

IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

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BRAD CUMMINGS, L.L.C.,) LAW NO. _____

Plaintiff,) **PETITION**

vs.)

A.D., L.L.C.,)

And)

FENTON CONSTRUCTION, INC.)

Defendants)

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I. GENERAL ALLEGATIONS

1. Plaintiff, Brad Cummings, L.L.C., is a limited liability company under the laws of the state of Iowa and licensed to do business and doing business in the State of Iowa with an office located at 701 Pierce Street, Suite 200, in the City of Sioux City, County of Woodbury, State of Iowa.

2. Defendant, A.D., L.L.C., (referred to in the remainder of this Petition as “Defendant AD”) is a limited liability company under the laws of the State of Iowa and licensed to do business and doing business in the State of Iowa, and has its principal place of business at 1800 3rd Street, in the City of Sioux City, County of Woodbury, State of Iowa.

3. Defendant Fenton Construction, Inc. (referred to in the remainder of this Petition as “Defendant Fenton”) is a corporation organized under the laws of the State of Iowa and licensed to do business and doing business in the State of Iowa, and has its principal place of business at 23155 C80, County of Plymouth, State of Iowa.

4. Plaintiff is the owner of a parcel of property located at a location known as 2503 18th Street in the City of Sioux City. This property is located immediately adjacent to and East of, and shares a common boundary with Defendant AD's property, described in Paragraph 4 below. The Plaintiff's parcel is referred in the remainder of this Petition as the "Cummings parcel".

5. Defendant AD is the owner of two parcels of property, which are contiguous to each other, and the two combined parcels of which are identified under the address known as 2503 18th Street in the City of Sioux City. This property is located immediately adjacent to and West of, and shares a common boundary with Plaintiff's property, described in Paragraph 3 above. The Defendant AD's parcels are referred in the remainder of this Petition as the "AD parcels".

6. Defendant AD purchased the AD parcels from Plaintiff in 2013.

7. Since its purchase of the AD parcels, Defendant AD has significantly raised the elevation of the AD parcels.

8. The increase in elevation of the AD parcels was accomplished through the services of the employees of, and with equipment owned by, Defendant Fenton.

9. The increase in the elevation of these AD parcels has averaged approximately five feet in height above the elevations that existed when the AD parcels were in the original, natural state as they existed at the time of the purchase by Defendant AD. This increase in elevation has been accomplished by the placement of tremendous amounts of fill soil acquired from other locations and then transported to, spread, and then compacted upon the AD parcels.

10. Upon information and belief, neither Defendant AD nor Defendant Fenton obtained the proper grading permit required by the City of Sioux City, Iowa to be obtained by a contractor or property owner prior to commencing the type of changes to the previous elevations of the AD parcels described in the paragraphs above.

11. Prior to this raising of the elevations upon the AD parcels, surface waters resulting from rain upon the Cummings parcel would naturally drain to the West from the Cummings parcel onto the AD parcels.

12. Once the surface waters from the Cummings parcel entered onto the AD parcels, the surface waters would then naturally flow to the West across the AD parcels. The surface waters would then naturally course into the Floyd River along the levee adjacent to the West boundary of the AD parcels

13. This natural drainage of surface waters from the Cummings parcel across the AD parcels and to the Floyd River occurred because the AD parcels were lower in elevation than the Cummings parcel before the addition of fill soils to the AD parcels by the Defendant AD and Defendant Fenton.

14. As a direct result of the increase in the elevation of the AD parcels, the surface waters caused by rainfall upon the Cummings parcels are now totally obstructed by the rise in elevation and cannot flow to the West to the Floyd River from the Cummings parcel.

15. This obstruction of the natural flow of the surface waters (which obstruction is caused by the raised elevation of the AD parcels) has created an effect whereby rainfall of any measurable consequence results in “ponding” of the surface waters upon significant portions of the Cummings parcel, and/or “water logging” considerable portions of the soil of the Cummings parcel making it impossible for industrial truck traffic and other uses desired by Plaintiff. In

addition, the increased elevation of the AD parcels causes some amounts of surface waters occurring on the AD parcels to now flow onto the Cummings parcel, thus also aggravating and increasing the ponding and waterlogging conditions described in this paragraph.

16. Since the Cummings parcel has a higher elevation than the original elevation of the two AD parcels before the fill soil was added to those parcels, the Cummings parcel is recognized by Iowa law as the “dominant estate”. ***Moody v. Van Wechel***, 405 NW2d 752, 756 (1987). This principle of law also results in the clear status of the AD parcels as “servient estates” *Id.*

17. Iowa law is clear that surface water from a dominant estate must be allowed to flow in its natural course onto a servient estate. The flow may not be diverted by obstructions erected upon or changes caused by the owners of the servient estate. The servient landowner may not interrupt or prevent the water’s natural flow to the detriment to the dominant landowner. *Id.*; ***Sojkav v. Breck***, 832 NW2d 384 (Iowa App. 2013).

18. This condition prevents Plaintiff from enjoying full and productive use of the Cumming parcel. Certain industrial uses of the Cummings parcel owned by Plaintiff have been, and continue to be, negatively impacted, and other desired industrial uses have been prevented outright, by the ponding of surface waters, and the creation of water logged soil on the Cummings parcel.

19. In an attempt to mitigate some of these damages, Plaintiff has incurred significant costs for engineering and surveying services, and for the construction of a ditch on the West boundary of the Cummings property that is intended to attempt to collect and drain surface water that is now prevented from naturally flowing off the Cummings parcel.

20. The conditions described in Paragraphs 1 through 18, and the injuries described in Paragraphs 18 through 19, will continue to exist, to grow worse, and to cause Plaintiff increasing injuries, as long as the present drainage pattern remains unaltered and the surface waters are obstructed from flowing from Plaintiff's property (Cummings parcel) onto Defendant AD's property (AD parcels) and then to the Floyd River.

CIVIL CONSPIRACY

21. Upon information and belief, the ownership and management of Defendant Fenton and Defendant AD are in reality possessed by and exercised by one and the same individuals, such that the actions of Defendant AD and Defendant Fenton in regards to the events described in this Petition have the same effects as if the actions were taken by one and the same entity.

22. Upon information and belief, Defendant Fenton engaged in a civil conspiracy with Defendant AD to complete the increase in elevations of the AD parcels, in an unlawful manner by violating the municipal code and/or regulations of the City of Sioux City governing such projects by not submitting an application to the City of Sioux City in order to gain a grading permit that would have approved, or rejected, the actions of the two Defendants in the project of raising the elevations of the AD parcels.

23. This civil conspiracy, along with the combined negligence of the Defendants as described below, was a proximate cause of the damages to Plaintiff as set forth in this Petition, and all who acted are jointly and severally liable for all of these damages.

24. Defendants Fenton and AD intentionally, willfully, and wantonly conspired to disregard the rights and property of the Plaintiff, and are thus jointly and severally liable for

punitive damages to punish and deter both Defendants and other persons from future similar wrongful conduct.

II. FIRST CAUSE OF ACTION (TRESPASS)

25. Plaintiff realleges and incorporates by reference the assertions made in the Statement of General Allegations, Paragraph 1-24.

26. Defendants, intended, or knew or had substantial reason to know, that the aforementioned actions would cause surface water to physically “pool” or “pond” upon Plaintiff’s property, in a manner in which it did not naturally pool or pond prior to the actions of the Defendants in raising the elevations upon the AD parcels.

27. The aforementioned actions on the part of the Defendants amounted to a deliberate physical invasion of Plaintiff’s property rights, tantamount to the continuous physical taking of the damaged portion of the Plaintiff’s property by ending the natural drainage of Plaintiff’s property and, in addition, creating a condition in which Plaintiff’s property serves as a drainage or retention area for water that would otherwise drain onto and from Defendant AD’s property.

III. SECOND CAUSE OF ACTION (NUISANCE)

28. Plaintiff realleges and incorporates by reference the assertions made in Paragraphs 1-24.

29. By the aforementioned actions, Defendant AD and Defendant Fenton created a condition tending to both cause past and present damages sustained by Plaintiff and to create future damages. In light of the conditions thereby created, Defendant AD’s use of its property cannot be considered lawful or reasonable, but rather constitutes a nuisance.

IV. THIRD CAUSE OF ACTION (NEGLIGENCE)

30. Plaintiff realleges and incorporates by reference the assertions made in the State of General Allegations, Paragraphs 1-24.

31. It is reasonably foreseeable to both Defendants that the placement of the tremendous amount of fill soil on the AD parcels would result in an obstruction of surface water that would otherwise naturally drain from the property of Plaintiff onto and across the AD parcels, and that, by raising the elevation of the AD parcels, the resultant obstruction of the natural drainage of surface water would cause injury to Plaintiff's property. Defendant AD and Defendant Fenton therefore owed a duty to Plaintiff to not raise the elevation of the AD parcels in such a manner that would cause injury to Plaintiff.

32. Defendant AD and/or Defendant Fenton failed to use due care in raising the elevations of the AD parcels.

33. As a result of this failure, excessive and unnecessary quantities of surface waters accumulate on Plaintiff's property, thereby directly and proximately causing the injuries referred to in Paragraphs 19 and 20.

V. DAMAGES AND INJUNCTIVE RELIEF

34. As a proximate cause of the actions of Defendant AD and/or of Defendant Fenton described above, Plaintiff has suffered damages in the form of expenses incurred in corrective efforts, plus the loss of profits that the Plaintiff could have otherwise have realized. As long as present conditions persist, Plaintiff will continue to suffer similar future damages in an amount which cannot presently be ascertained, and for which an award of monetary damages would be inadequate.

WHEREFORE, Plaintiff prays for judgment against the Defendant AD and Defendant Fenton as follows:

1. Compensatory damages in an appropriate amount, and such other amounts to compensate for lost profits that are appropriate under Iowa law.
2. Punitive damages in such an amount as the Court may deem sufficient to punish both Defendants for their reckless and malicious conduct, and to deter others from engaging in similar conduct.
3. An injunction together with other appropriate equitable relief, requiring Defendants AD and/or Defendant Fenton to resolve the condition which causes the surface water to accumulate upon Plaintiff's property and to waterlog the soil upon Plaintiff's property.
4. Such other relief as the Court may deem proper.

David L. Gill /es/

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