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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge, Circuit Court Judge

Appellate Case No.: 2022-000016
Case No.: 2018-CP-07-00911

Richard W. and Rebecca A. Drier, Sarmed and Jessica M. Shafi, *et al.*,

Plaintiffs,

v.

Advanced Flooring & Design Division of ISI, LLC f/k/a Advanced Flooring and Design, LLC, D.R. Horton, Inc., East coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc., Hutton's Landscapes, Inc., Lather Construction SC, Inc., Lather Construction, Inc., *et al.*,

Defendants,

D.R. Horton, Inc.,

Appellant

v.

Sarmed and Jessica M. Shafi, East Coast Construction Cleanup Corp. f/k/a S.C. Cleanup Co., Inc., Hutton's Landscapes, Inc., and Lather Construction, Inc.

Respondents.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Judge Price did not err in his ruling on the contractual indemnification provisions in East Coast's purported contract with D.R. Horton.

II. As trial judge, Judge Price retained jurisdiction over the contractual indemnification issue.

STATEMENT OF THE CASE

The instant case arises out of the development of the Tidewater Creek Neighborhood on Lady's Island, South Carolina and construction of fifteen (15) single family homes within the same. The construction of the homes occurred in 2015. Plaintiffs commenced the action on May 1, 2018 seeking damages for alleged construction defects in the vertical and horizontal construction and development of the homes. Plaintiffs sued the general contractor and developer, DR Horton, along with numerous other DR Horton subcontractors, including respondent East Coast Construction Cleanup Corp. In turn, Appellant DR Horton asserted crossclaims against its subcontractors for contractual and equitable indemnification. Litigation ensued and most of the Plaintiff's claims against the DR Horton subcontractors were resolved prior to the first home being called to trial. Contrary to the assertions in Appellant's brief, Plaintiff's claims against East Coast were resolved prior to trial.

On October 29, 2021, the Hon. H. Steven DeBerry heard motions for summary judgment filed by Respondents Lather and Hutton against DR Horton's indemnification claims. Respondent East Coast subsequently filed a motion for summary judgment against DR Horton's crossclaims on November 10, 2021. Again, contrary to the assertions in Appellant's brief, East Coast presented different arguments relating to the validity of

the purported contract when arguing its motion before the Hon. Bentley Price. Judge DeBerry denied Lather and Huttons' motions via Form 4 Order on November 12, 2021.

Trial began on Monday, November 15, 2021 with the Hon. Bentley Price presiding. The only claims outstanding against East Coast at that time were the DR Horton indemnification crossclaims. Judge Price heard East Coast's motion for summary judgment prior to opening statements and took it under advisement. On the second day of trial, Respondents Huttons, Lather, and East Coast moved to bifurcate the DR Horton Crossclaims from the Plaintiff's case without objection from DR Horton. Upon being granted by Judge Price, the same Respondents argued for directed verdict on the DR Horton indemnification crossclaims. Judge Price granted the motion for directed verdict against the contractual indemnification claims leaving only the equitable indemnification claim against the Respondents. On the third day of trial and before the resting of Plaintiff's case, DR Horton voluntarily dismissed its equitable indemnity claim against Respondent East Coast, ending the litigation as to East Coast. Ultimately, the jury returned a verdict against the Appellant for $140,000.00.

FACTS

East Coast Construction Cleanup Corp. is a small business based in Hardeeville, SC and owned and operated by Olga Aquino, a widow. It was founded by Ms. Aquino and her late husband. As its name suggests, East Coast is engaged in the business of providing cleanup services at construction sites as well as final clean services on the interiors of homes after construction is complete. Stated differently, East Coast has no involvement in the construction of any home at any time. East Coast is a cleaning company that worked for the wrong general contractor at the wrong time and has been

wrapped up in litigation for almost five years because of it. Converse to the assertions in Appellant's brief, East Coast has never been engaged in landscaping and no purported contract produced by DR Horton contains such a scope of work. Per Ms. Aquino's testimony, East Coast was hired to place dumpsters at locations identified by D.R. Horton so construction debris could be placed in the dumpsters by the other trades, pick up anything around the dumpsters, and clean the interiors of the homes as construction progressed or as directed by D.R. Horton. (R. pp. 959, line 15 – 960, line 13; p. 962, lines 21-23; p. 965, lines 14-25; pp. 967, line 24 – 968, line 16)

The contract presented by Appellant in support of its indemnification claims is dated November 30, 2012 and is signed by Sebastian Nungaray, Ms. Aquino's late husband. (R. p. 879). The contract contains no reference to Tidewater Creek or Beaufort County but does list the area it applies to as Myrtle Beach and assigns East Coast a Vendor Number of 520522. Exhibit A to this contract lists East Coast's scope of work as picking up construction debris, picking up trash on lots, hauling off of trash and debris, and disposal of the same. (R. pp. 889-893). No work regarding landscaping is referenced in any provision of the contract. In further support of its claims, DR Horton produced purchase orders for East Coast's work. These purchase orders list a different vendor number, 524672, which indicates these orders were issued under a different contract that has yet to be introduced by DR Horton and is not a part of the record of this case. Further, DR Horton's representative testified that the vendor numbers are specific to a certain area. (R. p. 971, lines 5-16).

East Coast moved for summary judgment on November 10, 2021. In its motion, East Coast asserted that the documents being relied upon by DR Horton contain

conflicting contract information leading to the conclusion that the contract D.R. Horton has presented is not applicable to the case at bar. In addition to highlighting the inconsistencies, East Coast argued that the indemnification provisions violate South Carolina law and public policy, further rendering the contract presented by DR Horton unenforceable.

STANDARD OF REVIEW

Appellant has provided the appellate standard for review of summary judgment. Per their post-trial motions referencing the motion as directed verdict, the correct standard of review for the court to exercise is that of directed verdict. "In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003) (quoting *Strange v. South Carolina Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994)). An appellate court will reverse the trial court's ruling only when there is no evidence to support the ruling or if the ruling is controlled by an error of law. *Hinkle v. Nat'l Cas. Ins. Co.*, 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

ARGUMENTS

I. JUDGE PRICE DID NOT ERR IN HIS RULING ON THE CONTRACTUAL INDEMNIFICATION PROVISIONS IN EAST COAST'S PURPORTED CONTRACT WITH DR HORTON.

A. DR Horton has not presented a valid contract with East Coast

"Although the existence of a contract is ordinarily a question of fact for the jury, where the undisputed facts do not establish a contract, the question becomes one of law." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) (quoting *Capital City Garage & Tire Co. v. Elec. Storage Battery Co.*, 113 S.C. 352, 362, 101 S.E. 838, 841 (1920)). "[F]or a contract to be valid and enforceable, the parties must have meeting of the minds as to all essential and material terms of the agreement." *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005). "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). "Where the contract language is plain and capable of legal construction, that language alone determines the instrument's force and effect. *Stevens*, 409 S.C. at 577, 762 S.E.2d at 700. (quoting *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)).

Appellant is relying on a "South Carolina Independent Contractor Agreement" between Horton and East Coast dated November 30, 2012 in asserting its claim. It reads as an agreement applicable to the "Costal Division" of South Carolina and the "Myrtle Beach Area." (R. p. 879). On the first page of the agreement, East Coast is assigned a Vendor Number of 520522. (*Id.*). The assigned Vendor Number in the contract (520522) does not match the Vendor Number on any of the DR Horton Purchase Orders (524672), which means a different contract is applicable to the work at issue. (R. pp. 949-956). Further, DR Horton's testimony is that the number on the purchase orders is specific to the Hilton Head/Beaufort area. (R. p. 970, lines 5-16). East Coast does not contest that

this is a valid agreement for DR Horton work at a different project in a different area under a different vendor number but based on the long-held principles of contract law outlined above, this agreement is invalid and unenforceable against East Coast in any context in this case.

The contract that Horton is relying on does not purport to apply to Tidewater Creek, and its provisions regarding indemnification cannot be applied to the work performed at the Tidewater Creek or any claims of deficiencies related to that work. The basic contract principle of the meeting of the minds has not been met. Clearly there was a meeting of the minds between the parties to perform work in the Myrtle Beach market under the assigned vendor number. However, there was no meeting of the minds that any work would be performed at this project, or in and around Beaufort, South Carolina in general. The "four corners" approach of contract review further leads to only one conclusion: that the agreement produced by Horton in this litigation is in applicable to the Tidewater Creek Project.

B. Assuming *arguendo* that the contract is valid, its indemnification provisions are unenforceable

"Indemnity is a 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." Campbell v. Beacon Mfg. Co., 313 S.C. 451, 453, 438 S.E.2d 271, 272 (Ct. App. 1993). S.C. Code Ann. § 32-2-10, also referred to as the Anti-Broad Form Indemnity Statute, states that any construction contract that purports to indemnify a promissee/indemnitee against damages resulting from the promisee/indemnitee's own negligence is unenforceable and against public policy. Further, the Supreme Court has ruled that "a contract of indemnity will not

be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in clear and unequivocal terms." *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). "Clear and unequivocal" terms are terms that are subject to only a single interpretation. *Id.*

Within the agreement that DR Horton is relying upon, the following provisions are found:

> 10. CONTRACTOR'S INDEMNITY
>
> 10.1 GENERALLY. To the fullest extent permitted by law, Contractor agrees to hold harmless, indemnify, and defend [Indemnitee] . . . from and against any and all . . . claims . . . lawsuits . . . for damages from . . . the destruction of property . . . arising out of or resulting from, or related in any way to the work performed . . . regardless of whether or not caused in part by Indemnitee. . . Losses specifically include but are in no way limited to . . . (1) breach of any warranties, representation, covenants, or obligations of contractor set forth herein; (2) the work performed or to be performed or material supplied by Contractor . . .; (3) any negligent, grossly negligent, and/or intentional act and/or omission of Contractor . . .; or (4) any negligent, grossly negligent, and/or intentional act and/or omission of Indemnitee related in any way to the work. Notwithstanding the foregoing, nothing herein shall require indemnity for losses caused solely by fault or negligence of the Indemnitee. . ..
>
> 10.2 INDEMNITY NOT EXCLUSIVE REMEDY. . . . Indemnitee shall have the right, at its own discretion and choosing, to defend any and all claims which may be asserted against it, and contractor agrees to reimburse indemnitee for any and all expenditures which indemnitee may make or incur on account of any such claim.

These provisions fail under both the Anti-Broad Form Indemnification Statute as well as the *Concord and Cumberland* standard. Section 10.1 requires East Coast to indemnify DR Horton for everything with the only exception being the sole negligence of Horton.

However, in the very next section, 10.2 Horton turns around and asserts a broad right to defend any action that is brought against it and requires East Coast to reimburse Horton for "any and all expenditures" accrued in defense of the claim. The unclear language of the provisions prevents East Coast from determining what its obligations are and what it is responsible for. Section 10 read as a whole does not pass the strict standard and is by definition, neither clear nor unequivocal.

Again, contrary to what is asserted in Appellant's brief, there is no distinction between the duty to indemnify and defend found within Section 10 of East Coast's contract. The purported contract between East Coast and DR Horton was not an insurance contract, but a construction contract with indemnification terms therein. South Carolina Courts have long held that common law contractual indemnification encompasses the duty to defend. *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). Accordingly, any discussion of the law of insurance contracts by appellants is misplaced and inapplicable to the matter before the Court. The all-encompassing duty to indemnify and defend that DR Horton is asserting in Section 10.2 is violative of the Anti-Broad Form Indemnification Statute and public policy. It allows DR Horton to defend any claim, with any attorney it wants, and then claim that the defense relates to East Coast's work and recoup every cent of the attorney fees and settlement funds without regard to who is at fault. When the contract is read as a whole, this language is fatal to the contract and as a result the provision fails as a matter of law.

C. There is no link between the alleged issues and East Coast's work.

East Coast is not involved in any of the actual vertical or horizontal construction. To put it in simple terms, no employee of East Coast swings a hammer or puts a shovel

in the ground. East Coast's main job, per DR Horton representative Ronald Bunner, is for trash hauls. (R. p. 972, lines 15-17). It also performed interior cleans and, on occasion, pressure washing. It was not within East Coasts scope of work to clean up old cars, refrigerators, or any other debris of that nature. (Id., at 234:19-22) East Coast was paid a total of $2,256.85 for its services on the home at issue and $63,111.70 for the project as a whole. Compared with the approximately $110,00 paid by DR Horton to its subcontractors and suppliers for just the Shafi residence, East Coast's small portion is indicative of its scope of work and responsibilities.

Plaintiff's allegations relate to debris such as glass, metal, old construction material, and other items surfacing in their yard. East Coast was not a grader or landscaper and had no role in the land development. As DR Horton stated, it was hired to place dumpsters, empty them when full, and provide periodic interior clean services. Now, DR Horton is seeking indemnification for "defending" East Coast's scope of work. There is no link between the issues and East Coast's scope of work which would allow DR Horton to recover. As previously discussed, DR Horton is seeking to make East Coast its liability insurance carrier, which is in direct conflict with South Carolina law. Accordingly, Judge Price's ruling should be upheld.

II. AS TRIAL JUDGE, JUDGE PRICE RETAINED JURISDICTION OVER THE CONTRACTUAL INDEMNIFICATION ISSUE.

A. The motion heard by Judge Price following the motion to bifurcate was a motion for directed verdict, not summary judgment.

Throughout Appellant's brief, it refers to the motion before Judge Price as one for summary judgment. However, in its Motion to Alter and Amend, D.R. Horton asserts that the motion heard and ruled upon by Judge Price was a Motion for Directed Verdict on the

bifurcated indemnification claims. “[T]he Court effectively heard a Directed Verdict motion by co-defendants before any evidence . . . on the issue was presented.” (R. pp. 521-522). Rule 50, SCRCP allows a party to move for directed verdict when the case presents only issues of law. “When ruling on a motion for directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible to of more than one reasonable inference, the trial court should submit the case to the jury.” *Unlimited Servs., Inc. v. Macklen Enters., Inc.*, 303 S.C. 384, 386, 401 S.E.2d 153, 154 (1991). There is no explicit requirement within the Rule that evidence be presented or testimony given. The only issue before the Court was the enforceability of the indemnification provision, which is an issue of law. The Court had been provided with the contract provisions at issue by request, and D.R. Horton was able to argue against the motion. There is no procedural flaw in how the motion was made or decided, and the Judge Price, as trial judge, had jurisdiction to rule on such a motion. In fact, counsel for D.R. Horton agreed with Judge Price’s jurisdiction over the matter.

> MS. PETERSON: . . . A judge has already decided as a matter of law that it’s not unenforceable.
>
> MS. LUCEY: We didn’t decide it was enforceable either.
>
> MS. PETERSON: No. So that’s what I am saying. The only issue that is a matter of law is is it enforceable as a matter of law.
>
> MS. LUCEY: Right. And I think that is within Judge Price’s purview.
>
> MS. PETERSON: It is, and he can say, “No, it’s not. Go to the jury.”
>
> THE COURT: I agree. (R. p. lines 5-15).

With all parties in agreement, the Court heard and ruled upon the legal issues under its jurisdiction. Accordingly, D.R. Horton's claim that Judge Price lacked jurisdiction is without merit.

B. Assuming *arguendo* that the motion heard by Judge Price was a motion for summary judgment, he retained jurisdiction to hear arguments on the motion and rule accordingly.

Appellant rests on the assertion that "one trial judge may not overrule another trial judge because doing so is reserved for the appellate courts." Appellant Brief, Pg 6. As previously discussed in this brief, counsel for D.R. Horton actually stated the opposite position, and indicated that Judge Price had jurisdiction to rule on the matter.

The appropriate test to apply to determine whether one judge may change a ruling made by a prior circuit judge in the same case and on the same issue is whether the original determination constitutes the law of the case. *Shirley's Ironworks, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). A denial of a motion to dismiss or motion for summary judgment is not the law of the case, and the rule asserted in Appellant's brief does not apply to Judge Price's ruling. The Court of Appeals has clearly explained this reasoning: [A] judge deciding a case on the merits is not bound by a prior order of another judge denying summary judgment. If the law stated otherwise, a party could never obtain relief from an erroneous order denying summary judgment since order denying summary judgment are never appealable, not even after final judgment." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). Further, under Rule 43(l) (incorrectly cited as Rule 41(l) in appellant's brief) a denial of summary judgment may be revisited by a subsequent judge when the state of facts has changed. *See*, Rule 43(l), SCRCP; *see e.g., Smith v. Breedlove*, 377 S.C. 415, 662 S.E.2d 67 (2008); *Dorrell v.*

S.C. Dep't of Transp., 361 S.C. 312, 325, 605 S.E.2d 12, 18 (2004); *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988).

First and foremost, Judge DeBerry's order does not apply to East Coast because East Coast did not argue its motion before Judge DeBerry. The Form 4 Orders issued by Judge DeBerry simply state that "the court finds genuine issues of material facts exist." These orders were issued on Huttons and Lather's motions and make no conclusions as to any facts or law. Therefore, there were no determinations of law or fact made by Judge DeBerry relating to East Coast, or any other Defendant. All rulings on East Coast's motion were made by Judge Price. As noted previously in this brief, East Coast's argument contains additional bases than that of Lather and Hutton's, and the issues presented by East Coast had not yet been ruled upon. Accordingly, any ruling made by Judge Price as to East Coast alone was proper under South Carolina law.

Additionally, the arguments advanced by East Coast regarding the applicability of the purported contract relied upon by DR Horton constitutes new evidence that was not part of DeBerry's decision. Assuming that DeBerry's orders applied to East Coast, the motion filed by East Coast prior to trial, taken under advisement by Judge Price, and ruled upon during the motion for directed verdict presented different facts and issues that were not heard or decided by Judge DeBerry. Specifically, East Coast asserted that the contract identifiers are different than those on the actual project documents. This was never discussed in the hearings with Judge DeBerry and was new evidence at the time it was presented to Judge Price.

Under either theory, Judge Price's ruling was not an overruling of Judge DeBerry that violates South Carolina law. Accordingly, Judge Price's ruling on the contractual indemnification provisions in DR Horton's purported contract with East Coast should be affirmed.

Conclusion

For the foregoing reasons, Respondent East Coast respectfully requests the rulings of Judge Price be affirmed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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