STATE OF IDAHO)
County of KOOTENAI)ss
FILED 1/29/2020
AT 5:10 O'Clock P. M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

RUSSELL L. SMITH, a married man,

Plaintiff,

vs.

LAURENCE BLAIR WATT and JANET MARIE WATT, CO-TRUSTEES OF THE WATT FAMILY TRUST; LAURENCE WATT AND JANET WATT, Husband and Wife; VISION BUILT CONSTRUCTION LLC, an Idaho limited liability company; and COMFORT HEAITNG AND AIR, INC., an Idaho corporation.

Defendants,

LAURENCE BLAIR WATT and JANET MARIE WATT, Individually and as Co-Trustees of THE WATT FAMILY TRUST,

Counterclaimants,

vs.

RUSSELL L. SMITH,

Counter Defendant.

Case No. **CV28-19-6664**

MEMORANDUM DECISION AND ORDER DENYING IN PART AND GRANTING IN PART RUSSELL L. SMITH'S MOTION TO DISMISS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This matter is before the Court on a Motion to Dismiss Construction Defect Claims for Failure to Comply with I.C. § 6-2501, et seq., filed on January 9, 2020, by plaintiff Russell L. Smith (Smith) against defendants Laurence Blair Watt and Janet Marie Watt (the Watts).

This lawsuit arises out of a dispute over a construction contract. Smith filed a Verified Complaint on September 16, 2019, initiating this lawsuit. On October 3, 2019, Smith filed a Jury Demand, and on October 4, 2019, Smith filed an Amended Verified Complaint. The Watts filed an Answer and Counterclaim on November 8, 2019. Smith filed an Answer to Counterclaim on December 10, 2019.

The Watts have a personal residence. On January 10, 2018, the Watts contracted with Smith to provide materials, services and improvements to the Watts' personal residence. Amended Verified Compl. 3; Answer to Amended Verified Compl. and Countercl. 13. The work to be performed by Smith pursuant to the contract consisted of "design services and construction/remodel services." Answer to Amended Verified Compl. and Countercl. 13, ¶ 5. The Amended Complaint alleges that the "...Defendants failed to make good on their promises to make payment, and Smith was forced to stop work and file a mechanics and Materialmens's Lien..." Amended Verified Compl. 4. Smith claims the Watts still owe him $425,853.00, and Smith seeks judgment on his claims and foreclosure of his mechanic's lien, breach of contract, and dishonored check. *Id.* at 5-6.

In the Watts' Counterclaim, the Watts allege Smith breached their contract, breached the implied warranty of workmanship, and Smith violated the mechanic's lien statute (I.C. § 45-525 and 48-601, et seq.), and In the alternative, quantum meruit. Answer to Amended Verified Compl. and Countercl. 18-21.

On January 9, 2020, Smith filed a Motion to Dismiss Construction Defect Claims for Failure to Comply with I.C. § 6-2501, et seq., and a Declaration of Michael G. Schmidt. Idaho Code § 6-2501, et seq., is the Notice and Opportunity to Repair Act (NORA). The Act applies to homeowners and others who sue contractors for construction defects

involving residential construction and remodeling. I.C. § 6-2502(1), (2). On January 17, 2020, the Watts filed a Response to Plaintiff/Counterdefendant Smith's Motion to Dismiss, a Declaration of Lynette Davis, and a Declaration of Janet Watt. On January 22, 2020, Smith filed a Reply in Support of Plaintiff's Motion to Dismiss for Failure to Comply with I.C. 6-2501 et seq., and a Memorandum of Costs & Attorney Fees. Oral argument was held on January 27, 2020. At the conclusion of that hearing, this Court took the matter under advisement.

II. STANDARD OF REVIEW.

Due to the submission of affidavits and exhibits, Smith's Motion to Dismiss has essentially been converted to a Motion for Summary Judgment.

In considering a motion for summary judgment, this Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.,* 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2,* 128 Idaho 714, 718, 918 P.2d 583, 587 (1996) (citation omitted). In ruling on a motion for summary judgment, the trial court is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak,* 105 Idaho 600, 601, 671 P.2d 1063, 1064 (1983). Should the evidence reveal no disputed issues of material fact, then summary judgment should be granted. *Smith,* 128 Idaho at 718, 918

P.2d at 587 (citation omitted).

A party responding to a motion for summary judgment (the non-moving party) is not required to present evidence on every element of its case. *Thompson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994). The non-moving party must establish a genuine issue of material fact only with respect to the elements challenged by the moving party's motion. *Id.* The moving party is entitled to summary judgment when the non-moving party fails to support the existence of an essential element of the non-moving party's case that they (the non-moving party) must prove at trial. *Thompson*, 126 Idaho at 530-31, 887 P.2d at 1037-38. At a trial in a contract case the plaintiff has the burden of proving: 1) that a contract existed; 2) the defendant breached the contract; 3) the plaintiff was damaged on account of the breach, and; 4) the amount of damages. IDJI2.d, 6.10.1. A mere scintilla of evidence will not create a material issue of fact. *East Lizard Butte Water Corp. v. Howell*, 122 Idaho 679, 681, 837 P.2d 805, 807 (1992). The non-moving party may not simply rest on allegations or denials. *Id.* Affidavits setting forth facts that would be admissible as evidence and other response provided for in I.R.C.P. 56(e) must show a genuine issue for trial. *Id.* Summary judgment is proper if the pleadings, depositions, admissions, and affidavits filed show that there is no genuine issue of material fact. *Id.*

III. ANALYSIS.

Smith asks this Court to dismiss the claims found in the Watts' Counterclaim due to (1) the "Watts' failure to serve a statutorily compliant Notice and Opportunity to Repair Act letter on Smith," (2) "failure to provide 21-days' time to inspect and respond, and failure to provide opportunities to inspect any defects[,]" (3) " failure to give any notice at all of several of the defect claims that are now being asserted," and a "failure

to provide adequate descriptions of other alleged defects[.]" Mot. to Dismiss Construction Defect Claims 2.

A. Smith's claim that the Watts failed to serve a statutorily compliant Notice and Opportunity to Repair Act (NORA) letter on Smith.

1. "Reasonable Detail" under NORA.

Smith argues that statutory compliance under NORA was not met due to descriptions that amounted to "non-specific window installation issues," as well as "non-specific 'structural issues.'" *Id.* at 3.

The Watts argue that, "the Watts' description of their claimed defects was more than sufficiently reasonable in detail to 'permit [Smith] to inspect the home and determine the general nature of the defect[s],' which is all that NORA requires." Resp. to Mot. to Dismiss.

From Watts' standpoint, the relevant section of the statute under NORA states:

> (1) Prior to commencing an action against a construction professional for a construction defect, the claimant shall serve written notice of claim on the construction professional. The notice of claim shall state that the claimant asserts a construction defect claim against the construction professional and shall describe the claim in reasonable detail sufficient to determine the general nature of the defect. Any action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section.

I.C. 6-2503(1). The statute then turns to Smith's duties:

> (2) Within twenty-one (21) days after service of the notice of claim, the construction professional shall serve a written response on the claimant. The written response shall:
>
> (a) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim;
>
> (b) Offer to compromise and settle the claim by monetary payment without inspection; or
>
> (c) State that the construction professional disputes the claim and

will neither remedy the construction defect nor compromise and settle the claim.

The statute then sets forth what happens to the claimant's (Watts') ability to maintain a lawsuit, depending on the claimant's and the construction professional's actions under the Act, up to this point, and based on further decisions made by each:

> (3) (a) If the construction professional disputes the claim or does not respond to the claimant's notice of claim within the time stated in subsection (2) of this section, the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.
> (b) If the claimant rejects the inspection proposal or the settlement offer made by the construction professional pursuant to subsection (2) of this section, the claimant shall serve written notice of the claimant's rejection on the construction professional. After service of the rejection, the claimant may bring an action against the construction professional for the construction defect claim described in the notice of claim. If the construction professional has not received from the claimant, within thirty (30) days after the claimant's receipt of the construction professional's response, either an acceptance or rejection of the inspection proposal or settlement offer, then at anytime thereafter the construction professional may terminate the proposal or offer by serving written notice to the claimant, and the claimant may thereafter bring an action against the construction professional for the construction defect claim described in the notice of claim.

The remaining subsections ((4)-(7)) of NORA are not applicable to Smith's motion.

In *Mendenhall v. Aldous,* the Idaho Supreme Court dealt with the question of whether enough reasonable detail was provided in a letter sent by Mendenhall to Aldous to address the defects made by Aldous's construction. 146 Idaho 434, 437, 196 P.3d 352, 355 (2008). That Court found that, "NORA's notice requirement does not require claimants to describe alleged defects with excessive particularity. *Id.* Instead the 'reasonable detail' requirement is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect." *Id.*

In regards to the letter sent by Mendenhall to Aldous, the Idaho Supreme Court found that, "[t]he letter stated, among other things, 'water problem with north roof of great room, east spouting leaks in four places.' This surely provided enough detail and pertinent information to permit the Aldouses to inspect the home and determine 'the general nature of the defect[s].'" *Id.*

In this case, the September 20, 2019, letter from Lynette M. Davis (attorney for Watts) to Michael G. Schmidt (Attorney for Smith) states:

> As previously indicated, we have been unable to locate permits for significant structural work performed by, or at the direction of, Russell Smith. Given the lack of any permit being pulled, and your refusal to provide any engineered plans or load calculations, we initiated an investigation of the structural modifications to determine their adequacy and compliance with the governing code requirements. While we now believe that the trusses in place are the trusses from the original construction of the home, it appears that they have been modified without the benefit of engineered plans or load calculations. We also have concerns regarding whether the existing structural modifications are structurally sound including, without limitation, the steel beams and other vertical and lateral load support components meet the current code requirements.
>
> I am waiting to hear back from the replacement contractor regarding timing, but believe it plans to start work next week. While I do not anticipate that work relating to any necessary structural modifications will start at that time, I have been advised that the replacement contractor will be working on the installation of the windows and that the few windows installed by Russell Smith will need to be re-framed and reinstalled in order to meet the manufacturer's installation requirements. Thus, I write to give you and your client an opportunity to conduct your own inspection of such work before the work is performed. I will advise as soon as I know the replacement contactor's schedule relation to the structural work, but if you would like someone to inspect the windows that were incorrectly installed by your client before that work is performed, you will need to make arrangements to have someone do so by early next week.
>
> Please contact me as soon a possible to make arrangements if you would like access to the property to conduct your own inspection of the work completed by your client.

Decl. of Michael G. Schmidt in Supp. of Mot. to Dismiss Construction Defect Claims.

Ex. 1. Four days later, Smith's attorney sent his September 23, 2019, letter, which states:

> I am in receipt of your September 20, 2019 letter to me regarding your clients' inability to locate information, as well as your offer to permit my client to inspect the premises before your client destroys evidence. Your letter also suggests that there may be some issues with permitting/engineering/framing, windows, and winterization. These issues are discussed below.
>
> Under the Notice and Opportunity to Repair Act, a party must provide the minimum information as listed under Idaho Code 6-2503. Importantly, it must also be "served" as therein provided and provide at least 21 days for our response. Your notice does not contain the appropriate information regarding a description of the defect in sufficient detain to determine the general nature of the defect. A close review of your letter also indicates that no defect is in fact asserted – all that is asserted are "concerns" lacking in any specificity. My client and I will not be able to respond due to the lack of any specifics regarding the suspected defects. Also, we will be unable to arrange to inspect in the short time you have provided. Reading between the lines, it is readily apparent that your client wants my client to turn over information and work product that your client has not paid for.
>
> With respect to the permits, please understand that your clients' inability to locate them does not mean they do not exist. In fact, all necessary permits were obtained.
>
> With respect to the structural/framing questions, you are incorrect that anything was "modified without the benefit of engineered plans or load calculations." Further, if your client has concerns regarding "whether the existing structural modifications are structurally sound, including. . .the steel beams and other vertical and lateral load support components," those concerns are a product of their own actions and not the actions of my client. All structural work performed on the home was performed according to the design of my client's structural engineer. There was no modification to the existing trusses. There were however, some defects in the existing trusses that were identified and addressed. This work was done according to the direction of the structural engineer.
>
> At the time your client refused payment forcing my client to declare material breach and cease further work on the project, there was a small amount of unfinished structural framing along the back wall and face of the house at the time of the cessation of work. This work had in fact been looked at by the structural engineer, who had run calculations on it and provided direction for completion of what was needed. My client was not able to complete this work earlier because he was waiting on Janet Watt's final design and layout of the new windows. He did not want to do the work and then have to tear it out for modification if your client decided

to relocate windows. All work performed meets or exceeds the building code. My client believes that if there are any problem related to the structural work, those problems derive from the Watts' inexperienced inspector.

With respect to permitting, the permit for the main house was paid for approximately one year ago. The cottage was a separate permit which was ready for the final sign off when my client was forced off the project. The main house drawings were only completed a couple days prior to the cessation of work due to Janet Watt's delay in providing the final design of the windows and floor plan. They had only to be given to the structural engineer for his approval prior to submission to the county. My client had been waiting for this information from Janet for many months. My client's documentation will easily establish this fact if your client attempts to dispute it.

In order to allow my client to proceed with the work on the house, the building department had allowed him to proceed on the condition that he would not cover anything up that needed to be inspected, which is .a standard practice. The county actually made inspections on the structural concrete work that was performed as well. Inspections would not be performed if there were no permit. If your clients cannot find any record of the permit, it is because they have not looked for it, or they don't know where to find it. Either way, it is no longer my client's problem.

With respect to the windows, my client's installation work was undertaken according to the manufacturer's requirements. The windows are MarvinWood Windows, and they require an installation different from that of any other window. The company who sold the windows to my client would normally be willing to do an on-site inspection of the installation to either show how they should be installed, or to confirm correct installation. Unfortunately, they are one of the parties who have not been paid because of your clients' actions, so we do not believe they would be willing to help under the circumstances at this time.

My client indicates he had only received the windows a few days prior to cessation of work and was still in the process of completing their installation. The few windows installed were installed correctly, although their installation was also not yet 100% complete. Again, this work would have been completed earlier except for the failure of your clients to provide direction for the window sizes, functions and locations that Janet Watt wanted. If your clients' contractor believes that the windows are installed incorrectly, that is likely because he/she has never installed Marvin Wood Windows. My client has himself had issues with Marvin's recommended installation, so he always exceeds their requirements in his completed installations. All window openings were framed to manufacturer's sizing requirements, which my client can document in court if necessary.

Decl. of Michael G. Schmidt. Ex. 2. Schmidt's letter then discusses the Watts' concerns about the approaching winter weather. *Id.*

This Court finds that the September 20, 2019, letter provided "reasonable detail" of the defects satisfying the NORA requirement. As stated in *Mendenhall,* "the 'reasonable detail' requirement is satisfied when a claimant provides a builder with enough information to identify the general nature and location of the defect." 146 Idaho 434, 437, 196 P.3d 352, 355. The September 20, 2019, letter first Identifies the trusses, which satisfies the general location requirement of this defect, and then the letter provides adequate information about the general nature of this defect by stating that, "[w]hile we now believe that the trusses in place are the trusses from the original construction of the home, it appears that they have been modified without the benefit of engineered plans or load calculations." Decl. of Michael G. Schmidt in Supp. of Mot. to Dismiss Construction Defect Claims. Ex. 1. Similarly, the next defect listed in the letter meets the "reasonable detail" NORA requirement by stating, "[w]e also have concerns regarding whether the existing structural modifications are structurally sound including, without limitation, the steel beams and other vertical and lateral load support components meet the current code requirements." *Id.* The general location element is met through identifying the, "steel beams and other vertical and lateral load support components." *Id.* This provided Smith with adequate description in which to find and inspect the general location of the defect. The general nature element is also met by the letter when it states that, "we also have concerns regarding whether the existing structural modifications are structurally sound..." and "...meet the current code requirements." *Id.* This provided Smith with a description of the general nature of the defect for him to inspect. Second, regarding the windows, this Court finds that the "reasonable detail" NORA requirement is met by the letter. The general location element is met by the letter when it identifies, "the few windows installed by Russell

Smith." *Id.* This provides more than an adequate general description of what Smith needs to inspect. The general nature element of the defect is met when the letter states that the windows, "...will need to be re-framed and reinstalled in order to meet the manufacturer's installation requirements." *Id.* This provides Smith with the general nature of the defect, vis-à-vis, the assertion that the windows do not meet the manufacturer's installation requirements.

2. Actual Notice is "Service" under NORA.

In addition to Smith's argument that the September 20, 2019, letter fails to give an adequate description, Smith also argues that, "this letter was never 'served' by certified mail, return receipt requested, and so cannot be deemed a true NORA letter." Mot. to Dismiss Construction Defect Claims. 3-4. Smith acknowledges in footnote 2 of his Motion that:

> ...in the case of *Davison v. Debest Plumbing, Inc.,* 163 Idaho 571, (2018) the Idaho Supreme court found that where a homeowner sent a NORA letter vial regular mail, eliciting a response and inspection of the alleged defect, along with a proposal to fix the defect from the construction professional, NORA compliance was substantial and the failure to "serve" would be excused. However, no Idaho cases have held that "service" by regular mail which fails to provide 21 days to inspect and which does not result in an inspection or proposal to repair defects is adequate.

Id. at 4. footnote 2.

This Court finds that the NORA requirements for service have been met by the September 20, 2019, letter from Davis to Schmidt, because Schmidt's letter responding to Davis's letter on September 23, 2019, represents actual notice of service. Watt, through his attorney (Davis), sent a valid NORA letter to Smith, which had obviously been received by Smith's attorney (Schmidt) and responded to by that attorney three days after the NORA letter was sent by regular mail.

Smith argues that NORA requires service of the NORA letter by certified mail. Mot. to Dismiss Construction Defect Claims. 3-4. Indeed, I.C. § 6-2502(8) requires "service...by certified mail," and Watts' attorney used regular mail. However, Smith's receipt and response to the NORA letter, through his attorney, which disputes the defects asserted by Watts, represents **actual** notice of the NORA letter. The Idaho Supreme Court in *Davison v. Debest* found that:

> "[a]s we have already observed, "[t]he purpose of [NORA] is to give contractors the opportunity to fix construction defects before a lawsuit is filed." *Mendenhall*, 146 Idaho at 436, 196 P.3d at 354. "The law does not require useless acts from litigants as prerequisites to seeking relief from the courts." *Ware v. Idaho State Tax Comm'n*, 98 Idaho 477, 483, 567 P.2d 423, 429 (1977) (quoting *Van Gammeren v. City of Fresno*, 51 Cal.App.2d 235, 124 P.2d 621, 623 (1942)).

Davison v. Debest Plumbing, Inc., 163 Idaho 571, 576, 416 P.3d 943, 948 (2018). The Idaho Supreme Court went on to compare the purpose of NORA to the purpose of the Idaho Tort Claims Act, and then found:

> The facts of this case are similar to those in *CNW [LLC v, New Sweden Irr. Dist.*, 161 Idaho 89, 383 P.3d 1259 (2016)]. Like the plaintiff in CNW who failed to strictly comply with the notice requirements of the ITCA, the Davisons failed to strictly comply with the notice requirements of NORA. Also, like the irrigation district, DeBest did receive actual notice of the defect. In both cases, the objectives of the statutes were fulfilled by the actual notice received by the defendants. DeBest received actual notice of the defect, sent an employee to inspect the defect, and offered to settle the claim by paying to repair the damage. It is difficult to imagine what more could have been accomplished had the Davisons strictly complied with NORA. Service of written notice after DeBest had obtained actual notice of the defect and sent an employee to inspect the damage would have been a useless act.

163 Idaho at 577, 416 P.3d at 949. Smith is not allowed to destroy the effect of the NORA letter by requesting the useless act of his attorney receiving a second copy of the NORA letter through certified mail, when actual notice has already been satisfied,

and the allegations of the NORA letter had been disputed by Smith in the September 23, 2019, letter.

B. Smith's claim that the Watts failed to comply with NORA because they would only allow a single inspection, and because they provided less than 21 days to conduct the inspection.

Smith argues that "[t]he Watts' September 20, 2019 letter is deficient due to its failure to provide 21 days to respond." Reply in Supp. of Pl's. Mot. to Dismiss. 3. Additionally, Smith argues that "the whole point of Mr. Schmidt's September 23, 2019 letter was to point out that *the Watts had not complied with NORA*, and Mr. Smith would be unable to inspect within five or fewer days." *Id.* (emphasis in original).

Regarding this issue, the Watts argue that:

> ...NORA does not require that a homeowner provide a time for inspecting the claimed defects. NORA, as noted above, provides that a homeowner must provide a written notice of alleged defects to a construction professional. I.C. § 6-2503(1). Then, once the construction professional has notice of the claimed defects, the construction professional has twenty-one (21) days to "serve written response on the claimant." I.C. § 6-2504(2). Critically, nowhere does the statute say that the homeowner is required to provide twenty-one (21) days to "inspect," as Mr. Smith alleges is required under NORA. *See* Smith Motion, at p.3 ("Mr. Smith should have been provided 21 days to inspect under NORA."). The requirement is that the construction professional must respond within twenty-one days of receiving notice on an alleged defect. I.C. § 6-2504(2) ("Within twenty-one days after service of the notice of claim, the construction professional shall serve a written response on the claimant."). However, once the construction professional responds and disputes the claimed defect, the homeowner is free to bring an action against the construction professional "without further notice." I.C. § 6-2504(3)(a). There simply is no requirement to provide twenty-one (21) days to inspect the property and Mr. Smith's suggestion that the Watts failed to wait twenty-one (21) days or provide twenty-one (21) days to inspect the property before bringing their claims has no bearing whatsoever on whether the Watts complied with the requirements of NORA. The Watts advised Mr. Smith of the window and structural defects on September 20, 2019. Mr. Smith disputed the claimed defects on September 23, 2019. After that point, the Watts were free to pursue their claims regarding the windows and the structural defects "without further notice" and could have filed their Counterclaim on September 24, 2019. I.C. § 6-2504(3)(a) ("If the construction professional disputes the claim... the claimant may bring an

action against the construction professional for the claim described in the notice of claim without further notice.").

In short, once Mr. Smith responded to the Watts' claimed defects by disputing and denying the same, the Watts' obligation under NORA to provide and opportunity to inspect was terminated. As such, the Watts, as clearly indicated in the September 20, 2019 letter, moved forward with replacing the windows. Had Mr. Smith's response on September 23, 2019 requested an inspection or "proposed to inspect the [same] ... within a specified time frame" as required under I.C. § 6-2503(2)(a), the Watts would have arranged for an inspection. However, Mr. Smith's response did not request any such inspection. Rather, Mr. Smith's response flatly denied any defect with the windows and stated "the few windows installed were installed correctly ... If your clients' contractor believes that the windows were installed incorrectly, that is likely because he/she has never installed Marvin Wood Windows ... All window openings were framed to manufacturer's sizing requirements, which my client can document in court if necessary." Schmidt Decl., Ex. 2 at p. 3. Given Mr. Smith's response did not request an inspection, and his assertion that he had all the documentation needed to prove his position in court, it was reasonable for the Watts to assume that Mr. Smith was not requesting to inspect the windows and to proceed with replacing them as they clearly said they would in their September 20, 2019 letter.

As to the structural issues, the Watts waited to file their Counterclaim until November 8, 2019, more than thirty (30) days after providing notice of their claimed defects and inviting Mr. Smith to inspect the structural defects on multiple occasions. Mr. Smith declined. Any suggestion that Mr. Smith was not provided ample opportunity to inspect the structural defects alleged by the Watts before they brought their claims for the same is simply unsupported by the facts.

Response to Pls'/Counterdefendant Smith's Mot. to Dismiss. 12-14.

Again, Idaho Code § 6-2503 subsection 2-3 states:

(2) Within twenty-one (21) days after service of the notice of claim, the construction professional shall serve a written response on the claimant. The written response shall:

(a) Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame. The proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim;

(b) Offer to compromise and settle the claim by monetary payment without inspection; or

(c) State that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim.

(3) (a) If the construction professional disputes the claim or does not

> respond to the claimant's notice of claim within the time stated in subsection (2) of this section, the claimant may bring an action against the construction professional for the claim described in the notice of claim without further notice.

Idaho Code § 6-2503 clearly does not require that the party asserting a defect specify a 21-day time period in which to allow for inspection of the property. While requiring a 21-day period for inspection might make all the sense in the world, the Idaho Legislature has not included such a requirement in NORA> Instead, the statute requires that the responding construction professional serve a written response on the claimant within 21 days. Idaho Code § 6-2503 then provides three response options for the construction professional. The construction professional can (1) propose to inspect, (2) offer to compromise/settle the claim, or (3) dispute the claim.

In this Case, Smith, in his attorney's letter of September 23, 2019, chose the third option of disputing the claim, and for this reason, the Watts were free under NORA to bring an action against Smith for the claims described in the September 20, 2019, NORA letter. In his September 23, 2019, letter, Smith's attorney did not propose to inspect the property. Instead, Smith's attorney proposed that the Watts' attorney's letter of September 20, 2019, was not a valid NORA letter, and that for this reason he would be unable to respond to the claims. Smith's attorney additionally stated that "[m]y client and I will be unable to arrange to inspect in the short time you have provided." Decl. of Michael G. Schmidt in Supp. of Mot. to Dismiss. Ex 2. That is the only mention of a NORA "inspection" in that letter. Clearly, the statement, "[m]y client and I will be unable to arrange to inspect in the short time you have provided," is not a "proposal" by Smith "to inspect the residence within a specified time frame" as I.C. § 6-2503(2)(a) requires of Smith. Immediately following this statement that Smith and his attorney would be unable to inspect in the short amount of time provided by Watts'

letter, Smith's attorney then responds at length to the Watt's claims, and disputes the claims in detail. *Id.* Smith has clearly not chosen the option enumerated in I.C. § 6-2503(2)(a), propose to inspect, and has instead equally clearly elected the option set forth in I.C. § 6-2503(2)(c), "state that the construction professional disputes the claim and will neither remedy the construction defect nor compromise and settle the claim." With Smith clearly disputing the Watts' claims, and clearly not proposing to inspect, the Watts are free to bring an action against the construction professional (Smith) for the claim(s) described in the September 20, 2019, notice of claim. Accordingly, Smith's motion to dismiss must be denied.

Additionally, this Court finds that the Watt's were not required to provide in their letter, a 21-day time frame for Smith to inspect the property. Instead, Smith was required under NORA to respond within 21 days, which he did, within four days. But NORA requires that if Smith wanted to inspect the property, he was required under NORA to "Propose to inspect the residence that is the subject of the claim and to complete the inspection within a specified time frame." I.C. § 6-2503(a). Smith's statement that he "will be unable to arrange to inspect in the short time you [the Watts] have provided" is not a proposal to inspect the residence. Simply rejecting the time frame for inspection offered by the Watt's is in no way a proposal to inspect the residence. Again, nowhere in the September 23, 2019, letter does Smith propose or ask for an inspection, and this Court cannot interpret the rejection of an inspection as a proposal for an inspection. NORA additionally requires that Smith's "proposal shall include the statement that the construction professional shall, based on the inspection, offer to remedy the defect, compromise by payment, or dispute the claim" *Id.* Nowhere does Smith provide such statement.

Smith has chosen the third option, under I.C. § 6-2503(c), of disputing the claims, and therefore, Smith waived his right to an inspection.

If Smith had proposed an inspection in his September 23, 2019, letter, then Smith would not have waived his inspection right under NORA. If Smith had requested inspection in a response letter sent after the timeframe offered by the Watts for inspection, but still within the 21-day response requirement under NORA, then Smith would also not have waived his right to inspection under NORA. Instead Smith had responded to the Watts NORA letter, disputing the claims found within, and he did not request an inspection. This Court finds that Smith did not request an inspection, and disputed the Watts claims in his September 23, 2019 response letter, therefore, under I.C. 6-2503(3)(a), the Watts are free to proceed with their claims and were subsequently not required to offer inspection of the property.

C. Smith's claim that the Watts failed to give any notice relating to "doors, flooring, concrete work," or any "Work" as defined in Paragraph 8 of Defendants' counterclaim.

Smith argues that:

> The Counterclaimants have not provided any argument or evidence to rebut Plaintiffs' Motion to Dismiss, apparently conceding that the door, floor, concrete, and generic "Work" defects are not appropriate to be stated as part of their Counterclaim.
>
> Courterclaimants' claims related to these items must be dismissed under NORA because under I.C. § 6-2503, the Watts needed to provide notice of these defects before bringing a claim...

Reply in Support of Plaintiff's Motion to Dismiss 2. (underlining in original).

The relevant section in the Watts' Counterclaim reads:

> The Construction/remodel services involved extensive remodeling of the home and detached garage located on the property, including, among other things, "remove arch wall adjacent to breakfast nook and make necessary structural adjustments as needed, develop guest bedroom suite adjacent to front door including a Jack and Jill bathroom... relocate laundry room into old pantry area, develop TV room... create

> mudroom...develop new pantry in Kitchen...[r]edesign [garage] to become guest cottage including kitchenette and bathroom... redesign up stairs to include 3 bedrooms, master suite with bathroom, second bath..." ("Remodel Services"). The Design Services and Remodel Services provided for in the Contract are collectively referred to as the "Work"

Def's Answer to Amended Verified Compl. and Countcl. 14. ¶ 8

The Watt's have not presented a NORA letter or any argument in their briefing on the Motion to Dismiss regarding this section of their Counterclaim. Idaho Code § 6-2503(1) states that "[a]ny action commenced by a claimant prior to compliance with the requirements of this section shall be dismissed by the Court without prejudice and may not be recommenced until the claimant has complied with the requirements of this section." Since no evidence has been presented by the Watts regarding NORA compliance with defects related to page 14 paragraph 8 of the Watts' counterclaim, claims related to this section are hereby dismissed without prejudice.

For the reasons discussed above, the Smith's Motion to Dismiss construction defects regarding all other claims outside those listed in page 14 paragraph 8 of the Watts' Counterclaim is denied because a genuine issue of material fact exists. The Smith's Motion to Dismiss Construction Defect regarding claims related to page 14 paragraph 8 of the Watts' Counterclaim is granted because no genuine issue of material fact exists; no NORA compliance was made on those issues.

III. CONCLUSION AND ORDER.

As set forth above, this Court finds the September 20, 2019, letter was a valid NORA letter. This Court finds that the September 20, 2019 letter satisfied the "reasonable detail" requirement and service requirements under NORA. This Court finds the September 23, 2019, response to that letter is a denial under I.C. § 6-2503(2)(c).

IT IS HEREBY ORDERED that Smith's Motion to Dismiss construction defects regarding all other claims outside those listed in page 14 paragraph 8 of the Watts' Counterclaim is denied **DENIED.**

IT IS FURTHER ORDERED that Smith's Motion to Dismiss Construction Defect regarding claims related to page 14, paragraph 8 of the Watts' Counterclaim is **GRANTED.**

DATED this 28th day of January, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 29th day of January, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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Secretary