

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.)

DOC: 272

NO: 272

Plaintiff

vs.

WILMA C. ROGERS

Defendant

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JUL - 3 1991
RUDY J. TESAR
CLERK DISTRICT COURT

PETITION
LAW

Assigned to Judge

COMES NOW the Plaintiff and for its Petition states and alleges as follows:

1. That Plaintiff is, and at all times material was, a corporation organized and existing under and by virtue of the laws of the State of Nebraska with its principle place of business being located at 7577 Burlington, Ralston, Douglas County, Nebraska.

2. That Franklin P. Rogers and Wilma C. Rogers were, at all times material, residents of Omaha, Douglas County, Nebraska and were the owners of real property commonly known as 7577 Burlington Street, Ralston, Nebraska and legally described as set forth in Exhibit "A" which is attached hereto, and by reference made a part hereof as if fully set forth herein.

3. That on or about September 16, 1985 Plaintiff purchased from Franklin P. Rogers and Wilma C. Rogers, the real property commonly known as 7577 Burlington Street, Ralston, Douglas County, Nebraska and legally described as set forth in Exhibit "A". That Exhibit "A" is a true and correct copy of the Deed delivered by Franklin P. Rogers to Plaintiff.

4. That during the summer of 1989, while Plaintiff was doing some construction work on said property, Plaintiff discovered that a sewer line ran in a north-south direction across said property at approximately the middle of Lot 5.

5. That upon investigation and belief Plaintiff believes that said sewer line is used by the City of Ralston.

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Ent. Ex. Dec.
Ent. Gen. Index

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CERK DISTRICT COURT

6. That on or about March 14, 1990 Plaintiff requested the City to move said sewer line but despite said requests the Defendant, City of Ralston, has refused and neglected to remove said sewer line.

7. That the Deed conveying said real property from Wilma C. Rogers, warranted that Grantor was lawfully seized of said premises; that they are free from encumbrance except easements and protective covenants of record. Said deed further provided that Defendant "will defend the title to said premises against all lawful claims".

8. That said sewer line constitutes an encumbrance and cloud upon said property not of record and it is contrary to the Warranty provided to Plaintiff by the Franklin P. Rogers.

9. That said sewer line damages Plaintiff's property and if the same is not removed, will continue to cause damage to Plaintiff's property.

10. That Plaintiff has requested Defendants to defend Plaintiff's title but Defendant has failed to do so.

11. That the (Wilma) C. Rogers should compensate Plaintiff for the diminished value of said property by reason of said sewer line.

WHEREFORE, Plaintiff prays for Judgment against Defendants for the damages sustained by Plaintiff as a result of said sewer line being present on said property, attorney fees, and for such other and further relief as the Court may deem just and equitable under the circumstances.

OMEGA CHEMICAL COMPANY, INC.,
Plaintiff,

By: 

Duane M. Katz, #12148
11590 West Dodge Road
Omaha, Nebraska 68154
(402) 496-1010
Its Attorney

ISSUED

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JUL - 3 1991
RUDY J. TESAR
CLERK DISTRICT COURT

PRAECIPE

Omega Chemical Company, Inc., Plaintiff
14981 Grover Street
Omaha, NE 68144

In District Court in and for Douglas County,
Nebraska.

vs.

Wilma C. Rogers, Defendant

Doc. 298

No. 272

TO THE CLERK OF SAID COURT:

Please issue Please issue summons and return it to Plaintiff's attorney for service upon Defendant by certified mail addresses to her as follows:

Mrs. Wilma C. Rogers
1717 South 84th Street
Omaha, Nebraska 68124

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JUL - 3 1991
RUDY J. TESAR
CLERK DISTRICT COURT

in the above entitled cause and deliver same to sheriff of said County.

DESIGNATE MODE OF SERVICE:
SHERIFF:
CERTIFIED MAIL:

NOTE TO ATTORNEYS:
Please specify beside each defendant's name when requesting a summons whether you elect "Personal Service" or "Residence Service."

[Signature]
Duane M. Katz
Address 11790 West Dodge Road
Omaha, NE 68154
Attorney for Plaintiff

ISSUE

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA


JUL - 3 1991

RUDY J. TESAR
CLERK DISTRICT COURT

FILED
DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JUL - 3 1991

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Doc.
Ent. Ex. Doc.
Ent. Gen. Index

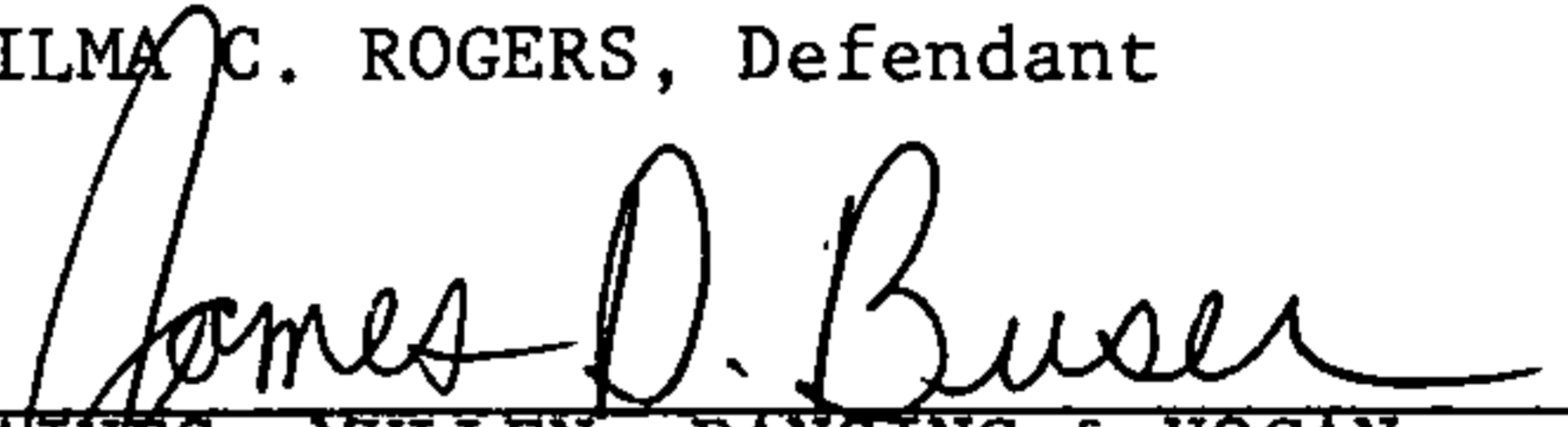


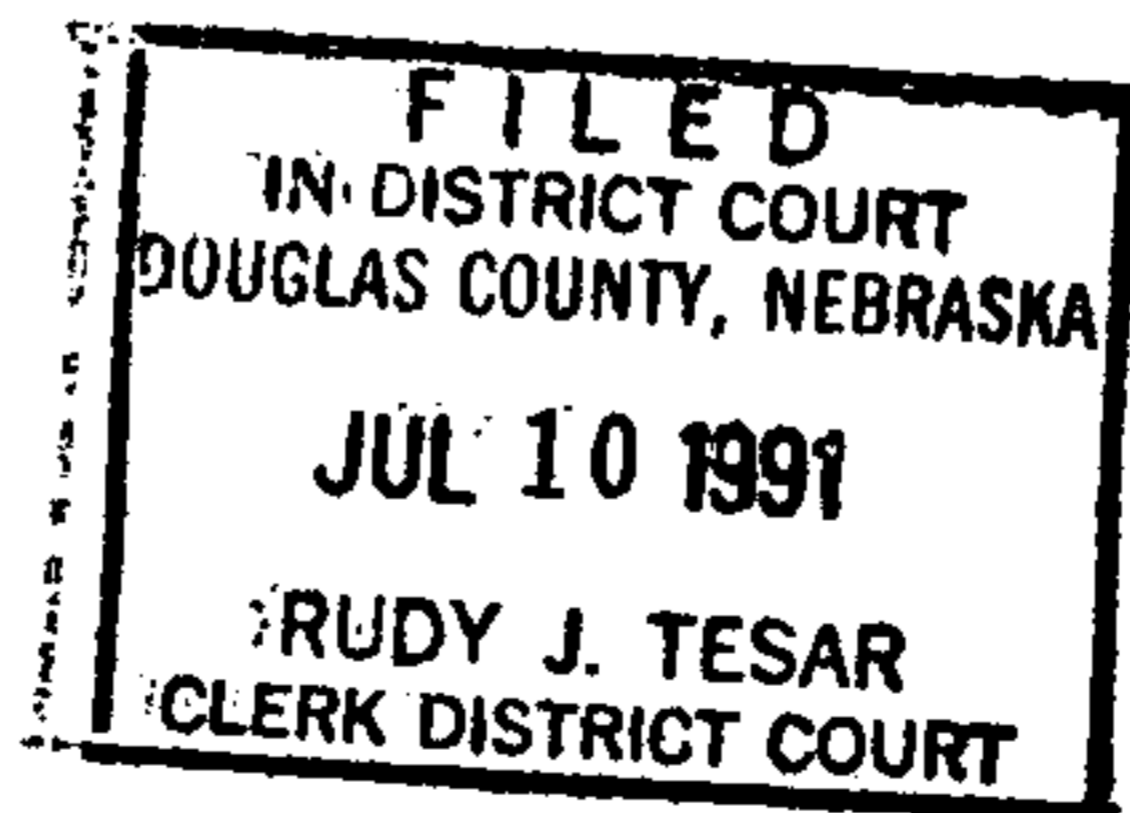
IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	VOLUNTARY APPEARANCE	
)		
WILMA C. ROGERS,)		
)		
Defendant.)		

COMES NOW James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, Nebraska 68114, and enters his appearance as attorney of record for Wilma C. Rogers.

WILMA C. ROGERS, Defendant


GAINES, MULLEN, PANSING & HOGAN
10050 Regency Circle, Suite 200
Omaha, NE 68114 (402) 397-5500
By James D. Buser - #19020



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FILED
DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
JUL 10 1991
RUDY J. TESAR
CLERK DISTRICT COURT

IN THE DISTRICT COURT, DOUGLAS COUNTY, NEBRASKA

FILED
DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
JUL 17 1991
RUDY J. TESAR
CLERK DISTRICT COURT

Omega Chemical Company, Inc.,

vs.

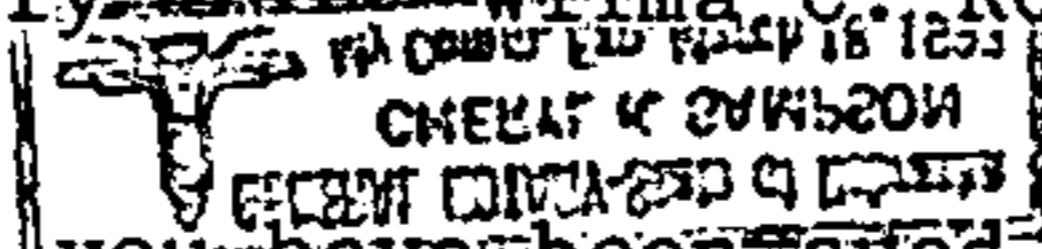
Wilma C. Rogers,

SUMMONS BY CERTIFIED MAIL

DOC. 898 NO. 272

STATE OF NEBRASKA)
COUNTY OF DOUGLAS)

This is to notify ~~Wilma C. Rogers~~



Defendant that you have been sued by Omega Chemical Company, Inc.

Plaintiff in the District Court of said County, and that in order to defend the lawsuit you must file an appropriate written response on or before thirty days after service of summons and Petition, in answer to the Petition said Plaintiff filed against you in the Office of the Clerk of said Court or such Petition will be taken as true and judgment entered accordingly for the relief demanded in the attached Petition.

RETURN of this Summons is due within ten days after return of the signed receipt.

WITNESS my signature and the Seal of said Court at Omaha and issued this 3rd day of July, 1991

RUDY J. TESAR, CLERK

BY: Carol McDermitt
Deputy

ATTORNEY FOR PLAINTIFF:

NAME: Duane M. Katz
ADDRESS 11590 W. Dodge Rd.
Omaha NE 68154
(402) 496-1010

C.M.

**CERTIFIED MAIL
PROOF OF SERVICE BY AFFIDAVIT**

STATE OF NEBRASKA
COUNTY OF DOUGLAS

SS

A copy of this writ was mailed by certified mail, return receipt requested, to defendant: _____

Wilma C. Rogers

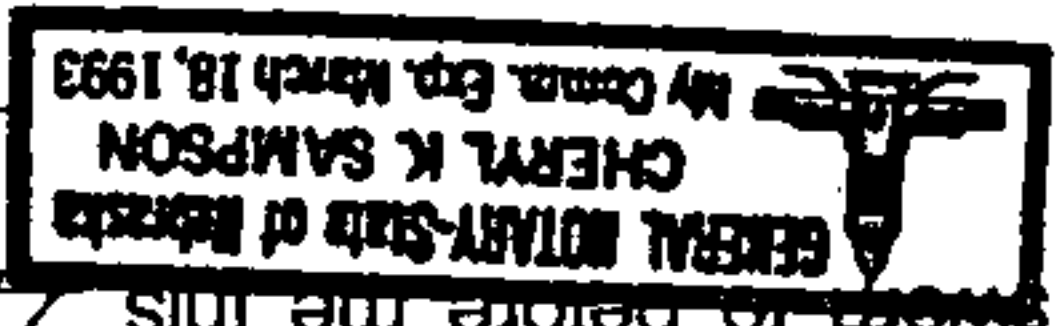
at the following address: 1717 S. 84th Street
Omaha, Nebraska 68124

on the 10th day of July, 19 91, which was within ten days of issuance
as required by Nebraska Statute.

The return receipt was signed on the 11th day of July, 19 91
(signed return receipt attached hereto). All done pursuant to the Nebraska Revised Statutes (Cumulative
Supplement 1983).

FURTHER AFFIANT SAYETH NOT.

Gen. Indor



Duane M. Katz
Attorney for Plaintiff

Notary Public

Subscribed and sworn to before me this 16 day of July, 19 91
POSTAGE: \$2.29

PS Form 3811, Apr. 1989 *U.S.G.P.S. 989-238-815

DOMESTIC RETURN RECEIPT

7. Date of Delivery: 7-11-91

6. Signature - Agent: _____

5. Signature - Addressee: Wilma C. Rogers

8. Addressee's Address (ONLY if requested and fee paid):
WILMA C. ROGERS
1717 SOUTH 84th STREET
OMAHA, NE 68124

3. Article Addressed to:

4. Article Number: P 533 580 112

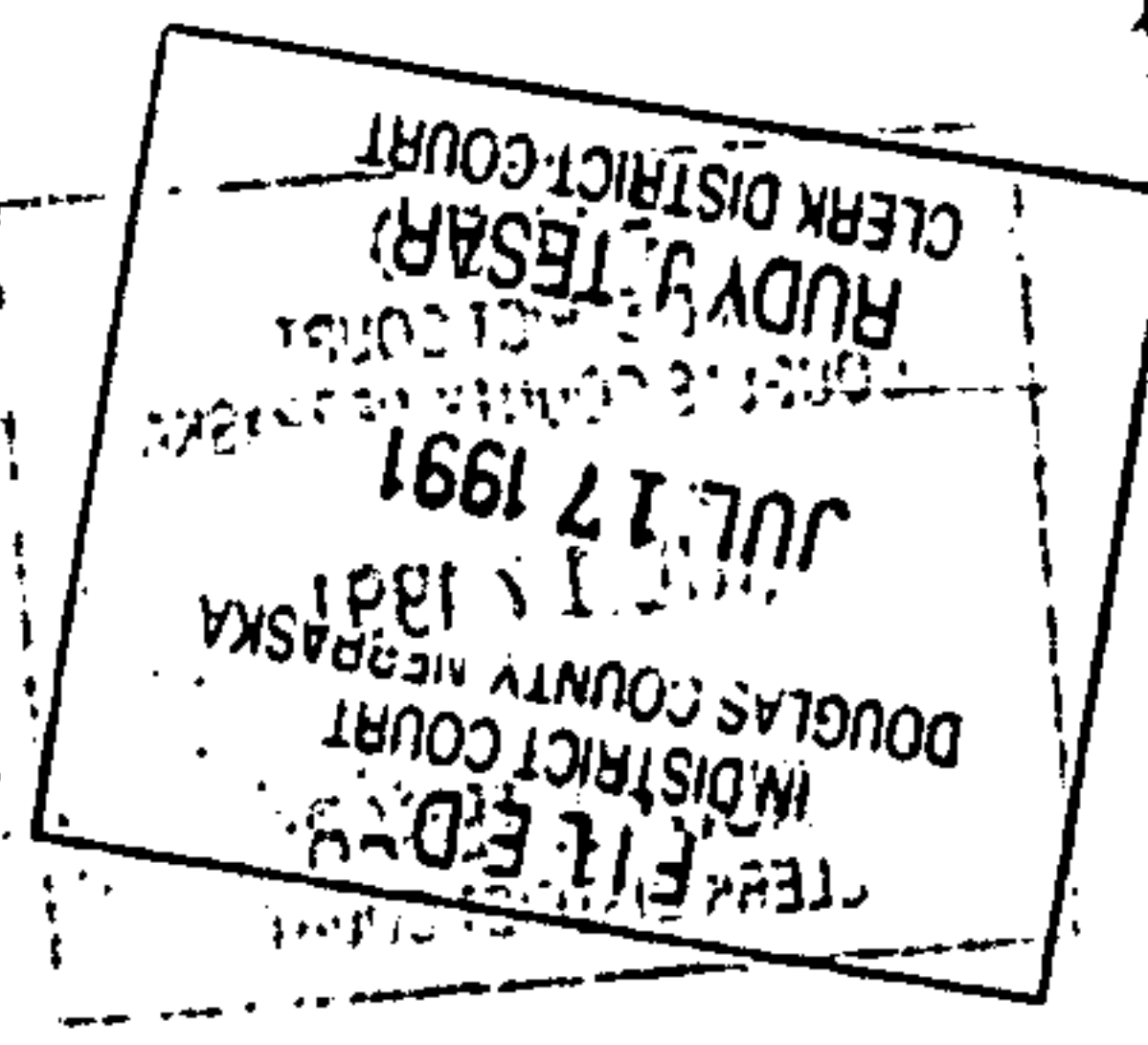
Type of Service:
 Registered
 Certified
 Express Mail
 Insured
 COD
 Return Receipt for Merchandise

Always obtain signature of addressee or agent and DATE DELIVERED.

1. Show to whom delivered, date, and addressee's address. 2. Restricted Delivery (Extra charge)

3 and 4. Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

SENDER: Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.



IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)		<u>DEMURRER</u>
)		
WILMA C. ROGERS,)		
)		
Defendant.)		

Defendant, Wilma C. Rogers, hereby demurs to Plaintiff's, Omega Chemical Company, Inc.'s, Petition pursuant to Nebraska Revised Statutes §25-806 on the grounds that the Petition does not state facts sufficient to constitute a cause of action because the statute of limitations has expired.

WHEREFORE, Defendant prays this Court to sustain Defendant's Demurrer and dismiss Plaintiff's Petition with prejudice and at Plaintiff's cost.

WILMA C. ROGERS, Defendant

FILED
 IN DISTRICT COURT
 DOUGLAS COUNTY, NEBRASKA
 JUL 23 1991
 RUDY J. TESAR
 CLERK DISTRICT COURT

James D. Buser
 GAINES, MULLEN, PANSING & HOGAN
 10050 Regency Circle, Suite 200
 Omaha, NE 68114
 (402) 397-5500
 By: James D. Buser #19020

NOTICE OF HEARING

This is to notify you that Defendant, Wilma C. Rogers, has called her Demurrer up for hearing before the Honorable J. Patrick Mullen, in Courtroom No. 4, Douglas County Courthouse, Omaha, Nebraska, on the 21st day of August, 1991, at 8:45 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated this 23rd day of July, 1991.

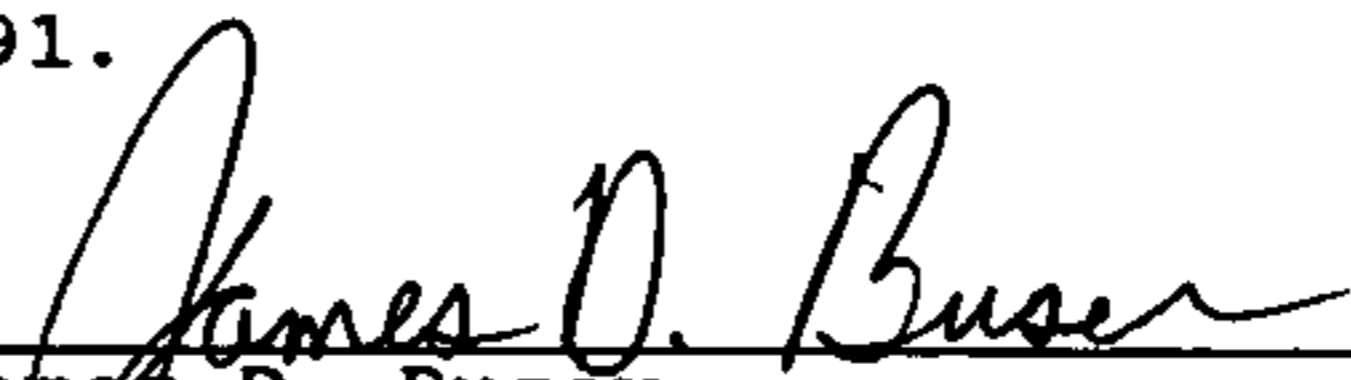
James D. Buser
 James D. Buser

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U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

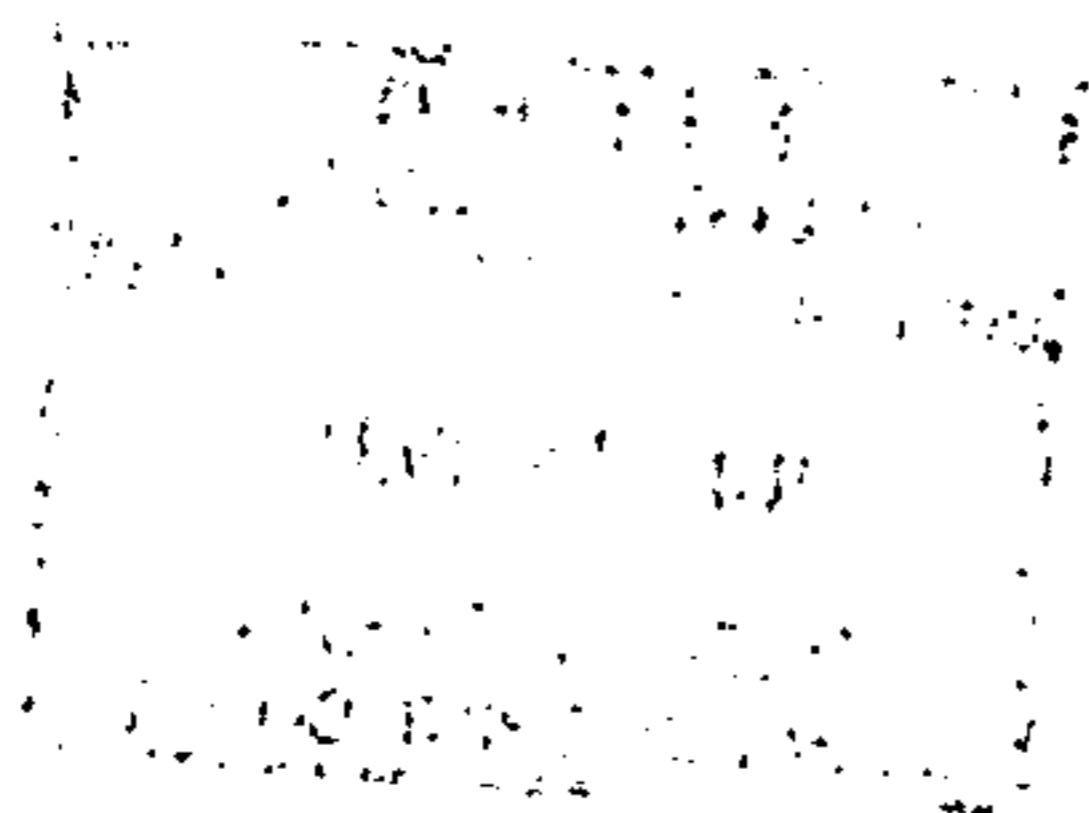
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of July, 1991, a copy of the foregoing document was forwarded to Mr. Duane M. Katz, Attorney at Law, at 11590 West Dodge Road, Omaha, Nebraska 68154, by depositing same in the U.S. Mail, postage prepaid.

Dated this 23rd day of July, 1991.



James D. Buser



Ent. App. Doc. _____
Ent. for Loc. _____
Ent. Gen. Index _____

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
JUL 23 1991
RUDY J. TESAR
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,)	DOC. 898	NO. 272
Plaintiff,)		
vs.)		<u>ORDER</u>
WILMA C. ROGERS,)		
Defendant.)		

On August 21, 1991, defendant's demurrer came on for hearing. Arguments were made by counsel. Briefs were submitted. The court being fully advised in the premises finds as follows:

For the purpose of the demurrer, the court accepts as true all well-pled facts contained within the petition.

Defendant's demurrer asserts the 5-year statute of limitation, Neb. Rev. Stat. 25-205 (Reissue 1989), which allegedly ran from the date of execution of the warranty deed in 1985. The plaintiff asserts that it could not reasonably have known of the breach of covenant against encumbrances until the actual discovery of the breach in 1989, at which time the plaintiff asserts the statute of limitations began to run.

Defendant's cases all have language supporting its assertion, but a closer reading in each case indicates the higher court is relying on the knowledge or conduct of the plaintiff in denying relief to the plaintiff.

To preclude a lawsuit for a breach of covenant of encumbrance after 5 years has elapsed when, as here, the plaintiff had no reasonable way to discover the breach, would be itself a breach of elemental justice.

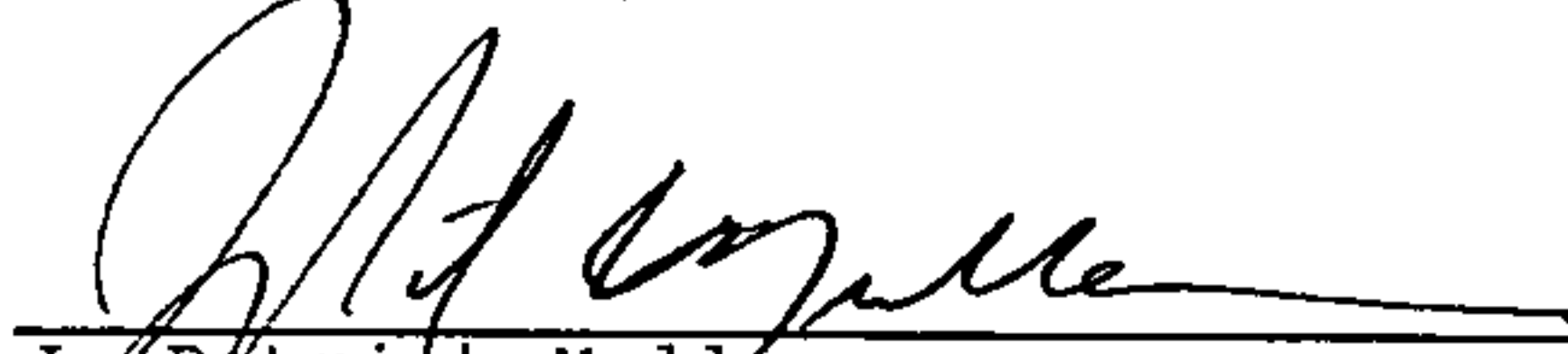
Defendant's demurrer is overruled.

Defendant is given 2 weeks to answer.

AND IT IS SO ORDERED.

Dated: September 24, 1991.

BY THE COURT:



J. Patrick Mullen
District Judge

898-272

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Journal 2905 Page 199
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,)

DOC. 898

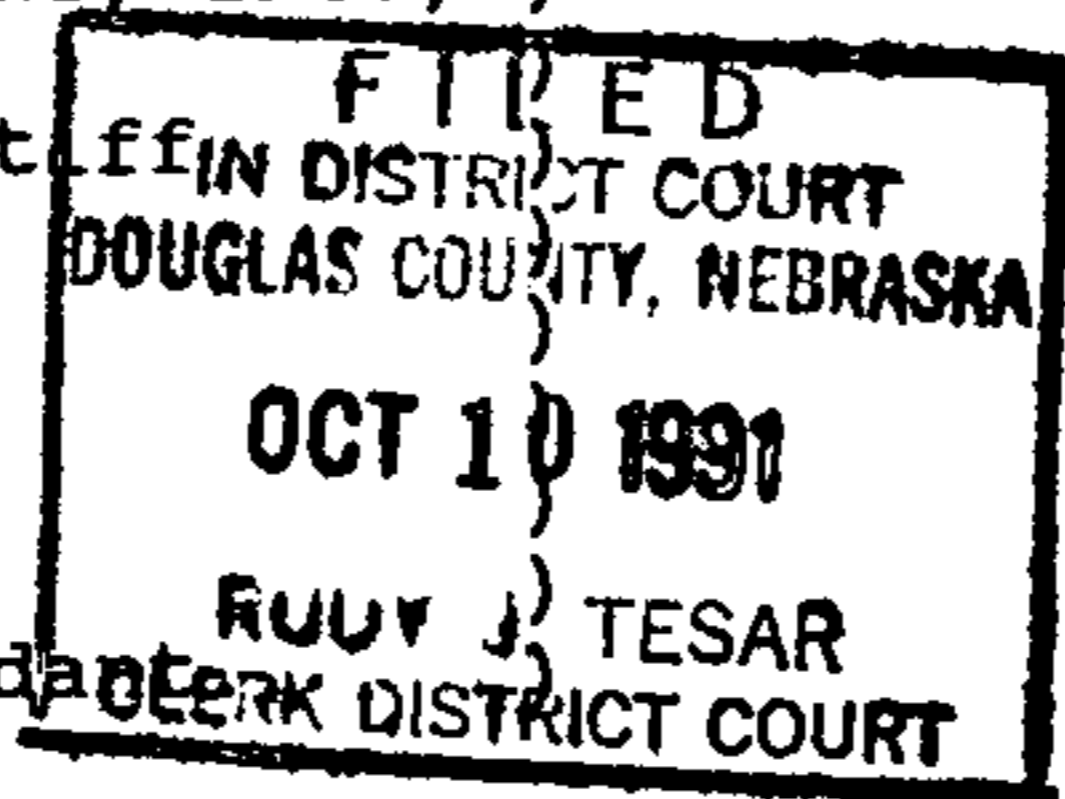
NO. 272

Plaintiff

vs.

WILMA C. ROGERS,

Defendant



ANSWER

COMES NOW the Defendant, Wilma C. Rogers, and for her Answer to the Plaintiff's Petition, admits, denies and alleges as follows:

1. Admits those portions of Paragraphs 2 and 3 which allege that Franklin P. Rogers and Wilma C. Rogers were residents of Douglas County, Nebraska, at times material to this lawsuit and were owners of real property commonly known as 7577 Burlington Street, Ralston, Nebraska. Defendant does not have sufficient knowledge to either admit or deny the remainder of Paragraphs 2 and 3 since Plaintiff has failed to attach its Exhibit "A" to the Petition, and therefore, Defendant denies same.

2. Admits Paragraph 10 of the Petition.

3. Defendant denies each and every other allegation of Plaintiff's Petition except those that constitute admissions against the interest of Plaintiff.

4. Defendant affirmatively alleges that Plaintiff's claim against Defendant for breach of warranty against encumbrances is barred by the applicable statute of limitations. The five-year statute of limitations period for Plaintiff's claim commenced on September 16, 1985, the date the deed transferring the property to Defendant was executed, and expired five years thenceforth, September 16, 1990.

5. Defendant affirmatively alleges that the "encumbrance" to the property alleged by Plaintiff is not within the scope of the warranty against encumbrances given by Defendant. The alleged sewer line does not affect legal title to the property but is

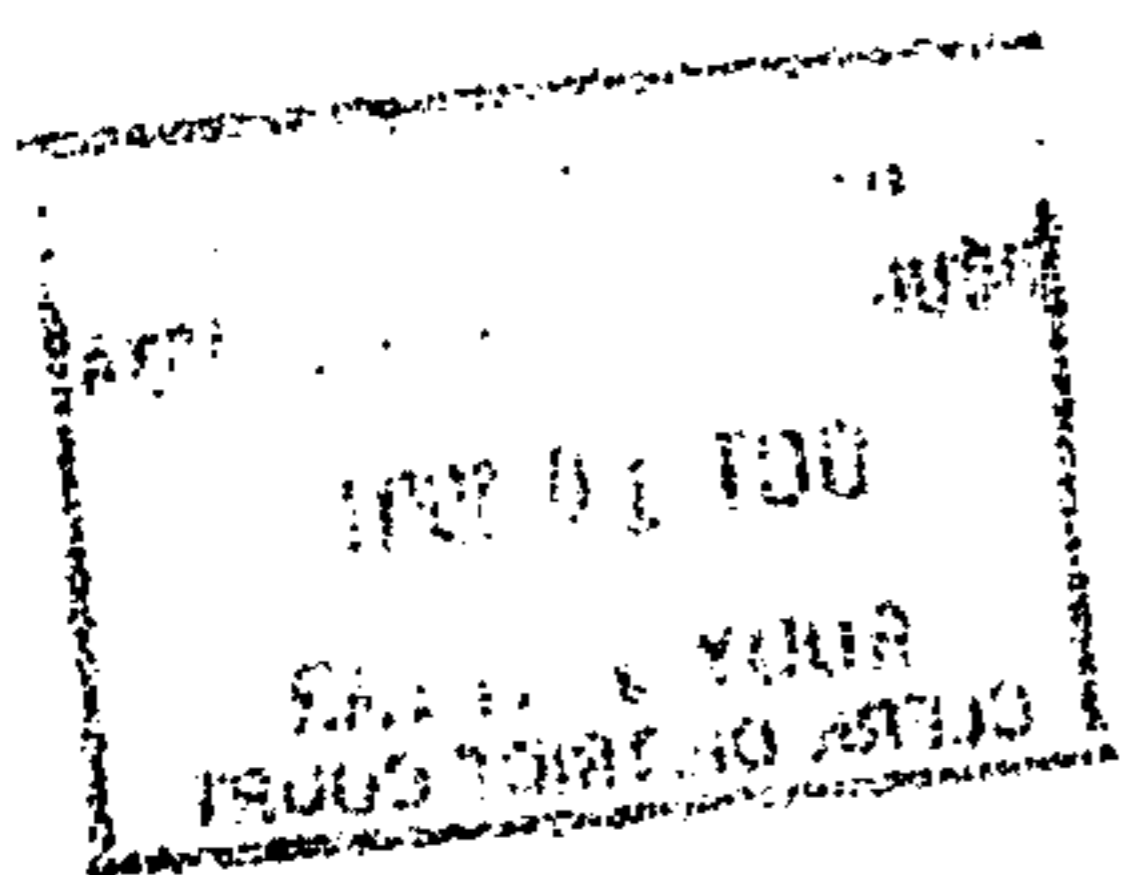
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a physical obstruction not within the scope of the warranty against encumbrances.

6. Defendant affirmatively alleges that Defendant did not, at any time material herein, have knowledge of the existence of the "encumbrance" alleged in Plaintiff's Petition.

WHEREFORE, Defendant, Wilma C. Rogers, prays that the Court enter an Order dismissing Plaintiff's Petition, with prejudice, and that Plaintiff be ordered to pay Defendant's costs herein, and for such other relief as the Court may deem appropriate in the circumstances.

WILMA C. ROGERS, Defendant



By

James D. Buser

James D. Buser - #19020
Of GAINES, MULLEN, PANSING & HOGAN
10050 Regency Circle, Suite 200
Omaha, Nebraska 68114
(402) 397-5500

Attorney for Defendant
Wilma C. Rogers

CERTIFICATE OF SERVICE


The undersigned hereby certifies that on the 9th day of October, 1991, a copy of the foregoing document was forwarded to Mr. Duane M. Katz, Attorney at Law, 11590 West Dodge Road, Omaha, Nebraska 68154, by depositing same in the U.S. Mail, postage prepaid.

Dated this 9th day of October, 1991.

James D. Buser
James D. Buser

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
OCT 10 1991
RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Doc.
Ent. Ex. Doc.
Ent. Gen. Index



The District Court of Nebraska

FOURTH JUDICIAL DISTRICT

ADMINISTRATOR DARWIN L. SEVERSON, JR. HALL OF JUSTICE OMAHA NEBRASKA 68183



OFFICE OF COURT ADMINISTRATOR

402-444-7004

COURT COPY

APRIL 6, 1992

LETTER SENT TO: DUANE KATZ
JAMES D. BUSER

OMEGA CHEMICAL COMPANY INC
VS
ROGERS, WILMA C

RE: Docket 898 Page 272

Dear Counselor:

Rule 6(A) of the Rules of Practice of the District Court for the Fourth Judicial District, regarding Case Progression Standards, requires that cases, appeals, and post-judgment proceedings filed in the District Court be processed in a timely and efficient manner.

Court records reflect that the above-captioned case, appeal, or post-judgment proceeding, assigned to the Honorable, J PATRICK MULLEN has been on file in the District Court of Douglas County, Nebraska, for more than 275 days and has not been certified as ready for trial or hearing, or otherwise disposed of.

You are hereby notified that, pursuant to Rule 6(A), the above-captioned case, appeal, or post-judgment proceeding will be dismissed by the Court for lack of prosecution unless, within thirty (30) days from the date of this notice, either (a) the case, appeal, or post-judgment proceeding is certified as ready for trial or hearing or (b) the Court by order excuses filing of the certificate within that time.


COURT ADMINISTRATOR

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBR.
APR - 6 1992
RUDY-J. TESAR
CLERK DISTRICT COURT

FILED
IN-DISTRICT COURT
DOUGLAS COUNTY, NEBR.
APR -6-1992
RUDY J. TESAR
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 WILMA C. ROGERS,)
)
 Defendant.)

DOC. 898 NO. 272

ORDER EXCUSING FILING OF
CERTIFICATE OF READINESS

THIS MATTER comes on for hearing pursuant to notice to the respective counsel of record for the parties and/or the parties themselves in the above-captioned case in accordance with Rule 4 of the Rules of Practice of the District Court of the Court Judicial District.

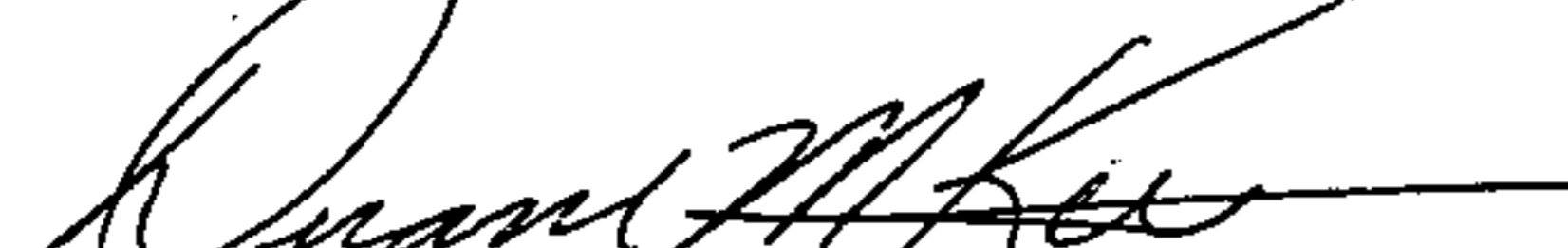
IT IS ORDERED that the filing of a Certificate of Readiness hereby excused until 10/28, 1992, when either (a) all discovery must be completed and the Certificate of Readiness must be filed, or (b) an Order extending the time for filing a Certificate of Readiness must be entered, or this case will automatically be dismissed for lack of prosecution.

DATED this 29 day of April, 1992.


BY THE COURT:


DISTRICT COURT JUDGE

PREPARED AND SUBMITTED BY:


Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, Nebraska 68154
(402) 496-1010
Attorney for Plaintiff

APPROVED AS TO FORM AND CONTENT:


James D. Buser, #19020
GAINES, MULLEN, PANSING & HOGAN
10050 Regency Circle, Suite 200
Omaha, Nebraska 68114
(402) 397-5500
Attorney for Defendant

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DISTRICT COURT
JUDICIAL DISTRICT
APR 29 1992

898-272

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APR 29 1992

RECORDED
Journal 288 Page 312
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	NOTICE OF SERVING DISCOVERY	
	)	DOCUMENTS	
WILMA ROGERS,)		
)		
Defendant.)		

Notice is hereby given that on the 23rd day of October, 1992, the following discovery materials were served upon Plaintiff by forwarding the same by regular United States mail, postage prepaid, to its attorney of record, Duane M. Katz, 11590 W. Dodge Road, Omaha, NE 68154:

1. Defendant's Interrogatories to Plaintiff
2. Defendant's Request for Admissions to Plaintiff
3. Copy of this Notice of Serving Discovery Documents

WILMA C. ROGERS, Defendant

James D. Buser

 GAINES, MULLEN, PANSING & HOGAN
 10050 Regency Circle, Suite 200
 Omaha, NE 68114
 (402) 397-5500
 By: James D. Buser - #19020

FILED
 IN DISTRICT COURT
 DOUGLAS COUNTY, NEBRASKA
 OCT 23 1992
 RUDY J. TESAR
 CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

OCT 23 1992

RUDY J. TESAR
CLERK DISTRICT COURT

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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

Omega Chemical Co
Plaintiff/Petitioner

Docket 898 Page 272

vs.

Wilma C. Rogers
Defendant/Respondent

ORDER EXTENDING TIME
FOR FILING OF CERTIFICATE
OF READINESS

This matter comes on for hearing on the request for an order granting an extension of time within which to file a Certificate of Readiness in the above-captioned

The Court finds that on APRIL 29, 1992 the filing of a Certificate of Readiness was, for good cause shown, excused until OCTOBER 28, 1992

RECORDED
INDEXED
OCT 29 1992
CLERK DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

IT IS ORDERED that the parties in the above-captioned case be, and they hereby are, granted an extension of time, until FEBRUARY 1, 1993, to file a Certificate of Readiness.

IT IS FURTHER ORDERED that, if a Certificate of Readiness is not filed within the specified time, this case will automatically be dismissed for lack of prosecution with no further action being taken by this Court.

Dated this 26TH day of OCTOBER, 1992

BY THE COURT:

[Signature]
District Judge

898-272

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Journal 2070 Page 75
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	MOTION FOR SUMMARY JUDGMENT	
)		
WILMA C. ROGERS,)		
)		
Defendant.)		

Defendant, Wilma C. Rogers, respectfully moves the Court for an Order of summary judgment pursuant to Neb. Rev. Stat. §25-1331 (Reissue 1989). Defendant submits that the pleadings and discovery show that there is no genuine issue as to any material fact, and that Defendant is entitled to a judgment as a matter of law.

WHEREFORE, Defendant, Wilma C. Rogers, prays for an Order of summary judgment in favor of Defendant in dismissing Plaintiff's Petition, with prejudice, at Plaintiff's cost.

DATED this 11th day of January, 1993.

WILMA C. ROGERS, Defendant

FILED
 IN DISTRICT COURT
 DOUGLAS COUNTY, NEBRASKA

JAN 11 1993

 RUDY J. TESAR
 CLERK DISTRICT COURT

James D. Buser

 GAINES, MULLEN, PANSING & HOGAN
 10050 Regency Circle, Suite 200
 Omaha, NE 68114
 (402) 397-5500
 By: James D. Buser - #19020

NOTICE OF HEARING

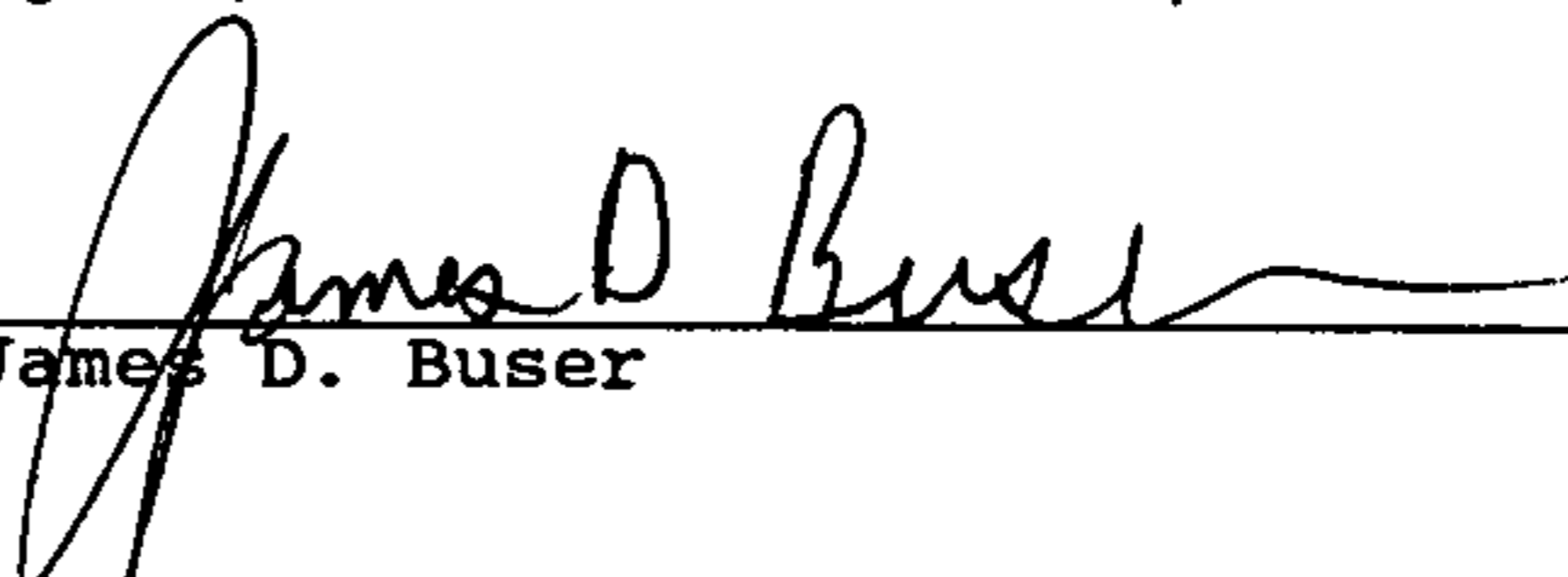
YOU ARE HEREBY NOTIFIED that hearing on the Motion for Summary Judgment will be held before the Honorable J. Patrick Mullen, in the District Court of Douglas County, Nebraska, on the 3rd day of February, 1993, at 8:30 a.m., or as soon thereafter as counsel may be heard.

James D. Buser

 James D. Buser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of January, 1993, a copy of the foregoing document was forwarded by regular U.S. Mail, postage prepaid, to Duane M. Katz, 11590 W. Dodge Road, Omaha, NE 68154.



James D. Buser

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

JAN 11 1993

RUDY J. TESAR
CLERK DISTRICT COURT

~~Mr. [unclear]~~
~~Mr. [unclear]~~
~~Mr. [unclear]~~



IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY,)
INC.,)
)
Plaintiff,)
)
vs.)
)
WILMA ROGERS,)
)
Defendant.)

DOC. 898 NO. 272

MOTION FOR PARTIAL SUMMARY
JUDGMENT

COMES NOW the Plaintiff, Omega Chemical Company, Inc., and hereby moves the Court, pursuant to Neb. Rev. Stat. Section 25-1330 et seq., for summary judgment in its favor on the grounds that there is no genuine issue of material fact, and Plaintiff is entitled to judgment on the question of liability as a matter of law. In support of its Motion, Plaintiff will offer at the hearing on its Motion the following exhibits:

1. Affidavit of Allen W. Doub dated JANUARY 21, 1993,
2. The court file and docket sheet in the action entitled:

In the District Court of Douglas County, Nebraska, Omega Chemical Company, Inc., Plaintiff, vs. Belgrade Company, et al., Defendant, Doc. 912, No. 512.

Dated this 21st day of January, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

BY:

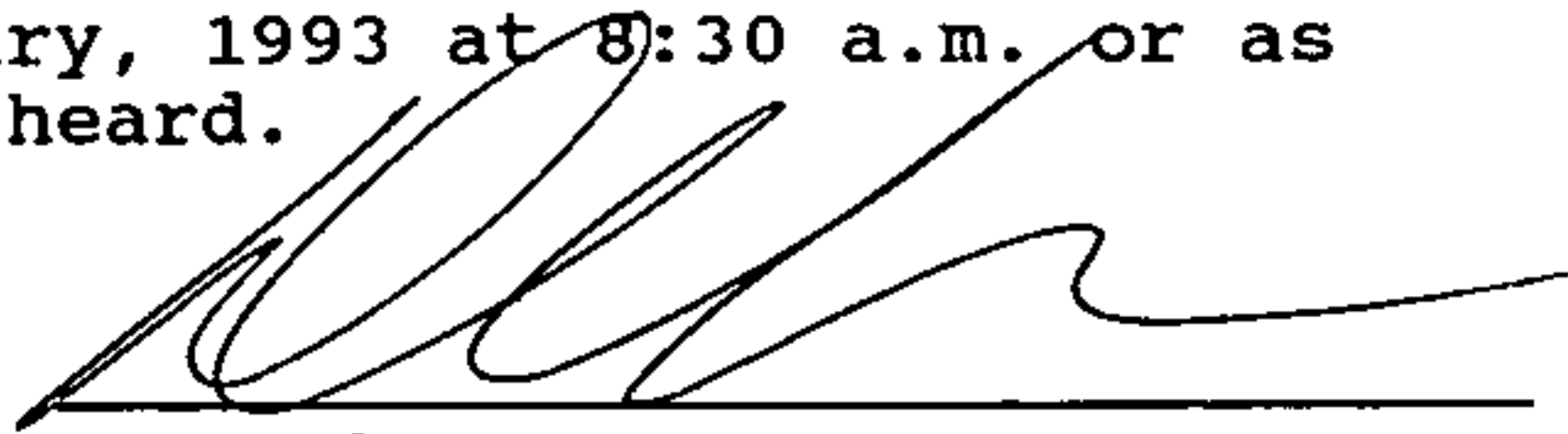
Duane M. Katz
Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
JAN 21 1993
RUDY J. TESAR
CLERK DISTRICT COURT

NOTICE OF HEARING

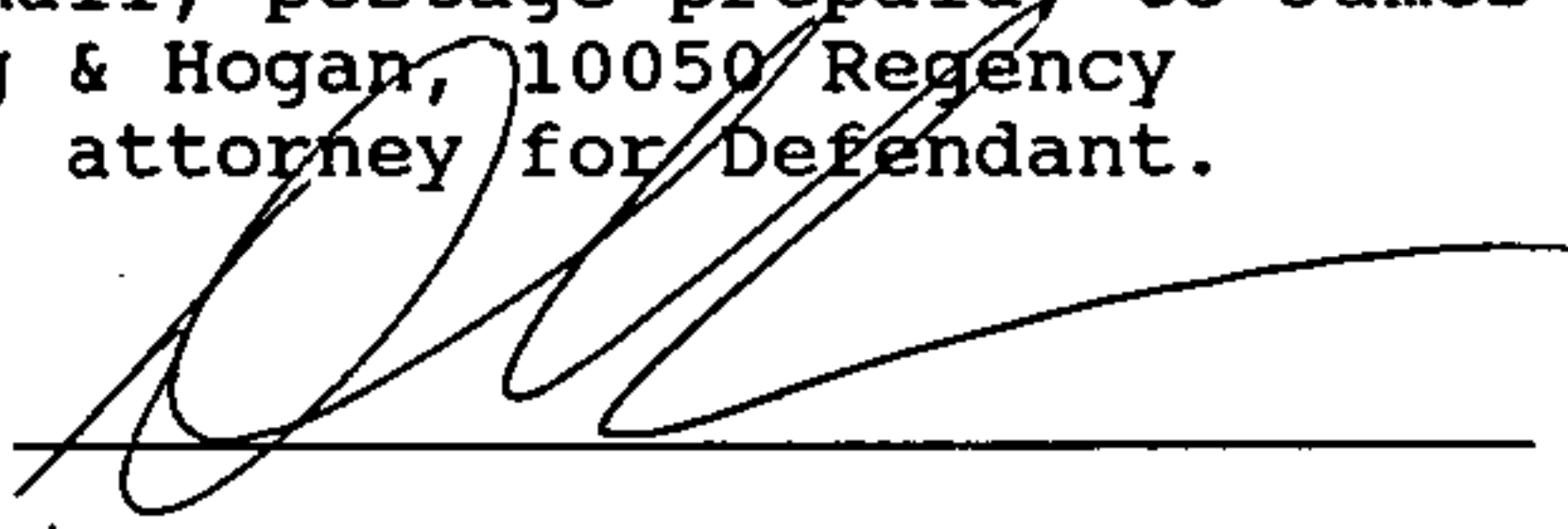
TO: Wilma Roger, Defendant, and James D. Buser, her attorney

You are hereby notified that Plaintiff will call up for hearing the above Motion for Partial Summary Judgment before the Honorable Patrick Mullen, District Court Judge, Courtroom No. 4, Douglas County Courthouse, 17th & Farnam Streets, Omaha, Nebraska, on the 3rd day of February, 1993 at 8:30 a.m. or as soon thereafter as counsel may be heard.



CERTIFICATE OF SERVICE

It is hereby certified that on this 21ST day of January, 1993 a copy of the foregoing Motion for Partial Summary Judgment was sent by Fax and United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.



RECEIVED
FEB 2 1993
FAX
ENCL 1 1993

a:Omega-Rogers\Motion.SJ

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

JAN 21 1993

RUDY J. TESAR
CLERK DISTRICT COURT

~~Mr. [unclear]~~
~~Mr. [unclear]~~
~~Mr. [unclear]~~

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	MOTION	
)		
WILMA ROGERS,)		
)		
Defendant.)		

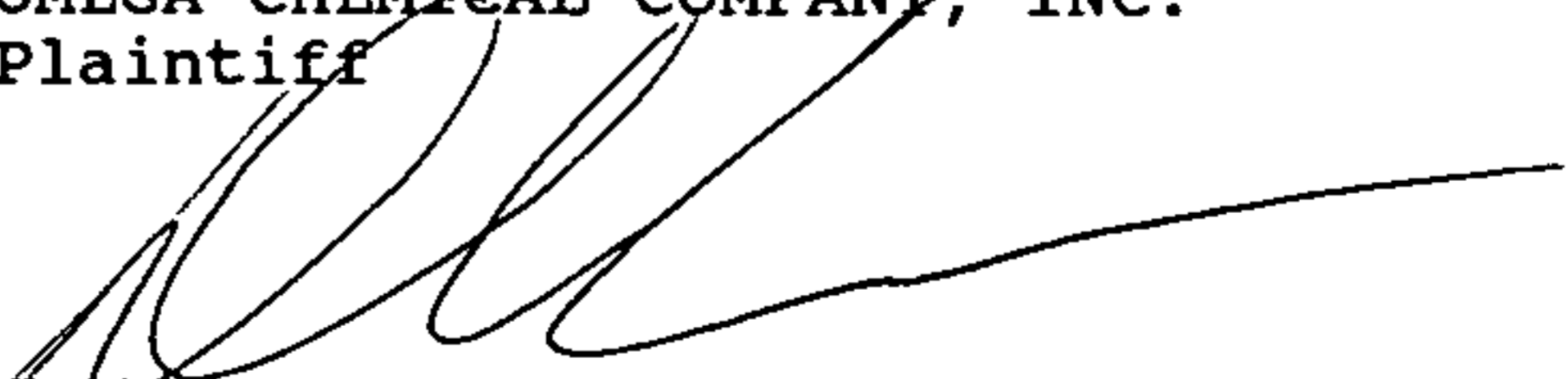
COMES NOW the Plaintiff, Omega Chemical Company, Inc., and moves the Court for an Order pursuant to Rule 36(b) allowing the Plaintiff to withdraw or amend the Request for Admissions hereinbefore deemed admitted. A copy of said amended and substituted answer is attached hereto and by reference made a part hereof.

In support of said Motion, Plaintiff shows to the Court that there are three cases pending in the District Court of Douglas County, Nebraska, involving disputes regarding title or injury to the property which is the subject matter of this action, and through mistake and inadvertence, Plaintiff failed to respond to the Request for Admissions previously filed herein.

That to deemed said Request for Admissions to be admitted will subserve presentation of this matter on the merits.

Dated this 21st day of January, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

BY: 
Duane M. Katz, #12148
Attorney at Law

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

JAN 21 1993

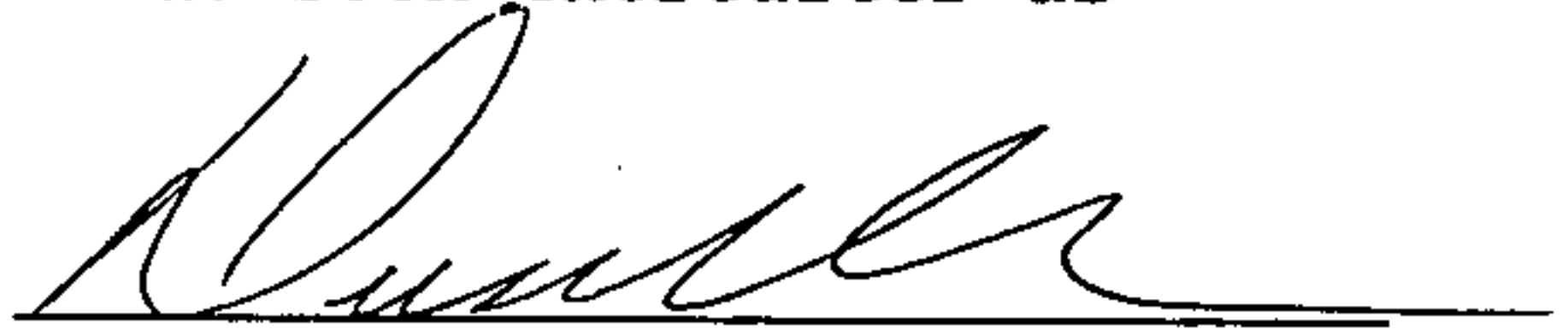
RUDY J. TESAR
CLERK DISTRICT COURT

11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

NOTICE OF HEARING

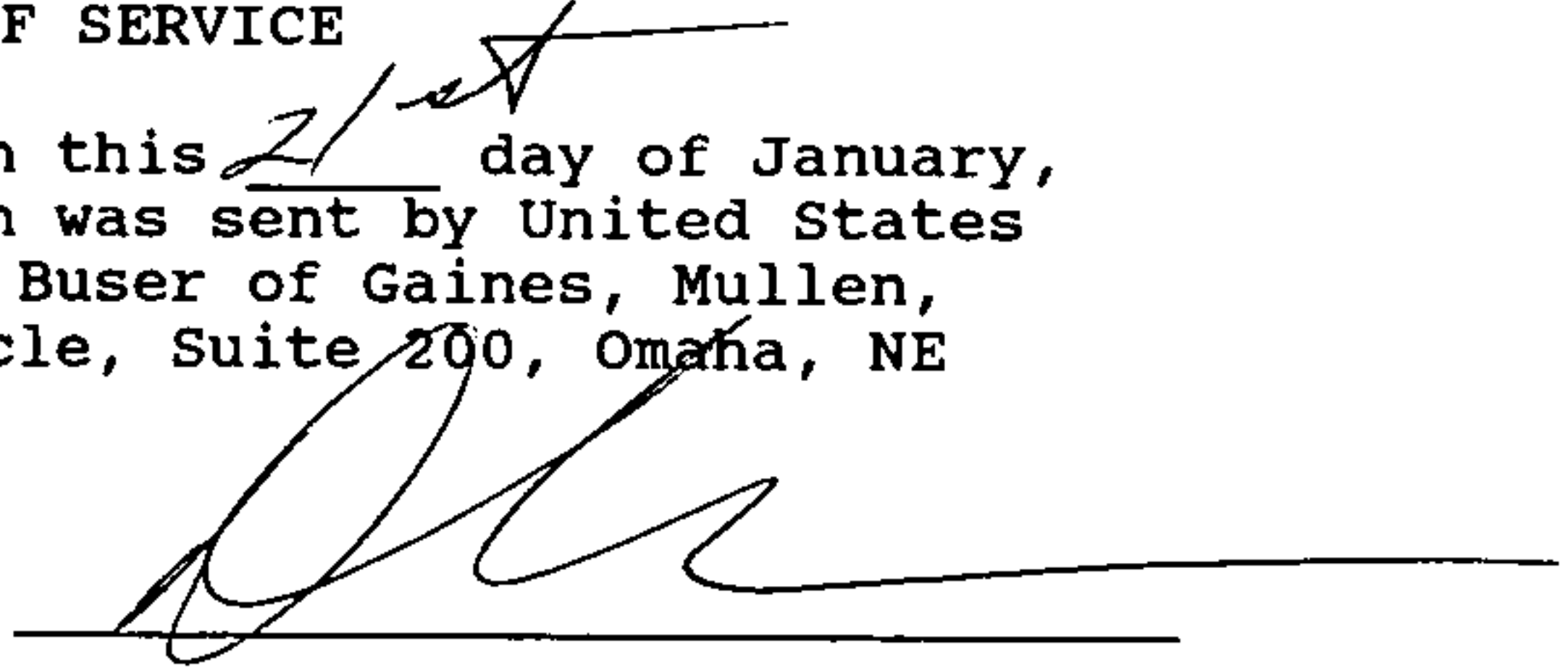
TO: Wilma Roger, Defendant, and James D. Buser, her attorney

You are hereby notified that Plaintiff will call up for hearing the above Motion before the Honorable Patrick Mullen, District Court Judge, Courtroom No. 2, Douglas County Courthouse, 17th & Farnam Streets, Omaha, Nebraska, on the 3rd day of February, 1993 at 8:30 a.m. or as soon thereafter as counsel may be heard.



CERTIFICATE OF SERVICE

It is hereby certified that on this 21st day of January, 1993 a copy of the foregoing Motion was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.



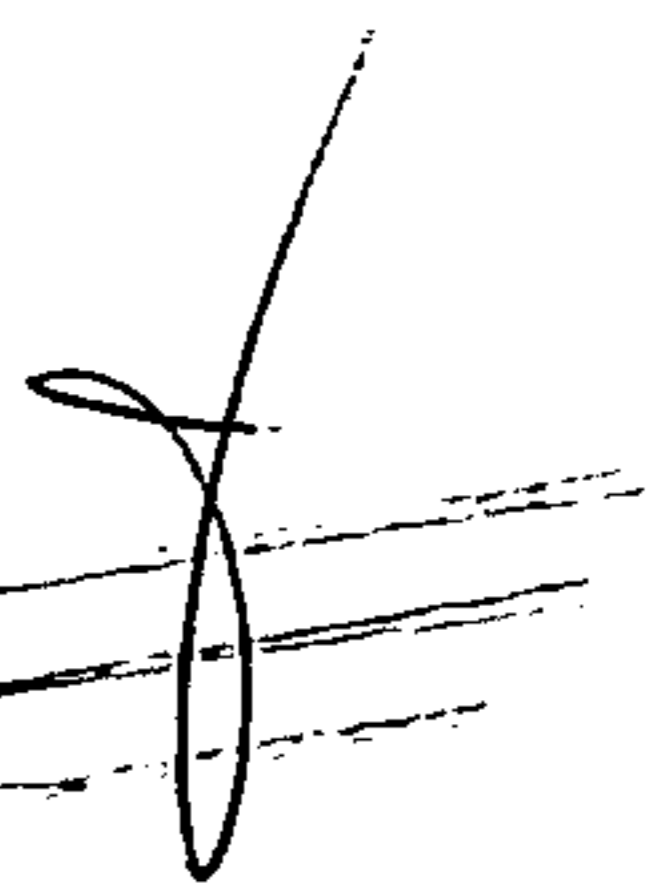
a:Omega-Rogers\Motion

FILED
IN DISTRICT COURT
DOLICH COUNTY NEBRASKA
JAN 21 1993
RUDY J. TESAR
CLERK DISTRICT COURT

Mr. App. L...

Mr. C. D...

Mr. C. T...



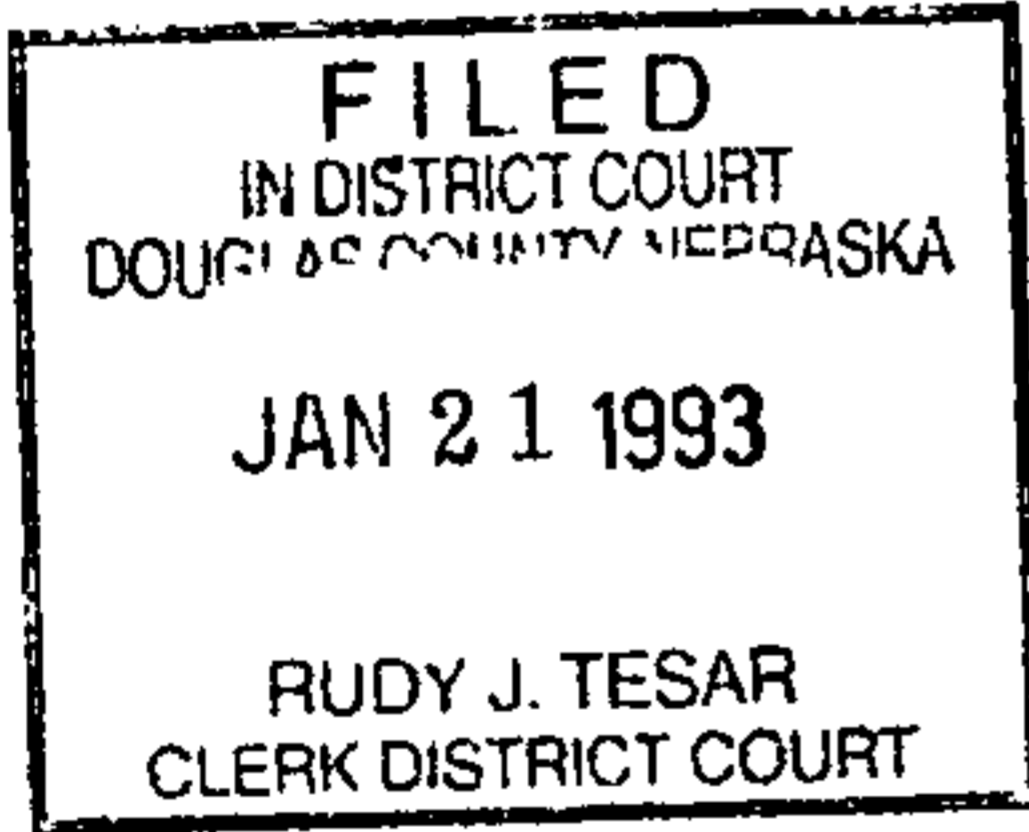
IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	NOTICE OF SERVICE	
)		
WILMA ROGERS,)		
)		
Defendant.)		

NOTICE IS HEREBY GIVEN that Plaintiff's Answers to Defendant's Request for Admissions were served upon the Defendant by mailing same to her attorney, James D. Buser, on the 21st day of January, 1993.

Dated this 21st day of January, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff



BY: Duane M. Katz
 Duane M. Katz, #12148
 Attorney at Law
 11590 West Dodge Road
 Omaha, NE 68154
 (402) 496-1010
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

It is hereby certified that on this 21st day of January, 1993 a copy of the foregoing Notice of Service was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.

[Signature]

[Faint, illegible text and lines, possibly a signature or stamp]

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

JAN 21 1993

RUDY J. TESAR
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,

Pltf.

CERTIFICATE OF READINESS FOR TRIAL

vs.

WILMA C. ROGERS, TYPE OF CASE

Law	<input checked="" type="checkbox"/>	Equity
001 AUTO NEG.		004 WARRANTY
002 OTHER NEG.		005 MALPRACTICE
<input checked="" type="checkbox"/> 003 CONTRACT		006 CONDEMNATION
021 MORTG. FORCL.		022 LIEN FORECL.
		023 CONTRACT FOR.

Doc. 898 No. 272 Judge J. Patrick Mullen

- | | |
|---------------------|----------------|
| 007 PATERNITY | 010 APP. NEG. |
| 008 WILL OR PROBATE | 011 APP. CONT. |
| 009 ASSAULT | 012 FRAUD |
| 024 INJUNCTION | 013 OTHER |
| 025 ACCOUNTING | |

The undersigned attorney of record for the Plaintiff the Defendant _____ represents to the Court as follows:

- Trial of this case will be jury _____ non-jury .
- That the issues are joined and the following pleadings have been filed:
 - Petition was filed _____ July 7, 19 91
 - a. Last amendment thereto was filed _____, 19 _____
 - Answer was filed _____ October 9, 19 91
 - a. Last amendment thereto was filed _____, 19 _____
 - Reply was filed _____, 19 _____
- That in the opinion of the undersigned the case is ready for trial; that all discovery proceedings including depositions and other necessary preparation has been completed; that the testimony of all necessary witnesses is as of the date hereof available for trial as certified hereby; that the trial is estimated to take no less than 2 days nor more than 3 days.
- That in the opinion of the undersigned a pre-trial conference is necessary _____; is not necessary _____
- That the undersigned is not available for trial of said cause during the jury panel weeks commencing on the following dates during the next ninety (90) days: _____
- This case has been consolidated with _____ found at docket _____, number _____, and the attorneys appearing in said case (or parties appearing pro se) are included below.
- The original and one copy hereof have been filed with the Court Administrator and a copy has been served on opposing counsel or parties appearing pro se personally or by United States Mail, postage prepaid, this 28th day of January, 19 93.

Attorney Number	Name (Individual, NOT FIRM, include current address & phone)
12148	Pltf's Trial Atty. Duane M. Katz, 11590 West Dodge Road, Omaha, NE 68154 496-1010
19020	Def's Trial Atty. James D. Buser, 10050 Regency Circle, Omaha, NE 68114 397-5500
	3rd Party Pltf's Atty.
	3rd Party Def's Atty.
	Other

Duane M. Katz
Attorney for Plaintiff

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

JAN 28 1993

RUDY J. TESAR
CLERK DISTRICT COURT

A failure to file objections or exceptions in accordance with the Rules of the Court shall be considered by the Court as notice and consent to the foregoing by opposing counsel.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

JAN 28 1993

RUDY J. TESAR
CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

JAN 28 1993

RUDY J. TESAR
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,)	DOC. 898	NO. 272
Plaintiff,)		
vs.)	OBJECTION TO CERTIFICATE OF	
WILMA C. ROGERS,)	READINESS FOR TRIAL	
Defendant.)		

Defendant, Wilma C. Rogers, objects to the filing of the Certificate of Readiness for Trial by Plaintiff in the above-captioned matter for the reason that additional discovery needs to be completed in order to properly evaluate the liability, if any, of the respective parties. In support of her objection, Defendant sets forth as follows:

1. On the 24th day of October, 1992, Defendant served its Interrogatories on Plaintiff by mailing them to its counsel of record, by regular U.S. mail, postage prepaid. A copy of these Interrogatories is attached hereto as Exhibit "A".

2. More than thirty (30) days have passed since the service of Defendant's Interrogatories upon counsel for Plaintiff, but Plaintiff has not responded to Defendant's Interrogatories.

3. The parties presently have pending before the Court Motions for Summary Judgment which the Defendant believes may make a trial of this case unnecessary.

WHEREFORE, Defendant requests the Court to strike the Plaintiff's Certificate of Readiness and extend the deadline for filing a certificate of readiness for 90 days.

DATED this 4th day of February, 1993.

WILMA C. ROGERS, Defendant

James D. Buser

GAINES, MULLEN, PANSING & HOGAN
 10050 Regency Circle, Suite 200
 Omaha, NE 68114
 (402) 397-5500
 By: James D. Buser - #19020

FILED
 IN DISTRICT COURT
 DOUGLAS COUNTY, NEBRASKA

FEB - 4 1993

 RUDY J. TESAR
 CLERK DISTRICT COURT

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that hearing on the Objection to Certificate of Readiness for Trial will be held before the Honorable J. Patrick Mullen in the District Court of Douglas County, Nebraska, on the 17th day of February, 1993, at 1:15 p.m., or as soon thereafter as counsel may be heard.


James D. Buser

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of February, 1993, a copy of the foregoing document was forwarded by regular U.S. Mail, postage prepaid, to Duane M. Katz, 11590 W. Dodge Road, Omaha, NE 68154.


James D. Buser

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,)	DOC. 898	NO. 272
Plaintiff,)		
vs.)		
WILMA ROGERS,)	DEFENDANT'S INTERROGATORIES	
Defendant.)	TO PLAINTIFF	

TO: Omega Chemical Company, Defendant, and its attorney of record, Duane M. Katz.

The following Interrogatories are served upon you pursuant to the Nebraska Rules of Discovery, and are to be answered fully, in writing, and under oath, in accordance with such rules. Your answers should be provided within thirty (30) days from the date of your receipt of these Interrogatories, by service upon the undersigned attorney at 10050 Regency Circle, Suite 200, Omaha, Nebraska 68114.

These Interrogatories are to be considered continuing in nature, and if new information is discovered after these Interrogatories are first answered which would change or further the responses initially provided, such information is to be promptly furnished to the undersigned.

1. Please identify by name and address all persons answering or assisting in the answering of these Interrogatories.

ANSWER:

2. Please identify by name and address all persons having knowledge or claiming to have knowledge of matters relating to this litigation.

ANSWER:

EXHIBITA

3. Please identify all documents which you intend to offer at trial of this matter.

ANSWER:

4. Please identify each person whom you expect to call as an expert witness at trial of this matter, and with regard to each such person, please provide the following information:

- a. A summary of his or her qualifications to serve as an expert witness in this matter.
- b. The subject matter in which he or she is expected to testify;
- c. The substance of the facts and opinions to which he or she is expected to testify; and
- d. A summary of the grounds for each opinion to be given.

ANSWER:

5. List each person and/or entity which has claimed an interest in the sewer pipeline alleged in Paragraph 4 of Plaintiff's Petition.

ANSWER:

6. With respect to each person or entity listed in the answer to the question submitted in Paragraph 5, specifically identify the following:

- a. The date on which such person or entity made it known to Plaintiff that he, she or it was claiming an interest in said sewer pipeline;
- b. The specific interest claimed in said sewer pipeline, e.g., easement, license;
- c. In reference to each interest claimed in Paragraph 6(b), the means by which such claimed interest was created; and

- d. Any and all documents and facts which each such person has asserted in support of the claimed interest listed above.

ANSWER:

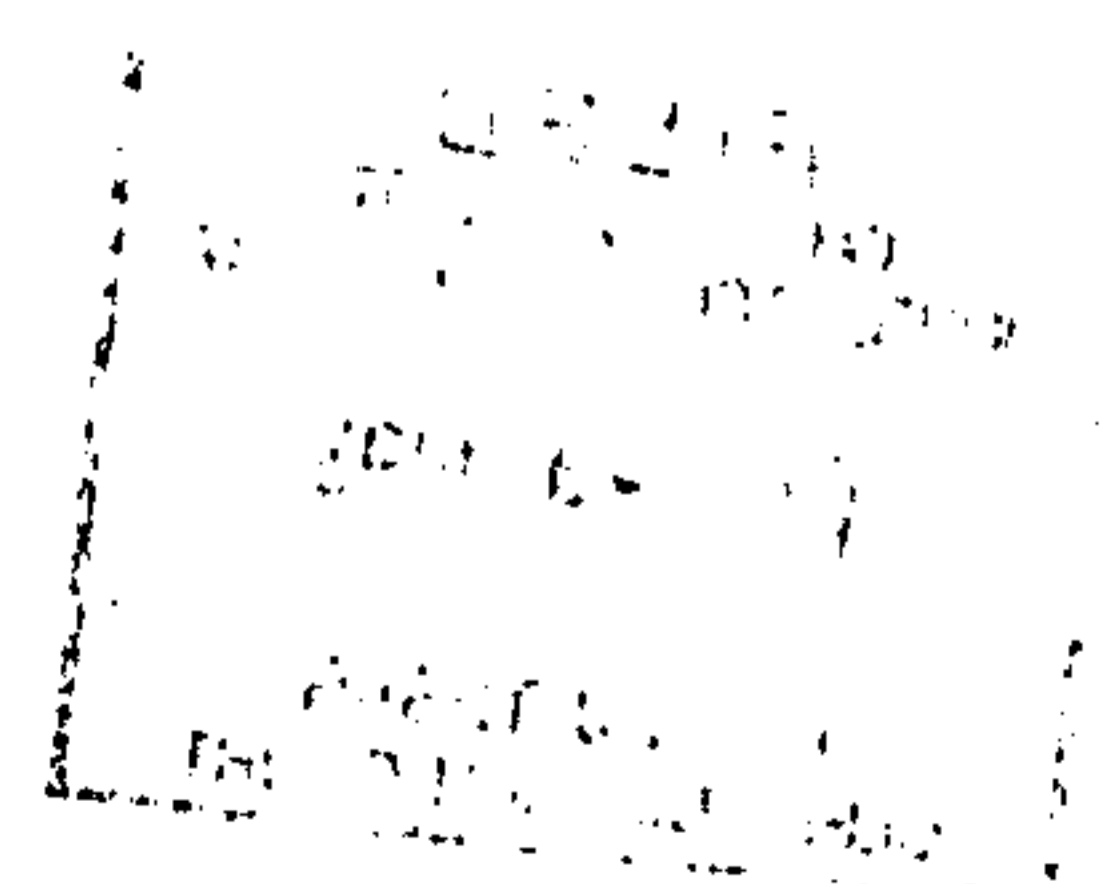
7. The date on which Plaintiff first became aware of the sewer pipeline reference in Paragraph 4 of Plaintiff's Petition.

ANSWER:

WILMA C. ROGERS, Defendant



GAINES, MULLEN, PANSING & HOGAN
10050 Regency Circle, Suite 200
Omaha, NE 68114
(402) 397-5500
By: James D. Buser - #19020



FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

FEB - 4 1993

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Doc.
Ent. Ex. Doc.
Ent. Gen. Index

SP

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.) DOC. 898 NO. 272
)
Plaintiff,)
)
vs.) ORDER
)
WILMA C. ROGERS,)
)
Defendant.)

On the 3rd day of February, 1993, defendant's motion for summary judgment and plaintiff's motion for partial summary judgment came on for hearing. The defendant was represented by her attorney, James D. Buser. The plaintiff was represented by its attorney, Duane M. Katz. Defendant's exhibits 1 and 2 were offered and received into evidence without objection. At defendant's request the court takes judicial notice of the pleadings. The court accepts the stipulation entered into by the parties that if the defendant were called, she would testify that she had no knowledge of the sewer line in question which crossed her property at any time material to the issues herein. Plaintiff's exhibit 3 is received into evidence over defendant's objection to paragraphs 9 and 16, but sustaining defendant's objection to paragraph 10 which is stricken and exhibit 4 which is received into evidence without objection. On plaintiff's request the court takes judicial notice of Docket 901 Page 512 and the docket entries made therein.

The court being fully advised in the premises finds as follows:

The court finds as true paragraphs 1 through 7 of plaintiff's petition.

The plaintiff in paragraph 8 of its petition claims that the sewer line constitutes an encumbrance on the property contrary to the warranty deed provided to the plaintiff by one Franklin P. Rogers. In exhibit 2,

plaintiff's answers to request for admissions, the plaintiff admits that no person or entity has been deemed by any court to have established by prescription, necessity or otherwise an easement, license or other right to construct or maintain the sewer pipeline alleged in paragraph 4 of the plaintiff's petition. The plaintiff further admits that the City of Ralston has denied any interest in the sewer pipeline alleged in plaintiff's petition and the plaintiff finally admits that no person or entity has any right to construct or maintain the sewer pipeline in question.

The case filed in the District Court of Douglas County at Docket 901 No. 512 further demonstrates the plaintiff's efforts at notifying the persons or entities who might claim an interest in the sewer line. All such persons notified disclaim any interest in the sewer line.

There being no claim, lien, charge, security interest, easement, right of way or any other claim which might impair the title or right of use of the property by the plaintiff, the presence of the pipeline upon the property may constitute a trespass, but does not constitute a breach of warranty against encumbrances as alleged by the plaintiff.

The unclaimed sewer line is not an easement which constitutes a breach of the warranty deed executed by Franklin P. Rogers and Wilma C. Rogers to the plaintiff as attached to exhibit 1.

There is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That the defendant's motion for summary judgment is sustained.

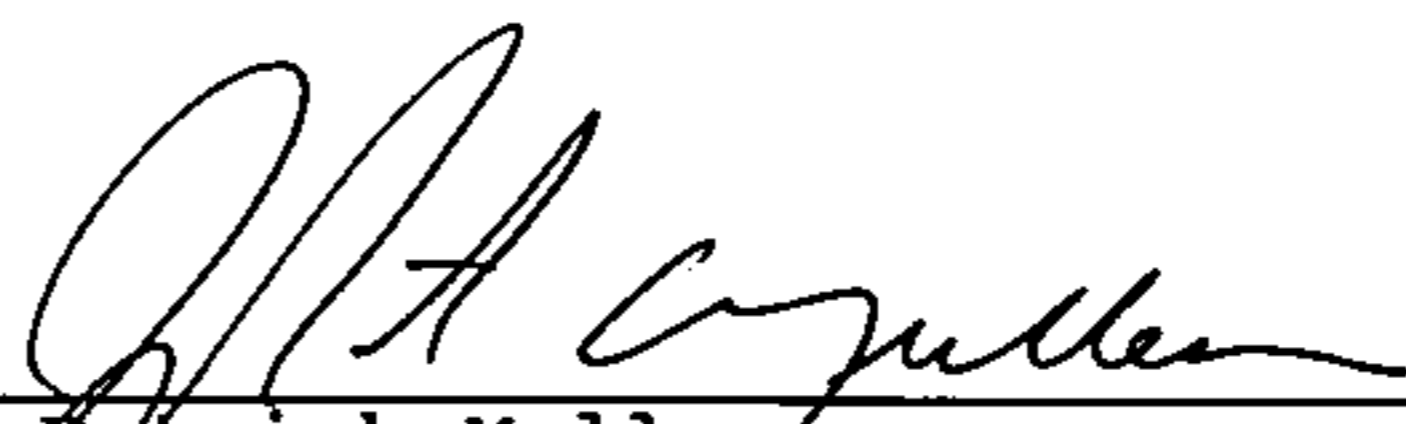
Plaintiff's motion for partial summary judgment is overruled.

Judgment is entered for the defendant.

Plaintiff's petition is dismissed at plaintiff's costs.

Dated: February ⁹ 8, 1993.

BY THE COURT:



J. Patrick Mullen
District Judge

RECEIVED
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CLERK OF DISTRICT COURT
DISTRICT OF COLUMBIA

898-272

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FEB 0 9 1993

RECORDED
Journal 3109 Page 137
CLERK DISTRICT COURT

COURT COPY

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

DOCKET 898 PAGE 272

PLAINTIFF: OMEGA CHEMICAL COMPANY INC
VS
DEFENDANT: ROGERS, WILMA C

FOLLOWING PARTIES OR ATTORNEYS OF RECORD HAVE BEEN NOTIFIED
THAT IN THE ABOVE ENTITLED CASE, ON THE 9TH DAY OF FEBRUARY 1993,
THE FOLLOWING DECISION WAS RENDERED:

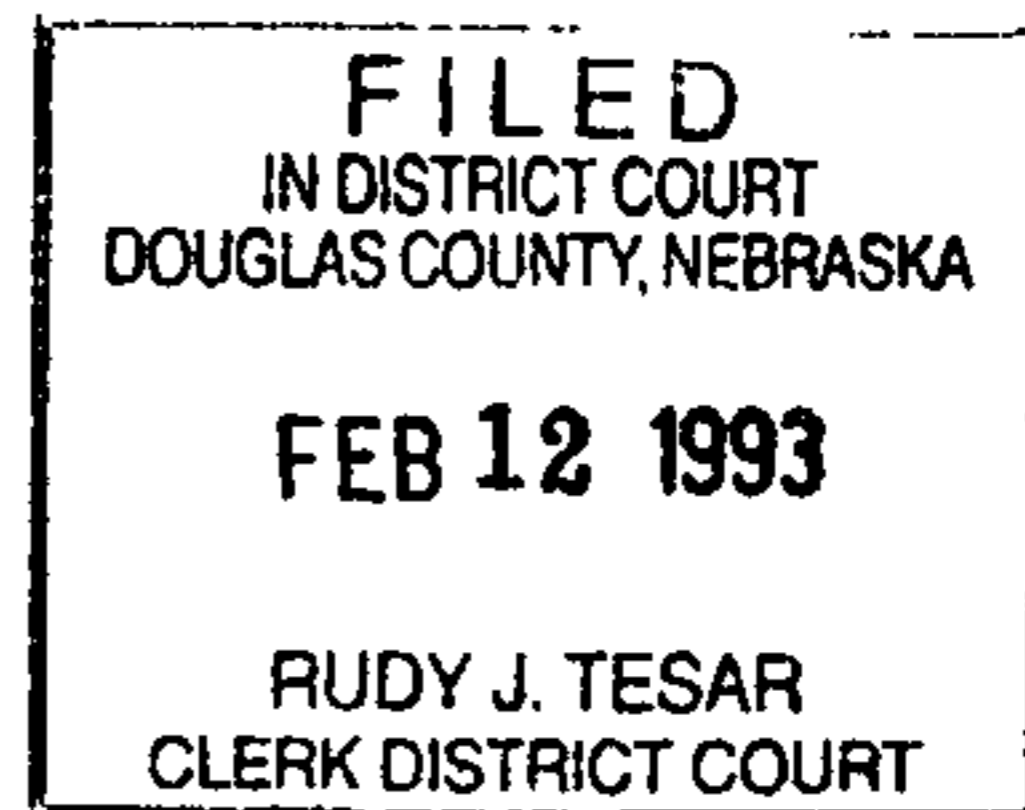
JUDGMENT

DATED THIS 11TH DAY OF FEBRUARY 1993.

RUDY J. TESAR
CLERK OF THE DISTRICT COURT

DUANE KATZ
11590 WEST DODGE ROAD
OMAHA, NEBRASKA 68154

JAMES D. BUSER
SUITE 200
10050 REGENCY CIRCLE
OMAHA, NEBRASKA 68114



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Ent. Ex. Doc. _____
Ent. Gen. Index _____

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY,
INC.,

DOC. 898 NO. 272

vs.

WILMA ROGERS,

FILED)
Plaintiff)
DISTRICT COURT)
DOUGLAS COUNTY NEBRASKA)
FEB 17 1993)
RUDY J. TESAR)
Defendant)
CLERK DISTRICT COURT)

MOTION FOR NEW TRIAL

COMES NOW the Plaintiff, Omega Chemical Company, Inc., and moves the Court for an Order setting aside the Court's decision entering summary judgment in favor of the Defendant on February 9, 1993, and granting to Plaintiff a new trial for the following the causes, each of them materially affecting the substantial rights of the Plaintiff:

1. Irregularity in the proceedings of the Court;
2. Abuse of discretion by the Court by which the Plaintiff was prevented from having a fair trial;
3. The decision is not sustained by the evidence;
4. The decision is contrary to the evidence;
5. The decision is contrary to law;
6. Errors of law occurring at the trial and accepted to by the Plaintiff;
7. The Court erred in holding and finding:
 "There being no claim, lien, charge, security interest, easement, right of way or any other claim which might impair the title or right of use of the property by the Plaintiff, the presence of the pipeline upon the property may constitute a trespass, but does not constitute a breach of warranty against encumbrances as alleged by Plaintiff."
8. The Court erred in failing to find that various persons

had, in fact, made a claim against the subject property by virtue of the allegation that said sewer was lawfully upon said property as evidence by the Counterclaim filed in the action entitled:

Omega Chemical Company, Inc., v. Belgrade Company, et al., in the District Court of Douglas County, Nebraska, Doc. 901, No. 502. *DMC*

Dated this 17 day of February, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

BY: *Duane M. Katz*
Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

NOTICE OF HEARING

You are hereby notified that Plaintiff will call up for hearing the above Motion for New Trial before the Honorable J. Patrick Mullen, District Court Judge, Courtroom No. 4, Douglas County Courthouse, 17th & Farnam Streets, Omaha, Nebraska, on the 4 day of MARCH, 1993 at 8:45 o'clock A.m. or as soon thereafter as counsel may be heard.

[Signature]

CERTIFICATE OF SERVICE

It is hereby certified that on this 17 day of February, 1993 a copy of the foregoing Motion for New Trial was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.

[Signature]

a:Omega\Rogers\NewTrial.mot

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

FEB 17 1993

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Doc.
Ent. Ex. D.
Ent. Cont. Index

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	NOTICE OF APPEAL AND	
	)	DEPOSIT OF DOCKET FEE	
WILMA ROGERS,)		
)		
Defendant.)		

COMES NOW the Plaintiff, Omega Chemical Company, Inc., and gives notice of its intent to appeal from the February 9, 1993 Order of the District Court of Douglas County, Nebraska, and the March 4, 1993 Order overruling the Plaintiff's Motion for New Trial. Plaintiff hereby deposits with the Clerk of the District Court the docket fee as required by Section 25-1912, R.R.S. 1943, as amended, and Section 33-103, R.R.S. 1943, as amended.

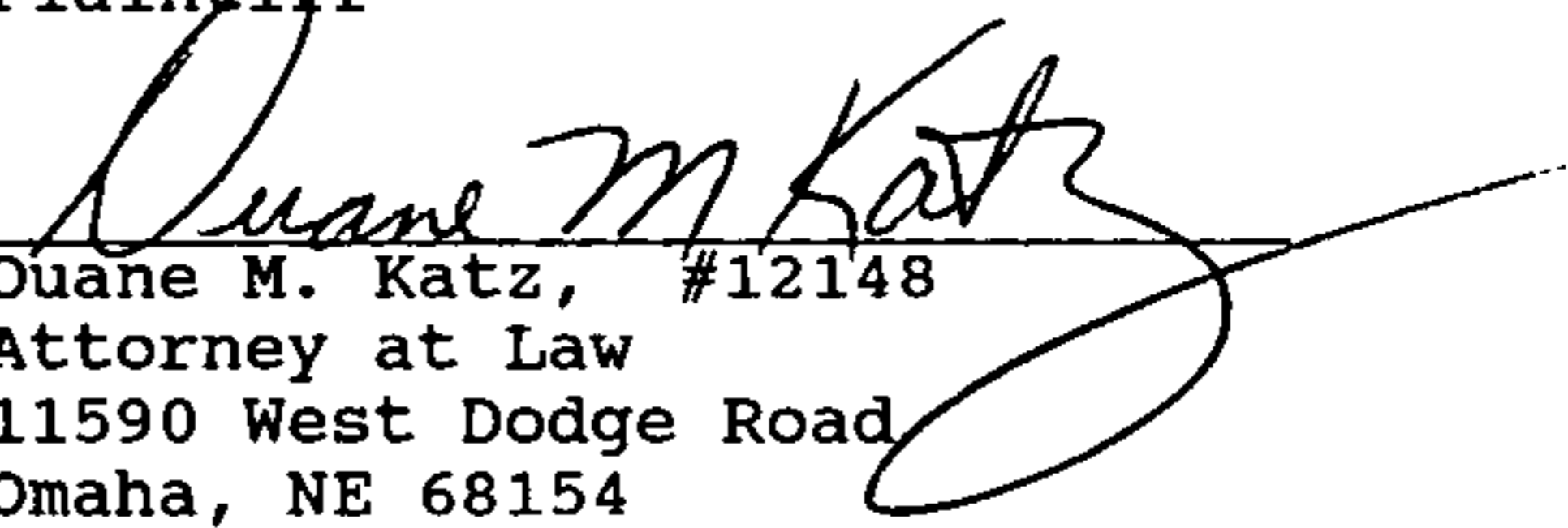
Dated this ~~18~~^{26TH} day of March, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

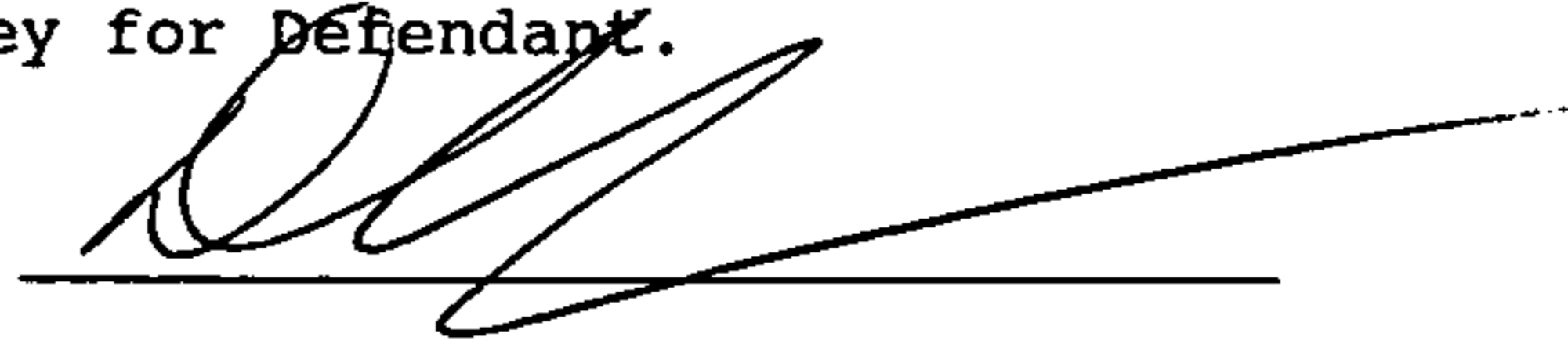
MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

BY: 
Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

CERTIFICATE OF SERVICE ²⁶

It is hereby certified that on this ~~18~~^{26TH} day of March, 1993 a copy of the foregoing Notice of Appeal and Deposit of Docket Fee was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.



a:Omega-Rogers\Appeal.not

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. Ex. Doc. _____
Ent. Ex. Index _____

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY,)
INC.,)
)
Plaintiff,)
)
vs.)
)
WILMA ROGERS,)
)
Defendant.)

DOC. 898 NO. 272

PRAECIPE FOR TRANSCRIPT

TO: Clerk of the District Court of Douglas County, Nebraska
Plaintiff, Omega Chemical Company, Inc., by and through its
attorney of record, hereby requests the Clerk of the District
Court of Douglas County, Nebraska, to prepare the transcript of
the above-captioned case. This transcript should include the
following items:

1. Petition filed by Plaintiff July 3, 1991.
2. Answer of Defendant, Wilma C. Rogers, filed October 10, 1991.
3. Defendant's Motion for Summary Judgment filed January 11, 1993.
4. Plaintiff's Motion for Summary Judgment filed January 21, 1993.
5. Order entered on or about February 9, 1993.
6. Motion for New Trial and Notice of Hearing filed by Plaintiff February 17, 1993.
7. Order entered March 4, 1993 overruling Plaintiff's Motion for New Trial.
8. Notice of Appeal and Deposit of Docket Fee filed by Plaintiff on March ~~27~~ 26, 1993.
9. Cash Deposit filed by Plaintiff on March ~~27~~ 26, 1993.
10. Praecipe for Transcript filed by Plaintiff on March ~~27~~ 26, 1993.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
MAR 26 1993
RUDY J. TESAR
CLERK DISTRICT COURT

11. Praecipe for Bill of Exceptions filed by Plaintiff on
March ~~19~~²⁶ 1993.

Dated this ~~19~~²⁶ day of March, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

BY: 

Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

CERTIFICATE OF SERVICE

It is hereby certified that on this ~~19~~²⁶ day of March, 1993
a copy of the foregoing Praecipe for Transcript was sent by
United States mail, postage prepaid, to James D. Buser of Gaines,
Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha,
NE 68114, attorney for Defendant.



a:Omega-Rogers\Transcript

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

Dist. App. Rec. *27*
Dist. App. Rec.
Dist. App. Rec.
Dist. App. Rec.
Dist. App. Rec.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA


OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	PRAECIPE FOR BILL OF	
	)	EXCEPTIONS	
WILMA ROGERS,)		
)		
Defendant.)		

TO: Clerk of the District Court of Douglas County, Nebraska, and Julie Jameson, Court Reporter

Plaintiff, Omega Chemical Company, Inc., by and through its attorney of record, hereby requests the Clerk of the District Court of Douglas County, Nebraska, and Julie Jameson, Court Reporter, to prepare the Bill of Exceptions of the above-captioned case. This Bill of Exceptions should include all evidence and exhibits offered at the hearing on the Motions for Summary Judgments held on February 3, 1993 in the above matter and should specifically include the court file and docket sheet in the action entitled "In the District Court of Douglas County, Nebraska, Omega Chemical Company, Inc., Plaintiff, vs. Belgrade Company, et al., Defendant, Doc. 901, No. 512.

Dated this 26 day of March, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

BY: 

Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

CERTIFICATE OF SERVICE 26th

It is hereby certified that on this 26th day of March, 1993 a copy of the foregoing Praecipe for Bill of Exceptions was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.



a:Omega-Rogers\Exceptions

U.S. MAIL
POSTAGE PREPAID
NO. 10050
REGENCY CIRCLE
SUITE 200
OMAHA, NE 68114

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
VS.	)	PLAINTIFF'S	
	)	CASH DEPOSIT	
WILMA ROGERS,)		
)		
Defendant.)		

KNOW ALL MEN BY THESE PRESENTS that Omega Chemical Company, Inc., as principal, is held and firmly bound unto Defendant, Wilma Rogers, in the sum of and amount of Seventy-Five Dollars (\$75.00), that Plaintiff, Omega Chemical Company, Inc. will pay all costs that may be adjudged against it in the Appellate Court, all in accordance with Section 25-1914, R.R.S. 1943, as amended 1991.


Dated this 26 day of March, 1993.

OMEGA CHEMICAL COMPANY, INC.
Plaintiff

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA

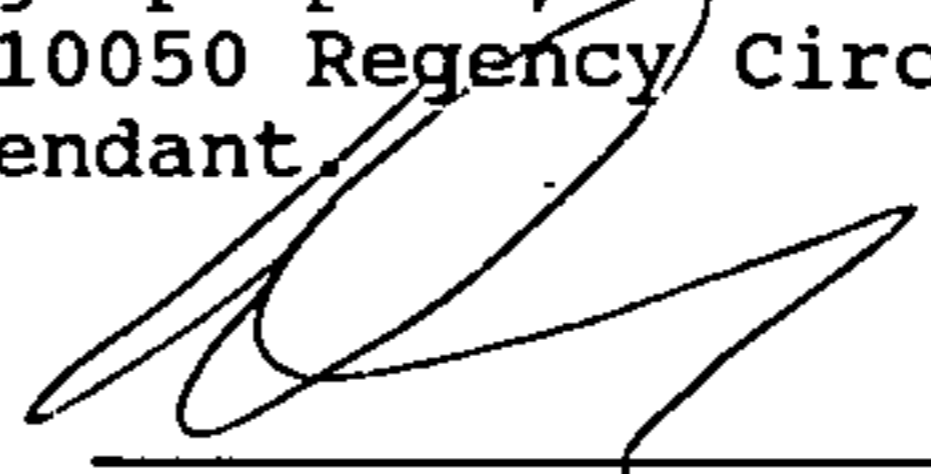
MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

BY: 
 Duane M. Katz, #12148
 Attorney at Law
 11590 West Dodge Road
 Omaha, NE 68154
 (402) 496-1010
 Attorney for Plaintiff

CERTIFICATE OF SERVICE

It is hereby certified that on this 26 day of March, 1993 a copy of the foregoing Cash Deposit was sent by United States mail, postage prepaid, to James D. Buser of Gaines, Mullen, Pansing & Hogan, 10050 Regency Circle, Suite 200, Omaha, NE 68114, attorney for Defendant.



FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

MAR 26 1993

RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Sec. _____
Ent. Ex. Doc. _____
Ent. Gov. Index _____



CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS

P.O. Box 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731
FAX (402) 471-3480

Lanet S. Asmussen
Clerk
Janice J. Culver
Deputy Clerk
Pamela J. Kraus
Christine E. Trueblood
Jill R. Machacek
Appellate Clerks
Jill R. Shea
Sandra R. Paice
Bailiffs

April 1, 1993

Douglas County District Court
Hall of Justice
1701 Farnam St
Omaha, NE 68183

Case Caption: Omega Chemical Company, Inc. v. Rogers
Court of Appeals No: A-93-0269
Trial Court No: 898-272

Dear Clerk:

We have received and filed the certified copy of notice of appeal in the above-captioned case. Please record the Court of Appeals number and use it on all future correspondence and filings.

Very truly yours,

Lanet S. Asmussen

LANET S. ASMUSSEN
LSA:et
APR 02 1993
RUDY J. TESAR
CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
APR 02 1993
RUDY J. TESAR
CLERK DISTRICT COURT

Dist. App. No. SM
Dist. Ct. No. _____
Dist. Ct. Index _____

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
APR 02 1993
RUDY J. TESAR
CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
APR 02 1993
RUDY J. TESAR
CLERK DISTRICT COURT

898-272

TRANSCRIPT TO THE SUPREME COURT

S/C # A-93-0269

Due: 4-23-93

OMEGA CHEMICAL COMPANY, INC.

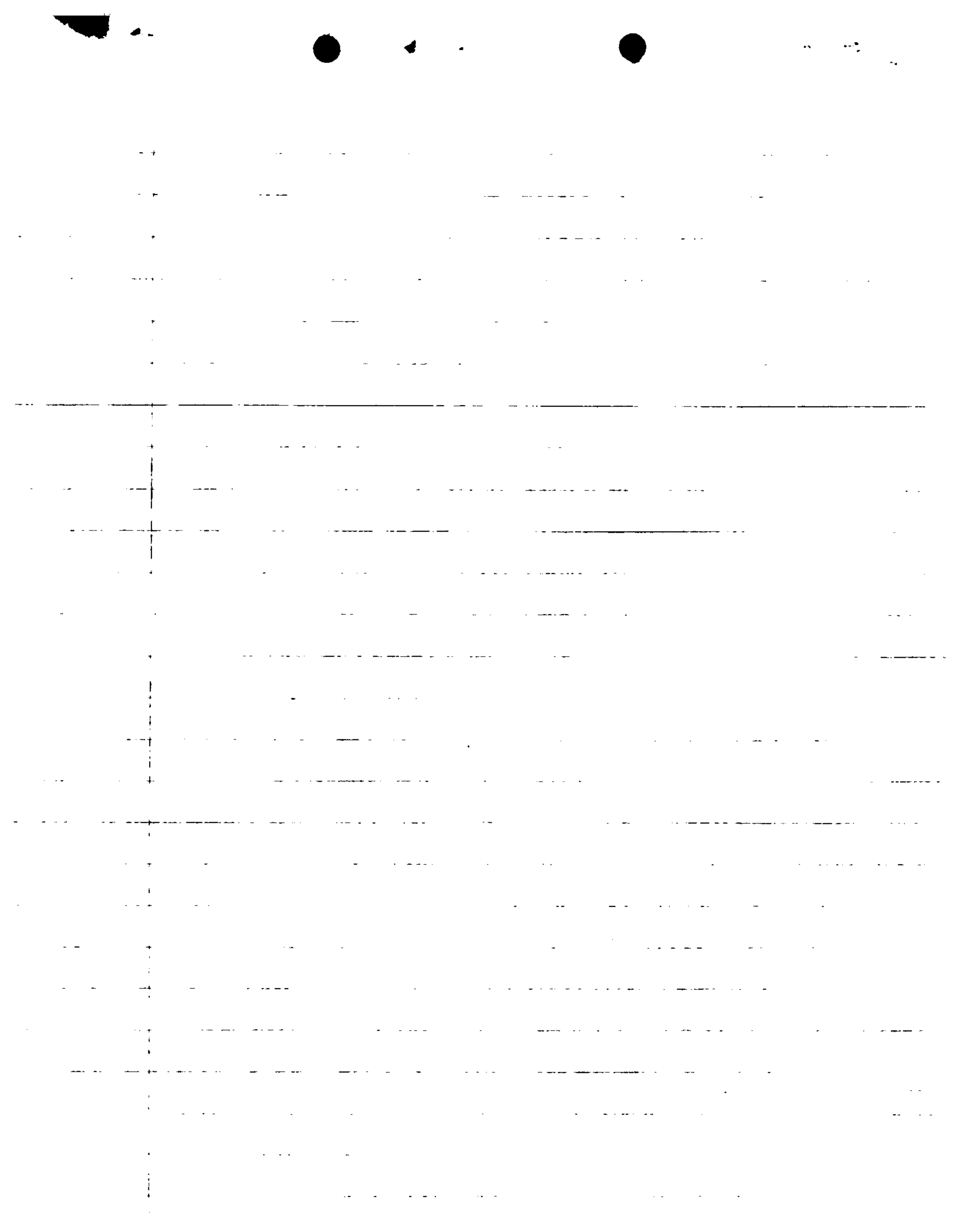
VS.

WILMA C. ROGERS

Jul. 3 '91	Petition	Page 1
Oct. 10	Answer	" 3
Jan. 11 '93	Motion for Summary Judgment	" 5
Jan. 21	Motion for Partial Summary Judgment	" 7
Feb. 9	Order of Dismissal (3109-137)	" 9
Feb. 17	Motion for New Trial	" 12
Mar. 4	Order overruling motion for new trial (3109-301)	" 14
Mar. 26	Cash Bond for Costs on Appeal (\$75.00) plaintiff	" 15

MADE

4-7-93



I N D E X

1. PETITION	PAGE 1
2. ANSWER	" 3
3. MOTION FOR SUMMARY JUDGMENT	" 5
4. MOTION FOR PARTIAL SUMMARY JUDGMENT	" 7
5. ORDER OF DISMISSAL	" 9
6. MOTION FOR NEW TRIAL	" 12
7. ORDER OVERRULING MOTION FOR NEW TRIAL	" 14
8. CASH BOND FOR COSTS ON APPEAL (\$75.00)	" 15

MADE

4-7-93

N O T I C E

OMEGA CHEMICAL COMPANY, INC.

Plaintiff

-vs-

WILMA C. ROGERS

Defendant

DOC. 898 NO. 272

SUPREME COURT # -----

COPY

Volume I

The Bill of Exceptions /in the above case was filed with
the Clerk of the District Court, Douglas County, Nebraska, on the
30th day of March, 1993

RUDY J. TESAR
CLERK OF THE DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

BY: RUDY J. TESAR

DATE: March 30, 1993

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY,)
INC.,)
)
Plaintiff,)
)
vs.)
)
WILMA ROGERS,)
)
Defendant.)

DOC. 898 NO. 272

STIPULATION

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBR.
MAY 13 1993
RUDY J. TESAR
CLERK DISTRICT COURT

COMES NOW the parties to the above-referred to action and, as evidenced by the signature of their attorneys of record hereon, stipulate and agree as follows:

1. That the following documents contained in the District Court of Douglas County, Nebraska, file relating to the action entitled "In the District Court of Douglas County, Nebraska, Omega Chemical Company, Inc., Plaintiff, vs. Belgrade Company, et al., Defendant, Doc. 901 No. 512" be included within the Bill of Exceptions prepared in the above-referred to matter:

- (1) Petition to Quiet Title filed October 25, 1991.
- (2) Answer and Counterclaim filed on behalf of Defendants Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed January 14, 1992.
- (3) Disclaimer filed on behalf of Defendants Belgrade Company, Edward Belgrade, Sara Zalkin, Jack B. Cohen and Harold Mann, in their individual capacities filed February 6, 1992.
- (4) Answer to Counterclaim filed on behalf of Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed by Plaintiff, Omega Chemical Company, Inc., filed February 10, 1992.

FILED
IN DISTRICT COURT
COUNTY OF WYOMING
AT CHEYENNE
MAY 1 1904
CLERK DISTRICT COURT

- (5) Reply to Answer of Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed by Plaintiff, Omega Chemical Company, Inc., on February 10, 1992.
- (6) Disclaimer filed on behalf of Defendant, Jack B. Cohen, individually and in his capacity as Trustee of the Zalkin Testamentary Family Trust filed on or about January 28, 1993.
- (7) Disclaimer filed on behalf of Defendant, Sandra Belgrade, as Co-Personal Representative of the Estate of Sara Zalkin, and on behalf of the Estate filed January 28, 1993.
- (8) Disclaimer filed on behalf of Defendant, Flexible Foam Products, Inc., filed on January 28, 1993.
- (9) Disclaimer filed on behalf of Defendant, Belgrade Company, filed on January 28, 1993.
- (10) Disclaimer filed on behalf of Defendant, Edward Belgrade, individually and in his capacity as Trustee of the Zalkin Testamentary Family Trust file on January 28, 1993.
- (11) Disclaimer filed on behalf of Defendant, Harold Mann, individually and in his capacity as Trustee of the Zalkin Testamentary Family Trust filed on January 28, 1993.
- (12) Disclaimer filed on behalf of Defendant, American National Bank, N.A., filed on January 28, 1993.
- (13) Affidavit of Sandra Belgrade filed on January 28, 1993.
- (14) Copy of Docket Sheet.

2. In support of said Stipulation, the parties show to the Court that the Court took judicial notice of each of the above documents and the original Praecipe for Bill of Exceptions filed in the above-referenced matter requested that the Bill of Exceptions include the court file and docket sheet in the action entitled "Omega Chemical Company, Inc., Plaintiff, vs. Belgrade Company, et al., Defendant, Doc. 901, No. 512."

Dated May 12, 1993.

OMEGA CHEMICAL COMPANY, INC.,
Plaintiff

BY: Duane M. Katz

Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

WILMA ROGERS, Defendant

BY: James D. Buser

James Buser, #19020
Gaines, Mullen, Pansing &
Hogan
10050 Regency Circle
Suite 200
Omaha, NE 68114
(402) 397-5500
Attorney for Defendant

A:Omega\Rogers\Stipulation

FILED
IN DISTRICT COURT
JULY 1 1993
CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBR.
MAY 13 1993
RUDY J. TESAR
CLERK DISTRICT COURT

Ent. App. Loc. _____
Ex. Dec. _____
Index _____

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.,	)	DOC. 898	NO. 272
)		
Plaintiff,)		
)		
vs.	)	ORDER	
)		
WILMA ROGERS,)		
)		
Defendant.)		

This matter having come on to be heard upon the Stipulation of the parties regarding the supplementation of the Bill of Exceptions in the above-captioned matter, and the Court, being fully advised in the premises,

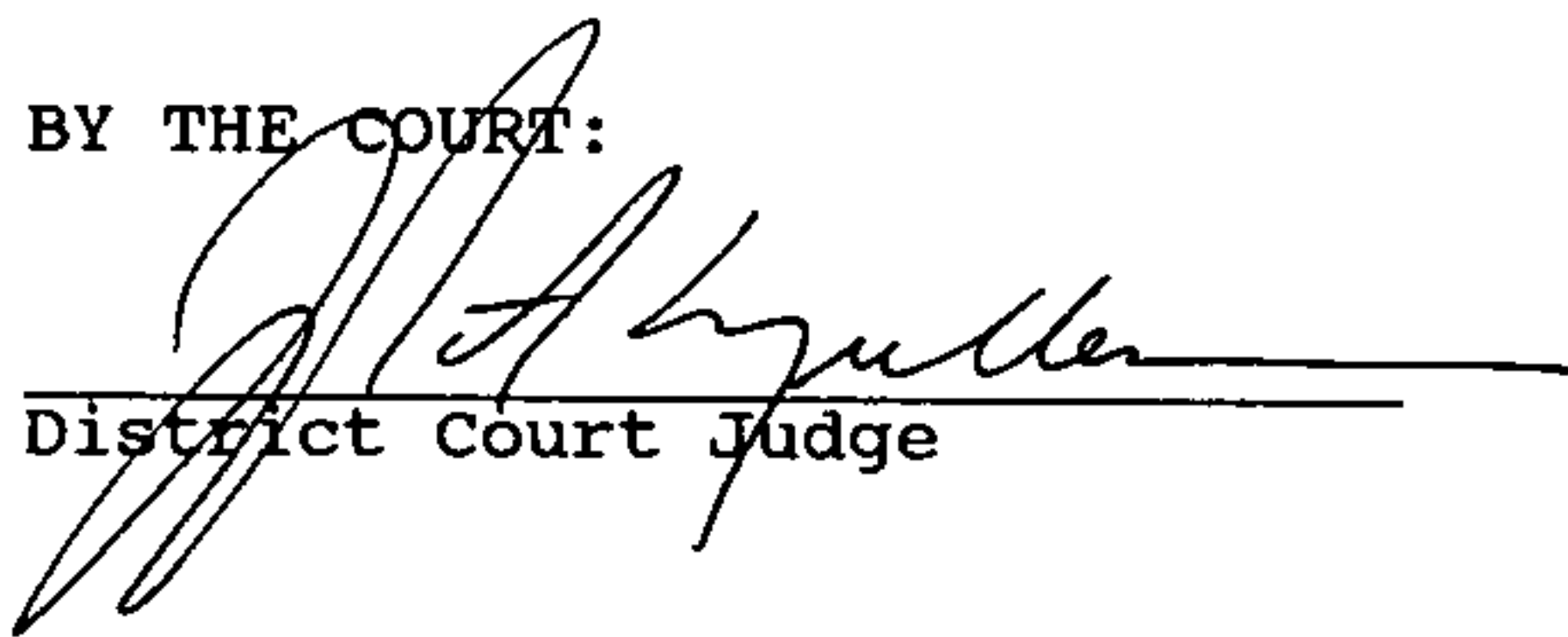
IT IS THEREFORE ORDERED that the Stipulation be allowed and the court reporter immediately amend the Bill of Exceptions filed in the above-referenced matter by including in said Bill of Exceptions the following documents which were contained in the District Court of Douglas County, Nebraska, file relating to the action entitled "In the District Court of Douglas County, Nebraska, Omega Chemical Company, Inc., Plaintiff, vs. Belgrade Company, et al., Defendant, Doc. 901 No. 512":

- (1) Petition to Quiet Title filed October 25, 1991.
- (2) Answer and Counterclaim filed on behalf of Defendants Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed January 14, 1992.
- (3) Disclaimer filed on behalf of Defendants Belgrade Company, Edward Belgrade, Sara Zalkin, Jack B. Cohen and Harold Mann, in their individual capacities filed February 6, 1992.
- (4) Answer to Counterclaim filed on behalf of Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed by Plaintiff, Omega Chemical Company, Inc., filed February 10, 1992.
- (5) Reply to Answer of Edward Belgrade, Jack B. Cohen and Harold Mann, as Trustees of the Eli Zalkin Testamentary Trust filed by Plaintiff, Omega Chemical Company, Inc., on February 10, 1992.

- (6) Disclaimer filed on behalf of Defendant, Jack B. Cohen, individually and in his capacity as Trustee of the Zalkin Testamentary Family Trust filed on or about January 28, 1993.
- (7) Disclaimer filed on behalf of Defendant, Sandra Belgrade, as Co-Personal Representative of the Estate of Sara Zalkin, and on behalf of the Estate filed January 28, 1993.
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- (11) Disclaimer filed on behalf of Defendant, Harold Mann, individually and in his capacity as Trustee of the Zalkin Testamentary Family Trust filed on January 28, 1993.
- (12) Disclaimer filed on behalf of Defendant, American National Bank, N.A., filed on January 28, 1993.
- (13) Affidavit of Sandra Belgrade filed on January 28, 1993.
- (14) Copy of Docket Sheet.

Dated at Omaha, Douglas County, Nebraska, this 13 day of May, 1993.

BY THE COURT:


District Court Judge

Prepared and Submitted By:

Duane M. Katz, #12148
Attorney at Law
11590 West Dodge Road
Omaha, NE 68154
(402) 496-1010
Attorney for Plaintiff

A:Omega\Rogers\Order

998-272

4

RECEIVED
JOURNAL CLERK

MAY 13 1993

RECORDED
Journal 3144 Page 266
CLERK DISTRICT COURT

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Omega Chemical Company, Inc., Appellant,
v.
Wilma C. Rogers, Appellee.

Case Caption

Omega Chemical Co. v. Rogers

Filed December 2, 1994. No. S-93-269.

Appeal from the District Court for Douglas County: J. Patrick Mullen, Judge. Affirmed.

Duane M. Katz for appellant.

James D. Buser, of Gaines, Mullen, Pansing & Hogan, for appellee.

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA
DEC - 2 1994
RUDY J. TESAR
CLERK DISTRICT COURT

FILED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
1934 - 8 - 21
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OMEGA CHEMICAL CO. V. ROGERS

NO. S-93-269 - filed December 2, 1994.

1. Summary Judgment: Appeal and Error. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such a party the benefit of all reasonable inferences deducible from the evidence.

2. Summary Judgment. Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.

3. Real Estate: Conveyances. A covenant against encumbrances promises the grantee that no encumbrances, liens, or servitudes exist against the land as of the date of the conveyance.

4. Real Estate: Conveyances: Words and Phrases. An encumbrance, within the meaning of a covenant against encumbrances, is every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee by the conveyance.

5. Deeds: Real Estate: Conveyances: Limitations of Actions. An action for damages for breach of a covenant of warranty contained in a deed conveying land is an action upon a specialty and must be brought within 5 years after the cause of action accrues; this rule applies in actions for damages for breach of a covenant against encumbrances.

6. Conveyances. A covenant against encumbrances is broken when made if an encumbrance exists, and the grantee's right of action against the grantor accrues at once thereon.

7. Title: Conveyances: Limitations of Actions. A covenant against encumbrances is a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once upon the breach of the covenant.

8. Conveyances: Limitations of Actions. When an encumbrance has been barred by the passage of the statute of limitations, there is no violation of the covenant.

9. Actions: Title: Conveyances. A cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title.

10. Real Estate: Title: Conveyances: Warranty. Covenants of quiet enjoyment and covenants of warranty in conveyances of real property may be breached by an eviction, actual or constructive, by reason of the hostile assertion of a paramount title holder.

11. Title: Warranty: Words and Phrases. A paramount title is one which prevails in an action or is successfully asserted; a covenant of warranty is not violated by the existence of an outstanding, but unfounded, claim upon the property.

12. Evidence: Trial: Rules of the Supreme Court. Admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted.

13. Real Estate: Title: Conveyances: Costs. A grantee that has succeeded in establishing its title against one without a valid

claim to the premises may not recover from a grantor the expenses of the lawsuit, because the adverse claim of the third party does not constitute a breach of the covenants by the grantor.

Hastings, C.J., White, Caporale, Fahrnbruch, Lanphier and Wright, JJ., and Boslaugh, J., Retired.

FAHRNBRUCH, J.

-1-

Omega Chemical Company, Inc. (Omega), appeals a district court's dismissal of its action for damages against Wilma C. Rogers for her failure to defend the title to property Omega had purchased from Rogers and her late husband, Franklin P. Rogers.

We affirm the action of the district court for Douglas County in entering summary judgment in favor of Rogers and in dismissing Omega's claim.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such a party the benefit of all reasonable inferences deducible from the evidence. LaBenz Trucking v. Snyder, ante p. 468, 519 N.W.2d 259 (1994); Barta v. Kindschuh, ante p. 208, 518 N.W.2d 98 (1994). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law. Id.

FACTS

Giving Omega the benefit of all reasonable inferences deducible from the evidence, we find the facts of this case are as follows:

On September 16, 1985, the Rogerses sold a parcel of land located in Ralston to Omega, a Nebraska corporation. The deed

conveying title to Omega and executed by "Franklin P. Rogers and Wilma C. Rogers, husband and wife," states in part:

And the grantor does hereby covenant with the grantee and with the grantee's heirs and assigns that grantor is lawfully seised of said premises; that they are free from encumbrance except easements and protective covenants of record[;] that grantor has good right and lawful authority to convey the same; and that grantor warrants and will defend the title to said premises against the lawful claims of all persons whomsoever.

In 1989, while doing construction, Omega discovered a sewerline, not of record, running across the property in a north-south direction. Upon investigation, Omega believed that a neighboring company, Flexible Foam Products, Inc. (Flexible Foam), had an interest in the sewerline. The neighboring property was owned at least in part by the Eli Zalkin Testamentary Trust (Zalkin Trust).

A representative of Flexible Foam, who was also a trustee of the Zalkin Trust, informed Omega that Flexible Foam was the user of the sewerline, but that the sewerline was owned and operated by the City of Ralston (City). Omega then requested that the City remove the sewerline. The City ultimately informed Omega that the sewerline was a private one which was not owned or maintained by the City, and refused Omega's request.

On June 27, 1991, Omega made a demand that Wilma Rogers defend the title to the property, which Rogers refused to do. On July 3, Omega sued Rogers for damages for the "diminished value of said property by reason of said sewer line." Omega alleged that the sewerline constituted an encumbrance and cloud upon the property,

contrary to the warranty provided by "the Franklin P. Rogers [sic]," and that the sewerline damaged and would continue to damage the property if not removed. Omega also filed in the county court for Douglas County an application to file a late claim against the estate of Franklin Rogers, then deceased. Although the record does not reflect the county court's ruling on the application, we assume that the application was overruled, there being no indication in the record presented us that the estate of Franklin Rogers was ever a party to the present lawsuit.

On October 10, Rogers answered, admitting that a demand had been made upon her to defend the title and that she had refused such demand, and generally denying the remaining allegations of Omega's petition. Rogers also affirmatively alleged that Omega's claim for breach of warranty against encumbrances was barred by the applicable statute of limitations; that the sewerline was not within the scope of the warranty against encumbrances; and that she did not, at any time material, have knowledge of the alleged encumbrance.

On October 23, Omega filed an equity action to quiet title naming Flexible Foam, the Zalkin Trust, the City, and others as defendants. The Zalkin Trust then asserted a counterclaim on the basis that it had acquired an easement by prescription. On January 11, Rogers filed a motion for summary judgment in Omega's law action, and on January 21, Omega filed a motion for partial summary judgment. On January 28, 1993, Flexible Foam, the Zalkin Trust, and other related entities filed disclaimers of all right, title, interest, or possession in or to the real property described in Omega's petition to quiet title.

On February 9, 1993, after a hearing in which the court took judicial notice of the quiet title action, the district court entered summary judgment in favor of Rogers and dismissed Omega's law action against Rogers for damages.

In so doing, the court noted that Omega had admitted, in response to a request for admissions by Rogers, that no person or entity had been deemed by any court to have established in any way an easement or other right to construct or maintain the sewerline, that the City had denied any interest in the sewerline, and that no person or entity had any right to construct or maintain the sewerline.

The district court further stated that, "[t]here being no . . . claim which might impair the title or right of use of the property by [Omega], the presence of the pipeline . . . may constitute a trespass, but does not constitute a breach of warranty against encumbrance as alleged by [Omega]."

Omega timely appealed to the Nebraska Court of Appeals. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Omega contends that the district court erred in (1) finding and holding that there was no claim, lien, charge, security interest, easement, right of way, or any other claim which might impair the title or right of use of the property by Omega; (2) failing to find that persons had made claim against the subject property by virtue of the presence of the sewerline and by allegations in a counterclaim in Omega's quiet title action that

the sewer was lawfully on the property; (3) sustaining Rogers' motion for summary judgment; and (4) overruling Omega's motion for partial summary judgment.

ANALYSIS

We first determine whether the district court erred in sustaining Rogers' motion for summary judgment, as that issue is dispositive of this appeal.

Omega's law action requesting damages for the presence of the unrecorded sewerline, which Omega refers to in its petition as an "encumbrance" upon the subject property, may be characterized as a suit for breach of the covenants of title contained in the warranty deed conveying the property from the Rogerses to Omega.

The warranty deed has its origins in the English common law. 6A Richard R. Powell, *The Law of Real Property* ¶ 897[1][b] (1993). However, the notion of common-law warranty was never a part of the law in this country, and the law of personal covenants developed in order to protect the purchaser of real property. *Id.*

"The personal covenants of title can take six separate forms. These are the covenants of (1) seisin, (2) right to convey, (3) freedom from encumbrances, (4) warranty, (5) quiet enjoyment, and (6) further assurances. . . . A deed might contain any one or more of the above covenants." *Id.*, ¶ 900[1] at 81A-130.

The deed conveying the subject property from the Rogerses to Omega contained the covenants of seisin, right to convey, freedom from encumbrances, and warranty. The covenants of seisin and right to convey assure the grantee that the grantor, at the time of the conveyance, was seised of the land and had the right to convey the land, respectively. 6A Powell, *supra*, ¶ 897[1][b]. Omega does not

allege in its petition that Rogers is in breach of these two covenants of title. Neither does Omega allege that Rogers is in breach of the covenant of further assurances. That covenant is one by which the grantor guarantees that he or she will do further acts necessary to assure title. Id., ¶ 900[2][f].

A covenant against encumbrances promises the grantee that no encumbrances, liens, or servitudes exist against the land as of the date of the conveyance. Id., ¶ 897[1][b]. An encumbrance, within the meaning of a covenant against encumbrances, is "every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee by the conveyance." Chapman v. Kimball, 7 Neb. 399, 403 (1878). Accord, Hartman v. Drake, 166 Neb. 87, 87 N.W.2d 895 (1958); Albin v. Parmele, 73 Neb. 663, 103 N.W. 304 (1905).

Omega, in its petition, characterized the sewerline as an encumbrance on the property contrary to the warranty provided by the Rogerses. Rogers affirmatively alleged in her answer, and now argues on appeal, that any claim by Omega for breach of the covenant against encumbrances is barred by the applicable statute of limitations.

Neb. Rev. Stat. § 25-205(1) (Reissue 1989) provides that "an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years." This court has long held that an action for damages for breach of a covenant of warranty contained in a deed conveying land is an action upon a specialty and must be brought within 5 years after the cause of action accrues. Cape Co. v. Wiebe, 196 Neb. 204, 241 N.W.2d 830 (1976); Campbell v. Gallentine, 115 Neb. 789,

215 N.W. 111 (1927); Bellamy v. Chambers, 50 Neb. 146, 69 N.W. 770 (1897); Kern v. Kloke, 21 Neb. 529, 32 N.W. 574 (1887). This rule applies in actions for damages for breach of a covenant against encumbrances. See, e.g., Cape Co. v. Wiebe, supra; Johnson v. Hesser, 61 Neb. 631, 85 N.W. 894 (1901); Bellamy v. Chambers, supra.

A covenant against encumbrances is broken when made if an encumbrance exists, and the grantee's right of action against the grantor accrues at once thereon. Schuler-Olsen Ranches, Inc. v. Garvin, 197 Neb. 746, 250 N.W.2d 906 (1977); Cape Co. v. Wiebe, supra. See, also, Chapman v. Kimball, 7 Neb. at 404 (holding that a covenant against encumbrances is "a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once upon the breach of the covenant").

Neither of the parties disputes that the sewerline was in existence at the time of the conveyance. Thus, Omega's cause of action for breach of the covenant against encumbrances accrued on September 16, 1985, the date that the Rogerses conveyed the subject property to Omega by warranty deed. Omega filed suit against Rogers on July 3, 1991, more than 5 years after its cause of action accrued.

Therefore, there was no genuine issue of material fact before the trial court on any cause of action arising from breach of the covenant against encumbrances. "When an encumbrance has been barred by the passage of the statute of limitations . . . there is no violation of the covenant." 6A Richard R. Powell, The Law of Real Property ¶ 900[2][c] at 81A-138 (1993). Assuming, without

deciding, that the sewerline constitutes an encumbrance upon the subject property, we hold that any claim against Rogers arising from an alleged breach of the covenant against encumbrances is time barred by § 25-205(1).

We next determine if there exist any genuine issues of material fact as to whether Rogers breached the covenants of warranty and quiet enjoyment contained in the warranty deed. A covenant of warranty has been considered by this court to be tantamount to a covenant for quiet enjoyment, with the breach of the latter also being a breach of the former. See, Campbell v. Gallentine, supra; Cheney v. Straube, 35 Neb. 521, 53 N.W. 479 (1892). For purposes of analysis, we will consider these two covenants together.

In contrast to a breach of a covenant against encumbrances, a cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. See, Hooker and Heft v. Estate of Weinberger, 203 Neb. 674, 279 N.W.2d 849 (1979); Campbell v. Gallentine, supra; Cheney v. Straube, supra. See, also, Neb. Rev. Stat. § 76-207 (Reissue 1990) ("[c]ovenants of quiet enjoyment and covenants of warranty in conveyances of real property may be breached by an eviction, actual or constructive, by reason of the hostile assertion of a paramount title holder"). Thus, we must inquire whether Omega has been evicted by, or surrendered the property to, a paramount titleholder.

"A paramount title is one which prevails in an action or is successfully asserted. . . . [A] covenant of warranty is not violated by the existence of an outstanding, but unfounded, claim

upon the property." Eggers v. Mitchem, 240 Iowa 1199, 1202, 38 N.W.2d 591, 592 (1949). See, also, A. C. Drinkwater, Jr., F., Inc. v. Elliot H. Raffety F., Inc., 495 S.W.2d 450 (Mo. App. 1973).

Omega's responses to Rogers' requests for admissions prove fatal to Omega's case:

REQUEST NO. 2. No person or entity has been granted, either expressly or impliedly, an easement, license, or any other property right to construct and/or maintain the sewer pipeline alleged in . . . [Omega's] Petition.

ANSWER NO. 2. Admitted.

REQUEST NO. 3. No person or entity has been deemed by any court of competent jurisdiction to have established by prescription, necessity, or otherwise, an easement, license, or other right to construct or maintain the sewer pipeline alleged in . . . [Omega's] Petition.

ANSWER NO. 3. Admitted.

REQUEST NO. 4. The City of Ralston has denied any interest in the sewer pipeline alleged in . . . [Omega's] Petition.

ANSWER NO. 4. Admitted.

REQUEST NO. 5. No person or entity has any right, legal, equitable, prescriptive, or by necessity to construct or maintain the sewer pipeline alleged in . . . [Omega's] Petition.

ANSWER NO. 5. Admitted.

Requests for admissions are governed by Neb. Ct. R. of Discovery 36 (rev. 1992). Subsection (b) of that rule states in part: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." (Emphasis supplied.) See, also, NI Indus. v. Husker-Hawkeye Distributing, 233 Neb. 808, 448 N.W.2d 157 (1989) (holding that admissions that a party has not sought to

withdraw or amend conclusively establish the matter admitted). There is no indication in the record that Omega ever sought to withdraw or amend its admissions. Omega's own admissions conclusively establish that there has been no hostile assertion by a paramount titleholder as to the subject property.

Omega attempts to argue that, although Flexible Foam, the Zalkin Trust, and others now disclaim interest in the property, Flexible Foam had initially claimed an interest, and that Rogers, having agreed to defend the title, was obligated to obtain a determination that the sewerline was not rightfully on the property, rather than Omega's being put to the expense of litigating the quiet title action.

However, the Rogerses, in the warranty deed conveying the property to Omega, covenanted that they would "defend the title to said premises against the lawful claims of all persons whomsoever." (Emphasis supplied.) Because Omega has admitted that no one has a lawful claim against the property, Rogers had no duty to defend the title. Moreover, a grantee that has succeeded in establishing its title against one without a valid claim to the premises may not recover from a grantor the expenses of the lawsuit, because the adverse claim of the third party does not constitute a breach of the covenants by the grantor. See, e.g., A. C. Drinkwater, Jr., F., Inc. v. Elliot H. Raffety F., Inc., supra. Cf. Chaney v. Haeder, 90 Or. App. 321, 752 P.2d 854 (1988) (holding that warranty deed statute requires grantor to indemnify grantee for costs if grantee, in good faith, unsuccessfully defends title, but that the covenant does not extend to adverse claims that are without legal foundation).

Inasmuch as Omega has admitted that no person or entity has a legal right to construct or maintain the sewerline, Rogers has no duty to either defend or indemnify Omega for the costs of the quiet title action, and the trial court correctly sustained Rogers' motion for summary judgment.

There being no genuine issue of fact as to whether there was a valid claim by a paramount titleholder to the subject property, a material fact, there can be no breach of the covenants of warranty or quiet enjoyment as a matter of law. Because this issue is dispositive of the appeal, it is not necessary for us to consider Omega's remaining assignments of error.

CONCLUSION

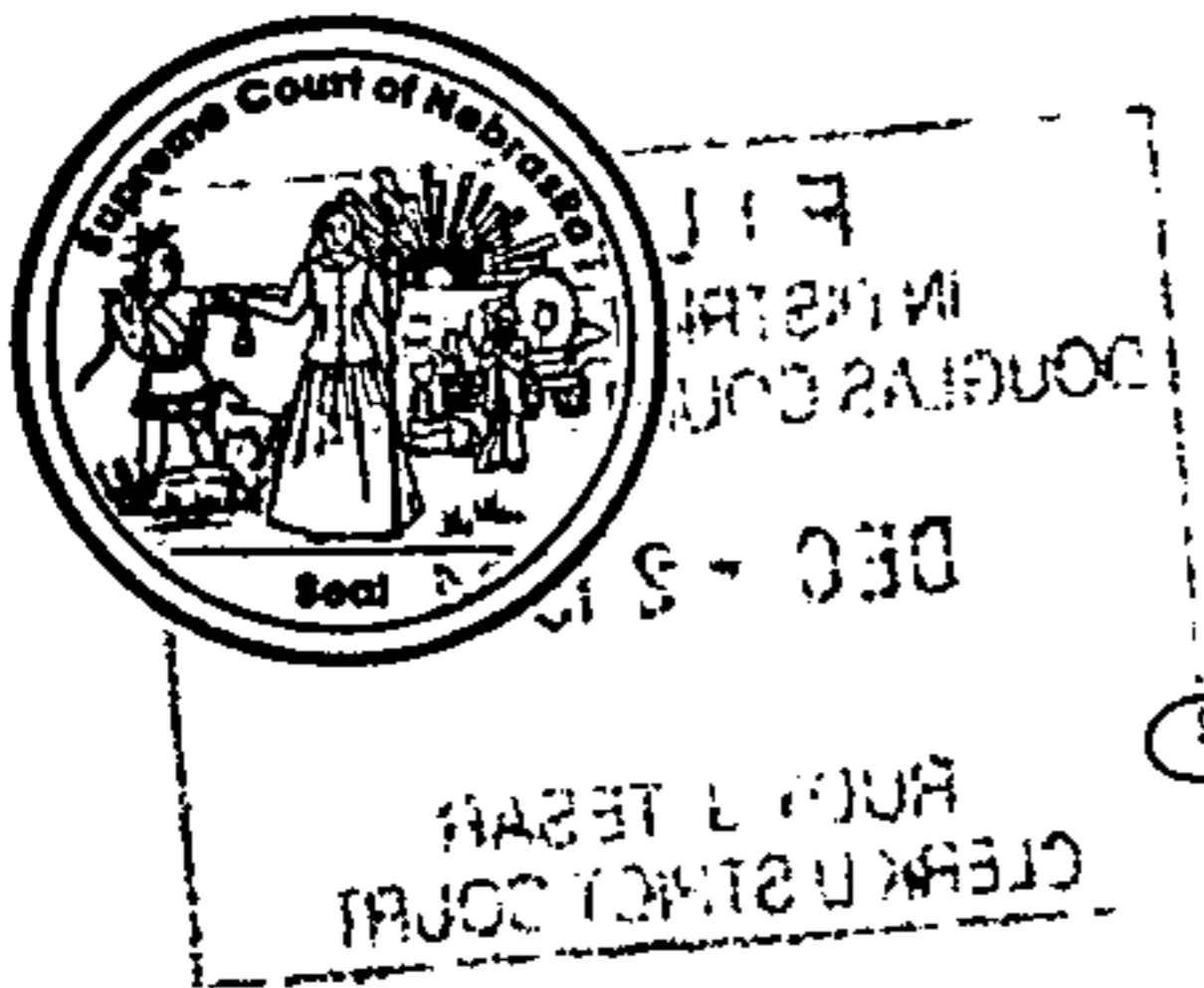
There being no genuine issues of material fact, and Rogers being entitled to summary judgment as a matter of law, the district court's order sustaining Rogers' summary judgment motion and dismissing Omega's petition is affirmed.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln.



Janet S. Aomuaem
Clerk/Deputy Clerk

SUPREME COURT NO.	S-93-269
TRIAL TRIBUNAL NO.	898-272
DATE OPINION FILED	December 2, 1994
DATE OPINION CERTIFIED	December 2, 1994

m
Dist. App. Doc. _____
Dist. Ex. Doc. _____
Dist. Gen. Index _____

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

DEC - 2 1994

RUDY J. TESAR
CLERK DISTRICT COURT

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

JAN 27 1995

RUDY J. TESAR
CLERK DISTRICT COURT

Date: January 25, 1995

NEBRASKA SUPREME COURT

To: Douglas County District Court, Nebraska

WHEREAS, in a late action in your court, captioned:

Omega Chemical Company, Inc. v. Rogers

you rendered judgment.

And, **WHEREAS, the plaintiff, Omega Chemical Company, Inc. prosecuted an appeal to this court.**

ON CONSIDERATION WHEREOF, the judgment which you rendered has been affirmed

by the Supreme Court.

NOW, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

Costs of this appeal are to be paid by appellant and are taxed at \$50.00.

WITNESS the Honorable William C. Hastings, Chief Justice, and the seal of this court.



Lanet S. Asmussen
 Clerk of the Supreme Court

Jan Culver
 Deputy Clerk

Supreme Court No.	COSTS IN THE SUPREME COURT	
S-93-0269	Cost Due Clerk Supreme Court	\$ -0-
	Paid by District Court Clerk	\$ 50.00
Trial Tribunal No.	Total Costs	\$ 50.00
898-272		
Date Opinion Issued		
12/02/94		

Costs should be distributed in accordance with Neb. Rev. Stat. § 25-1915 (Reissue 1985) and § 33-106.04 (Reissue 1993).

FILED
 DISTRICT COURT
 DOUGLAS COUNTY, NEBRASKA
 JAN 27 1995
 RUDY J. TESAR
 CLERK DISTRICT COURT

Ent. Ass. Doc.

Ent. Ex. Doc.

Ent. Gen. Index

M

3405 - 342

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

JAN 27 1995

RUDY J. TESAR
CLERK DISTRICT COURT

Doc. 898 No. 272

DISTRICT COURT
Douglas County, Nebraska

OMEGA CHEMICAL

vs.

W. ROGERS

NOTICE

**YOU ARE RESPONSIBLE FOR THIS BILL OF
EXCEPTION OR DEPOSITION. PLEASE RE-
TURN WITHIN 15 DAYS.**

Firm Bill of Exceptions

By (Vol I)

Phone No. _____

Date No Costs, 19____

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
MAR 30 1993
RUDY J. TESAR
CLERK DISTRICT COURT

Doc. 898 No. 272

DISTRICT COURT
Douglas County, Nebraska

Omega
vs.
Rogers

NOTICE

YOU ARE RESPONSIBLE FOR THIS BILL OF
EXCEPTION. OR DEPOSITION. PLEASE ○
TURN WITHIN 15 DAYS.

Firm Supplemental Bill of
Exception (Vol. I)
By _____

Phone No. _____

Date 18 COSTS, 1993 ○

FILED
IN DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

MAY 13 1993

RUDY J. TESAR
CLERK DISTRICT COURT

○

Doc. 898 No. 272

Omega
B
Rogers

Due: 4-23-93

MADE
4-7-93
MAR 26 1993

Date: _____ 19_____

CLERK OF THE SUPREME COURT,

DELIVER TO

STATE CAPITOL BUILDING,
LINCOLN, NEBRASKA 68509

OMAHA,

4-7-93

BILL TO

Quane Katz 496-1010

19 --

Doc 898 No 272 Omega Chem. Co
Cadeo vs. Wilma Rogers
Transcript to the
Supreme Court

PAID
APR 12 1993
RUDY TESAR
CLERK DIST. COURT
By N.W.

\$10.40

MADE

4-7-93

HAILED 4-9-93

100

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PAID

APR 1 1950

RUDY TESAR
CLERK DIST. COURT

3A

District Court
DOUGLAS COUNTY OMAHA, NEBRASKA 68183
RUDY J. TESAR, Clerk

DOCKET PAGE RECEIPT NO.
898 272 0049435 21

PLAINTIFF

DEFENDANT

*OMEGA CHEMICAL COMPANY INC

ROGERS, WILMA C

RECEIVED OF

DATE

DUANE M. KATZ

02/06/95

RECEIPT TOTAL MODE OF PAYMENT CREDIT

50.00 LOCAL

SUPREME COURT COSTS 50.00

The District Court of Nebraska

JUDGE J. PATRICK MULLEN
HALL OF JUSTICE
OMAHA, NEBRASKA 68183
402-444-7086
FAX 402-444-4550



JULIE WILSON
BAILIFF

JULIE L. JAMESON
REPORTER

January 31, 1995

Duane Katz
Attorney at Law
11590 West Dodge Road
Omaha, Nebraska 68154

James D. Buser
Attorney at Law
10050 Regency Circle, Suite 200
Omaha, Nebraska 68114

RE: **OMEGA CHEMICAL COMPANY, INC., v. WILMA C. ROGERS**
DOC. 898 NO. 272

Dear Counsel:

Please be advised that the Court made the following docket entry in the above-captioned matter on January 31, 1995:

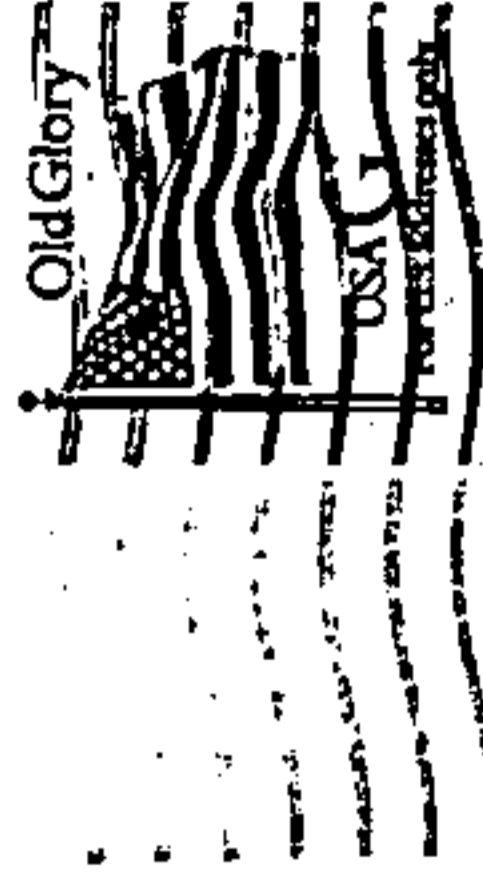
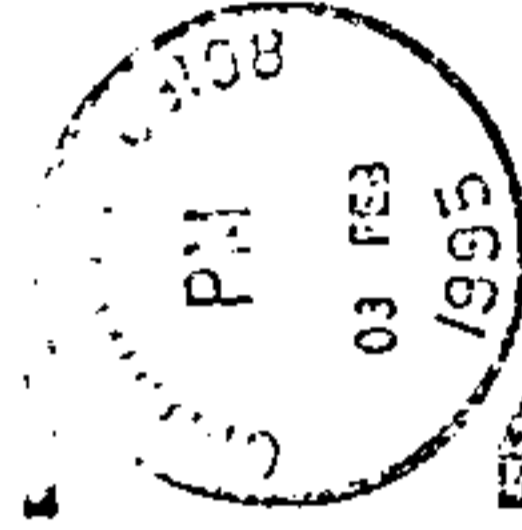
"Pursuant to Nebraska Supreme Court mandate, the judgment rendered herein is affirmed. Costs to appellant at \$50.00."

Sincerely,

A handwritten signature in cursive script that reads "Julie Wilson".

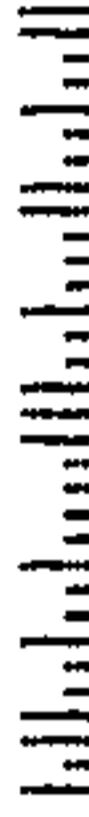
Julie Wilson
Bailiff

DUANE M. KATZ
ATTORNEY AT LAW
11590 WEST DODGE ROAD
OMAHA, NEBRASKA 68154



DMA #5 02/03/95 17:55

District Court of Douglas County
Hall of Justice
1701 Farnam Street
Omaha, NE 68183
ATTN: Julie Wilson, Bailiff



NOTICE

OMEGA CHEMICAL COMPANY, INC.

Plaintiff

-vs-

WILMA ROGERS

Defendant

DOC. 898

NO. 272

SUPREME COURT # 93-0269

COPY

Supplemental Volume I
The Bill of Exceptions in the above case was filed with
the Clerk of the District Court, Douglas County, Nebraska, on the
13TH day of MAY, 1993

RUDY J. TESAR
CLERK OF THE DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

BY: RUDY J. TESAR

DATE: May 13, 1993

DELIVER TO CLERK OF Supreme Court

OMAHA, Br 26 1993

BILL TO DAVID M. KATZ

19 --

898-272

Omega Chemical Company Inc

Wilma Rogers

Copy of Notice of Appeal to CRT Apprais

N/C

MADE

3-31-93

JUL 3 1991

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

OMEGA CHEMICAL COMPANY, INC.)
)
 Plaintiff,)
)
 vs.)
)
 WILMA C. ROGERS)
)
 Defendant.)

DOC. 298 NO. 272

PETITION

Assigned to Judge Mullen

COMES NOW the Plaintiff and for its Petition states and alleges as follows:

1. That Plaintiff is, and at all times material was, a corporation organized and existing under and by virtue of the laws of the State of Nebraska with its principle place of business being located at 7577 Burlington, Ralston, Douglas County, Nebraska.
2. That Franklin P. Rogers and Wilma C. Rogers were, at all times material, residents of Omaha, Douglas County, Nebraska and were the owners of real property commonly known as 7577 Burlington Street, Ralston, Nebraska and legally described as set forth in Exhibit "A" which is attached hereto, and by reference made a part hereof as if fully set forth herein.
3. That on or about September 16, 1985 Plaintiff purchased from Franklin P. Rogers and Wilma C. Rogers, the real property commonly known as 7577 Burlington Street, Ralston, Douglas County, Nebraska and legally described as set forth in Exhibit "A". That Exhibit "A" is a true and correct copy of the Deed delivered by Franklin P. Rogers to Plaintiff.
4. That during the summer of 1989, while Plaintiff was doing some construction work on said property, Plaintiff discovered that a sewer line ran in a north-south direction across said property at approximately the middle of Lot 5.
5. That upon investigation and belief Plaintiff believes that said sewer line is used by the City of Ralston.

6. That on or about March 14, 1990 Plaintiff requested the City to move said sewer line but despite said requests the Defendant, City of Ralston, has refused and neglected to remove said sewer line.

7. That the Deed conveying said real property from Wilma C. Rogers, warranted that Grantor was lawfully seized of said premises; that they are free from encumbrance except easements and protective covenants of record. Said deed further provided that Defendant "will defend the title to said premises against all lawful claims".

8. That said sewer line constitutes an encumbrance and cloud upon said property not of record and it is contrary to the Warranty provided to Plaintiff by the Franklin P. Rogers.

9. That said sewer line damages Plaintiff's property and if the same is not removed, will continue to cause damage to Plaintiff's property.

10. That Plaintiff has requested Defendants to defend Plaintiff's title but Defendant has failed to do so.

11. That the Wilma C. Rogers should compensate Plaintiff for the diminished value of said property by reason of said sewer line.

WHEREFORE, Plaintiff prays for Judgment against Defendants for the damages sustained by Plaintiff as a result of said sewer line being present on said property, attorney fees, and for such other and further relief as the Court may deem just and equitable under the circumstances.

OMEGA CHEMICAL COMPANY, INC.,
Plaintiff

By: 

Duane M. Katz, #12148
11590 West Dodge Road
Omaha, Nebraska 68154
(402) 496-1010
Its Attorney