STATE OF IDAHO)
County of KOOTENAI)ss
FILED_____
AT_____ O'Clock ____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

STEVE PARKES,

Plaintiff/Counter-Defendant,
vs.

THE VILLAGE CONDOMINIUM OWNERS, INC., an Idaho Corporation

Defendant/Counter-Claimant/Third party Plaintiff.
vs.

UNIVERSAL LAND COMPANY, an Oklahoma corporation,

Third Party Defendant.

Case No. **CV28-20-3249**

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment filed on November 6, 2020, by plaintiff Steve Parkes (Parkes) and Third Party Defendant Universal Land Company (Universal) against Defendant The Village Condominium Owners (The Village).

This is a dispute by a property owner (Parkes) against his homeowner association (The Villiage). Compl. 1-2, ¶¶ 1-3. Parkes' parcels have no improvements on those parcels and The Village now claims Parks cannot build on those parcels. *Id.* at 2, ¶4-5. Parkes claims The Village changed the original CC&R's for the subdivision and failed to follow the proper procedures to change the CC&R's by fialing to obtain all the required signatures from the owners of units and lots within the subdivision. *Id.* at ¶

6. On May 20, 2020, Parkes filed this lawsuit against The Villiage, seeking a "Judgment that Plaintiff may construct any improvements in either or both of Plaintiff's parcels consistent with the approve plat for the subdivision" and "Judgment that the modifications to the CC&R's which reduced the ability to rent units within the subdivision are not valid." *Id.* ¶¶ 8-9.

On June 29, 2020, The Village filed its Answer to Complaint, Counterclaim and Third-Party Complaint. The Village claims Parkes' claims are barred by his failure to comply with the Amended Condominium Declaration of the Village. Answer to Compl., Countercl. and Third-Party Compl. 2, ¶ 1. The Village also filed a counter-claim against Parkes and a third-party complaint against Universal (claiming it is a co-owner of one of Parkes' parcels), claiming that any building on these properties was to have been completed within seven years of the recording of the November 17, 1995, Declaration, and now, building on these properties is barred by that declaration. *Id.* 3-10, ¶ 1-42. The Village seeks declaratory relief that "Pursuant to the terms and meaning of the 2010 Declaration and the Condominium Property Act, Idaho Code § 55-1501, et seq., all of the Subject Properties are Common Area", and "In the alternative, if the Subject Properties are not Common Area, the time period to complete construction of the buildings has passed." *Id.* at 11, ¶ 44.

On August 3, 2020, Parkes/Universal filed their Answer to Counterclaim and Third-Party Complaint.

On November 6, 2020, Parkes/Universal filed a Motion for Summary Judgment, a Declaration of Arthur M. Bistline in Support of Motion for Summary Judgment, a Memorandum in Support of Motion for Summary Judgment, and Plaintiff and Thir[d]-Party Defendant's Request for Judicial Notice (requesting this Court take judicial notice of this Court's March 7, 2003, Order on Reconsideration in Kootenai County Case No.

CV 2001 5057, The Village Condominium Owners, Inc., v. The Village Development Group LLC).

On November 20, 2020, The Village filed its Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment and a Declaration of Mike Tiffany in Support of Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment.

On November 25, 2020, Parkes/Universal filed Plaintiff and Third Party Defendant's Response to Defendant's Response to Plaintiff and Third Party Defendant's Motion for Summary Judgment. The same document was filed again two days later on November 27, 2020. Also on November 27, 2020, Parkes/Universal filed a Motion to Strike Paragraphs 28 through 30 of the Declaration of Mike Tiffany's Declaration in Opposition to Plaintiff and Third Party Defendant's Motion for Summary Judgment.

Oral argument was held on December 2, 2020. At that hearing, the Court granted Parkes'/Universal's motion to strike paragraphs 28-30 of Tiffany's affidavit, and granted Parkes'/Universal's motion for judicial notice as it is required to under these circumstances pursuant to Idaho Rule of Evidence 201(c)(2). At the conclusion of the oral argument, the Court took Parkes'/Universal's motion for summary judgment under advisement.

II. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must

support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*

v. Kevic Corp., 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

III. ANALYSIS

At oral argument, counsel for Parkes/Universal began his argument by stating that "The Court can consider this a cross-motion for summary judgment." Counsel for The Village stated unequivocally that this is not a cross-motion for summary judgment,

and that The Village has not moved for summary judgment. The Court finds this is not properly a cross-motion for summary judgment and will only address the motion for summary judgment filed by Parkes/Universal.

Parkes/Universal argue that:

> The language in the CC&R's only applies to the declarant and Parkes is not the declarant. The 1995 declaration which the HOA seeks to enforce specifically defines who the declarant is at section 1.1.10 and it is not Parkes. The 2004 CC&R's defined who the declarant is and it is not Parkes. The 2010 CC&R's do not define who the declarant is at any point, notwithstanding the many references to the declarant. Parkes is not the declarant and cannot be said to stand in the shoes of the declarant as no evidence exists that Parkes agreed to accept the declarants' obligations under the CC&R's.

Mem. in Supp. of Mot. for Summ. J. 5.

Next, Parkes and Universal argue that, "[t]o the extent that the seven-year requirement is enforceable against Parkes, the remedy for breach of that provision is not a forfeiture of the property or the right to build." *Id.* at 6.

The Village concedes the argument that Parkes "properly asserts that he is not the Declarant under the Declarations" (Opp. to Pl. and Third Part Def.'s Mot. for Sum. J. 7), and "Parkes correctly states that he is not the 'Declarant' under the Declarations." *Id.* at 8. The Villiage agrees with Parkes' citation to the definition of "Declarant" set forth in the 1995 Declaration at Section 1.1.10:

> "Declarant" shall man THE VILLAGE APARTMENTS, an Idaho Limited Liability Partnership, and THE VILLGE DEVELOPMENT GROUP, L.L.C., an Idaho Limited Liability Company, collectively, and their respective representatives, successors, and assigns, as each relates to their respective property....

Id. at 8. To this end, The Village asserts that:

> Parkes argues that "no evidence exists that [he] agreed to accept the declarants' obligations" to complete the project in seven years." He repeatedly states that he "does not stand in the declarant/developers' shoes." He is correct. Parkes did not receive the right to finish the project—this right was held only by the Declarant. Therefore, the Court

> should deny Parkes' and Universal's Motion for Summary Judgment as the evidence before the Court establishes that Parkes and Universal did not have the right to complete the project.

Id. at 9.

In Parkes'/Universal's Reply brief (titled: Plaintiff and Third Party Defendant's Response to Defendant's Response to Plaintiff and Third Party Defendant's Motion for Summary Judgment) Parkes/Universal argue that:

> The point of the summary judgment is that Parkes is not the declarant. This fact is admitted by the Village. The Village raises a different defense on summary judgment — that only the declarant had the right to develop these properties and that Parkes had to have a separate grant of this right from the declarant — even though he clearly is the successor in interest to the declarant...
>
> The Declarant is not the only entity which had the right to construct new living units in the project and Parkes is entitled to develop his parcels.

Reply 2-3 (footnotes omitted).

This Court finds that both parties are in agreement that Parkes is not the Declarant under the Declaration." Opp. to Pl. Mot. for Sum. J. 7,9; Reply 2-3. This point has been argued by Parkes/Universal and conceded by The Village. *Id.* Parkes/Universal have put themselves in the precarious position of arguing for summary judgment on the grounds that "Parkes is not the Declarant" while at the same time claiming "he is clearly the successor in interest to the declarant". Reply 2. Parkes/Universal claim that "[t]he Declarant is not the only entity which had the right to construct new living units in the project and Parkes is entitled to develop his parcels." *Id.* at 3. The Village argues that, "the evidence before the Court establishes that Parkes and Universal did not have the right to complete the project." Opp. to Mot. for Summ. J. 9. There is nothing in the CC&Rs, or other documents thus far presented to the Court, that describes the rights or obligations of a "successor in interest to the

declarant". For this reason, this Court finds that a genuine issue of material fact remains as to the rights and obligations of Parkes and his right to develop his parcels.

Parkes/Universal argue that:

> The HOA sued the developer in 2001. In 2003, well past the seven-year requirement, the HOA entered into a settlement agreement which expressly contemplated that the HOA would be paid sums owed to it out of the proceeds of the sale of the developer/declarants undeveloped property. This is a waiver of the right to enforce the seven-year requirement.
>
> Waive[r] is a voluntary relinquishment of a known right. River Range, LLC v. Citadel Storage, LLC, 166 Idaho 592, 462 P.3d 120, 129 (2020).
>
> In this case, the CC&R's which contain the seven-year requirement were recorded and the HOA filed suit based on those CC&R's in 2001. The HOA then settled that suit in 2003, almost two years after the seven-year requirement had lapsed. The settlement contemplated that HOA being paid out of the sales of developer/declarants' remaining property in the project.
>
> The HOA clearly waived any right to enforce the seven-year building requirement when it expressly agreed that the developer could continue to develop their properties and agreed to accept the benefits of the developer doing so.

Mem. in Supp. of Mot. for Summ. J. 7.

The Village concedes that that, "Parkes and Universal correctly point out the 'existence of the 2003 settlement between the declarant/developer and the HOA is not in dispute.'" Opposition to Mot. for Summ. J. 7. The Village does argue that:

> However, there is a remaining question of fact as to whether The Village waived enforcement of the Declarations such that Parkes and Universal would be entitled to develop the Subject Properties. While the **"existence** of the [Settlement Agreement] is not in dispute, there is a dispute regarding whether The Village waived enforcement of the Declarations by executing the Settlement Agreement. Waiver is a question of fact. Summary judgment is not appropriate because there are material factual issues in dispute. As such, the pending Motion for Summary Judgment should be denied.

Id. The Village goes on to argue that:

> The Settlement Agreement did not unequivocally waive the seven-year requirement, nor did it waive the anti-waiver clause. Instead, it merely allowed for a temporary deviation from the 1995 Declaration, in the

> interest of all parties involved. Following the logic proposed by Parkes and Universal, an association, such as The Village, could not resolve a dispute short of trial without creating liability for a waiver claim, due to the settlement. Such a position directly conflicts with the purposes of settlement to avoid unnecessary litigation and encourage resolution among parties.

Id. at 15.

This Court agrees with The Village that a genuine issue of material fact exists regarding the question of whether The Village waived enforcement of the Declaration upon Parkes by executing the Settlement Agreement. In *River Range v. Citadel Storage,* the Idaho Supreme Court found that:

> "A waiver is a voluntary, intentional relinquishment of a known right or advantage, and the party asserting the waiver must show that he acted in reasonable reliance upon it and that he thereby has altered his position to his detriment." *Knipe Land Co. v. Robertson*, 151 Idaho 449, 457, 259 P.3d 595, 603 (2011) (quoting *Fullerton v. Griswold*, 142 Idaho 820, 824, 136 P.3d 291, 295 (2006)). "Waiver is foremost a question of intent." *Id.* (quoting *Seaport Citizens Bank v. Dippel,* 112 Idaho 736, 739, 735 P.2d 1047, 1050 (Ct. App. 1987)). The party alleging waiver must show a clear intention by the other party to waive before waiver will be established. *Id.* (citation omitted). Further, "[w]aiver will not be inferred except from a clear and unequivocal act manifesting an intent to waive, or from conduct amounting to estoppel." *Id.* at 458, 259 P.3d at 604 (citation omitted). "[W]aiver is a mixed question of law and fact. First, a court must find whether the facts alleged to constitute waiver are true. Second, the court must decide whether, if true, these facts suffice as a matter of law to show waiver." *Id.* (citation omitted).

166 Idaho 592, 462 P.3d 120, 129 (2020).

This Court finds there has been no evidence presented that The Village intentionally relinquished its known right to pursue its enforcement of the Declaration in regards to Parkes' proposed development. Similarly, there has been no evidence presented that Parkes/Universal acted in reasonable reliance upon The Village's supposed waiver, and there has been no evidence presented that Parkes/Universal thereby has altered his position to their detriment. For these reasons, this Court finds

that a genuine Issue of material fact exist regarding the question of whether The Village waived enforcement of the Declaration upon Parkes by executing the Settlement Agreement.

The Village argues that:

> Because Developer, as the Declarant, did not assign the right to complete the project, Parkes and Universal are prohibited from building on the Subject Properties. Additionally, development is prohibited because the Subject Properties are Common Area, and development has not been approved by the Board of Directors or the Architectural Control Committee. Finally, even if the Subject Properties were not considered Common Area, and Parkes and Universal had the right to complete the project, the seven-year time limit has passed, prohibiting development pursuant to the 2010 Declaration.

Opp. to Mot. for Summ. J. 9. Next, The Village argues that:

> Pursuant to the 2010 Declaration and Idaho law, the Subject Properties—purportedly owned by Parkes and Universal—are Common Area. As such, the condominium owners within The Village are the true owners of the Subject Properties...
>
> Parkes and Universal are prohibited from building on the Subject Properties because The Village has not approved development. Construction on the Subject Properties requires approval of the Board of Directors or the Architectural Control Committee. Parkes and Universal have not obtained the requisite approval for development—therefore, building is prohibited on the Subject Properties. Accordingly, the Court should deny Parkes' and Universal's Motion for Summary Judgment because building is prohibited on the Subject Properties.

Id. at 10-11. Next, The Village argues that:

> Even if the Subject Properties are not considered Common Area as set forth above, the time period to complete construction of the buildings has passed. The Declarations provide that development must be completed within seven years of the date of recording. When Parkes and Universal acquired the Subject Properties, the 1995 Declaration was recorded—putting Parkes on notice of the seven-year restriction.

Id. at 11-12.

In Parkes'/Universals' Reply brief, Parkes/Universal argue that the contemplated units Parkes wishes to develop are a "living unit" under the CC&Rs because the "2010

CC&Rs specifically contemplates that vacant property is a 'living unit' since in the language [it] pertains specifically to living units yet to be constructed." Reply 3. Next, Parkes/Universal argue that, "As set forth in the motion to strike filed herewith, the Court should not consider the parole evidence from Mr. Tiffany, but even if considered, the settlement agreement cannot be reasonably interpreted to only apply to parcels already 'planned' for construction." *Id.* at 3-4. Finally, Parkes/Universal argue that "Parkes concedes that he cannot build on the parcels without following the required procedure set forth in the CC&R's. He is seeking a declaration that he can build if he follows the required procedures." *Id.* at 4.

This Court finds that a genuine issue of material fact exists as to the question of whether the subject properties are to be considered a "common area", and the contemplated units are to be considered a "living unit". The evidence of both of these definitions as to the application to this case is threadbare, and what little has been presented is contested on each side. For this reason, a genuine issue of fact exists.

IV. CONCLUSION AND ORDER

For the above mentioned reasons, plaintiff Parkes' and third party defendant Universal's motion for summary judgment must be denied.

IT IS HEREBY ORDERED the Plaintiff /Counter-Defendant Parkes' and Third Party Defendant Universal Land Company's Motion for Summary Judgment is DENIED.

Entered this 7th day of December, 2020.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2020, a true copy of the foregoing was emailed to each of the following:

Lawyer	email	Lawyer	email
Art Bistline	service@bistlinelaw.com	Peter Smith	service@smithmalek.com

Jeanne Clausen, Deputy Clerk