STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

SIDNEY N. SMITH, Personal Representative of the Estate of SIDNEY E. SMITH, *Plaintiff*, vs. **COEUR D'ALENE NORTH HOMEOWNERS ASSOCIATION, INC.,** *Defendant*.	Case No. **CV 2013 4700** **MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the Motion for Summary Judgment filed by the defendant Coeur d'Alene North Homeowner's Association, Inc. (Association).

The action was initiated on June 25, 2013, by the plaintiff Sidney N. Smith, the Personal Representative of the Estate of Sidney E. Smith ("the Estate") seeking damages against the Association, alleging as a first cause of action breach of a fiduciary duty by the Association to abide by the Restated Declaration of Covenants, Conditions and Restrictions for Coeur d'Alene North Homeowner's Association, Inc. (CC&Rs) and as a second cause of action, breach of the CC&Rs. Complaint, pp. 1-6.

The Estate owns Unit 716 in the Coeur d'Alene North condominium complex, located in Kootenai County, Idaho. Complaint, p. 2 ¶ 3.1. On July 3, 2012, the plaintiff discovered a problem with the sewer system in the complex, relating to drainage from Unit 714 to Unit 716. *Id.*, p. 2 ¶ 5.4-5.5. "On or about that same day, either Apex Plumbing and/or D & C Sewer Service inspected the sewer line feeding unit 716, and

others, and also removed the clog which resulted in the backup." Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4 (citing Affidavit of Michael L. Haman in Support of Motion for Summary Judgment, Exhibit J, p. 88, Ll. 25 – p. 91, L. 5). "According to the plumber, 'The problem of the sewer line plugging has existed for many years (since the building was constructed) and is a result of inadequate grade/fall in the horizontal piping.'" Complaint, p. 2, ¶ 5.6. The plumber resolved the immediate problem and returned the sewer line to the same condition as it was prior to the clog. Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4 (citing Affidavit of Michael L. Haman in Support of Motion for Summary Judgment, Exhibit J, p. 88, L. 25 - p. 91, L. 5). "In fact, the condition of the line was the same as it was since the construction of the building." *Id.*

The Estate demanded the Association remedy the sewer problem, pursuant to the CC&Rs. Complaint, p. 3 ¶ 5.7. On August 1, 2012, the Association responded to the plaintiff's demand, stating in part: '[I]t was determined that the problem is with the drain pipe connected to each of your units which then drains into the main common pipe for the building. Because the issue is not with the main pipe, but is isolated to the pipe connected to your units, it has been determined that this is not an Association expense, but a repair expense to be incurred by the individual owners." *Id.*, Exhibit 1. The parties exchanged letters regarding the responsibility of the repair, and on September 12, 2012, the Association notified the plaintiff that it determined the problem was occurring in a common area and agreed the repair would occur at the expense of the Association. *Id.*, Exhibit 4. On September 19, 2012, "Apex Plumbing completed the repair work to the subject sewer line". Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4. The sewer line repairs were completed, permitted, inspected and approved by the City of Coeur d'Alene by October 18, 2012. *Id.*

Beginning October 1, 2012, the Estate listed Unit 716 for rent. Complaint, p. 4 ¶ 5.19. According to the Estate, "[t]he reason the Unit was not rented after July 3, 2012 was the sewer did not drain and the Plaintiff believed it was imprudent to offer for lease a Unit with a sewer problem." *Id.*, p. 4 ¶ 5.18. "In December, 2012, a potential purchaser of the subject Unit approached the Personal Representative, deposited an earnest money and thereafter purchased said Unit on January 14, 2013." Defendant's Memorandum in Support of Motion for Summary Judgment, p. 4 (citing Affidavit of Michael L. Haman in Support of Motion for Summary Judgment, Exhibit L, p. 37). The Unit was not rented between October 1, 2012, and the sale. Complaint, p. 5, ¶ 5.19.

The Associated moved for summary judgment on June 30, 2014. In support of the motion it filed "Defendant's Memorandum in Support of Motion for Summary Judgment" and the "Affidavit of Michael L. Haman in Support of Defendant's Motion for Summary Judgment." On August 20, 2014, the Estate filed an "Objection to Defendant's Motion for Summary Judgment", the "Declaration of Sidney N. Smith in Opposition to Defendant's Motion for Summary Judgment", the "Declaration of Peter J. Smith IV in Support of Objection to Defendant's Motion for Summary Judgment", and the "Declaration of Lindsey R. Simon in Opposition to Defendant's Motion for Summary Judgment". On August 26, 2014, the Association filed "Defendant's Reply to Plaintiff's Objection to Defendant's Motion for Summary Judgment".

Hearing on the Association's motion for summary judgment was held September 3, 2014. For the reasons below, the motion is denied.

II. STANDARD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA*

No. 8 Ltd. Partnership, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). "The court may permit affidavits to be supplemented . . . by depositions, answers to interrogatories, or further affidavits. 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 Finance 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)). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

"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)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). "[I]f the nonmoving party fails to provide a sufficient showing to establish the essential elements of his or her case, judgment shall be granted to the moving party." *Porter v. Bassett,* 146 Idaho 399, 403, 195 P.3d 1212, 1216 (2008)(citing *Atwood v. Smith,* 143 Idaho 110, 113, 138 P.3d 310, 313 (2006)). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If the non-moving party does not provide such a response, summary judgment, if appropriate, shall be entered against the party. *See id.* "Questions of law are subject to free review." *Halvorson v. North Latah County Highway Dist.,* 151 Idaho 196, 201, 254 P.3d 497, 502 (2011).

III. ANALYSIS.

A. The Association is Not Entitled to Summary Judgment on its Theory of Waiver (as a Defense to the Estate's Claim of Breach of Contract).

The Association argues that pursuant to section 9.3 of the CC&Rs in effect on July 3, 2012, "since the Plaintiff maintained insurance on Unit 716, the Plaintiff waived and released all claims that [he] against the Association for any and all damages that could have resulted from the July 3, 2012, sewage backup, regardless of fault by said Association." Defendant's Memorandum in Support of Motion for Summary Judgment, p. 6.

In response, the Estate maintains that section 9.3 of the CC&Rs is inapplicable to this case because that section states that the insurance policy shall be "'maintained by and for the benefit of the Association and the Owners.' [However, the] homeowner's insurance policy that covered the Unit in July 2012 benefited only the Owner." Objection to Defendant's Motion for Summary Judgment, p. 5 (underline in original). Moreover, since the homeowners' policy did not cover common areas of the property or

loss caused by water or substances that back up through sewers or drains, and section 9.3 only provides a waiver and release of claims "to the extent of the insurance proceeds available", the Estate contends no insurance proceeds were available and the waiver under section 9.3 of the CC&Rs is inapplicable. *Id.*, pp. 5-6.

"When interpreting CC&R's, this Court generally applies the rules of contract construction." *Sky Canyon Properties, LLC v. Golf Club at Black Rock, LLC*, 155 Idaho 604, 606, 315 P.3d 792, 794 (2013) (citing *Pinehaven Planning Bd. v. Brooks,* 138 Idaho 826, 829, 70 P.3d 664, 667 (2003)). The court must first determine whether or not the covenants are ambiguous. *Pinehaven Planning Board,* 138 Idaho at 829, 70 P.3d at 667 (citing *Brown v. Perkins,* 129 Idaho 189, 193, 923 P.2d 434, 438 (1996) (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). The determination of whether a covenant is ambiguous is a question of law. *Id.* (citing *Brown v. Perkins,* 129 Idaho 189, 192, 923 P.2d 434, 437 (1996)). To determine whether a covenant is ambiguous, the court must view the agreement as a whole. *Id.* (citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). However, in the present case, neither party has provided the Court with a copy of the entire agreement. On that basis alone, defendant's motion for summary judgment must be denied.

A covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Id.* (citing *Post v. Murphy,* 125 Idaho 473, 475, 873 P.2d 118, 120 (1994)). "Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used." *Id.* (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)). "Where there is no ambiguity, there is no room for construction; the plain meaning governs." *Id*. (quoting

Post, 125 Idaho at 475, 873 P.2d at 120). If the court determines that a covenant is unambiguous, then it must apply it as a matter of law. *Id.* (citing *City of Chubbuck v. City of Pocatello,* 127 Idaho 198, 201, 899 P.2d 411, 414 (1995)).

However, if a covenant is ambiguous, its interpretation is a question of fact. *Id*. When interpreting an ambiguous covenant, the Court must determine the intent of the parties at the time the agreement was drafted. *Id.* (citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). To determine the intent of the drafters, the Court looks to "the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties." *Id.*(quoting citing *Brown,* 129 Idaho at 193, 923 P.2d at 438). If a covenant is ambiguous, summary judgment is improper. *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007)

Here, the Court was only provided one page from the CC&Rs. The relevant sections from that page of the CC&Rs provides:

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> 9.1.2 Liability Insurance. A comprehensive general liability insurance policy covering all Common Area, public way and other areas that are under the supervision of the Association, and any commercial spaces that are owned by the Association, even if leased to third parties. The liability policy shall provide coverage of at least $5,000,000 for bodily injury and property damage for any single occurrence, covering bodily injury and property damage resulting from the operation, maintenance or use of the Common Area.
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> ***
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> 9.3 Waiver of Claims Against Association.
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> As to all policies of insurance maintained by or for the benefit of the Association and the Owners, the Association and the Owners hereby waive and release all claims against one another, the Board of Managers, to the extent of the insurance proceeds available, whether or not the insurable damage or injury is caused by the negligence of or breach of any agreement by any of said persons.
>
> 9.4 Right and Duty of Owners to Insure.
>
> **It is the responsibility of each Owner to provide adequate insurance on his personal property and upon all other property and improvements within his Unit.** Nothing hereby shall preclude any

> Owner from carrying any public liability insurance as he deems desirable to cover his individual liability for damage to persons or property occurring inside his individual Unit of elsewhere upon the Property. **Such policies shall not adversely affect or diminish any liability under any insurance obtained by or on behalf of the Association**, and duplicate copies of such other policies shall be deposited with the Board upon request. If any loss intended to be covered by insurance carried by or on behalf of the Association shall occur and the proceeds payable thereunder shall be reduced by reason of insurance carried by any Owner, such owner shall assign the proceeds of such insurance carried by him to the Association to the extent of such reduction, for application by the Board to the same purpose as the reduced proceeds are to be applied.

Affidavit of Michael L. Haman In Support of Defendant's Motion for Summary Judgment, Exhibit B (underline in original, bold added). The first sentence of paragraph 9.1.2 is not a complete sentence. Were it read in context of the entire policy, it might possibly make sense. But as presented by the Association at this time, it is incomplete.

The remaining language of the covenants that has been provided to the Court seems unambiguous, but again, viewed without context. While the parties seem to focus on the insurance coverage policy of the owner, disregarding the insurance coverage required of the Association, section 9.3 does not limit the waiver of claims against the Association to instances where an owner has an insurance policy for the benefit of the Association. Rather, the relevant language provides for waiver "As to <u>all policies</u> of insurance maintained by or for the benefit of the Association and the Owners…". Affidavit of Michael L. Haman In Support of Defendant's Motion for Summary Judgment, Exhibit B, p. 16 ¶ 9.3 (emphasis added). Section 9.1.2 of the CC&Rs requires the Association to have at least $5,000,000 in liability insurance to cover, among other things, property damage resulting from the maintenance of the common area. There is no evidence before this Court of any insurance policy maintained by the Association. To the extent that a policy was maintained by the Association "covering bodily injury and property damage resulting from the operation,

maintenance or use of the Common Area", that would be for the benefit of the homeowners. If such policy exists, the Estate's claim would be waived under § 9.3.

However, at the present time there is no evidence of any policy maintained by the Association before the Court. The only insurance policy provided to this Court as evidence is the Estate's policy that covered Unit 716. Declaration of Sidney N. Smith in Opposition to Defendant's Motion for Summary Judgment, Exhibit 1. This policy only benefits the owner of unit 716, not the Association. *Id.* As such, § 9.3 of the CC&Rs is not applicable to this case. Under the terms of the CC&Rs, presented in incomplete form to the Court at present, there is no language requiring the Estate to have insurance coverage for the benefit of the Association. And, even if that evidence was before the Court, it would not make § 9.3 applicable.

Based on the evidence presented, § 9.3 of the CC&Rs is inapplicable to the instant action at this time and the Association's request for summary judgment based on that provision is denied.

B. The Association is Not Entitled to Summary Judgment on its Theory of Causation (as a Defense to the Estate's Claim of Breach of Fiduciary Duty).

Relying on the theory of negligence, (as pertains to the Estate's claim of breach of fiduciary duty by the Association, the Estate's first cause of action), the Association makes the following argument: "At issue for the purposes of this Motion is whether the Association's alleged conduct was the *proximate cause of the Plaintiff's claimed damages*, if any." Defendant's Memorandum in Support of Motion for Summary Judgment, p. 7 (emphasis in original). The Association claims there is no evidence "that the Association's failure to repair the subject sewer line, as opposed to merely removing the clog, resulted in damages, i.e., the loss of potential rental income, from July, 2012, through December, 2012." *Id.*, p. 6. Because the Association removed the

clog on July 3, 2012, it argues "the Unit was in the same habitable condition it had been since its construction in the mid-1980s." *Id.*, pp. 7-8. The Association claims that since the Personal Representative's nephew occupied the unit from late August through September 2012, and since the Personal Representative failed to advertise the availability of the Unit until December 2012, two and a half months after the sewer pipe was fixed, and because the Personal Representative only received one inquiry about the availability of the Unit between July 2012 and December 2012, there is no evidence before the Court that demonstrates any conduct by the Association caused loss of rental income to the plaintiff. *Id.*, p. 8. Finally, the Association argues "[e]ven if there was a breach of a duty in failing to have a proper sewer line, that did not cause lost rental income since the Unit remained for the most part vacant because of other, unknown reasons." *Id.*, pp. 8-9. The Association does not cite to any exhibits or affidavits to support its claims.

In response, the Estate argues that the Association's failure to repair the sewer line caused damage to the plaintiff because, pursuant to Idaho Code and the Guidelines issued by the Idaho Attorney General, he was unable to lease the Unit such an uninhabitable condition. Objection to Defendant's Motion for Summary Judgment, p. 6. Specifically, the Estate maintains the Idaho Code and the Guidelines issued by the Idaho Attorney General require a landlord to provide a tenant with a habitable residence, which includes a working sewer system. *Id.* However, despite the clog being removed on July 3, 2012, "[t]he slope in the sewer line created a situation where the line would clog under normal use." *Id.* The Estate maintains that since the sewer was prone to clog, the Estate was unable to lease the Unit until the sewer was repaired. *Id.* Moreover, while the decedent's nephew resided in the Unit from late August to

September 2012, the Estate claims the nephew was told not to use the subject bathroom, a condition the Estate argues would be unacceptable to future tenants. *Id.*, p. 7. Finally, the Estate contends that once it "was provided with reasonable assurance that the sewer line was fixed, [after October 19, 2012,] the Unit was listed for rent." *Id.* The Estate does not cite to any specific evidence or affidavits to support its claims.

The Estate initiated this lawsuit claiming damages to the estate caused by the Association's breach of fiduciary duty and breach of the CC&Rs. In the Complaint the Estate claims the Association breached the fiduciary duty to the Estate and breached the CC&Rs by refusing and failing to repair the sewer line when it was demanded. Complaint, p. 6 ¶¶ 7.2, 8.3. At no place in the Complaint does the Estate state a cause of action for negligence. There is no allegation that the repairs, once completed, were negligently performed. It is unclear in briefing why the Association seeks summary judgment in this case under the theory of negligence. At oral argument, counsel for the Association stated that negligence is alleged as part of the breach of fiduciary duty.

The Association correctly notes that "…while questions of negligence are ordinarily factual issues, a court may make a determination as a matter of law when the undisputed evidence leads to only one reasonable conclusion." Defendant's Memorandum in Support of Motion for Summary Judgment, p. 7, citing *Leavitt v. Swain*, 131 Idaho 765, 963 P.2d 1202, 1205 (Ct.App. 1998). The Association then argues the clog was removed on July 3, 2012, and thereafter was in the same habitable condition it was in from the building's construction in the mid-1980's. *Id.,* pp. 7-8. The Association then claims the Estate relies solely on speculation that it lost rent due to the plumbing issue. Defendant's Reply to Plaintiff's Objection to Defendant's Motion for Summary Judgment, pp. 7-8. The Estate claims even after the clog was removed on July 3, 2012, the problem was not fixed, due to the sewer line not sloping enough. Objection

to Defendant's Motion for Summary Judgment, p. 6. The sewer line was completely fixed on September 19, 2012, and the Estate claims that during that period it was prudent for the Estate not to lease the unit. *Id.,* pp. 6-7. The Court finds there is an issue of fact to be resolved by the jury as to the Estate's actions in not leasing the unit during the time where the sewer would back up into and out of the shower drain.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court denies defendant's Motion for Summary Judgment in its entirety.

IT IS HEREBY ORDERED defendant's Motion for Summary Judgment is DENIED.

Entered this 29th day of October, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Peter J. Smith, IV / Lindsey Simon	667-4125	Michael L. Haman	676-1683

_____
Jeanne Clausen, Deputy Clerk