

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

THE HAVENS CONDOMINIUM
ASSOCIATION,

Plaintiff,

v.

CENTEX HOMES, et al.

Defendants.

THE RIVER CROSSING CONDOMINIUM
ASSOCIATION, AND VINCENT J.
TAMBURRO, ON BEHALF OF HIMSELF
AND OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

CENTEX HOMES, ET AL.,

Defendants.

THE TANGLEWOOD CONDOMINIUM
ASSOCIATION,

Plaintiff,

v.

CENTEX HOMES, A NEVADA GENERAL
PARTNERSHIP, ET AL.,

Defendants.

) IN THE COURT OF COMMON PLEAS
)
)

) FOR THE FIFTEENTH JUDICIAL
) CIRCUIT
)

) CASE NO.: 2015-CP-26-0118
)
)

) ORDER DENYING MOTIONS TO
) INTERVENE
)

) **RECEIVED**
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) JUL 22 2019
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) SC Court of Appeals
)

) CASE NO.: 2015-CP-26-00279
)
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) CASE NO.: 2015-CP-26-2718
)
)

**THE WOODLANDS CONDOMINIUM
ASSOCIATION,**

Plaintiff,

v.

**CENTEX HOMES, A NEVADA GENERAL
PARTNERSHIP, ET AL.,**

Defendants.

CASE NO.: 2015-CP-26-04514

This matter is before the Court upon motions for intervention ("Motions") filed by the following insurance carriers ("Insurers") for insureds who are defendants in this action, which motions are made pursuant to Rule 24 of the South Carolina Rules of Civil Procedure:

River Crossing v. Centex; Case No. 2015-CP-26-00279

- 1) American Empire Surplus
- 2) BITCO General Insurance Corporation
- 3) Clarendon National
- 4) Harleysville Insurance Company n/k/a Nationwide Insurance Company
- 5) Hartford Casualty Insurance Company
- 6) Hartford Fire Insurance Company
- 7) Scottsdale Insurance Company
- 8) Selective Insurance Company

Tanglewood v. Centex; Case No. 2015-CP-26-02718

- 9) Harleysville Insurance Company n/k/a Nationwide Insurance Company
- 10) Hartford Casualty Insurance Company
- 11) Hartford Fire Insurance Company
- 12) Selective Insurance Company
- 13) American Empire Surplus
- 14) Clarendon National

Woodlands v. Centex; Case No. 2015-CP-26-04514

- 15) BITCO General Insurance Corporation
- 16) Harleysville Insurance Company n/k/a Nationwide Insurance Company
- 17) Selective Insurance Company
- 18) American Empire Surplus

19) Clarendon National

Havens v. Centex; Case No. 2015-CP-26-00118

20) Crum & Forster Specialty Insurance Company and First Mercury Insurance Company

21) Harleysville Insurance Company n/k/a Nationwide Insurance Company

22) Selective Insurance Company

American Empire Surplus, BITCO General Insurance Corporation, Clarendon National, Hartford Fire Insurance Company, Hartford Casualty Insurance Company, Scottsdale Insurance Company, Crum & Forster Specialty Insurance Company, and First Mercury Insurance Company have acknowledged that Centex Homes, a Nevada General Partnership ("Centex") qualifies as an additional insured and have agreed to participate in the defense of Centex and their respective named insured(s) with respect to one or more of the above-referenced actions.

The present actions are separate complex construction defect cases. In each of their Complaints, Plaintiff alleges causes of action for negligence, gross negligence and breach of warranty against each of the named Defendants for damages allegedly caused by its alleged 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 parts of the buildings proximately caused by the defective work of the subcontractor.

In addition to jury charges, the Insurers seek 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.

These matters have been pending since 2015 and a date certain trial is not yet scheduled except for Havens for 2020.

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

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.

After careful consideration of the applicable law, arguments of counsel, the relevant pleadings, the documents in the Stipulation and Agreement of Record for Hearing on Motions to Intervene, 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) and affirming 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 each of the actions; the Condominium project at issue in each case. 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 Condominium project

in each case. Each of the Insurers' interest arises solely out of its contract of insurance with its insured(s) 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 captioned: Centex Homes, a Nevada General Partnership v. The Cypress Bend Condominium Association, et al., C.A. No. 2016-CP-26-6670 (the "Declaratory Judgment Action"). The Declaratory Judgment Action concerns the defense and indemnity obligations allegedly owed by insurers and seek declarations regarding, among other things, regarding whether damages claimed in this action "are covered under the [policies issued by the Insurers]". 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 an 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 Insurers have requested that they not be made parties and their involvement and the issue of insurance not be disclosed to the jury, and that there may not be any evidence in the record to support the special interrogatories and/or special verdict forms.

6. The Court further finds that the insurers shall be allowed to contest all insurance coverage issues, in a subsequent action and that any finding, argument, or issue as to reservation of rights letters to the insureds, is proper for consideration in a subsequent action and not in this present action.

7. The Court hereby denies intervention, irrespective of timing, on grounds that this Court finds that intervention would be prohibited at any time.

Based on the foregoing the Motions to Intervene is Denied.

AND IT IS SO ORDERED.

Honorable Clifton Newman, Presiding Judge

_____, 2019

_____, South Carolina



Horry Common Pleas

Case Caption: Woodlands Condominium Association , plaintiff, et al VS Centex
Homes , defendant, et al
Case Number: 2015CP2604514
Type: Order/Intervene

So Ordered

s/ Clifton B. Newman, 2127