



ONTARIO SUPERIOR COURT OF JUSTICE  
SMALL CLAIMS COURT

Toronto

ORDER OF THE COURT

Claim No. SC-21-00003579-0000

BETWEEN

MAITHEM MAHDI

Plaintiff(s)

and

FARAZ CHAUDHERY; FARAH SHEIKH

Defendants(s)

BEFORE: Deputy Judge MCNEELY

HELD BY:  In person  Videoconference  Teleconference  In writing  Hybrid

DATE: ~~April 04, 2024 at 10:00am~~ *Reserved Judgment*  
*Apr. 19, 2024.*

EVENT TYPE: Trial appealable

APPEARING: (Names, emails, and phone numbers)

Plaintiff(s): MAITHEM MAHDI (maithem212@gmail.com)(647-281-7030)

Representative:

*Att. d.*

Present

Present

Defendant(s): FARAZ CHAUDHERY (fchaudhery@gmail.com)(647-668-1104)

Representative: JUSTIN ROBINSON (jrobinson@jrlaw.ca) (647-391-1834)

*Att Trial*

Present

Present

Defendant(s): FARAH SHEIKH (farahsheikh@rogers.com)

Representative: JUSTIN ROBINSON (jrobinson@jrlaw.ca) (647-391-1834)

Present

Present

Claim No. SC-21-00003579-0000

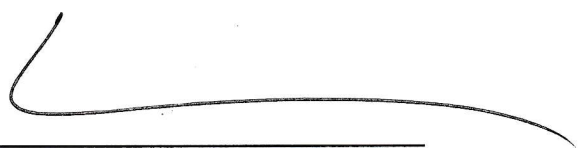
**ORDER OF THE COURT**

On April 9, 2024  
~~April 04, 2024~~

a hearing was held in the above matter and the following order was made:

- [1] For the reasons set out in the annexed Reasons for Judgment, this action is dismissed.
- [2] If the parties are unable to agree on costs, they may file written submissions on same with the Court to my attention in accordance with the following schedule: (1) defendants by NOON April 26, 2024 and (2) plaintiff by NOON May 10, 2024.

April 9, 2024  
Date

  
 Signature of Judicial Official  
 A. M. Neely DS-SCW

**REASONS FOR JUDGMENT IN SC -21-3579**

[1] By Amended Claim , originally issued March 26, 2021, and amended October 11, 2022, the plaintiff seeks damages in the amount of \$34,465 for the cost to repair water damage to his home and furniture, general damages for “suffering, loss of use and other relief”, \$2,000 in “mitigation expense” and “punitive damages.”

[2] The plaintiff pleads that these expenses were incurred by him as a result of what is alleged to be “negligent” and dishonest misrepresentation about water issues with the home sold by the defendants to the plaintiff and his wife in November of 2020.

[3] Both in his pleading and his argument at trial the plaintiff accuses the defendant of having known that water was entering through the rear foundation wall into the basement and of having dishonestly failed to disclose this leak issue to the plaintiff prior to closing.

[4] The plaintiff puts particular emphasis on a pre-closing email between the parties dated August 18, 2020, in which the male defendant answered the following question by the plaintiff “*Has there ever been any leaks at all.*” The response of the male defendant was as follows: “*There have been no issues with water in the basement. However, in the past couple of days, I noticed a wet spot in the basement ceiling in the area where the chimney is. A WETT inspector is coming Wednesday morning to assess. This will be repaired asap.*” The response went on to talk about an exterior downspout tray and goes on: “*I do not believe this area is the source of the issue, but until inspected I do not know for certain.*” The plaintiff cites this statement as wilfully false and as a negligent and or fraudulent misrepresentation by the defendants of a known water issue with the back wall of the basement.

[5] Oddly, there are two versions of this email: one at Tab 6 of Exhibit 1 and the other- confirmed by both sides to be the final and accurate version- found at *Exhibit 2 Document 32*. It is acknowledged by the plaintiff that the question of water in the basement was raised by him after he observed waterproofing on the exterior wall along the patio. It is not disputed that there was one water issue with the basement and that was the one near the chimney ceiling. The defendant’s realtor and witness Ms. Kathy Walker says it arose after a heavy rain, that that problem was fully disclosed and that it was repaired prior to closing. The plaintiff’s claim is unrelated to that ceiling water issue.

[6] The plaintiff testified and pleads that in or about March 26, 2021- the closing was in November of 2020- he discovered “wetness in the basement carpet at the” back wall of the basement “during a rainfall”. He testified that even with wet vacuuming water remained in the area. He says too that upon having the drywall removed he discovered “a crack” in the foundation wall and rotting wood, a wood sill, and damaged concrete along the top of the wall in the basement.

[7] The work to repair and restore the wall in the basement and to do excavation and waterproofing on the exterior of that wall cost the plaintiff and his wife jointly the sum of \$34,465. He also complains of health worries by reason of the potential for mould in the house and concerns respecting the health of his family, which includes young children.

[8] The plaintiff argues that since the wood sill appeared to have been rotting over a long period of time and since, when he lifted up the carpet, there appeared to be the shadows or marks left by some

moisture or water- he calls them stains- the defendants must have known of a water issue with the back wall and must have observed wetness or mould or odour of wetness or leaks in that area of the house during the years that they owned the house and that, therefore, they were dishonest in not telling the plaintiff that there was a water problem or leak issue in response to the August, 2020 email of enquiry or at any other time before closing.

[9] The plaintiff also relies on the evidence of two contractors hired by him to do the repair and restoration work. Both witnesses, Jeffrey Santos and Ayam Sadek, testified that the wood damage indicates water penetration of long duration although neither defined the period. And, their evidence was cited for the view that if waterproofing is done well, it should include the exterior of the foundation wall. While both men are experienced in their respective businesses, neither was qualified to provide an expert opinion to the court as to causation or any other issue in the action. There was also no expert report or claim that they were providing expert opinion evidence.

[10] The only other witness called by the plaintiff was the plaintiff's sister-in-law, Stephanie De Souza. She testified that she was aware that the plaintiff had inspected the interior wall of the basement before the purchase and that he had asked a question about water leaks of the defendants. She recalls seeing the email identified as Exhibit 2, Document 32. On cross-examination, she indicated that she also toured the property and had been given no indication- smell , taste, sight- of any water issue with the basement.

[11] In response to the plaintiff's claim, the defendant makes several submissions. First, they testify that there were not aware of any water issue or leak issue with the basement wall before being advised of the problem of water in March of 2021 by the plaintiff. They are categorical that neither of them knew of any water or leak issue and that had they been aware of any issue they would have disclosed it and had it addressed.

[12] The defendants both describe the house as a much-loved family home that had been a source of pride for the former couple. The divorce was the only reason the home was being sold. Both defendants would have been happy to stay in the property had they been able to manage that. Neither defendant smelled, tasted, or saw any wetness or indication of a mould, water or leak issue in the basement or the house. They are emphatic in their denial of the plaintiff's allegation of dishonesty and misrepresentation or of assertion that there was any non-disclosure of a known defect on their part.

[13] The defendants also called and relied on the evidence of their regular housekeeper, Raquel Gallant, the evidence of Kathy Walker, the real estate agent, and the evidence of John Xinos, the contractor who built the drywall and did the basement renovation for the defendants years ago. Even before the drywall was put in place by Mr. Xinos as part of that renovation, his evidence was that there was no evidence of a water problem with the wall and while it appeared that there had been some patch put in the inside of the wall by the prior owner, nothing appeared defective or as posing a water leak with the wall before the drywall sealed up that foundation wall.

[14] None of these witnesses saw, tasted, or smelled anything that would indicate a water issue or leak with the wall. Their evidence was clear and unequivocal. All of the defendants' witnesses were clear that they were not aware of any water or leak issue.

[15] On the issue of damages, the defendants' counsel Mr. Robinson admits that \$34,465 was spent by the plaintiff and his wife but point out that as the wife is not a plaintiff that only one half of that would be something that the plaintiff could claim even if liability were to be proven.

[16] As for liability, the defendants deny any liability to the plaintiff. The defendants say that if the problem existed at the time of closing, it was a latent defect completely unknown to them or either of them and that the statement that there were no water problems accurately reflected the understanding and awareness of the property which the defendants had.

[17] The plaintiff quite rightly points to the cases cited by him as relevant to the law on misrepresentation: *Cognos, Krawchuk, Singh and Menard*. Mr. Robinson cites cases, including *Heiter v. Gao* 2015 CanLII 2372 ( Sm. Cl. Ct) which reviews the authorities, including *Krawchuk*, and adopts as relevant the same principles regarding the elements of negligent and fraudulent misrepresentation and *caveat emptor* cited by the plaintiff. However, liability under the principles laid down in those cases is not determined in a vacuum. To find liability requires evidence .

[18] I accept without any reservation the evidence of the defendants that neither of them was aware of any water or leak issue with the basement prior to the March 2021 incident which caused the plaintiff so much expense and distress. I accept the statement by the male defendant to the effect that his statement that there were no water problems in the basement beyond the chimney ceiling one was a statement made honestly and in good faith and was based on the defendants' then honest understanding of the facts. I find no dishonesty or lack of candor or fraud or lie or negligence on the part of either defendant. Their evidence was compelling and entirely credible and their evidence as to the condition of the house was amply supported by the other witnesses called by them.

[19] The plaintiff firmly believes that the fact of rotting wood being of long duration behind the wall and of there appearing to be multiple and sometimes sizable stains on the carpet under pad proves that in the years before his purchase the basement had known water issues along the back wall and that there had been indications of wetness or smell or mould in the basement sufficient to cause the defendants to know of a water problem. I do not find that theory or belief to be proven on the evidence. Yes, wood rotting behind a wall can be seen once the wall is removed. It was not opened up between the rec room renovation and March of 2021. Yes, the under pad may have indications of moisture but stains on top of the carpet itself are not pointed to by the plaintiff and, in fact, the stains referenced in his evidence are those on the under pad which is located below the carpet. The under pad is hidden from view until the carpet is pulled up. The plaintiff pulled up the carpet in March of 2021.

[20] Given these findings as to the facts and the general conclusion that the defendants were entirely honest in their dealings with the plaintiff it is unnecessary to go into the alternative arguments advanced on the interpretation of the Agreement of Purchase and Sale. It is to be noted, however, that the plaintiff was aware of the potential for water issues in homes but chose to delete any right to inspect the property before closing. Instead, he decided to make enquiries of the sellers, lay persons who can only speak to what they are aware of, rather than to hire an inspector to formally investigate any water issue. He and his wife deleted any clause making the offer conditional on a professional inspection of the home.

[21] The plaintiff bears the burden of proof on the balance of probabilities of his allegations of negligence and dishonesty made in this action. He fails to meet that evidentiary burden on this record. The action is dismissed for these reasons.

[22] The general rule is that the winning party is awarded costs of the action subject to any countervailing arguments the plaintiff may wish to raise. If the parties are unable to agree on costs, they may file written submissions on same with the Court to my attention in accordance with the following schedule: (1) defendants by NOON April 26, 2024, and (2) plaintiff by NOON May 10, 2024. The parties are reminded to send a copy of their submission to the other side, not just the Court.

April 9, 2024

Released to Parties: April 9, 2024