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Don't buy without a home inspection

*Tw'as the night after closing
And all through the house,
The only ones stirring
Were kids, wife and spouse.*

*The reason sleep failed them
Was not very nice
The house was infested
With dozens of mice.*

So begins the latest sad tale of why it is always important for buyers to conduct a thorough home inspection, and why sellers should never ever sign a Seller Property Information Statement.

The story begins in Winnipeg in June 2004. Kim Wiebe and Glenda Scott visited a house they were interested in with their real estate agent. They did not inspect it closely, nor did they have it inspected by an independent inspector.

They were pleased with the house and bought it for full asking price within a few days of their first visit. When the plaintiffs took possession, they discovered a serious mouse problem. There were mice droppings everywhere. The buyers who have small children reacted dramatically. Ultimately, they sued the sellers for misrepresentation. When the case got to court, the evidence disclosed that the house was twice treated with bait stations by Poulin's Pest Control in the months prior to the sale.

At trial, the female seller testified that there were no mice and anything that did show up after the sellers moved out was caused by her pet hamster that had been allowed to run free throughout the house.

In January 2007, Justice Daniel P. Kennedy rejected the testimony about the hamster, and ruled that the discovery that Poulin's had treated the house twice was evidence that the sellers were aware of the rodent problem.

"I am left with disbelief," he wrote, "that what was described by the plaintiff were droppings from the pet hamster."

One of the main issues for the court to decide was whether there had been a fraudulent misrepresentation by the sellers to the buyers.

Two days after the offer was submitted, after the buyers reviewed what is called the Seller Property Information Statement in Ontario, they waived the conditions in the offer.

In the form, under the heading Structural, the following question appeared:

"To your knowledge, during your ownership of the property, has there ever been any damage to the buildings due to wind, fire, water, moisture, insects or rodents?"

The sellers, Vittorio and Rosa Loconte, answered this question "no." They made no other reference to the presence of mice in the house, but the buyers made no inquiries about mice either.

The buyers called this a deliberate misstatement, but the judge ruled that there was no evidence of structural damage to the house. He said that the filthy state of the house was due to a lack of maintenance attracting mice, and not to any structural problems.

He wrote, "Anyone who would allow a hamster to run free in the house for several days without being found would likely have different attitudes to the presence of mice than the plaintiff."

Justice Kennedy ruled that close scrutiny of the home would have disclosed the presence of mice.

"The attraction and price of the house," he wrote, "caused the plaintiff to by-pass the inspection which the plaintiff ought to have made following the warning contained in the Seller's Property Condition Statement..."

He then quoted extensively from the warnings in the property condition statement, which was used in this case:

"Purchasers are strongly urged to consider making their own enquiries after receiving the statement, keeping in mind that the seller's knowledge of the property may be incomplete or inaccurate. Additional information can be requested from the seller or from an independent source. .. Purchasers can hire an independent inspector to examine the property to determine whether defects or deficiencies exist and to obtain an estimate of the cost of repairing, rectifying or minimizing any such defects or deficiencies for their own account."

The Manitoba statement disclosure statement also says, "Purchasers are strongly urged to consider making their own enquiries concerning a property in addition to receiving this disclosure statement, recognizing that in some cases it may not be possible to claim against a seller who misstates the condition of a property if a seller makes statements believed to be true but is unaware of the existence of a particular defect or deficiency, or if a seller cannot be found or is insolvent or bankrupt.

"Purchasers should also keep in mind the possibility that sellers simply do not know the answers to certain of the questions in the statement or may not have sufficient expertise to provide a purchaser with the information the purchaser requires.

Purchasers should also remember that something about a property which would not bother some owners or potential owners might bother a particular purchaser with particular needs or sensitivities and any such purchaser should make special efforts to investigate the condition of the property further so as to minimize or eliminate completely later dissatisfaction with the property."

With all those warnings, I don't know why anyone would ever sign or rely on a disclosure statement, since they are so often invitations to litigation.

In the end, the judge dismissed the plaintiff's claim. He wrote that if the existence of mice was as fearful as it was to the plaintiffs, they ought to have inquired about it beforehand or obtained an inspection.

The lessons from the Wiebe v. Loconte case are clear:

First, always get a home inspection for a resale house. If you're freaked out by mice, put a "no rodent" warranty in the offer.

And second, if you're a seller, never sign a property disclosure statement unless you love litigation. And if you're a buyer, don't rely on the statement.

One final postscript: I've decided to keep my day job. For me, writing poetry and practising law don't mix.

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Wiebe et al v. Loconte et al, 2007 MBQB 19 (CanLII)

Date: 2007-01-23
Docket: CI 06-01-48359

Date: 23 JANUARY 2007

Docket: CI 06-01-48359

Indexed as: Wiebe et al v. Loconte et al

Cited as: 2007 MBQB 19

(Winnipeg Centre)

COURT OF QUEEN S BENCH OF MANITOBA B E T W E E N:

KIM D. WIEBE and GLENDA L. SCOTT)	In person
)	
plaintiffs,)	
)	
)	
- and -)	
)	
)	
VITTORIO LOCONTE and ROSA LOCONTE)	Erin Romeo
)	
defendants.)	
)	
)	
)	JUDGMENT DELIVERED:
)	January 23, 2007

KENNEDY, J.

[1] The parties will recall at the conclusion of the trial that I provided a brief oral comment on the principle issues that I must resolve.

[2] The first had to do with the plaintiffs main problem, which was to overcome the fact that they visited the home with the Realtor and while other potential purchasers were present and they did not observe any evidence of mice. They acted relatively promptly and bought the home very soon after they saw it.

[3] The plaintiffs did not give the house a close inspection nor did they have the house inspected by an independent inspector. It seemed from their evidence they were pleased with the house and were prepared to pay the asking price. Their offer was accepted on June 21, 2004. The conditions of the sale were waived on June 23, 2004 after signing the acceptance of the Sellers Property Condition Statement also on June 21st. The plaintiffs were sufficiently concerned that the Sellers Property Condition Statement be signed properly and it was returned to have the check marks replaced by their initials. The document contains the statement THE SELLER SHOULD INITIAL THE APPROPRIATE REPLIES and the purchasers were exact enough to require initials over check marks.

[4] The plaintiffs made no inquiries of whether there were or were not mice in the house. They did not look in cupboards or closets and there was no apparent concern about mice at the time.

[5] The offer was accepted in June and the possession date of the premises was not until August 31, 2004, which left ample time for the mice to return.

[6] The transaction included the usual documentation which included, the Real Estate Brokers Act Offer to Purchase, the Seller s Property Condition Statement, that is completed to indicate whatever problems there may or may not be with the premises and a Notice of Waiver of Conditions signed by the perspective purchaser stating that the Seller s Property Condition Statement has been received and is to the satisfaction of the purchaser.

[7] The vendor made no reference to the presence of mice in the house before the house was sold, however the plaintiff did not make any inquiries about the presence of mice either.

[8] Absent any fraudulent representation, the plaintiffs claim should fail based on the application of Caveat Emptor which is stated in *Alevizos v. Nurula* [2003] M.J. No. 433, is still alive and well .

[9] In the decision of Monnin, J. in *Taschereau et al. v. Fuller et al.*, 2002 MBQB 183 (CanLII), (2002), 165 Man.R.(2d) 202 (Q.B.), he accepted the application of caveat emptor and in referring to the *King and Yanofsky v. Koster*, [1992] M.J. No. 548; 84 Man.R.(2d) 45 (Q.B.), and *Stotts v. McArthur*, [1991] M.J. No. 578; 75 Man.R.(2d) 212 (C.A.). He went on to say:

A buyer purchases at his or her own risk. The buyer is responsible for investigating the property or obtaining appropriate warranties from the seller. Unless the seller has made fraudulent misrepresentations by act or omission, then the purchaser has no remedy unless there has been a warranty provided.

[10] With the passage of time between the date the offer was accepted and the possession date, the mice were apparently prevalent and mice droppings were found throughout the house.

[11] The evidence supports the plaintiffs position that there was a serious mouse problem. The only other relatively objective person was the Real Estate Agent for the plaintiffs who attended the premises within a day or so of taking possession and made an observation of the droppings which were found in closets, bedrooms and hallways, which clearly reflected the presence of fair activity on the part of mice. I found that while he observed the presence of mice droppings he did not react as dramatically as the plaintiff. It was, however, understandable as the plaintiff had small children who she felt would be threatened had she moved in before the house was clear of mice.

[12] The defendant testified that there were no mice and anything that did show up after vacating the home was caused by her pet hamster that was allowed to run free throughout the house. The Sanitation and Pest Control Report prepared by Poulin s in March and again in April 2004, prior to the acceptance of the offer by the vendor in June 2004, responded to a finding by Poulin s of droppings, some of which were in the basement, but mostly in the kitchen area. As a result, the report indicates that virtually the entire house was treated, upstairs, bedrooms, various sundry rooms, laundry rooms, all of which were treated with Generation Blox and Final Blox in closed bait stations with open bait stations under the sink, in the kitchen, along with bait stations under the fridge. The report indicates that the customer had removed poison placed out prior to Poulin s visit.

[13] I do not accept this testimony. A hamster could not have left the droppings evident in photos taken by the plaintiff. This evidence alone affected her credibility but the discovery by the plaintiff before the last hearing, that in March and again in April 2004, the defendant had Poulin s Pest Control services treat almost every room in the house also confirms a prior problem with mice.

[14] Was the failure to disclose the presence of mice a positive misrepresentation that warrants a finding of fraudulent misrepresentation? The defendant was silent about the matter before the sale and the plaintiff only discovered the problem after taking possession. From the pictures produced in evidence it is difficult to believe that there would not have been some evidence of mice present before the sale, unless it was removed before the house was viewed by potential buyers. This then would suggest it accumulated again and accumulated to the extent it did by August 31, 2004.

[15] The Seller s Property Condition Statement contains a number of directives that need to be considered. Did the defendants misrepresent any of the answers initialed in the Seller s Property Condition Statement? And did the plaintiff ignore the directive contained on the document.

[16] The first matter has to do with whether a misrepresentation was made in the Seller s Property Condition Statement. In particular, under the heading **STRUCTURAL**, section number 5C of the Seller s Property Condition Statement, it reads:

To your knowledge, during your ownership of the property, has there ever been any damage to the buildings due to wind, fire, water, moisture, insects or rodents?

To that query the defendants stated no .

[17] The plaintiffs relied on this statement to prove a deliberate misstatement. In their efforts to rid themselves of mice the plaintiffs removed various panels in the basement and other areas in the house, but the evidence does not disclose any structural damage as that expression is commonly understood. There were no invoices tendered for repair to the structure and I am forced to conclude after the plaintiff identified areas in the house which to her were filthy, that the state of the house was due to a lack of maintenance attracting mice and not any structural problems. Anyone who would allow a hamster to run free in the house for several days without being found, would likely have different attitudes to the presence of mice than the plaintiff.

[18] I am equally satisfied that close scrutiny of the home would likely have disclosed the presence of mice. The attraction and price of the house caused the plaintiff to by-pass the inspection which the plaintiff ought to have made following the warning contained in the Seller s Property Condition Statement which provides:

PURCHASERS SHOULD STILL MAKE THEIR OWN ENQUIRIES

Purchasers are strongly urged to consider making their own enquiries after receiving the statement, keeping in mind that the seller s knowledge of the property may be incomplete or inaccurate. Additional information can be requested from the seller or from an independent source such as the Municipality. Purchasers can hire an independent inspector to examine the property to determine whether defects or deficiencies exist and to obtain an estimate of the cost of repairing, rectifying or minimizing any such defects or deficiencies for their own account.

Purchasers are strongly urged to consider making their own enquiries concerning a property in addition to receiving this disclosure statement, recognizing that in some cases it may not be possible to claim against a seller who misstates the condition of a property if a seller makes statements believed to be true but is unaware of the existence of a particular defect or deficiency, or if a seller cannot be found or is insolvent or bankrupt. Purchasers should also keep in mind the possibility that sellers simply do not know the answers to certain of the questions in the statement or may not have sufficient expertise to provide a purchaser with the information the purchaser requires. Purchasers should also remember that something about a property which would not bother some owners or potential owners might bother a particular purchaser with particular needs or sensitivities and any such purchaser should make special efforts to investigate the condition of the property further so as to minimize or eliminate completely later dissatisfaction with the property.

[19] I am satisfied that the plaintiff was, (and was entitled to be), a fastidious individual when it came to the state of her future home and in the interest of her children, but nevertheless the issue was a cleaning problem requiring significant attention and not a structural one.

[20] Undiscovered mice found after taking possession is not a basis for this claim unless the contract or Seller s Property Condition Statement stated otherwise.

[21] The plaintiffs presented a substantial amount of evidence from photographs which disclosed droppings within the household. They testified that they were in the closets, in the hallways, in the kitchen, over the doors, in the cupboard and other locations in the basement, etc. However in going through the house the plaintiffs found only one dead mouse.

[22] The defendant, Rosa Loconte, persisted with the position that there were never any mice within the home when mouse poison was found in the attic and a high pitch device to deter mice remained plugged into the wall socket.

[23] This report is significant only because the defendants maintained there had never been problems with rodents.

[24] The findings by the plaintiffs of mouse droppings in the house once they had taken possession were described and there appears to have been an abundance of evidence reflecting the existence of mice within the various areas mentioned.

[25] The defendant's evidence in that respect was her belief that her pet hamster often was let loose from its cage to run throughout the house and went missing on many occasions for a day or two before it returned to its cage. I am left with disbelief that what was described by the plaintiff were the droppings from the pet hamster.

[26] The plaintiffs went to great ends to address the problem by reengaging Poulin's, storing their furniture, remaining in their former house until the house was cleaned and the removal of wall spaces where mice may have had nests. They also laid gravel in a four foot width all around the house to keep out mice in the future and are now claiming these costs as damages. They did not include the gravel as they did not have any invoices, but there were extensive means taken to rid the mice from their home. Notwithstanding their having reengaged Poulin's to clean the house, there was no evidence save for one mouse that was located in the premises.

[27] Mice in residential homes are not an unusual occurrence and if their existence was as fearful as it no doubt was to the plaintiffs, they ought to have inquired about it beforehand or obtained an inspection. The defendants denied the existence of mice after the plaintiffs took possession but did not misrepresent the situation based on the Seller's Property Condition Statement.

[28] In the result the plaintiffs claim must be dismissed.

[29] At the conclusion of this case the defendant sought costs which I did not consider because I disbelieved the defendant on her denial that the house had mice which I now conclude, without doubt it did. For this reason there will be no costs awarded despite the action against her being dismissed.