

Date:20090310

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Greiss v. Polycorp Developments Inc., 2009 NSSM 21

BETWEEN:

RAMI GREISS and SUSAN MACINTOSH

Claimant

- and -

**POLYCORP DEVELOPMENTS INC. formerly known as POLYGON
DEVELOPMENTS INC.**

First Defendant

- and -

RESIDENTIAL WARRANTY COMPANY OF CANADA INC.

Second Defendant

- and -

KINGSWAY GENERAL INSURANCE COMPANY

Third Defendant

- and -

DEXTER CONSTRUCTION COMPANY LIMITED

Fourth Defendant

SCCH 292835

POLYCORP DEVELOPMENTS INC.

Claimant

- and -

DEXTER CONSTRUCTION COMPANY LIMITED

Defendant

ORDER

Adjudicator: David T.R. Parker

Heard:

March 26, 2008

June 3, 2008

December 10, 2008

December 18, 2008

Submissions:

December 22, 2008 from the Claimants

December 22, 2008 from the Defendant Kingsway General Insurance Company

Decision: March 10, 2009

Counsel:

**John Di Costanzo represented the Claimants Rami Greiss and Susan MacIntosh
Peter Polly as owner represented the Defendant and Claimant Polycorp Developments Inc.
Clare E. Bilek represented the Defendant Kingsway General Insurance Company
Cory Withrow represented the Defendant Dexter Construction Company Limited**

Parker:-This matter involved two claims, the one being Claim No. 288508 as amended and being Rami Greiss and Susan MacIntosh Claimants and Polycorp Developments Inc. ("Polycorp") as First Defendant, Residential Warranty Company of Canada Inc. ("RWC") as Second Defendant and Kingsway General Insurance Company ("Kingsway") as Third Defendant and Dexter Construction Limited ("Dexter") as Fourth Defendant. The second claim being No. 292835 has Polycorp Developments Inc., claiming against the Defendant Dexter Construction Company Limited.

The second action was in the form of a third party claim; however there being no provision in the *Small Claims Court Act* for third party claims, the second action was commenced as a separate

action. With consent of all the parties and in accordance with the provisions of the *Small Claims Court Act* these actions were heard at the same time.

Before the hearing began the parties were asked if there were any motions and any requests to amend pleadings. The Small Claims Court procedure was also reviewed with the parties and the claims were then heard.

Pleadings – Action No. 288508

Greiss and MacIntosh Claim - Pleadings

A. The Claim:

The Claimants stated they entered into a Purchase and Sale Agreement with Polycorp for a home to be constructed by Polycorp in a proper and workmanlike manner and in accordance with the National Building Code. The Claimants stated that Polycorp agreed to register the property with the Residential Warranty Company of Canada.

The Claimants stated that on February 8, 2007, the waterlines between the Claimants property and the city froze causing damage to the Claimant's property. The Claimants stated they had to repair the damage and once the underground water pipe was exposed it was determined that the water pipe was not installed in a workmanlike manner or in accordance with the National Building Code or Halifax Regional Water Commission Standards.

The Claimants in their pleadings allege Polycorp either did not register the home or failed to honour the warranty contained in the Residential Warranty Company of Canada warranty.

The Claimants state the Residential Warranty Company of Canada Inc. and Kingsway General Insurance Company has refused to honour the residential warranty.

The Claimant alleges in their amended pleadings that the Defendant, Dexter Construction Limited, completed the installation of the water services to the property in an improper and negligent manner including not abiding by the appropriate building codes, not installing the services in accordance with the plans and specifications with knowledge that the improper installation could lead to freezing and damages to the prospective owner.

The Claimants state they have requested the Defendants to repair or pay for the costs of repairing the damage and the Defendants have refused therefore the Claimants are claiming their losses in the amount of \$12,435.56.

B. Defence – Polycorp

The Defendant Polycorp stated “(a) the work was not defective, (b) if the work was defective the Claimant did not act to mitigate their damage and overreacted greatly magnifying their damages and even if the work was defective, it cannot be shown for certain that it (the Defendant Polycorp) caused the problem. The home was registered in a new home warranty program as per the agreement of purchase and sale, and premiums were paid to the New Home Warranty Company.”

C. Defence – Kingsway

The Defendant Kingsway denies the existence of an insurance policy or warranty with the Claimants as either the insured or through a warranty with the Residential Warranty Company of Canada.

Kingsway stated it had no contract with Residential for the provision of insurance for residential warranties at the time of the claim and any such contract were terminated effective April 18, 2004.

In the alternative if Kingsway is found to have a contract with RWC then any damages that did occur did so outside the time of coverage of the residential warranty and the type

of damage alleged is not covered under the terms of the residential warranty.

In the further alternative, if Kingsway is found liable, then it cross claims against the Defendant, Polycorp.

Kingsway requests that:

- (a) the claim be dismissed against Kingsway with costs;
- (b) a declaration that Polycorp is obligated to indemnify or make contribution to Kingsway in respect of any liability.
- (c) judgment against Polycorp for any interest or costs which Kingsway may be obligated to pay the Claimants.

Pleadings – Claim No. 292835

A.The Claim – Polycorp

The Claimant Polycorp claims for all costs incurred under Small Claims Court case #288508 plus costs. The Claimant stated the Defendant Dexter “failed to perform work in a good workmanlike manner (ie. They were negligent) resulting in a claim against Polycorp by a home buyer that purchased a home from Polycorp.

B.The Defence – Dexter

The Defendant Dexter provides a general denial and stated that:

“In December 2002 it installed water services at 3843 Mont Blanc Terrace (which is the property involved in these two actions) Dexter stated it installed the water services according to applicable construction practices, plans and guidelines and all materials used were appropriate.

Dexter denies it was negligent or installed services in an unworkmanlike manner. It denies that freezing of the lines was caused by material supplied by Dexter. Dexter denies the Claimant, Polycorp suffered any loss or damage as a result of its action or inaction and Dexter requests the claim be dismissed.

Facts and Analysis

The Defendant Dexter was contracted to install services into the buildings including in this case the Claimant's building during the initial construction and once the foundation was in place.

The Defendant Dexter was supplied by Polycorp with schematic plans of where the waterlines were to be placed (Exhibit p.14). This was provided in December 2002 prior to footings for the foundation being put in by Polycorp or its contractors.

These plans were provided to Dexter by Polycorp prior to Dexter providing a quote.

The plans (Exhibit p. 14 at page 7) state "Domestic service laterals and curb stops are to be installed as per HRWC Standard drawing #2387-A"

There was no other plan showing water line going into the building prior to the installation of the water line services by Dexter in May of 2003.

The water lines installed were inspected by the city and then Dexter backfilled water lines with 18 inches of fill.

Polycorp's representative was on site during the excavation and installation of the water lines.

No other landscaping and excavation work was required by Dexter.

Plans showing a retaining wall and water lines positioning were contained in further drawing (Exhibit p.17). These were not provided to Dexter prior to Dexter's putting in the water line services.

Polycorp attempted to show that Dexter were aware of the location of the retaining wall and the position of the water line services as described in Exhibit p.17. I do not accept this to be the case based on the testimony of the Defendant Dexter, the fact that the waterlines went in under the supervision of Polycorp. The retaining wall and landscaping was completed later by Polycorp and ultimate depth of the waterlines was determined by Polycorp and not Dexter. Further when Dexter was aware that a retaining wall was being put in it alerted Polycorp of a potential problem with service lines. I accept the evidence that if the retaining wall had not been put in by Polycorp the water lines may not have been a problem or to put it another way the fact that the retaining wall went in a problem did occur and the change in the landscape was not something that was done by Dexter. I have considered the fact that Dexter was aware of code however it completed the job of putting the water lines in as instructed and supervised by Polycorp. If they were not going to be ultimately buried deep enough by Polycorp they could have insulated.

The Decision

I would hold Polycorp as the one responsible to the Claimants for not having the services protected sufficiently so that they would not freeze as a result of the additional of the retaining wall and landscaping of the property.

Polycorp had their agreement with RWC and Greiss was aware that they were insured by RWC or at least believed they were. Kingsway was now the actual or ostensible agent of RWC with regard to this home of Greiss. Not only was Kingsway not doing business with RWC concerning the home in question it was not doing any business in Nova Scotia with respect to RWC. Polycorp may have an action against RWC but certainly Greiss et al do not. It is not necessary to involve notice requirements and indemnification as there was not a contract between the Claimants and Kingsway. Kingsway shall receive its costs as it was

successful in defending the claim.

IT IS THEREFORE ORDERED that in claim **SCCH 288508** the Defendant Polycorp Developments Inc. pay the Claimant Rami Greiss and Susan MacIntosh the following sums:

| | |
|-------------------------|---------------|
| Excavation Work | \$3,464.91 |
| | 3,226.20 |
| Kel-ann Organics | 129.85 |
| Lyne Lands | 2,451.00 |
| Sand Seal | 300.00 |
| Quotation for 2008 work | 228.00 |
| Civ Tech Engineering | 327.00 |
| Engineer's Report | 565.00 |
| Shrubs | 109.52 |
| Shrubs | 182.75 |
| Service costs | 159.60 |
| Court costs | <u>170.88</u> |
| | \$11,314.71 |

The claim against Dexter Construction Company Limited and Kingsway General Insurance Company are dismissed and the Claimants Rami Greiss and Susan MacIntosh shall pay Kingsway General Insurance Company the following costs.

\$1,110.27 witness costs for Travel/ Hotel/Meals

IT IS FURTHER ORDERED THAT the claim **SCCH 292835** by Polycorp Developments Inc. against Dexter Construction Company Limited be dismissed

Dated at Halifax, this 10 day of March, 2009.

David T.R. Parker