

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Rygh v. Taylor, 2013 NSSM 37

BETWEEN:

ANDREW ARTHUR RYGH and GILLIAN LEE COSTELO

Claimants

- and -

JUDITH ANNE TAYLOR

Defendant

AND BETWEEN:

JUDITH ANNE TAYLOR

Claimant

- and -

SCOTIA FUELS LIMITED

Defendant

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on June 5, 2013

Decision rendered on August 23, 2013

APPEARANCES

For the Claimants (Rygh and Costello)

Blair McKinnon, counsel

For Judith Anne Taylor

Terry Degen, counsel

For Scotia Fuels

Eric Thomson, counsel

BY THE COURT:

[1] This decision deals with two cases that were tried together, as they arise out of the same facts. Essentially, it is a claim and a third party claim. Unfortunately, the rules for the Small Claims Court do not specifically provide for a third-party procedure. As such the defendant in the first action, Judith Anne Taylor, having been sued by the Claimants, Andrew Rygh and Gillian Costello (“Rygh and Costello”), brought a second action against the party that she believes ought to be ultimately responsible to Rygh and Costello, namely, Scotia Fuels Limited (“Scotia Fuels”).

[2] The facts of the case are these. Ms. Taylor lived in the home at 27 Bayswater Rd., in Dartmouth, for approximately 30 years before putting it on the market and eventually agreeing to sell it to the Claimants, Rygh and Costello. When arranging insurance, Mr. Rygh learned that it was necessary that the fill and vent pipes for the oil tank be moved away from their historical position under the dining room window, to meet current Code requirements Ms. Taylor agreed to have this work performed prior to closing, and contacted her fuel supplier, Scotia Fuels, to have them perform the work.

[3] From her perspective, Ms. Taylor did everything that she had obligated herself to do and the transaction for the sale of the home was completed on or about December 19, 2011.

[4] The oil tank for the home sits in a unfinished basement, which also houses the laundry facilities and a freezer. It has a concrete floor which, at the time, was

partially covered with carpeting. The furnace itself is not in the basement but is in the garage.

[5] The Claimants Rygh and Costello, are a young couple who were buying their first home. On or about December 20, 2011, before actually moving themselves in, they began moving large items into the home.¹ When they went down to the basement, they noticed that the carpet was completely drenched and there was water throughout. As a result of this finding, they first contacted their insurance company, Cooperators, which sent out someone to investigate. I will say more about that person, Lenora (known as Lou) Chaulk, later. Suffice it to say for present purposes that Ms. Chaulk had a difficult time locating the source of the water that had infiltrated the basement, in part because the water was not confined to any particular area. As a temporary remedial measure, the carpets were torn out and fans and dehumidifiers were brought in to begin to dry out the room.

[6] After considerable investigation, one of the possible sources of water infiltration was determined to be the holes that had been driven through the foundation for the new oil fill and vent pipes. This resulted in a call several weeks later to Scotia Fuels, which sent out one of their employees who offered the opinion that it had not been their drilling of a new hole which had caused the problem.

¹ The court acknowledges that Mr. Rygh initially pegged this date as December 22, but it was demonstrated to him by other documents that the date must have been the 20th. While it was suggested that this might reflect adversely on his credibility, I accept that this was an honest error and that he was simply mistaken about the date. Nothing of importance turns on it and his credibility is not discounted for having made this simple error.

[7] According to the testimony of Mr. Rygh, on January 28, 2012 there was a further incident of flooding, which resulted in them pulling away part of the wall (pegboard and insulation) to get a closer look at the holes which had been drilled by Scotia Fuels (actually by its subcontractor, Doug Rhind of Target Drilling & Sawing Ltd.)

[8] At or around that date, Peter Keith from the restoration specialist company First On-Site attended and made a determination that, in his opinion, one or both of the holes through which the oil fill and vent pipes had been fed had not been fully sealed with a cement compound, and as a result water had entered through these gaps.

[9] It is important to mention that the holes were sitting at or just slightly under ground level, in a slight depression of the land. As a result, at certain times water could pool and fill up this depression, with the further result that water could then freely pass through any open spaces in these holes. This fact is disputed by Scotia Fuels, which suggests that there was no way that water could have pooled in sufficient quantities to explain the amount of water getting into the basement. I will comment further on this issue later.

[10] In the end, Cooperators declined to cover the water damage and these Claimants were forced to take matters into their own hands. As noted, Scotia Fuels had already disavowed any responsibility.

[11] The Claimants obtained legal advice and contacted another fuel company, Bluewave, to perform some temporary repairs and to quote on a more permanent fix. They also obtained quotes to remediate the basement, which had experienced sufficient flooding and water saturation (carpet and drywall) as to

create what they believe to be a risk of serious mould. Rygh and Costello have yet to perform any remediation, as they lack funds. They have avoided using their basement because of air quality concerns. I will have more to say about these issues later.

[12] One of the things that the Claimants decided to do was relocate the oil fill and vent pipes to another location, where they now enter the foundation well above ground level. The old holes drilled by Scotia Fuels have been permanently filled.

[13] On January 23, 2013, Rygh and Costello commenced the claim against Ms. Taylor, seeking damages in the amount of \$20,239.06. Although the statement of claim does not specify the specific cause of action (i.e. tort or contract), implicitly it would be based on the contractual agreement to have the work done in a proper, workmanlike manner, and perhaps on the basis of some implied warranty to that effect.

[14] The claim is broken down into several components:

- a. \$977.50 for the cost to repair the area surrounding the intake pipe and move the pipes above grade. (as charged by Bluewave);
- b. \$14,814.15 for mould remediation and water damage restoration (as quoted by Power Vac);
- c. \$1,457.91 for tear out and drying fees (as quoted by Power Vac) At trial, this was reduced to \$1,227.91 ;
- d. \$1,300.00 for personal items damaged in the flood - paintings, area rug, books, and blanket duvets;

- e. \$1,817.00 for legal fees and disbursements incurred in attempts to have Scotia Fuels remedy the problem.

[15] As I indicated at the hearing, the latter charge for legal fees falls outside the jurisdiction of the Small Claims Court, and cannot be considered. What we are accordingly left with is the following:

cost to repair the area surrounding the intake pipe	\$977.50
mould remediation and water damage	\$14,814.15
tear out and drying fees	\$1,227.91
damaged personal items	\$1,300.00
	\$18,319.56

[16] The solicitor for Ms. Taylor did not file a Defence, *per se*, but rather commenced the separate action against Scotia Fuels, seeking to hold it responsible for the claim of Rygh and Costello. Ms. Taylor's claim is based on her contract with Scotia Fuels, which has warranted its work. In its Statement of Defence, Scotia Fuels essentially denies responsibility for having caused the problem.

The evidence

[17] In addition to the evidence of Mr. Rygh, the court heard evidence from Peter Keefe of the restoration company, First On-Site. It was he who attended on January 28, 2012 to investigate the source of the latest water incursion. As he explained, he began by eliminating all other possibilities, including the obvious ones such as water coming up through a floor drain. Eventually his attention focussed on the incoming oil pipes. It was his observation that the pipes entered

the foundation below the land grade line, and it was evident to him that the depression in the ground had been filled with water at some time. It was his observation that at least one of the holes through which the pipes fed was not completely sealed, which probably would have sufficed if they had been above grade. He testified that, once he put himself in a position to do so, from the vantage point of the basement he was actually able to see a pinpoint of daylight, indicating that one of the holes (at least) was not completely sealed from the outside. It was his conclusion that water had entered through this small hole.

[18] Mr. Keefe was extensively cross-examined on his credentials, and on his observations. In the end, the court is satisfied that he is a qualified individual in the area of water problems in residential homes, and that he was telling the truth and not exaggerating his findings. Questions such as why he did not attempt to photograph the “pinhole” remain, but do not in themselves impeach the truth of his evidence.

[19] The other expert who had visited the home was Lou Chaulk. She has ten years of experience as an inspector and estimator and is certified by the IICRC organization in the area of restoration. She now has her own company, Power Vac Belfor. She testified that she spent about two and a half hours at the home, checking everything she could to try and determine the source of the water. She eliminated as a possibility the floor drain in the basement, explaining that it was dry enough that “dust bunnies” were visible there - which would have been swept away had water come in at that point. Eventually her investigation took her to the area of the fill and vent pipe, which were not easily accessible from the basement viewpoint. As a result of finding wet insulation in the area below these pipes, and by eliminating other possible sources in her investigation, she concluded that water must have entered in the area of those holes.

[20] On her recommendation, dehumidifiers and fans were acquired to accelerate the drying out process for everything, including drywall which had gotten wet through wicking action. Because she was retained by Cooperators, which eventually denied the claim, she was not authorized to do any further remedial work.

[21] Later, in April, she was called back in by the homeowners to do some further investigation. She used moisture meters to determine that the drywall was now dry, and cut away a section of drywall that had been in the wet area and discovered that it was covered with mould on the inside. It was this discovery of mould that confirmed the Claimants' fear that the water incursion had done some serious damage.

[22] Ms. Chaulk confirmed on cross-examination that she is not an expert in mould and that she could not say what type of mould this was. However, mould removal and treatment is one of her company's specialties.

[23] At the request of the Claimants she provided an estimate for the tear-out, treatment and restoration of the affected areas in the amount of \$1,227.91 for tear-out and \$14,814.15 for mould removal and restoration.

[24] Scotia Fuels called several witnesses.

[25] Jeff Cox quoted on the job but had no part to play in the drilling or installation.

[26] Jeff Purcell had occasion to visit the property in connection with this job. He testified that there was evidence in the basement of previous water incursions.

[27] Craig MacIntosh worked with Terry Bennett doing the actual job. It was his determination that a specialized drilling company would be needed to drill the two holes through the foundation. As noted this was done by Target Drilling. Mr. MacIntosh testified that it was he who mixed up the hydraulic cement to fill around the holes, and he stated that he got down on his hands and knees to make sure that it was done correctly. The patching was only done from the outside. He said that it is his recommendation that spray insulation be applied from the inside (although he did not say that he made this recommendation to Ms. Taylor, the owner at the time.)

[28] Mr. MacIntosh was adamant that there was no daylight visible through the hole when he was finished his work. He suggested that something must have occurred afterward.

[29] Steve Lindsay is an installation foreman for Scotia Fuels who visited the property several times after the job. He testified that he met the Claimant, Ms. Costelo, who accused his company of creating a crack in the foundation. He said that he looked and determined that the crack she was referring to was old, and definitely not the source of any water. He checked the floor drain in the basement and found that it was slow emptying, which suggested to him that it might have been the culprit.

[30] Doug Rhind of Target Drilling testified. He was only involved in the drilling, not the filling around the holes, which job was done by Scotia Fuels' employee.

He testified that part of the drilling process is to inject water into the hole as a coolant for the bit, which might otherwise overheat. As a result, the insulation inside could have become wet.

[31] He testified that he had to move the earth and stones away from the area in order to be able to drill the hole straight through the wall. This created something of a shallow “well” around the window.

[32] When he was later called back to look at the wall crack, he determined that it had not been made by his activity. He also examined the floor drain and noted that it was partially blocked.

[33] Sean Dixon is the Scotia Fuels installation manager. He also investigated after the fact. He also provided the court with rainfall records for the Halifax area around the times when the water incursions happened. These records do not show any major rainfall on the day before or the day of these events.

Discussion and findings

[34] The evidence satisfies me that something happened during the drilling for the fill and vent pipes that changed the susceptibility of the home to be infiltrated by water. I am satisfied that the work by Scotia Fuels and/or its sub-contractor, Target Drilling, is more likely than not the cause.

[35] I am persuaded by the evidence of both Lou Chaulk and Peter Keefe that all other potential causes were considered. They considered the obvious possibilities such as the floor drain or the washing machine, and found no evidence that these were implicated. The evidence of the Scotia witnesses, to

the effect that the floor drain was slow to drain, or partially blocked, does not logically implicate it in causing a flood.

[36] I have confidence in the integrity of the two professionals, Chaulk and Keefe, and their careful exclusion of all other causes. They had no bias and gained nothing by identifying the holes drilled by Scotia Fuels as the possible cause. I also accept Keefe's evidence to the effect that he saw "daylight" when he finally took a close look at the holes from the inside, with wall and insulation stripped away to get a better view. I am unwilling to conclude that he fabricated this evidence, as was the implicit suggestion by counsel when cross-examining him. I also reject the implicit suggestion that someone deliberately created the hole by interfering with the cement.

[37] I agree that the evidence pointing to the drilled holes as the source of water infiltration is not perfect, but it is by far the best explanation. In fact, it is the only cause that is supported by any evidence.

[38] I have considered the fact that there was not much rain shown in the records the day before December 20, 2011. However, there had been a lot of rain a few days earlier, and no one can accurately say what the freeze-thaw cycle was like - or what was the drainage pattern on this land. No one was paying any attention to the area outside the drilled holes at that time, and to whether or not the "well" filled up with water. It is also possible that some of the water came in a day or two earlier - even before Ms. Taylor moved out - and was not discovered until the morning of December 20th.

[39] I also entirely reject the speculative suggestion by various persons that the floor drain might have been the source of the water. Had that been the case, I

have no doubt that it would have been confirmed by Ms. Chaulk on her first visit, as it was the obvious place to look. Others would also not have missed that.

[40] I appreciate the evidence to the effect that water used in the drilling process may partly explain the wet insulation, but there is no possibility that this amount of water can explain the extensive water incursion that occurred.

[41] Furthermore, common experience shows that even a small hole or crack open to the outside can admit a great deal of water, over time, and it is my finding in this case that the most probable source of water was the new holes drilled and imperfectly sealed. I also find that the holes entered below grade level, and that it was possible for water to accumulate and pool in the shallow wells sufficiently to enter through the imperfectly sealed hole or holes.

[42] I have no doubt that the failure to patch the holes completely was an innocent mistake by the Scotia Fuels employee, but it was a mistake with unfortunate consequences.

[43] I also find that the development of mould, as observed in the walls, is a reasonable inference to draw from the water incursions that happened in December 2011 and January 2012. There is no reason to suspect that this mould would have been there before because on the evidence this was not a wet basement. Ms. Taylor testified to this effect, and I accept her evidence over the speculations of the Scotia Fuels witnesses.

[44] I find that Scotia Fuels was negligent and in breach of its contractual duty to Ms. Taylor and is responsible for all damages that reasonably flow from the

breach. Those damages would consist of the damages that Ms. Taylor owes to the Claimants, Rygh and Costelo, which damages I must determine.

Damages

[45] The principal argument made by Scotia Fuels on the question of damages, as I understand it, is that the Claimants have failed to prove that the water caused mould, and that the mould represents a hazard that justifies the proposed remediation.

[46] The Claimants are relying on the assessment of Ms. Chaulk and her company to the effect that the area is contaminated with mould and that the cost to remediate it would be as indicated. Most of the cost included in that quote is for removal and replacement of drywall, painting, replacement of the damaged carpeting, and other matters that are not specific to mould but rather to water damage. Actual mould cleaning and treatment is a smaller part of the cost, in the amount of \$3,654.31.

[47] In the end, a party such as the Claimants must mitigate their damage reasonably, but not necessarily to the complete satisfaction of the wrongdoer. The Claimants are a young couple with a family, in their first home, who want to feel completely safe using the basement in their home. Mould has been confirmed to be present. They should not have to bear any risk that this would compromise their health. I find that the damages claimed are reasonable. I believe it was reasonable to relocate the fill and vent pipes. It is also reasonable to perform the tear out and remediation so there is virtually no risk to their health. And I accept the estimate for the items damaged by the water.

[48] As such, the Claimants will have judgment against Ms. Taylor in the amount of \$18,319.56, and in turn Ms. Taylor is entitled to have that sum paid to her by Scotia Fuels. Of course, the parties may wish to have Scotia Fuels pay the Claimants directly.

[49] The Claimants are also entitled to their cost of filing this claim in the amount of \$182.94, and Ms. Taylor is entitled to pass this on to Scotia Fuels and also to her own costs of \$182.94 as against Scotia Fuels. The parties did not prove any other claimable costs.

[50] There will be two separate orders reflecting the liabilities found herein.

Eric K. Slone, Adjudicator

