

IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN MENDEZ,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N10C-03-204 WCC
)	
RESIDENTIAL CONSTRUCTION)	
SERVICES LLC and SHERMAN)	
HEATING OILS, INC. and)	
GEORGE SHERMAN)	
CORPORATION)	
)	
Defendants.)	TRIAL BY JURY OF TWELVE DEMANDED

Submitted: April 9, 2014

Decided: July 23, 2014

On Plaintiff's Motion to Substitute the Real Party
in Interest Pursuant to Rule 17(A) - **DENIED**

ORDER

Louis J. Rizzo, Jr., Esquire, Reger Rizzo & Darnall LLP, 1523 Concord Pike,
Suite 200, Brandywine Plaza East, Wilmington, DE 19803. Attorney for Plaintiff.

Daniel P. Bennett, Esquire, Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, 919
North Market Street, Suite 200, Wilmington, DE 19801. Attorney for Defendant
Residential Construction Services LLC.

CARPENTER, J.

Upon consideration of Plaintiff's Motion to Substitute the Real Party in Interest Pursuant to Rule 17(A), supplements thereto, and Defendant Residential Construction Services LLC's ("RCS") response in opposition thereto, it appears to the Court that:

1. Plaintiff filed the underlying Motion on March 20, 2014, arguing that under Superior Court Civil Rule 17(a), the Court should allow Plaintiff to substitute Plaintiff's insurance company, the alleged real party in interest, Travelers Commercial Insurance Company ("Travelers") for the individual Plaintiff, Mendez. While RCS is amenable to Plaintiff adding the insurance company as a co-Plaintiff, RCS opposes Plaintiff's request to substitute the parties and contends that Plaintiff Mendez must remain in the case.

2. Rule 17 provides that: "[e]very action shall be prosecuted in the name of the real party in interest."¹ Superior Court Rules of Civil Procedure, Rule 25 provides the mechanism for substitution and states: "In case of any transfer of interest, the action may be continued by or against the original party, unless the Court upon motion directs the person to whom the interest is transferred to be

¹ Super. Ct. Civ. R. 17.

substituted in the action or joined with the original party.”² Under Rule 25(c), substitution is purely a matter of discretion with the Court.³

3. Section 2118(g) “specifically recognizes that there may be an action by a subrogated insurer against the tort-feasor.”⁴ Thus, when an insurance company has paid its insured and acquired those rights, it becomes a real party in interest. “However, although the insurer is a real party in interest, it is so only to the extent of its subrogation rights. The insurer cannot in its own name assert a claim on behalf of the insured for his claim.”⁵ Therefore, if the insured is not fully compensated by the insurance company, the insured is an indispensable party to the lawsuit and must be a party.⁶

4. Here, Plaintiff Mendez suffered losses from the fire. Travelers contends that those losses have been fully compensated by (1) their payment of losses covered by the insurance policy and (2) a settlement with a prior Defendant, Sherman Oil, made on the eve of trial. Because Plaintiff Mendez has been “fully compensated,” Travelers argues that they are the only real party in interest and,

² Super. Ct. Civ. R. 25.

³ *Hsu v. Great Seneca Fin. Corp.*, 2010 WL 2635771, at *4 (Del. Super. June 29, 2010) *aff'd*, 9 A.3d 476 (Del. 2010).

⁴ *DeVincentis v. Md. Cas. Co.*, 325 A.2d 610, 612 (Del. Super. 1964). *See also Murray v. James*, 326 A.2d 122, 123 (Del. Super. 1974) (allowing an insurer to proceed in its own name).

⁵ *The Peninsula Ins. Co. v. Wynne*, 1978 WL 139207, at *1 (citing *Catalfani v. Higgins*, 5 Storey 470 (1962)).

⁶ *Id.*

thus, must be substituted as Plaintiff in this action. RCS counters that Delaware law requires subrogation suits to be brought in the name of the insured. Further, RCS argues that the settlement with Sherman Oil does not affect the claims made against it because Plaintiff never alleged that Sherman Oil and RCS were joint tortfeasors, such that Sherman Oil's settlement payments would be deducted from RCS's liability, and Plaintiff's claims against RCS have not changed since the settlement to deduct such amounts.

5. The Court finds that Travelers is a real party in interest, having paid their insured and acquired subrogation rights. However, because this subrogation right is limited and Mendez suffered damages in excess of the payment made by Travelers, the Court cannot say with certainty that Mendez has been fully compensated. Therefore, Mendez remains an indispensable party to the lawsuit and Plaintiff's Motion is denied.

6. While the Court makes the ruling above, it must comment that the objection by RCS is very unusual. A party is usually seeking ways to introduce insurance into the litigation believing that an insurance company as a party would be less sympathetic and, thus, would favor their client. Here, given a free pass to substitute an insurance company into the litigation, RCS here passes on the

opportunity in what the Court can only assume is a litigation strategy that is unclear to the Court. If, after further thought, RCS wants to change its mind, it needs to do so before the trial.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.