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## Nebraska Judicial Branch

## Case Summary

In the District Court of Douglas County  
 The Case ID is CI 17 0010322  
 DPR, LP v. Omaha Fixture Manufacturing,  
 The Honorable Peter C Bataillon, presiding.  
 Classification: Negligence-Other  
 Filed on 12/07/2017  
 This case is Open as of 12/07/2017

## Parties/Attorneys to the Case

Party	Attorney
Plaintiff ACTIVE DPR, LP 10202 J Street Omaha NE 68127	James F Cann 1125 S. 103rd St., Ste 800 Omaha NE 68124 402-390-9500
Defendant ACTIVE Omaha Fixture Manufacturing, Inc. 10320 J Street Omaha NE 68127	Jacob W Harberg 7101 Mercy Rd, Suite 310 Omaha NE 68106 402-341-4554

## Court Costs Information

Incurred By	Account	Date	Amount
Plaintiff	Petition	12/07/2017	\$35.00
Plaintiff	Filing Fee - State	12/07/2017	\$1.00
Plaintiff	Automation Fee	12/07/2017	\$8.00
Plaintiff	NSC Education Fee	12/07/2017	\$1.00
Plaintiff	Dispute Resolution Fee	12/07/2017	\$0.75
Plaintiff	Indigent Defense Fee	12/07/2017	\$3.00
Plaintiff	Uniform Data Analysis Fee	12/07/2017	\$1.00
Plaintiff	J.R.F.	12/07/2017	\$6.00
Plaintiff	Filing Fee-JRF	12/07/2017	\$6.00
Plaintiff	Legal Aid/Services Fund	12/07/2017	\$6.25
Plaintiff	Complete Record	12/07/2017	\$15.00
Plaintiff	Service Fees	12/26/2017	\$5.47

## Financial Activity

No trust money is held by the court  
No fee money is held by the court

### Payments Made to the Court

Receipt	Type	Date	For	Amount
282599	Electronic Trans	12/08/2017	DPR, LP	\$83.00
			Petition	\$35.00
			Filing Fee - State	\$1.00
			Automation Fee	\$8.00
			NSC Education Fee	\$1.00
			Dispute Resolution Fee	\$.75
			Indigent Defense Fee	\$3.00
			Uniform Data Analysis	\$1.00
			J.R.F.	\$6.00
			Filing Fee-JRF	\$6.00
			Legal Aid/Services Fun	\$6.25
			Complete Record	\$15.00

### Register of Actions

01/08/2018 Answer  
ts This action initiated by party Omaha Fixture Manufacturing, Inc.  
Image ID N18008PP4D01

12/26/2017 Return Summons/Alias Summons  
JB The document number is 00499845  
Served 12/11/2017, Certified Mail  
Return Receipt Requested  
Image ID N17360EKID01

12/08/2017 Summons Issued on Omaha Fixture Manufacturing, Inc.  
The document number is 00499845  
E-MAILED: james.cann@koleyjessen.com  
Image ID D00499845D01

12/08/2017 Praecipe-Summons/Alias  
MG This action initiated by party DPR, LP  
Image ID N17342L7ID01

12/07/2017 Complaint-Praecipe  
No Praecipe filed /mg  
This action initiated by party DPR, LP  
Image ID N17341JMYD01



IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DPR, L.P., ) Case No. \_\_\_\_\_  
)  
Plaintiff, )  
)  
vs. ) **COMPLAINT**  
)  
OMAHA FIXTURE MANUFACTURING, )  
INC., )  
)  
Defendant. )

COMES NOW the Plaintiff DPR, LP and for its claims against Defendant Omaha Fixture Manufacturing, Inc., alleges and states as follows:

**Parties, Jurisdiction, and Venue**

1. Plaintiff DPR, LP (“DPR”) is a Nebraska Limited Partnership. DPR is the owner of real estate in Douglas County Nebraska located at 10202 J Street, and legally described as LANDS SEC-TWN-RGE 04-14-12 W 320 E 350 N 220 S 840 FT NW ¼ .62 AC. Plaintiff. DPR’s land is situated at the northwest corner of 102<sup>nd</sup> and J Streets in Omaha.

2. Defendant Omaha Fixture Manufacturing, Inc. is a Nebraska corporation and is the owner of real estate in Douglas County Nebraska located at 10320 J Street, and legally described as LANDS SEC-TWN-RGE 04-14-12 IRR S 321.74 N 704.5 W 357.91 E 724.91 FT SE 1/4 NW ¼. Defendant’s land is situated next door to the east of DPR’s land.

3. This court has subject matter jurisdiction pursuant to Neb. Rev. Stat. § 24-302 and other provisions of law.

4. Venue is appropriate in Douglas County because the real estate involved in this matter is situated in Douglas County and the actions which give rise to Plaintiff's claims occurred in Douglas County.

### **Factual Allegations**

5. This is a case that involves Defendant's diversion of surface water onto Plaintiff's land and into a building situated thereon, which water has caused Plaintiff to sustain damages to its land and building.

6. Both Plaintiff's parcel and Defendant's parcel consist of developed real estate. Improvements on each parcel include commercial buildings and parking lots.

7. But for modifications made by Defendant as alleged herein, water that falls on Defendant's property in the form of precipitation would naturally drain to the south where it was collected by storm sewers installed in or near "J" Street. The southern property line of both Plaintiff and Defendant's properties is at "J" Street.

8. At an unknown date, Defendant added many long downspout extensions and aluminum troughs on the east side of its building. These downspout extensions and troughs were installed to laterally divert precipitation that fell on the roof of Defendant's building away from the building and onto a narrow Union Pacific railroad spur that runs north and south between Plaintiff's and Defendant's properties.

9. In approximately 2006, the Union Pacific Railroad was not using the railroad spur and disconnected it from its railroad tracks.

10. Defendant made changes to the elevation of the landscaping at the southeast corner and along the side yard of its property which it knew or should have known would (a) prevent the diverted water from reaching natural drainage or swales,

(b) result in erosion, (c) cause water to be diverted off its property at an increased speed, and (d) prevent surface water that existed between Plaintiff and Defendant's properties, including precipitation diverted there by Defendant's installation of downspout extensions and aluminum troughs, from naturally being able to safely drain south to the storm sewers at or near "J" Street.

11. Defendant's actions as alleged above were negligent. Now, after a rainfall event, the surface water cannot drain to the south and it seeps into the ground using the former railroad spur as an infiltration zone. Once the infiltrated surface waters enter the subsurface, the water flows through a path of least resistance created by naturally occurring underground pore spaces, fissures, and micro-cracks, until it accumulates on Plaintiff's property and enters Plaintiff's commercial building. This water infiltration has resulted and will continue to result in damage to Plaintiff's property every time a significant rainfall event occurs.

12. It has only been since the summer of 2015 that intermittent large rains resulted in the cause of water infiltration becoming obvious such that the Plaintiff could reasonably ascertain and learn of these conditions.

13. In November, 2016, the Plaintiff gave notice to the Defendant of the problem and demanded corrective action. But Defendant took no action to properly alter the discharge.

14. Plaintiff's building's north foundation wall continues to be in peril of collapsing, despite recent repairs, due to conditions on Plaintiff's property created and worsened by the improperly and negligently diverted water from Defendant's property from 2015 to the present.

15. The Plaintiff cannot stop the subsurface water because it's origin is on the Defendant's property, and it therefore cannot make the necessary repairs on Defendant's property to stop the discharge.

### **FIRST CLAIM – INJUNCTIVE RELIEF**

16. All of the above allegations are incorporated into this claim.

17. Plaintiff is entitled to temporary and permanent injunctive relief in the form of an order requiring Defendant to remove or redirect the downspout extensions and the aluminum troughs and to remove landscape elevation changes or other obstructions so as to prevent Defendant from interfering with the natural flow of surface waters from Defendant's property and causing such water to be discharged onto Plaintiff's property.

18. Plaintiff has no adequate remedy at law for harm being done or threatened to be done by Defendant's actions. Plaintiff will suffer irreparable harm unless the acts and conduct of the Defendant of diverting the surface water are permanently enjoined. Defendant's continued acts and conduct of diverting the surface water is in violation of Nebraska law and interferes with the Plaintiff's property rights.

### **SECOND CLAIM - NEGLIGENCE**

19. The foregoing allegations are incorporated into this claim.

20. Defendant has a duty to exercise due care in diverting surface waters flowing from Defendant's land.

21. Defendant has negligently installed the downspout extensions, aluminum troughs, and the landscaping elevation changes and such actions have proximately

caused and will continue to cause damage to Plaintiff's property and improvements thereon.

22. As a direct and proximate result of Defendant's negligent diversion of surface water, Plaintiff has sustained damages. Plaintiff has had to replace a damaged foundation wall, asphalt, stoops, and excavate areas to allow the subsurface water to be contained and pumped before it reached the building. It may also have to install drain tile and a sump pump to collect and discharge the water. The costs are expected to increase because the Plaintiff cannot stop the water.

21. Plaintiff's damages are continuing in nature. To date, Plaintiff's damages are as follows:

A.	Foundational Repairs	\$12,325.00
B.	Paving Repairs	\$17,250.00
C.	Asphalt Repairs	\$6,000.00
D.	Excavation/Trenching/Freeze Protection	\$7,500.00
E.	Labor to Drain Water	\$7,500.00
F.	Engineer Fees	\$8,321.95
G.	Laboratory Tests	\$270.00
H.	Drainage Tiles	\$28,435.00
	TOTAL	\$87,601.95

WHEREFORE, the Plaintiff respectfully requests that:

A. Defendant Omaha Fixture Manufacturing, Inc. be temporarily and permanently enjoined from maintaining the above alleged downspout extensions,

trenches, and landscaping elevation changes that result in changes and obstructions to the natural flow of surface water south to the storm drains in "J" Street.

B. Defendant Omaha Fixture Manufacturing, Inc. be ordered to remove any obstructions or improvements made on its property which have prevented or changed the natural flow of surface water south to the storm drains in "J" Street.

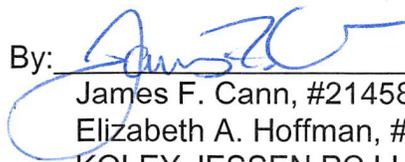
C. Judgment be awarded in favor of Plaintiff DPR, LP and against Defendant Omaha Fixture Manufacturing, Inc. in the amount of \$87,601.95 or such greater amount as proven at trial for damages proximately caused by Defendant's negligent displacement of surface water together with prejudgment and post judgment interest as is allowed by law.

D. Costs of this action be taxed to Defendant Omaha Fixture Manufacturing, Inc.

E. The Court award Plaintiff DPR, LP such other and further relief as the Court may deem just and equitable.

Dated this 7th day of December, 2017.

DPR, L.P., Plaintiff

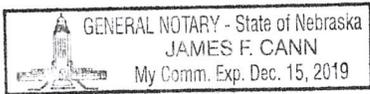
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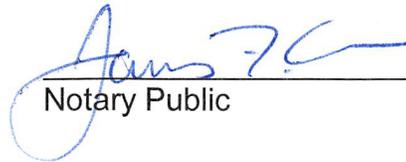
STATE OF NEBRASKA    )  
  ) ss.  
COUNTY OF DOUGLAS    )

RUSSELL S. DAUB, Managing Partner of the Plaintiff, being first duly sworn upon oath, depose and state that he has read the above and foregoing Complaint, that he knows the contents thereof, and that the allegations contained therein are true and correct as he verily believes.

  
\_\_\_\_\_  
RUSSELL S. DAUB

Subscribed and sworn to before me this 7<sup>TH</sup> day of December, 2017.



  
\_\_\_\_\_  
Notary Public

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DPR, L.P.,	)	CASE NO. CI 17-10322
	)	
Plaintiff,	)	
	)	
vs.	)	<b>ANSWER</b>
	)	
OMAHA FIXTURE MANUFACTURING,	)	
INC.,	)	
	)	
Defendant.	)	

COMES NOW the Defendant, Omaha Fixture Manufacturing, Inc., and for its response to the Complaint of the Plaintiff, states and avers as follows:

**Parties, Jurisdiction, and Venue**

1. Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Complaint.

2. Defendant admits Omaha Fixture Manufacturing, Inc. is a Nebraska corporation and is the owner of real estate in Douglas County Nebraska located at 10320 J Street, and legally described as LANDS SEC-TWN-RGE 04-14-12 IRR S 321.74 N 704.5 W 357.91 E 724.91 SE ¼ NW 1/4/. Defendant denies that the land is situated to the East of DPR's land.

3. Defendant admits the allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint.

**Factual Allegations**

5. Defendant denies the allegations contained in Paragraph 5 of Plaintiff's Complaint.

6. Defendant admits the allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. Defendant denies the allegation that modifications made by Defendant altered the natural drainage of precipitation on Defendant's property contained in Paragraph 7 of Plaintiff's Complaint. Defendant admits the southern property line of both Plaintiff's and Defendant's properties is at "J" Street.

8. Defendant denies the allegations in Paragraph 8 of Plaintiff's Complaint as characterized by the Plaintiff, and avers affirmatively that all downspouts were installed in compliance with appropriate criteria.

9. Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 9 of Plaintiff's Complaint, and thus denies same.

10. Defendant denies the allegations contained in Paragraph 10 and all of its subparts of Plaintiff's Complaint.

11. Defendant denies the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. Defendant denies the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. Defendant denies the allegations in Paragraph 13 of Plaintiff's Complaint as characterized by the Plaintiff.

14. Defendant denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. Defendant denies the allegations contained in Paragraph 15 of Plaintiff's Complaint.

### **First Claim – Injunctive Relief**

16. In response to Paragraph 16 of the Plaintiff's Complaint, Defendant reasserts the answers given in response to Paragraphs 1-15 above.

17. Defendant denies the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. Defendant denies the allegations contained in Paragraph 18 of Plaintiff's Complaint.

### **Second Claim- Negligence**

19. In response to Paragraph 19 of the Plaintiff's Complaint, Defendant reasserts the answers given in response to Paragraphs 1-18 above.

20. Paragraph 20 contains conclusions of law, to which no response is required. To the extent a response is deemed required, Defendant denies.

21. Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint.

22. Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23. Defendant denies the allegations contained in Paragraph 23 and all of its subparts of Plaintiff's Complaint.

WHEREFORE, having fully answered the Complaint of the Plaintiff, this Defendant respectfully requests an Order of this Court dismissing same at Plaintiff's costs and for such other and further relief as the Court deems just and equitable.

Dated this 8 day of January, 2018.

OMAHA FIXTURE MANUFACTURING, INC.,  
Defendant,

By:   
For: Nolan, Olson & Stryker, P.C., L.L.O.  
444 Regency Parkway Dr., Suite 109  
Omaha, Nebraska 68114  
(402) 932-5126  
Brian D. Nolan, #17764  
[bnolan@nolanolson.com](mailto:bnolan@nolanolson.com)  
Jacob W. Harberg, #26156  
[jharberg@nolanolson.com](mailto:jharberg@nolanolson.com)

CERTIFICATE OF SERVICE

The undersigned certifies that on the 8<sup>th</sup> day of January, 2018, the above and foregoing was served upon the following by U.S. mail, postage prepaid.

James F. Cann  
Elizabeth A. Hoffman  
Koley Jessen PC LLO  
One Pacific Place, Suite 800  
1125 S. 103<sup>rd</sup> St.  
Omaha, NE 68124



# Certificate of Service

I hereby certify that on Monday, January 08, 2018 I provided a true and correct copy of the Answer to the following:

Omaha Fixture Manufacturing, Inc. service method: No Service

DPR, LP represented by Elizabeth Ann Hoffman (Bar Number: 25875) service method: Electronic Service to Elizabeth.hoffman@koleyjessen.com

DPR, LP represented by Cann,James,F, (Bar Number: 21458) service method: Electronic Service to james.cann@koleyjessen.com

Signature: /s/ Jacob Wylie Harberg (Bar Number: 26156)