

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

VITOLD TUSSEY d/b/a)
1ST STATE WATERPROOFING,)
Third Party Defendant Below/)
Appellant,)
)
v.)
)
JENNIFER FINNEGAN,)
Plaintiff Below/Appellee,)
)
v.)
)
KEITH LEVITT,)
Defendant Below/Appellee.)

C.A. No.: CPU4-09-007778

Date Submitted: March 24, 2011

Date Decided: April 21, 2011

MEMORANDUM OPINION

Trial in the above captioned matter took place on February 28, 2011 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence¹, sworn testimony and supplemental briefs filed by the parties, the Court reserved decision. This is the Court's Final Decision and Order.

¹ The Court received into evidence the following items: Joint Exhibit # 1 (Advertisement of Keith Levitt Properties for Sale of a home at 404 Maple Avenue, Wilmington, DE 19809); Joint Exhibit # 2 (Seller's Disclosure of Real Property Condition Report signed by Plaintiff Finnegan and Defendant Levitt); Joint Exhibit # 3 (Agreement of Sale/Delaware Residential Property Essential Terms signed by Plaintiff Finnegan and Defendant Levitt); Joint Exhibit # 4 (Summary Report from Preferred Inspections, Inc. for Client Jen Finnegan for Inspection of 404 Maple Ave., Wilmington, DE 19809 performed on 7-19-07); Joint Exhibit # 4A (Confidential Inspection Report from Preferred Inspections, Inc. for Jen Finnegan Represented by Phil Manolakos for Inspection of 404 Maple Ave., Wilmington, DE 19809 on 7-19-07); Joint Exhibit # 5 (Endorsement to Agreement of Sale Regarding Inspection signed by Plaintiff Finnegan and Defendant Levitt); Joint Exhibit # 6 (Uniform Settlement Statement signed by Plaintiff Finnegan and Defendant Levitt); Joint Exhibit # 7 (Inspection Report, Recommendation and Estimate by 1st State Waterproofing for Plaintiff Finnegan dated 3-25-08 and signed by Defendant Tussey); Joint Exhibit # 8 (Inspection Report and Recommendation by 1st State Waterproofing for Defendant Levitt dated 7-20-07 and signed

I. Procedural Posture

The matter is an appeal *de novo* brought to the Court of Common Pleas pursuant to 10 *Del. C.* § 9571 from the Justice of the Peace Court. Appellant has timely perfected his appeal and has answered the Complaint.

(i) Complaint on Appeal.

The Complaint on Appeal alleges that on August 10, 2007, Jennifer Finnegan (hereinafter “Finnegan” or “Plaintiff”) purchased a property (hereinafter “residence” or “property”) at 404 Maple Avenue, Wilmington, Delaware 19809 from Keith Levitt (hereinafter “Levitt” or “Defendant”). Levitt allegedly certified to Finnegan that the basement of the residence had a properly installed French drain and had Vitold Tussey d/b/a 1st State Waterproofing (hereinafter “Tussey” or “Third Party Defendant”) certify as to such. Finnegan alleges that the property did not have a French drain and that the basement of the residence had extensive water damage. Finnegan further alleges that the cost to repair the alleged defect within the residence was \$9,292.00. Count II of the Complaint alleges that Levitt, as required by the State of Delaware

by Defendant Tussey); Joint Exhibit # 9 (Scope of Work to be Performed and Estimate by Basement Waterproofing Nationwide, Inc. for Plaintiff Finnegan signed by Finnegan); Joint Exhibit # 10 (Receipt from Oakleaf/The Home Depot Dumpster Rentals billed to Jennifer Finnegan in the amount of \$392.00 for a 20 Yard Dumpster with a 3.00 Ton Limit dated 4-7-08); Joint Exhibit # 11 (Copy of the front and back of Check Number 731 from Jennifer Finnegan to Basement Waterproofing Nationwide, Inc. dated 3-27-08 in the amount of \$600.00 notated as “Deposit”); Joint Exhibit # 12 (Credit Card Receipt for John Finnegan signed by such from Basement Waterproofing Nationwide in the amount of \$8,400.00; Citi Dividend World MasterCard Statement indicating a payment to Basement Waterproofing on 4-25-08 in the amount of \$8,400.00; Invoice from Basement Waterproofing Nationwide, Inc. to Jennifer Finnegan in the amount of \$8,400.00); Joint Exhibit # 13 (Proposal for Basement Work from Preferred Environmental Services, Inc. to Jenn Finnegan dated 4-6-08); Joint Exhibit # 14 (Defendant Tussey’s Responses to Plaintiff’s First Set of Interrogatories); Joint Exhibit # 15 (Client Full Report by KW Realty – Wilmington for the sale of 404 Maple Avenue, Wilmington, DE); Joint Exhibit # 16 (Thirty-Seven Color Photographs depicting the condition of the basement during the water problem/demolition/repair; Eight Enlarged Color Photographs depicting the condition of the basement including mud, water on the floor and cracks in the paneling on the wall); Joint Exhibit # 17 (Fax to Phil Manolakos from Keith Levitt dated 7-13-07 regarding the 404 Maple Endorsement to Agreement of Sale Regarding Inspection); Joint Exhibit # 18 (Defendant Levitt’s First Set of Interrogatories Directed to Defendant Tussey; Defendant Tussey’s Responses to Defendant Levitt’s First Set of Interrogatories Directed to Defendant Tussey).

and with knowledge as a licensed real estate salesperson with the State of Delaware, prepared a Seller's Disclosure as required by 6 *Del. C. Ch. 2570*.

Finnegan alleges that Levitt failed to disclose a water problem within the basement and that he allegedly replaced the paneling in the basement of the residence that was damaged by water. Further, Finnegan alleges that as a result of Levitt's failure to disclose the water problems in the basement as he is required to do, Levitt breached the contract with Finnegan and violated 6 *Del. C. Ch. 2570*, which allegedly resulted in Finnegan expending \$9,292.00 to install a French drain in the basement to remedy the issue. Finnegan requests that this Court award the amount of \$9,292.00 in damages plus pre-judgment interest, post-judgment interest, attorney fees and court costs.

(ii) Answer on Appeal.

Levitt through the Answer on Appeal admits that Finnegan purchased the property from him on August 10, 2007; however, Levitt denies that he certified to Finnegan that a French drain was properly installed in the basement of the residence. Levitt further denies that the property had a French drain and that the basement had extensive water damage. Levitt disputes the cost to repair the alleged defect within the residence. Levitt admits through the Answer that he prepared a Seller's Disclosure; however, Levitt denies that he failed to disclose a water problem within the basement and that he replaced paneling in the basement that was damaged by water.

Levitt denies that he breached the contract with Finnegan and that he violated 6 *Del. C. Ch. 2570* causing Finnegan to incur damages in the amount of \$9,292.00 in order to install a French drain to remedy the problem. Levitt requests that this Court dismiss Finnegan's Complaint with prejudice and award Levitt the costs of the action and such further relief as the Court deems just.

(iii) The Third Party Complaint.

Levitt brings a Third-Party Complaint on Appeal in the instant matter against Tussey. In the Third Party Complaint, Levitt alleges that he retained Tussey to inspect the basement of the residence as part of a pending sale of the property by Levitt to Finnegan.

Levitt alleges that on or about July 2007, Tussey provided Levitt with a report that stated that the basement of the residence had a properly installed French drain and that no water problems were observed in the basement. Further, Tussey allegedly recommended that Levitt install a Humidex humidifier to control the moist and stagnant air within the basement. Levitt sold the property to Finnegan on or about August 10, 2007. Finnegan initiated the current action against Levitt, alleging that the residence did not have a French drain and that the basement had extensive water damage. Further, Levitt alleges that if he is found to be liable and/or financially responsible to Finnegan, it will be due to the representations made by Tussey to Levitt regarding the basement of the residence and its condition.

Therefore, Levitt alleges that if he liable to Finnegan, then Tussey is liable to Levitt. Levitt requests that this Court enter an *in personam* judgment against Tussey in an amount equal to that which the Court may determine Levitt is liable to Finnegan plus pre-judgment interest and post-judgment interest at the legal rate, costs of this action and such further relief as the Court deems just.

(iv) Tussey's Answer to Third Party Complaint on Appeal.

Tussey through his Answer on Appeal denies that he was retained by Levitt to inspect the basement of the residence as part of a pending sale of the property from Levitt to Finnegan. Tussey admits that he installed a Humidex humidifier in the basement of the residence in order to

control the moist and stagnant air; however, Tussey denies that on or about July 2007, he provided a report to Levitt that stated that the basement of the residence had a properly installed French drain and that there were no water problems observed. Tussey admits that Levitt sold the property to Finnegan on or about August 10, 2007 and that Finnegan initiated the present action against Levitt, alleging that the property did not have a French drain and that the basement had extensive water damage.

Tussey denies that if Levitt is found to be liable and/or financially responsible to Finnegan that it will be due to his representations made to Levitt regarding the basement of the residence and its condition. Tussey additionally denies that if Levitt is liable to Finnegan, then he is liable to Levitt. Tussey requests that this Court dismiss Levitt's Third Party Complaint on Appeal with prejudice and award him costs of the action and such further relief as the Court deems just.

II. The Facts

Levitt, a real estate salesperson for the past three (3) years, became a licensed real estate agent in the State of Delaware in April 2007. Levitt holds a Bachelor's degree in Psychology/Philosophy from the University of Delaware. In December 2004, Levitt purchased the property at 404 Maple Avenue, Wilmington, DE 19809 through an estate sale from a co-worker at the time, David Ryan. At the time Levitt purchased the property, the home had been empty for several years. Levitt testified that he received no Seller's Disclosure from the owner when he purchased the property because it was an estate sale to which Seller's Disclosures are exempted.

Levitt resided in the residence for just over two (2) years. On or about July 9, 2007, Levitt listed the residence for sale because he had purchased another property. He prepared an

advertisement² for the property in conjunction with the sale. Levitt testified that he had painted the entire residence including the basement during the period of time that he resided within the home. He further testified that a portion of the basement within the home was finished, specifically the basement was paneled when he purchased the property but that the utility area of the basement was unfinished at that same time specifically that it was not paneled.

He performed renovations/minor updates to the basement, in his words “just to renovate” as well as to increase the price of the residence for sale, including painting, installing appliances, pulling down of the ceiling tiles and replacing a piece of drywall on the front wall of the basement. In the course of performing the renovations, Levitt discovered that the drop ceiling of the basement had been stapled to the rafters and that there were no stains or damage to the ceiling tiles. Levitt testified that the basement was five (5) feet below grade and that he observed no mold, mildew and/or leaks during the time that he resided in the home.

Levitt denied installing any paneling in the basement. Levitt further testified that he graded and planted seed in a six (6) foot area along the exterior left wall of the residence. He also stated that in the back of the residence on the exterior was a flower bed and a concrete sidewalk of which concrete abutted the foundation. Levitt stated that he had chalked such.

Levitt testified that he replaced the roof of the residence in July 2007 and that he stored the remaining grey shingles in the basement, specifically in the closet area of the utility room. Levitt testified that he prepared a Seller’s Disclosure³, which is required by law and he conceded that a buyer would likely rely upon it. The Seller’s Disclosure did not indicate any drainage or flooding problems affecting the basement because according to Levitt, he never experienced water in the basement. Levitt further testified that no damage existed in the crawl space of the

² See Joint Exhibit # 1.

³ See Joint Exhibit # 2.

basement and that he completed the Seller's Disclosure to the best of his knowledge. Levitt conceded that he did not initially disclose that he was a licensed real estate agent but that he did disclose such information later on as he needed to update such information. Further, Levitt stated that at the time of the sale of the property to Finnegan, he was a newly licensed real estate agent. Levitt testified that Finnegan's real estate agent knew that he was a real estate agent.

According to Levitt, the residence remained unoccupied for several months prior to the sale. However, according to Finnegan, Levitt informed her that had renters previously in the residence.

Levitt described the first meeting that he had with Finnegan. At that time, the property had been on the market for two to three days. Finnegan approached Levitt at the residence and inquired if she might be able to look around the property. Levitt did not recall if Finnegan had her realtor accompany her on that first meeting. Levitt received an offer for sale of the property from Finnegan in the amount of \$235,000 within a few days of the first meeting, which resulted in a profit of \$44,000 for him. The offer was contingent upon a home inspection.⁴ Levitt was not present for the home inspection but acknowledged that he received a copy of the home inspection report. Levitt testified that he had no further conversations with Finnegan prior to the sale but rather communicated with her real estate agent.

A week later, the home inspection took place. Levitt received a copy of the Home Inspection Report⁵ in which a major deficiency was noted. Levitt stated that he completed the endorsement and sent it to Finnegan's real estate agent. He then received the document back signed by Finnegan. Among other deficiencies that Finnegan sought correction of were the presence of termites, an updraft on the furnace and a ridge vent on the roof. The Home

⁴ See Joint Exhibit # 3 (Real Estate Contract).

⁵ See Joint Exhibits # 4 and 4a.

Inspection Report stated that ongoing moisture penetration occurred in the basement. Levitt testified that he never experienced any water problems in the basement including dampness while he resided in the home.

Levitt then agreed to correct the moisture in the basement⁶ which he believed to be dampness in the crawl space and decided to hire Third-Party Defendant, Tussey to accomplish such. Levitt was referred to Tussey by another real estate agent in his office and contacted Tussey to correct the problem in the basement because he needed a professional to evaluate the condition. Levitt testified that Tussey represented to him that he was a licensed mold and water control expert and Levitt believed that Tussey was an expert.

Tussey arrived to the residence to conduct the inspection of the basement. Levitt did not recall if he provided Tussey with a copy of the Home Inspection Report or did he recall is he informed Tussey that he never experienced any water problems in the basement; however, he later conceded that he did not provide Tussey with the home inspection report. Levitt testified that he would have informed Tussey that he was selling the home and that a sale sign was placed outside on the property.

According to Levitt, Tussey was on the location of the property for approximately five (5) minutes and that Tussey, using a flashlight, looked around and observed the center drain. Further, Levitt stated that he did not limit Tussey's inspection of the basement in any way. Levitt testified that Tussey informed him that he smelled moisture in the basement. Levitt stated that he was unaware of any issue as he had not been residing in the home for months at that time. Tussey then prepared a report based upon his inspection. Levitt received a copy of Tussey's report via facsimile and decided to hire Tussey to install a 1 x 4 foot humidifier in the basement on the rear wall to control the moisture. Levitt testified that he did not tell Tussey to write that

⁶ See Joint Exhibit # 5 (Endorsement to Contract).

there were no water problems in the basement in his report and that Tussey indicated this information in his report voluntarily.

Further, Levitt stated that he did not tell Tussey that a French drain existed in the basement because he was unsure if one did such exist. Levitt denied the existence of any fresh concrete in the basement.

Levitt testified that he did paint the paneling in the basement but did not recall at what exact time that occurred but that it was at some time after he had ceased residing in the home. The staining on the paneling in the basement was present at the time that Levitt purchased the home and that he was unaware as he purchased the home from an estate sale without disclosures. Levitt indicated that some of the window sills and some of the panel boards in the basement were warped.

The next contact that Levitt had with Finnegan was when the parties met at the settlement of the sale. After that, Finnegan's real estate agent contacted him in March 2008, expressing problems with the basement. Levitt advised that Finnegan should contact Tussey in regard to the issues that she was experiencing with the basement. Levitt did not go to the property to observe the issues. Levitt acknowledged that he saw Tussey's report dated 3-23-08 which indicated a problem with the French drain.

Levitt stated that since March 2008 that he has probably seen Finnegan's real estate agent at functions but did not recall if the issue regarding the basement was ever addressed between the two when they saw each other. Levitt testified that he was concerned about the issue that Finnegan was experiencing but that he never received any further contact regarding the issue and that the following contact that Levitt had with Finnegan was when he received notice of the instant litigation.

Bruce Hollingsworth (hereinafter “Hollingsworth”) testified that his mother has resided next door to Finnegan’s residence since 1964. Hollingsworth knew the prior owner of the residence and that he had been inside the residence of Finnegan when it was owned by the previous owner, Thomas Ryan. Hollingsworth indicated that during the time that he was in the residence, the basement had paneling on the walls, excluding the utility room. Hollingsworth is a housepainter who on three (3) occasions during the 1990s painted the ceiling tiles in the residence and observed discolored tiles as well as water stained tiles. Hollingsworth testified that he never observed water problems in the basement of the residence.

Hollingsworth spoke with Levitt and did not recall if Levitt had ever stated to him that there were any water problems in the basement. Further, Hollingsworth observed Levitt take paneling into the basement through a separate entrance. Hollingsworth then stated that he heard the sounds of a saw and hammering coming from the residence and did not recall if he observed Levitt remove anything from the residence around that time. Hollingsworth did not recall a time period in which he observed Levitt perform the abovementioned work and he further testified that he was never inside the residence while Levitt resided there. Hollingsworth indicated that Levitt installed a roof on the residence which appeared to be brown in color.

David Bellerose (hereinafter “Bellerose”), a sales representative for Basement Waterproofing Nationwide for the past six (6) years, was contacted by Finnegan to repair the basement in March 2008. Bellerose testified that his employment entails solving problems when there are water issues. However, Bellerose conceded that he does not perform the work himself nor does he supervise the work being done and that he would not know how to do the work. His method consists of the application of a mineral, sodium bentonite, to the foundational grading which prevents water from reaching the wall.

Bellerose stated that he inspects approximately 100 water issues annually and that his training in this area came from in the field experience. Bellerose's educational background consists of his graduation from a vocational high school in 1963. He further testified that he has experience in working with wood but does not have any formal education in determining the cause of wood rotting. His prior employment consisted of a position in 2004 as a manager of a quality assurance company which did not involve working with wood or carpentry but rather involved the testing of equipment. Prior to that, in 1998 he served as a missionary in Hungary during which time he replaced rotted windows in a century-old building. Bellerose conceded that his current employment is his first experience working in the field of basement water leaking.

He recalled the water issue in the residence and stated that it was serious on the back wall of the basement. He also found water damage to the sill plate and indicated that the water problem had been there for a long time. Further, he stated that he discovered that the paneling in the basement had been damaged and that the side walls of the basement had issues. Bellerose could not indicate exactly where the issue was on the side walls but stated that it could have been mold or damage to the baseboard trim and that the front wall, near the shower, had mold or moisture.

Bellerose removed some paneling from the back wall of the basement and found soil and sediment present and also discovered that the furring strips closer to the ground had been damaged but that there was no damage to the top of the studs. Bellerose explained that it is rare to see water at the top. Further, he also stated that sometimes the water and resulting damage cannot be seen and that he could not recall whether water had been building up in the blocks of the wall specifically.

Further, he stated that the basement was damp and mud was present but there was no standing water in the basement at that time. Bellerose did not recall the condition of the windows in the basement and also did not recall the grade level of the basement or if the basement was below grade. Bellerose stated that there was no other floor system in the basement of the residence.

Bellerose indicated that the key element in water issues is frequency, not so much time and stated that the water issue in the residence was ongoing for some period of time. Bellerose further stated that the water issue was a problem on three (3) walls of the basement in the residence and that the cost for such repair was essentially the same as the cost for repairing the entire basement. He conceded that he could have corrected only one (1) wall but that repair would have been more expensive and that evidence on the remaining walls indicated a problem to him. He indicated that the cost of repair is for the most part, a set charge of \$70.00 per linear foot. According to Bellerose, the correct way to remedy a water issue is to apply sodium bentonite to the foundation.

Bellerose acknowledged that exterior conditions can contribute to water issues such as grading level and rain gutters. He testified that he inspected the outside of the residence but did not recall what he found.

Finnegan, according to Bellerose, did not provide him with a copy of the Home Inspection Report. Bellerose provided Finnegan with an estimate for the repairs in the amount of \$9,000.00. Bellerose conceded that he is paid 100% commission for the work. Finnegan retained Bellerose to perform the work and upon completion of the work, Bellerose had no further dealings with Finnegan.

Amanda Frick (hereinafter "Frick") resides in the residence with Finnegan. Frick and Finnegan became roommates in August 2007. Frick moved into the residence after settlement. Frick acknowledged that she was in the basement at times in order to use the washer and dryer. Frick recalled the incident occurring in the basement in March 2008 which gives rise to the instant lawsuit. Frick stated that on that day it had been raining a lot and that there was water everywhere in the basement, specifically in front of the steps leading down to the basement and in the area of the basement to the right of the utility room but not the entire basement. The carpeting in the basement was wet and soaked. Frick could not determine where the water was coming from initially but later discovered that it had come from the back wall of the basement.

In response to Finnegan's hiring of Bellerose to remedy the situation, Frick assisted in demolition of the basement in order for Bellerose to complete the repair. Frick stated that the paneling in the basement was easy to take off and that it was not in good condition, specifically that it looked old. According to Frick, most of the paneling was warped at the bottom, the basement walls were discolored and black and green mold was present on all of the basement walls. Frick, Finnegan and two other friends demolished the basement in preparation for Bellerose to make the repairs. Finnegan rented a dumpster in order to remove the debris from the demolition.

Frick and the others removed the paneling from the walls using sledgehammers and hammers. According to Frick, the carpet that was in the basement was disposed of and part of the shower remained, specifically the tile. Frick stated that the bathroom was not paneled and did not think that paneling was present in the utility room. After Bellerose made the repairs to the basement, Frick stated that they have experienced no further water problems in the basement since that time.

John Finnegan (hereinafter “John Finnegan”), father of Plaintiff Finnegan, described how he discovered the property. He stated that his daughter, Finnegan was in the market for a house and that he saw the advertisement⁷ on the Internet for the residence. He suggested for his daughter to look at the residence. John Finnegan was present with the realtor at the time of the home inspection performed by Preferred Inspections. He walked through the residence with the realtor and stated that the inspection took approximately two (2) hours. He testified that as a result of the home inspection, some issues with the residence presented such as the sill plate rotted around the hot water heater, the presence of termites, paneling split and an updraft on the furnace.

Finnegan further stated that he observed water damage near the steps in the basement, specifically in the crawl area in which the tile had dry mud. He also discovered an unopened package of shingles in that area, which he stated were the same shingles used in the application of the new roof on the residence. John Finnegan recalled seeing and reading the entire Home Inspection Report.⁸ He stated that he did not necessarily understand the recommendations in the report and as a result, he took the report to Finnegan’s realtor. An endorsement to the contract⁹ was prepared by Finnegan’s realtor which John Finnegan saw and reviewed the document with his daughter prior to her signing it. He further stated that he was relying upon the expert’s recommendation that all that was needed to cure the issues was included. At that point, the parties proceeded to settlement.

In regard to the report, he stated that he did not recall if the report made reference to staining on the paneling in the basement.

⁷ See Joint Exhibit # 1.

⁸ See Joint Exhibit # 4 and 4a.

⁹ See Joint Exhibit # 5.

He did recall that the report indicated a recommendation to ensure a dry basement and he further testified that he observed the moisture and water problems as highlighted by the Home Inspection Report. John Finnegan stated that he believed that there had been water issues in the basement at one time.

John Finnegan testified that he was aware of the recommendation from Tussey but that he was not present when Tussey was at the residence on the first visit.

Finnegan recalled the incident in the basement that occurred in March 2008 that gives rise to the instant lawsuit. He received a call from his daughter that water was seeping into the basement from underneath the paneling and that the carpet in the basement was wet. He went over to the residence and found the basement to be muddy. He assisted his daughter in mopping up the water and using a wet vacuum as well. John Finnegan contacted Finnegan's realtor who in turn contacted Levitt. The recommendation from Levitt was to contact Tussey. John Finnegan recalled being present with his daughter when Tussey arrived at the residence in March 2008.

Finnegan testified that Tussey informed him and his daughter that Tussey had written on the initial report¹⁰ what he was told to write up by Levitt and that Tussey also stated that he was not permitted to do a thorough inspection. Further, he testified that he was informed by Tussey that the basement had a properly installed French drain that was most likely gravity fed. John Finnegan's initial concern was that the French drain was not functioning properly. He acknowledged that the basement of the residence is below grade. He recalled speaking with Tussey when Tussey came to the residence in regard to the water in the basement.

¹⁰ See Joint Exhibit # 8.

According to John Finnegan, Tussey stated that the problem in the basement could be corrected by installing a French drain and a sum pump. John Finnegan remembered observing fresh concrete in the basement which led him to believe that a previous issue had been corrected.

John Finnegan further testified that Bellerose removed a 4x8 section of paneling from the basement wall and that muddy residue was present and the floor plate was rotted as well. The paneling was damaged on the walls toward the bottom and John Finnegan stated that it was obvious that there was a water problem present at one time. However, at the time of the purchase of the residence, he stated that he did not own the home at that time and had no way to discover the damage behind the paneling.

Since the work performed by Bellerose, John Finnegan stated that there have been no further water problems in the basement and that the sum pump in the basement runs on a regular basis. He conceded that other neighbors in the area also have sum pumps in their homes.

Tussey, owner of 1st State Waterproofing, has been waterproofing basements for the past twenty (20) years in which he has installed more than 5,000 waterproofing systems. He recalled that he met with Levitt in July 2007 and that Levitt needed the basement of the residence inspected. Tussey stated that he spent 10-15 minutes in the basement conducting his inspection and that he was permitted to complete a full inspection. Tussey indicated that he was not informed of nor shown the Home Inspection Report. Tussey stated that it would have been helpful to him to have seen such report. Tussey asked Levitt if the basement had ever experienced water damage to which Levitt replied that it had not.

He stated that he inquired of Levitt as to how long he resided in the home, if water had been present in the basement and if so, where it appeared to be coming from and on how many occasions. Further, according to Tussey, the issue in the basement was the moisture.

Tussey stated that he placed in his report that there were no water issues in the basement after he spoke with Levitt and that he wrote such on the report because he believes his customers when they say that there are no water problems and his inspection also led him to the conclusion that no water problems existed in the basement. Tussey testified that Levitt asked him to write in his report that there were no water problems in the basement because Levitt needed the report for something. He conceded that he should not have put down what Levitt asked in his report.

Tussey testified that Levitt did not inform him that the residence was for sale. Tussey further stated that he was not informed that a third party would rely upon his report but that is aware that the document would normally be presented to some person, in other words, that the report was not simply for the homeowner. He stated that he knew that the report would be used by others.

During his inspection, Tussey observed one part in the basement, approximately a 15-20 foot space where new concrete had been poured. He stated that Levitt had pointed out the new concrete to him in the basement. Tussey testified that Levitt informed him that a French drain was present in the basement and was installed prior to his ownership of the residence. Tussey stated he confirmed Levitt's statement by observing a 20 x 1 foot area on the back wall and he concluded that a French drain existed. Tussey believed that a previous owner of the residence had installed a French drain. Levitt explained that there are different ways to install a French drain such as installing the drain with gravel and pipe or installing the drain with fabric. According to Tussey, the proper installation is with fabric.

Based upon his inspection in the basement, where the weather conditions were humid and the moisture level high, he detected an increased smell while present and recommended the installation of a Humidex. Tussey did not charge a fee for the inspection of the basement.

Levitt accepted Tussey's recommendation and proposal for the work and upon completion of the work, Tussey received the amount of \$1,200.00 for the work. Tussey described the installation of the Humidex. He made a 6 and ½ inch hold through the basement wall with a vibrating drill and that he did not drain the Humidex by gravity because it is vented.

Tussey stated that he was called back to the residence in March 2008. Upon his arrival, Finnegan and testified her father, John Finnegan were present. Tussey recalled being in the home prior to this visit. In regard to the report he prepared after his initial inspection of the basement, he stated that his listing on the report that the basement had never nor no current water problems was done as a favor to Levitt. During this visit to the residence in March 2008, he observed three (3) or four (4) spots where water was seeping into the basement from the back wall. Tussey testified that during this March 2008 visit to the residence, he informed John Finnegan that the basement had a French drain with a gravity drain system. Tussey stated that he concluded this because the presence of new concrete indicated to him that something was there.

Further, Tussey testified that he suspected the presence of a French drain through his own thorough inspection. Tussey stated that he conducted a sufficient inspection during his initial visit to the residence and that he recommended to Levitt a humidifier for the smell in the basement. He did not observe a rotted sill plate, water or paneling split during that visit. Tussey's testimony then became conflicting. He stated that in March 2008, he discovered the problem with the French drain in the basement which he believed had been blocked by clay. He further stated that he had no access to the French drain and that he conducted no inspection.

He indicated that there was no evidence of a problem with the French drain and that he checked all around it. Tussey testified that the problem experienced by Finnegan would not have been prevented by a French drain. In sum, Tussey testified that on his initial visit to the

residence, when Levitt was present, he observed new concrete and assumed the presence of a French drain. On his second visit to the residence, when Finnegan and John Finnegan were present, he observed mud in the basement and concluded that the French drain was not working. Tussey stated that it was not until the prior proceedings in this matter that he learned for the first time that no French drain existed in the basement.

Tussey's recommendation to Finnegan to correct the water issue in the basement was to repair the existing French drain in addition to the installation of a sum pump and that he could complete this work for the amount of \$2,000.00. However, Finnegan did not hire him to perform the work.

Finnegan described how she became involved with the residence. Her father, John Finnegan, saw the advertisement of sale¹¹ of the residence online. She then, accompanied by her mother and grandmother, drove by the residence. At that time, she observed a man cutting the lawn. She stopped and inquired if she could look around the outside of the residence. Levitt informed her that he was the owner of the residence and that she could look inside the home as well.

After the initial encounter with Levitt, Finnegan contacted her real estate agent and had a second visit to the residence. She received the Seller's Disclosure.¹²

Finnegan then submitted a bid on the home and the parties entered in a Sales Agreement.¹³ She obtained a home inspection of the residence and was present during such inspection along with her real estate agent.

The home inspection was conducted on 7-19-07 and lasted three (3) hours. Finnegan testified that her real estate agent did not do the walk through of the residence but rather that she

¹¹ See Joint Exhibit # 1.

¹² See Joint Exhibit # 2.

¹³ See Joint Exhibit # 3.

did such with the inspector. Finnegan did not recall if she provided the inspector with a copy of the Seller's Disclosure. Finnegan stated that she understood the conditions of the residence as explained to her by the inspector. Finnegan initially stated that she did not recall if Levitt

According to Finnegan, the home inspection revealed deterioration, staining and warped paneling among other issues. She stated that there may have been a water issue but that it would be difficult to say what was behind the paneling. Finnegan initially stated that she did not recall if Levitt disclosed the presence of termites but then conceded that the Seller's Disclosure indicated the presence of termites was unknown, not that it was indicated that there were no presence of termites. Further, Finnegan acknowledged that during the home inspection she smelled the moisture smell and that the home inspection report that she received and read explained the condition to which she understood. Finnegan also acknowledged a major deficiency as highlighted in the home inspection report, that being ongoing moisture penetration in the basement and also deteriorating paneling on the back wall of the basement and by the stairs in the basement.

Finnegan stated that she did not believe that other paneling was deteriorated. Finnegan conceded that she was aware the exterior of the residence had a negative grade and that she was also aware that a bed of mulch as well as concrete abutted the foundation of the basement on the exterior of the residence.

As a result of the conditions highlighted by the home inspection report, Finnegan required the owner, Levitt to correct the conditions and an endorsement to the contract was prepared by Finnegan's real estate agent. Finnegan stated that she assisted in the preparation of such endorsement and found it to be sufficient and included what she wanted corrected in the residence. Finnegan testified that she received the endorsement in Levitt's handwriting stating

what had been corrected and that she understood such. Further, she that she had no reason to believe that the work had been performed incorrectly. The proposal from Tussey regarding the installation of the Humidex came to Finnegan with the endorsement.

Finnegan testified that she relied upon Tussey's proposal and that the endorsement and Tussey's proposal were sufficient to correct future issues. However, she stated that even with the French drain, she, her father and the home inspector observed warping, mud and deterioration of the sill plate in the basement. The home inspector informed Finnegan that a prior issue had been present in the basement but could not determine the timing of such. Finnegan stated that she assumed that the problem pre-dated the installation of the French drain.

Based upon the home inspection, an addendum to the contract followed and Finnegan testified that she relied upon Tussey's recommendation and his report¹⁴ to correct the issue in the basement. Further, she believed that the basement had a properly installed French drain and that no water issue existed in the basement.

Finnegan observed roofing shingles in the basement prior to settlement and that she was aware that the roof of the residence had been replaced within a week of the submission of her bid. She also observed dried mud in the crawl space area behind the stairs in the basement.

The parties proceeded to settlement and Finnegan moved into the residence in August 2007.

Finnegan discussed the events in March 2008 that give rise to the instant litigation. On that day, it had been raining and Finnegan discovered that water was coming into the basement from the back wall. The rug in the basement was saturated and squishy. She contacted her father, John Finnegan who contacted Finnegan's real estate agent. The real estate agent then contacted Levitt who advised that Finnegan should contact Tussey to return to the residence.

¹⁴ See Joint Exhibit # 8.

Finnegan stated that she never spoke with Levitt and that Levitt instead spoke with her real estate agent. Finnegan contacted Tussey as per Levitt's advice given to her real estate agent.

Finnegan testified that Tussey informed her that Levitt informed him that there were no water problems in the basement and that Levitt was Tussey to write such on the report. Further, Finnegan stated that Tussey informed her that Levitt had prohibited him from conducting a full inspection of the basement but she indicated that she permitted Tussey to conduct a full inspection of such. As a result of Tussey's inspection on that day, he recommended a French drain to be placed on the back wall and the installation of a sum pump.

Finnegan testified that she obtained two (2) other estimates in order to correct the issue in the basement. One estimate was obtained from Preferred Environmental Services¹⁵ around the end of March 2008 for the removal of the paneling in the basement and the installation of a French drain in the amount of \$11,300.00. The other estimate was provided by Basement Waterproofing Nationwide. Finnegan chose to use Basement Waterproofing Nationwide because a family member and a neighbor had previously their services and Basement Waterproofing Nationwide came highly recommended.

Finnegan testified that the estimate in the amount of \$2,000.00 provided by Tussey was only for one (1) back wall where the problem occurred. Finnegan also stated that there were no leaks on the other walls. In choosing to hire Basement Waterproofing Nationwide, Finnegan stated that she anticipated problems and wanted the problem fully corrected. Finnegan stated that the proposed work from Preferred Environmental Services would have been the same work as performed by Bellerose and that in her decision not to hire Preferred Environmental Services, cost was one factor.

¹⁵ See Joint Exhibit # 13.

Finnegan testified that she, her roommate and two (2) friends removed the paneling in the basement and that the walls in the basement were moldy. According to Finnegan, there were water issues on three (3) walls in the basement and that she opted for the installation of a full system upon Bellerose's recommendation. Finnegan stated that she paid an additional one-hundred dollars for Bellerose to remove the shower from the bathroom in the basement. Finnegan testified that she did not wish to use Tussey to correct the problem as he had provided inaccurate information previously. Finnegan conceded that she did not contact her real estate agent or Levitt before retaining the services of Basement Waterproofing Nationwide.

Finnegan conceded that the sump pump in the basement runs constantly and that there is some issue present related to water but that there is no water that she can see coming into the basement.

Finnegan provided testimony and submitted documentary evidence regarding the damages that she incurred. She testified that as a result of this incident, she had to rent a dumpster to remove the debris in the basement in the amount of \$392.00¹⁶, placed a down payment on services for repair of the basement in the amount of \$600.00¹⁷ and paid the remaining balance to Basement Waterproofing for their services in the amount of \$8,400.00.¹⁸ Finnegan alleged that the total amount of damages that she incurred is \$9,492.00. Finnegan testified that since the work completed by Basement Waterproofing in April 2008 she has not experienced any water issues.

¹⁶ See Joint Exhibit # 10.

¹⁷ See Joint Exhibit # 11.

¹⁸ See Joint Exhibit # 12.

III. The Law

In a civil claim for breach of contract, the burden of proof is on the Plaintiff to prove his claim by a preponderance of the evidence.¹⁹ The plaintiff in a civil suit is required to prove all the elements of his or her claim by a preponderance of the evidence.²⁰ “Preponderance of the evidence” is defined as “the weight of evidence under all the facts and circumstances proved before you.”²¹ Or, put somewhat differently, “[t]he side on which the preponderance of the evidence exists is the side on which the greater weight of the evidence is found.”²²

To recover on a claim for breach of contract, the plaintiff must establish three elements by a preponderance of the evidence: (1) the existence of a contract, whether express or implied; (2) the breach of an obligation imposed by the contract; and (3) resultant damages to the plaintiff.²³ Stated differently, to state a claim for breach of contract, the Plaintiff must establish the following: (1) a contract existed; (2) the defendant breached the contractual obligations; and (3) the breach resulted in damage to the plaintiff.²⁴ Further, “when there is a written contract, the plain language of a contract will be given its plain meaning.”²⁵

If a contract is clear on its face, “extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity.”²⁶ In order to recover

¹⁹ *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at *3 (Del. Com. Pl. Nov. 17, 2009) citing *Interim Healthcare, Inc. v. Spherion Corp.*, 844 A.2d 513, 545 (Del. Super. Ct. 2005).

²⁰ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009) citing *Neilson Business Equipment Center, Inc. v. Monteleone*, 524 A.2d 1172 (Del. Super. Ct. 1987).

²¹ *Id.* citing *Warwick v. Addicks*, 157 A. 205, 206 (Del. Super. Ct. 1931).

²² *Id.* citing *Reynolds v. Reynolds*, 237 A.2d 708 (Del. Super. Ct. 1967).

²³ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009) citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

²⁴ *Williams v. Vertical Blind Factory*, 2009 WL 5604428 at *3 (Del. Com. Pl. Nov. 17, 2009) citing *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

²⁵ *Wilson v. Klabe Construction Co.*, 2003 WL 22931390 at *4 (Del. Com. Pl. July 22, 2003) citing *Phillips Home Builders v. The Travelers Ins. Co.*, 700 A.2d 127, 129 (Del. Super. Ct. 1997).

²⁶ *Pro Fuels, Inc. v. Silver Spring Apartments, Inc.*, 2006 WL 4128769 at *2 (Del. Com. Pl. Dec. 21, 2006) citing *N&P Partners, LLC v. Council of Unit Owners of Bayberry Woods Condominium*, 2006 LEXIS 38 at *17, 2006 WL 456781 (Del. Ch. 2006) (internal citations omitted).

damages for any breach of contract, plaintiff must demonstrate substantial compliance with all the provisions of the contract.²⁷ Damages for breach of contract will be in an amount sufficient to return the party damaged to the position that the party would have been in had the breach not occurred.²⁸ Plaintiff, however, has a responsibility of proving damages as an essential element of his claim by a preponderance of the evidence.²⁹ At the same time, however, a party has a duty to mitigate once a material breach of contract occurs.³⁰

A “good faith attempt to perform a contract, even if the attempted performance does not precisely meet the contractual requirement is considered complete if the substantial purpose of the contract is accomplished.”³¹

The Seller’s Disclosure Report, signed by the buyer and the seller, becomes part of the purchase agreement.³² Further, Plaintiff can show the breach of an existing contractual duty and resulting damages by pointing to representations made in the Seller’s Disclosure.³³

“The Buyer Property Protection Act requires that any person transferring residential real property ‘disclose, in writing, to the buyer, agent and subagent, as applicable, all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time of final settlement.’”³⁴ “The disclosure is to be executed with a ‘good faith effort’ by the seller and is part of the sales contract.”³⁵ “By requiring a ‘good faith effort’ to disclose

²⁷ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Emmett Hickman Co. v. Emilio Capano Developer, Inc.*, 251 A.2d 571, 573 (Del. Super. Ct. 1969).

²⁸ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009) citing *Delaware Limousine Services, Inc. v. Royal Limousine Svc., Inc.*, 1991 LEXIS 130 at *8 (Del. Super. Ct. Apr. 5, 1991).

²⁹ *Meyer & Meyer, Inc. v. Brooks*, 2009 WL 2778426 at *3 (Del. Com. Pl. May 19, 2009).

³⁰ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Lowe v. Bennett*, 1994 WL 750378 at *4 (Del. Super. Ct. Dec. 29, 1994).

³¹ *Marcano v. Dendy*, 2007 WL 1493792 at *6 (Del. Com. Pl. May 22, 2007) citing *Del. Civ. Pattern Jury Instructions* § 19.18 (1998).

³² *Iacono v. Barici*, 2006 WL 3844208 at *2 (Del. Super. Ct. Dec. 29, 2006) citing 6 *Del. C.* § 2573.

³³ *Id.*

³⁴ *Id.* at *4 citing 6 *Del. C.* § 2572.

³⁵ *Id.* citing 6 *Del C.* §§ 2573-2574.

material defects, the maxim of caveat emptor, ‘let the buyer beware’ is effectively eliminated.”³⁶

Further, “the language of the Buyer Property Protection Act creates a statutory duty of disclosure which may form the basis of a breach of contract claim.”³⁷

Regarding the issue of fraud, this Court in *Snow v. Opal*³⁸ stated:

At common law, fraud consists of: (1) a false representation, usually one of fact, made by the defendant; (2) the defendant’s knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or to refrain from acting; (4) the plaintiff’s action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance.³⁹ Fraud may arise from overt misrepresentations, through deliberate concealment of material facts, or by silence when there exists a duty to speak. One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability for pecuniary loss as though he has stated the nonexistence of the matter that the other was prevented from discovering.⁴⁰

IV. Discussion

Though this case has been deemed a breach of contract, it is not quite that simple based upon the trial record and issues raised by counsel. The case presents a multitude of issues which the Court will address in sequence.

(i) Breach of the Contract

There is no dispute that the parties entered into a contract for the sale of the property. There is also no question that the contract between the parties was executed and the real estate changed hands. However, the issue pending before this Court in regard to the breach of contract

³⁶ *Id.* citing *Snow v. Opal*, 2002 WL 32000658 (Del. Com. Pl. May 20, 2002).

³⁷ *Id.* citing *See Guttridge v. Ifland*, 2005 Del. LEXIS 518, 889 A.2d 283 (Del. Super. Ct.)(Del. 2005).

³⁸ *Snow v. Opal*, 2002 WL 32000658 (Del. Com. Pl. May 20, 2002).

³⁹ *Id.* at *4 citing *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1074 (Del. 1983).

⁴⁰ *Id.* citing *Lock v. Schreppler*, 426 A.2d 856, 860-61 (Del. Super. Ct. 1981) (quoting *Restatement (Second) of Torts* § 550 (1976)).

is whether Levitt breached the contract by failing to disclose an existing water problem in the basement of the home.

The testimony is conflicting. Levitt testified that he never experienced any water problems in the basement including dampness during the time that he resided in the home. However, the testimony of Hollingsworth indicated that sometime during the 1990s when he was in the home, he observed water stained tiles in the basement.

Hollingsworth did not recall whether Levitt ever informed him of water problems in the basement. Bellerose stated that the water issue in the residence had been ongoing for some time. John Finnegan testified that during the home inspection he observed water damage near the steps in the basement and that he believed that there had been water issues in the basement at one time. Tussey stated that based upon information received from Levitt as well as from his own inspection of the basement that no water problems existed. Finally, Finnegan stated that during the home inspection she smelled the moisture in the basement and that upon receipt and review of the home inspection report, she understood the condition that may have existed in the basement. Further Finnegan acknowledged observing deteriorating paneling on the back wall of the basement as well as by the stairs.

Finnegan testified that as a result of the conditions highlighted by the home inspection report, she assisted in the preparation of an endorsement to the contract for Levitt to correct the deficiencies. Further, she found such endorsement and requirements of Levitt to be sufficient and that she had included what she wanted corrected in the residence.

Based upon the testimony of the witnesses and documentary evidence submitted, the Court finds that a breach of contract occurred. Finnegan assisted in the preparation of the endorsement to the contract which in her words was sufficient and included the conditions that

she wanted corrected. Levitt did not entirely comply with Finnegan's request. Finnegan requested that Levitt correct the deficiencies as highlighted by the Home Inspection Report to which Levitt agreed as evidenced by the Endorsement to the Sales Agreement.

Levitt agreed to correct the ongoing moisture penetration in the basement to which Levitt believed to be the dampness issue; however, the Endorsement provided for correction of the basement and crawlspace dampness as indicated in the Home Inspection Report prepared by Preferred Inspections, Inc. The Home Inspection Report indicated ongoing moisture penetration as indicated by the interior paneling and windows sills showing stains and deterioration which indicated long term moisture in the finished sections of the basement.

The testimony and evidence at trial indicates that Levitt failed to disclose the existence of a water problem in the basement. The testimony and evidence revealed that material defects in the basement existed prior to the execution of the contract. Specifically, the testimony revealed that Levitt observed staining on the paneling in the basement when he purchased the home. He further admitted to observing at that time warped window sills and warped paneling. Hollingsworth, while in the residence in the 1990s, observed discolored ceiling tiles and water-stained ceiling tiles.

Bellerose upon his inspection of the basement determined that an ongoing water issue had been occurring in the basement for some time. Frick described warped paneling in the basement and observed discolored walls in the basement after the demolition had occurred in preparation for the repair. Further, Levitt admitted that he performed renovations to the basement just to perform renovations and to increase the sale price of the home such as replacing ceiling tiles in the basement, replacing drywall on the front wall of the basement and painting the paneling in the basement; however, the Court does not find this testimony credible. The Court

also finds that Levitt as a licensed real estate agent and a resident of the home for two (2) years knew or should have known of water problems in the basement. Levitt failed to disclose the existence of a water problem in the basement although he denied the existence of such.

The Agreement of Sale executed by the parties provides that the buyer may have the property inspected and if the buyer is not satisfied with the current defects of the property as stated in any written inspection report other than cosmetic items, buyer shall provide seller with a written request for repairs...The seller shall then, in writing, agree to correct the defects at seller's sole cost by a licensed contractor with written proof of the work being completed... Levitt attempted to correct the entire ongoing moisture penetration issue by solely addressing the dampness in the basement but that did not satisfy the requirements to which he agreed in the Endorsement.

(ii) Plaintiff's Duty to Mitigate Damages

In any breach of contract action, the Plaintiff has a duty to mitigate damages. Finnegan attempted to do such as she contacted Tussey to inspect the basement and chose not to hire him to perform the repair to the basement based upon prior inaccurate information he provided. Finnegan came to this decision after she received two (2) other estimates from contractors to repair the basement. Finnegan testified that she anticipated that a problem would exist on the remaining walls of the basement and wanted the problem addressed correctly. Although the testimony indicated that only one (1) wall of the basement was leaking water into the basement, the remaining walls indicated water damaged as the evidence demonstrated. Further, in securing three (3) estimates for the repair of the basement and minimizing her costs by demolishing the basement herself, she reasonably mitigated her damages.

(iii) Plaintiff's Duty to Notify Defendant and/or Third Party Defendant

Finnegan was under no duty to notify Levitt or Tussey before securing a contract to repair the basement. Finnegan contacted Levitt when the problem in the basement occurred and Levitt advised her to contact Tussey. Further, there is no provision in the contract between the parties that calls for prior notice.

(iv) Appropriate Measure of Damages

Levitt only corrected one part of his requirement by correcting the dampness in the basement. Levitt was also required, per the Endorsement, to take steps to ensure a dry basement and to control the ongoing moisture penetration. Though the parties did not have an express agreement to install an entire basement system, Levitt implicitly agreed to such when he signed the Endorsement and undertook the requested repairs.

The Endorsement clearly states for Levitt to correct the basement and crawlspace dampness as per the Home Inspection Report prepared by Preferred Inspections, Inc. Levitt admitted that he received a copy of the Home Inspection Report. With that said, his agreement to correct the issues highlighted by the Home Inspection Report included repairs to control the ongoing moisture penetration in the basement, not simply the dampness.

Levitt argues that he corrected the issue of the moisture in the basement by contacting Tussey and following Tussey's recommendation of the installation of a humidifier to control the moisture. However, Levitt's argument neglects a key piece of information. Levitt never informed Tussey of the conditions listed in the Home Inspection Report nor provided a copy of such to Tussey. Without such information and relying upon Levitt's information, Tussey provided the recommendation that he could based upon the information he was given by Levitt.

Levitt addressed the moisture smell in the basement by hiring Tussey to address that limited issue. Levitt did not inform Tussey of an ongoing moisture penetration as indicated in the Home Inspection Report.

As per the Endorsement to the Sales Agreement, Finnegan requested that Levitt repair the deficiencies discovered in the home as indicated by the Home Inspection Report. Levitt agreed to correct the basement and crawlspace dampness as set forth in the Home Inspection Report. Finnegan relied on Levitt's representation that the issue had been corrected. Finnegan also relied upon Tussey's recommendation as to the installation of the humidifier to correct the ongoing moisture penetration issue; however, Levitt failed to inform Tussey of the entire situation and conditions indicated in the Home Inspection Report.

Therefore, based upon Levitt's failure to correct the issue in its entirety, it was reasonable under the circumstances for Finnegan to perform the amount of work that was performed in the basement by Basement Waterproofing Nationwide. As a result of Levitt's failure to remedy the issues that he agreed to remedy, Finnegan sustained damages as a result of Levitt's breach of the contract. Based upon the condition of the basement as demonstrated by the evidence and testimony, Finnegan anticipated that problems would occur in the basement other than the existing problem on one (1) wall; therefore she had to correct the deficiency that Levitt failed to address by having an entire basement system installed.

a. Liability of Third Party Defendant

Based upon the concealment of the Home Inspection Report and the true nature of the deficiencies in the basement as indicated by Home Inspection Report, the Court finds that Tussey is not liable to Levitt. Levitt concealed the true nature and full extent of the ongoing moisture penetration when he hired Tussey.

Levitt only informed Tussey of a dampness issue in the basement. Levitt admitted in his testimony that he did not provide Tussey with the Home Inspection Report. Had Tussey been provided with such information, his recommendation in regard to correcting the issues in the basement may have changed. Levitt did not indicate to Tussey that the Home Inspection Report discovered ongoing moisture penetration. Thus, Tussey relied upon Levitt's concealment of the true nature and extent of the water damage and Tussey concluded that there were no water problems in the basement based upon this misrepresentation.

V. Opinion and Order

Based upon the foregoing reasons and analysis discussed *supra*, this Court finds in favor of Plaintiff Jennifer Finnegan and enters judgment against Defendant Keith Levitt in the amount of \$9,492.00. On the Third-Party Complaint, the Court finds in favor of Third-Party Defendant Vitold Tussey d/b/a 1st State Waterproofing and enters judgment against Defendant Keith Levitt. Each party shall bear their own costs in this action.

IT IS SO ORDERED this 21st day of April 2011.

/S/ John K. Welch, Judge
John K. Welch
Judge

/jb
cc: Ms. Tamu White, Supervisor, Civil Division