

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite: Harrington v. Bellefontaine, 2006 NSSM 30

Date: 20061212
Claim: SCCH 257012
Registry: Halifax

Between:

Joseph Harrington

Claimant

v.

George Bellefontaine and Beach Breeze Estates Limited

Defendants

Adjudicator: W. Augustus Richardson, QC

Heard: October 24th; November 20th, 2006 in Halifax, Nova Scotia.

Appearances: Lisanne Jacklin, for the Claimant
Andrew Inch, for the Defendants

By the Court:

[1] This matter came on before me on October 24th and November 20th, 2006.

[2] The claim arises out of a defective septic bed on the claimant's property. Mr Harrington moved into his house at 25 Gammon Lake Road, Lawrencetown, Nova Scotia in October 2003. The property is not on the municipal water system. It is served by a well and a septic bed system in the ground near to the house.

[3] In brief, I find on the evidence that the area bed septic system was installed by the defendant Beach Breeze Estates Limited in or about the fall of 1999. I am also satisfied that the defendant George Bellefontaine shared an ownership interest with his brother David in the defendant company. George Bellefontaine was the "Qualified Person" within the meaning of regulations enacted under the *Environment Act* of Nova Scotia who assessed the site conditions and decided that an area bed system (as opposed to, for example, a raised bed septic system) was the appropriate system given the site's water table and soil conditions.

[4] I am satisfied that the lands and premises at 25 Gammon Lake Road were, at the time of the septic system's installation, owned by Beach Breeze; and that the lands and premises were then sold to Carol and Steve Whynot. They lived there from 1999 until the fall of 2003, when they sold the property to Mr Harrington.

[5] What evidence there was concerning the septic system during the Whynots's occupancy was to the effect that there was no problem at all with it. However, about two or three weeks after Mr Harrington and his family moved into the house (and after the torrential downpours associated with Hurricane Juan) his sewage system backed up. A trench was dug which had the effect of relieving the water table pressure on the system (which had caused it to back up). The trench permitted the continued use of the system, but it was an obvious stop-gap that posed its own health hazards. Mr Harrington eventually decided that the only way to deal with the problem was to install a new, raised bed septic system. He then commenced this claim for the cost associated with installing a new system and a new well.

[6] I am satisfied on the evidence that was called, and in particular that of the expert Mr Williams, that the septic system then in place (being an area bed system):

- a. was the wrong design for the site *as the site existed in October 2003*; and
- b. was not constructed *in 1999* according to the then prevailing standards for area bed systems.

[7] I am also satisfied on the evidence, and so find, that the 1999 construction defects contributed to the septic system's "failure" in 2003.

[8] It is not necessary for me to detail here the reasons for any of the above findings, given the conclusion I have reached with respect to the legal issues involved in this case. Nor, and for the same reason, is it necessary for me to make a finding on whether the site conditions changed between 1999 and 2003. (Such a finding would of course be relevant to the issue of causation.)

[9] Mr Harrington claims for the cost of upgrading the septic system to a raised bed system. He alleges that the defendants negligently designed, and negligently installed (or permitted the installation of), a defective septic system. There was no contract between the claimant and the defendants. Mr Harrington purchased his house from a third party, who in turn appears to have purchased the property either from one of the defendants or from another party who was a privy of the defendants.

[10] As noted above, I am satisfied that the area field system that was installed in 1999 by Beach Breeze was installed improperly. I am also satisfied that, given the close connection between the corporate defendant and the individual defendant, the corporation's failure to install the system properly was negligent.

[11] The fundamental issue however is whether constructing an inadequate or even defective septic sewage treatment system is capable of giving rise to a claim *in tort* for the cost of remedying the defects. I say this because there was no contract between the defendants and the

claimant. Accordingly, the defendants could be liable, if at all, only if the defective system was so defective as to constitute a “dangerous” defect: see *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co Ltd.* [1995] 1 SCR 85.

[12] What type of dangerous condition is required to trigger defendant’s duty in tort to avoid an economic loss to the plaintiff? In *Rivtow Marine Ltd v. Washington Iron Works* [1974] SCR 1189 the decision to repair the defective crane was triggered by the failure of another crane which had resulted in the death of a crane operator. In *Bird Construction, supra* a storey-high section of 4-inch stone cladding about 20 feet in length fell from the ninth storey of a condominium to the ground, sparking obvious concerns about potential serious property and personal injury (including death) to persons using the building or walking about it. On the other hand, vinyl siding which tears off the side of a house in the wind (thereby risking possible injury to a passer-by) was judged not sufficiently dangerous to trigger the duty: see, for e.g., *Carleton Homes v. Graham* 2004 NSSC 134.

[13] In this case the septic system failed within roughly four years of its installation. In my opinion, and on the evidence, this was well before the elapse of the normal useful life of a properly installed septic system. The system was on that finding obviously “shoddy” and “defective.” The question, however, is whether it was *dangerously* defective.

[14] The claimant submits that the defects in the septic system constituted a dangerous defect within the meaning of the case law. I do not agree. On the case law cited to me it would appear that the danger must include a material risk of sudden and serious, perhaps fatal, injury to people. Minor injury or inconvenience would not appear to be enough to take the problem outside of the category of “shoddy work” and into the category of “dangerous defect.” And in this case there was no evidence of a risk of material and serious harm to the claimant or others as a result of the defect. The back up was relieved when a trench was dug to relieve the pressure on the system.

[15] It is of course true that a house which is not connected to a municipal water main cannot be used as a residence within a municipality without an operating septic bed system. It is also true that a defective septic system could lead to sickness by contaminating wells in the vicinity. On the evidence, however, this could happen in ordinary course at the end of a septic system’s useful life. The fact that the septic system fails before the end of its useful life (as here) is not, on the law, sufficient to put its failure into the same category as the type of loss in *Rivtow Marine* or *Bird Construction*.

[16] There were other issues outside of this one. The defendants also argued that the defendant George Bellefontaine, as the designer but not the constructor of the system, had no *personal* duty to ensure that the builder constructed the system properly. There was also a question of causation, inasmuch as there was evidence that the surrounding grounds, and the area immediately over the septic system, had been changed or degraded between the time of the bed’s installation and the time Mr Harrington purchased the property. However, in view of my finding on the crucial issue, it was not necessary for me to make findings on these points.

[17] I accordingly dismiss the claim, but without costs, inasmuch as I was satisfied that the corporate defendant did not install the system according to the appropriate specifications.

Dated at Halifax, this 12th day of December, 2006

Original: Court File)
Copy: Claimant)
Copy: Defendants)

W. Augustus Richardson, QC
ADJUDICATOR