

1 Case No. CV104

2 Dept No. \_\_\_\_\_

3 126535

NO  
FILED

MAR 06 1989

ALBERT J. HAMMOND  
JUSTICE OF THE PEACE

4  
5  
6 EUREKA JUSTICE COURT

7 IN AND FOR THE COUNTY OF EUREKA, STATE OF NEVADA

8 TED R. and MARY R. CARRION,

9 Plaintiffs,

10 vs.

11 JAMES E. and  
12 LORRAINE B. DOTSON and  
13 DOES I-V, inclusive

14 Defendants,

JUDGMENT

I hereby certify that the foregoing is a true and  
correct copy of the original Judgment

4. Filed in Justice Court, Eureka Township,  
Eureka County, Nevada on March 6 19 89

EUREKA JUSTICE COURT, EUREKA TOWNSHIP  
EUREKA COUNTY, NEVADA

DATED this 6<sup>th</sup> day of March 19 89

15  
16 On November 21, 1988, a trial was held in the  
17 above entitled matter, with Jack B. Ames presiding as acting  
18 Justice of the Peace for Eureka Township. The plaintiffs  
19 did not appear but were represented by Milos Terzich,  
20 Attorney at Law from Gardnerville, Nevada. The defendants  
21 appeared in court and were represented by Gary D. Fairman,  
22 Attorney at Law from Ely, Nevada.

23 Prior to accepting evidence the court listened  
24 to argument on a Motion for Protective Order and Request  
25 for Attorney Fees and a Motion to Dismiss Counterclaim.  
26 The Motion to Dismiss Counterclaim was denied. However  
27 the Motion for Protective Order and Request for Attorney  
28 Fees was taken under advisement.

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Concerning the Motion for Protective Order and Request for Attorney Fees, the court finds as follows:

The parties engaged in discovery on prior occasions and have waived any objection under Rule 25A of the Justices' Courts' Rules of Civil Procedure.

On November 4, 1988, defendants mailed a Notice of Taking Deposition to plaintiffs' attorney setting a deposition for 9:00 o'clock a.m. on Saturday November 12, 1988. On November 8, 1988, plaintiffs mailed a Motion for Protective Order with points and authorities to defendants' attorney. Upon receipt of the Motion for Protective Order, defendants cancelled the deposition. Plaintiffs are requesting attorney fees in the amount of \$312.50 actually incurred for preparing the Motion and the points and authorities.

From the testimony and exhibits received into evidence at the time of the trial, the court makes its findings of fact as follows:

1. Plaintiffs are the owners of the Owl Club which is located on Lots 7 and 8 in Block 22 in the Town of Eureka, County of Eureka, State of Nevada.
2. Defendants are the owners of the Nevada Club which is located adjacent to and to the left of the Owl Club on Lots 5 and 6 of Block 22.
3. The walls of the two buildings are inches apart and join at the roof of the Owl Club.
4. The roof of the Nevada Club hangs over the

1 the roof of the Owl Club. The Nevada Club roof is  
2 approximately eighteen feet higher than the roof of the  
3 Owl Club over the bar area and ten feet higher over the  
4 apartment area.

5 5. During the winter because of melting and  
6 freezing, damage is done to the Owl Club as a result of  
7 the water and ice falling onto its roof from the higher  
8 roof of the Nevada Club. Although they have been aware  
9 of the damage, defendants have failed to take reasonable  
10 and necessary measures to correct the situation.

11 6. Plaintiffs paid \$4,937.00 to Delta Roofing  
12 and Insulation for work done to their roof on October 9,  
13 1985, to repair damages which occurred sometime prior to  
14 that date. Ron Carrion, the manager of the Owl Club,  
15 testified approximately \$2,400.00 of the bill was for  
16 damages directly caused by run-off of water and ice from  
17 the Nevada Club.

18 7. On May 24, 1987, plaintiffs received a bill  
19 in the amount of \$1,036.00 from Miles Brothers Construction  
20 for work performed on the roof of the Owl Club to repair  
21 damage created by the run-off of water and ice from the  
22 Nevada Club.

23 8. Sometime in 1982 the parties met and discussed  
24 the damage that was occurring to both buildings from the  
25 water and ice running off the defendants' building. As a  
26 result of that conversation it was agreed that defendants  
27 would buy materials to install guttering on the defendants'  
28 building and plaintiffs would install the materials at their  
expense. Although the terms of the agreement are at issue

1 the evidence supports the defendants' version of the  
2 agreement.

3 9. Defendants in the early part of 1983 purchased  
4 some material for \$72.57, however, plaintiffs failed to have  
5 it installed. Dennis Cunningham verbally offered to install  
6 the guttering, however, there is a conflict concerning the  
7 amount of Cunningham's bid. Ron Carrion claims the bid was  
8 \$480.00 and Dennis Cunningham claims the amount to be  
9 \$250.00. Plaintiffs rejected Cunningham's offer.

10 11. Although the method of installation was not  
11 discussed with Ron Carrion before the rejection, the court  
12 finds that it would have been inadequate to correct the  
13 run-off problem and prevent damage to plaintiffs' roof.

14 12. Plaintiffs filed their action against defendants  
15 on May 24, 1988.

16 DISCUSSION OF THE LAW:

17 Rule 26 (i) of the JCRCP requires discovery to be  
18 completed forty-five days before the date set for trial. Rule  
19 30 (b) (1) requires reasonable notice for the taking of a  
20 deposition which is to be not less than fifteen days prior to  
21 the deposition. Rule 30 became effective June 28, 1988. Prior  
22 to June 28, 1988, the rule required not less than five days  
23 notice. The defendants failed to give sufficient notice for  
24 the deposition and noticed the matter for a non-judicial day.  
25 Plaintiffs' attorney made no effort to contact the attorney  
26 for defendants, but the court knows of no requirement that he  
27 do so. Plaintiffs were required to file their Motion for  
28 Protective Order and are entitled to recover their attorney

1 fees incurred in relation to the Motion.

2 Defendants' counterclaim is based upon the breach  
3 of an unwritten contract. The statute of limitations is four  
4 years. NRS 11.190. The four year period would commence as  
5 of the date of the breach, which was sometime in 1983. The  
6 four years expired prior to the commencement of this action,  
7 therefore, defendants counterclaim should be dismissed.  
8 Furthermore, the defendant failed to prove damages except for  
9 \$72.57. The installation of the materials purchased by  
10 defendants if installed as suggested by Dennis Cunningham  
11 would not have been adequate to protect the parties buildings  
12 from futher damage.

13 It is unknow when the damage actually occurred for  
14 which the repairs were made in October 1985. The damages were  
15 the result of several years of run-off from the Nevada Club  
16 prior to the winter of 1985. Plaintiffs filed their action  
17 on May 24, 1988. An action to recover damages to real property  
18 must be filed within four years of the date of damages.

19 NRS 11.220; Hartford Ins. v. Statewide Appliance, 87 Nev. 195,  
20 198 (1971). Plaintiffs were aware damages were occurring as  
21 early as 1982. It is impossible to determine what part of the  
22 \$2,400.00 expended in October, 1985, by plaintiff was for damages  
23 occurring after May 24, 1984. On the other hand, the \$1,036.00  
24 expended by the plaintiffs for the repair of damages caused  
25 by water running off of the defendants' roof was for damages  
26 occurring after October 1985 and plaintiffs are entitled to  
27 recover that amount from defendants. See 48 ALR 1248.

28 Defendants' affirmative defenses do not apply to  
the damages occurring after the 1983 agreement. Accord and

1 satisfaction would apply, if at all, to a claim for damages  
2 prior to 1983. The requisite intent to establish the  
3 affirmative defenses has not been shown. The court finds that  
4 the plaintiffs never intended to foreclose themselves from  
5 pursuing redress for damages occurring after 1983. It is  
6 difficult for the court to believe the defendants, knowing that  
7 damage was occurring to plaintiffs' building, were justified,  
8 after spending \$72.57, in not correcting their building to stop  
9 the damage from occurring in the future.

10 ORDER

- 11 1. It is hereby ordered that plaintiffs recover  
12 from defendants \$312.00 in attorney fees necessarily incurred  
13 in preparing the Motion for Protective Order.  
14 2. It is further ordered that defendants counterclaim  
15 be and the same hereby is dismissed.  
16 3. It is further ordered that defendants pay to  
17 plaintiffs \$1,036.00 as and for damages sustained to plaintiffs'  
18 real property.  
19 4. It is further ordered that plaintiffs recover  
20 reasonable attorney fees for prosecuting this suit from  
21 defendants in the amount of \$750.00 together with their costs  
22 of suit.  
23 5. It is further ordered plaintiffs recover interest  
24 on this judgment at the legal rate from the service of the  
25 complaint which was May 24, 1988, until paid.  
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1  
2 DATED this 3<sup>rd</sup> day of MARCH, 1989.  
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5  
6 JACK B. AMES  
7 Acting Justice of the Peace  
8 Eureka Township  
9  
10

11 cc. Gary D. Fairman  
12 737 Avenue G - P.O. Box 5  
13 Ely, Nevada 89301

14 Milos Terzich, LTD  
15 1524 Highway 395  
16 P.O. Box 608  
17 Gardnerville, Nevada 89410  
18  
19

20 RECORDED AT THE REQUEST OF  
21 Ron Carrion  
22 BOOK PAGE  
23 194 438  
24 '89 MAR -7 P356

25 OFFICIAL RECORDS  
26 EUREKA COUNTY, NEVADA  
27 M.N. REBELEAU, RECORDER  
28 FILE NO. FEE \$  
126535 11.00

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