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February 11, 2015

VIA LAWYERS SERVICE
Honorable Ned M. Rosenberg, J.S.C.
Essex County Superior Court
Hall of Records
465 Dr. Martin Luther King, Jr. Blvd., Chambers 224
Newark, New Jersey 07102

Re: Feliciano Tenezaca and Jose Zuna v. Toll Brothers, Inc.
Docket No.: ESX-L-1262-11
Our File: 335-0

1) **Plaintiffs' Motion to Compel Production of Signed Authorizations**
2) **Motion on Short Notice to Intervene by Timothy J. Carlsen**

Returnable February 20, 2015

Dear Judge Rosenberg:

Please accept the following letter brief on behalf of plaintiffs Feliciano Tenezaca and Jose Zuna in support of plaintiffs' Motion to Compel Production of Signed Authorization as well as serve as an Opposition to the Motion on Short Notice filed by Timothy J. Carlson to Intervene For the Purpose of Opposing Plaintiffs' Motion. These motions are currently returnable before Your Honor on February 20, 2015.

I. Mr. Carlsen's Motion to Intervene is Procedurally and Legally Deficient and Should be Denied

The motion filed by Timothy J. Carlson proposing to intervene in this litigation "solely for the purpose of opposing plaintiffs' motion to compel production of signed authorization" is procedurally flawed and is not supported by the relevant legal authority. The proper procedure for intervention in state court is clearly set forth in *Rule* 4:33-3. Under this *Rule*, upon motion, a party can seek to intervene either as a plaintiff or a defendant. In addition to serving a motion to intervene on all parties, the person desiring to intervene must also attach to the motion a pleading setting forth the claim or defense for which the intervention is sought, along with a case information statement. If the motion is granted an intervener becomes a party to the litigation and that is why a form of a Complaint or Answer is required to be submitted.

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The current motion to intervene filed by Timothy J. Carlsen does not comply with *R.* 4:33-3 in that no pleading or case information statement are attached to the unsubstantiated motion papers. Mr. Carlsen's motion is further flawed as he proposes to intervene only for the limited purpose of responding to plaintiffs' motion to compel production of signed authorizations. This intervention for only a small period of time has absolutely no support in the New Jersey court rules or case law. One is either in the case as a party or they are not. Mr. Carlsen cannot have it both ways and attempt to intervene in this case but only for a limited time and limited purpose. The rules of intervention do not work that way.

There are two types of intervention, intervention as of right under *R.* 4:33-1 and permissive intervention under *R.* 4:33-2. Mr. Carlsen is seeking to intervene under *R.* 4:33-1, intervention as of right, and as such he bears the burden of establishing all of the necessary factors and requirements to enable him to intervene. *R.* 4:33-1 provides in part:

> Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and if so situated that the disposition of the action may, as a practical matter, impair or impede the ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The courts have clearly articulated the four criteria for intervention as of right under *R.* 4:33-1. To intervene as of right, the movant must establish the following: 1) claim "an interest relating to the property or transaction which is the subject of the transaction"; 2) show that the movant is "so situated that the disposition of the action may as a practical matter, impair or impede its ability to protect that interest"; 3) demonstrate that the movant's interest is not "adequately represented by existing parties"; and 4) make a "timely application to intervene". *See Sutter v. Horizon Blue Cross and Blue Shield of New Jersey*, 406 N.J. Super 86, 106 (App. Div. 2009): *Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). Although Mr. Carlsen cites these four criteria in his moving papers, he fails to specifically address how he has satisfied each of the criteria. This failure is most likely due to the fact that Mr. Carlsen cannot possibly satisfy any of the above requirements and is therefore not entitled to intervene as of right.

In the case *sub judice*, Mr. Carlsen cannot possibly satisfy the first requirement, "an interest relating to the property or transaction which is the subject of the transaction," as he has absolutely no interest in the construction site on which both plaintiffs were injured (the property) nor does he have interest in any of the companies, whether it be the general contractor, Toll Brother, or any of the subcontractors (the transaction). In fact if the proposed expert did have such a biased interest it would not appropriate for him to be an expert in the litigation. Experts by definition are supposed to be dis-interested. Expert testimony is subject to the other rules of evidence, and cannot create a danger of undue prejudice or result from bias on the part of the expert. *Id.* at 209. In determining admissibility of that expert's opinion, the court must make sure that the expert's qualifications are legitimate and that there is no bias affecting the testimony of that expert. *Rubanick v. Witco Chem. Corp.*, 125 N.J. 421, 453 (1991).

Mr. Carlsen is not a partner, shareholder or any person who has any interest in the subject of this litigation. This not a situation where a tenant or a landowner has a direct financial interest in the litigation or who is an indispensable party with a stake in the litigation. *See NVE Bank v. Ber-Loew Partnership*, 2012 WL 5381697 (N.J. Super A.D.)(attached hereto) wherein the court found that a partner in a Partnership had not satisfied the first required element of intervention under *R.* 4:33-1, that he had an interest relating to the property that was the subject of plaintiff's action. The Court held the properties at issue were owned solely by the Partnership and the Partnership had sole interest in defending any actions relating to the properties. *Id.* at 5. Furthermore in *Sutter v. Horizon Blue Cross Blue Shield*, 406 N.J. Super 86 (App. Div. 2009) the court denied a medical society's motion to intervene as the societies did not have an interest in the subject matter of the action. *Id.* at 107. The *Sutter* court found that since the societies had nothing to lose or gain based on the outcome of the settlement/resolution of case, they could not make the required showing of intervention as of right. *Id.*

In the case at hand Mr. Carlsen has absolutely no interest in this personal injury lawsuit filed by two severely injured plaintiffs against Toll Brothers, the developer, and the other contractors on the job site. Mr. Carlsen is merely an expert hired by Toll Brothers to support Toll Brother's incorrect assertion that they did not commit any safety violations. He, in no stretch of the imagination, has any "interest in the subject matter of the lawsuit." Mr. Carlsen might have an interest in not signing the requested certifications as he apparently does not want the plaintiff to see what he represented to become a "Safety Expert," but this is no way equates to an "interest in the subject matter of this lawsuit." Furthermore, Mr. Carlsen has nothing to gain or lose from the outcome of this personal injury action, as he merely gets paid by the hour to offer his opinion. Therefore, it is quite clear that Mr. Carlsen fails to satisfy the first prong of the intervention analysis as he has no, "interest in the subject matter of the lawsuit."

Mr. Carlsen also fails to satisfy the second criteria under the intervention analysis, that he is "so situated that the disposition of the litigation may impair or impede his ability to protect that interest." *See Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). The disposition of this litigation does not impair or impede Mr. Carlsen's interest in the litigation as, was noted above, he has no interest or stake in this personal injury litigation. It is the ligation itself, not a rather routine discovery issue of the litigation such as signed certifications, that a potential intervener must have a stake in. Having Mr. Carlsen sign the required Safety certifications does not "impair or impede" Mr. Carlsen's ability to protect his interest in the litigation, as he has absolutely no interest in this litigation to begin with.

The third criteria Mr. Carlsen must satisfy before he can intervene is to "demonstrate that the applicant's interest is not adequately represented by existing parties". *See Builders League of South Jersey, Inc. v. Gloucester County Utilities Authority*, 386 N.J. Super 462, 468 (App. Div 2006). Mr. Carlsen was hired by defendant Toll Brothers to act as its "Safety Expert". The attorney for Toll Brothers defended the deposition of Mr. Carlsen and interposed any and all objections he felt were necessary. Therefore it is quite clear that the discovery dispute involving this expert is "adequately represented by existing parties," namely Toll Brothers. Any objections or issues that Mr. Carsen has regarding signing certifications to enable plaintiff to explore the legitimacy of Mr. Carlsen's safety

credentials can be adequately defended by counsel for Toll Brothers. As a result, Mr. Carlsen fails to satisfy the third intervener criteria and as such his motion must be denied.

The fourth criteria for intervention, "a timely application to intervene" is also not satisfied as any request at any time by Mr. Carlsen to intervene would be inappropriate. One cannot intervene just for a small portion of the case and then exit out of the case. Once a motion to intervene is granted that person becomes a party to the case. Whether the intervener is joining as a plaintiff or defendant they are joining the actual, ongoing litigation. It is irrelevant when Mr. Carlsen filed his motion to intervene as the timing would always be improper since his actual motion is procedurally improper and legally deficient.

Based upon the above analysis it is clear that a Motion to Intervene is not the proper procedural tool for Mr. Carlsen to enter this personal injury litigation and even if it were, he clearly fails to satisfy the four criteria necessary to intervene as of right under *R.* 4:33-1. Furthermore Mr. Carlsen fails to accompany his current motion with the proposed pleading he would file if the motion were granted as required under *R.* 4:33-3. Therefore, Mr. Carlsen's Motion to Intervene should be denied in it's entirety.

II. <u>Plaintiff's Motion to Compel Authorizations</u>

Plaintiff's Motion to Compel Mr. Carlsen to Sign Authorizations on the other hand is supported by the relevant legal authority and should be granted in its entirety. It must be noted that plaintiffs' motion should be treated as unopposed since Mr. Carlsen has not provided the requisite basis to become an intervener as of right and in fact Mr. Carslen has no standing to assert any claims or opposition in this litigation. Standing refers to the plaintiff's "ability or entitlement to maintain an action before the court," and courts will not entertain matters where legal standing is lacking. *New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n*, 82 *N.J.* 57, 67, 411 A.2d 168 (1980); *In re Quinlan*, 70 *N.J.* 10, 34, 355 A.2d 647, cert. denied, 429 U.S. 922, 97 S. Ct. 319, 50 L. Ed. 2d 289 (1976). Standing is present where the plaintiff has a sufficient stake in the outcome of the litigation and there is a substantial likelihood that plaintiff will suffer harm in the event of an unfavorable decision. *New Jersey State Chamber of Commerce*, 82 *N.J.* at 67. The purpose of standing is to "assure that the invocation and exercise of judicial power in a given case are appropriate." *Id.* at 69. Further, the doctrine "serves to fulfill the paramount judicial responsibility of a court to seek just and expeditious determinations on the ultimate merits." *Ibid.*

Mr. Carlsen, although lacking standing to assert any claims or opposition, attempts to assert that the plaintiffs' request for signed authorizations is merely a "fishing expedition". This accusation could not be further from the truth. The requested authorizations are clearly relevant and permitted by New Jersey's discovery rules. Further, the argument against disclosure based on the allegation of a "fishing expedition" was dismissed by the Supreme Court over fifty years ago. *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947)("no longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); *Westinghouse Electric Corporation v. Local No. 449 of International Union of Electrical and Radio, Machine Workers, C.I.O., et al*, 39 N.J.Super. 438, 445, (Chancery Div. 1956); *See also Olson Transportation*

v. Socony-Vacuum, 8 Fed.Rules Serv. 34.41 (E.D.Wis. 1944) ("[T]he [federal discovery] rules ... permit 'fishing' for evidence as they should."

It must also be noted that Mr. Carlsen's Motion does not claim that the requested discovery is either "confidential" or "privileged." *R.* 4:10-3 provides that the Court may make any Order limiting discovery in the interest of justice upon a good cause being shown. State and federal courts agree that trade secret and/or confidential information sought in the discovery process is entitled to protection. For example, the United States Supreme Court found:

> Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34, (1984). The New Jersey Court Rules governing protective orders expressly extends protection to a "trade secret or other confidential research, development, or commercial information...." *R.* 4:10-3(g)(emphasis added). *See also Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 376, 662 A.2d 546, 556 (1995) ("Documents containing trade secrets, confidential business information and privileged information may be protected from disclosure." (emphasis added)). As Supreme Court wrote in Lamorte, "information not technically meeting the strict requirements of trade secrets may be protected as 'confidential information.'" 167 N.J. at 300-01, 770 A. 2d at 1166-67 (citing *Roboserve, Ltd. v. Tom's Foods, Inc.* 940 F.2d 1141, 1456 (11th Cir. 1991))("A confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected.").

Under New Jersey Law, "confidential commercial information" includes data that, while not meeting the technical definition of a trade secret, is nevertheless confidential and commercially useful, such as business methods used, records compiled and customer contacts. *A. Hollander & Son, Inc., v. Imperial Fur Blending Corp.*, 2 N.J. 235, 249, 66 A.2d 319, 325 (1949); Platinum, 285 N.J. Super at 295, 666 A.2d at 1036 (stating that the key to determining the misuse of confidential business information is the intended use of the information and the relationship of the parties at the time of the misuse).

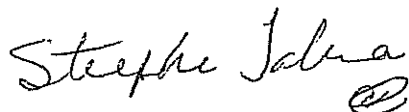
In the case at hand Mr. Carlsen does not offer any "good cause" to support a claim of confidentiality or the need for a protective order. However even if he does make such an argument, a brief review of the information necessary for the application to be a Certified Safety Professional would negate any such position. The Application Instructions require the candidate to submit: 1) Contact information; 2) a Qualifying credential; 3) Experience information; 4) Education information; 5) Application agreement and validation (acknowledging the information is truthful); and 6) Payment. *(Exhibit E to Plaintiffs' Motion p.8 entitled CSP Chapter 3 Application Instructions)*. There is absolutely no confidential or privileged information in the application materials. As such Mr. Carlsen has no basis for his secrecy and attempt to hide the applications that he submitted to obtain his credentials.

It is Mr. Carlsen who holds himself out as a "Certified Safety Professional" and cites in his deposition and CV his membership in and/or titles from several professional organizations including the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers. (*Exhibit D to Plaintiffs' Motion, Carlsen CV*). Plaintiff is certainly entitled to basic due diligence as to these purported qualifications of Mr. Carlsen and determine what Mr. Carlsen proffered when he was applying for these various titles and certifications. This is exactly the type of discovery that is proper and appropriate when investigating the purported qualifications of an expert. *See Lawlor v. Kolarsick*, 92 *N.J.Super.* 309, 312-13 (App.Div.), *certif. denied*, 48 *N.J.* 356 (1966) (cross examination of a purported expert witness may include evidence that the witness's purported qualifications to comment on the issues presented "was less than he claimed, and that such deficiency affected his credibility.")

Furthermore, the case of *Gensollen v. Pareja*, 416 N.J. Super 585 (App. Div. 2010), cited by Mr. Carlsen, is completely distinguishable from the case at hand. In *Gensollen* the expert was asked to "compile and produce nonexistent documents" that the court found would be unduly burdensome and expensive for the expert. In the case at hand Mr. Carlsen is not asked to compile or produce any documents. In fact, he is not asked to do any work at all. He is merely asked to sign authorizations, which are not privileged or confidential, which would allow plaintiff to review Mr. Carlsen's applications with the various safety boards and professional organizations. These applications and membership requests have already been completed by Mr. Carlsen and would not require any extra work or money to be expended by Mr. Carlsen or Toll Brothers. A signature, with no other effort to be expended by Mr. Carlsen, would not harass or burden defendant's expert and is certainly within the scope of relevant and pertinent discovery to impeach an expert witness.

Accordingly, it is respectfully requested the Court grant the within Motion to Compel Mr. Carlsen, the defense liability expert, to produce signed authorizations with respect to the Board of Certified Safety Professionals, International Code Counsel (ICC), American Society of Civil Engineers, National Society of Professional Engineers, New Jersey Society of Professional Engineers and American Society of Safety Engineers, which are attached to plaintiffs' motion papers as Exhibit G.

Respectfully submitted,



STEPHANIE TOLNAI
For the firm

ST:cf

cc: Civil Motions Clerk- Essex County Superior Court (Via Lawyers Service)
Bonnie H. Hanlon, Esq. (Via Electronic & Regular Mail)
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Ltr to Judge Rosenberg.wpd