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Vendors take risk signing SPIS form

A recent leaky basement court case from the Ontario Superior Court in Thunder Bay is the latest in what might be called a flood of litigation resulting from the use of the Seller Property Information Statement (SPIS) by Ontario real estate agents.

Rhonda Usenik is a young public health nurse who wanted to buy a low maintenance house in Thunder Bay, back in May 2004. When she found one she liked, she read the SPIS form that the vendors had prepared at the request of their real estate agent.

In answer to the question, "Is the property subject to flooding," the sellers, Michael and Donna Sidorowicz, answered "no." They also answered no to the question, "Are you aware of any moisture and/or water problems?"

Their answers to those questions resulted in almost three years of costly litigation when Usenik sued them for deceit or, alternatively, negligent misrepresentation.

Pre-sale inspections of the house by the purchaser, her own agent, her boyfriend and her home inspector, failed to disclose any water problems. But shortly after she took possession, Usenik became aware of water leaking into the basement. The drywall began to blister, and mould was discovered growing behind the baseboard.

At trial, the evidence revealed that the vendors told their real estate agent that there had been some water in the basement a number of years previously, but that they had fixed the problem. They said that the agent advised them that since the problem had been fixed, there was no need to mention it.

It turns out that this was the wrong answer.

Usenik obtained quotes totalling \$47,040 for repairs and sued for these costs, as well as other damages for loss of rental income from the basement tenant, and loss in value of the house due to the leaky basement.

The lawsuit was not based on a breach of the agreement of purchase and sale. Instead, it was framed as a case of damages resulting from the sellers' misrepresentation or deceit.

The trial took place before Justice John Wright in Thunder Bay last year, and the judgment was released in February 2008.

After hearing evidence for six days, the judge decided that either or both of the disputed SPIS statements were false.

The vendors and, apparently, their agent, interpreted the SPIS question to mean "Is the property NOW subject to flooding?"

But the truth of the matter, the judge reasoned, was the while it may not "now" be subject to flooding, it was *subject* to flooding? in other words, "it was liable or exposed or prone to flooding."

Wright also held that the statements were made negligently, that the purchaser relied on the misrepresentation, and that but for the misrepresentation, the purchaser would not have bought the house.

Damages of \$33,874.33, plus GST on part of that amount, were assessed against the vendors. Included in the award was the sum of \$2,000 for aggravation.

In addition, the buyers were awarded about \$20,000 in court costs against the sellers.

For home sellers, the prime lesson to be learned from the case is never - ever - sign an SPIS form. The problem is that the form currently in use in Ontario is far too complex and misleading for lay people - and many real estate agents - to understand and complete properly.

The sellers' agent in the case was added to the litigation as a third party defendant, and did not escape liability. Just before trial a settlement was reached in the third party action which saw the agent making a contribution to the sellers' damages.

This case may well be the beginning of a - pardon the expression - flood of actions against agents across Ontario who will be sued, or disciplined professionally, for instructing their clients to sign this very dangerous form.

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Usenik v. Sidorowicz, 2008 CanLII 11373 (ON S.C.)

Date: 2008-02-25

Docket: CV-05-0291

URL: <http://www.canlii.org/en/on/onsc/doc/2008/2008canlii11373/2008canlii11373.html>

Noteup: [Search for decisions citing this decision](#)

[Reflex Record](#) (noteup and cited decisions)

Decisions cited

- [Spinks v. Canada \(C.A.\)](#), 1996 CanLII 4041 (F.C.A.) [1996] 2 F.C. 563 (1996), 134 D.L.R. (4th) 223 (1996), 19 C.C.E.L. (2d) 1

COURT FILE NO.: CV-05-0291

DATE: 2008-02-25

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
RHONDA JACQUELINE USENIK,)	<i>Terry Gilbert, for the Plaintiff</i>
)	
)	
)	
Plaintiff)	
)	
- and -)	
)	
)	
MICHAEL SIDOROWICZ and DONNA BARBARA SIDOROWICZ and GLEN FERLAND,)	<i>Nicholas Melchiorre, for the Defendants Michael & Donna Sidorowicz</i>
)	Glen Ferland being unrepresented
)	
)	
Defendants)	
)	
)	
)	
)	HEARD: May 28, 29 & 30, July 30 & 31, and August 1, 2007, at Thunder Bay, ON.

J. Wright, J.

Reasons For Judgment

Liability:

[1] This is a claim for damages under Rule 76 Simplified Procedure arising out of the purchase of a house. The purchaser says that she was led to buy the house based upon untrue statements made by the vendors. She sues the vendors for deceit and, in the alternative, for negligent misrepresentation. She sues the defendant Glen Ferland for negligence in the conduct of his pre-purchase inspection of the house which she had hired him to conduct. He, in turn, cross-claimed against the vendors. On consent he was allowed to withdraw that claim without costs.

[2] The purchaser is a young woman who wanted a low maintenance house. Before making an offer to purchase she read a Seller Property Information Statement [tab 3, ex 1] which the vendors had completed for their realtor and which he passed on to her.

[3] The purchaser says that some of the answers given were untrue, inaccurate or misleading, specifically:

Environmental: item#3: Is the property subject to flooding? answer: No

Improvements And Structural: item# 7: Are you aware of any moisture and/or water problems? answer No

[4] The purchaser says that, relying upon the misrepresentations in the statement, she made an offer to purchase which the vendors accepted. As a result of the purchase she incurred costs remedying a leaking basement situation which became apparent shortly thereafter.

[5] The vendors say that the statements were true when made. They say that while they had experienced difficulty with water in the basement in the past, they had experienced no such difficulty recently.

[6] The vendors note that the seller property information statement states:

"any person who is in receipt of and utilizes this statement acknowledges and agrees that the information is being provided for informational purposes only and is not a warranty as to the matters recited hereinafter even if attached to an agreement of purchase and sale. . . buyers must still make their own inquiries notwithstanding the information contained on this statement."

[7] The vendors also note that:

a) Schedule F to the Offer provides that the offer was conditional upon the inspection of the property by a qualified home inspector and obtaining a report satisfactory to the Plaintiff on or before 6:00 pm on May 31, 2004.

b) As part of clause 25, "AGREEMENT IN WRITING," the document provided:

...This Agreement including any schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein. For the purposes of this Agreement, Seller means vendor and Buyer means purchaser....

[8] Presale inspections of the premises by the purchaser, her realtor and her boyfriend failed to disclose any signs of water problems. Specifically, there was no indication of mould, there was no indication of water staining, there was no musty smell associated with dampness.

[9] The purchaser says that on one of her trips Mrs. Sidorowicz advised her to keep water away from the house and keep leaves cleared from the eaves trough gutters.

[10] A presale inspection by a professional home inspector, the defendant Glen Ferland, did not disclose any evidence of moisture or leaking.

[11] The purchaser takes exception to the manner in which Ferland conducted his examination. While he advertises that he uses a moisture meter during his inspections in order to seek out hidden moisture which may exist under subflooring and behind walls, the purchaser maintains that he did not use a moisture meter and that in the circumstances this constituted a breach of their contract. She relies upon the assumption that moisture was in fact present during the inspection period, that she did not see him use a moisture meter, that there is no mention of his use of a moisture meter in his report and that the boxes which would ordinarily be checked off were not. Mr. Ferland maintains that he used his moisture meter and it disclosed no moisture. Under the circumstances I have concluded that the plaintiff has failed to prove her case against Mr. Ferland and that action will be dismissed.

[12] The plaintiff/purchaser wanted a house in good condition. Although she did not mention this to the vendors, she also wanted one with a finished basement that could be rented. This particular house was zoned for single-family residence only but it was her understanding that the city would not create difficulty as long as the tenants did not constitute a nuisance, there was an independent exit from the premises to the exterior and that other fire regulations were met.

[13] The vendors are a retired couple who were downsizing. They are first generation Canadians having come here from the old country a number of years ago. They brought with them their sense of order and cleanliness and everyone agrees that the house appeared to be immaculate and in "mint condition".

[14] On the 19th of May 2004 the vendors met with their realtor and completed the Seller Property Information Statement (tab 3, ex 1) with him. They say that they advised him that a number of years previously there had been some trouble with water in the basement but that they had fixed the problem and had not experienced any difficulty since that time. They say that the realtor advised them that since the problem had been fixed there was no need to mention it.

[15] The realtor confirms that there was some discussion about a previous water problem in the basement. His recollection is that he was told that during the winter of 1996, a winter when a record snowfall was experienced, snow had drifted down the back steps and when it melted, the drain at the foot of the steps being plugged, the water flowed under the door and into the basement. This would be in the kitchen area on the northeast corner of the building as shown on the sketch tab 1 ex 1. The water found in 2004 was coming through the North wall at the NW corner of the house.

[16] The vendors now concede that in June of 1995 water was found on the floor outside of the bathroom in the basement at the point marked with an X on the sketch at tab 1 ex 1. They say that they subsequently cleaned the eaves troughs, routed an eaves trough to the front of the house and ran a section of pipe from the downspout at the northwest corner of the house out onto the driveway thereby directing that flow of water down the driveway to the street. They claimed that thereafter they experienced no difficulty with water in the basement.

[17] Impressed with the appearance of the house, and relying upon the statements in tab 3 ex 1 the purchaser submitted an offer on the 21st of May 2004 which was conditional upon the inspection by Mr. Ferland amongst other things.

[18] Mr. Ferland's report is to be found at tab 20 Exhibit 1. His company includes basic consumer information as part of their report package. At page 60 there is a memorandum entitled "basement leaks/moisture". This begins:

"All areas below the grade line are susceptible to water at one time or another. A house with water problem does not necessarily mean it was poorly constructed. It's a fact of home construction.

The most common cause of basement water problems is inadequate surface grading and drainage. In general over 90% of basement water problems are the result of neglected gutters and downspouts or improper grading. A very small percentage of basement moisture problems are the result of high water table. Basement moisture problems are not always obvious. Mouldy or musty odors are not always present during the time of inspection, and signs of moisture may be hidden by interior finishes."

[19] At tab 20, ex 1, pg. 22 of that report: recommend increasing grade to slope away from building wherever possible to reduce possible moisture intrusion into basement

[20] At page 23: "window well: none -- recommend installing a window well where window is on ground level to help with grading and so drainage runs away from foundation".

[21] At page 25: "gutter/downspout: "ensure that all downspouts remained extended/redirected to discharge at least 6 feet away from building to reduce moisture penetration and foundation damage"

[22] At the time there were three downspouts from the eaves troughs. The downspout in the north west corner of the property as shown on tab 1 Ex 1 had an extension which carried the water from the roof to the west onto the driveway where it flowed down to the street.

[23] On the first of August 2004 tenants moved into the basement. Unfortunately, the extension from the northwest corner downspout into the driveway interfered with their line of travel from the driveway around the corner of the house, across the cement patio and down the basement stairs into their apartment. They removed this extension. This resulted in water flowing off the roof into the down spout being discharged at the northwest corner of the house up against the basement wall.

[24] Over the period August 9, 10, 11 there was heavy rain with a total of 35.5 mm of rain falling. On August 26, 2004 there was another heavy rain with 10 mm of rain falling. The tenants reported that there had been water on the floor the previous two to three weeks.

- [25] By September the 11th 2004 the drywall was blistering and the baseboard was removed. Mould was found to be growing.
- [26] On September 19th 2004 the purchaser had the house inspected by an engineer, Mr. Czinkota, whose report is found at tab 5, ex 1.
- [27] That report noted, amongst other things, that the floor had been wet numerous times in the past.

"We believe there are several factors contributing to problem

1. The most significant problem is the presence of the downspout from the roof. Rainwater from half of the roof is being dumped at this location. [The northwest corner of the house] it will find a way into the ground, even though attempts have been made to waterproof the ground in the area [the concrete patio]. The water will then enter the hollow block wall and flow out into the basement floor.
2. Vehicles must get very close to the house before they enter the garage at the back of the property. The presence of a wheel load so close to an un-reinforced block wall will overstress the wall.
3. In the winter, the snow on the driveway will be removed. Once the snow has been cleared, the frost will penetrate much deeper than normal. Freezing, wet soil can set up significant lateral loads which in turn can damage a foundation wall.

Immediate action: the downspout for the eaves trough should be led well away from the area. This can be achieved by changing the slope of the trough so that it carries water to the front of the property. It may also be achieved by running the rainwater leader to the backyard. . . .

Permanent repair: the only positive way to stop the basement leakage is to install a weeping tile system. This will require an excavation around the entire perimeter of the house. A buried weeping tile (drainpipe) will be connected to an interior sump pit with provisions for pumping the water to the backyard into a buried pit. The foundation wall will have to be repaired and protected from water intrusion. The excavation around the house must be backfilled with proper granular fill. The concrete patio at the back of the house will need to be rebuilt so that it slopes away from the house. The driveway must be re-sloped and resurfaced so that it will drain water away from the house."

Sections in [] are my comments.

- [28] At this stage the engineer was unaware that a weeping tile system was in place.
- [29] In her distress at the discovery of water, the significance of the comments concerning the proper maintenance of the eaves trough and discharge of the water from the down spout made by Mrs. Sodorowicz, Mr. Ferland and Mr. Czinkota did not impress itself upon the purchaser. By September 19, 2004 the downspout extension had not yet been replaced. Modifications to the eaves trough were not effected until October 27 2005, more than a year later.
- [30] The engineer quoted a price of \$600 to prepare drawings for the installation of a weeping tile system and inspections of the work. He was never called upon to do this.
- [31] On October 21 2004 a test for mould was conducted at a cost of \$166.12.
- [32] On November 04 2004 the purchaser obtained a quote for various services from Asbestrol Services Inc. Mould removal including the removal of the wall from the bathroom to the corner of the laundry room, the floors, interior walls being cut up 2 ft from floor level, sealing off the area during work and subsequent disinfecting of the area was said to cost \$9,740.
- [33] Removal of part of the concrete patio at the rear of the house, and installation of new weeping tile to the sump pump on the south side to the rear door and installation of blue skin and primer to seal the wall with new asphalt to the garage and a new concrete slab at the rear was said to cost \$13,800.
- [34] Refinishing the basement to new condition including the framing for exterior walls, drywall repairs, exterior wall insulation and vapor barrier, and new tub and taps, ceramic tile floor and walls, baseboards, was said to cost \$23,500

Are the vendors liable in damages for misrepresentation?

- [35] There are three kinds of misrepresentations or erroneous statements:

Fraudulent statements,
Negligent statements,
Inadvertent or innocent statements.

- [36] Only the first two types of statements attract liability. Neither torts nor contract provide a cause of action for damages for innocent misrepresentations.

- [37] A fraudulent statement is a statement of fact which is false, made by a person knowing it to be false or made so recklessly that the person does not care whether he is speaking the truth or not. (*Peek v. Derry* (1889) 14 App. Cas. 337). Knowledge of the falsity, intent to deceive or recklessness to the extent that the person does not care whether the statement is true or not is the factor that marks the distinction between deceit, i.e. fraudulent misrepresentation, and negligent misrepresentation.

Fraud in common parlance is a somewhat comprehensive word that embraces a multitude of delinquencies differing widely in turpitude, but the types of conduct that give rise to an action of deceit have been narrowed down to rigid limits. In the view of the common-law "a charge of fraud is such a terrible thing to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind." Influenced by this consideration, the House of Lords has established in the leading case of *Derry v. Peek* (1889), 14 App. Cas 337, that an absence of honest belief is essential to constitute fraud. If a representor honestly believes his statement to be true he cannot be liable in deceit, no matter how ill advised, stupid, credulous or even negligent he may have been. Lord Herschel, indeed, gave a more elaborate definition of fraud in *Derry v. Peek* at page 374, saying that it means a false statement "made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," but, as the learned judge himself admitted, the rule is accurately and comprehensively contained in the short formula that a fraudulent misrepresentation is a false statement which, when made, the representor did not honestly believe to be true." (Cheshire and Fifoot *On The Law Of Contract*, 6th ed. (1964) page 241)

- [38] A negligent misrepresentation is a representation carelessly, not knowingly, made that is untrue, inaccurate or misleading. A person may be misled by a failure to divulge as much as by a statement that is inaccurate or untrue. The duty may be breached not only by positive misstatements but also by omissions, for they may be just as misleading. (*Spinks v. R.* 1996 CanLII 4041 (F.C.A.), (1996) 134 DLR (4th) 223 (Fed. CA))

- [39] One difference between a fraudulent misstatement and a negligent misstatement is that the entire agreement clause is vitiated by fraud and it is not open to the defendant to rely upon it if fraud is found. See *Ballard v. Gaskill* (1955), 14 W.W.R. 519 (B.C.C.A.), *Thiel v. Milmine*, [1995] OJ 3074 (Superior Court). In a case of fraud the person misled may seek rescission of the contract. Rescission is not sought here.

- [40] In this case the misrepresentation is not part of the contract. The purchaser does not sue in contract. The purchaser sues in tort on a freestanding representation made by

the vendors.

[41] Were the statements false?

[42] If so, were the false statements made with an intent to deceive, ie. knowing they were false or recklessly, not caring whether they were false or not?

[43] If not, were the false statements made negligently?

[44] Did the plaintiff rely upon the defendant's misrepresentation?

[45] Was the false statement a material cause of the act of the plaintiff, ie., has it been shown on a balance of probabilities that the plaintiff would not have acted to her detriment had it not been for the false statement made by the defendant?

Were the Statements False?

[46] Yes, one or more of the statements was false.

[47] The questions asked caused the vendors some uncertainty. They consulted with their real estate agent. The questions were phrased in the present tense: Is the property subject to flooding? . They interpreted this to mean Is the property NOW subject to flooding? . But the truth of the matter was that while it may not now be flooding it was *subject* to flooding, ie. it was liable or exposed or prone to [Concise Oxford Dictionary] flooding unless one took the simple precaution of ensuring that roof water was not allowed to fall at the northwest corner of the basement wall. A misrepresentation can consist of a failure to divulge needed information. (*Spinks v. R.* [1996 CanLII 4041 \(F.C.A.\)](#), (1996) 134 D.L.R. (4th) 223 (Fed Ct.))

Were the false statements made fraudulently, that is with an intent to deceive, knowing they were false or recklessly, not caring whether they were false or not?

[48] No, they were not.

[49] Obviously, the burden of proof in establishing fraud is clearly on the plaintiff. (*Charpentier v. Slauenwhite* (1971) 22 D.L.R. (3d) 222 @ 227 (NSSC))

[50] The purchaser points to what she sees as incriminating evidence: the fact that the vendor was painting a crucial area of the basement right before the actual sale, evidence from neighbours that the wife would sweep water off the back patio when it rained, the fact that there was damage to the cement block wall and evidence of previous efforts to repair the same in the northwest corner of the basement where water was eventually found to be entering, evidence that there had been leaking at some time in the past. The purchaser says that Mrs. Sidorowicz told her to keep water away from the house, to keep leaves and other debris out of the eaves trough. The purchaser also points to the issue of aluminium wire. The vendors said there was no aluminium wire. In fact there was some aluminium wire. The purchaser argues that Mr. Sidorowicz had changed a fixture and therefore must have known about the aluminium wire. The purchaser says that this impacts fatally upon his credibility.

[51] I have considered this and other evidence which, standing alone, appears to be damning. I have also considered the fact that the basement had been finished, except for some subflooring, by previous owners thereby hiding the evidence of past efforts to stem leaks. I have considered that everyone who inspected the house prior to sale agreed that there was no visible indicia of water problems, no stained wood work, no mould, no paint peeling, no musty smell coming from hidden rot under sub floors or in walls. I have the evidence of the house inspector who swears he used his moisture meter which would detect hidden moisture and he found nothing. He particularly zeroed in on the NW corner of the house, the place where the trouble actually developed, because of its vulnerability to leaking, the downspout being immediately outside, the absence of a window well which would allow the surrounding area to be sloped away from the house the concrete patio actually sloping towards the house at that point and some exterior cracks observed in the basement wall at that location. I have the description of the vendors as people who kept an immaculate house, who used the basement extensively for family living, especially in the summer because it was cooler, and could not be expected to tolerate moisture of the kind that was found. I also have the conjunction of several days of heavy rainfall together with the ill advised removal of the downspout extension which precipitated the trouble.

[52] I am satisfied that the vendors were aware that there could be moisture in the house if the gutters were not kept clean and the downspouts were interfered with, just as there could be moisture in the house if the windows were left open during a rainstorm. They maintained the gutters and the downspout extensions and advised the purchaser to do the same. Unfortunately, she did not realize the significance of their advice and they did not warn her that she would have a wet basement if she did not take their advice.

[53] However, I cannot say that even on the civil standard, the purchaser has established that the vendors had that degree of a wicked mind envisaged by our definition of civil fraud.

Were the false statements made negligently?

[54] Yes, the false statements were made negligently. In the words of the General Confession of the Book of Common Prayer they did that which they ought not to have done and failed to do that which they ought to have done. . . . Having embarked upon answering the questions asked the vendors should have followed their instincts and disclosed the previous problems, explained the solution to the problem and explained what would happen if the downspouts were not handled properly. Their failure to elaborate in this matter has brought them to grief.

Did the plaintiff rely upon the defendant's misrepresentation?

[55] I am satisfied that the purchaser relied upon the vendor's misrepresentation. It is argued that she actually acted upon the report of her building inspector. She did indeed rely upon it as well. But these statements by the vendors were important to her and, in the absence of any contrary evidence, she acted upon them.

Was the false statement a material cause of the act of the plaintiff, ie., has it been shown on a balance of probabilities that the plaintiff would not have acted to her detriment had it not been for the false statement made by the defendant?

[56] Can it be said that even if the vendors had not made the statements they did the purchaser would have bought the property and found herself in the same predicament? Again, this is a question to be determined on a balance of probabilities. The purchaser was a discriminating purchaser who had inspected many homes. "Hassle-free" living was her objective. I am satisfied that but for the misrepresentations the purchaser would not have bought this house.

Damages:

[57] These statements or non-statements of the vendors do not constitute a warranty. This action is in tort not contract. Compensation is to be assessed to redress damages suffered and not to restore the fabric of the house to the condition the purchaser anticipated it to be in.

[58] The proper approach to damages has given me a great deal of difficulty. Some water leaked in onto the basement floor. It wicked up into the base boards and walls. Leaking had obviously taken place at some time in the past and the sub floor had been affected. Estimates for remedial action in excess of \$60,000 were in evidence.

[59] Damages appear to fall under specific headings:

Removal of water contaminated wood in the basement to eliminate the propagation of mould.

Remedial work to prevent future leaking.

Restoration of basement.

Other damages

Cleanup and removal of water contaminated wood in the basement to eliminate the propagation of mould.

[60] SST General Contractors gave an estimate in October 2004 (tab 12 ex 1) of \$5,735.93 for stripping the two finished rooms in the basement removing the contaminated walls and sub floors, reframing products with 61 feet insulating and drywalling. A year later (tab 14 ex 1) the estimate changed to \$7,356.26. The purchaser's boyfriend who operates a haulage and grading company did the cleanup and submitted a bill for \$7,085 plus GST. This included the removal of the cement or concrete patio at the back, which was an additional item in SST's estimate. I allow the \$7,085 plus GST for this item.

Remedial work to prevent future leaking.

[61] Some proposals for remedial work were ambitious. Some estimates envisaged digging up the entire perimeter of the house, laying down new weeping tile and covering the exterior basement wall with a waterproof membrane.

[62] Mr. Ferland, who had been involved in construction for 30 years and who had spent the past 10 years inspecting houses was not impressed by this approach. In his opinion a cracked basement wall can only be repaired by replacing the wall. This is unnecessary. In his opinion most basement walls have cracks of one sort or another. The key to a dry basement is the proper handling of water. One should landscape the surrounding area so that the water flows away from the building. Downspouts should have extensions which direct the water away from the building. A sump pump connected to the weeping tile around the exterior of the building should draw water away. Water falling near the building should be encouraged to work its way down to the weeping tile rather than in through the basement wall.

[63] In his opinion one should make the obvious changes first. In his opinion the eaves troughs should have been sloped to the front of the building and the extension on the downspout at the northwest corner should have been replaced to direct roof water away from the basement as soon as possible. Mr. Ferland's recommendation was that instead of embarking upon the removal of the concrete patio at the rear it should have been lifted enough to create a slope away from the building. A window well might have been installed to assist with this change of elevation.

[64] In Mr. Ferland's opinion a portion of the concrete patio at the northwest corner where leaking was occurring should have been opened and a hole dug down to the weeping tile. If the tile was found to be blocked a Roto-Rooter Co. would be brought in to clear it out. A sump pump should have been installed in the sump pit located in the basement. (This in fact was done.) In his opinion the extensive excavation along the west wall which damaged the driveway was unnecessary. That wall was not leaking.

[65] [Although the engineer testified on the trial that the cement blocks on that wall had been displaced by weight on the driveway, he did not mention this in his report and there was no indication of leaking along that wall. Mr. Steele who excavated that wall and saw it from both the exterior and the interior testified that the blocks were not displaced, that it was the blocks on the north wall which were displaced. This seems to be confirmed by the photographs. The confusion may arise because of a difference of opinion as to the location of North.]

[66] Mr. Ferland noted that the slope from the back to the front of the house was downward. Water on the driveway could not seep down the basement wall because a ledge had been built along the length of that wall which directed water on the driveway away from the house and which sealed the space between the driveway and the basement. In any event, in his opinion, placing waterproof membrane on a basement is simply a "band aid" solution. The true solution lies in redirecting water away from the house and encouraging that water which falls near the house to percolate down to the weeping tile. His practical approach would have seen the leaking problem solved at a cost of approximately \$6,000 consisting of a sump \$500, window well \$1000, lifting the slab \$2000, redirecting the eaves troughs \$200 and miscellaneous other expenses.

[67] Mr. Nastor of SST General Contractors testified that \$8,000 would have stopped the water coming in. On the other hand his own estimate which involved excavating the entire perimeter of the house 8 feet below the footings and waterproofing the wall was in excess of \$25,000. Contractors doing this type of work prefer to do a massive job to protect themselves from dissatisfied clients who may find that other leaks develop later.

[68] In the event, Mr. Steele brought in some men who excavated the West wall after which SST General contractors installed new weeping tile on that wall and applied a waterproof membrane to that wall, all of which was covered by plywood to disperse lateral forces created by heavy vehicles on the driveway close to the house. SST charged \$8,189.33. Mr. Steele charged \$6,600 plus GST for removing the concrete patio, excavating in the West wall, removing the prior fill and backfilling the excavation. Given that this work was done on the recommendation of the engineer I cannot find that it was unreasonable.

Restoration of basement:

[69] The cost of restoring the basement was also contentious. It is also problematic because the work had not yet been done at the time of trial. Estimates included rebuilding of the bathroom using new fixtures. I am satisfied that the former fixtures were perfectly adequate. They could be disinfected if mould was a worry. Repairs to the two bedrooms including rebuilding the walls and sub floors and insulating the former were estimated by SST to be \$7,356.26. Rebuilding the bathroom with new accessories was \$9,408. I allow \$10,000 for restoration.

Other damages:

Loss of market value:

[70] The purchaser led evidence through her realtor that a stigma attaches to houses which have had leaking basements. In her opinion the market value of such houses must be reduced by \$10,000 at a minimum in order to compete with similar houses on the market. She testified that in her experience it did not matter whether the problem had been solved or

not. Counsel for the vendors argues that this was not pleaded. At the opening of trial the purchaser submitted her claim which exceeded the \$50,000 limit under the summary procedure rule. This is not a case for making allowance under this head.

Loss of income:

[71] The purchaser rented the basement. Following the discovery of water in September 2004 she remitted \$100 a month in rent. In December she moved out of the house and allow the tenants to occupy the main floor. This claim is too remote. There was no understanding between the parties that a rental property was being sold and indeed it was not zoned for such an apartment. That claim is dismissed.

General damages for inconvenience, aggravation etc.

[72] The plaintiff has satisfied me that she is entitled to recovery under this head. See *Downey v. Irving oil Ltd.* (Newfoundland District Court Grand Falls October 20 1980) I allow \$2,000 under this heading.

[73] Judgment will issue against the defendants Michael Sidorowicz and Donna Barbara Sidorowicz in the amount of \$33,874.33 plus GST on (\$7,085 + \$6,600)

[74] The action against Glenn Ferland is dismissed.

[75] The cross claim by Glenn Ferland is dismissed without costs.

[76] The third-party action I understand to have been discontinued.

[77] I may be spoken to with respect costs, prejudgment interest and any other matters which may not have been dealt with.

The Hon. Mr. Justice J. deP. Wright

Released: February 25, 2008

COURT FILENO.: CV-05-0291

DATE: 2008-02-25

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RHONDA JACQUELINE USENIK,

Plaintiff

- and

MICHAEL SIDOROWICZ and DONNA BARBARA
SIDOROWICZ and GLEN FERLAND,

Defendants

REASONS FOR JUDGMENT

J. deP. Wright J.

Released: February 25, 2008

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