

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO: 2000-CP-10-4870

CHARLES SALMONSEN, individually)
and on behalf of all others similarly)
situated,)

Plaintiff,

vs.

CGD, Inc. f/k/a CHARLESTON GYPSUM)
DEALERS & SUPPLY CO., INC.)
FRANK CRIDER, RAYMOND G.)
WOLFORD, HENRY (HANK) FUTCH,)
AND HAROLD (HAL) FUTCH)

Defendants.

**ORDER GRANTING CLASS
CERTIFICATION AND DENYING
JOINER**

FILED
2003 SEP 25 PM 2:29
JULIE J. BRISTROW
CLERK OF COURT
BY _____

This matter came before the Court on September 18, 2002, on motions by both parties. Plaintiff appeared through counsel Justin Lucey and Mary Leigh Arnold; Defendants appeared through Counsel Joseph Dapore and Patrick McDonald. Both parties filed extensive materials and memorandum in support of their respective positions. This Order disposes of Plaintiff's Motion to Certify the Class. Defendants' Motion for Summary Judgment and Motion to Amend to Join Additional Parties are addressed by separate order. For the reasons specified below, Plaintiff's Motion to Certify the Class is granted.

FACTUAL BACKGROUND

Charleston Gypsum Dealers and Supply Co., Inc. (hereinafter "Charleston Gypsum") sold the Parex EIFS (synthetic stucco) that was utilized as the exterior cladding on Plaintiff's residence in 1994. On May 15, 1995, Charleston Gypsum sold its business and name to CSR America. Charleston Gypsum shortly thereafter changed its name to CGD, Inc. After all known creditors were paid, the sales proceeds were distributed to the CGD, Inc.'s shareholders over the next several years. GCG, Inc. was administratively dissolved by the Secretary of State's office circa 1999.

1/5/ RMD Jr

In 2000, Plaintiff learned of the defective nature of the EIFS system on the home. In addition to suing the usual EIFS defendants, the contractor, the applicator, and the manufacturer, Plaintiff sued the supplier, Charleston Gypsum. CSR America, the current owner of the name Charleston Gypsum, answered and litigated the case until trial. As briefed by the Defendant¹, "Charleston Gypsum's liability insurance carriers initially denied coverage and, therefore, Charleston Gypsum did not actively participate in the litigation." (Memorandum in Opposition, p. 6). When the case was called to trial last Fall, CSR America's attorney appeared and brought with her CGD, Inc.'s former president to speak on behalf of CGD, Inc. CSR America settled its successor liability, and left CGD, Inc. in the case. CGD, Inc. took the position that it was a defunct company without assets to satisfy a judgment.

On October 15, 2002 an Order was entered allowing the Plaintiff to amend the Complaint. On October 23, 2002, an Amended Complaint was filed on behalf of all persons whose structures were clad with Parex Eifs sold by CGD, Inc. Pursuant to S.C. Code Ann. §33-14-107, Plaintiff named CGD, Inc's shareholders. Within a few months, several different lawyers entered appearances for the Defendant, including Mr. DaPore, who has been retained by Defendant's insurance carrier. Defendant's interrogatory responses indicated possible insurance coverage.

Plaintiff's engineer expert, Robert Sisroy, clearly and concisely described the defective nature of EIFS systems: they trap water causing rot from the inside out. Each defense expert states in their affidavit that the EIFS system is inherently incompatible with window systems. (Glick ¶14; Carlson ¶16). Defendant witness Ron Hodges, the Parex account representative for the Defendant in the 1990's, testified that the system is defective and it does not matter whether or not you have flashing or good application.

¹"Defendant" refers to the corporate Defendant.

1st RMO Jr

DISCUSSION

Defendant did not contest many of Plaintiff's allegations in support of class certification. Much of Defendant's opposition was predicated on its argument that it would not be "fair" for only the EIFS distributor to be held responsible for damages to an EIFS house, when numerous individuals/entities contributed to the damages. Notably, Defendant does not contest that the product it sold was defective, does not contest that as a product supplier, it is liable for the defective product; and does not contest that there is a limited fund.

I. ALL OF THE PREREQUISITES FOR CLASS CERTIFICATION UNDER RULE 23(A) ARE SATISFIED.

This action has been brought as a class action pursuant to Rule 23(a) of the South Carolina Rules of Civil Procedure. Under this rule, the proponent of the class must show:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are common questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,
- (4) the representative parties will fairly and adequately protect the interest of the class, and
- (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

S.C.R.C. P. 23(a).

1. The proposed class is so numerous that joinder of all members is impracticable - Rule 23(a)(1).

Plaintiff seeks certification of a class of all persons whose structures were clad with Parex EIFS product sold or supplied by Defendant prior to May 15, 1995. In determining whether a proposed class satisfies the numerosity requirement, the court should consider the size of the class, the nature of the action, the location of the class members, the expediency of joinder, and the practicality of multiple lawsuits.

Plaintiff contends that there are more than 400 potential members of the class. Plaintiff's

1/1 RMD JT

estimate of numerosity is supported by the Affidavit of Wendy Rumford and the testimony of Ron Hodges. Ron Hodges, the Parex sales representative, opined that, based on the Defendant's sales volume, there would be 350 structures. Thus, the proposed class is so numerous that joinder of members is impractical. Clearly, the numerosity requirement is satisfied.

2. There are questions of law and fact common to the class - Rule 23(a)(2).

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." SCRCP 23(a)(2). The South Carolina Supreme Court discussed the issue of common questions of law or fact in the case of Gardner v. South Carolina Department of Revenue, 353 S.C. 1, 577 S.E. 2d 190 (2003). The court stated that:

To establish commonality, a party must show that 'there are questions of law or fact common to the class. Rule 23, SCRCP. In practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together. Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991). Critically, 'not every issue in the case must be common to all class members.' O'Conner v. Boeing North Amer. Inc., 184 F.R.D. 311, 329 (C.D. Cal. 1998). Commonality is met only where the class shares a determinative issue. See Scott v. Haworth, 916 F. 2d 134, 145 (4th Cir. 1990).

Id.

In the present case, common questions of law and fact clearly predominate over individual concerns. Plaintiff alleges that the EIFS product supplied by Defendant and installed on his home and others similarly situated is defective. The common issue of the defective nature of the product supplied by the Defendant will predominate in the matter. A second common issue which will predominate are those issues relating to the limited funds, including shareholder liability for corporate funds, insurance coverage, and pro rata distribution of insufficient funds. Accordingly, Plaintiff has met his burden under Rule 23(a)(2), SCRCP, and established the matter is well suited for class certification.

3. The claims of the Plaintiff are typical of the claims of the potential class members - Rule 23(a)(3).

Rule 23(a)(3) requires that the claims of the class representative be “typical of the claims of the class.” SCRCP 23(a)(3). The requirement demands merely that “the claims or defenses do not need to be coextensive, but rather similar to, or shared by, most of the members of the class.” J. Flanagan, South Carolina Civil Procedure, at 180 (2d ed. 1996). The most authoritative treatise on class actions summarizes the concept of typicality as follows:

[A] plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the name plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.

A. Conte, Newberg on Class Actions section 3.13 at 3-76 to 3-77 (3rd Ed. 1992).

Clearly, the Plaintiff’s claims arise out of a common course and pattern of wrongdoing. The claims of Plaintiff and the class members all arise from the Defendant supplying a defective product. The fact pattern is the same with respect to all class members, and the same legal theory is asserted on behalf of all. Accordingly, the typically requirement has been satisfied.

4 The named Plaintiff will fairly and adequately protect the interests of the class - Rule 23(a)(4).

The principal factor in determining the adequacy of a class representative is whether the Plaintiff has the ability and commitment to prosecute the action vigorously. South Carolina Nat. Bank v. Stone, 139 F.R.D. 325, 328 (D.S.C. 1991). There are two criteria to which courts look in determining whether the class representative adequately protects the interests of the class: (1) The class representative should not have any significant antagonistic or conflicting interests to the unnamed class members; and (2) It must appear that the class representative will vigorously prosecute the interests of the class through qualified counsel. Runion v. U.S. Shelter, 98 F.R.D. 313, 316 (D.S.C. 1983). The adequacy of Plaintiff’s counsel, like that of the individual Plaintiff, is presumed in the absence of specific proof to the contrary. South Carolina Nat’l Bank v. Stone, 139 F.R.D. at 330-1, citing Falcon v. General Tel. Co. 626 F.2d 369, 376 n.8 (5th Cir. 1980), vacated on other grounds, 450 U.S. 1036, 101 S.Ct. 1752, 68 L.Ed. 2d 234 (1981). Furthermore, courts

15/ RMD Jr

generally hold that the employment of competent counsel assures vigorous prosecution. South Carolina Nat'l Bank v. Stone, 139 F.R.D. at 330.

Both prongs of the "adequacy" test are met here. First, Plaintiff has retained counsel; experienced in consumer and class action litigation to prosecute his claims and those of the Class. Second, there is nothing to suggest that the representative Plaintiff has any interest antagonistic to the vigorous pursuit of the Class claims against Defendants. Plaintiff shares with the Class the interest in establishing that the Defendant supplied defective product that result in damage to their homes. Moreover, it appears that vigorous representation had now created a source of funds for payment of claims. Accordingly, the representative Plaintiff and his counsel adequately represent the interests of the Class.

5. The amount in controversy exceeds one hundred dollars for each class member- Rule 23(a)(5).

The final prerequisite is that the amount in controversy must exceed one hundred dollars for each member of the class. This amount is based on the amount claimed by the Plaintiffs if it is apparent that the claim is made in good faith. Gardner v. Newsome Chevrolet-Buick, 404 S.E. 2d 200, 201 (S. C. 1991).

Robert Sisnroy submitted a supplemental affidavit expressing his belief that all such structures would have more than \$100.00 in damage at this time, especially as they are in excess of eight years old. Furthermore, Plaintiff's cost expert, Terry McKelvey, opined that he expects remediation to cost between \$75,000.00 and \$100,000.00 per structure, exclusive of non-EIFS work such as replacement of windows. Defense witness Ron Hodges testified that EIFS structures can be re-clad for \$20.00 per square foot of external surface (Hodges, pp. 75-77). In this case, there is no doubt that all class members have a claim in excess of the required one hundred dollars.

II. THE EXISTENCE OF A LIMITED FUND TO SATISFY THE CLASS CLAIMS SUPPORTS CLASS CERTIFICATION.

In addition to satisfying the Rule 23 criteria, there are additional compelling reasons for

15/ RMO Jr

certifying this class:

1. The corporate Defendant is defunct and administratively dissolved.
2. There is a limited amount of insurance coverage available.
3. The value of the claims in the class greatly exceeds the Defendant corporation's ability to pay, even with insurance.
4. The distribution to shareholders arguably constitute corporate assets that should be available to pay creditor claims.
5. Parex's insurance carrier for the same time period is undergoing liquidation.
6. Other matters briefed by Plaintiff.

Defendant invests much of its opposition to class certification in the concept of fairness, that it is not fair to hold the distributor accountable by himself and that homeowners should litigate their entire claim at once, and that all potential EIFS defendants be sued at once. This argument misses the reality of the current situation. Of roughly one-hundred claims against Parex in the Charleston area, only one dozen or so have included Charleston Gypsum. Admittedly, however, almost all of those have included other defendants, usually including general contractors, EIFS applicators, etc.

Secondly, the insurance company for one of the principal EIFS defendants, Parex, for the period in question, 1991-1995, is undergoing liquidation. Not only will there likely be a shortfall of funding from the Home Insurance Company liquidation, any action which includes Parex, will be stayed for the foreseeable future.

Third, discussed previously, Charleston Gypsum/CGD is a dissolved corporation that distributed funds to its shareholders prior to its dissolution. Thus, the funds available to satisfy the class members claims are those that are available through insurance coverage and the disgorgement of funds distributed to the shareholders. The fact that there are limited funds available which are insufficient to satisfy the class members claims, mandates that the class procedure is the superior method of resolving this litigation.

“Classic’ limited fund class actions ‘include claimants to trust assets, a bank account,

1st Rmd Jr

insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit and others.” Ortiz v. Fibreboard Corp. 527 U.S. 815 (1999). The courts have held that when a limited fund is available which is insufficient to satisfy the total claims, a binding class action is not only permitted but required. Id. The rationale for requiring a mandatory class treatment is to ensure that the class as a whole participates in the allocation of the limited funds. Id. This same rationale supports class treatment in this case.

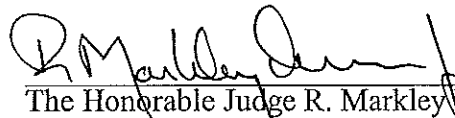
CONCLUSION

Plaintiff has satisfied the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure. All considerations weigh in favor of certifying the Plaintiff’s class. Therefore, the following class is certified:

All persons and entities that own or have owned structures clad with Parex EIFS sold by the Defendant between January 1, 1991 and May 15, 1995. This class excludes:

- a) Employees of the Defendant; and
- b) Those persons who have released the Defendant or are currently in litigation with the Defendant.

AND IT IS SO ORDERED!


The Honorable Judge R. Markley Dennis, Jr.
Ninth Judicial Circuit

Charleston, South Carolina
September 25, 2003

1/5/ RMD/JF

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C. P. & G. S.

By 
DEPUTY CLERK