

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Dr. Ba Lam,

File No. C8-02-012545

Plaintiff,

Vs.

County of Ramsey, Minnesota; Daniel
Schacht, office of the Ramsey County
Attorney, and David MacMillan,

ORDER and MEMORANDUM

Defendants.

The above-entitled matter came duly on before the undersigned, a Judge
of District Court, on May 16, 2007, upon Defendants' Motion for Summary
Judgment.

Alfred Stanbury, Esq. of Stanbury Law Firm, P.A., appeared for and on
behalf of Plaintiff. C. David Dietz, Esq., Assistant Ramsey County Attorney,
appeared for and on behalf of the Defendants.

Based upon all the files, records and proceedings herein, arguments and
memoranda of counsel and the Court being fully advised in the premises makes
the following:

ORDER

1. That Defendants' Motion for Summary Judgment as to Count I of
Plaintiff's Complaint is hereby granted.
2. That Count I of Plaintiff's Complaint is hereby dismissed with prejudice.
3. That Defendants' Motion for Summary Judgment as to Count II of
Plaintiff's Complaint is hereby denied.

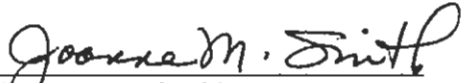
4. Let the attached Memorandum become a part of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 11 day of

BY THE COURT:

June 2007


Joanne M. Smith

MEMORANDUM

This dispute arises out of a previous lawsuit entitled Dr. Ba Lam v. Ramsey County, et al., File No. 62-C2-02-009271. In the previous action, the parties ultimately settled that case which was heard before the Honorable David C. Higgs, a Judge of Ramsey County District Court, on March 30, 2005. The parties executed an "Agreement and Release" dated April 15, 2005. It is this "Agreement" that Defendants now contend was breached.

Plaintiff's Complaint states two causes of action. The first is Breach of Contract. Specifically, Plaintiff alleges that Defendants did not do the work they had promised in that they failed to locate the catch basin and drain gate within the paved portion of the roadway and the bituminous curb was not extended to the western edge of Plaintiff's property. Further, Plaintiff alleges that Defendants' acts were intentional and without legal justification, thereby damaging Plaintiff's property and landscaping.

Count II alleges an Intentional Perpetuation of Nuisance. Specifically this cause of action alleges that surface water continued to drain from ordinary rains and snow melt across Plaintiff's property from March 2005 to March 2006 and therefore Plaintiff's property and his enjoyment of the property have been and will be damaged.

The "Agreement and Release" provisions which underlie this dispute are as follows:

1. The County of Ramsey will, either with its own forces or through

contracts with third parties, and at its sole cost and at no cost to Plaintiff, design and construct a catch basin and underground pipe which will drain surface water from Lake Johanna Boulevard and discharge it into park land owned by the County on the north side of Lake Johanna Boulevard, no later than October 31, 2005. The catch basin will be constructed to lie within the paved portion of Lake Johanna Boulevard. The purpose of this catch basin and drain pipe is to prevent surface water from ordinary rains and snow melt from draining off Lake Johanna Boulevard and across Plaintiff's property. To accomplish the construction of this drainage system, the County, or its contractors, may find it necessary to disturb the landscaping Plaintiff has placed adjacent to the road. The County shall restore all such disturbed landscaping to its original condition.

- ~~2. The County, with its forces or independent contractors, shall extend the existing bituminous curb to the western edge of Plaintiff's property.~~
3. Plaintiff will be permitted to maintain his existing landscaping within the public highway right-of-way. Nothing in this agreement shall operate as or be deemed a waiver or surrender by Defendants of any of its public highway easement interest.

In addition, it was noted by David McMillan, one of the Defendants herein, and acting as the attorney for Ramsey County in the earlier case before Judge Higgs that:

We will also agree to either use the existing culvert or establish a new culvert and catch basin and draining system . . . That will require – probably we believe it might require obtaining such permits from the watershed district and the Department of Natural Resources. So the settlement – we don't think there will be any problem with that but the settlement is conditioned on receiving those permits, we will obtain the permits, we will pull the permits.

The record is clear and it is undisputed that the Assistant Maintenance Engineer for the Ramsey County Public Works Department, Kathy

Jaschke, applied for a permit from the Rice Creek Watershed District in order to install the drainage system. Ms. Jaschke applied for the permit on September 2, 2005, but the permit was not actually issued until October 31, 2005. It is further undisputed that the utility markings were placed by November 4, 2005, and construction of the new drain system was completed by November 8, 2005. However, it was discovered that the drain gate installed in November 2005 was not on the paved portion of Lake Johanna Boulevard per the "Agreement." In addition, it is undisputed that Ms. Jaschke had not been told that the catch basin was to be installed in the pavement. Consequently, Ms. Jaschke contacted Doug Meyer. Mr. Meyer is one of Ramsey County's Engineering Technicians. He determined that according to best engineering practices, that the drain should be installed at the lowest point in the area. This work was performed and, according to Mr. Meyer, was done in accordance with best engineering practices.

Plaintiff subsequently objected to the placement of the drain gate and the bituminous curb. Shortly after November 1, 2005, and while the work was in progress, Plaintiff brought the matter before Judge Higgs seeking to have the Defendants held in Contempt. That request was denied by Judge Higgs and then taken to the Minnesota Court of Appeals. See Lam v. Ramsey County, 2006 WL2348536, Minn. App. (August 15, 2006). The Plaintiff did not prevail in the Court of Appeals.

After Plaintiff filed this lawsuit in December 2005, the Defendants attempted to resolve the issues Plaintiff raised. However, when those efforts failed, Plaintiff moved the drain gate into the paved portion of Lake Johanna

Boulevard in November 2006 per the "Agreement." While it does not appear that there is any further ongoing dispute over the placement of the drain gate, Plaintiff contends that the bituminous curb now extends onto his property by seven to eight inches at the point where the grate is located. The Plaintiff, in his deposition testimony, referred to this as his "land," but in reality it is where Ramsey County has a right-of-way easement.

In this action, Plaintiff claims that the bituminous curb was intentionally placed on his property and alleges that by it being seven to eight inches away where it should have been located per the "Agreement," Defendants are in breach of the "Agreement" and have intentionally perpetuated a nuisance.

Defendants maintain that Plaintiff's claims fail as a matter of law because Plaintiff has not shown how he has been damaged in any way. Defendants assert that there are no genuine issues of material fact present and, as such, are entitled to summary judgment. In Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995), the Court stated that if the nonmoving party fails to establish an essential element to its case, summary judgment is proper.

One of the essential elements of a breach of contract claim is that damages occurred as a result of a breach. If "the Plaintiff cannot establish that he or she has been damaged by the alleged breach," summary judgment is appropriate as a matter of law. Jensen v. Duluth Area YMCA, 688 N.W.2d 574 (Minn. App. 2004).

The law is clear that there cannot be any recovery for damages which are remote, conjectural or speculative. The question of whether or not

damages are too remote or speculative to be submitted to the jury is a question of law for the trial court. Jackson v. Reiling, 249 N.W.2d 896 (Minn. 1977).

The Plaintiff states he has been damaged in excess of \$50,000 because of the intentional acts of Defendants. However, he has not stated how he has been damaged. It appears to the Court after reading Plaintiff's deposition testimony that he claims that Defendants are liable for the damage that is caused by trash clogging the drain which causes water to pool on his property and that the bituminous curb extends onto his property.

~~The record before the Court is devoid of any measurement for~~
Plaintiff's claimed damages. While it is accurate that damages are for a jury to decide, there first must be a reasonable basis for approximating the loss. Polaris Indus v. Plastics Inc., 299 N.W.2d 414 (Minn. 1980). Plaintiff has not done so. Plaintiff has simply failed to sufficiently approximate any alleged loss. Therefore, on this basis Defendants are entitled to summary judgment as to Count I of Plaintiff's Complaint.

Given the Court's ruling on this issue, the Court finds that this renders the arguments on Defendants' substantial performance argument moot.

Finally, Defendants argue that they are entitled to summary judgment as to Plaintiff's Nuisance claim.

Minn. Stat. §561.01 sets forth the cause of action of nuisance as follows:

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a Nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance and by the

judgment the nuisance may be enjoined or abated, as well as damages recovered.

In Frisk v. Hanna Coal & Ore Corp., 164 F.Supp. 870 (D.C. Minn.

1958) the Court held:

In order for interference with enjoyment of life or property to constitute a nuisance in law, interference must be a material and substantial one entitling party to relief, and degree of discomfort is measured, not by standards of persons of delicate sensibilities and fastidious habits, but by standards of ordinary people having regard to character of area in which they reside.

Plaintiff cites Hall v. Stokely – Van Camp Inc., 106 N.W.2d 8 (1960)

for the proposition that where recovery is sought for personal discomfort and annoyance, no fixed measure of damages can be applied. The jury has large discretion in assessing damages, having regard to the severity and duration of the nuisance complained of.

Defendant has responded by attempting to distinguish this case from the instant case. However, Hall is still good law and is properly applied to an action for nuisance.

Defendant further argues with regard to damages that Plaintiff has failed to produce any evidence as to how he calculated the alleged damages. Plaintiff, therefore argues, since Plaintiff has failed to sufficiently approximate the alleged loss, summary judgment is appropriate.

The record is clear that Plaintiff has not produced any evidence to approximate his alleged loss. However, a nuisance claim is different than a breach of contract claim with respect to damages. In alleging that his personal use and enjoyment of his property have been diminished given the water pooling

in the street and flowing over his property, Plaintiff made statements in his deposition which indicate he clearly feels he has suffered at least some emotional harm. He stated that by the curb encroaching on his property it has been offensive not only to his eyes and senses but to his family's and friends' eyes and senses as well. He further said that the curb issue has prevented him from starting a family and although not preventing his enjoyment of the property physically, it is "something that's hovering over like a dark sky, a black cloud." Defendants' counsel inquired if he had received any psychiatric help to deal with how he was feeling, and Plaintiff stated that he had not. He further stated he did not think any treatment would help remove what he called the "elephant off his chest."

Since the law is clear that in an action for nuisance no fixed damages can be required where recovery is sought for personal discomfort or annoyance, a jury must decide this issue. Accordingly, Defendants' motion for summary judgment as to Count II of Plaintiff's Complaint must be denied.

JMS