

Caveat Emptor Applied to Alleged Basement Flooding Damage

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In *Giancola v. Dobrydnev*, 2020 ONSC 6007 (CanLII), the Ontario Superior Court of Justice rejected a buyer's attempt to terminate an agreement to purchase a home after finding alleged flood damage in the basement.

In July 2017, the defendant had agreed to purchase a property in Vaughan, Ontario for \$1,167,000. After the Agreement was signed but prior to the scheduled closing, the buyer approached the plaintiff sellers directly and requested that they provide a vendor take-back mortgage in the amount of \$150,000. This was refused and the defendant failed to complete the purchase.

The plaintiffs re-listed and sold the property in May, 2018, for \$925,000. They sued the defendant for damages relating to the lower sale price.

In response to the claim, the buyer alleged that when he inspected the property he noticed a defect in the concrete basement floor that was allegedly repaired by the plaintiffs after a flood. He said that he discussed the damage with the plaintiffs and that they acknowledged that they never applied for a building permit for the repairs. However the buyer failed to raise the issue until the day before closing when his lawyer demanded either a two month extension of the closing date and a reduction of the purchase price to \$999,000, or the cancellation of the entire transaction.

The plaintiffs denied that they had concealed any significant repairs and argued that the defendant was looking for an excuse to get out of the deal after he ran into financing problems due to a dramatic downturn in the real estate market in mid-2017.

At the hearing in 2020, the dispute turned in part on the distinction between a latent defect and a patent defect:

- Patent defects are such as may be discovered by inspection and ordinary vigilance on the part of a buyer and with respect to them the primary rule is *caveat emptor* ("buyer beware") (citing the Ontario Court of Appeal in *McCallum v. Dean*, [1956] O.J. No. 345, at para. 5). Where a defect falls within the definition of a patent defect, a seller is not bound to call attention to such defects and the buyer beware rule applies: *Capel v. Martin*, 2008 CanLII 13612 (ON SC), at para. 11.
- "Latent defects" are defects with the property (often relating to the structure) which are not obvious, and which are not readily apparent to someone exercising reasonable care in his or her inspection of the property: *Krawchuk v. Scherbak*, 2011 ONCA 352 (CanLII) at para. 81. Ordinarily, if a seller actively conceals a latent defect, the rule of *caveat emptor* no longer applies and the buyer is entitled, at their option, to ask for a rescission of the contract or compensation for damages: *Capel v. Martin* at para. 10.

The Court reaffirmed that the law in Ontario is *caveat emptor* ("buyer beware") with respect to patent defects. This puts the obligation on a buyer to take diligent steps to discover any defects before making a firm offer to purchase, or to provide the right of a home inspection that would give them the ability to protect themselves in a contract by requesting repairs before closing, reducing the purchase price, or by refusing to remove any condition about a home inspection and allowing the contract to be terminated: *Ricchio v. Rota*, 2011 ONSC 6192 (CanLII), at paras 24-25.

In the case at hand, the buyer had not made the offer conditional on an inspection, and had not taken diligent steps to raise the issue until the transaction was scheduled to be completed. At the same time, it was clear that the buyer's mortgage financing fell approximately \$200,000 short of the amount required to complete the purchase. Further, the buyer had not produced any evidence from the subsequent owners of the property to substantiate his claim that there was any damage to the property which had been concealed. The application judge did not find the buyer's argument that the sellers had attempted to conceal any defects to be credible. Rather, the judge found that the buyer "concocted a story about the state of repair of the basement floor and the foundation of the residence to force the Plaintiffs to reduce the closing price on the residence to a price more reflective of the market conditions in late July 2017."

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In the result, the sellers obtained an award of damages of \$306,130.54 relating to the lower purchase price on the subsequent sale.

The decision is a cautionary example about the need to take diligent steps to inspect a property and raise any issues about alleged defects well before closing. As noted in the decision, even had the buyer's story about the state of repair of the basement floor been true, the alleged repairs to the basement floor were there to be seen when the buyer visited in March 2017. Any defects relating to the state of the basement were patent defects. The buyer could have submitted an offer to purchase that was conditional on an inspection of the property. The buyer could have required written disclosure from the sellers addressing any concern about the basement floor. He chose to do neither prior to entering into the Agreement to buy the property, and then waited until the date of closing to raise the issue. The law of caveat emptor therefore applied and the buyer was not entitled to refuse to complete the purchase.

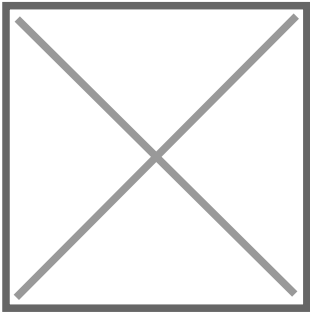
Appeal Dismissed

The Ontario Court of Appeal dismissed the buyer's appeal: *Giancola v. Dobrydnev*, 2021 ONCA 793 (CanLII). While the appellate court found that the motion judge had erred in relying on the hearsay evidence of a home inspection that was undertaken by the subsequent purchaser of the home, this error was not material to the conclusion, including the point that the appellant could have made his offer to purchase conditional on a home inspection but chose not to do so. Any issue with respect to the basement was readily apparent to any potential buyer. Therefore, the principle of *caveat emptor* applied.

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