CITATION: Bolduc v. Legault, 2023 ONSC 1192
COURT FILE NO.: C-4275/15
AMENDED DATE: 2023-03-28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Stacey Bolduc and Alain Bolduc	)	James L. Longstreet, for the Plaintiffs
Plaintiffs	)	
	)	
– and –	)	
	)	
	)	
Randy Paul Legault	)	Spencer D. Ball, for the Defendant
Defendant	)	
	)	
	)	**HEARD:** December 5, 6, 7, 8 and 9, 2022
	)	**WRITTEN CLOSING SUBMISSIONS**:
	)	January 23, 2023

AMENDED REASONS FOR JUDGMENT
Released Date Amended to March 28, 2023

R.D. GORDON J.

Overview

[1] On July 18, 2014 Stacey Bolduc purchased from Randy Legault property known municipally as 3044 Menard Street, in the City of Greater Sudbury (the "property").

[2] A few months later a water leak developed in the downstairs bathroom. In the course of addressing that leak Mrs. Bolduc's husband Alain discovered not insignificant moisture in the cement blocks of the basement. Over time, that moisture caused failure of the mortar in some locations, weakened the cement blocks and compromised the structural integrity of the foundation. The plaintiffs say that the cost to remediate the water and foundation damage is over $400,000. They seek damages from the defendant based of breach of contract and negligent misrepresentation.

[3] The defendant says he was unaware of any water infiltration or foundation issues and is not liable for any of the plaintiffs' damages. In the alternative, he says that damages claimed are excessive.

Background Facts

[4] The defendant acquired this property in August of 2001. Title was taken in his name, along with his wife at the time (Gail), and a friend who joined in the transaction to facilitate the financing.

[5] The main level of the home had three bedrooms, a bathroom, kitchen and living room. In the basement there was a granny-flat with another bedroom, a bathroom, laundry room, kitchen and living room.

[6] Initially the defendant, along with Gail and her two children, lived downstairs while the upstairs was renovated. Once renovations were complete the family moved to the main floor.

[7] In 2003 the defendant and Gail separated. She moved from the home and the defendant remained with the two children. That same year Mr. Legault met his current wife, Julie. She moved into the home in 2004 with her two children Amanda and Justin who were then age 11 and 7. To accommodate all of the children, the defendant built an additional bedroom in the basement. He also converted the basement kitchen into a bar. Following that renovation the basement had two bedrooms, a bathroom, laundry room and recreation room comprised of the bar and living room area.

[8] In 2007 a water leak from the refrigerator in the upstairs kitchen resulted in water running down the wall into the basement below. Mr. Legault's evidence was that drywall had to be replaced in the basement on the east wall just south of the bathroom above and below the window located there. He testified that the concrete foundation blocks were visible when those repairs were done but that there was nothing to indicate water infiltration other than from the refrigerator issue. Exhibit 31 is a photograph taken of the concrete block wall after the drywall had been removed on that occasion. Aside from water staining that might reasonably be expected from the leak, there is no obvious deficiency in the block wall.

[9] In November of 2009, the defendant settled the issues arising from his separation from Gail. For the purposes of the settlement, the property was valued at $205,000 and was transferred into his name alone.

[10] With the issues regarding his first marriage behind him and things going well at work, the defendant and Julie began looking for their "forever home" in September of 2010. They soon found that home, made an offer to buy it and Mr. Legault put the property up for sale. Initially, he believed he had the property sold, however the buyer was unable to complete the transaction.

[11] In the meantime, there was a second water incident at the home on October 16, 2010 when a waterline located above the ceiling of the basement bathroom broke causing water damage in the basement. After shutting the water off, the defendant notified his insurer, and a company was dispatched to do the clean-up work and provide an estimate for repairs. Drywall was stripped from the interior wall separating the bathroom and what was then the bar and part of the interior west wall of the bathroom. Drywall was also removed from the ceiling of the bathroom and a section of the eastern exterior wall of the basement in the bathroom (approximately 2 feet) and bar (approximately 6 feet). Some of the sub-floor was removed along the perimeter of the exterior wall. The defendant accepted an insurance settlement of just over $11,000 and determined that he

would complete most of the repairs himself. The concrete block foundation would have been visible on the approximately 8 feet of the exterior east wall where the drywall was removed. Mr. Legault testified that he installed new studs in this area as he intended to change the bar to a kitchen and wanted the added stability of additional studs for the cabinetry.

[12] Mr. Legault determined that he would keep the property and repair the water damage downstairs, and convert the bar back into a kitchen, leaving him with separate living areas upstairs and down to rent out. He began the repair work in 2011. He built a doorway to separate the downstairs and upstairs living areas, changed the bar back into a kitchen by installing new cabinets, counter and sink, rebuilt and covered the walls that had been stripped, and replaced the subfloor that had been removed. The defendant's evidence was that this work was done over a period of 18 months or so, with the basement being rented for the first time in the spring or summer of 2012. Between then and the sale in July of 2014 the basement was rented most of the time.

[13] In May of 2014, when tenants of the property who had hoped to buy were not able to do so and left, Mr. Legault decided to sell. With the assistance of his wife, an advertisement and photos were put on Kijiji on May 26, 2014 listing the property for sale at a price of $258,000. Mr. and Mrs. Bolduc saw the advertisement and contacted the defendant to view the property. It showed well. They subsequently entered into negotiations and a deal was reached at $239,000. The agreement was conditional on, among other things, a satisfactory home inspection being conducted. Mr. Bolduc is a mason by trade with a good deal of experience in construction. He determined that he would undertake the inspection on his own. The condition was waived, and the deal closed on July 18, 2014. After spending a few weeks painting and doing some minor renovations, Mr. and Mrs. Bolduc moved their family into the upstairs of the home and rented the basement apartment to a tenant named Chad Patrie.

[14] Everything seemed fine at the property until October 1, 2014 when a pipe in the downstairs bathroom burst causing water damage. Mr. Bolduc turned the water off and contacted his insurer, which authorized him to begin the clean-up. He started by taking off the bottom two feet of drywall where it was wet and discovered that some of the subfloor appeared black and rotted. The more he looked, the more rotted flooring he discovered. As he removed flooring and got closer to the exterior walls, he discovered dampness in the cement block foundation.

[15] Eventually he had the basement inspected by a certified home inspector Mike Gauthier who, when he visited the property on December 14, 2015, observed that most of the interior wall finishes at the perimeter were removed, exposing the basement foundation walls, and that the wood subfloor had been removed. He testified that the wood at the base of the walls was rotten in areas and that the concrete block mortar was disintegrating and missing in areas. His opinion was that a combination of the lack of exterior foundation seal, weak mortar and water penetration was leading to the deterioration of the foundation. He said that although the foundation had not yet begun to settle or bow, it would be expected to do so unless remediated. He took several photographs that were appended to his report.

[16] Subsequent inspections by a City of Sudbury official resulted in two orders to comply. The first, dated July 17, 2015 required the plaintiffs to obtain building permits for the basement, rear yard deck, side entrance deck and front entrance deck and to build in compliance with the Ontario Building Code. The second is dated March 31, 2016 and required them to obtain a building permit for all foundation alterations/repairs and build in compliance with the Ontario Building Code.

[17] The plaintiffs have obtained quotes to have the required work done and the cost is said to amount to over $400,000. They seek, among other things, the costs of completion from the defendant.

The Plaintiffs' Claim of Breach of Contract

The Applicable Law

[18] The plaintiffs take the position that the defendant was in breach of contract because he failed to disclose the water infiltration in the basement and resulting foundation condition, which they say were latent defects.

[19] Defects in property may be either "patent" or "latent".

[20] A defect which is readily apparent to someone exercising reasonable care in their inspection of a property is said to be patent. Patent defects need never be disclosed to purchasers because they are there for the purchasers to see for themselves.

[21] A defect which is not readily apparent on such an inspection is said to be latent. A purchaser is obliged to accept a latent defect in a property unless one or more of the following circumstances arise: (1) The defect is known to the vendor and concealed by him or her so as to prevent its discovery by the purchaser. (2) Even if not concealed by the vendor, the latent defect is known to the vendor and is such that makes the property uninhabitable, dangerous, or potentially dangerous. (3) The latent defect is known to the vendor and he makes a representation concerning the same with reckless disregard for the truth or falsity of that representation (see *McGrath v. MacLean* 1979 CanLII 1691 (ONCA).

Analysis

[22] The plaintiffs contend that the water infiltration and basement problems were latent defects, and I would agree. A review of the photographs accompanying the Kijiji listing of the property shows a clean and well-maintained finished basement. There was nothing readily apparent to the purchasers or to the real estate agent, either inside or outside of the home, that would lead them to believe there was a significant problem with the water infiltration that would have affected the foundation of the home. Although there may have been some minor cracking or filling visible on the concrete walls in the laundry room area, those areas were consistent with a home of this age and would not have led a reasonable person to inquire further.

[23] Common to the three circumstances in which a vendor can be found responsible for latent defects is the requirement that he know of the defect. The plaintiffs are required to prove that knowledge on a balance of probabilities.

[24] I am of the view that the defendant did not know of the precarious state of the foundation when the property was sold to the plaintiffs because there was scant evidence to suggest that it was then in a precarious state. Mr. Bolduc, who is an experienced mason and inspected the exterior of the foundation prior to closing noted nothing untoward. Neither he nor the real estate agent who toured the property with him noticed any bowing or settling of the foundation or any cracks in the interior finishes or window casings that might suggest a problem. There was no suggestion of crooked floors or sticking doors or windows. In short, there was nothing to suggest that the foundation was at any risk. Even the home inspector Mr. Gauthier noted when he visited the property in December of 2015 that there was no bowing or settling of the foundation.

[25] I am also not satisfied that Mr. Legault knew there to be a water infiltration issue when the house was sold. The evidence indicates that Mr. Legault would have had occasion to see the interior foundation walls in one of three ways: (1) On a regular basis, where the block foundation has always been exposed, for example, in the laundry room. (2) In 2007 when a water issue resulted in the removal of drywall. (3) In 2010 when a water issue also resulted in the removal of drywall.

[26] There is no evidence to suggest that the exposed block foundation revealed water infiltration at the time of sale. Although the plaintiffs suggested that the wall had been recently painted, the photographic evidence did not accord with that position and was not confirmed by anyone, including the real estate agent who inspected the property with Mr. Bolduc. None of the tenants who testified indicated any water issues in any part of the basement, including the laundry room. That there was no indication of water leakage there lends credence to the defendant's position that there was no evidence of water infiltration elsewhere either.

[27] With respect to the water leak in 2007, as noted above there was nothing about the exposed cement block to suggest water infiltration other than from the leak that had recently take place. Furthermore, had Mr. Legault then known of the problem, surely he would not shortly thereafter have agreed to a valuation of $205,000 for the property in his settlement with Gail.

[28] With respect to the water leak in 2010, the plaintiffs argue that water infiltration must have been obvious and that the use of spray foam insulation to fill the mortar gaps indicates an attempt to stop the flow of water. However, I note the following: First, the defendant testified that he observed no water infiltration in the foundation other than what might have been expected from the leak being addressed and that he did not insert the spray foam that was observed. He gave his testimony in an honest and straight forward manner. Second, if the water was saturating the cements blocks as indicated in the recent photographs, the use of spray foam insulation to fill mortar cracks would hardly be effective to alleviate the problem. Much more likely is that the spray foam was used to fill the cracks in order to lessen the cold coming through them. I note from the photographs that it appears as though a window was filled in on the wall in question and was sealed around its perimeter with the same spray foam. The mortar cracks that were filled were likely done at the same time and appear to be either above grade or very close to grade. There is no evidence to suggest that Mr. Legault filled in this window or the mortar cracks except the photographs of the studs that show the foam very close to the new studs he installed after the water damage in 2010. In my view, those photographs are just as consistent with the studs being installed after the spray foam was applied. There was no reliable expert evidence that would allow a finding of when the spray foam was inserted based upon its colour. Third, the wall that was then exposed

did not always look dark and water stained as it does in the video clips filed by the plaintiffs. In the photographs accompanying the report of Mr. Vickerman, the wall is shown and is not obviously damp. Similarly with the photographs appended to the report of Mr. Gauthier. Fourth, if the foundation was as damp in 2012 as is now suggested, surely the tenants who lived in the basement would have noticed some evidence of it – and yet of the tenants who testified, all recalled the basement as dry with no dampness, mustiness or odour.

[29] Essentially, the plaintiffs argue that if the blocks were damp with saturation when exposed in late 2014 they must have been the same in 2012. Yet there is really no evidence to support that inference. Although Mr. Vickerman noted that the foundation issue is the result of long-term water infiltration, he did not define "long-term" and his inspection was done almost six years after the sale. Although Mr. Gauthier indicated that the wood rot at the base of the walls and subfloor was indicative of seepage over many years, he also indicated that some wood had not rotted, and some areas showed greater indications of moisture than others. Unfortunately, he did not specifically indicate the state of the wood or the foundation in the location where the drywall had been removed due to the 2010 water issue. As a result, I am unable to say, from his evidence, what the condition of the foundation and wood was in the location where Mr. Legault would have last viewed it in 2012. The only photographs of the area included in Mr. Gauthier's report are at pages 12 and 19 and in neither photograph is water staining or water infiltration of the cement blocks obvious.

[30] My finding that Mr. Legault did not know of the latent defect means that he can have no liability for it on the basis of breach of contract.

The Plaintiffs' Claim of Negligent Misrepresentation

[31] The plaintiffs claim that during the showing of the home and in response to their inquiries, the defendant represented to them that there had never been any flooding, there had been no leaking of the foundation and no water issues with the property.

[32] Although Mr. Legault has a different version of what, if anything, was stated during the showings of the property, I need not resolve the factual dispute to determine this issue.

[33] The agreement of purchase and sale signed by the parties governed their contractual relationship. Paragraph 26 of the agreement provides, among other things, that: "This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between the Buyer and the Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein."

[34] There is no representation or warranty in the agreement dealing with the state of the foundation, water leakage or past flooding of the property. The situation is similar to that in *Mariani v. Lemstra* (2004), 2004 CanLII 50592 (ON CA) where the plaintiff relied on an allegedly false representation contained in a listing agreement, a pre-contractual document that was not incorporated into the agreement of purchase and sale. The representation having been external to the agreement of purchase and sale, it was found to be the very type of representation for which an entire agreement clause is intended to exclude liability. The court intimated that where the parties are bound by a standard form agreement of purchase and sale that explicitly excluded

reliance upon any representations not contained therein, it would be difficult to see why a duty of care in tort would not be excluded as well.

[35] The plaintiffs argue that a duty of care arises out of the close relationship existing between them and the defendant as purchasers and vendor of the property. I do not disagree; and in the absence of an entire agreement clause, that relationship would, in my view, be sufficient to hold the defendant responsible for any negligent representation he made. However, the plaintiffs, by signing the agreement of purchase and sale, specifically agreed that it contained the entire agreement with no other representations. Unless the representations were contained in the agreement of purchase and sale or some other document arising from it, the plaintiffs are without recourse.

[36] As I have indicated, the agreement of purchase and sale contained no representation concerning water damage, condition of the foundation or flooding.

[37] The plaintiffs are unable to point to any other document arising from the agreement of purchase and sale that provided any such representation. In closing argument, counsel for the plaintiffs argued at paragraph 56 that: "Another item of negligent misrepresentation, upon which Mr. and Mrs. Bolduc relied, was the Statutory Declaration of Randy Legault, dated July 16, 2014 (See Trial Exhibit #6), wherein he stated words to the effect that no authority had any concerns for the house, when he neglected to point out all of the construction that he generalled. It was false." Having reviewed Exhibit 6, it is my view that there are no such words to that effect.

[38] Although the defendant admitted at trial that he had made several renovations to the home without permit, there were no representations in the agreement of purchase and sale that all renovations were made with required permits and no document provided on closing to that effect.

Conclusion on Liability

[39] I am not without sympathy for Mr. and Mrs. Bolduc. They strike me as basically decent, honest, hard-working people. They certainly did not expect to find themselves in a home with significant structural issues and there is no doubt they will sustain a significant loss. However, the issue at this stage of the proceedings is not one of sympathy or loss. It is liability. It is whether they have proved it to be more likely than not that Mr. Legault was aware of the issues. In my view, they did not do so.

Damages

[40] Notwithstanding my finding that Mr. Legault is not liable for the damages suffered by Mr. and Mrs. Bolduc, the following is my analysis on the issue of damages.

[41] Damages are awarded to put the injured party in the same position as if the contract had been performed without breach, or to restore the aggrieved party to the position he or she would have been in had the defendant properly discharged his duty of care.

[42] However, to decide the appropriate measure of damages in a particular case one must keep in mind the basic principle of mitigation. If an injured party can prevent a loss or make it less serious by taking reasonable steps, he or she is required to take them. [See *Toronto Industrial Leaseholds Limited v. Posesorski et al* 1994 CanLII 7199].

[43] The plaintiffs called Shawn Burns, the owner of Preeminent Construction Ltd., as a witness on the issue of damages. He testified that in accordance with the recommendations of the engineer Mr. Vickerman, the only viable means of repairing the damage is to replace the foundation. He provided an estimate for this and all related work amounting to $402,326.00.

[44] Although I might quibble with some of the items in Mr. Burns' estimate, I have little doubt that the cost to remediate the property is now $350,000 to $400,000. The problem I have with the estimate is that it is the amount required to remediate the property as observed by Mr. Vickerman in 2020, not the amount required to remediate the property as it existed when the deficiency in the foundation was discovered some six years earlier. The reason this presents a difficulty is because there was significant deterioration in the interim. In 2014 there was no bowing of the foundation walls or settling of the cement blocks and no evidence that the blocks contained debris that would render them unsuitable for other repair.

[45] That other repair is core-filling – a process by which the existing cement blocks are filled with re-bar and liquid cement, thereby reinforcing their structural capacity. I acknowledge and agree that core-filling is not likely a suitable repair at this time. But eight years ago, when the problem was revealed, it likely was. Indeed, Mr. Gauthier the expert home inspector, suggested it as a remedial option in 2015. Mr. Bolduc, who has much experience with core-filling, testified that it was not now an option due to the condition of the foundation, but did not testify that it was not an option eight years ago.

[46] I accept the evidence of Townes Tarvudd and his father Joel Tarvudd, both of Laari Construction, that to core-fill the foundation of the property would today cost approximately $42,000, inclusive of HST. Working from the estimate prepared by Shawn Burns in March of 2016, the interior repair costs would have been in the range of $50,000. On this evidence, the remediation costs, had they been undertaken when the issues were discovered, would be less than $100,000. The plaintiffs were successful in receiving some $75,000 from their home insurance and title insurance companies not long after the issues were discovered and therefore had the means to conduct the repairs. In my view, it was not reasonable for them to undertake no remedial action and allow the further deterioration of the property. A reasonable course would have been to undertake the core-filling and renovation of the property and to seek their costs of doing so from the defendant.

[47] In my view, had the plaintiffs properly mitigated their damages, an appropriate award would be $100,000 plus prejudgment interest from the time the claim issued. Had the repair work been undertaken in a timely fashion, much of the stress and aggravation suffered by the plaintiffs would not have occurred. I therefore assess the damages for mental stress and loss of enjoyment of use at zero. I would also make no award of punitive or aggravated damages.

[48] The plaintiffs have also advanced a claim for loss of rent in the amount of $99,000. Again, much of that loss would have been avoided had the remediation taken place in a timely fashion. Providing a full year for the repair work to be effected the loss of rent claim is properly limited to $12,000.

[49] In summary, had I determined the defendant to be liable to the losses suffered by the plaintiffs, I would quantify those losses at $104,000 ($42,000 + $50,000 + $12,000) plus prejudgment interest.

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The Honourable Mr. Justice R.D. Gordon

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