

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS)
FOR THE TENTH JUDICIAL CIRCUIT)

C.A. No. 2019-CP-04-1942)

Natalie Zitek, individually, and on behalf of all)
others similarly situated,)

Plaintiff,)

vs.)

D.R. Horton, Inc., Jane Doe #1-10; and, John)
Doe #1-50,)

Defendant,)

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Sep 06 2023

SC Court of Appeals

D.R HORTON, INC.,)

Third-Party Plaintiff,)

vs.)

AJ LANDSCAPING & GRADING LLC,)
A/K/A AJ LANDSCAPNG & GRADING,)
INC; ALLPRO TEXTURES, LCC; ALPHA)
OMEGA CONSTRUCTION GROUP, INC.;)
AMERICAN CONCRETE AND PRECAST, INC.,)
A/K/A ACP CONCRETE, INC.; A&J FRAMING,)
INC; ALPHA E.M.C; A-Z, INC.; ATLANTA)
FLOOR DESIGNS CENTER; A GRADE ABOVE)
OTHERS, LLC; BRAND-VAUGHAN LUMBER)
CO., INC.; BKF BUILDERS, INC; BUILDERS)
DESIGNHOUSE, LLC; BMC EAST, LLC D/B/A)
COLEMAN FLOOR, LLC; BUILDERS)
FIRSTSOURCE SOUTHEAST GROUP, LLC,)
A/K/A BUILDERS FIRSTSOURCE, INC;)
BRAVO CARPENTERS, INC.; CARYL)
MECHANICS II, INC.; CARYL MECHANICALS,)
INC.; CANNADAY SIDING AND GUTTER, INC;))
CORTES PAINTING, LLC; CBU ENTERPRISES,)
INC.; CPI SECURITY SYSTEMS, INC.; DOM)
GROUP, LLC; FERGUSON ENTERPRISES, INC.)
;FIVE STAR CONSTRUCTION INC.; FIVE)
STAR FOUNDATIONS, LLC; GALLOWAY-)
BELL, INC.; A/K/A GALLOWAY-BELL, INC. II)
BGET FLOORED, LLC; GBS BUILDING)
SUPPLY-US LBM, LLC, A/K/A GBS)

**AMENDED
SCHEDULING ORDER**

The Defendant's Motion for a Protective Order

This motion surrounds a controversy that arose during the depositions of Jeremy Young and Brian Waddell, two former employees of the Defendant. These individuals apparently retained Mr. Imhoff at some point prior to their depositions. Plaintiff's Counsel attempted to question the witnesses about the details surrounding their retainment of Mr. Imhoff. Mr. Imhoff objected to the questioning on the grounds that it violates attorney-client privilege. Should this issue remain unresolved, each witness shall submit an affidavit to the Court for *in camera* review. The Court will then rule on this motion.

The Plaintiff's Motion to Compel

The Plaintiff filed several motions to compel, all of which were resolved prior to the hearing except one. The Plaintiff served interrogatories and requests for production on Alpha E.M.C. in August of 2021 and has received no response. Accordingly, the Plaintiff's Motion to Compel is GRANTED. Third-Party Defendant Alpha E.M.C. shall provide complete discovery responses within **fifteen (15)** days from the date of this Order. Another motion was filed pertaining to Third-Party Defendant Five Star Foundations. No discovery responses were filed by this Third-Party Defendant due to the Court being informed at the September hearing that they would be dismissed from the suit. The formal Order has not been executed at this point, so Five Star Foundations is technically still a party to the suit. The Court declines to require Five Star Foundations to answer any discovery requests at this point. The Order dismissing them shall be submitted promptly. This issue may be revisited if Five Star Foundations ultimately is not dismissed.

Installed Building Products, LLC

Installed Building Products, LLC previously filed a Motion to Make A More Definite Statement, alleging that it cannot identify by reading the Third-Party Complaint the specific claims against it. This motion was before the Court at the September hearing, but was inadvertently left out of the November Order. Accordingly, the Court orders the Defendant/Third-Party Plaintiff to provide the following information to Installed Building Products, LLC a/k/a Installed Building Products II, LLC:

1. The products, services, or brands that were allegedly involved in the construction of the Plaintiff's residence.
2. Each particular contract(s) on which its claims are based.
3. The span of time during which the contract(s) was made, the work was performed, or the materials were provided.

The remaining motions have common elements, many being virtually identical. Therefore, the Court will address the contents of these motions by topic.

Inspections

The Court allowed inspections in its previous Order. Over 100 houses have been visibly inspected. There has been some destructive testing conducted, although this did not occur until the week of the hearing, with there being sharp disagreement over the source of the delay. The Court extended the deadline for inspections to February 28, 2023 by way of a Consent Order. The parties did reach an agreement as to the various aspects of destructive testing, although there was initial disagreement as to the terms.

Ultimately, the parties executed a written document entitled “Destructive Testing Agreement” on February 7, 2023. The Court notes that there is a provision in that agreement that allows the parties to submit any disputes regarding the agreement to the Court. The Plaintiff moves for a Protective Order addressing the inspections. The Plaintiff moves that further inspections be curtailed since approximately half of the houses in the subdivision have been inspected.

Multiple Third-Party Defendants raised the issue of inspections as they pertain to their work. Not all of the Third-Party Defendants performed work and/or provided services to each home, with some having a very limited involvement in the project. Counsel for these parties are concerned that their clients will not have the ability to conduct inspections on homes that were subject to their work.

Accordingly, the Court amends its previous Order as follows:

1. The Defendant shall be allowed to continue inspections as scheduled.
2. Further inspections, not to exceed **fifteen (15)** additional homes in the class shall be allowed.
3. The protocol, as executed by the parties in the prior testing shall be adopted by the Court, with any disputes regarding the destructive testing being referred to the Court.
4. Any Third-Party Defendant with fewer than **five (5)** houses on which they performed work and/or provided materials shall specify those houses by the end of business on **Tuesday, February 21, 2023**. The houses specified by the Third-Party Defendant shall be included in the larger inspection group if possible, provided that they have not been inspected previously.
5. If a Third-Party Defendant specifies houses that have not been included in the larger inspection group or previously inspected, that party shall be allowed to inspect **one (1)** of the non-included houses. If destructive testing is sought, then the protocol executed between the Plaintiff and Defendant as noted above shall be followed.
6. No house shall be subject to a second inspection.
7. The inspection deadline shall be extended to **Monday, March 6, 2023**.

Survey

The Defendant seeks court permission to send out a survey to homeowners in order to better frame the issues with each house and streamline the discovery process. A sample survey was presented, along with arguments from Counsel. The Plaintiff opposes the motion.

While the Court understands the reasoning behind the survey proposal, the discovery schedule is “tight,” as pointed out by Counsel at the hearing. Even with the Court’s modifications outlined below, adding a new element of discovery into the case at this stage is not warranted. Accordingly, the Defendant’s request to be allowed to send a survey to individual homeowners is **DENIED**. This does not prohibit the parties from sending a survey with consent. In that event, a Consent Order may be submitted modifying this provision.

Absent Class Member Depositions

The Defendant seeks an Order setting forth the number of absent class member depositions that may be taken. After considering the arguments of Counsel, the Court allows additional absent class depositions not to exceed **ten (10)**.

Deposition of Dr. Whitlock

The Plaintiff's expert has been deposed by Defense Counsel for five (5) days. The deposition has been recessed, with a new date being set for Third-Party Defendants to have the opportunity to depose him. There is much disagreement between Counsel as to what caused the lengthy deposition. The Plaintiff alleges that Defense Counsel asked repetitive questions, had no exhibits copied and ready to present to the witness for identification, and was generally unprepared to use digital exhibits. The Defendant alleges that the witness ignored a subpoena to bring his file to the deposition, would not answer questions without referring to a collection of over 1000 photographs and was generally disorganized. The Court makes no finding as to fault, but is concerned that this deposition has taken a week of time and still is not finished.

The parties shall resume the deposition of Dr. Whitlock, not to exceed **three (3) days**. The Defendant may continue to depose Dr. Whitlock inside this time period only after the scheduled Third-Party Defendants have concluded their questioning. To expedite the process, Dr. Whitlock shall bring his file to the deposition. To allow for efficient reference and review, any attorney planning to depose Dr. Whitlock shall bring physical copies of exhibits in their possession that they plan on using for questioning.

Discovery Timeline

The Court recognizes that a significant amount of work remains in order for this case to be ready for trial. While five months (the time between the November ruling and the April 1 deadline) normally would be ample time to complete discovery in a case that was over three years old at the time of the ruling, this case does have unique and complicated issues that will require some extra time. Accordingly, the Court extends the date in which discovery should be completed to **Monday, May 8, 2023**. The Court is mindful that the mediator is requesting that the parties' exhibits and other presentation information be submitted in advance.

Status Conference

The Court will hold a status conference during the April 17 term of Common Pleas in Anderson to address any lingering discovery issues. This hearing shall be held virtually.

Previous Order

Unless specifically modified in this Order, all provisions in the previous Order of this Court shall remain in full force and effect. Once the term information is obtained from Court Administration, the Court will schedule an **in-person** pre-trial hearing in which pre-trial motions may be heard, voir dire requests considered, and the Court's structural plan for the trial discussed.

AND IT IS SO ORDERED!

February 15, 2023

R. Scott Sprouse
Judge, Tenth Judicial Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit