

SCCH 343810

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**

Cite as: Boyd v. Wawanesa Mutual Insurance Company, 2011 NSSM 69

BETWEEN

**Maria H Boyd**

**CLAIMANT**

-and-

**The Wawanesa Mutual Insurance Company      DEFENDANT**

**Adjudicator: David TR Parker**

**Heard: June 1, 2011, June 6, 2011, September 23, 2011**

**Decision: December 8, 2011**

**ORDER**

Counsel: The Claimant was represented by Donald L Presse  
The Defendant was represented by Michael P Scott

**Pleadings:**

**1. The Claim:**

The claimant stated that Wawanesa issued a policy covering property damage and damage to the claimant for her residence at 8546 Highway 103 Port Mouton, Nova Scotia which was in effect on February 2, 2010.

On February 2, 2010 the claimant's home suffered a pipe rupture which caused excessive flooding in their home. The claim was reported to the defendant and it assigned Graham Campbell of Marsh Adjustment Bureau to inspect the home.

Marsh Adjustment Bureau Limited hired Systems Care, the contractor to carry of the necessary repairs to the home.

Systems Care did not repair the extensive damages to the home as required under the policy. The claimant has been required to hire third parties to carry out repairs to the home. Some of the repairs have not been completed due to the cost. The defendant has refused to pay for the repairs.

The claimant stated that the defendant's failure to remedy the damages arising from the pipe rupture constitutes a breach the policy and breach of contract. The claimant claims that the defendant is liable for all damages arising from the breach of contract.

The claimant claims against the defendant for some \$25,000 plus costs and interest.

This claim was filed in the Small Claims Court on February 14th 2011.

The defence to the claim is dated May 2, 2011.

**The Defence:**

The defendant in its pleadings stated that immediately following the reported loss, the claimant contracted with Systems Care Cleaning & Restoration to undertake remediation work at the home at 8456 Highway 103 Port Mouton, Nova Scotia on an emergency basis. The emergency work to the heating and plumbing systems was completed shortly thereafter.

The defendant stated that if the claimant has suffered any damage, loss or expense then it was result of the claimant's own action or inaction.

### **3. Witnesses**

#### **Peter Habaybeh**

Mr. Habaybeh lived common-law with the daughter of the claimant and resided in the home in September of 2009. In December of 2009 they had flooding on the upper level which he said was deemed to be bad plumbing. He said that he started repairs left town and came back later when the second incidents occurred. He stated that on February 3rd there was a second flooding when he came back in the afternoon. He said he met with Mr. Campbell, the adjuster and we agreed the pipe broke. Mr. Habaybeh described the damage to the home. He said that Systems Care came in the first few days and returned to the house four or five days later. He said there was one electric heater in the basement and three or four upstairs and all were running.

On cross-examination Mr. Habaybeh stated that the claim of December of 2009 was not from freezing but rather water pipe rupture and the insurance company wrote out a cheque for the claim. He said he had started repairs to the drywall in the main foyer. He said that in February loss the original loss was not finished as he had not repaired the floor, that is, replace the pine flooring. He said in his testimony that he could not recall signing a contract with Systems Care. He told the court he contacted the adjuster and said he did not want Systems Care in his property and that Mr. Campbell; the adjuster offered him \$1500.00 to do the work. He said there still moisture and and also garbage left outside which caused the mess. He said he talked to other contractors and Envirobate were the only ones willing to look at it. He said they came in to the home and he was told there was mold. He said I don't recall kicking Systems Care off the property on the day he left. He said "it could have been possible I can't remember". He did confirm that Systems Care took out frozen plumbing. He recalled the adjuster telling him that he

needed a new furnace. He said he had no photos of mold in the house although he thought he took them on his cell phone.

**Tim Ambrose:**

Mr. Ambrose is the owner of Envirobate Inc. which specializes in removal of hazardous materials. He has extensive experience in mold removal and experience in structural damage both residential and commercial. Mr. Ambrose was called in on the site on September 17, 2010 and Peter Habaybeh showed him the damaged areas. Mr. Ambrose in his testimony described where he saw water damage at the top of the electrical box and top of stairs looking down towards electrical panel ceiling of the entry or floor of bathroom. "That is where the major water damage was". An area in the living room there was water damage to the floor. He said there was possible asbestos coming down the stairs on the main floor. He said underneath the floor in the crawlspace there was water stains and mold. He said the ceiling towards kitchen there was mold growth. He said the baseboard there was water damage and he described water damage in the upstairs bathroom. He described water dripping on top of the furnace where the lines feed into the furnace and there was a drip from it. He said in the first 48 to 72 hour you have to remove it [the water] while it is frozen and then dry it through blowers and with a shopvac and dehumidifiers. He said that in his opinion the amount of water that came in and the time that elapsed started the problem. He did say that the floor joists were twisted in the area where the water was and he couldn't tell if it was from past water. On cross examination he described the areas that appeared to be wet but he did not do moisture readings. He said his quote of \$45,350.00 plus tax deals with water damage and he did not do moisture readings. He did state that he had no idea when water damage occurred and that he went to the home seven months after the second damage and that he was never there when it first happened. He did say that if the home is not heated over the winter and spring moisture could happen. He said it is a Marine climate and the house is an old structure. He said that there was water on the furnace and it caused damage and caused mold for sure. Where it showed stains of water in the floor he said this damage could be from the first loss [December 2009]. Mr. Ambrose said he could tell by looking at a copy of the

bill that there were no dehumidifiers on site. Heat does not get rid of moisture. He said he found present, some moisture at the stone foundation.

**Graham Campbell:**

Mr. Campbell is an adjuster with Marsh Adjusting and has worked in the industry for 25 years. He said that at the time of the incident in February he was very busy with freeze ups as the temperature was reaching  $-20^{\circ}\text{C}$  and the winds were Gale like. He said he arrived to the property on February 4, 2010 and met with Mr. Habaybeh, Lee Smith of Systems Care and Mr. Habaybeh's partner. He said that the policy covered the actual cash value not replacement costs and was for the building only. He said the emergency part of the claim required bringing the structure back to normal that is dry and then after that they would do repairs. He said the house was literally frozen as the heating system failed or was not sufficient. The radiators were split and it was  $-20^{\circ}\text{C}$  in the house same as the temperature outside. He said that heat was restored and they got the ice out.. He said that Mr. Habaybeh hired Systems Care. He said electric heaters are brought in after the ice was taken out. Mr. Habaybeh told him that he did not trust Systems Care and then he kicked them off the site. Said it slowed the process by one or two days nothing significant and then he allowed Systems Care to come back in. We had plumbers come in on the weekend and the project was started up the first of the week. He said he was told that the firebox and burned out in the furnace and because of carbon monoxide it was not safe to run the furnace and he told Mr. Habaybeh he had to buy a new furnace. He said in hindsight it probably caused the loss. He said it probably was not at peak efficiency. He said as far as he knows Mr. Habaybeh did not put the furnace in the home and the heaters were left in the home for 21 days. He said the house was dry and the material was removed. With respect to damage he said he did not know why Mr. Habaybeh could not get it done for \$1400.00. In his view any contractor could get it done for that amount. He said in late February Mr. Habaybeh called to say he had discovered a wet area in the living room. He said the living room floor was effected on the first loss in December of 2009 and the damage in the second loss was the same as in the first loss. The first loss had never been repaired by Mr. Habaybeh therefore that part of the loss on the second

loss would not be covered by insurance. He said one of the larger items in terms of cost was the furnace and the policy did not cover this as it was a maintenance issue.

He said the dehumidifier will not work in freezing temperatures and the dehumidifier is not always what is required. He said that moisture readings were gone after the ice was removed and the heating put on. There was no need for a dehumidifier. He said that he knew the fans were on the heaters and this was another reason for not requiring a dehumidifier.

### **Lee Smith**

Mr. Smith is part owner of Systems Care. He said that his company was an insurable loss contractor and that 60% of his business involves water loss remediation. He was sent on February 4<sup>th</sup> to determine the cause of the problem, extent of damage and an action plan to remediate the problem. At the time the temperature was -10 to -12°C, the wind was blowing and that ice was in the hallway, into the kitchen, and living room and over the electric panel. He said he proceeded to get an electrician to certify the panel. Then get heat into the basement to protect the furnace, to get plumbers to remove the pipe, get the ice up and removed and then get heat the house up with the electric heaters. He said there were seven electric heaters and after he got the ice out he used moisture meters and checked throughout the house. The meters were calibrated once a day. He said on February 19 he received a call from Peter Habaybeh who was tearing up the floor and thought it was wet. As a result he checked it out. The moisture meter in the kitchen indicated to 12%, living room 13.9% in the Hall or kitchen 12 percent. Mr. Smith indicated to the court that 14% was considered dry. Mr. Smith said he went in the premises on February 6 and February 7 to check his equipment and he met with Peter Habaybeh who agreed that we should go ahead with the plumber and remove the drywall. He said the furnace was worn out inside the firebox and needed to be replaced and that he

informed Peter Habaybeh and Graham Campbell. He said he remove the heaters on February 23 at this stage the place was dry. He said the house needed repairs especially in the basement. He said his final bill was \$9935.68 and after chasing the claimant for his money he put the claimant in collection to get \$1471.82 “the money I am out for the deductible and depreciation. He said he supplied a quote to do the repairs and that was \$1429.22 and that related to the drywall being put back on the wall and the ceiling and doing the flooring on the hallway. In cross examination he said he found no evidence of mold and that Mr. Ambrose saw the mold a year later.

### **Analysis**

The claimant in this case will not succeed for the following reasons. The contract the claimant had with respect to the remediation work done in the home was with Systems Care. If remediation work or lack thereof was what caused the problem the claimant's recourse is against Systems Care with whom the claimant had a contract.

Even if the claimant was able to show there was an action in tort or in contract, Mr. Ambrose does not give a breakdown with respect to the items with respect to the work he indicated has to be performed or for the items that require replacement. For example the items related to the furnace would not be covered under the policy of insurance. This was a maintenance issue with respect to the furnace. The testimony of the defendant's witnesses was that a larger portion of the repair estimate provided by Mr. Ambrose related to the furnace. What that amount is we just do not know and I would have to guess. The court is not in a position to guess.

There are other problems with respect to the claimant's case. This would relate to the time lapse between when the damage occurred originally in February and when the damages complained of were dealt with when Tim Ambrose was brought in some seven months later. The evidence would indicate that while damage occurred in February that was water related the damage property was removed, the property was dried out by Systems Care. The claimant was told that they should have its furnace fixed however refused to

have same done and eventually the defendant refused to continue heating the home with its seven heaters installed the home which originally dried out the home. The claimant did not take assertive action to ensure there were no damages resulting from his inaction. The home was an older home with a wet basement and no furnace that was working properly.

The claimant argues that much of the costs as articulated in the quotation of Mr. Ambrose was due to water and resulting mold mold. The best evidence I have before me is that there was no mold that was detected after the losses in December and February and that Systems Care dried out the place where the water had presented itself before leaving the premises.

The final problem that I have with the claimant's case is a fact that the claimant had suffered a previous insurance claim, was paid out on that claim as it chose to do the repairs and that repairs were never completed. Some or a portion at least of the damage that was now being claimed involved an area that was never repaired. This area could not be quantified with exactitude however the defendant insurer should not be responsible for an area damaged that was never repaired in the first place.

For all these reasons the claimant will not succeed in this claim against the defendant. While there was no claim for the amount of \$1429.22 which the defendant agreed it would pay, if that amount has not been paid in should be now paid as the final amount due under the last damage covered by the insurance company.

**It Is Therefore Ordered that the claim against the defendant be dismissed with no order as to costs.**

**Dated at Halifax this 8 day of December 2011**