

Seller not liable for water damage or foundation issues discovered after closing

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Litigation between buyers and sellers often concerns whether or not a seller had an obligation to disclose deficiencies with a property that were discovered after closing. In such cases, a buyer may feel that the seller had an obligation to disclose the deficiencies that were discovered. However, unless the buyer can point to specific terms of a written agreement that the seller breached, there may not be any remedy available unless they can prove that a seller took steps to conceal known deficiencies.

In *Bolduc v. Legault*, 2023 ONSC 1192 (CanLII), the buyers sued the seller for the costs of remediating water and foundation deficiencies to a residential home in Sudbury, Ontario, which they purchased in 2014.

The plaintiffs saw the advertisement for the property on Kijiji and entered into an agreement of purchase and sale (APS) with the seller for \$239,000, conditional on, among other things, a satisfactory home inspection being conducted.

One of the plaintiffs was a mason by trade with a good deal of experience in construction, and he determined that he would undertake the inspection on his own. The inspection condition was waived and the transaction closed.

In October 2014, a pipe in the downstairs bathroom burst causing water damage. During clean-up, the plaintiffs discovered that the subfloor appeared black and rotted. When they removed flooring closer to the exterior walls, they discovered dampness in the cement block foundation. A certified home inspector determined that a combination of the lack of exterior foundation seal, weak mortar and water penetration was leading to the deterioration of the foundation.

Subsequent inspections by a City of Sudbury official resulted in two orders to comply. The first 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 required them to obtain a building permit for all foundation alterations/repairs and build in compliance with the Ontario Building Code. The estimated cost to remediate the water and foundation damage exceeded \$400,000.

The buyers sued the seller for breach of contract and negligent misrepresentation.

The plaintiffs argued that the defendant breached the agreement of purchase and sale because he failed to disclose the water infiltration in the basement and the resulting foundation condition, which they argued were latent defects. "Latent" defects are defects that were not readily apparent, in contrast to "patent" defects, which are readily apparent to someone exercising reasonable care in their inspection of a property. Patent defects need not be disclosed to buyers because they are there for the buyers to see for themselves.

The 1979 decision of the Ontario Court of Appeal in *McGrath v. MacLean* 1979 CanLII 1691, affirmed that a buyer is obliged to accept a latent defect in a property unless:

1. the defect was known to the sellers and concealed by them so as to prevent its discovery by the buyer;
2. the latent defects were known to the sellers (even if not concealed) and made the property uninhabitable, dangerous, or potentially dangerous; or

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3. the latent defect was known to the sellers and they made a representation concerning the same with reckless disregard for the truth or falsity of that representation.

The trial judge was satisfied based on the evidence that the seller did not know of the precarious state of the foundation when the property was sold to the plaintiffs. Amongst other things, there was no visible bowing or settling of the foundation or any cracks in the interior finishes or window casings. There was no evidence that the exposed block foundation revealed water infiltration at the time of sale.

While there was evidence that two prior water leak incidents had occurred in 2007 and 2010, the trial judge was satisfied that the issues were addressed at the time and the seller did not have any knowledge of more serious damage to the property's foundation. As the seller did not know of the latent defects, he had no liability on the basis of breach of contract.

The plaintiffs also claimed that during the showing of the home and in response to their inquiries, the seller represented that there had never been any flooding, there had been no leaking of the foundation, and no water issues with the property. They claimed that the seller was liable for negligent misrepresentation as a result.

The trial judge dismissed this portion of the claim due to the written entire agreement clause in the APS, which stated as follows: "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."

The plaintiffs could not point to a representation or warranty in the APS dealing with the state of the foundation, water leakage or past flooding of the property, nor any other written representation by the seller outside of the APS.

In the trial judge's view, the situation was similar to that in *Mariani v. Lemstra*, 2004 CanLII 50592 (ON CA), where a plaintiff sued on the basis of an allegedly false representation in a listing agreement which had not been incorporated into the APS. In *Mariani*, the Ontario Court of Appeal found that the relationship between the parties was governed by a standard agreement of purchase and sale that explicitly excluded reliance upon any "external" representations, which similarly excluded any related duty of care in tort.

In the absence of an entire agreement clause, the close relationship between buyers and sellers would be sufficient to hold the sellers responsible for any negligent representation. However, by signing the APS, the buyers specifically agreed to the entire agreement with no other representations. Since the alleged misrepresentations concerning water damage, condition of the foundation or flooding were not contained in the APS or some other document arising from it, the plaintiffs were without recourse. The action was therefore dismissed.

The decision illustrates the perils of not conducting a thorough home inspection before entering into a binding APS, although it is not clear that a standard home inspection would have uncovered the foundation issues at the time of the purchase. The buyers do not appear to have claimed that the seller engaged in fraudulent misrepresentation concerning the deficiencies, which might have negated the effect of the entire agreement clause in the APS.

The trial judge noted that he was not without sympathy for the buyers, who certainly did not expect to find themselves in a home with significant structural deficiencies. However, the issue is not one of sympathy or loss but liability on the part of the seller. At the end of the day, the buyers were simply not able to prove that it was more likely than not that the seller was aware of the issues that they discovered after closing. A PDF version is available to download [here](#).

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