

Construc



Date: November 17, 1997
Docket: 31523
Registry: Kelowna

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN:

REINHARD and UTE SENNE

CLAIMANTS

AND:

BRIAN TAYLOR

DEFENDANT

AND:

THE REGIONAL DISTRICT OF CENTRAL OKANAGAN

THIRD PARTY

REASONS FOR JUDGMENT

OF THE

HONOURABLE JUDGE B.C. WEDDELL

Appearing for the Claimants:

David Habib

Appearing for the Defendant Brian Taylor:

Brian Taylor in person

Appearing for the Third Party

Regional District of Central Okanagan:

Nanette Quibell

Place and Date of Hearing:

Kelowna, B.C.
October 24, 1997

The history leading up to the commencement of this action is as follows. In 1989 the defendant Brian Taylor owned property that was within the boundaries of the Regional District of Central Okanagan. He owned the subject property of this action therein and was desirous of commencing a building thereon and proceeded to do so. He applied for and was granted a building permit for that purpose. He hired a contractor to build the dwelling for him, and construction proceeded and was completed in 1991 when on September 18, 1991 the final inspection report for the construction of the property was issued. Mr. Taylor applied for the building permit in his own name and thus became his own contractor and hired a sub-contractor for the construction. Mr. Taylor had submitted the plans of the dwelling he wished constructed to the Regional District and received their approval thereon and the construction commenced. In late 1989 or 1990, there was what purported to be a "final inspection" of the property done by officials of the Regional District.

Mr. Taylor sold this property in October of 1993 to people called Haworth. The Haworth's occupied the property until they sold it to the claimant herein in 1994. The claimant hired a contractor in the spring of 1996 to extend the roof on the property and to finish the basement area of the residence, which at that time was a concrete basement in an unfinished condition with a slab floor. When the contractor hired by the Senne's proceeded to do the work, he discovered damp areas or evidence of excessive moisture, and on further investigation, discovered that the house had been completed without installing drain tile around the basement foundation, as was called for in the original plans for which a building permit had been issued to Mr. Taylor in November of

1989.

Mr. Taylor testified that during the time of his occupancy of the premises he did not experience any water difficulty or moisture problem of any kind and was not aware of any such problem until he received notice of this action against him, which was commenced on May 30, 1996.

Evidence was given that after the construction had been completed by Mr. Taylor, the landscape above his property had changed as a result of a subdivision and further building lots and alterations to the land taking place above him, and the building had been altered by alterations while it was owned and occupied by the Haworths.

The claimants have thus commenced this action against the defendants on the basis that the water problems existing were the result of the negligent activities of either Mr. Taylor, the original contractor, or the officials of the Regional District who have taken third party proceedings herein.

The general contractor hired by Mr. Taylor was not made a party to this action, nor was he or anyone who worked for him at the time called as a witness. The Haworths were not called as witnesses, nor were they made parties to this action.

What must be determined in this action is to whether or not Mr. Taylor had a duty of care to the Sennes; that he breached that duty; and that damages resulted.

The evidence clearly establishes that there was in fact no drain tile installed around the perimeter of the basement of this property and that the Sennes did excavate and install the same, which cured the problems. They seek compensation for the costs of doing that work as a result of the breach of a duty of care and/or the negligence of the officers of the Regional District.

The Regional District, the third party herein, takes the position that if there were any deficiencies that caused the damage, the Regional District is to be indemnified by Mr. Taylor by virtue of the provision of the original building permit issued in 1989 which provided, in part, as follows:

"In consideration for the granting of this permit, I agree to indemnify and keep harmless the Regional District of Central Okanagan and its employees against all claims, liabilities, judgments, costs and expenses of whatsoever kind, which may accrue against the said Regional District in consequence of, and incidental to, the granting of this permit."

That permit had earlier provided as follows:

"The granting of this permit does not relieve the applicant, occupier or owner from conforming to all requirements of every pertinent by-law and regulation enforced within the Regional District of Central Okanagan and the approval of any plans or specifications in support of an application for this permit likewise does not excuse the applicant, occupier or owner from conforming to every by-law and regulation."

There can be no argument in this case that the drain tile was not installed originally and, likewise, there can be no argument that the plans originally submitted, for which the building permit was issued, did contain provision for the installation of such drains.

Called as a witness by the defendant was Mr. Ray Patterson who is the chief building inspector for the Regional District and has been since 1993. He has been an building inspector in several municipalities in the Province of British Columbia, and has extensive experience in that area from 1980 until the present. It was also part of his duties to check compliance with the by-laws of the Regional District and see to the compliance and supervise the inspectors of the construction. Mr. Patterson testified that he had inspected the subject property in this action after a water problem became evident to the claimants when they were in the process of carrying out their renovations.

Mr. Patterson testified that a building inspector has discretion to exempt from installation matters that are shown on the plans thereof. Specifically he testified that a building inspector could exercise that discretion and dispense with the requirement for the installation of drain tile on a basement foundation. He testified that such discretion had been exercised in the areas under his jurisdiction and would be exercised in certain areas throughout the Regional District depending on the conditions.

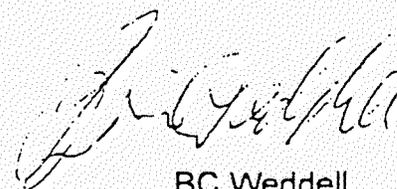
In this case, as in all civil cases, the burden of proving a claim rests upon a claimant who must establish the claim on a balance of probabilities. The difficulty faced by the claimant in this case is that he is proceeding against a defendant with whom he had no discussions, contractual relationship or communication in respect of the matter at all.

Mr. Taylor testified that he did not supervise the construction of his house and relied on the contractor he had hired for that purpose. As I indicated earlier in these reasons, there was no representative of that contractor called to testify, nor indeed was there any evidence given as to any discussions between the contractor or his agents or the building inspector of the day who inspected the property, nor was there any evidence given with respect to whether or not the building inspector had exempted this contractor from installing the drain tile. The evidence indicates that the building inspector had that power should he chose to exercise it.

Similarly there is a lack of evidence as to the actual cause of the water difficulties the claimant finds himself facing. There was evidence of renovations to the existing building and further subdivision development, and building above and beside the existing property.

Based on that evidence and those conclusions, therefore, I find that the claimants have not established any claim against the defendant, and it also follows that his claim against the third party Regional District also must fail. The claimants' claim is therefore dismissed.

Kelowna, BC
November 17, 1997



BC Weddell
Provincial Court Judge