UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

IN RE MI WINDOWS AND DOORS, INC., PRODUCTS LIABILITY LITIGATION	2:12-mn-00001-DCN MDL No. 2333 Hon. David C. Norton

RESPONSE TO OBJECTIONS FILED BY ASHTON BURDEN, LLC, ASHTON ORLANDO RESIDENTIAL, LLC, ASHTON TAMPA RESIDENTIAL, LLC, AND D.R. HORTON, INC. - JACKSONVILLE

Defendant MI Windows and Doors, Inc. ("MIWD"), through its undersigned attorneys, hereby submits the following response to the objections filed by Ashton Burden, LLC, Ashton Orlando Residential, LLC, and Ashton Tampa Residential, LLC (ECF No. 259) and D.R. Horton, Inc. - Jacksonville (ECF No. 260).

RELEVANT PROCEDURAL HISTORY

On February 27, 2015, the Court entered an Order Preliminarily Approving Settlement, which granted preliminary approval to the nationwide class action settlement (the "Settlement") in this action (the "Order"). (ECF No. 227). The Settlement applies to "MIWD Product," which is defined to include "any and all MIWD windows that are glazed with Glazing Tape and were manufactured or sold between July 1, 2000 and March 31, 2010." (ECF No. 215-1 at 10 ¶ 36).

On June 1, 2015, Ashton Burden, LLC, Ashton Orlando Residential, LLC, and Ashton Tampa Residential, LLC (collectively, "Ashton"), filed an objection to the Settlement Agreement. (ECF No. 259). Ashton contends that it is a Contractor/Construction Class Member. (*Id.* at 2). On June 1, 2015, D.R. Horton, Inc. - Jacksonville ("D.R. Horton") also filed

an objection to the Settlement Agreement. (ECF No. 260). (D.R. Horton and Ashton are referred to herein as the "Builders"). D.R. Horton also contends that it is a Contractor/Construction Class Member. (*Id.* at 2).

ARGUMENT

District courts have "wide discretion in deciding whether or not to certify a proposed class[.]" *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989) (internal citations omitted). A class action settlement may be granted final approval if, after a hearing, it is found to be "fair, reasonable, and adequate." *Alvarez v. Keystone Plus Constr. Corp.*, 303 F.R.D. 152, 159 (D.D.C. 2014). Members of preliminarily approved class action settlements that do not opt out of the settlement are provided with an opportunity to file objections that set forth the grounds as to why the settlement is not "fair, reasonable, and adequate." *See, e.g., Tennille v. W. Union Co.*, 785 F.3d 422, 436 (10th Cir. 2015) (recognizing that class members must be provided "with an opportunity to present their objections" before a class action settlement will be granted final approval). The Fourth Circuit has held that "Rule 23(e) require[s] the court to consider the fairness and adequacy of the settlement primarily with regard to the interests of the plaintiff class members." *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 160 (4th Cir. 1991). The court's decision should be "informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement." *Nelson v. Mead Johnson & Johnson Co.*, 484 F. App'x 429, 434 (11th Cir. 2012). The court "may rely upon the judgment of experienced counsel for the parties" and, "[a]bsent fraud, collusion, or the like, the district court should be hesitant to substitute its own judgment for that of counsel." *Id.* (internal quotations omitted). As set forth below, the Builders have not raised any valid grounds as to why the

Settlement Agreement here is not "fair, reasonable, and adequate." As such, the objections should be overruled.

I. The Settlement Agreement Does Not Create an Inequitable Situation as All Contractor/Construction Class Members Receive Significant Benefits under the Settlement.

The Builders contend that the Settlement Agreement is unfair because it allegedly creates "an inequitable situation" where a Contractor/Construction Class Member "cannot qualify for repairs or monetary compensation" but nevertheless releases its claims against MIWD. (ECF No. 259 at 3; ECF No. 260 at 3). The Builders' objection reflects a misunderstanding of the basic concepts in the Settlement Agreement. First, any member of the Contractor/Construction Class that owns Affected Property can qualify for repairs or monetary compensation. (*See* ECF No. 215-1 at 36-41) (setting forth relief available to Contractor/Construction Class Members who currently own Affected Property). Second, even if a member of the Contractor/Construction Class no longer owns Affected Property, it nevertheless benefits from the Settlement Agreement because it receives a full release from homeowners for any and all claims relating to the Windows. (ECF No. 215-1 at 17). The Settlement Agreement specifically states that all Class Members "shall be deemed to, and do hereby, release and forever discharge any other persons or entities from claims for which [MIWD] could be liable to any Class Members arising out of or relating to MIWD's Product and whether based on the . . . marketing, production, performance, labeling, promotion, advertising, sale, representation, distribution, installation recommendations, installation, or repair (including warranty repair) of MIWD's Product." (ECF No. 215-1 at 17). Thus, the Contractor/Construction Class Members that do not qualify for repairs or monetary compensation under the Settlement Agreement nevertheless

obtain a significant benefit through the release that MIWD obtained on their behalf. The Builders' contentions otherwise have no merit and should be disregarded by the Court.

a. No Intra-Class Conflict Exists.

The Builders contend that the Settlement is objectionable because it allegedly creates an intra-class conflict. (ECF No. 259 at 5-6; ECF No. 260 at 5-6). Although not entirely clear, it appears that the Builders contend that the Settlement Agreement creates an intra-class conflict by eliminating the rights of some Contractor/Construction Class Members to seek relief from other Class Members. (*Id.*). The Builders have misinterpreted the Settlement Agreement. When the Settlement Agreement receives final approval, all Contractor/Construction Class Members will be released with respect to claims based on the Windows. (*See* ECF No. 259 at 17-18; ECF No. 260 at 17-18). Thus, no Contractor/Construction Class Member can be held liable with respect to the Windows themselves and, as such, will not need to assert claims against other Contractor/Construction Class Members to recover for such potential liability. Moreover, the release provided in the Settlement Agreement is limited to the Windows themselves. It does not affect any other rights or obligations between and among the Contractor/Construction Class and does not release Contractor/Construction Class Members from claims based on improper installation of the Windows as only claims "for which Defendant [MIWD] could be liable" are released. (*See* ECF No. 259 at17-18; ECF No. 260 at 17-18). As such, the Settlement Agreement does not create an intra-class conflict.

II. The Settlement Agreement Does Not "Impermissibly Interfere with the Contractual Rights of Potential Class Members."

The Builders contend that the Settlement Agreement violates the Contractor/Construction Class Members' "due process rights" by allegedly preventing developers, such as the Builders, from bringing claims against independent contractors, subcontractors, and insurance carriers

"relating to the supply and installation of the applicable MIWD Products." (ECF No. 259 at 7; ECF No. 260 at 7). Again, the Builders misunderstand the Settlement Agreement. The Settlement Agreement only releases claims relating to the Windows themselves and does not affect any contractual relationships that may exist between or among the Contractor/Construction Class Members. (ECF No. 215-1 at 17-18). For example, if a Homeowner brought suit against a Contractor for defective installation, the Settlement Agreement does not prohibit the Contractor from filing suit against the subcontractor as a third-party defendant for defective installation as only claims "for which Defendant [MIWD] could be liable" are released. (ECF No. 215-1 at 17-18, 54). Moreover, because the Homeowners have released all claims involving the alleged product defects, the Settlement Agreement protects the Contractor/Construction Class Members from suits brought by Homeowners related to those alleged defects. As such, there is no merit to the Builders' contention that the Settlement Agreement violates due process.

III. The Proposed Settlement Properly Requires Submission of an Opt-Out Notice Prior to Final Approval of the Settlement Agreement.

The Builders contend that the Settlement Agreement violates due process because the opt-out period expired prior to the time for filing objections and the opt-out period instead should not begin until after the Court issues final approval of the Settlement. (ECF No. 259 at 7-9; ECF No. 260 at 7-9). The Builders ignore the fact that, in determining whether to grant final approval of a class action settlement, a court must consider the reaction of the class members to the settlement. *See In re Certain Teed Fiber Cement Siding Litig.*, 303 F.R.D. 199, 217 (E.D. Pa. 2014). In order to evaluate whether the class members' reaction to the proposed settlement weighs in favor of approval, the court looks to the number of class members who submitted objections or opted out of the class. *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 318 (3d Cir. 1998); *see also Radosti v. Envision EMI, LLC*, 717 F. Supp.

2d 37, 43 (D.D.C. 2010) (reviewing "the filings submitted in connection with the objections and opt-outs" to determine whether the class action settlement agreement was fair, reasonable, and adequate). Thus, in order for the court to evaluate a class action settlement, the opt-out period must expire prior to the fairness hearing. As such, the Builders' objection has no merit and should be disregarded.

IV. The Builders Do Not Have a Valid Claim under the Equal Protection Clause.

The Builders contend that the Settlement Agreement violates the Equal Protection Clause because it allegedly allows homeowners to pursue claims for defective installation of the Windows but does not allow the Contractor/Construction Class Members to pursue such claims. (ECF No. 259 at 10; ECF No. 260 at 10). The Builders misunderstand both the law and the Settlement Agreement. Under the Equal Protection Clause of the Fifth and Fourteenth Amendments, the "[g]overnment may not constitutionally deny to any person the equal protection of the laws." *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013). The Equal Protection Clause is implicated if a "statute affects a fundamental right or some protected class." *Id. See also Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014), *cert. denied*, 190 L. Ed. 2d 140 (2014) (finding Equal Protection Clause is implicated when "the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group"). Here, there is no government actor, no statute, no fundamental right, and no protected class at issue. As such, the Equal Protection Clause has no bearing.

Moreover, as discussed above, the Settlement Agreement does not deny Contractor/Construction Class Members the ability to pursue claims based on the defective installation of the Windows. The release provided in the Settlement Agreement is limited to the Windows themselves and does not release builders/contractors from claims based on improper

installation of the Windows as only claims "for which Defendant [MIWD] could be liable" are released. (ECF No. 215-1 at 17-18). As such, the Builders' contention that the Settlement Agreement violates the Equal Protection Clause has no merit.

CONCLUSION

For the foregoing reasons, MIWD respectfully requests that the Court overrule the objections filed by Ashton and D.R. Horton.

Dated: June 25, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2015, a copy of the foregoing answer was filed electronically, such that notice of this filing should be sent by operation of the Court's electronic filing system to all parties and counsel of record.

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