

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Halifax Regional Water Commission v. Environmental Solutions Remediation Services, 2010 NSSM 77

Between:

Halifax Regional Water Commission

CLAIMANT

- and -

Environmental Solutions Remediation Services

DEFENDANT

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: September 20, 2010 and October 7, 2010

Decision: December 17, 2010

Counsel: Ian R Dunbar, Counsel represented the Claimant

Charles E Burgher Atlantic Regional Manager For
Environmental Solutions Remediation Services represented
the Defendant

Parker:-this matter involved a water main that were struck by the defendant when it was digging monitoring wells on Quinpool Road in Halifax, Nova Scotia. The defendant is an

environmental consulting firm. The claimant is the wastewater and storm water utility of the Halifax Regional Municipality ("HRM"). HRM owns Quinpool Road and water lines under the road.

The claimant sues in negligence and negligent trespass and claims \$7611.02 for its cost to repair the damage water main.

The defendant does not challenge the amount of the claim however does challenge the claim itself.

Defendant's Pleadings:

The defendant in its pleadings stated that on August 19, 2009 it contacted Halifax Regional Water Commission requesting a "locate" in front of 6054 Quinpool Road as it needed to drill two monitoring wells on the road. On September 17, 2009 the defendant along with the subcontractor completed one monitoring well. A second monitoring well was initiated in keeping with the water Commissions blue markings and the obvious locations of the laterals from the building to the water main. The defendant further stated this effort was unsuccessful when a second unmarked water main, running parallel to the water Commissions Mark water main was struck. The defendant in its pleadings stated the water Commission was negligent by:

- Ignoring the defendant's advice to the water Commission that the purpose of the work was to drill monitoring wells, and
- Failing to mark the second water main and as such misled the defendant in determining where to drill the second monitoring well, leading directly to the drilling being conducted in the wrong location, and
- Failing to have an adequate "locate protocol" in place to support the "locate" service offered.

The defendant counterclaims against the claimant for special damages in the amount of \$915.45 for costs incurred in an attempt to drill the failed monitoring well along with prejudgment interest, costs and disbursements.

Prior to commencing the proceedings the parties were asked if there were any preliminary matters or motions that either side wish to make with respect to this matter. The parties were also asked if there was any request to change pleadings. The claimant advised the court that in addition to the negligent claim they wish to specifically plead negligent trespass. The amendment was noted and as there was no objection to same the amendment was allowed. The parties were then advised of the procedure in the Small Claims Court and the matter proceeded accordingly.

On August 19, 2009 the defendant contacted the claimant's utility, the water Commission and requested a "locate" in front of 6054 Quinpool Road. This call resulted in a trouble and repair order completed by the claimant. The order 83287 dated August 19, 2009 stated "location 6054 Quinpool Road locate & mark s/box & main installing monitoring wells".

This resulted in an employee of the claimant going to the site and marking a blue "T" on the road at the location of a water valve opposite 6054 Quinpool Road. The defendant later showed up and began drilling a hole approximately 3 feet from the blue markings, it then proceeded along the road opposite 6056 Quinpool Road and drilled another 4 inch hole in diameter and it was at this second site that the drill caused a puncture in the pipe.

The defendant argues they were not responsible as they drilled within acceptable industry tolerance from the area where the claimant indicated where the pipe was located. The defendant also argues that the claimant failed to mark the second water main in the area and this resulted in the defendant being misled by omission as to where the second

monitoring hole was to be drilled. Thirdly the defendant stated that the claimant had inadequate "locate protocol" in place to ensure that this would not happen.

The issues:

Should the claimant have done more to ensure the water main was not struck?

Should the defendant have done more to ensure that the water main was not struck?

Within a legal context the question that has to be dealt with before this court is: was the defendant negligent in its acts or omissions or was the claimant negligent in its acts or omissions? Coupled with this is the question of negligent trespass which the claimant put squarely before this court. With respect to the concept of negligent trespass counsel for the claimant referred to the case of *Bell Canada v. Cope (Sarnia) Ltd.* (1980), 11 CCLT 178 decision of the Ontario Supreme Court which was later affirmed at the Ontario Court of Appeal wherein Justice Linden stated:

"In a trespass action, once direct damage to the person or property of the plaintiff be shown, the defendant bears the burden of proving that this damage did not occur as a result of any intentional or negligent conduct on his part".

The reason for this comment is that trespass is an intentional tort where mistake is no defence. There is a burden shift here which is imposed upon the defendant to show they are not negligent rather than the claimant having to show or prove negligence of the defendant. This in my mind is significant.

Arguments of the Defendant:

The defendant in its brief to this court raised the following arguments:

The water Commission are the owners of the water main and for that reason the best qualified to conduct the "locate". When the water Commission agreed to conduct a locate the defendant had a right to rely that the service they offered was conducted in an acceptable industry standard.. The water Commission was negligent in that regard when they totally missed the 15 inch water main, a distant measurable in feet not inches, when painting the blue "locate" mark. After the break on September 17, 2009, the Commission in conducting a post accident response was able to correctly locate the broken water main with their own electric equipment used for that purpose, proving that it was possible for them to accurately locate the 15 inch water main, something they had failed to do following the August 19, 2009 request.

The "locate" protocol used by the Commission was not sufficient as proven by the fact that they did not locate and mark the second 24 inch water main, when their own expert witness stated he would have if asked to do the locate. The Commission did not request a site sketch as did another interested party, Halifax Regional Municipality nor did they request a site meeting. Evidence is given that since this incident and because of this incident, the water Commission has changed their locate protocol to include these features as part of conducting a "locate". This suggests that the water Commission themselves had concluded that their locate protocol was deficient on August 19, 2009 leading to the events on September 17, 2009.

The brief goes on to state that the above noted actions or failures to act properly by the Water Commission all provided the defendant the beliefs on it starting the drilling that it was safe to drill the holes where they were drilled. There were no physical characteristics on the surface or during drilling to suggest otherwise. There were no instructions given by the Water Commission nor markings or superstructure on the site to suggest otherwise.

The defendant stated it could have hired an independent service provider, however the water Commission offer and carry out the service on their own property as a standard practice. The Water Commission has the knowledge of their own property that an

independent service provider does not have and there was no reason to believe that an independent service provider could be better positioned to do the work.

The proximity of the valve box, by the plaintiff's own testimony, had no relevance to the location of the water main and the defendant could not and did not rely on that feature. They were guided solely by the "locate" of the water main and the "locate" of the lateral.

The proximity of the drill site for monitoring well1 and monitoring well2 were just outside the minimum of the tolerance zone separation from the blue "locate" mark for the water main. The locate by the Water Commission after the incident correctly identified the water main as being straight and true as it was in line with the still in place drill relative to the curb and the blue locate marking. There was no curve or bend in the water main that contributed to the accident. Drilling monitoring well2 just beyond the property boundary of 6054 Quinpool Road did not have a bearing on the loss.

The defendant goes on to state it has been suggested that methods to excavate which are not appropriate to the purpose of drilling monitoring Wells should have been used. The defendant submits that if the Water Commission had property marked both the 15 inch and 24 inch water mains and follow the locate protocol they have now adopted then the defendant would have had more information to consider whether or not they should even have continued with the plan to place monitoring wells.

This sums up the arguments of the defendant.

Arguments of the Claimant:

The claimant argues that the defenses contained in the pleadings have no merit and that there is no evidence that the Water Commission ignored Environmental Solutions advice that the purpose of the work was to drill monitoring Wells. Further the claimant suggests that there is no evidence that the Water Commission had and inadequate "locate protocol" or that the protocol employed was the cause of the incident.

The claimant while acknowledging that there are two water mains running down Quinpool Road and that only one of these water mains was marked by the water Commission, Environmental Solutions hit the same water main that was marked. Therefore the claimant argues that the second main did not have to be marked as a second main was not struck by the defendant. The claimant argues that a number of "signs" should have alerted Environmental Solutions that drilling where they did on Quinpool Road could cause damage.

The signs were: the proximity of the blue paint line to the drill site; the proximity of a valve box to the drill site; the defendant had not obtain clearance to dig at that specific site and Quinpool Road is a major street known to contain old underground services.

The Water Commission also argues That Environmental Solutions had avail to a number of resources which could have and would have prevented the damage that did occur. These resources included: hiring a company to locate underground services; digging without mechanical tools to avoid damaging underground equipment; using a hydro-vac method of excavation which would prevent any damage to underground equipment and calling the Water Commission on the day of drilling to obtain clearance at the specific location.

Analysis:

Environmental Solutions is knowledgeable in drilling monitoring wells. They received general permission from the defendant to proceed in drilling wells on their property. The claimant having knowledge this sensitive team to mark where the main water main is where the claimant's intended to drill two monitoring wells. The defendant in this case went beyond where it said it was going to drill that is to say it drilled in front of 6054 Quinpool Road where it indicated it was going to drill to the claimant. It also drilled in front of 6058 Quinpool Road. This in and of itself is not indicate negligence but it is one of the indices that form part of the entire picture. There are a number of services and valves in the area and this should have given the defendant pause in drilling the second

hole farther away from the first hole that was drilled. In fact it should have given them pause in drilling at all without taking further measures the least of which would have been to call the Water Commission in to make sure that nothing would go wrong. The senior supervisor for the Water Commission in his evidence which I accept this stated if he were on site and saw the lines he would not have drilled. He said looking at the whole site I simply would have made more inquiries. There was no intention by the defendant to drill into a water main but when you are on someone else's property you must take extreme care not to cause damage and to say the Water Commission or Halifax Regional Municipality should have done more to prevent damage to their own property cannot in my view be supported. The argument that the protocol had changed does not in and of itself indicate that the claimant must be negligent. The claimant certainly does certain things and takes certain actions to assist those that wish to enter onto its property so they will not do harm to themselves or to the property. Ultimately however those that go on to the property of the claimant must do their utmost to ensure no harm is done. In this particular case the claimant has shown that other precautions could have taken place including a simple call into the city to ensure the city had personnel on site so the defendant would not cause any damage to hidden pipes or services.

In this case the claimant will succeed in its claim and the defendant will not succeed in its counterclaim.

IT IS THEREFORE ORDERED that the defendant pay the claimant the following sums:

\$7611.02

\$179.36 court costs

\$7730.38

IT IS FURTHER ORDERED that the counterclaim against the claimant and defendant by way of counterclaim is dismissed with no order as to costs