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Home inspector warned of moisture in basement

Purchasers still bought, but later sued vendors

Judge found plaintiffs didn't pay sufficient attention to report

Who is responsible for water leaking into a basement when it is discovered after closing?

How can purchasers protect themselves when the basement looks dry during an inspection?

What is the vendor's liability when the lower level of a house becomes a wading pool the day after closing?

In the summer of 1999, Margaret and Steven Gallagher signed an agreement to purchase a house on Kindle Court in Ottawa from Glen and Nancy Pettinger.

The agreement was conditional on a home inspection, which was performed a few days later by Paul Bouzanis. His report indicated that the basement showed evidence of moisture penetration and that future repairs might be required.

At the same time, the vendors delivered a Vendor Property Information Statement (VPIS) to the purchasers. (These disclosure forms are not typically used in the Toronto area.)

On the form, the Pettingers noted that the lot and basement had flooded twice during heavy rainstorms in 1987 and 1991. They wrote that the basement was "damp," but that they were unaware of any moisture or water problems there.

As luck would have it, Ottawa had 18.6 millimetres of rain during the two days before closing on Oct. 1, 1999, and heavy rains earlier in September.

When the Gallaghers took possession, they noticed that the basement carpet was "squishy" and there was two inches of water near the basement's north wall. When they removed the rug and wall panelling, they discovered mildew and rotted wood, indicating that water seepage had been occurring for some time.

The Gallaghers sued the Pettingers, claiming that the information they put on the VPIS disclosure form was a negligent misrepresentation, and that the vendors were aware of, but concealed, a serious water problem in the basement.

At trial, the vendors denied any knowledge of water problems, and their evidence was supported by their two daughters, one of whom slept in the basement for several years during the 1980s. Even the family cleaning lady, Ruby Par, testified that she did not notice any water problems when she cleaned the house the day before closing.

After closing, the Gallaghers renovated the house to the tune of more than \$200,000 and sued the vendors for almost \$33,000, representing what they allocated to the cost of repairing the water leak.

This included extensive demolition, exterior excavation around the basement walls, installing new drains and major interior renovations to repair the water damage.

After reviewing the costs, the trial judge calculated the actual losses to be \$17,628.

The trial judge found that the water leakage was a latent, or hidden, defect, and not readily observable during a routine inspection.

After listening to the evidence, he expressed the belief that the vendors did not know of the defect and did not take steps to conceal it. (For another "latent defect" case, see the nude beach case, Title Page, April 26, 2003, at <http://www.aaron.ca>.)

The judge also determined that the Pettingers did not make any negligent misrepresentations as to the water problems.

In fact, they had indicated that the basement was damp and had flooded during two previous storms. That, said the judge, should have put the purchasers on notice that when the lot flooded, the basement may have been affected as well.

When the home inspector, Paul Bouzanis, testified at trial, he noted that soil surrounding a house could become saturated and even a small amount of additional rainfall can cause flooding to occur.

As a result, it would be possible for the flooding to have occurred after the vendors moved out of the house.

When he released his ruling in February, Justice Robert J. Smith dismissed the Gallaghers' claim against the Pettingers.

He noted that the purchasers had obtained a home inspection before waiving the condition.

That report showed possible water problems and indicated the type of repairs which might be required.

As a result, any reliance the Gallaghers made on the Pettingers' disclosure would have been transferred to the home inspector.

Responsibility for the condition of the house had switched to the home inspector.

Purchasers who want to protect themselves from home defects should ensure that warranties in their agreements of purchase and sale are drafted very carefully.

They should also ensure that they pay close attention to their home inspection reports.

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