STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION, Plaintiff, vs. HERITAGE COMMUNITIES, INC, A SOUTH CAROLINA CORPORATION; HERITAGE RIVERWALK, A SOUTH CAROLINA CORPORATION; BUILDSTAR CORPORATION, A SOUTH CAROLINA CORPORATION, RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME, RIVERWALK AT ARROWHEAD COUNTRY CLUB PROPERTY OWNERS ASSOCIATION, INC., A SOUTH CAROLINA CORPORATION, NATIONAL SURETY CORP., AND TONY L. POPE AND LYNN POPE, INDIVIDUALLY AND REPRESENTING AS A CLASS ALL UNIT OWNERS AT RIVERWALK AT ARROWHEAD COUNTRY CLUB HORIZONTAL PROPERTY REGIME Defendants.	)	Civil Action No. 2009-CP-26-10053

HARLEYSVILLE GROUP INSURANCE, A PENNSYLVANIA CORPORATION, Plaintiff, vs.	)	Civil Action No. 2009-CP-26-11862

HERITAGE COMMUNITIES, INC, A SOUTH CAROLINA CORPORATION; HERITAGE MAGNOLIA NORTH, INC., RIVERWALK, A SOUTH CAROLINA CORPORATION; BUILDSTAR CORPORATION, A SOUTH CAROLINA CORPORATION, MAGNOLIA NORTH HORIZONTAL PROPERTY REGIME, MAGNOLIA NORTH PROPERTY OWNERS ASSOCIATION, INC. A SOUTH CAROLINA CORPORATION AND NATIONAL SURETY CORP.,

Defendants.

Order denying leave to deposit funds pursuant to Rule 67.

This Motion to Deposit Funds under Rule 67, S.C.R.C.P. came before the Court March 28, 2017. The Motion was filed by Harleysville Group Insurance, a Pennsylvania Corporation ("Harleysville"). Harleysville is represented by Brian P. Crotty and Robert C. Calamari, of Nelson Mullins Riley and Scarborough, LLC. Appearing in opposition to this Motion is John P. Henry and Philip C. Thompson, of Thompson & Henry, P.A., who represent the judgment creditors: Riverwalk at Arrowhead Country Club Horizontal Property Regime, Riverwalk at Arrowhead Property Owners Association, Inc., Tony L. Pope and Lynn S. Pope, Individually and Representing as a Class all Unit Owners at Riverwalk at Arrowhead Country Club Horizontal Property Regime (hereinafter collectively "Riverwalk"), Magnolia North Horizontal Property Regime and Magnolia North Property Owners Association, Inc., (hereinafter collectively "Magnolia North"). Riverwalk and Magnolia North are collectively referred to as "judgment creditors". The attorneys were present at the hearing and each side was able to orally argue and submit memorandums of law for

review by the Court. After reviewing all relevant information and case law, I find the Motion to Deposit Funds in the court pursuant to South Carolina Rules of Civil Procedure, Rule 67 is **Denied**.

Background

On January 22, 2009, judgments were entered against Harleysville's insureds in the case of Riverwalk at Arrowhead Country Club Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2003-CP-26-7169 and Pope et al. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2005-CP-26-3289 ("Riverwalk Actions"), in the total amounts of Four Million Five Hundred Thousand Dollars ($4,500,000) and One Million Dollars ($1,000,000), respectively, for a total of Five Million Five Hundred Thousand ($5,500,000) in the Riverwalk Actions. The trial court in the Riverwalk Actions granted a set-off in the amount of One Million Twenty-Eight Thousand Eight Hundred Twenty-One and 69/100 Dollars ($1,028,821.69), resulting in the total judgments in the Riverwalk Actions becoming Four Million Four Hundred Seventy-One Thousand One Hundred Seventy-Eight and 31/100 dollars ($4,471,178.31).

On May 20, 2009, a judgment was entered against Harleysville's insureds in the case of Magnolia North Property Owners Association, Inc. v. Heritage Communities, Inc., Heritage Riverwalk, Inc. and Buildstar Corporation, C/A No. 2003-CP-26-3203) (Magnolia North Action") in the total amount of Eight Million Five Hundred Thousand dollars ($8,500,000). The trial court in the Magnolia North Action granted a set-off in the amount of $1,531,063.15, resulting in the total judgment in the Magnolia North Action becoming Six Million Nine Hundred Sixty-Eight Thousand Nine Hundred Thirty-Six and 85/100 dollars ($6,968,936.85).

After the verdicts were rendered in 2009, Harleysville brought the above captioned declaratory judgment actions to determine what part of the judgments in the underlying actions, if

any, were covered. The cases were consolidated and the declaratory judgment action was referred to the Honorable Judge John Milling, as special referee. On March 5, 2013, Judge Milling issued his Order finding Harleysville's coverage in the Riverwalk Actions was for only $3,044,449.43 of the judgment amounts, and that Harleysville's coverage in the Magnolia North Action was for only $3,766,954.00 of the judgment amount, but also finding that "time-on-risk" applied to the verdicts. This Order was appealed by all parties.

On January 11, 2017, in Opinion No. 27698, the South Carolina Supreme Court affirmed Judge Milling's Order judgment of $3,766,954.00 in the Magnolia North Action against Harleysville and modified the judgment in the Riverwalk Action against Harleysville to $2,922,338.54 (the "Judgment Sums"). Based on the final Orders of the trial court in these actions, as affirmed and modified by the Supreme Court, the responsibility for the judgments between Harleysville and its insureds in the underlying Riverwalk and Magnolia North Actions is as follows:

Riverwalk Actions Total Judgment	=	$4,471,178.31
Harleysville's responsibility	=	$2,922,338.54
Insured's responsibility	=	$1,548,839.77

Magnolia North Action Total Judgment	=	$6,968,936.85
Harleysville's responsibility	=	$3,766,954.00
Insured's responsibility	=	$3,201,982.85

Petitions for rehearing have been filed with the Supreme Court by both sides in the appeal, and they remain pending.

Statutory post-judgment interest began to accrue upon filing the judgments in 2009. (S.C. Code §34-31-20). Until filing this Motion, Harleysville has made no effort to stop the accrual of post-judgment interest, by either paying or offering to pay the judgement amount. It has been over eight (8) years since the first judgements were ordered in January 2009.

Harleysville now seeks leave of this Court to deposit the Judgment Sums ($2,922,338.54 in Riverwalk and $3,766,954.00 in Magnolia North) with the Horry County Clerk of Court pursuant to Rule 67 to prevent the further accrual of post-judgment interest. In addition to depositing these Judgment Sums, Harleysville states they will include in the deposit an amount sufficient to cover accrued post-judgment interest as of the date of the deposit. Counsel for the judgment creditors calculates the Judgment Sums with accrued post-judgment interest as of February 7, 2017, as being $6,327,377.88 in the Riverwalk Actions with post-judgment interest accruing $1,659.31 per day thereafter, and $8,804,839.88 in the Magnolia North Action with post-judgment interest accruing $2,529.52 per day thereafter. Defendants argued upon deposit, there would be a total remaining balance of Four Million Seven Hundred Fifty Thousand Eight Hundred Twenty-Two and 81/100 ($4,750,822.81) Dollars on the underlying judgments. This amount is the difference between the total judgement value and the portion that Harleysville is responsible for in the judgement, it is the amount the Supreme Court found is the Insured's responsibility.

Analysis

Rule 67

The South Carolina Supreme Court and the South Carolina Court of Appeals have addressed the use of Rule 67 to stop the accrual of interest on very few occasions. Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (1995); Manning v. Brandon Corp., 163 S.C. 178, 161 S.E.2d 405 (1931); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); Small

Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998); Renaissance Enterprises v. Ocean Resorts, 334 S.C. 324, 513 S.E.2d 617 (1999). Rule 67 of the South Carolina Rules of Civil Procedure provides that:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. Money paid into the court under this Rule shall be deposited as directed by the court in any bank or institution authorized to receive public funds, and shall be withdrawn only upon the check of the clerk of court in favor of the party to whom the order of the court directs.

Rule 67, SCRCP.

Under Rule 67, both the South Carolina Supreme Court and the South Carolina Court of Appeals have approved the practice of depositing judgment sums with the clerk of court as a means to prevent the continued accrual of post-judgment interest. *See, e.g.*, Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895 (S.C. 1995); Duval v. Heritage Life Ins. Co., 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000); Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d 884 (Ct. App. 1998).

Allowing post-judgment interest to be cut off upon deposit with the court of the judgment sums and accrued post-judgment interest "encourages the debtor to pay the judgment and assures the judgment creditor the funds will be available at the conclusion of the appeal." Russo v. Sutton, 317 S.C. 441, 444, 454 S.E.2d 895, 896 (S.C. 1995). Once the judgment sums and accrued post-judgment interest have been deposited into the Court, the judgment creditors will be assured that sufficient funds will be available for the satisfaction of the judgments against Harleysville and there would be no need for supplementary proceedings or an execution on the judgment. Additionally, Harleysville would be deprived of the use of such funds.

However, the cases listed above are distinguishable from the present case because none involved an insurance policy. Additionally, the Courts have made it clear that Rule 67 cannot be

used to alter or affect the contractual or legal relations of the parties, including contractual provisions regarding the payment of interest. Renaissance, *supra*. (There is nothing in Rule 67 indicating that a deposit in Court will affect the parties' contract regarding interest); Turner Coleman, Inc. v. Ohio Const. and Eng., Inc., 272 S.C. 289, 251 S.E.2d 738 (1979). (There is nothing in Rule 67 that abrogates or overrides the intent of the parties regarding interest rates as expressed in their contract.) The Court in Renaissance pointed out that our Rule 67 is substantially the same as Rule 67, Fed. R. Civ. P. and the Federal Courts have also uniformly held that Rule 67 could not be used to alter or affect the contractual and legal duties of the parties. Renaissance, *supra*. at 619. The Renaissance Court also noted "Stopping the contractual accrual of interest would in effect substitute the interest rate of the Court's deposit account for that provided by contract which the Court has no authority to do." Id. at 619 (citing LTV Corp. v. Gulf State Steal, Inc. of Alabama, 969 F.2d 1050 (D.C. App. 2006). However, in the present case, there is no contractual interest rate disagreement and thus Renaissance is not relevant in those terms.

Judicial Discretion

Depositing money with the Court pursuant to Rule 67, SCRCP is within the sound discretion of the Court. The South Carolina Supreme Court ruled in South Carolina Department of Transportation v. First Carolina Corporation of South Carolina, "The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter with the discretion of the trial court and will not be overturned absent an abuse of discretion." 369 S.C. 150, 152, 631 S.E. 2d 533, 535 (2006). Additionally, the South Carolina Supreme Court has adopted the ruling from Cajun Elec. Co-op., Inc. v. Riley Stoker Corp., 901 F.2d 411, 445 (5th Cir 1990) ("Whether Rule 67 relief should be available in any particular case is a matter committed to the sound discretion of the

district court.") An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). Both parties acknowledge in their memorandums of law that it is within the sole discretion of the trial court to grant or deny the Rule 67 request to deposit money into the Court.

Additionally, both parties cite to Small v. Pioneer Machinery, Inc., 330 S.C. 62, 496 S.E.2d (1998). In Small v. Pioneer Machinery, Inc., Small received a $500,000 verdict against Pioneer on May 31, 1996. On August 27, 1996, Pioneer filed a motion to deposit the amount of the judgment in the court pursuant to Rule 67 SCRCP pending their appeal of the case. The Parties continued to try to resolve the matter until January 7, 1997, when the trial judge was notified there would be no resolution without an appeal. *Id.* On February 7, 1997, the court agreed to grant Pioneer's Rule 67 motion. *Id.* "The trial judge held Pioneer had complied with the terms of Rule 67 and it would be an abuse of discretion to refuse to allow the funds to be deposited." *Id* at 64.

The present case is substantially different from Small v. Pioneer Machinery, Inc.. The present cases began in 2003 and 2005 respectively. In 2009 the trial court found against Heritage, Harleysville's insureds, in both cases. The declaratory judgement actions went to the Honorable Judge John Milling as special referee and the Court of Appeals. The Court of appeals upheld the 2011 special referee verdicts. Harleysville then filed a petition for certiari. The Supreme Court of South Carolina issued its opinion affirming the Magnolia North judgement and modifying the Riverwalk judgment and partitioned out the portion of the judgement that was covered under Harleysville's policy.

Different from Small, the present matter has been in litigation for fourteen (14) years. A Judgment was entered in 2009. There has been ample time for the Judgement debtors, Harleysville,

to pay the judgement over to the Judgment Creditors, almost eight (8) years to be exact. During the eight (8) years since the judgments were entered, as stated above, the cases have been consolidated, been referred to a special referee, appealed to the Court of Appeals, and appealed to the Supreme Court. Both Parties have now filed in the Supreme Court petitions for rehearing. In Small the trial court granted the Rule 67 motion after the parties had tried diligently to settle the issues. Less than one (1) year after Small obtained a judgment, after notifying the court of their intent to try to resolve the matter by agreement, the negotiations fell apart and the trial court granted the Rule 67 motion.

By depositing money into the court the judgement debtor may stop the running of interest by paying the amount of the judgment into court during the pendency of an appeal. Sears v. Fowler, 291 S.C. 43, 44, 358 E.E.2d 574, n. 1 (1987). The court stated in Russo, "a judgement debtor's deposit of funds into the court pending his own appeal prevents further accrual of interest. 317 S.C. 441, 454 S.E.2d 895. However "a judgement creditor is not entitled to interest on the judgment obtained during the pendency of an unsuccessful appeal. The rationale for the rule is that a judgment creditor's appeal delays his right to the judgment, and the debtor, therefore, should not be required to pay interest. *Id* at 443, quoting Sears v. Fowler, 291 S.C. 43, 358 E.E.2d 574, (1987).

The rationale behind Rule 67, SCRCP, is that "such a rule encourages the debtor to pay the judgement and assures the judgment creditor the funds will be available." Duval v. Heritage, 339 S.C. at 620, 529 S.E.2d at 568, quoting Russo v. Sutton, 317 S.C. 441, 454 S.E.2d 895. However, in this case the rule has not encouraged Harleysville to pay the judgment. They have waited until the final petition for rehearing from the Supreme Court of South Carolina before making this motion to deposit funds into the court. Additionally, one of the reasons for a set statutory interest rate is to encourage the debtor the pay the creditor.

The equities of this case require the Court to deny Harleysville's Rule 67 motion asking for leave of the court to deposit money into the court. It would be inequitable to allow Harleysville to deposit money in the court to stop the accrual of interest at this final point in the appellate process. Therefore, for the foregoing reasons, Harleysville's Rule 67 motion is DENIED.

Conway, South Carolina

April 24, 2017

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge