

THE STATE OF SOUTH CAROLINA)
)
BEAUFORT COUNTY)

IN THE COURT OF COMMON PLEAS

Jim Lancaster, Nancy Lancaster, Art Holland,)
Jeanette Holland, Wendell Turner, Phyllis Turner,)
Jack Bennett, Joan Bennett, on behalf of themselves)
and all others similarly situated,)

Plaintiffs,

v.

Georgia-Pacific Corporation and/or)
Georgia Pacific, LLC,)
Grayco Home Center, Inc.,)
Del Webb Communities, Inc., an Arizona)
Corporation;)
Razor Component Systems, Inc. a South Carolina)
Corporation,)
Razor Enterprises, Inc., a Texas Corporation, and)
DJ Construction Co., LLC,)

Defendants.

Case No. 2007-CP-07-03166

**Order Denying Motion to Compel
Plaintiff to Deliver Del Webb's Settlement
Offers to Homeowners**

Defendant Del Webb filed a motion entitled **Motion to Compel Plaintiffs' Counsel to Deliver Del Webb's Settlement Offers to Homeowners** arguing that Named Plaintiffs/Plaintiffs' Counsel have not complied with the provisions of the Right to Cure Act¹ in that they have not delivered Del Webb's settlement offers to the respective homeowners. The Court heard argument on this motion on October 23, 2012. For the reasons set forth below, Del Webb's motion is DENIED.

Background

In a previous order, the Court ordered that the Right to Cure Process would proceed for a representative class of ten percent of the affected homes, or which equates to approximately 79 homes. Plaintiffs were required to give notice regarding this representative class pursuant to the terms of the Act. Plaintiffs served Del Webb with one general notice letter for all 79 houses, but

¹ The official name of the Act is the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act," but will be referred to herein as the Right to Cure Act.

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did not specify the alleged defects on each of the homes. Thus, Del Webb filed a motion requesting that the Court order Plaintiffs to provide specific notice of the claimed installation defects for each of the 79 homes. The Court found that Plaintiffs' representative notice satisfied the Act.

After Del Webb received the representative notice letter, it inspected each of the 79 houses pursuant to the terms of the Act. Del Webb then delivered 76 settlement offers to Plaintiffs' counsel on September 28, 2012, which was within the Court's deadline for making "any" offers pursuant to the Right to Cure Act as set forth in the Preliminary Case Management and Scheduling Order. Plaintiffs' counsel readily admitted at the October 23, 2012 hearing that they have not delivered the offers to the respective homeowners, and they request that the Court not require them to deliver the settlement offers.

Legal Analysis

The South Carolina Supreme Court in *Grazia v. South Carolina State Plastering* set forth the intent of the Right to Cure Act:

The Right to Cure Act has an express public policy intent of: (1) addressing the need for an alternative dispute resolution method to promote settlement of construction disputes without litigation, while adequately protecting the rights of homeowners; and (2) requiring a would-be plaintiff in certain construction defect matters to file a notice of claim with the would-be defendant and provide an opportunity to resolve the claim without litigation. *See* 2003 South Carolina Laws Act 82 (S.B. 433).

390 S.C. 562, 703 S.E.2d 197 (2011). As set forth in *Grazia*, the purpose of the Right to Cure Act is to allow homeowners and contractors to attempt to resolve claimed construction defects without litigation. To that end, the Act requires homeowners to give notice to contractors what he/she claims is wrong with the house and to indicate if there is any resulting damage (if known).

The subject action is unique in that it is the first case following the *Grazia* opinion to allow representative notice in a class context. As noted above, this Court allowed the Plaintiffs

to give representative notice to ten percent of the homes, which is approximately 79 homes. While Del Webb objected to the representative notice, it exercised its statutory right under the Right to Cure Act and inspected each of the 79 houses. Plaintiffs did not dispute Del Webb's statutory right to inspect the houses. Thereafter, Del Webb delivered 76 settlement offers to Plaintiffs' counsel; however, Plaintiffs' counsel has refused to deliver the 76 offers to the respective homeowners/class members.

The Act mandates that contractors have the right to offer a settlement to homeowners who have given notice pursuant to the Right to Cure Act. The Act states:

(A) The contractor or subcontractor has thirty days from service of the notice to inspect, offer to remedy, offer to settle with the claimant, or deny the claim regarding the defects. The claimant shall receive written notice of the contractor's or subcontractor's, as applicable, election under this section. The claimant shall allow inspection of the construction defect at an agreeable time to both parties, if requested under this section. The claimant shall give the contractor and any subcontractors reasonable access to the dwelling for inspection and if repairs have been agreed to by the parties, reasonable access to affect repairs. Failure to respond within thirty days is deemed a denial of the claim.

(B) The claimant shall serve a response to the contractor's offer, if any, within ten days of receipt of the offer.

(C) If the parties cannot settle the dispute pursuant to this article, the claimant may proceed with a civil action or other remedy provided by contract or by law.

S.C. Code Ann. § 40-59-850. Del Webb argues that in accordance with the Right to Cure Act, it made 76 offers to settle to individual homeowners in an attempt to avoid/resolve litigation. It further argues that by refusing to deliver the settlement offers, Plaintiffs are not only interfering with the purpose and requirements of the Act, but also with the possible settlement of claims. Accordingly, Del Webb filed a motion asking the Court to order Plaintiffs' counsel to deliver the 76 settlement offers to the homeowners whose houses were inspected.

Del Webb points out that it is now undisputed that there are differences among the 79 houses selected by Plaintiffs as part of the Right to Cure process. Specifically, it is undisputed that some of the selected houses had no PrimeTrim on them whatsoever, while other houses had less than five PrimeTrim boards total. Del Webb argued that the substantial differences from house to house are not conducive to a "class-wide offer to settle". Del Webb argued that it spent substantial time and resources inspecting the 79 individual homes, and that it should not now be foreclosed from having its settlement offers considered by the individual homeowners.

On the other hand, Plaintiffs argued that they should not be required to deliver the settlement offers to their individual client class members. In sum, Plaintiffs argued that Del Webb only had the right to offer a "class wide" settlement to all 790 class members, and that the court should not be concerned with the admitted differences among the houses selected for inspection by the Plaintiffs. Plaintiffs argue that this result is mandated by the South Carolina Supreme Court's opinion in *Grazia* and by this Court's previous rulings. The Court agrees.

First, the Supreme Court in *Grazia* allowed for "representative compliance" with the Act, and gave the circuit courts broad latitude on how to effectuate implementation of the Act. This Court agrees with Plaintiffs' assertion that representative compliance comports with the settlement provisions of the Act.

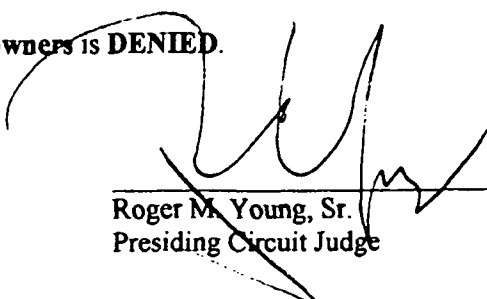
Second, this Court's case management order at Paragraph 4 states: "Based upon the notice required by South Carolina Code 40-59-840 (as set forth above) and the information obtained from the aforementioned inspections, a class-wide offer to cure may be made by the defendants, which offer will be presented to the class representatives for response..." This limits Defendants to making only a class-wide settlement offer. Del Webb's 76 individual settlement offers do not comply with this Court's mandate that any offers be "class-wide."

Third, allowing class action defendants to make individualized settlement offers would effectively defeat the purpose of a class action suit. By not opting out of the class and agreeing to allow their individualized claims to be handled by representative claims, the remaining class members implicitly agree that settlement offers be made to the class as a whole, and not to individual members of it. Plaintiffs should not be required to deliver any individual settlement offers to individual homeowners because the class representatives should be able to reject any such offer in a "representative capacity." Therefore, class counsel are under no obligation to deliver individualized settlement offers because class action defendants may not make individualized class action settlement offers.

Finally, the Court notes that *Grazia* explicitly points out that "the Right to Cure Act does not confer any corresponding obligations on the part of the claimant that would not ordinarily be present: the claimant is not required to accept any offer by the contractor/subcontractor to remedy the alleged defect, and he or she is not required to accept an offer of settlement of the claim." 390 S.C. at 573, 703 S.E.2d at 202.

Therefore, the Defendant Del Webb's **Motion to Compel Plaintiffs' Counsel to Deliver Del Webb's Settlement Offers to Homeowners is DENIED.**

IT IS SO ORDERED.



Roger M. Young, Sr.
Presiding Circuit Judge

 South Carolina

Dated: 4/12, 2012