STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO: 2019-CP-04-01942
Natalie Zitek, individually, and on behalf of all others similarly situated, Plaintiff, v. D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50, Defendants.	**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**
D.R. Horton, Inc. Third-Party Plaintiff v. IBP Asset, LLC d/b/a Blue Ridge Building Products, et al.	

This matter is before the Court upon the Motion of IBP Assets, LLC d/b/a Blue Ridge Building Products ("Blue Ridge") seeking an Order granting Summary Judgment in its favor on the claims by D.R. Horton, Inc. set forth in the Second Amended Answer and Third-Party Complaint. For the reasons set forth herein, the Motion is GRANTED.

Procedural History

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. In her Complaint, Plaintiff Zitek alleged that the prerequisites of South Carolina Rule of Civil Procedure (SCRCP) 23(a) had been satisfied and that class certification is appropriate. Pertinent to the present

Motion, Plaintiff Zitek alleged in her Complaint that her claims are "typical of the class" and that "questions of law and fact common to the Class predominate over questions affecting only individual members."

On October 20, 2020, Plaintiff Zitek moved for an Order certifying the Class under SCRCP Rule 23, wherein she re-alleged that her claims are "typical of the Class members' claims." Plaintiff Zitek filed an affidavit contemporaneously with the motion for class certification, identifying the defects common to the Class.

On January 27, 2021, this Court certified the Class, finding, *inter alia*, that Plaintiff Zitek's claims are typical of the Class.

On March 11, 2021, Horton filed an Amended Answer and Third-Party Complaint, naming Blue Ridge as a Third-Party Defendant. On February 23, 2022, Horton filed a Second Amended Answer and Third-Party Complaint. In its Third-Party Complaint, Horton demands that Blue Ridge defend Horton in this lawsuit and indemnify Horton for the damages it has and will sustain as a result of Blue Ridge's work in the Rose Hill subdivision.

Blue Ridge first filed a Motion for Summary Judgment on August 1, 2022, which was argued September 8, 2022. However, due to administrative oversight, no ruling was issued based on the initial arguments and the Court heard the Motion again on April 21, 2023. At that time, the factual issues concerning the underlying allegations of defect that had been asserted against Blue Ridge were largely conceded as not being included in the class claims. However, Zitek's counsel suggested that there could be a class issue related to doors that had been tested and found to leak through or around the doorknob. Blue Ridge's counsel requested additional opportunity to investigate that suggested concern.

A hearing was held again on July 21, 2023. All parties to this motion were present and participated in the presentation to the Court. Multiple briefings have been submitted by all parties and considered by the Court.

Finding of Fact

Based upon the evidence submitted to the Court, the Stipulation of the Plaintiff and the statements of counsel on the record, I find that the following material facts are not in dispute:

1. Blue Ridge and Horton entered a "South Carolina Independent Contractor Agreement" (hereinafter "Subcontract") on or about January 12, 2010. In the paragraph entitled "Scope of Work," reference is made to Exhibit A for a list of "construction-related" activities that Blue Ridge was contracted to undertake. However, Exhibit A is not attached to the Subcontract and no party has produced the document. The Court finds that Exhibit A does not exist.

2. The Subcontract also references a "Pricing Schedule" at Paragraph 3.1. No Pricing Schedule has been submitted in evidence.

3. According to excerpt from a "Vendor Spend" spreadsheet produced by Horton, Blue Ridge installed a number of different products on various homes in the Rose Hill subdivision between 2012 and 2017. Relevant to the allegations and motions before the Court is the installation of gutters, attic insulation and door hardware. Blue Ridge did not work on every house in Rose Hill and did not perform the same work on each of the houses where it did work.

4. Blue Ridge did not work on the home of the Class Representative, Natalie Zitek.

5. Plaintiff has stipulated that batt and blown insulation and gutters are not included in the class claims.

6. Plaintiff has submitted evidence that water may have infiltrated the patio door at 8 Duxbury Lane through a doorknob when tested by Plaintiff's Expert, Dr. Rhett Whitlock. Blue Ridge did not perform any work at this residence. There is no evidence that Blue Ridge installed door hardware on any patio door. Furthermore, Dr. Whitlock testified that he did not know why the doorknob leaked and did not testify that this is a systemic issue throughout the neighborhood. Thus, there is no evidence that Blue Ridge contributed to the water infiltration on any residence in the Class.

Conclusions of Law

I. Summary Judgment Standard

Summary judgment is appropriate when the movant demonstrates that the material facts of the case are undisputed, and the moving party is entitled to judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); Rule 56(c), SCRCP. If the moving party meets its initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party cannot simply rest on mere allegations or denials contained in the pleadings. *Singleton v. Sherer*, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008). Instead, the nonmoving party must come forward with specific evidentiary support showing there is a genuine dispute for trial. *Rife v. Hitachi Const. Mach. Co.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005).

"[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Here, there is no dispute regarding any material fact.

II. Summary Judgment Should be Granted on all Causes of Action Against Blue Ridge

Blue Ridge seeks Summary Judgment on all causes of action brought by Horton in the Second Amended Answer and Third-Party Complaint ("Third-Party Complaint").

In its First Cause of Action of the Third-Party Complaint, Horton claims that Blue Ridge is liable under a theory of Contractual Indemnification and demands that Blue Ridge indemnify Horton for the damages it has and will incur as a result of Blue Ridge's work in the Rose Hill subdivision. The specific contract provision is not cited in the Third-Party Complaint, nor attached as an exhibit. The Subcontract has been submitted to the Court in conjunction with this Motion.

Horton demands contractual indemnification under Section 10 of the contract between itself and Blue Ridge. The contractual indemnity provision demands that Blue Ridge "hold harmless, indemnify, protect and defend" Horton from and against all "losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract . . . ." The full text is as follows:

10. CONTRACTOR'S INDEMNITY.

10.1 GENERALLY. TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY AGREES TO HOLD HARMLESS, INDEMNIFY, PROTECT AND DEFEND OWNER, ITS PARENT CORPORATION, SUBSIDIARIES, AFFILIATES, SUCCESSORS AND ASSIGNS, AND EACH OF THE AFOREMENTIONED ENTITIES' RESPECTIVE OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, AGENTS AND INSURERS (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "INDEMNITEE"), FROM AND AGAINST ANY AND ALL DEMANDS, CLAIMS, ACTIONS, CAUSES OF ACTION, PROCEEDINGS, LAWSUITS, SETTLEMENTS, JUDGMENTS, FINES, PENALITES, LOSSES, ATTORNEYS FEES, LITIGATION COSTS, INTEREST, AND EXPENSES OF ANY KIND (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "LOSSES") FOR DAMAGES FROM BODILY OR PERSONAL INJURY, DEATH, THE DESTRUCTION OR LOSS OF PROPERTY (INCLUDING LOSS OF USE), OR ANY OTHER KIND OF DAMAGES OR HARM, ARISING OUT OF, OR RESULTING FROM, OR RELATED IN ANY WAY TO THE WORK PERFORMED AND/ OR THE MATERIALS SUPPLIED UNDER THIS CONTRACT, REGARDLESS OF WHETHER OR NOT CAUSED IN PART BY INDEMNITEE. SUCH LOSSES SPECIFICALLY INCLUDE, BUT ARE IN NO WAY LIMITED TO LOSSES ARISING OUT OF OR ATTRIBUTABLE TO: (1) A BREACH OF ANY WARRANTIES, REPRESENTATIONS, COVENANTS OR OBLIGATIONS OF CONTRACTOR SET FORTH HEREIN; (2) THE WORK PERFORMED OR TO BE PERFORMED OR MATERIAL SUPPLIED BY CONTRACTOR, CONTRACTOR'S AGENTS OR EMPLOYEES, SUPPLIERS OR SUBCONTRACTORS AND THEIR RESPECTIVE AGENTS AND EMPLOYEES, AND/OR ALL OTHER ENTITIES OVER WHOM THE CONTRACTOR MAY EXERCISE CONTROL (INDIVIDUALLY OR COLLECTIVELY HEREINAFTER, "CONTRACTOR'S AGENTS"); (3) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/OR INTENTIONAL ACT AND/ OR OMISSION OF CONTRACTOR AND/ OR CONTRACTOR'S AGENTS; OR (4) ANY NEGLIGENT, GROSSLY NEGLIGENT, AND/ OR INTENTIONAL ACT AND/OR OMISSION OF THE 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. THE LOSSES DESCRIBED HEREIN SHALL INCLUDE, BUT ARE NOT LIMITED TO, DEMANDS, CLAIMS, OR ACTIONS ASSERTED BY (1) ANY PRESENT OR FUTURE OWNER OF THE HOUSE INCORPORATING THE WORK; AND (2) ANY OWNER, CONTRACTOR, OR ANY THIRD PARTY (INCLUDING, BUT NOT LIMITED TO, PERSONNEL FURNISHED BY CONTRACTOR AND/OR CONTRACTOR'S AGENTS). THE INDEMNIFICATION OBLIGATION UNDER THIS CONTRACT SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR UNDER WORKERS' COMPENSATION ACTS, DISABILITY BENEFIT ACTS OR OTHER EMPLOYEE BENEFIT ACTS. THE INDEMNITY PROVISIONS CONTAINED HEREIN ARE INTENDED TO BE AS BROAD AND INCLUSIVE AS PERMITTED BY LAW.

For the reasons set forth below, Summary Judgment is Granted as to the First Cause of Action.

First, Summary Judgment is appropriate because there is no evidence that Horton has sustained "losses . . . arising out of, or resulting from, or related in any way to the work performed and/or the materials supplied under this contract . . . ." As set forth above, Plaintiff is not pursuing a claim for work within the scope that Blue Ridge performed. Thus, there are no losses within the defined scope of the indemnity agreement.

Horton contends that it is entitled to recovery for losses incurred prior after the Notice of Claim was received and prior to the Stipulation being filed. However, there is no evidence in the

record that any such losses were incurred or what they might have been. However, irrespective of any proof of losses, Horton is not entitled to recover from Blue Ridge because the indemnity agreement is unenforceable as a matter of law.

In South Carolina, contracts purporting to relieve an indemnitee from the consequences of its own negligence must be stated 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) (citing, *Fed. Pac. Elec. v. Carolina Prod. Enters.*, 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) ("Indeed, most courts agree with the basic rule 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."). The Court of Appeals in *Federal Pacific Electric v. Carolina Prod. Enterprises* addressed the issue of contracts attempting to seek indemnification of damages arising from the indemnitee's concurrent negligence:

> A contract of indemnity will be construed in accordance with the rules for the construction of contracts generally. Because it is somewhat unusual for an indemnitor to indemnify the indemnitee for losses resulting from the indemnitee's own negligence, a contract containing an indemnity provision that purports to relieve an indemnitee from the consequences of its own negligence will be strictly construed.

Fed. Pac. Elec., 298 S.C. at 26 (internal citations omitted). "[B]road, comprehensive, and general terms" are inadequate to show the parties intended the indemnitor to indemnify the indemnitee for the indemnitee's own concurrent negligence. See, *Concord & Cumberland*, 424 S.C. at 656–57, 819 S.E.2d at 176. The Court of Appeals in *Concord & Cumberland* explains that in *Federal Pacific*, the same Court found the use of general terms such as 'indemnify . . . against any damage suffered or liability incurred . . . or any loss or damage of any kind in connection with the leased premises during the term of the lease' did not disclose an intention to indemnify for consequences arising from the indemnitee's own negligence." *Id.* at 651, 819 S.E.2d at 173 (citing, *Fed. Pac.*

Elec. 298 S.C. at 29, 378 S.E.2d at 58-59) (brackets removed). "Although there is no verbatim phrase that must be used to meet the clear and unequivocal standard, there must be some language in the indemnity clause that **clearly shows** the parties intent to absolve the indemnitee of the consequences of its own concurrent negligent." *Concord & Cumberland*, 424 S.C. at 657, 819 S.E.2d at 176 (emphasis added). Our Court of Appeals noted the challenges that this standard presents to attorneys as quoted by the Texas Supreme Court:

> As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, "yet be just ambiguous enough to conceal that intent from the indemnitor." *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707-08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties' intent was camouflaged or "clear and unequivocal."

Concord & Cumberland, 424 S.C. at 658 n.6, 819 S.E.2d at 176 (Ct. App. 2018).

I find that the indemnification provisions of the Subcontract between Horton and Blue Ridge are not clear and unequivocal for the following reasons:

First, nowhere does the provision expressly state that Blue Ridge is responsible to indemnify Horton for its concurrent liability to a homeowner. Rather, it uses exception clauses to avoid the broad form indemnity that is statutorily prohibited. The Subcontract requires indemnity for losses "regardless of whether or not caused in part by [Horton]." But, then inserts a vague exception for "losses caused solely by fault of negligence of [Horton]." This structure is not unequivocal.

This confusion is amplified by the extremely complicated grammatical structure of the provision itself. The indemnification requirement is described within a single sentence containing 260 words, 48 commas and 34 conjunctions/disjunctions. The sentence includes multiple serial

lists, definitions, sub-parts, sub-ordinate clauses, parenthetical notes and prepositional phrases. As a result, the indemnity provision of this contract is manifestly unclear.

Finally, the Subcontract itself does not clearly set forth the material term of the "scope of work" that triggers the obligations for indemnity. The contract must be "clear and unequivocal" to the parties at the time of its acceptance. Otherwise, a subcontractor cannot fairly appreciate the risks that it might be accepting through an indemnity provision. Because there is nothing in this contract that established the work to be performed, it cannot be said that the work that was performed was part of the bargain at the time the indemnification provision was offered.

In its Second Cause of Action, Horton demands equitable indemnification based on the "special relationship" existing between Horton and Blue Ridge and because Horton has and will incur damages as a result of Blue Ridge's work in the Rose Hill subdivision. As stated above, there is no evidence of wrongdoing by Blue Ridge for which Horton is exposed to liability from the Plaintiff Class. Therefore, there is no basis for equitable indemnity.

Finally, Horton also brings causes of action against Blue Ridge for breach of contract (Third Cause of Action), breach of express warranties (Fourth Cause of Action), breach of implied warranties (Fifth Cause of Action), and negligence, gross negligence, and recklessness (Sixth Cause of Action). Again, as stated above, there is no evidence that Plaintiff is asserting any claim on behalf of the class arising out of work performed by Blue Ridge, thus there is no basis for a derivative claim. Likewise, Horton has produced no evidence of negligence, breach of contract or breach of warranty for which Horton has sustained independent damages for which it is entitled to recovery.[1] Whether Blue Ridge procured insurance as may have been required

[1] Blue Ridge contends that, because these causes of action are dependent solely on the potential liability that may arise from Plaintiff Zitek's claims against Horton and because Horton's damages arise exclusively from having to defend itself from Plaintiff Zitek's lawsuit, these causes of action are in reality claims for equitable indemnification and should be dismissed in accordance with the South Carolina Court of Appeals' ruling in *Stoneledge at Lake*

under the Subcontract was not pled in the Third-Party Complaint and is therefore not before this Court.

Conclusion

For the reasons stated above, Summary Judgment is GRANTED to Blue Ridge on all causes of action against in the Second Amended Answer and Third-Party Complaint of D.R. Horton.

IT IS SO ORDERED.

Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 635, 776 S.E.2d 434, 437 (Ct. App. 2015). See also, *Hampton Hall, LLC v. Chapman Coyle Chapman & Assocs. Architects AIA, Inc.*, 2018 WL 3475472, at *1-2 (D.S.C. July 19, 2018). Because the Court has found that there is no evidence of any wrong-doing or breach on the part of Blue Ridge, this question is rendered moot and is not addressed in this Order.

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