

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., et al.,

Defendants.

**RECEIVED**

**Sep 06 2023**

**SC Court of Appeals**

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D.R. Horton, Inc.

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J Landscaping & Grading, LLC, et al.

Third-Party Defendants.

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ProBuild Company, LLC; et al.,

Fourth-Party Plaintiffs,

v.

Harrelson Painting, LLC, et al.,

Fourth-Party Defendants.

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Nicholas Soto a/k/a Nicolas Soto, Individually and d/b/a Soto HVAC,

Fifth-Party Plaintiffs,

v.

Toribio Islas and Alejandro Soto,

Fifth-Party Defendants.

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**PROPOSED ORDER GRANTING BUILDERS SERVICES GROUP, INC. D/B/A GALE CONTRACTOR SERVICES' MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on July 21, 2023, on Defendant Builder Services Group, Inc. D/B/A Gale Contractor Services' (hereinafter "Defendant" or "Gale") Motion for Summary Judgment pursuant to Rule 56(C) of the South Carolina Rules of Civil Procedures ("SCRCP").

Gale argued that the record reflects there is no genuine issue as to any material fact as it relates to D.R. Horton's Third-Party Complaint against Gale and Gale is entitled to a judgment as a matter of law.

### **BACKGROUND**

This litigation arises out of the development and construction of the Rose Hill subdivision in Anderson County, South Carolina. The Rose Hill subdivision consists of approximately 270 single-family homes. D.R. Horton served as the developer and builder for the Rose Hill subdivision, taking over the project from Poinsett Development, LLC and Poinsett Homes, LLC. Gale served as a subcontractor to D.R. Horton, providing labor and materials for 91 of the homes in the Rose Hill subdivision. Gale's scope of work at the Rose Hill subdivision consisted of installing the garage doors, gutters, downspouts, and batt and blown insulation.

On September 25, 2019, Plaintiff Natalie Zitek ("Plaintiff Zitek") brought a class action lawsuit on behalf of herself and a proposed class of other similar situated Rose Hill homeowners (collectively the "Class") against D.R. Horton, Inc. and Jane and John Does. On February 23, 2022, D.R. Horton filed a Second Amended Answer and Third-Party Complaint, naming Gale as a Third-Party Defendant. In its Third-Party Complaint, D.R. Horton demanded that Gale defend D.R. Horton in this lawsuit and indemnify D.R. Horton for the damages it has and will sustain as a result of Gale's work in the Rose Hill subdivision. However, during a status conference before the Court on April 21, 2023, counsel for Plaintiff Zitek confirmed that the gutters, downspouts, and insulation were not defects for which Plaintiff Zitek would be seeking damages. Counsel for Plaintiff then filed the said stipulation with the Court on July 20, 2023 (the "Stipulation"). Upon entry of the Stipulation, D.R. Horton agreed to dismissal of its' breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness

claims against Gale. Only D.R. Horton's claim for indemnification remained at issue during summary judgment arguments.

The universe of documents upon which D.R. Horton relied for its indemnity claims consists of 1) The "First Amendment to Master Addendum to Independent Contractor Agreement" executed March 8, 2006; 2) the "Master Addendum to Independent Contractor Agreement" executed October 23, 2015 respectively, (the foregoing collectively referred to herein as the "Addendum Contracts")<sup>1</sup> and 3) Plaintiff Zitek's Notice and Opportunity to Cure Improper Construction Conditions and Resulting Damages correspondence served December 11, 2019 (the "NOC Letter"). D.R. Horton contends the indemnity provision cited in its Indemnification and Additional Insured Tender (the "Tender")<sup>2</sup> creates Gale's duty to defend and indemnify D.R. Horton and reimburse them for attorney's fees relating to litigation for the case. However, the Independent Contracting Agreement where the indemnification clause was cited was never produced to Gale. The only Independent Contractor Agreement pertaining to Gale produced by D.R. Horton is a compilation of the Addendum Contracts, identified above. Notably, in the Addendum Contracts the indemnification clause states in pertinent part:

Indemnity and Insurance. Any defense, indemnification hold harmless or similar obligation (collectively "Indemnification") imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work).

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<sup>1</sup>The Addendum Contracts, Bates Stamped KDC13229-13251, were attached as Exhibit 25 to Gales' Mem. in Supp. of Mot. for Sum. J.

<sup>2</sup> D.R. Horton's Indemnification and AI Tender were attached as Exhibit 27 25 to Gales' Mem. in Supp. of Mot. for Sum.J.

## LEGAL STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted if “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 judgment as a matter of law.” *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). “In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment.” *Id.*; *Wachovia Bank, N.A. v. Coffey*, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). Furthermore, the “construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995).

## CONCLUSIONS OF LAW

### **I. D.R. Horton’s Third-Party Complaint against Gale must be dismissed because the defects common to the class do not implicate the work of Gale.**

As reflected in the Stipulation, Plaintiff Zitek is not alleging a common defect that implicates Gale’s work. Specifically, there are no allegations of common defects in Plaintiff Zitek’s pleadings, the deposition testimony, or expert reports as to gutters, downspouts, batt and blown insulation, or garage doors. Accordingly, because D.R. Horton has not incurred, nor will it incur, any damages in this lawsuit resulting from Gale’s work, Gale cannot be compelled to defend and

indemnify D.R. Horton in this lawsuit. The Court finds in the absence of any derivative claim, the entire Third-Party Complaint by D.R. Horton against Gale warrants dismissal.

**II. D.R. Horton Cannot prove the Addendum Contracts apply to the construction of Rose Hill and Cannot prove that Gale is bound by the Indemnification Clause Referenced in its Tender.**

A breach of contract claim is a failure to perform a contractual promise without legal excuse. The action is one at law, predicated on the existence of a contract. *See Sterling Development Co. v. Collins*, 309 S.C. 237, 421 S.E.2d 402, 404 (1992); *Cain v. United States Insurance, Co.*, 232 S.C. 397, 102 S.E.2d 360 (1958). A binding, valid contract must exist for there to be a cause of action for breach of contract. *Id.* The party asserting such a claim must, therefore, allege and prove each material element of the contract sued on. *Rabon v. State Financial Corp.*, 203 S.C. 183, 26 S.E.2d 501 (1943). A contract only arises when there is actual agreement by parties in which they demonstrate mutual intent to be bound. *Electro-Lab of Aiken, Inc. v. Sharp Construction Co. of Sumter, Inc.*, 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004).

First, the Addendum Contracts entered into between D.R. Horton and Gale do not encompass terms governing the construction of Rose Hill. Without the underlying Independent Contractor Agreement, the Addendum Contracts do not define the scope of work Gale was hired to perform. There was no “meeting of the minds” in the Addendum Contracts for the installation of insulation, gutters, downspouts and garage doors at Rose Hill. The terms of a contract speak for themselves; however, without the underlying Independent Contractor Agreement, the terms to which the Addendum Contracts apply cannot be known.

In addition, the lack of the Independent Contractor Agreement, to which the Addendum Contracts refer, inherently creates an issue of ambiguity as to the terms governing the relationship between Gale and D.R. Horton as it applies to Rose Hill and the conditions of any indemnity

obligations imposed on Gale. Any such ambiguity must be construed against the drafter, D.R. Horton. A court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 502 (Ct.App.2007). (“Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.” (quoting *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (internal quotation marks omitted))).

Read as a whole, the Addendum Contracts are ambiguous as to what scopes of work they contemplate. “A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.” *McGill v. Moore*, 381 S.C. 179 at 185, 672 S.E.2d 571 at 574 (citation omitted). Whether a contract is ambiguous is to be determined from examining the entire contract, not by reviewing isolated portions of the contract. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975) (citation omitted). Nowhere in the Addendum Contracts is the scope of work Gale was hired to perform at Rose Hill even discussed nor is the Rose Hill subdivision identified. Accordingly, the Addendum Contracts do not apply to the insulation, gutters, downspouts and garage doors Gale installed at Rose Hill.

Second, D.R. Horton failed to produce any contract with Gale containing the Indemnification clause cited in its Tender. D.R. Horton cannot reasonably assert Gale is bound by an indemnification clause in a contract which has never been produced and to which D.R. Horton cannot prove Gale agreed. Again, there was no “meeting of the minds” between D.R. Horton and Gale with respect to the indemnification clause cited in the Tender. Therefore, the Third-Party

Claims based on the indemnification clause cited in the Tender fail and any Third-Party Claims that are based on the Addendum Contracts are not enforceable as a matter of law.

**III. D.R. Horton's claims for contractual indemnity fail as a matter of law and public policy.**

As a matter of law, D.R. Horton's claim for indemnity for its own negligence fails if the language contained in the indemnity clause does not clearly and unequivocally provide indemnity for D.R. Horton's own negligence. *See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 647, 819 S.E.2d 166, 171 (Ct. App. 2018). Our 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." *Id.* *Concord* held a general contractor must "meet the very high standard of eliminating any possibility that the contract language on which [it] rel[ies] can be read to limit indemnification to the [general contractor's] own negligence" and "if any other interpretation of the contract language is reasonably possible, [the general contractor] cannot prevail on their contract claims as a matter of law." *Id.*

First, the trigger point for the indemnification provision in the Addendum Contracts is damage "caused by Contractor's [Gale's] negligence or the negligence of its subcontractors or its Work (including any liability of Builder for its supervision of Contractor, Contractor's subcontractors, or Contractor's Work). With the Plaintiff's stipulation there are no allegations of defective work by Gale in the record.

Second, the Court finds the indemnity provisions contained in the Addendum Contracts fall directly in line with the *Concord* decision and are unenforceable as a matter of law. The Addendum Contracts' Indemnification provision does not clearly and unequivocally state what Gale's indemnification responsibilities are as they relate to the sole or concurrent negligence of

D.R. Horton. Although recognizing that “there is no verbatim phrase that must be used to meet the clear and unequivocal standard,” *Concord*, 424 S.C. at 657, 819 S.E.2d at 176, the Court notes that there is no reference to the sole negligence of D.R. Horton in the indemnity provision. There is also a lack of clarity between the inclusion of liability for Builder for its supervision of the Contractor but the exclusion of work, negligence or misconduct of Builder, which by definition includes supervision of the subcontractors. The language contained in the Addendum Contracts appears to require indemnity for concurrent acts and omissions of D.R. Horton, as it states Gale must indemnify D.R. Horton for “any liability of Builder for its supervision of Contractor”. Further, “supervision” is broad and undefined. The Court finds this clearly creates ambiguity as to whether D.R. Horton is seeking indemnification for its own concurrent negligence and must be construed against D.R. Horton. Accordingly, the Court finds the indemnification agreement is unenforceable because it is vague, ambiguous, and implies D.R. Horton is to be indemnified for its own negligence contrary to the clear and unequivocal standard in *Concord*.

Third, the indemnity provision in the Addendum Contracts also states, “Contractor shall then have the duty to reimburse Builder *only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor*”. (Emphasis added). The Court finds D.R. Horton cannot attribute any loss Gale caused since Plaintiff Zitek is not seeking damages for the scope of work Gale performed. Without damages or a loss caused by Gale, D.R. Horton has no claim. D.R. Horton has provided no evidence of what it has spent defending claims against it related to Gale’s scope of work. Moreover, a demand for attorney’s fees is not ripe until entry of a judgment. *See Bayles v. Marsh Realty & Assocs., LLC*, Civil Action No. DKC 20-3322, 2021 U.S. Dist. LEXIS 61066, at \*9 (D. Md. Mar. 30, 2021). Since there will be no judgment attributable to damages from Gale’s work pursuant to Plaintiff Zitek’s Stipulation, the Court finds it is inequitable for D.R.

Horton to demand that Gale defend and indemnify it. As a result, D.R. Horton's claim for contractual indemnification against Gale fails as a matter of law.

**IV. D.R. Horton's Unclean Hands Preclude it from Recovering under a Theory of Equitable Indemnification.**

In general, there is no right to indemnity between joint tortfeasors. *Atl. Coast Line R.R. Co. v. Whetstone*, 243 S.C. 61, 70, 132 S.E.2d 172, 176 (1963). Equitable indemnity arises in scenarios where "the first party is at fault, but the second party is not." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999); *see also Fowler v. Hunter*, 697 S.E.2d 531, 388 S.C. 355 (S.C. 2010). "If the second party is also at fault, he comes to court without equity and has no right to indemnity." *Id.* For a party to recover under the theory of equitable indemnity, it must satisfy the following three elements: (1) the party from whom indemnity is sought is liable for causing the plaintiff's damages; (2) the party seeking indemnity is exonerated from any liability for those damages; and (3) the party seeking indemnity incurred damages as a result of the plaintiff's claims against it, which were eventually proven to be the fault of the indemnitor. *Id.* However, South Carolina law is clear that "[t]he most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault." *Id.*

Pursuant to the Stipulation, Plaintiff Zitek is not seeking any damages related to Gale's scope of work because there are no defects in Gale's work. Thus, D.R. Horton cannot prove it has incurred damages as a result of defending against Plaintiff Zitek's claims that are the fault of Gale. Further, by virtue of the Stipulation, D.R. Horton has been exonerated from liability relating to any defects in Gales' work. Therefore, is no genuine issue of material fact for a jury to consider with respect to D.R. Horton's equitable indemnity claim against Gale.

**CONCLUSION**

This Court finds there is no genuine issue as to any material fact as to DR Horton's Third-Party Complaint against Gale, and that the moving party is entitled to judgment as a matter of law, pursuant to Rule 56(c). SCRCP. Therefore, it is hereby **ORDERED** that Gale's Motion for Summary Judgment as to all of D.R. Horton's third-party claims is **GRANTED** and D.R. Horton's Third-Party Complaint against Gale is **DISMISSED WITH PREJUDICE**.

**IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_ 2023.**

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The Honorable Judge Sprouse



Anderson Common Pleas

**Case Caption:** Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

**Case Number:** 2019CP0401942

**Type:** Order/Summary Judgment

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit