SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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Re: ***The Council of Unit Owners of Windswept Condo. Ass'n v. Schumm v. Ocean Atlantic Assocs. VII LLC***
C.A.No, S12C-08-011 RFS

Upon Defendant's Motion for Summary Judgment. **GRANTED.**

Submitted: October 10, 2013
Decided: November 20, 2013

Dear Counsel:

Before the Court is Defendant Robert Schumm's ("Schumm's") Motion for Summary Judgment, filed in this breach of contract action brought by Plaintiff The Council of Unit Owners of Windswept Condominium Associates (the "Council").

For the reasons set forth herein, Schumm's Motion is **GRANTED**.

FACTS

The facts, viewed in the light most favorable to the non-moving party, are as follows. Windswept Condominium ("Windswept") is a residential complex located at the Peninsula of the Indian River Bay in Millsboro, Delaware. Windswept consists of eleven buildings comprising 177 Units. Schumm is the owner of Windswept Unit 1202 ("Schumm's Unit") and has been since its construction in 2006. Like many of the residents at Windswept, Schumm is a "summer-weekender" whose primary residence is elsewhere.[1]

In June of 2010, lightning struck Building One of Windswept causing a destructive fire. The most significantly damaged Units were 1101 and 1201, with the floor having been burned out and caving in. Schumm's Unit was located on the second floor of Building One, next to Unit 1201 and above Unit 1101 and Unit 1102. Schumm's Unit sustained mostly smoke and soot damage. As a result, the carpeting, some drywall, two bathtubs and the master bathroom vanity were removed from Schumm's Unit.

The Council retained Royal Plus Fire & Restoration ("Royal Plus") to repair and reconstruct Building One. The Royal Plus renovation was led by project manager

[1] Banks Dep. at 23-24.

Michael Kohut ("Kohut"), who began reconstruction in late January or early February of 2011. At the commencement of the reconstruction, Kohut noticed water damage to the subfloor of Schumm's Unit. Subsequently, Windswept contacted Broadpoint Consulting Group ("Broadpoint"), which in turn brought in MacIntosh Engineering ("MacIntosh"), to conduct a site investigation to further evaluate the subfloor damage. Their investigation revealed approximately 900 square feet of severely damaged and delaminated AdvanTech, subflooring material. The Council received reports from MacIntosh and Broadpoint which recommended pressure testing all the existing plumbing from within Schumm's Unit and the floors above, including the fire suppression system, to determine the water and moisture source.

Subsequently, Kohut and Royal Plus plumber, John Tallent ("Tallent"), performed pressure testing within Schumm's Unit; however, the fire suppression system was unable to be tested. No leaks were detected in the water supply lines nor were any cracks found in the drain pipes. Additionally, there were no visible water stains evidencing water leakage. The existing piping from the floors above Schumm's Unit were not tested.

Furthermore, Royal Plus closely examined the plumbing within Schumm's Unit. Specifically, Schumm's master bathroom shower (the "shower") was investigated. Initially, the shower drain was tested and it was found not to leak. In

order to determine if the shower pan itself was cracked, the pan was filled with approximately one-and-a-half inches of water with the drain plugged. It showed no signs of a leak. With the water still in the pan, Kohut proceeded to stand in the shower pan in an attempt to mimic a person taking a shower. Once again, the shower pan did not leak. Next, additional water was added to the shower pan and the water was purposely splashed onto the shower walls. Yet again, water did not leak. Finally, the shower pan was filled to the rim with water and the water was moved back and forth. As a result, water appeared to leak from beneath the shower pan. Ultimately, an inspection showed evidence of a hairline crack in the shower pan. The crack was located in what would have been the front left-hand corner of the shower pan, extending from near the top of the shower pan to within approximately one inch of the bottom of the shower pan. The cracked shower pan was deemed the cause of the water damage to Schumm's Unit and the Unit below.

Since Building One was open to the elements and time was of the essence, the Council retained Royal Plus under a separate contract to perform the repairs and renovations of Schumm's Unit and the Unit below. The cost of repairs amounted to $154,832.91. Meanwhile, the Council pursued insurance coverage for such repairs. Ultimately, coverage was denied pursuant to policy language "excluding water

damage that occurs over a period of 14 days or more."[2] Subsequently, Schumm received an invoice from Windswept in the amount of $154,832.91 (the "Assessment") with the description, "Reimbursement for Sub-floor Claim to Windswept" with a due date of November 3, 2011. Schumm refused to reimburse Windswept.

Consequently, on August 9, 2012, the Council filed a complaint against Schumm claiming breach of contract and seeking reimbursement for the costs incurred to repair Schumm's Unit and the Unit below. Schumm filed a Third-Party Claim against developer Ocean Atlantic Associates, VII, LLC ("Ocean Atlantic") on September 19, 2012. On August 20, 2013, Schumm moved for summary judgment pursuant to Superior Court Rule of Civil Procedure 56. On September 19, 2013, Ocean Atlantic responded to Schumm's Motion adopting Schumm's arguments in support of summary judgment, but denying liability.

CONTENTIONS OF THE PARTIES

Despite vigorous briefing, the parties' contentions can be whittled down to one principal argument: whether the record supports a causal connection between Schumm's Unit and the water damage found within Schumm's Unit and the Unit below. For this reason, the parties' contentions have been narrowed to address this

[2] Def.'s Mot. for Summ. J. Appendix Exhibit N .

particular issue.

A. Schumm

Schumm maintains summary judgment is appropriate and must be granted because the Council failed to prove his shower pan leaked or identify that the source of alleged water originated from his Unit. In response to Council's claim that Schumm's faulty shower pan was the source of water, Schumm argues that "it has been proven time and again that the shower pan in fact did not leak."[3] Schumm begins by directing the Court to the deposition of Kohut, who was asked about the alleged leaking cracks:

> Q: Okay. So what then made you think it was a crack, you know, that the water came through a crack?
>
> A: I don't recall saying there was a crack.
>
> Q: Okay, maybe I misunderstood something.
>
> A: No, earlier I had mentioned a crack where we had thought, and that's why I stood in the tub.
>
> Q: Okay. So you stood in the tub, and I don't want to put words in your mouth so correct me if I'm wrong –
>
> A: Okay.
>
> Q: – you stood in the tub just to see in case there was a hairline crack that you couldn't see, with an inch-and-a-half of water filled up

[3] Def.'s Mot. for Summ. J.

in the shower, if there was a crack that you couldn't see, if water would come out of it?

A: Yes.

Q: And nothing did?

A: Nothing did.[4]

Furthermore, Schumm claims that the Council's expert, Mark T. Kilgore, P.E. ("Kilgore") has not stated that the hairline crack found in the shower pan would have been able to cause the extensive damage that was discovered.[5] Additionally, Schumm's experts Daniel J. Dauphin, P.E. ("Dauphin") and Daniel M. Honig, P.E. ("Honig") have established that the shower pan did not leak.[6] This fact is not disputed by Kilgore.[7]

Second, Schumm claims that if the faulty shower pan had been the source of water, as alleged, then there would have been staining or subfloor damage present below the shower pan upon its removal.[8] Accordingly, Kohut testified that "there would have definitely been some water stain somewhere if there was a leak going

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[4] Kohut Dep. at 72-73.

[5] Def.'s Reply to Pl.'s Resp.

[6] Dauphin Report at 2; Honig Report at 24 (Def.'s Mot. for Summ. J. Appendix Exhibits S, T). In an off-site 23 hour water test performed by Dauphin, the shower pan did not leak.

[7] Def.'s Reply to Pl.'s Resp.

[8] Def.'s Mot. for Summ. J.

on," yet there were no water stains.[9] Kilgore agreed with Kohut that had the shower pan been the source of the water, water damage and stains would have been evident on the subfloor beneath the shower pan.[10]

Third, Schumm contends that Royal Plus inspected his Unit for leaks and found no evidence of leaks elsewhere:

> Q: All right, so that was just a visual inspection because that was basically all you could do?
>
> A: That's right.
>
> Q: And you didn't see anything that you felt–
>
> A: No.
>
> Q: – indicated that–
>
> A: There was a leak going on, correct, no, we did not.
>
> Q: Okay. Would you necessarily see it, I mean is that something that would always be present?
>
> A: Yeah, especially to the extent of the damage to that floor, there would have definitely been some water stain somewhere.
>
> Q: Okay.
>
> A: You know, there would have been something evident.

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[9] *Id.* (citing to Kohut Dep. at 47).

[10] *Id.* (citing to Kilgore Dep. at 78).

Q: Okay.

A: Now, if a drain was leaking, a toilet was, you know, leaking or – there would be water stains.

Q: Like in the framing, you're saying?

A: On the framing, on the subfloor, you would have seen.[11]

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Q: So at that point, were you satisfied that you had determined what caused all that subfloor damage?

A: I wasn't out to find out what caused it; it was to find out if– we were called out to see if there was a leak in the pipes that may have caused the subfloor damage.

Q: Okay.

A: And that's the only thing we found. I mean and that's about as far as we could do test-wise or, you know, plumbing wise.

Q: Okay. So when Royal Plus notified Wilgus we think the shower pan has a leak, and I'm paraphrasing, you weren't telling them we think the shower is what caused this damage?[12]

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A: Yeah, I think that, you know, we were there, looking for a leak. You know, and that leak, what we found in the tub was the only thing that we found that day that leaked.[13]

Schumm contends that the damage to his Unit and the Unit below was not

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[11] *Id.*

[12] *Id.* (citing to Kohut Dep. at 75).

[13] *Id.*

caused by an unknown water source originating from his Unit, but rather was likely caused by the excessive amount of water used to suppress the fire in June of 2010.[14] Schumm's Unit is located above and adjacent to Units 1101 and 1201, the two Units that were most significantly damaged by the fire.[15] Specifically, a portion of the floor from Unit 1201 collapsed into Unit 1101, the Unit directly below.[16] In support of this contention, Schumm's engineering expert Honig opined:

> The significant amount of water that had to have been present to damage such an extensive area of sheathing could only have come from exposure to an excessive amount of water. During the June fire event, immense amounts of water were applied to the building, including to the adjacent Unit 1201. The severely damaged floor of Unit 1201 would have allowed water to reach the composite sheathing in its subfloor. Once the water infiltrated the subfloor, wicking would allow the water to travel and settle into any lower areas, with the Acoustiblok membrane effectively holding the water against the sheathing. The months between the June fire event and the February Royal Plus inspection provided long-term, unremediated exposure sufficient to cause the extensive, sever delamination of the composite floor sheathing.[17]

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[14] Def.'s Reply to Pl.'s Resp.

[15] *Id.*

[16] *Id.*

[17] Honig Report at 24 (Def.'s Mot. for Summ. J. Appendix Exhibit T).

B. The Council

The Council claims summary judgment must be denied because the water originated from within Schumm's Unit and there is a factual issue as to the water source.[18] Therefore, it is the Council's contention that Schumm is responsible for the costs incurred to repair the damaged and destroyed subfloor to Schumm's Unit and the damage below Schumm's Unit ("Structural Damage").[19] The Council asserts that the source of water that caused the Structural Damage was the result of either a leak arising from Schumm's faulty shower pan or an unknown water source originating from within Schumm's Unit.[20]

It is the Council's belief that Schumm failed to properly maintain the fixtures within his Unit and, as a result, a leak developed causing severe Structural Damage.[21] The Council retained Kilgore to provide an expert opinion as to the water source that resulted in such extensive Structural Damage. Kilgore concluded the following:

> 3. Long-term dripping of water from the shower door onto the tile and grout could have contributed to the damage to the floor decking material/substrate located in the vicinity of the shower compartment;

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[18] Pl.'s Reply to Def.'s Mot. for Summ. J.

[19] Pl.'s Comp.

[20] Pl.'s Comp.; Pl.'s Reply to Def.'s Mot. for Summ. J.

[21] *Id.*

4. Failure of caulking in-place along the juncture of the shower compartment door and frame would contribute to damage in the vicinity of the shower compartment due to long-term, undeterred flow of shower compartment water;

5. The damage that was observed in unit 1202 was completely confined to the area immediately underneath the master bathroom, laundry room, utility room, and second bathroom.... The water that caused the structural damage originated within unit 1202.[22]

Therefore, it is the Council's contention that "... if damage originates from a Unit, that Unit owner is responsible for all such damage because it is not equitable to apply that burden to other Unit Owners that were not at all related to the issue."[23]

To support their claim that Schumm remains responsible for the costs incurred, the Council turns to the Declaration Establishing A Plan for Condominium Ownership of Premises Situate in Indian River Hundred, Sussex County, Delaware, Pursuant to the Unit Property Act of the State of Delaware of Windswept Condominium (the "Declaration") and the Code of Regulations for Windswept Condominium (the "Code of Regulations")(together, the "Condominium Documents"). The Council alleges the following are parts of the Unit "... all sinks, baths, or other plumbing or heating or cooling facilities, located within or without the

[22] Kilgore Report at 6 (Pl.'s Reply to Def.'s Mot. for Summ. J. Appendix Exhibit E).

[23] Pl.'s Reply to Def.'s Mot. for Summ. J. at 13-14.

Unit but solely serving the Unit.... The plumbing and water lines serving each Unit commencing at the collector from the main lines serving each Unit."[24] Furthermore, the Code of Regulations provides that a Unit Owner is responsible for the maintenance, repair and replacement of portions of his Unit, including the plumbing, lines and fixtures.[25] The Code of Regulations further provides that a Unit Owner is under an obligation to keep his Unit in good order, condition, and repair.[26] Lastly, the Council cites to Article V, Section 5(b) of the Code of Regulations which allows the Council to hold each Unit Owner responsible for all damages to any and all other Units or to the Common Elements resulting from his failure to make repairs required to be made by him.[27]

Finally, the Council claims that pursuant to the Code of Regulations, "failure of a Unit Owner to comply with any term of the Condominium Documents entitles the Council to, *inter alia*, institute legal action to recover the sums due."[28] The Council claims that Schumm's refusal to pay the Assessment constitutes a breach of the Condominium Documents, for which the Council has been damaged in the

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[24] Pl.'s Comp. (citing to the Declaration at 7(a)).

[25] *Id.*

[26] *Id.* (citing to the Code of Regulations Article V, Section 5(b)).

[27] *Id.*

[28] Pl.'s Comp. (citing to the Code of Regulations Article X, Section 1(a)).

amount of $154,832.91, which amount the Council asserts they are now entitled to recover.[29]

STANDARD OF REVIEW

This Court may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[30] However, a motion for summary judgment should not be granted when material issues of fact are in dispute or if the record lacks the information necessary to determine the application of the law to the facts.[31] A dispute about a material fact is genuine "when the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[32] Therefore, the issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[33]

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[29] *Id.*

[30] Super. Ct. Civ. R. 56(c)

[31] *Bernal v. Feliciano*, 2013 WL 1871756, at *2 (Del. Super. May 1, 2013) (*citing Ebersole v. Lowengrub*, 180 A.2d 467, 468 (Del. 1962)).

[32] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 243 (1986).

[33] *Id.*

Although the moving party for summary judgment initially bears the burden of demonstrating that the undisputed facts support his legal claims, once the movant makes this showing, the burden "shifts" to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[34] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.[35]

DISCUSSION

The parties have advanced numerous arguments in support of their positions. However, the Court has narrowed those arguments down to one principal issue: does the record support the Council's claim that the Structural Damage was the result of Schumm's faulty shower pan.

Until now, the case has proceeded on the theory that the Structural Damage was attributable to Schumm's faulty shower pan. To begin, the Council's Complaint alleged the following: "On February 28, 2011, Royal Plus conducted pressure testing, as recommenced, and *discovered a leak in the shower pan of Unit 1202, which leak*

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[34] *Hughes ex rel. Hughes v. Christina Sch. Dist.,* 2008 WL 73710, at *2 (Del. Super. Jan. 7, 2008) *(citing Storm v. NSL Rockland Place, LLC,* 898 A.2d 874, 879-80 (Del. Super. 2005))

[35] *Joseph v. Jamesway Corp.,* 1997 WL 524126, at *1 (Del. Super. July 9, 1997) (*citing Billops v. Magness Const. Co.,* 391 A.2d 196, 197 (Del. Super. 1978)).

was the source of the water which caused the Structural Damage."[36] Furthermore, Royal Plus plumbing administrator, Cheryl Hoggenmiller ("Hoggenmiller"), drafted a letter to the Council claiming they had discovered a crack in Schumm's shower pan and when filled with water "it started to leak in the front corners where the pan was cracked."[37] In addition, Julie Banks ("Banks"), the Association Manager for Wilgus Associates, Inc., communicated with Schumm via email and explained "the source of leak happens to be a leak in the corner of your shower pan."[38] Weeks later, Banks sent Schumm a second email stating, "...the [Royal Plus] team discovered a failure in the subfloor in unit 1202 that was later determined by an independent engineer to be caused by a crack in the corner of the master bath shower pan."[39] Although the Council would disagree now, the record contains substantial evidence that the Council's theory on causation was in fact centered around Schumm's faulty shower pan.

However, in response to Schumm's Motion for Summary Judgment the Council provided an alternative theory and alleged generally that the Structural Damage was

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[36] Pl.'s Comp. (Emphasis added).

[37] Def.'s Mot. for Summ. J. Appendix Exhibit G.

[38] *Id*. Appendix Exhibit K.

[39] *Id.* Appendix Exhibit L.

the result of a water source originating from within Schumm's Unit. Yet, the record provides for just the opposite. During the deposition of Kohut, he claimed that the *only* leak discovered during the investigation was the one emanating from Schumm's shower pan.[40] The Council appears to claim that an untested pipe within Schumm's Unit *could* have leaked causing the damage, yet fails to identify the source of that leak. Additionally, expert Kilgore has provided a report for which he concludes that the water that caused the Structural Damage originated from within Unit 1202 (Schumm's Unit); however, his conclusion is couched in terms such as "could have" and "possibly."[41] To illustrate, when Kilgore was questioned regarding his opinion concerning the source of the water, he stated:

> A: From the evidence that I've seen, it appears that it *could* have been originating from the shower pan.
>
> Q: Could have been?
>
> A: It could have been.
>
> Q: Okay. And it could have been originating from somewhere else?
>
> A: That's a possibility.[42]

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[40] *Id.* (citing to Kohut Dep. at 75) (Emphasis added).

[41] Pl.'s Reply to Def.'s Mot. for Summ. J. Appendix Exhibit E at 6 ("Long-term dripping of water from the shower door onto the tile and grout *could* have contributed to the damage to the floor decking material/substrate located in the vicinity of the shower compartment.").

[42] Def.'s Mot. for Summ. J. (citing to Kilgore Dep. at 35) (Emphasis added).

An expert's testimony must be based on probability not on possibility, that is no better than mere conjecture.[43] The Council has not only failed to provide the Court with expert testimony that is based on something more than speculation and conjecture, but has failed to provide any record evidence or causation testimony of an alleged water leak in Schumm's Unit. It is clear that the Council seeks to expand their theory on causation to now include an *unknown water source* for the specific purpose of giving fresh legs to a collapsing theory. Put another way, once Schumm disproved the Council's theory, the Council's ability to prove causation was put in jeopardy. Furthermore, the Council has failed to show good cause for adding a new theory to the case.

Lastly, in determining that the Council has failed to prove causation as to the extensive Structural Damage, the Court relies on the "physical facts rule" to conclude that the physical facts of this case positively contradict the Council's theory on causation. The "physical facts rule" stands for the proposition that "the testimony of witnesses which is positively contradicted by the established physical facts is of no probative value and a jury will not be permitted to rest a verdict there on."[44]

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[43] *Phillips v. Delaware Power & Light Co.*, 216 A.2d 281 (Del. 1977). (Summary judgment was granted when the plaintiff failed to show nothing more than mere possibility of causal connection).

[44] *Gen. Motors Corp. v. Dillon*, 367 A.2d 1020, 1024 (Del. 1976).

Additionally, the untruthfulness of testimony requiring a trial court to take a case from the jury under the "physical facts rule" must be (1) inherent in the rejected testimony, so that it contradicts itself, or (2) irreconcilable with facts which, under recognized rules, the court takes judicial notice, or (3) obviously inconsistent with or contradicted by undisputed physical facts.[45] For example, in *Scott v. Harris,* the United States Supreme Court held that the lower court erred by accepting an unbelievable version of facts to defeat a summary judgment motion.[46] Furthermore, this Court has previously interpreted the *Scott* decision to hold that "a court should not allow absurd or **fanciful** speculations to defeat a summary judgment motion."[47]

In the case at bar, the physical facts are in direct conflict with the Council's theory on causation. To begin, during his deposition, Kohut was given a floor plan of Schumm's Unit and asked to mark the subfloor that had been damaged.[48] The most extensive damage was identified in the areas beneath the kitchen, dining room and

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[45] 29A Am. Jur. 2d Evidence §1376 (2013).

[46] *Scott v. Harris,* 550 U.S. 372, 380 (2007). ("The record in this case includes a videotape capturing the events in question. Where, as here, the record blatantly contradicts the plaintiff's version of events so that no reasonable jury could believe it, a court should not adopt that version of facts for purposes of ruling on a summary judgment motion.").

[47] *Turner v. Ass'n of Owners of Bethany Seaview Condo.,* 2013 WL 1861930, at *3 (Del. Super. Apr. 26, 2013).

[48] Def.'s Mot. for Summ. J. (citing to Kohut Dep. at 47-48, 52); (Appendix Exhibit H).

hallway, where the subfloor was completely destroyed.[49] Kohut did not identify the subfloor of the master bathroom. Furthermore, when the shower pan was removed the subfloor underneath was found to be "in decent shape."[50] Similarly, the subfloor beneath the master bathtub, which was to the right of the shower, and the subfloor beneath the toilet, was "undamaged."[51] Kohut testified that there would have definitely been some water stain somewhere if there was a leak going on, especially to the extent of the damage to the floor.[52] However, there was no evidence of water stains. Likewise, Kilgore accepted Kohut's testimony that there was no water staining discovered beneath the shower pan.[53] Significantly, Kilgore agrees that had the shower pan been the source of water, there would have been evidence of water damage or stains on the subfloor located in the master bathroom.[54] Therefore, the Council's own expert accepts the proposition that if there was no staining, then there was no leak.[55] Lastly, Schumm's expert Honig opined that "had the shower pan been

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[49] Def.'s Mot. For Summ. J.

[50] *Id.* (citing to Kohut Dep. at 8).

[51] *Id.* at 54-55.

[52] *Id.* at 47.

[53] *Id.* (citing to Kilgore Dep. at 77-78).

[54] *Id.* at 68 .

[55] *Id.* at 69.

the source of the extensive and widespread sheathing, [as alleged,] the subfloor below the shower pan would have at minimum displayed significant, observable water staining."[56] In conclusion, the physical facts of this case are so clear that they ultimately contradict the Council's theory on causation and the Council cannot defeat a motion for summary judgment.

Finally, the parties have requested the Court to award the prevailing party with reasonable attorneys' fees. We begin with the principle that "under the American Rule, prevailing litigants bear the responsibility of paying their own attorney's fees."[57] However, certain exceptions will shift the fee, such as a statute, contract or an equitable doctrine.[58] In the case *sub judice*, the Code of Regulations specifically provides, "In any proceeding arising out of any alleged default by a Unit Owner, the prevailing party shall be entitled to recover the costs of the proceedings, and such reasonable attorneys' fees as may be determined by the Court."[59] Therefore, the

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[56] Honig Report at 19 (Def.'s Mot. for Summ. J. Appendix Exhibit T).

[57] *Nat'l Grange Mut. Ins. Co. v. Elegant Slumming, Inc.,* 59 A.3d. 928, 933 (Del. 2013) (*citing to Goodrich v. E.F. Hutton Group, Inc.,* 681 A.2d 1039, 1044 (Del. 1966).

[58] *Id.*; *Thomas v. Marta*, 1990 Wl 35292, at *2 (Del. Super. Mar. 27, 1990) (*citing Casson v. Nationwide Ins. Co.*, 455 A.2d 361 (Del. Super. 1982).

[59] Def.'s Mot. for Summ. J. (citing to the Code of Regulations Article X, Section 1(c); *Freibott v. Miller*, 2012 WL 6850450, at *1 (Del. Super. Nov. 2, 2012). ("The Indian Harbor documents, dated August 1985, include the Declaration and the Code of Regulations.... These documents form an ordinary contract....").

In the case at bar, the Condominium Documents create an ordinary contract.

burden appropriately shifts. Upon providing the Court with an affidavit in support of attorneys' fees, Schumm shall receive reasonable attorneys' fees.

CONCLUSION

Based on the aforementioned, Schumm's Motion for Summary Judgment is **GRANTED** and the Third-Party Claim against Ocean Atlantic is thereby dismissed.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary

Judicial Case Manager