

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

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.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
Landscaping & Grading, LLC; AllPro
Textures, LLC; Alpha Omega Construction
Group, Inc.; American Concrete and Precast,
Inc.; a/k/a ACP Concrete, Inc.; A&J Framing,
Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co, Inc.; BKF
Builders, Inc.; Builders Designhouse, LLC;
BMC East LLC d/b/a Coleman Floor, LLC;
Builders Firstsource Southeast Group, LLC,
a/k/a Builders Firstsource, Inc.; Bravo
Carpenters, Inc.; Caryl Mechanics II, Inc.,
a/k/a Caryl Mechanicals, Inc.; Cannaday
Siding & Gutter, Inc.; Cortes Painting, LLC;
CBU Enterprises, Inc.; CPI Security Systems,
Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star Construction Inc.;
Five Star Foundations, LLC; Galloway-Bell,
Inc., a/k/a Galloway-Bell, Inc. II; Get
Floored, LLC; GBS Building Supply – US
LBM, LLC, f/k/a GBS Building Supply, Inc.;
General Shale Brick Inc.; Greener Pastures,
Inc., a/k/a Green Pastures of Aiken, LLC;
IBS Asset, LLC d/b/a Blue Ridge Building
Products; Installed Building Products, LLC,

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**ORDER GRANTING GALLOWAY-
BELL, INC. A/K/A GALLOWAY-BELL,
INC II'S MOTION FOR SUMMARY
JUDGMENT AS TO ALL CLAIMS
ASSERTED BY THIRD-PARTY
PLAINTIFF D.R. HORTON, INC.**

RECEIVED

Oct 25 2023

SC Court of Appeals

a/k/a Installed Building Products II LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., and Silver Line Building Products Corporation

Third-Party Defendants.

This matter is before the Court on July 21, 2023, on Galloway-Bell, Inc. a/k/a Galloway-Bell, Inc. II's ("Galloway-Bell") Motion seeking an Order granting Summary Judgment in its favor on the claims by D.R. Horton, Inc. ("Horton") set forth in its Second Amended Answer and Third-Party Complaint. For the reasons set forth herein, the Motion is GRANTED.

PROCEDURAL BACKGROUND

This class action litigation against DR Horton stems from alleged construction defects and deficiencies in the Rose Hill subdivision in Anderson, South Carolina. There are approximately 220 single-family homes out of 271 single-family homes that are a part of this class action suit. Horton served as the general contractor for the project, which began in 2007 and was completed

in 2017. The suit was certified as a class action against Horton on January 27, 2021. D.R. Horton filed a third-party suit against Galloway-Bell and other subcontractors on March 11, 2021. The Third-Party Complaint includes allegations against Galloway-Bell for negligence, breach of warranty, breach of contract, equitable indemnity, and contractual indemnity. On July 20, 2023, Plaintiff filed her Stipulations as to Limitation on Claims. Notably, Plaintiff stipulated that “Plaintiff Natalie Zitek . . . and the Class are not making defective construction claims for the . . . 1. batt and blown insulation[.]”

LEGAL 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), SCRC. 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Galloway-Bell sought Summary Judgment on all causes of action brought by Horton in the Second Amended Answer and Third-Party Complaint (“Third-Party Complaint”). Horton’s Third-Party Complaint alleged causes of action against Galloway-Bell for contractual indemnification,

equitable indemnification, breach of contract, breach of express warranties, breach of implied warranties, and negligence/gross negligence/recklessness. For the reasons set forth below, Summary Judgment is granted as to all causes of action alleged by Horton against Galloway-Bell.

I. D.R. Horton's Third-Party Complaint against Galloway-Bell must be dismissed because the defects common to the class do not implicate the work of Galloway-Bell.

Plaintiff Zitek has stipulated that neither she nor other members of the Class allege any common defect implicating the work of Galloway-Bell. There are no allegations of common defects in Plaintiff's pleadings, deposition testimony, or expert reports related to the installation of insulation installed by Galloway-Bell. Furthermore, Horton has presented no evidence that it has incurred any damages resulting from Galloway-Bell's work. Therefore, Galloway-Bell cannot be found negligent/grossly negligent/reckless or have breached any contract or warranties. Furthermore, Galloway-Bell cannot be compelled to defend and indemnify Horton. This Court finds that the entire Third-Party Complaint by Horton against Galloway-Bell should be dismissed.

II. Horton's claims for negligence, gross negligence, recklessness, breach of express and implied warranties, and breach of contract are merely disguised indemnity claims.

Horton's negligence/gross negligence/recklessness, breach of express and implied warranties, and breach of contract causes of actions are all merely disguised indemnity claims. *See Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Clear View Construction, Inc.*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015); *Stoneledge at Lake Keowee Owners' Ass'n. Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015). Horton has not presented any evidence showing any damages that could show its claims are more than disguised indemnity claims. *See id.* The record supports only the conclusion that Horton's claims are disguised

indemnity claims, and, therefore, Horton's claims for breach of contract, breach of express or implied warranties, and negligence/gross negligence/recklessness should be dismissed.

III. Horton's claim for contractual indemnity fails as a matter of law.

The language contained in a contract must "clearly and unequivocally" provide for the indemnification of Horton's concurrent or sole negligence. *Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), *reh'g denied* (Oct. 19, 2018). The contractual indemnity language contained within the contract fails to meet the "clear and unequivocal" standard required under *Concord & Cumberland*. Specifically, the indemnity provision fails to clearly and unequivocally state whether Galloway-Bell is required to indemnify Horton for its concurrent or sole negligence. *See id.* Therefore, Horton's claim for contractual indemnity should be dismissed.

This Court finds there is no genuine issue as to any material fact as to DR Horton's Third-Party Complaint against Galloway-Bell, 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 Galloway-Bell'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 Galloway-Bell is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this _____ day of _____ 2023.

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/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit