

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**NORTHUMBERLAND STANDARD CONDOMINIUM CORPORATION
NO.72**

Plaintiff

- and -

**1573454 ONTARIO LTD., PHOENIX GENESIS FINANCIAL INC., J. E.
DOUBT ASSOCIATES INC., S.G. MACDONALD CONSULTING ENGINEER
INC., THE TOWN OF COBOURG**

Defendants

A N D B E T W E E N:

1573454 ONTARIO LTD. and PHOENIX GENESIS FINANCIAL INC.

Plaintiffs by Counterclaim

- and -

**NORTHUMBERLAND STANDARD CONDOMINIUM CORPORATION
NO. 72.**

**Defendants by
Counterclaim**

**FRESH AS AMENDED STATEMENT OF DEFENCE AND COUNTERCLAIM OF
1573454 ONTARIO LTD. and PHOENIX GENESIS FINANCIAL INC.**

TO: **DAVIDSON HOULE ALLEN LLP**
410 Laurier Avenue West Suite 800 Ottawa,
ON K1R 1B7

Christy J. Allen
LSO # 48963B
christie@davidsoncondolaw.ca

Melinda Andrews
LSO #67407F
melinda@davidsoncondolaw.ca

Tel: 613 - 231 – 8286
Fax: 613 - 788 – 2359

Lawyers for the plaintiffs and defendants by counterclaim,
Northumberland Standard Condominium Corporation No. 72

AND TO: **JAMES McGRATH**
Barrister and Solicitor
17 King St. East
Cobourg, ON K9A 1K6
james@jmcgrathlaw.ca

Lawyers for the defendants,
J. E. Doubt Associates Inc. and
S. G. Macdonald Consulting Engineer Ltd.

AND TO: **TEMPLEMAN LLP**
205 Dundas St. East
Belleville K8N 5A2

Jennifer Savini
Jsavini@tmlegal.ca

Lawyers for the defendants,
The Town of Cobourg

DEFENCE

1. The defendants admit the allegations contained in paragraphs 2, 4, 5, 7, 9, and 11 of the statement of claim (the “Claim”).
2. The defendants deny each and every of the other allegations in the Claim, except as otherwise expressly admitted herein.
3. The plaintiff was created by declaration “the Declaration” pursuant to the *Condominium Act, 1998*, SO 1990, c 19 (the “Act”) on August 19, 2011. The lands, common elements, and building described as Northumberland Standard Condominium Corporation No. 72 (“NSCC 72”) are referred to herein as “the Property.”
4. The defendant, 1573454 Ontario Ltd. (“157”) was the developer of the Property and the declarant of NSCC 72.
5. The defendant, Phoenix Genesis Financial Inc. (“Phoenix”) is a corporation incorporated pursuant to the laws of Ontario. Phoenix was incorporated on September 9, 2011.
6. Phoenix was incorporated after the creation of the plaintiff, and has no involvement with the matters at issue. The Claim as against Phoenix is frivolous, vexatious, and designed to disrupt the business interests of the defendants and their principals. The Claim as against Phoenix entirely lacks standing and merit.

The Audit and Alleged Deficiencies

7. At all material times, it was the plaintiff’s responsibility to arrange for an audit of the Building pursuant to the *Act*.

8. The audit was repeatedly deferred by a majority vote of condominium unit owners. Any liability resulting from the plaintiff's failure to conduct the audit lies with the plaintiff.
9. When the audit did finally take place, 157 was prevented from participating in the Audit by the plaintiff, contrary to article XII(h)(i) of the Declaration.
10. Furthermore, statutory purposes of a performance Audit, as set out in section 44(4) of the *Act*, are to determine potential claims for payments out of the guarantee fund under the *Ontario New Home Warranties Plan Act*. This act did not apply to NSCC 72 as it was a conversion rather than a new build. Even if the audit report was accurate (which is denied), the audit results would not entitle the plaintiffs to the damages claimed.
11. Nonetheless, following the audit, 157 took steps to remedy several of the alleged deficiencies.
12. With respect to the balance of the alleged deficiencies, they are *de minimus*, not the defendants' responsibility, and gave rise to no loss. In the alternative, the deficiencies were caused by the plaintiffs' own failure to properly maintain the Property.
13. The defendants deny any liability for the alleged deficiencies and put the plaintiff to the strict proof thereof.
14. The defendants respond specifically to the alleged deficiencies in the Audit, stating as follows, using the same numbering format contained in paragraph 18 of the Claim:
 - a. The land with the paving stones (missing or otherwise) does not belong to NSCC72 and this issue does not affect the plaintiff.
 - b. The catch basin was installed in 2015.

- c. Maintenance of the catch basins and removal of debris was at all material times the plaintiff's responsibility, and not that of 157.
- d. The landscaping cannot be completed because the plaintiff is blocking and obstructing the development of the adjacent land.
- e. 157 has nothing to do with this allegation. The fencing was removed in 2014 by a neighboring resident of Cobourg and the police were involved.
- f. The missing garage thresholds were installed in 2015 by 157.
- g. These lights were not required and were merely "roughed in" if the event plaintiff felt the need for lighting at the rear of the Garages.
- h. The carport walls were fully finished in 2015 by 157.
- i. Any deficiencies to the roof or soffit finishes were corrected and completed in 2015 by 157.
- j. The fire separation is not required as the phase 2 extension or other neighboring building has not been constructed.
- k. There is no requirement for cement board ceilings.
- l. This cladding was repaired and/or completed in 2015 by 157.
- m. The flashing was repaired and/or completed in 2015 by 157.
- n. The roof was installed in 2010 and the plaintiff has failed to properly maintain it since that time. This is not 157's responsibility.
- o. The "pitch pockets" were installed in 2010 and the plaintiff has failed to properly maintain them or utilize them correctly since that time. This is not 157's responsibility.
- p. The parapet wall was fully installed in 2011 by 157 but will be strengthened by the extension when it is built to the west.
- q. The exterior doors were installed as required in 2011 by 157. Any deficiency related to the flashing around the doors is a result of the plaintiffs' removal of, or failure to properly maintain same.

- r. The stone veneer was completed in 2015 by 157.
- s. There was no missing emergency lighting when construction of the Property was completed. Any missing lighting or signs are a result of the plaintiff's removal of, or failure to properly maintain same.
- t. The patio stones were installed in 2010 and move slightly seasonally due to changes in temperature, freezing and thawing, etc. Any deficiencies are a result of the plaintiff's failure to maintain the patio.
- u. An air unit was installed during construction of the Property. Ongoing maintenance and replacement of air units are the responsibility of the plaintiff. This is not by 157's responsibility.
- v. The defendants deny any deficiency with respect to the heating, ventilation, and air conditioning of the Building and put the plaintiff to the strict proof thereof.
- w. The defendants deny any deficiency with respect to the insulation of the Building and put the plaintiff to the strict proof thereof.
- x. Any deficiencies with the trim were corrected in 2015 by 157.
- y. The windows were resealed in 2015 as a goodwill gesture by 157. Resealing of caulking around windows is an ongoing maintenance obligation of the plaintiff.
- z. The defendants deny any deficiency with respect to the vent covers in the Building and put the plaintiff to the strict proof thereof.
- aa. At the time of construction, there was no requirement on 157 to install railings. Subsequently, condominium unit owners installed stairs without proper railings. Any deficiency in this regard is not 157's responsibility.
- bb. Several ceiling tiles were replaced in 2015 as a goodwill gesture by 157. Replacement and maintenance of ceiling tiles is an ongoing maintenance obligation of the plaintiff.
- cc. There is no requirement for garbage room sinks, drains, or faucets.
- dd. There is no requirement for all the rooms to have exhaust ventilation. Ventilation in the garbage compactor room was installed in 2015 by 157.

- ee. All deficiencies with the noted electrical wiring were remedied in 2015 by 157.
- ff. Any missing covers were replaced in 2015 by 157. Subsequent removal or damage to junction box covers are an ongoing maintenance obligation of the plaintiff.
- gg. The finishes have been subject to use for over ten years. Any deficiencies are a result of the plaintiff's failure to maintain the common elements.
- hh. The finishes have been subject to use for over ten years. Any deficiencies are a result of the plaintiff's failure to maintain the common elements.
- ii. The defendants deny any deficiency with respect to the fire stopping and put the plaintiff to the strict proof thereof.
- jj. The defendants deny any deficiency with respect to the fire rating assembly and put the plaintiff to the strict proof thereof. The Town of Cobourg is aware of this allegation and would have taken urgent steps to remedy the issue if it had any merit.
- kk. The second egress path was not a requirement at the time of construction, nor at the time of the Audit.
- ll. The defendants deny any deficiency with respect to the common element handrails and put the plaintiff to the strict proof thereof.
- mm. The main structure that forms the Property is over a hundred years old. Floor tiles are part of the plaintiff's ongoing maintenance obligations. The defendants deny any deficiency with the floor tiles which would result in inoperable doors.
- nn. This allegation is inaccurate. The deficiency referred to in the Audit is a "deodorizer" for the garbage chutes and bins, which is not a requirement. The defendants deny any deficiency with respect to the garbage chute. NSCC72 are fully aware that there is a fire system installed in the garbage chute as confirmed by Quinte Fire and NSCC72 advised the Town of Cobourg of same.
- oo. The electrical panels in question belong to 157. This issue does not affect the plaintiff.

- pp. The defendants deny that the 4th floor water heater is missing. It is plainly obvious that the washroom and meeting room of the 4th floor have hot water. The heating unit is in the ceiling. This allegation is frivolous, vexatious, and outrageous.
- qq. The lockers were finished in 2015 by 157.
- rr. The high level water alarm was not a requirement during construction. This is not 157's responsibility.
- ss. The incomplete vent was repaired in 2015 by 157.
- tt. The defendants deny any deficiency with respect to the walls of the garbage compactor room and put the plaintiff to the strict proof thereof.
- uu. Elevator permits are renewed on an annual basis. This requirement is plainly and obviously the plaintiff's responsibility.
- vv. The defendants deny any deficiency or exposure with respect to the concrete form blocks and put the plaintiff to the strict proof thereof.
- ww. The defendants deny any deficiency with respect to the light fixtures and put the plaintiff to the strict proof thereof.
- xx. At the time of construction, this room was not an exercise room, but was a boiler room. The plaintiffs have substantially altered the layout of the room, and caused the issues they allege against the defendants.
- yy. At the time of construction, this room was not an exercise room, but was a boiler room. The plaintiffs have substantially altered the layout of the room, and caused the issue they allege against the defendants.
- zz. The ceiling tiles were installed as required in 2011 and replaced as a goodwill gesture in 2015 by 157. Any deficiency related to the panels is a result of the plaintiffs' removal of, or failure to properly maintain same.
- aaa. Some windows were installed as early as 2008. Any deficiency related to the windows is a result of the plaintiffs' removal of, or failure to properly maintain same.

15. In summary, the plaintiff's allegations with respect to the audit and the Property are denied. Nearly all of the alleged deficiencies are the result of expected wear and tear over years of use by residents.
16. NSCC 72 was specifically aware of, and consented to, the construction of the exterior fire exit referred to in paragraph 23 of the Claim. This was a demand by the Town of Cobourg and the fire exit was constructed under the Supervision of the Town Chief Building Officer at the time. The chairman of NSCC 72's board of directors, Mr. Gratton, is the resident of unit 406 and his occupancy permit required the fire exit. The suggestion that NSCC 72 did not authorize this addition is plainly without merit.
17. 157 further denies that it is in breach of any warranties with respect to the construction of the Building.
18. The agreements of purchase and sale contained a one-year warranty to NSCC 72's unit owners for any deficiencies. That warranty has long-since expired.
19. The original agreements of purchase and sale specifically provided that there were no warranties or representations relating to the units or the common elements except as specifically provided in the agreements of purchase and sale. The agreements of purchase and sale did not contain any warranties relating to the deficiencies claimed by the plaintiff.
20. Subsequent purchasers after May 18 2017 received a Status Certificate from NSCC72, paragraph 18 or others which brought to their attention the legal claim against the Builder

and Declarant and knew or ought to have known of the alleged deficiencies and concluded their purchase nonetheless.

21. The defendants deny that the Property is unfit for human habitation. This allegation is vexatious and outrageous.
22. 157 states that the Property was constructed in a good and proper manner, fit for human habitation, in compliance with applicable building codes and by-laws, and in accordance with the plans and specifications filed with the municipality, using materials of good quality, free from defects and in accordance with standard industry practices.
23. 157 states that the construction and development of the Property was a successful conversion of a heritage building into a high-quality condominium. The registration of NSCC 72 with the Land Registry could not have taken place without the proper approvals and compliance with all the relevant regulations and statutes.
24. The Agreement of Purchase and Sale of each and every condominium unit of NSCC 72 states the following:

The Purchaser acknowledges and agrees that the filing of the consulting engineers' certificate with the local municipality, or the issuance by the local municipality of an occupancy certificate or such other confirmation that the Property may be occupied shall, subject to the provision of subparagraph (b) hereof, constitute complete and absolute acceptance by the Purchaser of all construction matters, and the quality and sufficiency there including, without limitation, all mechanical, structural and architectural matters.

25. The consulting engineers' certificate was filed with the Town of Cobourg.
26. The Town of Cobourg issued occupancy certificates for all of the condominium's units.

27. Accordingly, pursuant to the Agreements of Purchase and Sale, all the purchasers of NSCC 72's condominium units were deemed to have fully accepted the quality and sufficiency of the construction.

Development of Neighbouring Property

28. Though phase 2 of NSCC 72 was not completed, 157 intends to complete construction of a neighbouring and adjoined residential building. The plaintiff is aware of this objective.
29. The completion of the neighbouring and adjoined building would make the need for, and existence of, the current fire exit obsolete. The fire exit needs to be removed for the construction to be completed.
30. The necessary egress from NSCC 72 can be provided without any easement on 157's lands. There is no express or implied easement given by 157.
31. Accordingly, the alleged easement sought has no basis in law.
32. 157 states, and the fact is, that since the creation of NSCC 72, the plaintiff has actively and repeatedly interfered with, obstructed, and prevented 157 from completing the development and construction of a neighbouring building.
33. 157 pleads that any noncompliance with the *Ontario Building Code*, the *Ontario Fire Code*, and with any other applicable by-laws or regulations are the plaintiff's responsibility, and result from the plaintiff's disruptions and lack of cooperation.
34. At paragraph 29 of the Claim, the plaintiff pleads as follows:
- [The order to comply] requires the Corporation... to correct the outstanding construction deficiencies and lack of building permits...

35. It is clear that the plaintiff understands that any deficiencies with the Property lie with NSCC 72, and not with the defendants.

The Claim is Statute-Barred by the *Limitations Act*

36. The alleged deficiencies, even if they are accurately described by the Claim (which is denied), would have been obvious to the plaintiff, or any unit owner, resident, or board member of NSCC 72 upon the creation of NSCC 72 in 2011 or shortly thereafter, and certainly before May 17, 2015.
37. Contrary to the allegations made by the plaintiff, the Turnover Meeting occurred on May 6, 2013.
38. All of the allegations made in the Claim were known to NSCC 72, or ought to have been known to a reasonable person in NSCC 72's position, at the time that the Property was completed or as of the date of the Declaration, in or about 2011, or certainly before May 17, 2015.
39. More than two years passed between May 17, 2015, and the issuance of this claim. Accordingly, the Claim is statute-barred in its entirety.
40. Further, or in the alternative, preliminary reports which preceded the Audit date were distributed to the board of directors of NSCC 72 before May 17, 2015.
41. Even if the alleged deficiencies were not known to the plaintiff in 2011 (which is denied), the plaintiff knew or ought to have known of the matters giving rise to the Claim upon receiving the preliminary reports, or before May 17, 2015.

42. The two-year anniversary of the receipt of the preliminary reports was no later than May 17, 2017. Accordingly, the Claim is statute-barred.
43. Further, or in the alternative, the Fresh as Amended Statement of Claim, amended May 25, 2022, (the “Amended Claim”) contains numerous new allegations which were not in the original Claim, to wit, allegations with respect to, *inter alia*:
- a. *Ontario Fire Code* deficiencies;
 - b. the Town’s orders to comply;
 - c. deficiencies with the west wall of the building and the fire escape; and
 - d. the easements sought over 157’s lands.
44. Even if this Honourable Court finds that the entire claim was not statute-barred, these added claims were certainly known (or ought to have been known) by the plaintiff in 2011 and certainly no later than May 18, 2017, when the Claim was issued. The amendments to the Claim must be statute-barred.
45. The defendants plead and rely on the provisions of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B and the *Real Property Limitations Act*, R.S.O. 1990, Chapter L.15.
46. The plaintiffs amended their Claim without leave of the court, in contravention of the *Rules of Civil Procedure*. By filing this Fresh as Amended Defence, the defendants do not waive their rights to bring a motion to strike the plaintiff’s pleadings for non-compliance.

Laches

47. Further to the above, the defendants seek the dismissal of the Claim for their undue delay.

48. Notwithstanding the plaintiff's knowledge of the matters at issue in the Claim for years, the plaintiff did not diligently take steps to commence its claim.
49. Even following commencement of the Claim, the plaintiff unduly delayed its advancement of the matter. The principal and directing mind of the defendant, J. E. Doubt Associates Inc., is now deceased. The absence of his evidence from these proceedings greatly prejudices the defendants.
50. The defendants plead and rely on the equitable doctrine of laches.

No Damages or Entitlement to Other Remedies

51. The plaintiff has not suffered any loss or damage in respect of which the defendants are liable.
52. If the plaintiff has suffered any losses or damages, which are not admitted but expressly denied, the amounts claimed are excessive, exaggerated, remote, unenforceable, unrecognized at law, caused or contributed-to by the plaintiff's own conduct, and totally and completely unconnected with any default on the part of the defendants.
53. The plaintiff's claims are vexatious, frivolous, outrageous, and have significantly damaged the reputation of the defendants.
54. The defendants accordingly ask that this action be dismissed with costs on a substantial indemnity basis.

COUNTERCLAIM OF 1573454 ONTARIO LTD.

55. The defendant/plaintiff by counterclaim, 1573454 Ontario Ltd., (“157” as defined previously) claims against the plaintiff/defendant by counterclaim, Northumberland Standard Condominium Corporation No. 72 (“NSCC 72”, as defined previously):

- a. \$11,000,000 in damages for intentional interference with economic relations, restraint of trade, breach of contract, and defamation;
- b. \$1,000,000 for punitive, aggravated, or exemplary damages;
- c. A declaration that NSCC 72 has no interest, right, or title in any property owned by 157 legally described as:

PT LTS 8, 11,13,16,17 & 18 BLK F2 S/S UNIVERSITY AV AND W/S
GEORGE ST PL CADDY (FORMERLY PT LT 17 CON A HAMILTON)
COBOURG PT 2 PL 39R12493; TOGETHER WITH AN EASEMENT OVER PT
7 39R12493 AS IN ND62753; TOGETHER WITH AN EASEMENT OVER PT
LTS 3,4,5,6,8,10,11,12,13,15,16,17 & 18 BLOCK F2 CADDY PLAN
FORMERLY PT LT 17 CON A HAMILTON) PT 1 PL 39R12493 AS IN
ND65484; TOWN OF COBOURG

being PIN 51094 - 0442 LT (the “Neighbouring Property”), and that the notice registered as instrument ND22877D (the “Notice”) is a slander to title of the Neighbouring Property;

- d. The deletion of the Notice from title to the Neighbouring Property;
- e. A declaration that 157’s construction and development of the building, lands, and common elements known as NSCC 72 were done in a good and proper manner in compliance with relevant provisions of the *Act* and all applicable regulations and statutes;
- f. prejudgment and post-judgment interest on the amounts in paragraphs 53(a) and (b) above, pursuant to the *Courts of Justice Act*, RSO 1990, c. C43; and
- g. its costs on a substantial indemnity basis.

56. Since its inception, NSCC 72 has taken deliberate steps to interfere with 157's development of the Neighbouring Property and with 157's ability to trade freely as a builder and developer in the Town of Cobourg and other areas.
57. By refusing to remove certain chattels and fixtures, and by refusing to cooperate with 157, NSCC 72 has prevented 157 from developing the Neighbouring Property and from building an attached condominium.
58. As a result of 157's inability to build on its own lands, it has suffered and continues to suffer damages in the form of lost business opportunities.
59. Furthermore, NSCC 72 is bound, via its Declaration, and by a costs-sharing agreement dated August 26, 2011 with respect to improvements to the Property and the development of the Neighbouring Property.
60. To date, NSCC 72 has refused to pay the amounts it is responsible for under the costs-sharing agreement or to enter into a new costs-sharing agreement, in breach of the Declaration and in contravention of the *Act*.
61. Furthermore, NSCC 72 has repeatedly misrepresented the quality and status of the Property to public officials, residents of Cobourg, condominium unit owners, auditors, and numerous other individuals.
62. Specifically, the defendants by counterclaim made the following false and defamatory statements about 157, *inter alia* (the "Defamatory Comments"):

- a. that 157's construction and development of the Property was deficient, not done in a good and proper manner, and not done in compliance with good and prudent practices in the construction industry;
 - b. that NSCC 72 was not fit for human habitation;
 - c. that NSCC 72 was not in compliance with the *Ontario Building Code* and the *Ontario Fire Code*; and
 - d. that 157 was deficient in its duties as the property manager of NSCC 72.
63. In their ordinary meaning or by innuendo, the Defamatory Comments indicated, among other things, that
- a. 157 had engaged in dishonest, illegal, and/or unethical conduct;
 - b. 157 was not an adequate, skilled, or experienced builder and developer;
 - c. 157 was dishonest and untrustworthy; and
 - d. 157 was not competent in the services it provided.
64. Each of these meanings is false and defamatory, and would tend to lower 157's reputation in the eyes of a reasonable person in the industry.
65. As a result of the Defamatory Comments, 157 has experienced significant difficulty proceeding with building and development in the town of Cobourg and other places, and will have its Tarion Warranty fees substantially increased. 157 has accordingly suffered a significant loss of business income.

66. 157's reputation and standing in the community has been and will continue to be impaired.
67. 157 pleads and relies on the provisions of the *Business Corporations Act* and the *Libel and Slander Act*.
68. 157 pleads that the above amounts to intentional interference with economical relations.
69. NSCC 72 commenced this legal proceeding against 157 maliciously and in bad faith, with the intention of intimidating and embarrassing 157.
70. The conduct of NSCC 72 has been egregious, high-handed, reprehensible, willful, and contemptuous. The defendants by counterclaim are deserving of full condemnation and punishment by this Honourable Court and should be ordered to pay aggravated or punitive damages, to mark the community's condemnation and deter others from similar conduct.
71. 157 requests that the counterclaim be heard at the same time as or immediately following the hearing of the main action.

1573454 Ontario Ltd.
and Phoenix Genesis Financial Inc.
The Defendants and Plaintiffs by Counterclaim
c/o Suite 425, 975A Elgin Street West
Cobourg, Ontario K9A 5J3

John Lee and Laurel Clarry
Phone Numbers: 905-269-4166 & 905-269-7801
JohnTTLee36@gmail.com & ClarryL@outlook.com
Representatives of these two Defendants

**NORTHUMBERLAND STANDARD CONDOMINIUM
CORPORATION NO. 72**
Plaintiff

- and -

**1573454 ONTARIO LTD., PHOENIX GENESIS
FINANCIAL INC., et al.**
Defendants

**1573454 ONTARIO LTD. AND PHOENIX GENESIS
FINANCIAL INC.**
Plaintiffs by Counterclaim

**NORTHUMBERLAND STANDARD CONDOMINIUM
CORPORATION NO. 72**
Defendants by Counterclaim

ONTARIO

SUPERIOR COURT OF JUSTICE
Proceeding commenced at COBOURG

**FRESH AS AMENDED STATEMENT OF DEFENCE and
COUNTERCLAIM OF 1573454 ONTARIO LTD. and
Phoenix Genesis Financial Inc.**
September 29, 2022

**1573454 Ontario Ltd. and Phoenix Genesis Financial
Inc., TWO OF THE Defendants and Plaintiffs by
Counterclaim**

John Lee and Laurel Clarry
Representatives of the Two Defendants
Suite 425, 975A Elgin Street West
Cobourg, Ontario K9A 5J3
905-269-4166

Johnntlee36@gmail.com clarryl@outlook.com