Date: 19981027
Docket: 22426
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

JOHN MARTIN SWAGAR and MARTINA PAYNE-SWAGAR

PLAINTIFFS

AND:

PIERRE HUBERTUS VEK, MARIA WILHELMINA VEK and CITY OF KAMLOOPS

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BLAIR

(IN CHAMBERS)

Plaintiffs Appearing on Their own Behalf.

Counsel for the Defendant City of Kamloops: L. S. Marchand

Place and Date of Hearing: Kamloops, B.C.
October 23, 1998

[1] The Plaintiffs, John Martin Swagar and Martina Payne-Swagar, on July 15, 1994, purchased a residence in the Barnhartvale area of Kamloops from the defendants, Pierre Hubertus Vek and Maria Wilhelmina Vek ("Mr. and Mrs. Vek"). The Plaintiffs claim serious deficiences led them to abandon the residence ("the residence") some 14 months after purchase and they seek damages from the vendors, Mr. and Mrs. Vek, as well the defendent City of Kamloops ("the City"). The City applies pursuant to Rule 18A of the ***Rules of Court*** for an Order dismissing the action against it.

Background

[2] Although earlier represented by counsel, Mr. Swagar and Mrs. Payne-Swagar, who reside in Alberta now, act for themselves in this action. The City's Rule 18A application was filed January 15, 1998, and the hearing of this application was peremptory upon the Plaintiffs, it having been adjourned on several earlier occasions at the Plaintiffs' request. The Plaintiffs filed no affidavit material in response to the City's application. Counsel for the City advised that counsel for Mr. and Mrs. Vek took no position in regard to the City's Rule 18A application.

[3] The Plaintiffs both made submissions which did not respond particularly to the City's application, but canvassed the difficulties which they found with the residence purchased from

Mr. and Mrs. Vek as well as the personal and financial problems they have suffered as a result of their purchase. The Plaintiffs advised that in 1995 they abandoned the residence after finding it contained major structural, foundation, heating, electrical, plumbing and other deficiencies. After their departure, they said the home was condemned and the property sold, leaving them owing approximately $70,000 to the banking institution which financed their purchase. They commenced this action on April 20, 1995, seeking to recover their losses. I do not draw any conclusions as to the legitimacy of their complaints, but I accept that the experience has been exceedingly stressful for them, particularly Mrs. Payne-Swagart. I include their perspective of the situation to provide background to this action.

[4] The Plaintiffs claim against the City for negligently inspecting the residence. The residence in Barnhartvale consisted of a trailer and carport erected in 1970 by Robert Way, three years before Barnhartvale was amalgamated into the City. Mr. and Mrs. Vek subsequently acquired the residence and in 1985 and 1986 obtained two building permits for two additions to the residence which were later inspected to ensure compliance with the city's building regulations. The inspections dealt only with the new additions, the foundations for which were independent of the foundations of the original residence. The Plaintiffs completed the purchase of the residence on July 15, 1994, and only later sought a report on

whether the residence complied with the building bylaws. The Plaintiffs encountered problems with the home shortly after purchase and retained David Ouellette, then of High Country Home Inspection Services, to inspect and report on the residence. I find Mr. Ouellette's inspection occurred September 30, 1994, with his report prepared and delivered to the Plaintiffs the same day. The report outlined serious difficulties with the residence's roof, plumbing, electrical system, foundation, heating and structure.

[5] The City claims the Plaintiffs' claim is barred under the ***Municipal Act***, R.S.B.C. 1996, c. 323, for failing to commence this action against the City within the six month time limit provided by s. 285 and for failing to provide written notice of the claim as required by s. 286.

Limitation Period

[6] Section 285 (formerly s. 754) of the ***Municipal Act***, provides that actions against the City must be commenced within six months after the cause of action first arose. In building inspection cases, the time has been construed as commencing to run when the Plaintiffs discovered the damage or when they ought to have discovered it: see ***Ordog v. Mission*** (1980), 31 B.C.L.R. 371 (B.C.S.C.). I am satisfied that the the Plaintiffs on September 30, 1994, learned of the damage to the residence upon receipt of Mr. Oullette's inspection report and

on that date had six months in which to commence this action. The action was commenced on April 20, 1994, some 20 days beyond the limitation period allowed by s. 285 of the ***Municipal Act*** and I find the action is time barred.

[7] The City further submits that it did not receive the notice of the claim as required by s. 286 of the ***Municipal Act*** which provides the notice of a claim must be given to the municipality within two months of the damage being sustained. Mr. Justice Bouck found in ***Ordog (supra)*** that the notice period under s. 286 commences at the same date as the limitation period under s. 285. The ***Municipal Act*** provides in s. 286 (3) that:

> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action if the court before whom it is tried, or, in the case of appeal, the Court of Appeal, believes
> (a) there was reasonable excuse, and
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

The City concedes it suffered no prejudice, but submits the Plaintiffs cannot be excused from their failure to provide written notice as they have failed to produce evidence establishing a reasonable escuse for failing to provide the required notice.

[8] I earlier noted the Plaintiffs failed to file any affidavit material from which I might find evidence of a

reasonable excuse for failing to provide written notice. I find nothing in the the City's material which might assist the Plaintiffs. Even in their oral submissions there is no excuse provided for the failure to start the action or give notice of the claim within the required time limits, other than that the Plaintiffs did not know the law and depended on others to assist them in the action against the City.

[9] Having reached a conclusion contrary to the Plaintiffs with regard to the time limitations imposed by ss. 285 and 286 of the ***Municipal Act***, I will not address the further defence raised by the City in which it submitted that it did not owe the Plaintiffs a duty of care in connection with the allegations and, if it did owe the Plaintiffs a duty of care, it had met the requisite standard of care.

[10] The Plaintiffs' failure to give the City notice of the claim or to explain the omission and its delay in commencing the action against the City leads me to conclude that this action is out of time as against the municipality and the application will be allowed.

[11] The City will have its costs at Scale 3 if demanded.

"R.M. Blair"

BLAIR J.