

11-1577

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

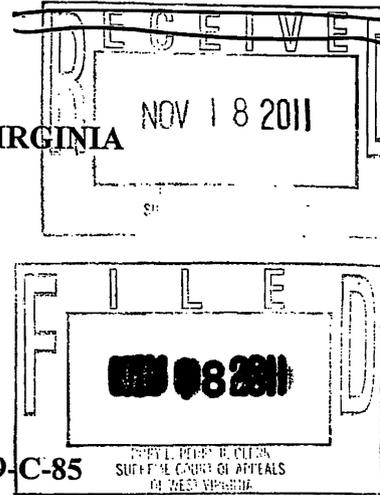
UNIVERSITY COMMONS RIVERSIDE
HOME OWNERS ASSOCIATION, INC.,
on Its Own Behalf and on Behalf of Its
Members and Individual Unit Owners,

Plaintiff,

v.

UNIVERSITY COMMONS MORGANTOWN,
LLC, et al.

CIVIL ACTION NO. 09-C-85
(Judge Susan Tucker)



ORDER CERTIFYING QUESTIONS AND STAYING DISCOVERY

On July 7, 2011, the Plaintiff filed a “Motion for Protective Order to Limit Depositions.” On August 1, 2011, Defendants University Commons Morgantown, LLC, Koehler Development, LLC, Collegiate Homes, Inc., Richard Koehler, Adam Sharp, Frank E. Koehler, Jr., and Richard Dunlap, R.E. Crawford Construction, Inc., Pozzuto & Sons, Inc., O.C. Cluss Professional Services, LLC, and the Third-Party Defendants Universal Forest Products Eastern Division, Inc., Triad Engineering, Inc., BUH Enterprises, Inc. and Herron Engineering filed “Defendants’ Response in Support of Triad Engineering, Inc.’s and BUH Enterprises, Inc.’s Alternative Motion to Require Joinder of All University Commons Riverside Unit Owners as Plaintiffs and Defendants’ Response to Plaintiff’s Motion for Protective Order to Limit Depositions.” On August 1, 2011, Defendant The Building Code Enforcement Official of Star City, West Virginia, filed its “Joinder, With Exception, in Defendants’ Response in Support of Triad Engineering, Inc.’s and BUH Enterprises, Inc.’s Alternative Motion to Require Joinder of All University Commons Riverside Unit Owners as Plaintiffs and Defendants’ Response to Plaintiff’s Motion for Protective Order to Limit Depositions.”

On August 15, 2011, Plaintiff filed “Plaintiff’s Reply in Opposition to Defendants’ Motion to Require Joinder of All University Commons Riverside Unit Owners as Plaintiffs and Plaintiff’s Reply in Support of Plaintiff’s Motion for Protective Order to Limit Depositions”; and “Plaintiff’s Reply in Opposition to Defendant The Building Code Enforcement Official of Star City, West Virginia’s Joinder, With Exception, in Defendants’ Motion to Require Joinder of All University Commons Riverside Unit Owners as Plaintiffs and Plaintiff’s Reply in Support to Plaintiff’s Motion for Protective Order to Limit Depositions.”

The Plaintiff contends that the West Virginia Common Interest Ownership Act, (“CIOA”), authorizes a homeowners’ association to sue for damages to the individual units and common areas. Defendants contend that while the CIOA may confer standing upon the homeowners’ association to institute such action, the CIOA is nonetheless an inadequate representative for unit owners with regard to damages unique to the individual units. Further, Plaintiff contends that joinder of each individual unit owner is unnecessary because: (1) the CIOA offers an efficient means for the resolution of this matter; (2) *res judicata* will protect the Defendants from multiple or inconsistent judgments; and (3) there is a mechanism in place for objections by unit owners to any settlement agreement reached between the Plaintiff and Defendants. Conversely, the Defendants contend that because of the variety of individual claims being made and the potential for a conflict of interest between the homeowners’ association and the individual unit owners, the unit owners must be joined as necessary parties to this lawsuit. Based upon these issues, Defendants further contend that substantial case law exists calling into question the authority of the homeowners’ association to settle or resolve the unit specific complaints on behalf of the unit owners, requiring joinder of each individual unit owner in order

to protect Defendants from multiple or inconsistent obligations. To date, the Defendants have taken the depositions (via oral examination) of fifteen (15) unit owners (representing 19 units).

Plaintiff contends that, to date, each deposition of a unit owner has resulted in nearly the identical recitation of problems and damages sustained by unit owners at the UCR Condominium Complex; thus, Defendants have been sufficiently apprised of all the requisite facts and the extent of damages allowing them to mount their defense(s). Further, to the extent that additional depositions may be needed, the Plaintiff argues that a representative class is sufficient to provide testimony. Defendants contend that discovery is meant to be broad and liberal, to aid the litigants in the quest for potentially relevant and discoverable information. Defendants further assert that they would be severely prejudiced if the Court limited the number of unit owner depositions because it creates an uneven playing field where Plaintiff has the opportunity to talk to all unit owners so it can collect factual information and discrepancies to tailor its case for trial; yet, the Defendants are denied the same right.

As a result of the parties' inability to agree on certain matters, the parties have asked this Court to certify the following questions to the Supreme Court of Appeals of West Virginia for further guidance:

- a. Is a Unit Owners' Association an adequate representative when a lawsuit is instituted by a Unit Owners' Association on behalf of two or more unit owners pursuant to W. Va. Code § 36B-3-102(a)(4) and the damages sought include unit specific damages affecting only individual units?
- b. If the Unit Owners' Association is an adequate representative to institute litigation pursuant to W. Va. Code § 36B-3-102(a)(4) on behalf of individual unit owners for unit specific damages affecting only individual units, is a unit owner nonetheless a necessary and indispensable party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure?
- c. If individual unit owners are not named Plaintiffs in a lawsuit instituted on their behalf by a Unit Owners' Association and are not necessary and indispensable parties to the suit, does the Association have the authority under § 36B-3-102(a)(4) to settle and release any and all claims of the unit owners

where said individual unit owners have been provided reasonable notice of, and have made no objection to, said settlement and release? If so, what constitutes sufficient notice?

- d. Whether matters pertaining to a unit owners' claim for lost rent or inability to rent are matters that affect the common interest community for which the Unit Owners' Association may institute litigation pursuant to § 36B-3-102(a)(4)?
- e. Pursuant to § 36B-3-102(a)(4), what constitutes a "matter affecting the common interest community" and what constitutes a "unit specific" element?
- f. Is a representative example of unit owners sufficient to offer deposition testimony and trial testimony in this matter to establish defects and damages that are common to all units?

Having reviewed and considered the arguments submitted by all parties, the Court hereby

FINDS as follows:

Joinder of Unit Owners as Necessary Parties

1. This action is governed by the West Virginia Common Interest Ownership Act, W. Va. Code § 36B-3-102, *et seq.*

2. Pursuant to the CIOA, an Association may "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." W. Va. Code § 36B-3-302(4).

3. Pursuant to W. Va. Code § 36B-3-102, *et seq.*, Plaintiff has standing to bring this action on behalf of its Members only as to matters affecting the common interest community. The CIOA defines "common interest community" as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration."¹

4. Pursuant to the CIOA, "unit" is defined as "a physical portion of the common interest community designated for separate ownership or occupancy[.]" W. Va. Code § 36B-3-

¹ In addition to West Virginia, the following states have also adopted the Uniform Common Interest Ownership Act: Alaska, Colorado, Connecticut, Minnesota, Nevada, Vermont and Delaware.

103(33).

5. No law exists in West Virginia regarding an Association's capacity to represent individual unit owners with respect to damage to individual units.

6. "Constructional defect cases relate to multiple properties and will typically involve different types of constructional damages, and issues concerning causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof[, but] rather, individual parties must substantiate their own claims. . . ." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697, 703-04 (Nev. 2009) (citing *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 543 (Nev. 2005)).

7. In the instant case, the "First Amended Complaint" alleges several damages claims that may differ among individual units, including inability to re-sell their units, failure to provide adequate public offering statements to prospective buyers, delivering misleading promotional material to prospective buyers, failing to inspect units, damages from burst water lines, faulty construction, faulty appliances, cracked drywall, and lost rental income.

8. The Court finds that the claims relating to damage to individual units require specific proof of the information given to each purchaser and of any damage caused to the individual unit by the allegedly faulty construction.

9. The Court concludes that the homeowners are not adequately represented by the association because the parties could have conflicting interests.

10. Rule 19 of the West Virginia Rules of Civil Procedure provides as follows:

A person who is subject to service of process **shall be joined as a party in the action** if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) **the person claims an interest relating to the subject of the action** and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability

to protect that interest, or (ii) **leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations** by reason of the claimed interest.

W. Va. R. Civ. P. 19(a) (emphasis added).

11. The Court finds that the individual unit owners have claimed an interest related to the subject of this action.

12. Based in part on the questions about the adequate representation of individual interests, the law is not clear as to whether an owners' association's settlement of claims precludes an individual owner from asserting claims for damages to his individual unit based on the same conduct. In fact, no state that has adopted the Uniform Common Interest Ownership Act appears to have case law concerning an owners' association's authority to settle claims it brings on behalf of unit owners.

13. However, in *Siller v. Hartz Mountain Associates*, 461 A.2d 568 (N.J. 1983), the owners' association gave the developer a general release, but some unit owners maintained individual actions against the developer seeking damages for defects in the individual units. *Id.* New Jersey's Supreme Court found, on appeal, that the owners' association had the exclusive authority to settle claims relating to the common elements based on its exclusive responsibility to maintain those elements. *Id.* at 573. However, the Court found that the unit owners' claims for damage to individually-owned property were not barred by the settlement because each owner has "primary rights to safeguard his interests in the unit he owns." *Id.* at 574. Accordingly, the Court permitted individual suits against the developer to proceed despite the general release it obtained from the owners' association in exchange for settlement. *Id.*

14. The Court finds the holding in *Siller* persuasive because the CIOA permits the HOA to institute litigation on behalf of unit owners for "matters affecting the common interest

community” but does not make clear whether the association, by bringing a claim on behalf of the unit owners, has the exclusive right to settle the claim.

15. The Court concludes that joinder of each individual unit owner pursuant to Rule 19 is the best way to ensure adequate representation of the unit owners’ claims and to prevent the risk of Defendants incurring double, multiple, or otherwise inconsistent obligations. Accordingly, the Court hereby **ORDERS** that all individual unit owners be joined as plaintiffs in this litigation.

Plaintiff’s Motion for Protective Order to Limit Depositions

16. “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” W. Va. R. Civ. P. 26(b).

17. The Court has “traditionally given the Rules a liberal construction favoring broad discovery, because broad discovery policies are ‘essential to the fair disposition of both civil and criminal lawsuits.’” *State ex rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, 499 S.E.2d 283 (1997) (citing *State ex rel U.S. Fidelity and Guar. Co. v. Canady*, 194 W. Va. 431, 444, 460 S.E.2d 677, 690 (1995)).

18. However, “[t]he frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that: (A) The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case” W. Va. R. Civ. P. 26 (b).

19. “[T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . .

2) That the discovery may be had only on specified terms and conditions . . . [and] 4) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters” W. Va. R. Civ. P. 26(c).

20. However, the parties are entitled to a “liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Sticklen v. Kittle*, 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (W. Va. 1981) (quoting *Conley v. Gibson*, 355 U.S. 41 (1957) (footnote omitted)).

21. In determining whether discovery is burdensome or oppressive, courts look to the specific facts and circumstances of the particular case. *Truman v. Farmers & Merchants Bank*, 180 W. Va. 133, 375 S.E. 2d 765, 768 (1988), citing *Krantz v. United States*, 56 F.R.D. 555, 557 (W.D. Va. 1972).

22. Most courts require a specific showing as to the manner in which each discovery request is burdensome or oppressive unless the sheer volume of the request in light of the case issues makes it obviously objectionable. *Truman*, 375 S.E. 2d at 768.

23. As discussed *supra*, “[c]onstructional defect cases relate to multiple properties and will typically involve different types of constructional damages, and issues concerning causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof[, but] rather, individual parties must substantiate their own claims” *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697, 703-04 (Nev. 2009) (citing *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 543 (Nev. 2005)).

24. In this case, Plaintiff is claiming a wide range of damages relating to the common areas and to specific units. Moreover, many of the claims being made require subjective proof

that can only be provided by those individuals directly involved in the original purchase transaction and/or the current owners (lost rental income, inability to re-sell units, failure to provide adequate public offering statement to prospective buyer, etc).

25. The Court finds that the testimony of the owners of each unit, both now and at the time the units were built, is relevant and discoverable.

26. The Court finds that while it may be more expensive to defend additional depositions, the expense is directly proportional to the scope of Plaintiff's claims. In this case, Plaintiff's claims were not limited to only a few units or a few unit owners; they extend to all common areas, every unit, and even different periods of time.

27. Based upon the same reasoning, the Court finds that a representative example of unit owners would be an unfair limitation given the breadth of claims pled by the Plaintiff against the various Defendants.

28. Accordingly, the Court **DENIES** the Plaintiff's Motion for Protective Order to Limit Depositions and **FINDS** that the Defendants are entitled to depose, if they choose, all unit owners, past, present or future.

Certified Questions

29. "Any question of law . . . may, in the discretion of the circuit court in which it arises, be certified by the supreme court of appeals for its decision." W. Va. Code § 58-5-2.

30. Such certification is appropriate where there is a sufficiently precise and undisputed factual record on which the legal issues can be determined. *Hannah v. Heeter*, 213 W. Va. 704, 707, 584 S.E.2d 560 (2003).

31. The Court finds that the determination of the proper scope of the CIOA and discovery are legal questions.

32. The Court finds that the facts necessary to decide these legal issues are undisputed, and the only issue for decision is the application of these facts to the law.

33. Accordingly, the certification of the above listed proposed questions to the West Virginia Supreme Court of Appeals is appropriate.

Stay of Discovery Pending Decisions on Certified Questions

34. West Virginia Code § 58-5-2 provides as follows with regard to certified questions:

§ 58-5-2. Certification to supreme court of appeals.

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, *and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back.* The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

W. Va. Code § 58-5-2 (emphasis added). The plain language of the foregoing Code Section provides for the stay of further proceedings in this case until the questions are decided and the decision thereof certified back.

35. To permit discovery to go forward while certified questions are pending before the Supreme Court of Appeals of West Virginia allows an ongoing record to be developed, despite the fact that answers to the questions certified are necessary to determine the proper continued course of the instant action.

36. To the extent that it is determined that individual unit owners are necessary parties to the instant action, after these unit owners are formally brought into the suit, it is likely that a significant portion, if not all, of the discovery undertaken while the certified questions are pending will need to be revisited for the purpose of incorporating the individual unit owners into the discovery process.

37. Therefore, continuing discovery prior to the time when the answers to questions certified are known is likely to lead to increased litigation costs, duplication of effort and inefficiency in the litigation process, each of which runs counter to the goals of judicial economy and efficiency which are essential to the proper management and control of this action.

38. To the extent that certain parties contend that language contained in Rule 17 of the West Virginia Revised Rules of Appellate Procedure is dispositive of this issue, this Court rejects such a contention and specifically concludes that the cited Rule does not constitute legal authority sufficient to outweigh the clear mandate imposed by West Virginia Code § 58-5-2 with regard to a stay of discovery in this action; it would be both impractical and illogical for this Court to conclude otherwise.

39. For these reasons, the Court **ORDERS** that all discovery in this action shall be stayed upon entry of this Order until such questions have been decided and the decision thereof certified back.

40. In light of the stay on discovery, the Court further **ORDERS** that the Case Management Order entered on May 2, 2011, and the Second Amended Scheduling Order entered on June 6, 2011, are hereby **VACATED** with respect to discovery matters. However, the Court maintains the current trial date of June 12, 2012 on its docket and will revisit further scheduling issues once the certified questions are certified back and the stay on discovery is lifted.

41. All depositions previously noticed by any party are hereby canceled, and it will be the responsibility of the noticing party to re-notice any fact or expert witnesses once the stay of discovery is lifted.

Enter this the 5th day of October, 2011.

ENTER: Susan B. Tucker
JUDGE SUSAN B. TUCKER

FILED Oct 5, 2011
CIVIL ORDER BOOK 130 PAGE 582
JEAN FRIEND, CLERK ✓

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STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and
Family Court of Monongalia County State
of West Virginia hereby certify that the attached
copy of the original Order
made and entered by said Court.

Jean Friend Circuit Clerk
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