

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

JOHN CARDAMONE and his wife,)
SALLY CARDAMONE, and)
BENJAMIN T. CLARK and his wife,)
DIANE M. CLARK, and RAMONA)
GIANNI, and NATHAN W. GORDON)
individually and on behalf of others)
similarly situated in the State of South)
Carolina,)

Civil Action No.: 2002-CP-07-1377

Plaintiffs,)
v.)

**Notice Of Motion And
Motion To:**

- 1) Intervene**
- 2) Be Substituted as Class Representative**
- 3) Have Movant's Counsel Substituted as
Class Counsel**

DRYVIT SYSTEMS, INC., ESTATE)
BUILDERS, INC., and AMERICAN)
WAY APPLICATORS OF SOUTH)
CAROLINA, INC.,)
)
Defendants.)

TO: GEORGE E. MULLEN, ESQUIRE, ATTORNEY FOR PLAINTIFFS AND RALPH E. TUPPER, ESQUIRE, ATTORNEY FOR DRYVIT SYSTEMS, INC.

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for Timothy Treon and Jane Treon and P. Jennings Scearce (hereinafter collectively referred to as the "Intervenors") will move before the Presiding Judge of the Fourteenth Judicial Circuit at the Beaufort County Court House, Beaufort, South Carolina, on the tenth (10th) day after service or as soon thereafter as counsel may be heard, or at such time and place as may be set by the Court, for an Order in the above-entitled action allowing the Intervenors to intervene pursuant to Rule 24 of the South Carolina Rules of Civil Procedure for the purpose of asking the Court to: 1) allow the Intervenors to participate in the instant action as named class representatives pursuant to Rule 23 of the South

Carolina Rules of Civil Procedure; 2) substitute the movants as class representatives; and 3) substitute the movant's counsel as class counsel.

Facts and Procedural Background

Intervenors own homes clad with a synthetic stucco system¹ manufactured by Dryvit Systems, Inc. (hereinafter "Dryvit"). Intervenors Treon purchased a home located at 34 Old Fort Drive, Hilton Head Island, South Carolina in February 1994. A Dryvit EIFS product was applied to their home. Intervenor Scarce purchased a home located at 1 Upwind, Hilton Head Island, South Carolina in July 1999. A Dryvit EIFS product was applied to his home. By Order dated September 3, 2002, this Court certified a class action lawsuit against Dryvit pursuant to Rule 23, SCRCF. The September 3rd Order defined the class in two parts. First, the South Carolina class consisted of

[a]ll persons who own or have owned a one- or two-family residential dwelling, or townhouse (hereinafter "structure") in the State of South Carolina who would be a member of the Class purportedly created in [sic] the action pending in Tennessee, Posey et al. v. Dryvit Systems, Inc.²

September 3rd Order, p.2.

The second part of the South Carolina class definition included:

All persons who own or have owned a structure in the State of South Carolina on which an Exterior Insulation and Finish System ("EIFsystem")

¹ Synthetic stucco is also known as an Exterior Insulation Finish System, EIF system or by the acronym "EIFS."

² The Tennessee action (Posey v. Dryvit) referenced in South Carolina class definition was *conditionally certified* in April of 2002 by the Circuit Court for Jefferson County, Tennessee at Dandridge. The conditional Tennessee class consisted of

All Persons who, as of the Notice Date, in any State other than North Carolina, own Property that is clad in whole or in part with Dryvit EIFS installed after January 1, 1989. Excluded are those who: (1) have, prior to the Notice Date, settled with Settling Defendant, providing a release of claims relating to Dryvit EIFS; (2) have obtained a judgment against Settling Defendant for a Dryvit EIFS claim, or had a judgment entered against them on such a claim in Settling Defendant's favor.

Order of Circuit Court for Jefferson County Tennessee at Dandridge, April 8, 2002, p. 2.

have been installed or any previous owner of such structures who incurred any costs or expenses to inspect, repair, or replace the EIF system or other property damages by the EIF system at any time from January 1, 1989, until the date Defendants' continuing conduct is terminated (the "Class Period").

September 3rd Order, p.2.

The Intervenor meets both parts of the South Carolina class definition. As for the first part, each Intervenor meets the requirements of the Posey conditional class: all owned homes clad in whole or part with a Dryvit EIFS, none of the homes are located in North Carolina, the EIFS on the homes was applied sometime after January 1, 1989, and Intervenor has not concluded their claims against Dryvit prior to the instant action. As for the second part, Intervenor owns a structure in the State of South Carolina on which a Dryvit EIF system is installed. Therefore, Intervenor is a member of the class certified by the October 3rd Order.

Legal Discussion

The Intervenor has standing to intervene in the instant action. Each Intervenor has a personal stake in the outcome of this South Carolina class action because each is the owner of property clad with Dryvit's EIFS and each Intervenor's right to a remedy from Dryvit for the damage caused by its EIFS is affected by the instant lawsuit. Bailey v. Bailey, 312 S.C. 454, 441 S.E.2d 325 (1994) (noting that a party must have a personal stake in the subject matter of a lawsuit in order to intervene).

Intervention is appropriate whenever an applicant makes a timely motion to intervene in an action to protect its interest in the subject matter of the litigation. Rule 24(a), SCRPC. Such a motion is inappropriate whenever the applicant's interests are adequately represented by the existing parties. *Id.* In the instant case, there is no question that the Intervenor has made a timely

application to protect interests that are not being adequately represented by the existing parties.

When conducting a class action in South Carolina, the trial court "may at anytime impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought." Rule 23(d)(2), SCRCF. One such protection specifically mentioned by Rule 23 is "notice to absent persons that they may come in and present claims and defenses if they so desire."

Id. Rule 23 also requires notice of a proposed dismissal or settlement of the class action. Rule 23(c), SCRCF.

In the October 3rd Order, this Court specifically ordered the named parties and their counsel to "provide this Court with a proposed Notice Plan" by September 31, 2002. Order, p.7. Notice of the class action, and notice of a class member's ability to "opt out" of the action is addressed on several pages of the October 3rd Order. Order, pp 5-7. Despite the provisions of Rule 23 and the specific instruction of the Court, no notice has ever been given. The named representatives and their counsel have undertaken to certify this class, then attempt to compromise and dismiss the action without any notice to classmembers. Such actions are clearly violative of Rule 23 and the October 3rd Order and form more than an adequate basis for the granting of this motion.

Intervention is appropriate whenever a person's interests are not being adequately represented by the existing parties. Berkeley Electric v. Town of Mount Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). In the instant case, the inadequacy of the representation is undisputable.

The basic requirements of a class action have been ignored. The explicit command of the Court has been ignored. A class action was certified and yet no notice has been given.

In support of the intervenor's motion, the undersigned counsel submits Affidavits of Movants as Exhibit "A", the attached proposed notice plan as Exhibit "B", the attached legal notice attached

as Exhibit "C", the attached publication notice attached as Exhibit "D", and the proposed exclusion request as Exhibit "E".

WHEREFORE, the intervenors therefore pray that this court grant their motion to intervene, allow them the opportunity to represent the class as certified in this matter, and provide them with such other and further relief as the court deems just and proper.

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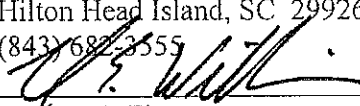
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