

[50] The ***Act*** provides[12] that a condominium corporation has a duty to control, manage, administer, and maintain the common elements and common assets of the corporation. Conversely, a unit owner has a duty to maintain their unit, and any improvements made to it.[13] The condominium corporation can enter a unit to perform its mandate and duties only in certain circumstances, none of which apply in this case.[14] In other words, pursuant to the ***Act,*** WCC 505's responsibilities pertain, in the main, to the common elements, and its rights relative to individual condominium units are limited. That is the starting point for this analysis.

[12] ss. 85 and 180 of the ***Act***.
[13] s. 180 of the ***Act***.
[14] s. 90 of the ***Act***.

[51] I have also considered article 2.03(e) of the Declaration, which provides that a unit owner cannot make structural changes to a unit or alterations that serve other units without the consent of the Board. I have already found that there is no evidence that Lehmann made structural changes to the Unit. Similarly, there is no evidence that he made alterations or installations that served another unit in the complex, so Board approval of the work he did was not required under article 2.03(e) of the Declaration.

[52] I also accept that after Lehmann's renovations were completed, the Unit appeared to be inhabitable. There is no evidence to the contrary, and the plaintiff evidently held the same view because she purchased the Unit as her primary residence.

[53] Having said all of the foregoing, there is one fact that might have led WCC 505 to question the details of the renovations that Lehmann performed. WCC 505 was aware, in November 2013, that the Unit was "not rated or safetied for residential occupation", which in my view was tantamount to knowledge that there was no occupancy permit for the Unit. Nevertheless, thereafter, WCC 505 trusted Lehmann to renovate the Unit and assumed that it was rendered inhabitable, but made no inquiries and took no steps to verify what work was done.

[54] The issue is whether, knowing in 2013 that the Unit was not rated or safetied for residential occupation, WCC 505 had a duty in 2014 to ensure, after Lehmann's renovations, that it could be occupied as a residence, or at a minimum to make inquiries in that regard.

[55] Certainly, in performing their duties, the directors and officers of WCC 505 were required to exercise the care, diligence, and skill of a reasonable and prudent person in

comparable circumstances,[15] but neither the ***Act***, the Declaration, nor the by-laws provide that WCC 505 has any responsibility or owed any duty relative to whether a unit was inhabitable or had an occupancy permit. In addition, in this case the City did not issue any order relative to the Unit until September 2017. In hindsight, given WCC 505's knowledge in November 2013 that the Unit was uninhabitable, it would have been helpful had WCC 505 shared its knowledge in 2014, but that practical reality is far from a legal obligation to have done so.

[56] I am not satisfied, therefore, that there was any legal basis upon which WCC 505 was required to act relative to either the renovations that Lehmann performed, or whether an occupancy permit issued for the Unit.

[57] The plaintiff also pointed to a status certificate issued by WCC 505 in December 2014 which provided that "[a]s far as the board of directors know, [Lehmann] is not in breach of the Declaration, By-laws or Rules".[16] The Declaration at article 2.03(a) provides that each unit shall be occupied and used only as a private single family dwelling.

[58] WCC 505 argued that when the status certificate issued, Lehmann's renovations were completed, and no breaches were apparent. In addition, the Declaration provides that a status certificate is not conclusive proof of the matters certified therein where there is an innocent misrepresentation or error.

[15] s. 94(2) of the ***Act***.
[16] There are no WCC 505 "Rules" in evidence.

[59] In this case, the status certificate speaks only to compliance with the Declaration and by-laws, and does not contemplate any issues relative to municipal permits or compliance with municipal by-laws. The status certificate as written, therefore, was accurate, because there is no evidence that Lehmann was occupying or using the Unit for anything other than a private single family dwelling.

[60] For all of the foregoing reasons, WCC 505 has satisfied me that there is no genuine issue requiring a trial in this matter relative to the plaintiff's claim grounded in negligence. Similarly, there is no evidence of a contract between the plaintiff and WCC 505, and as such there is no genuine issue requiring a trial with respect to that cause of action. The plaintiff has not satisfied me that a trial is required with respect to either cause of action against WCC 505.

Counterclaim by WCC 505

[61] The plaintiff argued that the counterclaim should be dismissed because of WCC 505's negligence.

[62] As referenced above, pursuant to the ***Act***, the plaintiff had a duty to maintain the Unit under s. 180(2), while WCC 505's rights relative to the Unit were limited. Section 181 sets out an exception to this general approach, as follows:

> **Unit owner's failure to perform duty**
>
> 181(1) Subject to subsection (2), if a unit owner fails to carry out his or her duty under subsection 180(2) or the declaration, the condominium corporation may do the work required to carry out that duty.
>
> **Unit owner to be given opportunity to comply**
>
> 181(2) Before doing any work under this section, the condominium corporation must give the unit owner a written notice that

(a) describes the owner's duty and the work to be done;

(b) specifies a date by which the work must be done, which must allow the unit owner a reasonable opportunity to complete the work; and

(c) describes the consequences of not completing the work by the specified date.

Deemed consent of unit owner

181(3) The unit owner is deemed to have consented to any work done by the condominium corporation under this section.

Recovery of costs

181(4) The cost of the work done by the condominium corporation under this section is to be added to the common expenses payable in respect of that owner's unit.

[63] WCC 505 argued that it rectified the Deficiencies in this case pursuant to s. 181(1), after the plaintiff had notice of the City's orders and failed to perform the remedial work herself. WCC 505 also pointed to ss. 213 and 215 of the ***Act***, under which unit owners are required to comply with the ***Act***, the Declaration and by-laws, and condominium corporations are empowered to do what is reasonably necessary to remedy a contravention, including doing work to or in a unit.

[64] It is clear to me that s. 181(1) of the ***Act*** permitted WCC 505 to rectify the Deficiencies in this case, because the plaintiff failed to maintain the Unit by not acting upon the orders issued by the City. Accordingly, the plaintiff did not fulfill her duty under s. 180(2), and WCC 505 had authority to do the work required after giving the plaintiff appropriate notice. There is no issue that the plaintiff received notice of the orders from both the City and WCC 505, and that she had the opportunity to respond,

but chose not to do so from September 2017 when the first order issued, through to August 2018 when WCC 505 obtained a building permit for the Unit.

[65] Having determined that WCC 505 acted appropriately under s. 181(1) of the ***Act***, it follows that the costs of the remedial work are to be added to the plaintiff's common element expenses for the Unit. The plaintiff is liable, therefore, pursuant to the counterclaim.

[66] Having said that, in my view there may be an issue as to the quantum of the counterclaim. WCC 505 put into evidence a series of invoices relative to the Remedial Costs, for work apparently performed in the Unit, which were not challenged by the plaintiff.

[67] Nevertheless, I have noted that some of the invoices[17] relate to work done at "79 Smith", without specific reference to the Unit, or at "3-79 Smith", though the Unit is characterized as either Unit "A" or Unit "1" in the evidence. I am concerned, therefore, because as referenced above, the City appeared to identify some deficiencies outside of the Unit, in other locations within the condominium complex.

[68] I am prepared to grant judgment to WCC 505 for all legitimate Remedial Costs incurred with respect to the Unit pursuant to the City's orders, but I am not satisfied with the specific invoices that I have identified. If the quantum of the Remedial Costs cannot be agreed upon, counsel may seek an appearance to make submissions as to next steps.

[17] In particular, exhibits 7, 11, 12 and 13 to the affidavit of Alberto Janabajab affirmed May 14, 2021.

[69] WCC 505 will have judgment for the fines and the administrative fee issued by the City, totalling $13,015.00.

[70] WCC 505 has also claimed legal fees of $2,837.14 in the counterclaim, but it has filed no evidence to support that amount. Accordingly, that aspect of the counterclaim is dismissed.

[71] Until the quantum of the counterclaim is addressed, the injunction issued by Bock J. will remain in place.

CONCLUSION

[72] The motions for summary judgment dismissing the plaintiff's claim are granted.

[73] The motion for summary judgment granting WCC 505's counterclaim is granted in part.

[74] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

_____

J.