

QUAN-EN YANG, et al.
On His Own Behalf and on Behalf
of All Others Similarly Situated,

Plaintiffs,

vs.

G & C GULF, INC. d/b/a
G&G TOWING., et al.

Defendants.

* IN THE
* CIRCUIT COURT
* FOR
* MONTGOMERY COUNTY, MD.
* Case No. 403885-V
* Hon. Ronald B. Rubin
* Specially Assigned
* TRACK VI

* * * * *

**Opposition to Motion by Heller Brothers Realty, LLC for Summary Judgment, and
for Other Relief**

Plaintiffs, by and through the undersigned Plaintiff Class Counsel, respectfully submit this Opposition to the Motion by Heller Brothers Realty, LLC (“HBR”) for Summary Judgment, and For Other Relief (the “Motion for Summary Judgment”). HBR’s Motion for Summary Judgment must be denied because HBR is not party to this case (and thus, cannot properly file a motion in this case), and because HBR has already received complete relief under the Court’s Final Order Approving 2019 Proposed Compromise of Plaintiffs’ Claims, Form Settlement Demand And Certifying Settlement Class (Dkt. No. 865) (“Final Order”).

I. Background.

HBR is the owner of a parking lot located at the Glenmont Shopping Center in Silver Spring, Maryland. Beginning in November 2008, HBR contracted with G&C Gulf, Inc. d/b/a G&G Towing for the provision of towing services. As a result, when the Court certified the Defendant Class in this case on November 18, 2016 (Dkt. No. 219), HBR – because it fit within the class definition – became an absent Defendant Class Member in this litigation.

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Clerk of the Circuit Court
Montgomery County, Md.

In 2018, all Defendant Class Members were offered the opportunity to settle the claims against them. HBR originally chose to take the settlement by virtue of the fact that it did not opt out of the 2018 Settlement. When it failed to pay its obligation under the 2018 Settlement, a judgment was entered against HBR. *See* Dkt. No. 429, Master Judgment.

After judgment was entered, counsel for HBR, Mary Craine Lombardo (“Ms. Lombardo”), of Stein Sperling Bennett De Jong Driscoll PC, filed a Motion to Clarify Order Or, In the Alternative, Vacate Final Judgment (“Motion to Clarify”) on February 15, 2018. *See* Dkt. No. 405. With the consent of Plaintiff Class Counsel, the Court entered an Order that HBR be removed from the 2018 Defendant Settlement Class, and be reclassified as an “opt-out” from the 2018 Settlement. *See* Dkt. No. 426. During this time, Plaintiff Class Counsel explained to Ms. Lombardo that HBR could intervene in the case and proceed in the litigation as a party; HBR, however, chose not to. Instead, it remained a mere absent Defendant Class member in this case.

Plaintiffs are pleased that HBR decided to accept the recent 2019 Proposed Compromise of the Plaintiffs’ Claims. As an absent class member accepting the 2019 Settlement, HBR, like all Defendant Class Members, is subject to the terms of settlement as set out in the Final Order (Dkt. No. 865):

Following (a) acceptance of the Proposed Compromise by a Defendant Class member; and (b) payment of all monies due and owing pursuant to the Completed Settlement Demand, the Defendant Settlement Class member shall receive a release from the 2019 Plaintiff Settlement Class of all claims that were or could have been brought with respect to the tows within the Class Period. Such release shall be prepared and mailed by Plaintiff Class Counsel within a reasonable period of time.

See Final Order at ¶12.D.

Thus, as set forth in the Final Order, all Defendant Class members who accepted and paid their share under the 2019 Settlement did so in consideration of the following: (1) each

received a complete and final “release”; and (2) upon payment, they were no longer deemed a member of the Defendant Class certified by this Court on November 18, 2016.

There is no dispute that when HBR remitted the settlement payment under the 2019 Settlement, Plaintiffs timely sent HBR its release on October 7, 2019. Likewise, upon payment, HBR was no longer deemed a member of the certified Defendant Class. And since HBR did not previously intervene in the litigation (as it had a right to do), and was not otherwise added as a party to this case, it now has no further interest in the litigation.

II. HBR’s Motion for Summary Judgment Must Be Denied Because HBR is Not a Party to This Action.

HBR’s Motion for Summary Judgment must be denied because HBR is not a party to this case. This fact was conceded by HBR in its Motion to Clarify. *See* Dkt. No. 405 at 1 (identifying HBR as a “[n]on-party”). Although HBR is not a party, HBR filed its Motion for Summary Judgment, even though the Maryland Rules only permit a **party** in an action to do so:

Any **party** may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law.

See Md. Rule 2-501.

Nonetheless, HBR maintains in its Motion for Summary Judgment that because the docket reflects that HBR is an “interested party”, that HBR is thus “a “party” entitled to file this motion.” *See* Memorandum in Support of Motion for Summary Judgment at 1. HBR’s argument not only lacks any supporting authority, but is directly contrary to Maryland law:

The term “party” is not defined in the Maryland Rules; however, those persons who are entered on the record as plaintiff or defendant are generally considered the parties. *Douglas v. First Sec. Fed. Sav. Bank*, 101 Md.App. 170, 643 A.2d 920 (1994). **Any other persons who may be affected by the outcome of the cause of action, either indirectly or consequently, although interested persons, will not be considered parties.** Black's Law Dictionary, Revised 5th Ed. (1983), *cited in Virginia Int'l Terminals v. Ceres Marine Terminals*, 879 F.Supp. 31, 32–33 (E.D.Va.1995)(stating that the term “party” is a technical word having a

precise meaning in legal parlance); *Golatte v. Mathews*, 394 F.Supp. 1203, 1207 (M.D.Ala.1975) (stating that the term “party” refers to those by or *534 against whom a legal suit is brought; all others who may be affected by the suit, indirectly or consequently, are persons interested but not parties); *M & A Elec. Power Coop. v. True*, 480 S.W.2d 310, 314 (Mo.Ct.App.1972)(declaring that a person whose name is designated on the record as plaintiff or defendant is a party).

Milburn v. Milburn, 142 Md. App. 518, 533–34 (2002) (emphasis added). Although HBR is correct in that it is listed as an “interested party” in the Court’s docket, HBR’s position that it is a party to this case misinterprets Maryland law.

Instead, HBR *was* merely a defendant **class member** – not a party to this case. It is well established that absent class members are not parties to a case. “Discovery of absent class members, while not forbidden, is rarely permitted **due to the facts that absent class members are not “parties” to the action**, and that to permit extensive discovery would defeat the purpose of class actions which is to prevent massive joinder of small claims.” *McCarthy v. Paine Webber Grp., Inc.*, 164 F.R.D. 309, 313 (D. Conn. 1995) (emphasis added). *See also In re Publ’n Paper Antitrust Litig.*, No. 3:04 MD 1631 (SRU), 2005 WL 1629633, at *1 (D. Conn. July 5, 2005) (“The Federal Rules of Civil Procedure do not provide for discovery from absent class members as “parties.” In other words, party discovery techniques—such as interrogatories, document requests, and requests for admissions—only apply to named plaintiffs in a class action, not absent class members.”); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (“Nothing in Rule 23 suggests that class members are deemed ‘parties’. On the contrary, Rule 23(d)(2) specifically provides that the court may notify class members that they have the *option* of appearing in the case through their own counsel and the additional option of intervening, presenting claims or defenses, or otherwise formally entering the action.”); *In re Worlds of Wonder Sec. Litig.*, No. C-87-5491 SC (FSL), 1992 WL 330411, at *2 (N.D. Cal. July 9, 1992) (“Absent class members are not parties and separate discovery of individual class members not

representatives is ordinarily not permitted.”); *Graff v. United Collection Bureau, Inc.*, 132 F. Supp. 3d 470, 477 (E.D.N.Y. 2016) (“Three circuit courts have considered and rejected the very objection raised here. In *Williams*, 159 F.3d at 269, the Seventh Circuit rejected a nearly identical claim, noting that “absent class members are not ‘parties’ before the court in the sense of being able to direct the litigation,” . . .”).¹

Because HBR did not intervene in the litigation prior to accepting and paying the 2019 Settlement, it is not and has never been a party to this case. Indeed, at most HBR is a former member of the certified Defendant Class. Accordingly, its Motion for Summary Judgment is not properly before this Court and must be denied.

III. HBR Received Full Relief Under the Final Order in Consideration for its Settlement Payment, and is Not Entitled to More.

Moreover, HBR’s Motion for Summary Judgment should be denied because HBR has already received the full relief under the Final Order. *See* Part I, *supra*. HBR appears to acknowledge this fact in its Motion for Summary Judgment at 3 – “HBR has paid in full on a demand for settlement that extinguishes all claims against it” –but nonetheless requests this Court enter an order granting summary judgment for HBR.²

¹ Consistent with this approach, the Maryland Rules make clear that since members of a class action are not parties, they may only be subject to discovery **by motion**. See Md. Rule 2-231(g) (“[f]or purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class.”).

² HBR alternatively asks this Court “for leave to intervene”. Memorandum in Support of Motion for Summary Judgment at 1. As illustrated plainly in HBR’s own admission that HBR has “paid in full on a demand for settlement that extinguishes all claims against it”, HBR does not have standing to intervene, as any claims between the Plaintiff Class and HBR are fully resolved pursuant to the settlement agreement. *Scott & Wimbrow, Inc. v. Calwell*, 31 Md. App. 1, 4, (1976) (claimant had “no standing to intervene . . . because it could, in no manner, be affected by the outcome”).

The factual circumstances, in addition to the law, demonstrate why HBR's Motion for Summary Judgment must be denied. As discussed in Part I, *supra*, in 2018 HBR could have, but chose not to, intervene in the litigation. Instead, it remained as a member of the certified Defendant Class. When HBR chose to accept and pay the 2019 Settlement, it extinguished any interest that it ever may have had in the litigation. Indeed, there is no dispute in this case that HBR promptly received the bargained for consideration in return for its settlement payment – on October 7, 2019, Plaintiff Class Counsel sent an executed Release to HBR by Federal Express that “extinguishes all claims against it”. Motion for Summary Judgment at 3.

Because no other relief is required under the Final Order, or proper under the law, HBR's Motion for Summary Judgment must be denied.

IV. Conclusion

For the reasons set forth above, the Plaintiff Class respectfully requests that this Court deny HBR's Motion for Summary Judgment.

Dated: December 30, 2019

Respectfully submitted,

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*Attorneys for Representative Plaintiffs and
the Certified Plaintiff Class*

By: Richard Gordon (KSK, with permission)
Richard S. Gordon

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2019, copies of the foregoing Opposition to Motion by HBR Realty, LLC for Summary Judgment, and proposed Order, were served by electronic and first class on the following:

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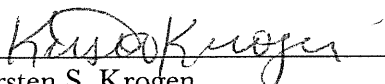
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Order

UPON CONSIDERATION OF Heller Brothers Realty, LLC’s Motion for Summary Judgment, and for Other Relief (“Motion for Summary Judgment”), and the Plaintiffs’ Opposition thereto, , it is this ____ day of _____, 20 ____, by the Circuit Court for Montgomery County,

ORDERED, that the Motion for Summary Judgment is hereby DENIED.

Hon. Ronald B. Rubin
Judge, Circuit Court for Montgomery County

Cc: Richard Gordon
James Ulwick
Jean Lewis
Stephen Ring
Gardner Duvall
Patrick McKeVitt
Matthew Patner
Thomas Murphy
Michael Campbell