

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

BEACH VILLAS AT OCEAN KEYES PROPERTY OWNERS
ASSOCIATION, INC.,

Plaintiff,

vs.

OCEAN KEYES DEVELOPMENT, LLC, KEYE CONSTRUCTION CO., INC.,
RUSSELL P. BALTZER, FIRST EXTERIORS, LLC, CAREFREE EXTERIORS
INC., COASTAL STUCCO, INC., RICHARD H. CONSTRUCTION, LLC a/k/a
RICARDO HERNANDEZ d/b/a RICHARD FRAMING CONSTRUCTION,
RICHARD H. CONSTRUCTION, LLC a/k/a RICARDO HERNANDEZ d/b/a
RICHARD FRAMING CON., INC., BUILDERS FIRSTSOURCE-SOUTHEAST
GROUP,
LLC, STEEL HOMES INTERNATIONAL, INC., RENAISSANCE STEEL
INSTALLATION, LLC n/k/a RENAISSANCE STEEL, LLC, BENCHMARK
STEEL SERVICE, LLC AND DIETRICH BUILDING SYSTEMS n/k/a
CLARKWESTERN DIETRICH BUILDING
SYSTEMS, LLC,

Defendants.

OCEAN KEYES DEVELOPMENT, LLC AND KEYE CONSTRUCTION
CO., INC.,

Third-Party Plaintiffs,

vs.

RENAISSANCE STEEL INSTALLATION, LLC f/k/a RENAISSANCE
STEEL, LLC n/k/a INNOVATIVE STEEL TECHNOLOGIES,
BENCHMARK STEEL ERECTORS, and TOTAL CONSTRUCTION, LLC,

Third-Party Defendants.

) IN THE COURT
) OF COMMON
) PLEAS
) FIFTEENTH
) JUDICIAL
) CIRCUIT
)
) CASE NO. 2014-
) CP-26-6573

) AMENDED
) ORDER
) DENYING
) MOTION OF
) INSURERS
) FOR LIMITED
) INTERVENTIO
) N

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SC Court of Appeals

THIS MATTER comes before this Court upon Motions of Canopus US Insurance Inc. ("Canopus"); Hartford Fire Insurance, Hartford Casualty Insurance Company and Hartford Underwriters Insurance Company (collectively "Hartford"); and Selective Insurance Company of

South Carolina ("Selective") seeking to intervene in the trial of this matter for the limited purpose of submitting special interrogatories to the jury regarding issues related to insurance coverage.

The present action is a complex construction defect case. In its Complaint, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the above-named Defendants for damages caused by its negligent and defective work.

The Insurers each seek to intervene for the "limited purpose of submitting and participating in the preparation of jury instructions, special interrogatories, and/or a special verdict form for submission to the jury.

The insurers contend that allowing intervention is essential for ensuring jury charges on issues such as, but not limited to, the following:

- (1) definition of progressive damages;
- (2) how to determine the cost of repairing defective workmanship originally performed by each individual subcontractor;
- (3) how to determine the cost of repairing damage to other parts of the buildings that result from the defective workmanship of the subcontractor; and
- (4) proof requirements by the parties seeking damages such that they must show, before recovery is available, (a) defective work of the subcontractor and (b) damage to other parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the moving parties seeks to be permitted to request certain special interrogatories such as, but not limited to, the following:

- (1) line item for the cost of removing and replacing the work of their respective insured(s);
- (2) cost of removing and replacing portions of the building damaged by the work

of their respective insured(s); and

(3) the date on which the progressive damage started and ended.

This matter has been pending for three (3) years and a date certain trial is scheduled for October 16, 2017.

DISCUSSION OF THE LAW

“The granting of intervention is wholly discretionary with the trial court and will be reversed only for abuse of discretion.” Sauner v. Public Service Authority, 354 S.C. 397, 411, 581 S.E.2d 161, 169 (2003) (citing South Carolina Tax Commission v. Union Co. Treasurer, 295 S.C. 257, 260, 368 S.E.2d 72, 74 (Ct. App. 1988)). The court should consider the practical implications of a decision allowing intervention. Ex parte Government Employee’s Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007) (affirming the family court’s denial of an insurer’s motion to intervene). “However, a party must have standing to intervene in an action pursuant to Rule 24, SCRPC.” Id. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a “real party in interest.” Id. “A real party in interest... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.” Id.

BACKGROUND

At the outset of the hearing in this matter, counsel for Plaintiff agreed to allow each of the Insurers to fully intervene as named parties in the case and allow counsel for each of the Insurers to participate in the actual trial, including the questioning of witnesses and making of arguments to the jury. Each of the Insurers stated that they did not wish to intervene in this case as parties to

the action, and specifically argued that the issue of insurance should not be permitted within the trial nor should the presence of the intervening parties be disclosed to the jury.

Additionally, counsel for Plaintiff agreed that, if the Insurers have properly reserved their rights through the issuance of proper reservation of rights letters to their insureds, Plaintiff would agree that the Insurers could contest all coverage issues in a subsequent action. The Insurers Selective and Hartford each moved alternatively that in the event their Motions for Intervention are denied, that they be allowed to contest all insurance coverage issues in a subsequent action.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, and the memoranda and other submissions of the parties, the Court hereby finds as follows:

1. The Insurers lack the necessary standing to intervene and do not meet the requirements for intervention under Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP"). As our Supreme Court has held, "intervention is only appropriate where the party seeking intervention has 'a real proprietary interest in the subject matter of the proceedings;' an interest which is merely 'peripheral and not the real interest at stake' will not warrant intervention." Ex parte Gov't Employee's Ins. Co. (GEICO) v. Goethe, 373 S.C. 132, 139, 644 S.E.2d 699, 703 (2007) (quoting Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994)) (in GEICO, the court affirmed the family court's denial of insurer's motion to intervene). The Insurers do not have an interest in the property that is the subject of this action, the Beach Villas project. The Insurers do not have an interest in the underlying transaction that is the subject of this litigation, namely the development and construction of the Beach Villas project. Each of the Insurers' interest arises solely out of its contract of insurance with its insured and those interests are not appropriate to be



litigated or interjected into this construction defect action. Intervention is not appropriate simply because a non-party only has a monetary interest in the outcome of the case.

2. The Insurers can satisfactorily protect any purported interests they may have in a separate declaratory judgment action, including the declaratory judgment action that is currently pending. Furthermore, addressing coverage issues in this action is likely to create inconsistent results pending the judicial determinations and outcomes in the Declaratory Judgment Action.

3. The South Carolina Supreme Court's recent decision in Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 803 S.E.2d 288 (2017) does not mandate that the Insurers have a right to intervene to ask special interrogatories or request special verdict forms.

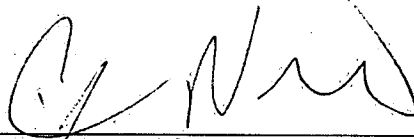
4. In order to avoid impermissible conflict determining coverage issues, this state requires a separate action. See Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965). I find that the deep injection of insurance coverage issues into this construction defect action would place counsel defending an insured in an irreconcilable conflict created by the diametrically opposed goals where, on the one hand, counsel must try to minimize its insured's liability by showing lack of consequential damages and, on the other hand, counsel would likely be faced with the necessity of proving consequential damages in order to trigger and maximize coverage for its insured.

5. I find that the special interrogatories and/or special verdict forms requested by the Insurers will likely be confusing to the jury and may unfairly prejudice the parties participating in the trial due to the interjection of extraneous insurance coverage issues into an already complex construction defect case, particularly given that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

October 12, 2017

A handwritten signature in black ink, appearing to read 'Clifton Newman', written over a horizontal line.

Clifton Newman
Presiding Judge