STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S852-98 CnC

LORNE LAVINE)
)
v.)
)
H. WILLIAM KOCH, JR.)
and DORIS KOCH)

CHITTENDEN COUNTY CLERK
FILED IN CLERKS OFFICE
MAY - 3 2000
DIANE A. LAVALLEE
CLERK

JUDGMENT ORDER

The above-entitled action came before the Court for a bench trial on January 13 and 14, 2000. After considering all of the evidence, the Court finds in favor of Plaintiff. As such, the Clerk is expressly directed to enter judgment for the Plaintiff.

IT IS THEREUPON ORDERED, ADJUDGED AND DECREED, that judgment is hereby entered to the Plaintiff, Lorne Lavine.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that there is due to the Plaintiff the following sums:

Damages in the principal amount of $36,500.00, attorney's fees in the amount of $10,000.00, costs in the amount of $150.00, prejudgment interest on $26,500.00 from October 1, 1998, totaling $4,826.63, for a sum total of $51,476.63, plus interest running at a per diem of $12.00 from the date written below.

Dated at Burlington, Vermont, this 3 day of ~~April 2000~~ May 2000.

Superior Court Judge

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STATE OF VERMONT
Chittenden County, ss.:

SUPERIOR COURT
Docket No. 852-98 CnCv

LORNE LAVINE

v.

H. WILLIAM KOCH, Jr. and
DORIS KOCH

FINDINGS OF FACT, CONCLUSIONS OF LAW AND NOTICE OF DECISION

FINDINGS OF FACT

1. Plaintiff purchased defendant Doris Koch's house in October, 1996, for $230,000. He claims that substantial structural rot existed in the house at the time of the sale, and that defendant sellers knew of the problem, had a duty to reveal it, but failed to do so.

2. Defendants are a retired couple, who moved up here from Princeton, New Jersey, as their children had attended college in this area, and now resided here.

3. Defendant husband, William Koch, had an interest in house construction, but had never actually engaged in carpentry or the building of houses professionally. The Koches knew what they wanted for their

retirement home, and the husband sketched out their wishes on several ordinary 8 ½ x 11 sheets, including a floor plan and side view.

4. The Koches took these sketches to one Clem Noel, a carpenter and housebuilder operating out of the Waterbury area. An agreement was reached for Noel to serve as carpenter/framer for the construction of the new house. No general contractor was appointed. Instead, Mr. Koch engaged in fairly close oversight of the job, and paid each trade directly. The construction evidently proceeded smoothly, and by the end of 1985 the couple were able to move in.

5. The original site included enough acreage that the Koches engaged in some subdivision. Two lots were subdivided, and houses constructed and sold by the Koches. Evidently, Mr. Koch oversaw construction of these dwellings as he had his own. Then Koches probably made $10-20,000 on each of these two dwellings when they were sold. A fourth lot was planned, but subdivision approval was not obtained.

6. They lived in the house for more than ten years, evidently without major repairs being done. Some rot developed on the south-facing deck, which was remedied by addition of pressure treated boards. An angled buttress which supported the deck at the southeast corner was removed, and replaced with a vertical support post. A window was added in the southwest corner of the house.

7. In November, 1995, a drilled well was installed on the site. This improvement required 650 feet of drilling. With accompanying backhoe work, the improvement cost over $11,000. It was necessitated by the previous dry summer, which Mr. Koch testified had barred him from washing his auto. The well installation necessitated dealing with an existing cistern, which had stored water from the previous, shallow well source. That cistern was immediately adjacent to the northern wall of the house. It

was in this area that the well drillers removed trim board and replaced the same with new wood. Those well drillers brought the new supply pipe and associated electrical cable into the house by the sill plate along this northern foundation wall.

The court draws the inference from this expensive well installation that the Koches, in November and December 1995, intended to continue living in their home. It is certainly an expensive improvement for a couple that planned to sell and move.

8. Within six or seven months, the Koches are dealing with one Nancy Jenkins, a local real estate agent. She is well known as such an agent. Based on her advice, they list the house for sale at $305,000, June 19, 1996, and sign a twelve month exclusive listing contract. They leave for a trip to British Columbia. After their return from B.C., in the summer of 1996, they hire one Fred Blais to appraise the house, "for insurance purposes." Although he was not sure, Mr. Koch recalled that Blais might have appraised the house for $275,000. Some weeks later, the Koches have terminated their relationship with Jenkins, although they remain effusive in their praise of how warmly that relationship was terminated. Such was offered, gratuitously, two or three times during trial.

9. In September, 1996, the Koches commence a relationship with one Bill LaPorte of the Lang Agency, to market their house. This listing was for $234,500, a 23% reduction from the June price with Jenkins. Put differently, the house price was reduced $70,000 over three months, and $40,000 from an appraisal figure only two months old.

Mr. Koch explained this precipitous decline by noting that their grandson was recruited to play hockey for the University of Michigan, and they would therefore be traveling often to see him play in that state. While the court never underestimates the enthusiasm of grandparents, it seems nevertheless an unexplained and very substantial drop in the price of the

house. Something happened, from the installation of the well in November, to the eventual sale in October, to make the Koches very willing to sell out at any price.

10. Plaintiff, a dentist, signed a contract to purchase the house in early October, for $230,500.

11. While he viewed the house, Mr. Koch regaled plaintiff with details concerning the house's construction features and unique attributes.

12. Plaintiff's contract gave him the right to have the house inspected, including the right to back out of the deal should the inspection reveal substantial problems. Plaintiff hired one McKenzie to do the inspection. That person prepared a sixteen page form report, which noted a number of problems. It noted rotting in the deck, around the kitchen window, at an interior southwest corner, and at trim on the southeast corner. The total of repairs estimated by McKenzie were about $1,500, and plaintiff used the report to obtain a $500 reduction in the contract price. The McKenzie report noted that it was non-intrusive, hence no components were removed to view what might be underneath.

13. The sellers themselves had completed a form disclosure, called "Seller's Property Information Report," on a local real estate agent form. They maintain all the information was entered onto the report by real estate agent Jenkins, although Doris Koch clearly signed it as title holder to the property. That Report had a number of areas which could be checked to indicate problems, such as "windows," "exterior walls," etc. No problems in "Structure/Components" were noted.

14. The only real discussion between buyer and sellers revolved around repairing the outside deck and replacing certain "lolly columns" in the cellar with more permanent fixtures.

15. The Spring after plaintiff moved into the house, 1997, he contacted two different carpenters about repairing the deck rot. Both advised him that the deck could not be repaired, but instead should be replaced. What plaintiff had assumed was a $750 repair, was now a $5,000 item. Also, by that Spring, the glass sliding door would not slide open.

16. Plaintiff eventually hired the Reed brothers, experienced carpenters, to make his deck repairs. They quickly saw that the exposed deck problems were neither the only nor even the more serious problems. When the Reeds pulled the deck off the house, they saw the bottoms of the 2 x 6 studs were rotted. They then removed the rim plate between the deck and the house, exposing more rot previously hidden.

17. Most of the sill around the foundation, upon which the studding is mounted, was rotted and required replacement. The "header" or lintel supporting the sliding glass doors was rotted, requiring replacement. A good deal of the pine casing around the sliding door was rotted. That casing cannot practicably be replaced, necessitating replacement of the entire door. Floor joists had to be reinforced where the ends had rotted.

18. The Reed brothers worked from August 6 through early September on the repairs. We find their work to have been reasonably necessary and reasonably priced–$31,000. They replaced rotted windows and the sliding doors with Andersen, which was roughly comparable to what had been there.

19. Beyond the structural rot previously summarized, the Reeds found significant evidence pointing to the fact that the rot had been, literally, uncovered previously. A good deal of the trim around the base of the house was relatively new. It was not at all rotted, although directly adjacent to and touching thoroughly rotted sills. This new trim had been attached with relatively long, 3 ½" nails, although only tacked along the top, the only

places any nails would hold. Normally, wide trim boards such as those involved would be nailed both above and below, to prevent them from warping. The strong inference drawn by the Reeds, and which the court finds persuasive, is that this trim board had been replaced relatively recently, by someone who had realized the rot existing underneath the trim.

Indeed, the Koches stated that the trim board had been replaced by the well driller, the December before they sold the house. Mr. Koch made a big point of describing how the well driller had been able to staple electric conduit to the inside of the sill plates that December. In other words, Mr. Koch, a retired homeowner interested in the construction process, was quite attentive to what the well driller was doing.

Given these facts, we draw several inferences. First, well drillers do not generally engage in carpentry repairs on their own volition. They are hired to drill and install wells and associated equipment, such as supply lines and electric pumps. If some small repair is necessary to keep the customer happy, the well driller would presumably do it. But it seems quite unlikely that the well driller would take the step of supplying new trim boards and installing them–work presumably outside the scope of his contract--without telling the otherwise attentive homeowner "Look, we have to get new trim pieces, because the old ones are wholly rotted, from contact with the rotted sills beneath."

If the sill plates were as totally rotted as the Reeds described in July 1998, which testimony we find credible, they were probably exhibiting substantial rot in late 1995. By that time the house was already ten years old. Rot is progressive, rather than sudden.

20. There is other evidence that rot problems had been uncovered by the Koches. On the southeast corner of the house, after the deck was removed, the Reeds uncovered some corner posts which constituted very unusual construction. PL EX 5. While the corner post of a 2 x 6 studded house would normally consist of several 2 x 6 members, here, there was a pressure treated post. It is not normal to see pressure treated lumber used in

framing, as framing is not normally exposed to moisture. The pressure treated post, obviously installed vertically, is accompanied by another piece of post, apparently derived from the same piece, laid horizontally along the foundation sill, although not long enough to reach the end of the foundation segment. Above that horizontal post section, is jammed in a painted post, which supports a pressure treated "lintel," (description of Marcel Beaudin), which in turn props up badly rutting header supporting the sliding glass doors.

We accept plaintiff's proposition that this obviously jury rigged repair is not original to the house, and probably within the awareness of its owners.

Mr. Koch offered an explanation that this particular section of wall had been removed on several occasions to permit access to the basement for pouring cement, introducing long sections of copper pipe, etc. That is not germane to the ultimate question of whether the post was jammed against a pressure treated plank, to shore up a sagging corner and rotting structural members. Finally, Mr. Koch's major point is that some plywood sheathing showing in PL EX 5 photo was not their while he and his wife lived in the house, as there was no plywood sheathing anywhere in the basement. That point might well be correct. It was never fully explained, but we know that after the Reeds exposed the unusual posts, there was some delay. The plaintiff notified defendants of what had been found; the plaintiff had to locate financing to make the repairs. We assume he was reluctant to leave a large hole in his cellar, through which animals could enter the house. So we are not surprised to see a new piece of plywood nailed to the inside. We conclude that Mr. Koch's explanations all evade the real point of the unusual posts.

The more probably inference is that the posts, jammed into place to support a pressure treated "lintel," which in turn supports a rotting structural member, constituted a hidden, short term repair. By using a pressure treated section of 2 x 6, (piece "D" in EX 5A), under the rotting header, (piece F), further rot can somewhat be forestalled, as that type of wood will

better resist the spread of rot, although only in the short term. (Thomas Reed testimony).

21. The Koches knew of substantial rot problems in the framing of the house when the sold in 1996. That is the reason they sold the house when they did and the reason they dropped the price almost 25 % in order to accomplish a quick sale. Although a minor point, it seems that is also the reason they walked away from a subdividable lot both quickly and for very little money.

They did not disclose this hidden defect.

22. The court is not persuaded by the explanation that the house was sold because they would be making several trips a year, of ten-day duration, to Michigan to watch a grandson play hockey there.

23. The repair work of the Reeds fixed the symptoms, but not the cause of this house problem.

Some of the rot may have been caused by water splashing off a poorly designed deck. Some may have been caused by wooden boards too close to the ground, which would thereby wick up moisture. But a good deal of the rot damage occurred away from both the deck and the ground. Above the kitchen window, there was rot as far as eight feet high. Tyvek weather sealing paper showed moisture damage all around the house. The house–although generally well insulated--is prone to developing ice dams on the roof. The house–perhaps because of its sleek and modern design--has virtually no roof overhang, thereby permitting rain to be lashed against the full extent of the walls, and to run off the roof directly onto the walls. At the time plaintiff purchased, it did not even have eave gutters to remove rain water running off the roof.

Clearly the rot problems are the result of water. What percentage came up from the bottom or down from the top is beyond our ability to determine. Plaintiff offered credible evidence that the roof, and its inade-

quate soffit ventilation, constitutes a probable and substantial source of the problem.

From the available testimony, we conclude that additional work–on the roof and its ventilation/insulation system--will have to be done to repair the cause of the problem (structural rot) which were not revealed. Mr. Reed estimated the cost of the roof work at $10-20,000.

24. The chimney needs repair. Its bricks are loose, the mortar between them cracked, the cement cap leading up to the flue tile also cracked. Mr. Reed thinks it needs to be taken down to the roof line and re-bricked. He estimates the cost at $350. Again, we find Mr. Reed credible. The evidence also shows that a silicon sealer was applied around the flue and on some cracks in the cement cap. This is an amateur solution to a problem, really no solution at all. Hence, the Koches probably knew that the chimney was not perfect.

We cannot find, however, that the Koches knew either that their apparent silicon cure was improper, or that the bricks, mortar and cap problems existed during their ownership of the house, to the extent showed by the photo in evidence, or to the extent that it should have been revealed to purchasers.

25. We are persuaded that the $31,000 paid to the Reeds was reasonably necessary to cure the structural infirmities present in the house at the time of purchase, known to defendants, and not revealed. We are further persuaded that $10,000 will have to be paid to repair the roof and related insulation system, to prevent recurrence of the structural damage.

CONCLUSIONS OF LAW

1. The foregoing facts are largely uncontested. What was, ultimately, contested was more the inferences to be drawn from those facts. In

finding facts, we have been clear in separating evidentiary facts from the few inferences we have drawn. All facts stated above, including the inferences, were proved by clear and convincing evidence.

2. Vermont recognizes the tort of negligent failure to disclose. Pearson v. Simmonds Precision Products, Inc., 160 Vt. 168, 170-73 (1993). Under negligent failure to disclose

> A party to a business transaction has a duty to exercise reasonable care to disclose to the other party the following information before the transaction is consummated:
>
> > (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
> >
> > * * *
> >
> > (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, ... or other objective circumstances, would reasonably expect a disclosure of those facts.

Id., 160 Vt. at 170-71, quoting Restatement (Second) of Torts §551(2) (1977). Comment j to Clause (e) includes Illustration 3 regarding which facts are basic to the transaction:

> A sells to B a dwelling house, without disclosing to B the fact that the house is riddled with termites. This is a fact basic to the transaction.

We conclude that the failure to disclose structural rot is fully equivalent to

the existence of termites. Nondisclosure once there is a duty to disclose is "subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose..." §551(1). Hence, it the same as negligent misrepresentation (§552).

3. Negligent misrepresentation need be proved only by a preponderance of the evidence.

4. The duty to speak, based on superior knowledge, can arise for a seller of a home. Silva v. Stevens, 156 Vt. 94, 103 (1991). Such a duty would arise where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser. Id. Here, the material fact is existence of substantial rot in structural members. A purchaser knows that rotten structural members cannot be tolerated, for eventually the house will sag and worse. Hence, if they exist, they must be repaired. Such repairs can be expensive. That fact of structural rot is not within the reach of observation of a prospective purchaser, because it is hidden under clapboards or trim boards.

5. If there is proof of intentional misrepresentation, there is adequate evidence to support each element of negligent misrepresentation. Silva v. Stevens, 156 Vt. at 103 n. 2.

6. This is a case against a husband and wife. Most of the evidence related to the husband's knowledge of the house or participation in its construction, repair or improvement. Title was actually held in the name of the wife. We conclude that the evidence is sufficient to support a judgment against both.

The wife signed the disclosure form filled out by the first broker, Jenkins. She also participated in the pricing decisions, which permit an inference of knowledge of serious problems from their precipitous, other-

wise unexplainable drop.

The husband put himself forward as the person to deal with, regarding the physical attributes of the house. He had the knowledge and failed to communicate it.

In sum, both spouses had knowledge of the problems and participated in its concealment. They are jointly liable.

7. We specifically decline to find that plaintiff was, himself, somehow negligent in failing to uncover the rot. He hired a professional inspector. As a matter of law, such a step constitutes reasonable diligence.

8. Plaintiff should not be able to recover the cost of repairing the deck. It was both open, clear and negotiated that the deck had rot problems. It was up to plaintiff as purchaser to accurately assess the nature, extent and cost to repair the problem that was literally and figuratively out in the open.

9. It is plaintiff's burden to prove its damages, but those already remedied and those still remaining to be remedied. When plaintiff presents credible evidence of a remaining, necessary repair of $10-20,000, what should the court do? We must conclude that that range constitutes the range from the probable to the possible. It would be error to charge the upper figure to defendants, as there is no showing that it will probably cost an additional $20,000 to eliminate the moisture sources. Similarly, it would be error to take some figure in the middle, without evidentiary support that the intermediate figure represents the more probable cost. We must therefore award the low end of the range, although we find the witness credible..

10. We reject plaintiff's claim of negligent design. To the extent Mr. Koch was the designer of the house, which would be stretching the term to use it at all, he designed it for his own use. He owed no duty to any other person, for work he did in 1985 to build a house for his wife and himself, in which they lived for the next ten years.

11. We decline to award punitive damages. Plaintiff paid $230,000. He will have to pay perhaps $40,000 in repairs. But once the house is fixed up, it is apparently a $300,000 house. An experienced real estate agent listed it at such a price, and her goal was presumably a quick sale. Moreover, the payment of this judgment will probably be a substantial issue for defendants, a retired couple. Although we have been convinced of substantial concealment, it did not involve issues of personal safety.

12. We decline to make any award under Vermont's Consumer Fraud Act, 9 V.S.A. §2451, et seq. In order to recover under that Act, the plaintiff must "recover from the seller," 9 V.S.A. §2461(b). A "seller" is defined as "a person regularly and principally engaged in a business of selling goods or services to consumers." §2451(c). Defendants here are a retired couple, they were not regularly or principally engaged in any business. The fact that Mr. Koch was the entrepreneur for two additional houses adjacent to the subject house, over a ten year period, on which some profit was earned, does not alter our thinking in this regard. The construction of those homes occurred and was completed some years ago. It was not directly related to the sale of defendants' sole and principal residence, which is the subject of this action. Mr. Koch is not a seller, within the definition of the Act, nor is his wife.

NOTICE OF DECISION

Plaintiff should be awarded $41,000, with interest on the $31,000 already paid, plus costs. Counsel to submit proposed form of judgment.

Dated at Burlington, Vermont, January 19, 2000.

Judge