



Bob Aaron bob@aaron.ca

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## Buyer gets frosty welcome

A recent decision of the Small Claims Court in Winnipeg illustrates whether the buyer or seller is responsible for damage to a home, which is discovered on closing.

Hazem Alzawawy was interested in buying a small house in Winnipeg. He found a tiny 612-square-foot, one-bedroom bungalow that was described in the listing with the Winnipeg Real Estate Board as having forced air, natural gas heating.

When he inspected the house there was a furnace in the basement. He assumed it was in working condition because of the information on the listing.

There were also five or six space heaters in the house, but Alzawawy didn't think anything of it since it was not uncommon in Winnipeg to use space heaters as an additional heat source.

In February last year, Alzawawy made an offer to buy the house for \$35,000. The offer was accepted and closing took place on April 1, 2007.

On the afternoon of the closing day, the buyer entered the house to find pieces of ice hanging from the faucets and the water in the toilet bowl frozen. All of the space heaters had been removed and the house was extremely cold inside.

Two days later, the new owner discovered a tiny sticker on the furnace indicating that it had been turned off two years earlier. An inspector came from Manitoba Hydro and reported that the furnace was "currently unsafe."

Alzawawy later had the furnace replaced at a cost of \$2,750. The work to correct the damage caused by the frozen pipes cost \$7,500.

Claiming that the seller Amelia Mesa left the house without a working furnace or other heat source, Alzawawy sued for the cost to replace the furnace and repair damage caused by frozen pipes.

At trial, the seller argued that the presence of the space heaters should have alerted Alzawawy to the fact that the furnace was not working, and that the doctrine of *caveat emptor* (buyer beware) applied to the case.

Justice Shawn Greenberg disagreed.

"In my view," she wrote, "it was reasonable for Mr. Alzawawy to assume, considering the representation in the listing agreement, that the furnace he saw in the house was working. ... I think it is reasonable for a person buying a home in Winnipeg (especially when the purchase and possession are in winter) to assume that the home has a heat source. Mr. Alzawawy was left with a home with none."

Greenberg noted the owner did not testify, and there was no explanation why the listing showed the house had forced air, natural gas when in fact the furnace had been turned off two years earlier.

In holding the seller responsible for \$10,000 in damages (the dollar limit in Manitoba Small Claims Court), the judge ruled that the risk of damage passed to the purchaser at 9 a.m. on the day of closing. But since Environment Canada records showed that the temperature was above freezing on that date, she concluded that the freezing must have occurred sometime before the time of closing, "as a result of the defendant's failure to heat the house."

Several lessons may be learned from the case:

Purchase agreements should always provide for an inspection just before closing.

Always have an expert or a home inspector check the furnace and air conditioning, especially if you're buying off-season.

Make sure the purchase agreement contains warranties that the mechanical systems are in good working order.

If you're leaving the house for a holiday in the winter, remember that if the furnace fails or a circuit breaker trips or fuse blows, the heat will turn off resulting in frozen pipes. Shut the water off at the source and turn a tap on to bleed the pressure out of the system.

Make sure your insurance policy covers damage from frozen pipes.

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**Bob Aaron** is a Toronto real estate lawyer. He can be reached by email at [bob@aaron.ca](mailto:bob@aaron.ca), phone 416-364-9366 or fax 416-364-3818. Visit the column archives at <http://aaron.ca/columns/toronto-star-index.htm> for articles on this and other topics.

### Alzawawy v. Mesa, 2008 MBQB 248 (CanLII)

Print:  PDF Format

Date: 2008-09-24

**Decisions cited**

- [Alevizos v. Nirula](#), 2003 MBCA 148 (CanLII) (2003), 234 D.L.R. (4th) 352 (2003), [2004] 10 W.W.R. 634 (2003), 180 Man. R. (2d) 186
- [Child and Family Services of Northwest Winnipeg v. D.A.G. and D.M.G.](#),  [reflex](#) (1989), 21 R.F.L. (3d) 458 (1989), 59 Man. R. (2d) 24
- [L vesque v. Comeau et al.](#), 1970 CanLII 4 (S.C.C.) [1970] S.C.R. 1010
- [Stotts v. McArthur](#),  [reflex](#) (1991), 75 Man. R. (2d) 212

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Docket: CI 08-01-56321

Indexed as: Alzawawy v. Mesa

Cited as: 2008 MBQB 248

(Winnipeg Centre)

**COURT OF QUEEN S BENCH OF MANITOBA**

**B E T W E E N:**

|                              |   |                           |
|------------------------------|---|---------------------------|
| HAZEM SALEM HASSAN ALZAWAWY, | ) | For the plaintiff:        |
| plaintiff,                   | ) | <u>In Person</u>          |
| - and -                      | ) |                           |
|                              | ) |                           |
| AMELIA MESA,                 | ) | For the defendant:        |
| defendant.                   | ) | <u>J. Graeme E. Young</u> |
|                              | ) |                           |
|                              | ) | JUDGMENT DELIVERED:       |
|                              | ) | September 24, 2008        |

**GREENBERG J.**

[1] This is a small claims appeal in which the plaintiff, Hazem Alzawawy, seeks damages for repairs that he was required to do to a home that he purchased from the defendant, Amelia Mesa. Mr. Alzawawy claims that the home was left by Mrs. Mesa without a working furnace or other heat source, as a result of which the pipes froze. Mr. Alzawawy seeks the cost to replace the furnace and to repair the damage caused by the frozen pipes.

**ISSUES**

[2] It is not contentious that the furnace was not operating when Mr. Alzawawy took possession of the house. Nor is it contentious that the water in the pipes was frozen when Mr. Alzawawy first entered his new home. The contentious issue is when the water froze. Since the offer to purchase stipulates that the risk stays with the vendor until the time of possession, the defendant says that, if the water froze after the time of possession, the damage is not her responsibility.

[3] As to the furnace, the defendant relies on the doctrine of *caveat emptor*. She says that Mr. Alzawawy should have known that the furnace was not working when he purchased the house. Mr. Alzawawy says that the defendant represented that the furnace was working in the listing document and that he could not have known that the furnace was not in working condition when he viewed the house.

## WHEN DID THE PIPES FREEZE?

[4] Mr. Alzawawy testified that he first saw the house in mid-February 2007. The house was a 612 square foot, one bedroom bungalow. The information on the Winnipeg Real Estate Board listing form shows the heating in the house as FORCD and the heat fuel as NGAS. When Mr. Alzawawy saw the house in February, he saw a furnace in the basement. Because of the information on the listing document, he assumed that the furnace was operational. However, he also noticed five or six space heaters throughout the house. He did not think this was an indication that the furnace was not working because he did not think it uncommon to use space heaters as an additional heat source. He said he has done so himself. During the course of his inspection of the house, Mr. Alzawawy turned on the taps in the house and the water was running.

[5] On February 17, 2007, Mr. Alzawawy made an offer to purchase the house for \$35,000.00, which was accepted, with possession to take place at 9:00 a.m. on April 1, 2007. Mr. Alzawawy went to the house on April 1<sup>st</sup> at around 3:00 p.m., after he finished work. When he entered the house, he found pieces of ice hanging from the faucets and the water in the toilet bowl was frozen. He testified that it was warmer outside the house than inside and that he and his wife took turns going to their car to warm up. There were no space heaters left in the house.

[6] Mr. Alzawawy testified that he called Manitoba Hydro to come to look at the furnace. He said that when the Hydro inspector came on April 3<sup>rd</sup> to check the furnace, he found a small sticker on the furnace that indicated that the furnace had been turned off two years earlier. Mr. Alzawawy had not seen the sticker when he saw the furnace in February. He says that the sticker was only one or two inches in size.

[7] The inspector completed an inspection notice which states:

Furnace left off at drop. Appliance is to be thoroughly cleaned and inspected OR replaced ASAP is old, corroded & suspect at present currently unsafe.

[8] Mr. Alzawawy subsequently had the furnace replaced at a cost of \$2,750.00. The work to correct the damage caused by the frozen pipes cost \$7,500.00.

[9] At the time Mr. Alzawawy purchased the house, Mrs. Mesa's son, Richard Mesa, was living in it. Richard Mesa testified that he moved out of the house on March 31<sup>st</sup>, 2007 and that when he left the house at about 8:00 p.m. that evening, the home was warm and the water was not frozen. He said that he used the water for various purposes that day without any trouble. Richard Mesa said that, when he left the house on the evening of March 31<sup>st</sup>, his mother, sister and niece remained in the house to clean it.

[10] Richard Mesa acknowledged that the furnace had been turned off and that he was using space heaters to heat the house. He said he did this because it was cheaper to heat the house that way. Mr. Mesa said that on March 31<sup>st</sup>, the last day that he occupied the house, he had two heaters on in the house. He said that, when he left the house that night, he removed all but one heater and left that one on.

[11] The defendant does not dispute that, when Mr. Alzawawy first went to the house, the pipes were frozen. However, it is the defendant's position that the water was not frozen on the night of March 31<sup>st</sup> and could not possibly have frozen between the time Richard Mesa left the house and the time Mr. Alzawawy arrived the next day, particularly considering the outside temperature at the time. The defendant argues that Mr. Alzawawy must have waited a few days before entering the house; that the temperature dropped and the water froze after the possession date.

[12] In support of her position, the defendant submitted as evidence Environment Canada records which show that the temperature in Winnipeg was above zero degrees Celsius from noon on March 30, 2007 until 10:00 p.m. on April 1<sup>st</sup>, at which time it started to drop. The temperature was below zero all of April 2<sup>nd</sup> with a low of minus eight that day. The defendant argues that it is not possible that the water froze on April 1<sup>st</sup> since the temperature was above freezing.

[13] I accept the defendant's argument that, if Richard Mesa left the house on the evening of March 31<sup>st</sup> with the heat on, the pipes would not have frozen overnight. The problem is that, for the reasons I give below, I do not believe Richard Mesa's evidence. I accept Mr. Alzawawy's evidence that the water in the pipes was frozen when he entered the house on the afternoon of April 1<sup>st</sup>. And, in view of the temperature readings, I can only assume that it had been frozen for some time before March 30<sup>th</sup>. The Environment Canada records for March 30<sup>th</sup> show that the temperature was below freezing for the first half of that day and rose to above zero at midday. I was not provided with records for the days before March 30<sup>th</sup>.

[14] As I said, Mr. Alzawawy testified that he entered the house at around 3:00 p.m. on the day of possession and found the water in the taps frozen. His evidence was confirmed by two witnesses, Arlette Passage, who lived in the house next door, and Murla Zayed, a friend of Mr. Alzawawy's wife.

[15] Ms Passage testified that she met Mr. Alzawawy and his wife when they came to their new house on April 1, 2007. They invited her into the house. She said that the house was very cold colder inside the house than outside - and she saw the frozen water in the taps and toilet. When cross-examined on whether she could be mistaken as to the date, she was definite that it was April 1<sup>st</sup> because she and her boyfriend always make a big deal about April Fool's Day.

[16] Murla Zayed testified that Mr. Alzawawy's wife took her to see the house on April 1, 2007 and that she saw the frozen water in the toilet when she went to use the bathroom. She said that she remembers the date as April 1<sup>st</sup> because when she went to use the bathroom and found the toilet frozen, she asked her friend whether she was playing a joke on her. She says she also remembers the date because she was leaving for Egypt a few days later.

[17] I have no reason to disbelieve these witnesses. The defendant argues that their evidence was too convenient to be believed. I disagree. In fact, neither witness was given any advance notice that she was going to be asked to testify. They were brought to court on my suggestion. This trial was scheduled for one day of hearing. After Mr. Alzawawy testified, I asked him if he had any witnesses who could confirm his version of events. He told me that his wife had passed away but there were others who saw the frozen water and he would see if he could contact them over the lunch hour, which he did, and they testified in the afternoon. I note, in particular, with respect to Ms Passage, that she has no current connection to Mr. Alzawawy. She never in fact became Mr. Alzawawy's neighbour because he never moved into the house. He sold it once the repairs were completed and has not seen Ms Passage since. So, in my view, she is an independent witness.

[18] On the other hand, the only witness for the defendant was her son, Richard. I have a great deal of difficulty accepting any of his evidence because he made statements in his evidence which could not possibly be true. One part of his evidence is particularly suspect.

[19] Mr. Alzawawy testified that, when he purchased the house, he had not met the owners. After finding the water frozen, he asked his neighbour, Ms Passage, if she knew the prior owners. A few days later, when he was at the house, Ms Passage came to tell him that the previous occupant, Richard Mesa, was at the repair shop across the street. Mr. Alzawawy went across the street and spoke to Mr. Mesa and asked him if he knew who the prior owner of the house was. Mr. Mesa said that he did not!

[20] In cross-examination, Mr. Mesa acknowledged that he had this conversation with Mr. Alzawawy and that he refused to tell Mr. Alzawawy who the owner was. He explained that refusal by saying that he did not know who Mr. Alzawawy was and that he would not give that information to just anyone. But this explanation is inconsistent with his evidence in direct examination that he had met Mr. Alzawawy before the conversation at the repair shop. In direct, he testified that he had gone to the house to check his mail, that he had invited himself into the house and that he saw that the entire house had been gutted. Mr. Mesa said this happened on either April 3<sup>rd</sup> or April 4<sup>th</sup>. But I do not believe it is possible that the house was gutted two or three days after Mr. Alzawawy took possession. The furnace inspector did not arrive at the house until April 3<sup>rd</sup>, a fact confirmed by the inspection notice that he completed. Mr. Alzawawy testified that he did not start renovations until after the furnace was replaced because he could not start repairs until there was heat in the house. So the statement that the house was gutted on April 3<sup>rd</sup> or 4<sup>th</sup> cannot be true.

Alternatively, if Richard Mesa had met Mr. Alzawawy on April 3<sup>rd</sup> or 4<sup>th</sup>, as he testified, then his explanation that he did not know him on the subsequent meeting at the repair shop is untrue.

[21] I could point to other problems with Richard Mesa's evidence but this story is enough in my view to discredit his testimony entirely. But perhaps more significant than the credibility issues with Mr. Mesa's evidence is the fact that the defendant called no other witnesses to corroborate Mr. Mesa's evidence that the house was heated and the water flowing the day before possession. Richard Mesa testified that several of his relatives had been in the house on March 31<sup>st</sup> to help him move. However, not one was called to testify. Most notable was that the defendant was herself in the house on the night of March 31<sup>st</sup>, and although she sat through the entire trial, she did not testify. Her failure to testify, in my view, leads me to draw an inference that she could not support her son's evidence.

[22] As stated by Philip J.A. in *Northwest Child and Family Services Agency v. G.(D.A.)*  [reflex](#), (1989), 59 Man.R. (2d) 24 (Man. C.A.) at par. 22:

I return to C. and the failure of the agency to call him as a witness. There is no obligation upon a party to call witnesses in a civil case; however, inferences may be drawn by the trial judge when a particular witness is not called.

Similarly, in *Levesque v. Comeau*, 1970 CanLII 4 (S.C.C.), [1970] S.C.R. 1010, Pigeon J. stated (at pp. 1012-13):

Appellant Lola Levesque's expert examined her for the first time more than a year after the accident, and after she had consulted several doctors and undergone different examinations in the meantime. She alone could bring before the Court the evidence of those facts and she failed to do it. In my opinion, the rule to be applied in such circumstances is that a Court must presume that such evidence would adversely affect her case.

[23] I am satisfied that Mr. Alzawawy entered the house on the afternoon of April 1<sup>st</sup> and that the water was frozen at that time. The defendant's counsel argued that the risk passed to the purchaser at the time of possession, which was 9:00 a.m. on April 1<sup>st</sup>. But, since the temperature was above freezing on April 1<sup>st</sup>, I can only infer that the freezing occurred some time before 9:00 a.m. on that day. And I believe that the water froze because the defendant left the house with no heat some time before March 31<sup>st</sup>.

[24] There is no question that the defendant knew the furnace was not working and I believe Mr. Alzawawy that there were no electric heaters in the house when he took possession. Even if I believed Richard Mesa that he left one space heater in the house, he would have to know that was not sufficient to keep a home in Winnipeg warm in the winter. Moreover, the integrity of the defendant's claim that the pipes froze after possession is undermined by her misrepresentation (discussed below) as to the condition of the furnace.

[25] I am satisfied that the water froze before April 1<sup>st</sup> as a result of the defendant's failure to heat the house.

## THE FURNACE

[26] It is not disputed that the furnace was not operational when Mr. Alzawawy took possession on April 1<sup>st</sup>. Nor did the defendant challenge the evidence that the furnace had to be replaced. However, the defendant argues that the condition of the furnace should have been obvious to Mr. Alzawawy when he viewed the house in February. She says Mr. Alzawawy should have

been alerted to the fact that the furnace was not working by the space heaters in the house. The defendant relies upon *caveat emptor*.

[27] But *caveat emptor* does not apply where the purchaser relies upon representations by the vendor and the defects in the property would not be detected by reasonable inspection. In V. DiCastrì, Q.C., **Law of Vendor and Purchaser** (Toronto: Carswell, looseleaf ed.), vol. 1, the author explains:

In the case of patent defect, as distinguished from latent defect as to quality or condition, and where the means of knowledge are equally open to both parties and no concealment is made or attempted, a prudent purchaser will inspect and exercise ordinary care: *caveat emptor*. However, while inspection by a purchaser bars him from complaint as to matters patent, the mere means of knowledge, or the opportunity to inspect when he has relied solely upon a representation by the vendor, does not have this result. Neither is a purchaser who is unqualified to make an effective inspection, and where, in any event, an inspection could not be conclusive, necessarily barred from relief. [footnotes omitted]

[28] The law on *caveat emptor* was reviewed by the Manitoba Court of Appeal in *Alevizos v. Nirula*, 2003 MBCA 148 (CanLII), 2003 MBCA 148. In that case Scott C.J.M. said:

18 There can be no doubt that *caveat emptor* is alive and well in Manitoba despite its well-publicized deficiencies. In *Stotts v. McArthur*  *reflex*, (1991), 75 Man.R. (2d) 212 at para. 18, this court considered with approval the following statement from V. DiCastrì, Q.C., *Law of Vendor and Purchaser*, 3rd ed. (Toronto: Carswell, 1988), vol. 1 (at para. 239):

It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of the land which may be material to the purchaser's judgment. The purchaser must form his own judgment: *caveat emptor*. This principle, though much criticized, continues to demonstrate a disconcerting durability.

19 Thus mere silence without more on the part of the vendor with respect to a defect subsequently discovered by a purchaser will not normally found a cause of action against the vendor by the purchaser for misrepresentation or for fraud. But there are exceptions as we shall see, if a vendor is found to have been deceitful.

[29] Scott C.J.M. went on to explain that silence and half-truths can amount to a fraudulent misrepresentation, quoting the following from G. Spencer Bower, K.C., & The Hon. Sir A.K. Turner, **The Law of Actionable Misrepresentations**, 3rd ed. (London: Butterworths, 1974), at p. 94:

To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie", and one of the most dangerous and insidious forms of lie.

[30] I note again that the defendant did not testify. She did not explain why the listing document stated that the house had forced air heating using natural gas when the furnace had been turned off two years before. In my view, it was reasonable for Mr. Alzawawy to assume, considering the representation in the listing agreement, that the furnace he saw in the house was working. There was no evidence that there was anything about the furnace that would lead a layperson to conclude that the furnace was not operational. A layperson cannot be expected to do a professional inspection. Nor do I think a reasonable person would assume that the furnace was not working simply because space heaters are being used. In fact, unless it is otherwise apparent, I think it is reasonable for a person buying a home in Winnipeg (especially when the purchase and possession are in winter) to assume that the home has a heat source. Mr. Alzawawy was left with a home with none.

[31] I find that the information in the listing document and the failure of the defendant to tell the purchaser that the furnace was not working was deceitful. Moreover, it was a misrepresentation about something that made the house uninhabitable. Mr. Alzawawy is entitled to damages for the cost to replace the furnace.

## DAMAGES

[32] Mr. Alzawawy's evidence as to what it cost him to replace the furnace and repair the damage caused by the frozen pipes was unchallenged. While his damages exceed \$10,000.00, he waives any amount above the Small Claims Court limit. I am therefore awarding Mr. Alzawawy damages of \$10,000.00 plus costs of \$150.00 plus disbursements.

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J.