

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**

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 RECONSIDERATION**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

On September 29, 2014, this Court filed its Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment. On November 4, 2014, defendant Coeur d'Alene North Homeowner's Association, Inc. (Association) filed "Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment" (which was a motion and memorandum combined), and "Affidavit of Michael L. Haman in Support of Defendant's Motion to Reconsider." On November 12, 2014, plaintiff Sidney N. Smith, the Personal Representative of the Estate of Sidney E. Smith ("the Estate"), filed "Objection to Defendant's Motion for Reconsideration." On November 18, 2014, the Association filed "Defendant's Reply to Plaintiff's Objection to Defendant's Motion to Reconsider." On November 19, 2014, oral argument was held on the Association's Motion to Reconsider. At the conclusion of that hearing, the Court took the motion under advisement.

The Association's motion to reconsider is based on its argument that the Estate has waived the Estate's claims against the Association under Section 9 of the CC&R's, because each party carried "proper insurance such that the parties waived all rights against each other." Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment, p. 2.

The following factual summary is taken from this Court's September 29, 2014, Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment:

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, L. 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.

Memorandum Decision and Order Denying Defendant’s Motion for Summary Judgment, pp. 1-3. In analyzing the Association’s “waiver” argument on summary judgment, this Court wrote:

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 *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:

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.

9.3 Waiver of Claims Against Association.

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 all policies 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.

Memorandum Decision and Order Denying Defendant’s Motion for Summary Judgment, pp. 5-9. In its motion to reconsider, the Association discusses its insurance policy. Defendant’s Motion to Reconsider Court’s Memorandum Decision and Order Denying Defendant’s Motion for Summary Judgment, pp. 3-4.

II. STANDARD OF REVIEW.

A decision to grant or deny a motion to reconsider is left to the sound discretion of the trial court. *Farmers National Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994).

III. ANALYSIS.

As mentioned above, the applicable waiver provision reads:

9.3 Waiver of Claims Against Association.

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.

Affidavit of Michael L. Haman In Support of Defendant's Motion for Summary

Judgment, Exhibit B. (*italics added*). The italicized portion shows that waiver only

applies if there are insurance proceeds available. It is up to the Association to come

forward with evidence to support its affirmative defense of waiver. It is beyond dispute

that up to this point the Association has provided no evidence that its insurer has paid

any amount of money to the Estate on the Estate's claim. Thus, there is no "proceeds

available" by the Association's insurer to the Estate. The Association cites

Intergovernmental Risk Management v. O'Donnell, 692 N.E.2d 739, 295 Ill. App. 3d 784

(Ill. 1st Dist. 1998). Defendant's Motion to Reconsider Court's Memorandum Decision

and Order Denying Defendant's Motion for Summary Judgment, p. 3. However,

counsel for the Association points out why that case cuts against its position on

reconsideration, writing, "The Village turned the matter over to its carrier,

Intergovernmental, which paid the loss. *Id.* at 786-789." *Id.* In the present case, at the

present time, the Association's insurance carrier has paid nothing.

The Association asks this court to ignore the language of the waiver clause

which reads, "...to the extent of the insurance proceeds available,..." and instead find

that waiver occurs merely because each party has an insurance policy. The

Association argues, "That is, since both parties had insurance that covered the same

loss, then under the CC&Rs both parties waived all rights and claims against each

other, and waived subrogation rights on behalf of their insurance carriers." *Id.*, p. 4.

There is simply no evidence that at this time the Association's insurance carrier has

made any proceeds available to the Estate. Thus, there is no waiver. Additionally,

since the Association discussed "subrogation", there is no evidence that the Estate's

insurance carrier has paid any monies to the Estate for the same damage, thus, there would be no subrogation that could be made by the Estate's carrier against the Association's carrier.

IV. CONCLUSION AND ORDER.

For the reasons set forth above, the Court denies Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment.

IT IS HEREBY ORDERED Defendant's Motion to Reconsider Court's Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment is DENIED.

Entered this 1st day of December, 2014.

John T. Mitchell, District Judge

Certificate of Service

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

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

Jeanne Clausen, Deputy Clerk