

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
08 CVS 21190

MARK ELLIOTT, TOR AND MICHELLE )  
GABRIELSON, MICHIMIRO AND YOKO )  
KASHIMA, on behalf of themselves and all )  
others similarly situated, )  
Plaintiffs )

v. )

KB HOME NORTH CAROLINA, INC. and )  
KB HOME RALEIGH-DURHAM, INC., )  
Defendants )

and )

KB HOME RALEIGH-DURHAM, INC., )  
Third-Party Plaintiff )

v. )

STOCK BUILDING SUPPLY, LLC, )  
Third-Party Defendant )

**ORDER ON JOINT MOTION  
TO COMPEL**

THIS MATTER comes before the Court on the parties Joint Motion to Compel Attendance of Insurance Carriers and Their Counsel to Mediation (“Motion to Compel”) pursuant to Rule 4 of the Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures. The parties seek an order requiring representatives of certain insurance carriers to attend a mediated settlement conference scheduled for September 27, 2016.

THE COURT, having considered the Motion to Compel, the affidavit of the Mediator, Ross R. Hart, the discussions with counsel in this matter, and other

appropriate matters of record, concludes, in its discretion, that the Motion to Compel should be GRANTED for the reasons set forth below.

### FACTUAL AND PROCEDURAL BACKGROUND

1. The factual and procedural background of this matter has been recited in numerous orders of the Court. Accordingly, the Court recites only those limited background facts necessary to resolve the Motion to Compel.

2. National Union/AIG (“National Union”) is the insurance carrier for Third-Party Defendant Stock Building Supply, LLC (“Stock”) and insures Defendant KB Home Raleigh-Durham, Inc. (“KB Home”) as an additional insured. Liberty Mutual Fire Insurance Company (“Liberty Mutual”) insured Stock and KB Home as an additional insured prior to 2013.<sup>1</sup> American Guarantee/Zurich (“Zurich”) served as Stock’s excess insurance carrier beginning in or around 2013.

3. The parties have conduct four mediated settlement conferences as part of this litigation, the first of which occurred in 2010. The second mediation was held in or around March 2015 in Miami, Florida and the third and fourth mediations were held in Raleigh, North Carolina on July 11, 2016 and August 29, 2016, respectively. Representatives from Liberty Mutual were present at the first mediation in 2010 and at the July 2016 mediation. Representatives from National Union were present at

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<sup>1</sup> Liberty Mutual has filed a declaratory judgment action against KB Home, KB Home Raleigh-Durham, Inc. and Stock Building Supply, LLC regarding coverage issues arising from this lawsuit. That action currently is pending in the United States District Court for the Eastern District of North Carolina (5:13-CV-831-BR), but has been stayed pending the outcome of this lawsuit.

the 2015 mediation and the July 2016 mediation. Representatives from Zurich have attended all four mediations in person.

4. The parties advised the Court that KB Homes and Plaintiff reached a tentative settlement following the most recent mediation on August 29, 2016, but that a final global resolution could not be reached without the presence of National Union and Liberty Mutual and their counsel. The parties contend that the physical presence of representatives for each of the insurance carriers, and their counsel, is essential to reaching a final “global resolution” of this lawsuit and the federal court declaratory action.

5. A fifth mediation has been scheduled for September 27, 2016 (the “September mediation”). The parties intend to seek a final global resolution during this mediation. Accordingly, the parties request that this Court compel all of the parties’ respective insurance carriers and their counsel to attend the September mediation. Zurich has acknowledged through counsel that its representatives will appear in person at the September mediation. Counsel for Liberty Mutual opposes the Motion to Compel. Counsel for National Union has advised the Court that he is available to attend the mediation, but that National Union’s representative, Jeff Rohde, will be unable to attend because of a previously scheduled vacation conflict. National Union has offered, however, to have Mr. Rohde available by telephone during the mediation.

#### DISCUSSION

6. Rule 19 of the General Rules of Practice and Procedure for the North Carolina Business Court (“BCR”) provides that all cases pending in the Business Court “shall be subject to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions and such other Rules or orders consistent therewith as may be established or entered by the Business Court.” BCR 19.1.

7. N.C. Gen. Stat. § 7A-38.1(a) (“Mediated settlement conferences in superior court civil actions”) provides that it was “enacted to require parties to superior court civil actions and their representatives to attend a pretrial, mediated settlement conference conducted pursuant to this section and pursuant to rules of the Supreme Court adopted to implement this section.” The statute includes the following provision:

The parties to a superior court civil action in which a mediated settlement conference is ordered, their attorneys and other persons or entities with authority, by law or by contract, to settle the parties' claims shall attend the mediated settlement conference unless excused by rules of the Supreme Court or by order of the senior resident superior court judge.”

N.C. Gen. Stat. § 7A-38.1(f). Rule 4A(1)(b) of the Rules Implementing Statewide Mediated Settlement Conferences in Superior Civil Court Actions (hereinafter “Mediation Rules”), promulgated pursuant to N.C. Gen. Stat. § 7A-38.1, provides as follows:

A representative of each liability insurance carrier . . . which may be obligated to pay all or part of any claim presented in the action . . . shall be represented at the conference by an officer, employee or agent, other than the carrier’s outside counsel, who has the authority to make a decision on behalf of such carrier or who has been

authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

N.C. Settlement Conf. Rule 4(b). Therefore, under the statute and the Mediation Rules, insurance carriers who may be obligated to pay any part of a claim must be represented in mediation by an authorized agent.

8. The parties have represented to the Court that the carriers they seek to compel to attend the September mediation “may be obligated to pay all or part of” the claims in this action. All of the insurance carriers are either currently the insurer with a duty to defend one of the parties in this action or previously insured one of the parties during the relevant time periods underlying the claims. Accordingly, the Court finds that Zurich, National Union, and Liberty Mutual are insurance carriers as contemplated by Rule 4A of the Mediation Rules and the underlying statute.

9. The Court also believes that it has the requisite authority to issue an Order to compel the insurance carriers to mediation. Although there is no specific case law in North Carolina that states that a court can retain the authority to compel the attendance of non-party insurance carriers to mediation, North Carolina courts have recognized the discretion of the trial court to issue sanctions against parties and those obligated to appear in mediation under the Mediation Rules, but who failed to appear without good cause. See *Triad Mack Sales & Serv., Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 407–09, 438 S.E.2d 485, 486–88 (1994) (holding that the trial judge acted within his discretion when he imposed sanctions on the absent party under Rule 37 of the North Carolina Rules of Civil Procedure following the party’s

failure to attend mediation without good cause); See also *Perry v. GRP Fin. Servs. Corp.*, 196 N.C. App. 41, 48–50, 674 S.E.2d 780, 784–86 (2009) (sanctions for a party’s non-attendance pursuant to Rule 4A of the Mediation Rules were well within the discretion of the trial judge unless there was good cause for the absence). It follows from these cases that the Court has the authority to issue an order to compel attendance at a mediated settlement conference.

10. There is also case law from other jurisdictions in which courts have compelled insurance carriers and their representatives to attend mediation based on a local court rule. See *Campagnone v. Enjoyable Pools & Spas Serv. & Repairs, Inc.*, 163 Cal. App. 4th 566, 572, 77 Cal. Rptr. 3d 551, 555 (2008) (holding that the trial court could sanction insurance agents with potential coverage responsibilities who did not attend the mediation as required by local court rule); *Casaccio v. Curtiss*, 228 W.Va. 156, 164, 718 S.E.2d 506, 514 (2011) (finding that the insurance carrier for the insured party is considered a “party” to the action pursuant to a local rule permitting trial court authority to impose sanctions for carrier’s failure to participate in mediation).

11. Accordingly, the Court finds that it has the authority to compel Zurich, National Union, and Liberty Mutual to attend the September mediation. The Court recognizes that the insurance carriers have already attended and participated in, to varying degrees, the prior mediated settlement conferences conducted in this lawsuit, and that attendance at the September mediation carries with it associated costs to those carriers. Nevertheless, the spirit of the Mediation Rules requires that the

necessary parties continue to participate in the mediation process until either a resolution has been reached or the mediator has determined that an insurmountable impasse has occurred. Accordingly, the Court concludes that the necessary parties should be required to attend.

THEREFORE, IT IS ORDERED that the Motion to Compel is GRANTED, in part, and DENIED, in part, as follows:

12. The following parties are compelled to attend in person the mediated settlement conference scheduled for September 27, 2016:

- a. Christopher Blake, Esq. and adjuster Nestor Ramirez on behalf of Liberty Mutual;
- b. Phillip Reeves, Esq. and adjuster Julie Almer on behalf of Zurich; and,
- c. Steve Rapp, Esq. on behalf of National Union.

13. Adjuster Jeffrey Rohde is not required to attend in person, but is ordered to be available by telephone on behalf of National Union from the starting time of the mediated settlement conference until such time as the mediator declares the mediation closed. National Union is not required to have an adjuster or claims representative personally present at the mediation.

SO ORDERED, this the 19th day of September, 2016.

/s/ Gregory P. McGuire  
Gregory P. McGuire  
Special Superior Court Judge  
for Complex Business Cases