

Case No. CV104

Dept No. _____

NO
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ALBERT J. HAMMOND
JUSTICE OF THE PEACE

EUREKA JUSTICE COURT

IN AND FOR THE COUNTY OF EUREKA, STATE OF NEVADA

TED R. and MARY R. CARRION,

Plaintiffs,

vs.

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

Defendants,

JUDGMENT

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

Attest to the Justice Court, Eureka Township,
Eureka County, Nevada on March 16 1989

EUREKA JUSTICE COURT, EUREKA TOWNSHIP
EUREKA COUNTY, NEVADA

DATED this 6th day of March 1989

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

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

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

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

6 On November 4, 1988, defendants mailed a
7 Notice of Taking Deposition to plaintiffs' attorney
8 setting a deposition for 9:00 o'clock a.m. on Saturday
9 November 12, 1988. On November 8, 1988, plaintiffs mailed
10 a Motion for Protective Order with points and authorities
11 to defendants' attorney. Upon receipt of the Motion for
12 Protective Order, defendants cancelled the deposition.
13 Plaintiffs are requesting attorney fees in the amount of
14 \$312.50 actually incurred for preparing the Motion and the
15 points and authorities.

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

- 19 1. Plaintiffs are the owners of the Owl Club
20 which is located on Lots 7 and 8 in Block 22 in the Town
21 of Eureka, County of Eureka, State of Nevada.
- 22 2. Defendants are the owners of the Nevada Club
23 which is located adjacent to and to the left of the Owl Club
24 on Lots 5 and 6 of Block 22.
- 25 3. The walls of the two buildings are inches
26 apart and join at the roof of the Owl Club.
- 27 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. ~~Plaintiffs failed to have it installed and~~
6 ~~therefore, on 10/10/83, Dennis Cunningham verbally offered to install~~
7 ~~the guttering, however, there is a conflict concerning the~~
8 amount of Cunningham's bid. Ron Carrion claims the bid was
9 \$480.000 and Dennis Cunningham claims the amount to be
10 \$250.00. Plaintiffs rejected Cunningham's offer.

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

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

17 DISCUSSION OF THE LAW:

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

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