

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ELIAS S. SHAMMAS and SUSAN)
M. BOGER)
)
Plaintiff)
)
v.) Civil No. 97-0008-B
)
THE MOONEY COMPANY)
)
Defendant)

FINDINGS OF FACT AND CONCLUSIONS OF LAW¹

This action involves claims of negligence, breach of contract, and negligent misrepresentation against Defendant, The Moody Company. Plaintiffs, Elias Shammass and Susan Boger, hired Defendant to conduct a home inspection and now seek damages for Defendant's failure to discover fire damage to the house. At trial, the Court granted Defendant's motion for judgment as a matter of law on Plaintiffs' breach of warranty claim. Pursuant to the Court's recommendation, Plaintiffs merged their negligence and negligent misrepresentation claims into one claim.

The Court conducted a trial on the matter on February 17th and 18th, 1998. The parties have filed post-trial proposed findings of fact and conclusions of law for the Court's consideration. After considering the evidence and the arguments advanced by the parties, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 (a).

I. Findings of Fact

1. In 1982 a fire occurred inside a Victorian house in Stockton Springs, Maine. Several firefighters arrived at the scene and fought the fire in the rear first floor bedroom and bathroom. The

¹ Pursuant to 28 U.S.C. 636(c) (1993), the parties have consented to proceed before the United States Magistrate Judge.

fire also spread up the back wall and into the rear of the attic. Very little fire damage occurred to the rest of the house.

2. The firefighters spent about fifteen to thirty minutes fighting the fire and about five and a half hours looking for hot spots and guarding against flare-up.

3. After the fire, the owners of the house repaired the fire damage.

4. Subsequent to the fire the house was used as a boarding home for the elderly.

5. In 1991 the owners of the house put the house up for sale.

6. Plaintiffs visited the house in September 1992, January 1993 and prior to closing in March 1993.² Plaintiffs spent about thirty to forty minutes in the house on at least two occasions. Plaintiffs visited the house with Rollerson Realty Agent Tom Calderwood on at least two occasions.

7. Plaintiffs offered \$60,000 for the house around Christmas 1992. At the time the house was listed for \$89,500. In January of 1993, the owners of the house accepted the Plaintiffs' offer to purchase the house for \$60,000.

8. In January of 1993, Plaintiffs went into the attic of the house with Calderwood. Plaintiffs noticed a hole in the eave and asked Calderwood why was there a hole in the eave. Calderwood told them that the hole was probably caused by a chimney fire which was common in older homes in Maine. The Court finds Calderwood's statement to have minimal relevance in this case because at no time was Calderwood speaking for the Defendants and Calderwood never told Defendant that he told Plaintiffs that a chimney fire occurred in the attic.

9. Plaintiffs did not ask Calderwood about the section of the attic that was painted with silver paint. Plaintiffs did not know silver paint indicated that a fire occurred in that section of the attic.

² Plaintiff Boger also visited the house alone in August 1992.

10. On one of the visits to the house, Calderwood and the Plaintiffs discussed getting the house inspected by a professional home inspector. Calderwood recommended that Plaintiffs contact Defendant. Plaintiff Bolger contacted Defendant and arranged for one of the Defendant's home inspectors, Anthony Sousa, to conduct a standard home inspection. Plaintiffs paid Defendant three hundred and forty-five dollars for the inspection.

a. Home Inspection by Anthony Sousa

11. Sousa conducted the home inspection on January 18, 1993. At the time, Sousa had conducted more than two hundred home inspections in Maine. Sousa is a licensed engineer.

12. Before the inspection, Sousa had no knowledge that a fire occurred at the house.

13. Sousa conducted an outside examination of the house, looking for signs of structural instability, and then a basement-to-attic inspection of every accessible space in the house. Sousa took about four hours to inspect the interior and exterior of the house.

14. At no time did Sousa smell any noxious odor indicating burnt wood.

15. After completing the inspection, Sousa went to his office and wrote the home inspection report. The report consisted of several pages and notes that Sousa made when he inspected the house. The report referred to numerous repairs that needed to be done to the house. Sousa made clear that he based the information in the report on visual evidence. In the beginning of the report, Sousa wrote the following:

This inspection report is limited to observations made from visual evidence. No destructive or invasive testing was performed. Exhibit 16 at page 1.

This report is based on an examination of the major systems in this building; specifically the heating, plumbing, electrical, and structural systems. This report is an opinion about the condition of this building. It is based on visual evidence available during a diligent inspection of all reasonably accessible areas. No surface materials were removed, no destructive testing

undertaken, nor furnishings moved. This report is not an exhaustive technical evaluation. Such an evaluation would cost many times more. Exhibit 16 at page 2.

As Professional Engineers, it is our responsibility to evaluate available evidence relevant to the major systems in this building. We are not, however, responsible for conditions that could not be seen or were not within the scope of our service at the time of the inspection. Exhibit 16 at page 2.

16. Sousa made the following findings in his report regarding the structural integrity of Plaintiffs' house:

The structural system is in good condition. Exhibit 16, page 1.

Where visible, the floor joists, girders, columns, ceiling joists, rafters, and wall framing are in good condition. Exhibit 16, page 1.

Based on visible evidence, we consider the structural condition of this building to be average. The conditions noted here are common in many homes of this age and construction type we inspect. Most of the recommendations we have made are relatively easy to complete. Exhibit 16, page 4.

17. Sousa only once mentioned evidence of fire damage in the house. Sousa wrote under the section of the report entitled "Structural Integrity":

There was evidence of a structural fire occurring in this home in the past. The damage appeared to be concentrated in the last five feet at the rear of the front attic. It appears that the damage has been repaired and cleaned up satisfactorily. There is no evidence of structural instability.

18. Sousa's conclusion that a structural fire occurred in the attic conflicted with Calderwood's statement that a chimney fire caused the damage in the attic.

19. Before sending the report to Plaintiff, Alan Moody, President of Defendant Company, reviewed and signed the report. Moody is a licensed engineer.

20. Plaintiff Boger read the report several times and read it to Plaintiff Shammass. Additionally the Plaintiffs had friends review the report including a real estate lawyer, a house

restorer and a former building inspector. The report did not raise any concerns for the Plaintiffs or their friends. Plaintiffs never called Defendant with any questions about the information in the report.

b. Fire Damage to the House

21. Plaintiffs purchased the house in April 1993 and hired Karl Boger and Manley Shute to begin restoration work on the house in the summer. Both claimed to have found several areas of the house damaged by fire.

22. After reviewing the evidence, the Court finds that the holes in the clapboards are burn holes. The Court bases this finding on the testimony of Karl Boger and Manley Shute. The Court has no reason to doubt their testimony that they found burn holes. However the Court finds Boger's testimony that he knew they were burn holes when he first walked around the house unpersuasive. Instead the Court finds Boger and Shute first knew the holes were burn holes when they physically examined the holes during preparations to paint the house. Accordingly, the Court finds that a home inspector could not have determined that the holes were burn holes based solely on a diligent visual inspection.

23. The Court finds that the Plaintiff failed to adequately demonstrate that areas around the windows of the house were damaged by fire. The Court is not satisfied that Plaintiffs' photos depict fire damage around the windows. The Court is also persuaded by the testimony of Norman Becker, Alan Moody and Anthony Sousa, all licensed engineers with home inspection experience. All three engineers examined the house on October 20, 1997 and testified that there was no evidence of fire damage around the windows.

24. The Court finds that the eastern side of the porch contained a minor amount of fire damage and that the damage was visible the day Sousa conducted his inspection.

25. The Court is satisfied that Boger and Shute discovered fire damage to clapboards, sheathing, and a corner post. However they only discovered the fire damage after they began intrusive restoration work on the house. The Court finds that Sousa could not observe evidence of fire damage to the clapboards, sheathing and corner post because at that time Sousa conducted the home inspection, Plaintiffs did not begin intrusive restoration work.

26. Plaintiffs hired Alexander Hutcheon, a licensed engineer with home inspection experience, to conduct an inspection of the house and determine if Defendant should have discovered additional evidence of fire damage in the house.

27. Hutcheon conducted a visual home inspection on November 5, 1993 and an invasive home inspection on October 2, 1994.

28. The Court finds that Hutcheon was unable to perform a standard home inspection of the house on November 5, 1993, because when Hutcheon met Manley Shute at the house to do his inspection Shute told Hutcheon that a “major fire” occurred at the house. Shute then led Hutcheon around the house and pointed out the repairs that he and Karl Boger made to the exterior of the house. Hutcheon did not conduct a standard home inspection similar to Sousa. Instead, he conducted an inspection that focused on discovering evidence that a fire occurred in the house.

29. The Court also finds that the condition of the house changed between Sousa's and Hutcheon's inspections. The Court will note when those changes influenced Hutcheon's inspection in the appropriate subsequent findings.

30. Hutcheon discovered a small amount of charcoal on the basement floor. Hutcheon thought the charcoal was from burned wood but did not know where the charcoal came from or how long the charcoal had been on the basement floor. Sousa testified that he never saw any charcoal in

the basement. Plaintiffs failed to prove that the charcoal was on the basement floor the day Sousa conducted his inspection. Plaintiffs also failed to show where the charcoal came from. Accordingly, the Court finds the Plaintiffs failed to demonstrate that the charcoal in the basement has any relevance in the disposition of this case.

31. The Courts finds that the first floor floorboards were charred and that an inspector who conducted a diligent visible inspection would have seen them from the basement.

32. From the basement one can see charred first floor floorboards. No evidence of fire exists in the room above the floorboards because the room was completely redone in sheetrock after the fire. The Court disagrees with Hutcheon's conclusion that an inspector conducting a diligent visual inspection would have determined that an extensive fire occurred in the house because the room was done in sheetrock, not in plaster like the rest of the house. This testimony is refuted by Mr. Becker, Mr. Moody, and Mr. Sousa, home inspectors who collectively have conducted thousands of home inspections. The Court believes that Hutcheon's conclusion about the first floor bedroom is heavily based on information that Shute told him about the fire and not what a home inspector would conclude during a diligent visual inspection.

33. The Court finds that charred floorboards exist on the second floor. However the Court finds that an inspector conducting a diligent visual inspection would not have seen the charred floorboards because the floorboards were covered by carpet at the time Sousa conducted the home inspection.

34. A chimney runs through a second floor closet. The bottom of the second floor closet, near the chimney, contained minor amount of charring from fire that was visible when Sousa

conducted the inspection. No evidence exists that the fire in the closet had extended further up the wall into the attic or that the fire caused any structural damage to the house.

35. On the day Sousa conducted the inspection he shined a flashlight through a hole on the first floor bathroom ceiling and observed some charred members and repairs. To the extent Hutcheon's testimony conflicts with what Sousa observed, the Court attributes the conflict to the widening of the hole by Karl Boger in August 1993. The Court accepts Sousa's testimony that he saw some charred members that were properly repaired.

36. The Court also finds that there was visible fire damage in the rear of the front attic that was repaired.

37. Evidence of fire damage exists in the rear attic. However when Sousa inspected the house the rear attic was inaccessible. Sousa wrote in the report that the inaccessibility of the rear attic limited the extent of the structural inspection.

38. Based on the above findings the Court concludes that on January 18, 1993 Sousa could have seen the following conditions of fire damage to the house if he conducted a diligent visible inspection:

- (a) The burn-through floorboards in the basement.
- (b) The charred boards through the hole in the first floor ceiling.
- (c) Minor amounts of charring on the eastern side of the porch.
- (d) Charring near the chimney at the bottom of the second floor closet.
- (e) Charred members in the rear of the front attic that were painted silver.

C. Structural Integrity

39. All four experts stated that they considered the house structurally sound. The only minor exceptions noted by Mr. Hutcheon were one floor joist repair in the second story closet (which only became visible when Mr. Hutcheon conducted an intrusive inspection by removing plywood flooring) and the existence of two rafters which were burned in the fire. Hutcheon did not provide any estimate about the cost of repairing the two rafters. Hutcheon's testimony regarding the two rafters is contradicted by expert Becker and the evidence. The Court is satisfied that the rafters are structurally sound.

D. Odor Problem

40. Before closing on the house, Plaintiff Shammass smelled a smoky odor at the house on more than one occasion but attributed the odor to the chimney fire. *See* Finding of Fact 8. At no time before closing on the house did Plaintiff Boger smell an odor.

41. Karl Boger first smelled an odor indicating burnt wood after he repaired a pipe in the house in August 1993. Plaintiff Boger first smelled the odor after she visited the house a couple of weeks after Karl Boger made the repair. Plaintiff Boger sent a letter to Defendant in September 1993 indicating her displeasure of the inspection done by Defendant. Plaintiff Boger made no mention of the odor in the letter.

42. Plaintiffs spent a total of a few weeks at the house during the summers and winters over the past few years. When the weather was hot and moist, Plaintiff Boger had headaches from smelling the odor. All experts admitted that charred wood can vaporize noxious fumes in hot weather.

43. Other individuals had been inside the house and did not smell any odor. For several years beginning in the early 1980's the house was used as a boarding home for the elderly. The Court has no evidence that any person during this time smelled a noxious odor indicating burnt wood at any time. Vern Thompson entered the house on several occasions in the mid-1980s as an Emergency Management Technician and never smelled an odor. Several real estate agents who marketed the property and toured the house did not mention an odor problem in notes they took about the house. Anthony Sousa did not notice an odor in the house when he conducted an inspection of the house in January 18, 1993. Anthony Sousa and Alan Mooney and Norman Becker did not notice an odor in the house when they visited the house on October 20, 1997, with the exception that Norman Becker noticed a faint smoky odor in the attic of the house. Alexander Hutcheon did not notice an odor in the house on two of his visits to the house except near the charcoal in the basement.

44. Although an odor may at times exist in the house, the odor does not make the house uninhabitable.

II. Conclusions of Law

Count I - Negligence

For a plaintiff to prove that a defendant committed negligence, a plaintiff must show that: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty and (3) the breach of that duty was an actual and legal cause of injury suffered by the defendant. *Aliberti, LaRochelle & Hodson Engineering Corp., Inc. v. F.D.I.C.*, 844 F. Supp. 832, 844. Whether the defendant owes the plaintiff a duty is a question of law. *Morrill v. Morrill*, 616 A.2d 1272, 1274 (Me. 1992). It is not enough that a plaintiff states that a duty is owed. A plaintiff must allege

sufficient facts to support their contention that a defendant owes him a duty. *Lewis v. Mains*, 150 Me. 75, 76, 104 A.2d 432 (1954).

In Maine “One who undertakes to render services in the practice of a profession owes a duty to exercise that degree of skill, care and diligence exercised by members of that same profession.” *Rowe v. Bennet*, 514 A.2d 802, 804 (Me. 1986). As a company who employs licensed engineers to conduct home inspections, Defendant has a duty to conduct their scope of services, home inspections, with a degree of skill, care and diligence exercised by other licensed engineers.

Defendant testified that the standard in the industry for a standard home inspection is to conduct a visual inspection of the house focusing on the mechanical and structural systems.³ Defendant’s description of what a standard home inspection entails is delineated in the Home Inspection Report and supported by all of the expert engineers who testified at trial. Finding of Fact 11. Therefore, Defendant owed the duty to Plaintiffs to conduct a diligent *visual* home inspection with the standard of care exercised by other licensed engineers who conduct home inspections. Plaintiffs have not provided the Court with sufficient evidence that Defendant breached its duty to conduct a diligent visual home inspection with the degree skill or care of others in their profession.

Defendant’s inspector, Anthony Sousa, could see five areas affected by fire. Finding of Fact 38. None of the areas that could be observed indicated that the house’s structural system was compromised. Finding of Fact 39. The floorboards in the basement, the charred members seen through a hole in the bathroom ceiling, and the fire damage in the attic were all properly repaired. Finding of Fact 39. The minor charring on the eastern side of the porch and the charring near the

³ Whether Defendant conducted a proper inspection of the mechanical systems of the house is not an issue in this trial.

chimney on the second floor closet did not structurally compromise the house. Defendant reasonably concluded that the house was structurally sound.⁴

Plaintiffs also argue that a diligent inspector, having seen instances of fire damage to the house, would have been alerted that a major fire occurred at the house and could not have concluded that the house was in structurally good condition. Plaintiffs' argument that a major fire occurred throughout the house is refuted by the evidence and by what Sousa observed. Findings of Fact 1, 38.

Plaintiffs contend that there is an odor in the house that makes the house uninhabitable. The Court does not agree. Findings of Fact 40-44. Even if the Court agreed with Plaintiffs' contention, the Court can find no evidence that Defendant had a duty to detect olfactory evidence that a fire existed at the house. Plaintiffs employed Defendant to conduct a visual examination of the structural stability of the house. The Court is satisfied that Defendant met the standard of care required of him to meet his duty.

Plaintiff also raises a claim of negligent misrepresentation. Plaintiff alleges that Defendant provided false information regarding the structural integrity of the house. The Court holds that Plaintiff failed to prove that Defendant gave them false information regarding a material fact, two key elements of their claim of negligent misrepresentation. *Devine v. Roche Biomed. Lab.* 637 A.2d 441, 445 (Me. 1994). Defendant provided accurate information to Plaintiff about the structural integrity of the house and therefore Plaintiffs' negligent misrepresentation claim must fail. Finding of Fact 16.

⁴ Plaintiffs have presented, at best, minimal evidence that unobserved areas of the house will reveal that the house is not structurally sound. On October 2, 1994 Mr. Hutcheon returned to the house to conduct an intrusive inspection to search for structural damage from the fire. That inspection yielded one floor joist that was possibly damaged and not properly repaired. Hutcheon found no other evidence of structural damage.

Count II - Breach of Contract

The parties agree that they entered into a contract for Defendant to conduct a diligent visual inspection of the house's structural and mechanical systems. Findings of Fact 10,11,15,19,20.

The Court holds that Defendant did not breach the terms of the contract. Defendant conducted a diligent inspection and found the structural system to be in good condition. Finding of Fact 16.

Defendant and Plaintiffs did not contract for Defendant to determine whether an odor indicating burnt wood existed in the house. Plaintiffs has not shown by a preponderance of the evidence that the house is structurally compromised. Therefore Plaintiffs breach of contract claim must fail.

III. Conclusion

Accordingly, Judgment shall enter in favor of Defendant as against Plaintiffs on all Counts of Plaintiffs' complaint.

SO ORDERED.

Eugene W. Beaulieu
U.S. Magistrate Judge

Dated on March 18, 1998.