

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

One Hamlin Place Townhome Association,)
Inc.,)
)
)
Plaintiff,)
)
vs.)
)
John Wieland Homes and Neighborhoods of)
The Carolinas, Inc. as successor by statutory)
Merger to John Wieland Homes and)
Neighborhoods of South Carolina, Inc.; et al.,)
)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No.: 2017-CP-10-5245

**ORDER GRANTING SUMMARY
JUDGMENT FOR DEFENDANTS
NAMED AS JORGE MEDINA, AND
JEORGE MEDINA A/K/A JMC
CONSTRUCTION, LLC A/K/A JMC
CONSTRUCTION, INC. AND ALL
EXTERIORS CONSTRUCTION, LLC
TO CROSS CLAIMS AND THIRD-
PARTY CLAIMS ASSERTED BY
CERTAIN CO-DEFENDANTS**

-- AND --

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Gary Keisler, Individually and as Class)
Representative, John Does (1-50) and Jane)
Does (1-50),)
)
)
Plaintiff,)
)
vs.)
)
)
John Wieland Homes and Neighborhoods of)
The Carolinas, Inc. as successor by statutory)
Merger to John Wieland Homes and)
Neighborhoods of South Carolina, Inc.; et al.,)
)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No.: 2017-CP-10-5246

RECEIVED
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SC Court of Appeals

This matter came before me for argument on Monday, April 17, 2022. The motions for summary judgment were filed on March 3, 2022, by Defendants named as Jorge Medina, Jorge

Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc. (hereafter “JMC”) and Defendant All Exteriors Construction, LLC (hereinafter “All Exteriors”) requesting the dismissal of cross claims and third-party claims asserted by the general contractors for the construction of the One Hamlin Place Townhomes located in Mount Pleasant, Charleston County, South Carolina. Although four separate motions for summary judgment were filed contemporaneously, one motion each by JMC and by All Exteriors in the One Hamlin matter (C/A No. 2017-CP-109-5245, the “HOA Action”) and the Gary Keisler matter (C/A No. 2017-CP-109-5245, the “Class Action”), the motions and arguments were nearly identical. Therefore, for clarity and as much brevity as possible, the motions are decided with a single, joint Order.

At the conclusion of the motions hearing, the court requested counsel for JMC and All Exteriors to submit a proposed order reflecting the court’s ruling from the bench. In the interim, on April 23, 2022, Form Orders in both the HOA Action and the Class Action granting the requested relief were filed. Furthermore, for the reasons articulated below, the court hereby GRANTS the motions for summary judgment and further finds the alternative request to bifurcate is MOOT. Lastly, as an additional matter raised during the hearing on Monday, the court orders that the 30(b)(6) depositions of the general contractor entities be scheduled and taken within thirty (30) days of the date of this order.

THE PARTIES

Arguing on behalf of JMC and All Exteriors was Andrew N. Cole with Collins & Lacy, PC. Arguing and appearing on behalf of Residential Partners, LLC was Thomas C. Hildebrand, Jr. with Parker Poe Adams & Bernstein, LLP. Appearing on behalf of RP Falcon Properties, LLC f/k/a JW Homes, LLC, RP Falcon Land, LLC, f/k/a JW Land Investment, LLC, RP Falcon Realty, LLC, f/k/a Wieland Realty, LLC, and Residential Partners, LLC was Blake A. McKie with Duffy

& Young, LLC. Residential Partners and the RP Falcon entities were identified jointly in the underlying memorandums as the “RP Companies.” Arguing on behalf of John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc. n/k/a John Wieland Homes and Neighborhoods of South Carolina, and Builders Support Services of the Carolinas, Inc. was Theodore L. Manos with Robertson Hollingsworth Manos & Rahn, LLC. The John Wieland Homes entities were identified collectively in the underlying memorandums as “Wieland.” John C. Hayes, IV appeared for and spoke on behalf of both the HOA Action and Class Action Plaintiffs. Other counsel were present in the courtroom, but none join in or opposed the arguments.

BACKGROUND

This is a construction defect lawsuit involving eleven (11) buildings that comprise the One Hamlin Plantation Townhomes (hereinafter the “One Hamlin Townhomes”) which are located in Mount Pleasant, Charleston County, South Carolina. Wieland was the developer and general contractor for the construction of Buildings 1, 2, 3, and 4 at the One Hamlin Townhomes. The RP Companies are alleged to have been the developer and general contractor for the construction of Buildings 5, 6, 7, 8, 9, 10, and 11 at the One Hamlin Townhomes. Buildings 1 through 4 were completed between August 2009 and April 2012 and Buildings 5 through 11 were completed between April 2013 and November 2014.

Invoices and other documentation produced in discovery show that JMC performed work on Buildings 1, 2, 3, 4, 6, and part of 5. Generally, JMC’s scope of work was the installation of siding, trim, and the three asphalt shingle roofs on Buildings 2, 4, and 6. All Exteriors performed a similar scope of work installed siding and trim on Buildings 7, 8, 9, 10, 11, and part of 5.

Therefore, JMC performed work under both Wieland and the RP Companies, and All Exteriors performed work under the RP Companies. No written subcontract was entered between JMC, All Exteriors, Wieland, or the RP Companies.

Plaintiffs filed their original summonses and complaints for both the HOA Action and the Class Action on October 12, 2017. Plaintiffs amended the HOA Action and the Class Action complaints on January 17, 2018, and again on January 30, 2019. The third-amended complaint in the Class Action was filed November 11, 2020.

On April 15, 2019, Wieland filed its answer to Plaintiffs' Second Amended Complaint and for the first time asserted cross claims against various subcontractors, including JMC, alleging claims for (1) indemnity; (2) negligence; (3) breach of implied and/or express warranties of merchantability, workmanlike service, and/or fitness for a particular or intended purpose; and (4) breach of contract. Wieland also asserted a cross claim for (5) strict liability/products liability, but not against JMC. Wieland's cross claims were based on its work developing and/or building Buildings 1 through 4 at the One Hamlin Townhomes. JMC generally denied the substantive allegations alleged in the pleadings by the Plaintiffs as well as the cross claims by Wieland.

The RP Companies filed amended answers to Plaintiffs' Second Amended Complaints and asserted cross claims against JMC and third-party claims against All Exteriors on February 5, 2020. Under both the cross claims and third-party claims, the RP Companies asserted claims for (1) indemnity; (2) negligence; (3) breach of warranty; and (4) breach of contract. They also asserted a claim for (5) strict liability/products liability against a window manufacturer. JMC answered these claims March 12, 2020, and All Exteriors answered March 13, 2020. The claims brought by the RP Companies mirrored the claims brought by the Wieland Defendants but applied to the RP Companies' work developing and/or building Buildings 5 through 11 at the One Hamlin

Townhomes. On November 24, 2020, The RP Companies renewed their cross claims and third-party claims when responding to the Third-Amended Complaint in the Class Action, which was filed November 11, 2020. JMC and All Exteriors generally denied the substantive allegations alleged in the pleadings by the Plaintiffs as well as the cross claims and third-party claims by the RP Companies.

The HOA Action and the Class Action were mediated together twice. The first mediation was on September 8 and 9, 2021. The second mediation was on February 8, 2022.¹ JMC and All Exteriors agreed to a joint settlement number with the Plaintiffs at the second mediation. The general terms of the settlement were set forth in a Memorandum of Settlement that was electronically signed by counsel for Plaintiffs, JMC, and All Exteriors with the intent that the document complied with South Carolina Civil Procedure Rule 43(k). Neither Wieland nor the RP Companies agreed to dismiss or resolve their respective cross claims and third-party claims against JMC and All Exteriors; therefore, on March 3, 2022, JMC and All Exteriors filed their motions for summary judgment against these cross claims against Wieland and the RP Companies. These motions for summary judgment were argued on April 18, 2022.

STANDARD OF REVIEW

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg'l Med Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) (emphasis added).

¹ Because of continued Covid restrictions, the second mediation was conducted virtually.

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” S.C. R. Civ. P. 56(c). “Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing”—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party’s case.’” Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)).

“Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” Id. (internal quotation marks, citations, and italics omitted). Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings. Id. “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (citations omitted).

“In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Nevertheless, when the evidence is susceptible of only one reasonable

interpretation, summary judgment may be granted.” Holmes v. E. Cooper Community Hosp., Inc., 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014).

DISCUSSION

1. The cross claims and third-party claims asserted by Wieland and the RP Companies are merely alternative wordings for a claim for equitable indemnity.

Wieland acknowledges that it entered no written contract with JMC. The RP Companies acknowledge that they entered no written contracts with JMC or All Exteriors. In their respective cross claims and third-party claims, Wieland and the RP Companies allege they suffered an injury because the HOA Action and Class Action Plaintiffs sued them first.

In South Carolina, alleged claims that are merely disguised claims for equitable indemnity should be dismissed and/or restated as claims for equitable indemnity. “The character of an action is primarily determined by the allegations contained in the complaint.” Stoneledge at Lake Keowee Owners’ Association, Inc., et al. v. Clear View Construction, LLC, et al., 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct.App. 2015) (Stoneledge A); Stoneledge at Lake Keowee Owners’ Ass’n, Inc., et al. v. Builders FirstSource-Southeast Group., et al., 413 S.C. 630, 635, 776 S.E.2d at 437 (Ct.App. 2015), reh’g den. (Sept. 14, 2015), cert. den. (Oct. 20, 2016) (Stoneledge B). The character of the cross claim is a question of law for the court. Stoneledge A at 620-621, 776 S.E.2d at 429; Stoneledge B at 635, 776 S.E.2d at 437.

In the present action, it is clear that the cross claims and/or third-party claims alleged by Wieland and the RP Companies against JMC and All Exteriors only exist because Plaintiffs first brought claims against Wieland and the RP Companies alleging the same construction defect violations. Under Wieland’s and the RP Companies’ own allegations, their respective cross claims and/or third-party claims arose only when they faced potential liability for Plaintiffs’ damages and incurred fees and costs defending against Plaintiffs’ lawsuit. The alleged cross claims and/or third-

party claims sounding in negligence, breach of warranties, and breach of contract are nothing more than different ways of alleging claims for equitable indemnity.

2. Summary judgment is appropriate because Wieland and the RP Companies cannot prove that they are without fault.

“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.” Fountain v. Fred’s Inc., ___ S.C. ___, ___ S.E.2d ___, 2022WL610265 at *3 (filed March 2, 2022) (citing Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 60, 518 S.E.2d 301, 305 (Ct.App. 1999)). “An equitable indemnity claim may arise when a third party makes a claim against the indemnity plaintiff for damages the third party sustained as a result of another party’s tortious conduct.” Stoneledge A at 624-625, 776 S.E.2d at 431 (citation omitted).

To recover under their equitable indemnity claims, Wieland and the RP Companies must each prove: (1) that JMC and/or All Exteriors were at fault in causing the alleged construction defect damages suffered by the Plaintiffs; (2) Wieland and the RP Companies have no fault for these damages; and (3) Wieland and the RP Companies incurred expenses that were necessary to protect their interests in defending against the Plaintiffs’ claims for these damages. See Fountain at *3 (citing Inglese v. Beal, 403 S.C. 290, 299, 742 S.E.2d 687, 692 (Ct.App. 2013)); Stoneledge A 413 S.C. at 625, 776 S.E.2d at 432 (citations omitted).

The second prong of the equitable indemnity claim requires Wieland and the RP Companies to prove that they are without fault. “A party is not entitled to equitable indemnification if any negligence of his own has joined in causing the injury.” Fountain at *3 (citing Vermeer 336 at 60, 518 S.E.2d at 305). “Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. If the second party is also at fault, he comes to court without equity and has no right to indemnity.” Fountain at *4 (citing Town of

Winnsboro v. Wiedeman-Singleton, Inc., 303 S.C. 52, 57-58, 398 S.E.2d 500, 503 (Ct.App. 1990), affirmed by Town of Winnsboro v. Wiedeman-Singleton, Inc. 307 S.C. 128, 414 S.E.2d 118 (1992)); see also A. Bright Arial & Calvin T. Vick, Jr., South Carolina Construction Law Desk Book, p.327 (SC Bar 2013).

JMC and All Exteriors presented testimony from the experts retained by Plaintiffs as well as Wieland and the RP Companies stating that a general contractor bears some responsibility and liability for the construction of an underlying project. Derek Hodgin of Construction Science and Engineering (CSE), the construction defect expert hired by Wieland and the RP Companies, has testified that the general contractor is the “captain of the ship” and is in charge of coordinating and overseeing the work being performed by its subcontractors. George Cook, the cost estimator hired by the RP Companies, testified in the present action that a general contractor has some responsibility to verify that the construction and/or repairs performed are compliant with buildings codes and industry standards. An excerpt from Mr. Cook’s deposition is illustrative:

Q. And you, as the general contractor being in charge of the job, you bear at least some responsibility to make sure that the sub did their work correctly originally. Right?

A. Yes.

Q. And that’s kind of how construction and how the construction practice works. Right?

A. Sure.

Q. You wouldn’t be telling me that as the general contractor I’ve got no responsibility to make sure the buildings are done correctly. Right?

A. No, I don’t think that would fly.

George Cook Deposition dated April 7, 2022, p.55, ll.1-12.

Wieland and the RP Companies have offered no testimony to refute this opinion and/or concession stated in the very case now before this court. The current issues before the court are motions for summary judgment. JMC and All Exteriors met the initial burden under Rule 56,

SCRCP to demonstrate that, as a matter of law, Wieland and the RP Companies have some liability in this case. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). Indeed, the experts hired by Wieland and the RP Companies concede that some repairs are required at the One Hamlin Townhomes. Since JMC and All Exteriors met their initial burden, it is incumbent on Wieland and the RP Companies to “do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*.” Id. (quoting Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (Sup.Ct. 1986) (italicized emphasis in original)).

Wieland and the RP Companies argue in their responsive memorandums, and JMC and All Exteriors concede, that they did not self-perform work at the One Hamlin Townhomes and that JMC worked on Buildings 1, 2, 3, 4, 6, and part of 5 and All Exteriors worked on Buildings 7, 8, 9, 10, 11, and part of 5. This evidence merely confirms that JMC and All Exteriors worked on the project. No evidence was presented that exonerates Wieland or the RP Companies from their respective responsibilities and liability for their supervision of the work constructing the One Hamlin Townhomes. To the contrary, expert witnesses retained and/or relied on by Wieland and the RP Companies in this case have conceded that Wieland and the RP Companies, in their capacity as the general contractors on the One Hamlin Townhome project, have some fault with the alleged construction defects. Based on their own witnesses, Wieland and the RP Companies come to this court with some fault. Having not presented information sufficient to prove they are *without* fault, Wieland and the RP Companies come to this court without equity. As a matter of law, neither Wieland nor the RP Companies can recover on their cross claims and third-party claims for equitable indemnification against JMC and All Exteriors.

3. JMC's and All Exteriors' Alternative Request to Bifurcate the cross claims and third-party claims at trial.

The court has discretion as to whether to bifurcate a trial. Wright v. Hiester Construction Co., Inc., 389 S.C. 504, 516, 698 S.E.2d 822, 828 (Ct.App. 2010) (citation omitted). However, because this court has granted summary judgment in favor of JMC and All Exteriors on the cross claims and third-party claims asserted by Wieland and RP Companies, these claims are resolved. This court finds the motions to bifurcate are moot.

4. Additional discovery issue raised to the Court during the hearing.

During the arguments on the motions for summary judgment, the issue of Plaintiffs having not yet taken the depositions of the representatives for Wieland or the RP Companies was raised. This court finds that discovery was sufficiently completed to rule on the motions for summary judgment that were filed by JMC and All Exteriors. However, regarding the continuing claims, this court finds that additional discovery is warranted. This court finds that the depositions of the representatives from Wieland and the RP Companies should be taken. Therefore, pursuant to this court's inherent authority pursuant to Rules 26 and 30 of the South Carolina Rules of Civil Procedure, this court orders the scheduling and taking of the depositions of Wieland and the RP Companies pursuant to Rule 30(b)(6), SCRCP, within thirty (30) days of the date of this order.

IT IS THEREFORE ORDERED that:

1. Summary Judgment is GRANTED to JMC against the cross claims asserted by Wieland and the RP Companies in the HOA Action (C/A No. 2017-CP-10-05245);
2. Summary Judgment is GRANTED to JMC against the cross claims asserted by Wieland and the RP Companies in the Class Action (C/A No. 2017-CP-10-05246);
3. Summary Judgment is GRANTED to All Exteriors against the cross claims asserted by the RP Companies in the HOA Action (C/A No. 2017-CP-10-05245);

4. Summary Judgment is GRANTED to All Exteriors against the cross claims asserted by the RP Companies in the Class Action (C/A No. 2017-CP-10-05246);

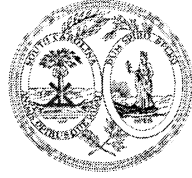
5. The alternative requests by JMC and All Exteriors to bifurcate the cross claims and third-party claims asserted against them by Wieland and the RP Companies are MOOT because of the rulings on the summary judgment motions; and

6. The parties still involved in the litigation shall schedule and take the depositions of the representatives for Wieland and the RP Companies pursuant to Rule 30(b)(6), SCRPC, within thirty (30) days of the date of this order.

AND IT IS SO ORDERED

The Honorable Bentley Price
Judge, Ninth Judicial Circuit

April ____, 2022
Charleston, South Carolina



Charleston Common Pleas

Case Caption: Gary Keisler , plaintiff, et al VS John Wieland Homes and
Neighborhoods of the Carolinas Inc as , defendant, et al
Case Number: 2017CP1005246
Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766