

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019CP041942
Appellant Case No. 2023-001401

RECEIVED

May 13 2024

SC Court of Appeals

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, Defendant

D.R. Horton, Inc., Appellant,

v.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping
& Grading, Inc; 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-Vaughn
Lumber Co., Inc.; BFK 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.; Caryl Mechanicals, Inc.;
Cannaday Siding and 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 BGET
Floored, LLC; GBS Buildings Supply-Us LBM, LLC,
A/K/A GBS Building Supply, Inc.; General Shale Brick
Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of
Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building
Products; JLS Masonry, Inc.; Kings Landscaping, LLC;
Landshapers, LLC; Lade-Danler, 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&Lreyna
Construction, LLC; M&M Foundations, LLC; Nazareth
Builders, LLC, NB Contractors, LLC; Poinsett
Development, LLC; Poinsett Homes, LLC; P&T
Construction, LLC; P&L Enterprises, LLC; Probuild
Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.;
Rodney Howard Grading Co.; Sandlapper Concrete,
LLC; Sodfather, Inc.; Landscape Contractors; Stock
Building Supply, LLC; Topbuild Home Services, Inc,
A/K/A Gale Gale Contractors Service; Tucker Materials,
Inc., A/K/A Gypsum; UTM Enterprises, Inc.; Dupree
Plumbing Company, Inc.; Willow Tree Landscaping,
Inc., Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor
Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale
Contractors Services) and IBP Assets, LLC d/b/a Blue
Ridge Building Products are the Respondents.

INITIAL REPLY BRIEF OF APPELLANT REPLYING TO RESPONDENT GALE

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INTRODUCTION

The brief filed by Respondent Builder Services Group, Inc. d/b/a Gale Contractor Services argues many things that are not an issue on this appeal. This is an appeal by Appellant D. R. Horton, Inc. against Gale for attorneys' fees, expenses and costs. It is based on a contract between the parties. That is all. When Plaintiff's counsel limited their claims on the eve of Gale's summary judgment hearing by filing a written stipulation, D. R. Horton's counsel acknowledged that this removed the other issues from the case. (Record __, Tr. July 20, 2023- July 21, 2023, pp. 171 lines 17-25 -172 line 1; Plaintiff's Stipulation As To Limitation On Claims, filed July 20, 2023) Only the attorneys' fees, expenses and costs incurred before the stipulation are at issue.

This is an appeal from the grant of a motion for summary judgment. Gale notes this in its brief, but then argues the appeal as though it is based on the trial judge's ruling after a full non-jury trial. The two standards are different. The standard for summary judgment is "reasonable inference" concerning a "genuine issue as to any material fact." Rule 56(c), SCRCF; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001).

ARGUMENT

The best reply to Respondent Gale's brief is a single line from Hamlet. It is spoken by Queen Gertrude to express doubts about whether another character is entirely forthright in what she is presenting as truth. "The lady doth protest too much, me thinks." (Record ____, Hamlet, Act III, Scene II) In at least 19 places in its brief, Gale argues that it should win because D. R. Horton has not produced the underlying contract between the parties. Gale does not say that it did not sign such a contract. It does not say that such a contract never existed. It does not say that it did not ever have such a contract in its possession. It does not say that it is not bound by such a contract. Instead, it says over, and over, and over again that it should win because D. R. Horton cannot find the contract.

We know that such a contract was signed and is effective because D. R. Horton produced not one but four separate contracts that are evidence of it. The first is the Master Addendum to Independent Contractor Agreement effective as of January 1, 2006. (Record __) The second is the First Amendment to Master Addendum to Independent Contractor Agreement signed on May 21, 2008. (Record __) The third is the Master Addendum to Independent Contractor Agreement effective as of July 1, 2015. (Record __) The fourth is the Amendment No. 1 to Master Addendum to Independent Contractor Agreement signed on October 23, 2015. (Record __) If there was no underlying Independent Contractor Agreement, there would have been no reason to sign these four contracts. That alone is sufficient to overcome Gale's motion for summary judgment.

Gale is a sophisticated out-of-state corporation. (Record ____, July 20-21, 2023 TR p. 166, lines 12-14) The Termination section of each Master Addendum, which is in the penultimate paragraph, refers to its in-house "General Counsel." Small businesses do not have

in-house general counsel. Also, the four contracts describe a sophisticated corporate structure with multiple subsidiaries. The 2015 Master Addendum “is entered into in contemplation of the announced transaction involving spin-off of Masco Corporation’s services businesses in mid-2015 to TopBuild Corp,” both of which are Gale by another name, and more evidence of sophistication. The 2006 Master Addendum shows the subcontractor headquartered in Michigan. The 2015 Master Addendum shows it headquartered in Florida. These are facts from Gale’s own contracts. As a sophisticated business enterprise, it never would have agreed to any of these later contracts if there were not first an Independent Contractor Agreement.

D. R. Horton was entitled to continue to look for the Independent Contractor Agreement and, if found, present it at trial. Whether or not it was found, D. R. Horton was entitled to put witnesses on the stand to testify about its contents. Gale and D. R. Horton had a business relationship lasting since 2006 – almost twenty years. (Record ___, July 20-21, 2023 TR p. 166, lines 4-6) It is entirely proper for D. R. Horton’s witnesses to testify about Gale’s obligation for D. R. Horton’s attorneys’ fees, expenses and costs throughout that relationship. This obligation is not unique to Gale. As shown by D. R. Horton’s contracts with its other subcontractors, it is part of D. R. Horton’s business model. (Record ___, Defendant D. R. Horton, Inc.’s Memorandum In Opposition To All Third-Party Defendant’s Motions For Summary Judgment, filed July 11, 2023 and August 7, 2023) D. R. Horton does not build homes. It relies entirely on subcontractors for construction. (Record ___, July 20-21, 2023 TR p. 170, lines 3-7) That is the reason for the attorneys’ fees, expenses and costs provision in all the subcontractor contracts.

Even without the Independent Contractor Agreement, each Master Addendum standing alone is sufficient to overcome Gale’s motion for summary judgment. The relevant provisions, with D. R. Horton as “Builder” and Gale as “Contractor”, are as follows:

This Master Agreement modifies the terms of any Builder preprinted standard contractor/subcontractor agreement (including its attached exhibits) (“Standard Agreement”) entered into between Builder and Contractor for the provision of goods and/or services by Contractor (the “Work”) to a Builder building project (“Project”). This Master Addendum will supersede and control any conflicting terms or conditions of the Standard Agreement (the Standard Agreement as modified by the Master Addendum is referred to as the “Contract”). Therefore, notwithstanding anything to the contrary in the Standard Agreement, the following provisions will apply to any Contract.

* * *

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 ... Work

Other than as set forth above, Contractor’s Indemnification shall not apply ... to the extent that the Loss arises out of the work, negligence or misconduct of Builder

* * *

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 and not excluded from indemnification in the preceding paragraph.

* * *

Contractor will name Builder as an additional insured on Contractor’s CGL policy pursuant to an Additional Insured Endorsement
(Record __)

At minimum, these provisions create a jury issue. Beyond that, it is hard to refute the argument that they create an obligation for attorneys’ fees, expenses and costs on the part of Gale that is independent of any other contract.

Each Master Addendum covers “claims, demands” and “attorneys’ fees and litigation costs”. Each of these categories is a “Loss”. Gale is required to cover them because they arise from its “Work.” It is not necessary that Gale be found negligent. Gale did the “Work.” It is

responsible for defending its “Work.” Gale had “the duty to reimburse” D. R. Horton for defense expenditures “attributable to Loss” relating to Gale’s “Work.”¹

Almost a year before granting Gale’s motion for summary judgment, the trial judge denied the motions for summary judgment filed by other third-party defendants concerning D. R. Horton’s contracts that were even more exacting than this one. (Record ___, Order, filed November 3, 2022; Defendant D. R. Horton, Inc.’s Memorandum In Opposition To Third-Party Defendants Five Star Foundations, LLC, Long Heating & Air Conditioning, Inc., Caryl Mechanics II, Inc. a/k/a Caryl Mechanicals, Inc., Alpha Omega Construction Group, Inc., General Shale Brick, Inc., P&T Construction, Inc., King’s Landscaping & Grading, LLC, AJ Landscaping & Grading, LLC, Landshapers, LLC, Rite Rug Company, Inc., a/k/a Rite Rug Co., Atlanta Floor Designs Center, Allpro Textures, LLC and Manale Landscaping, LLC’s Motions For Summary Judgment, filed September 7, 2022) Also, after the trial judge granted Gale’s motion for summary judgment, he then sent to the jury the contract between D. R. Horton and another third-party defendant, JLS Masonry, Inc., on the same issue. (Record ___, JLS Motion for Judgment Notwithstanding, filed September 22, 2023; JLS Motion for Reconsideration filed November 20, 2023; Form Order 4, filed November 8, 2023 denying JLS Motion for Judgment Notwithstanding, and Form 4 Order Denying Third-Party Defendant JLS Masonry, Inc. Motion For Reconsideration, filed December 12, 2023; TR. September 15, 2023, p. 868, 933-934) The Court affirmed that indemnity provision remained in the trial when it sent the issue to the jury and answered the jury’s question about indemnity. (Record ____, TR. September 15, 2023, pp. 933-934). Litigants should be able to rely upon consistency within the same case.

¹ D.R. Horton incorporates herein its briefs filed in this appeal regarding Respondent IBP, including, for example, the discussion regarding the distinction between a duty to indemnify and a duty to defend.

Gale has acknowledged that its work on the project included insulation, gutters, downspouts and garage doors. (Record __, Gale's Initial Brief, p. 19, ll. 4-5) At the outset of the litigation, Plaintiff's counsel sent D. R. Horton a letter providing some more specifics about their claim. (Record __, Notice and Opportunity to Cure Letter dated December 11, 2019, filed August 29, 2023 at 1:15 PM) (Record ____) The letter notes "missing/inadequate insulation at exterior walls" ... "insufficient insulation in attics" ... "Insufficient/improperly installed grading/drainage, resulting water damage" ... and "Sloppy workmanship throughout Rose Hill."

The Complaint included 60 Jane and John Doe defendants alleged to have been involved in construction of the homes at the Rose Hill subdivision. (Record __, Complaint, Paragraphs 8 & 16) Gale is in that category. "Water intrusion" is alleged. That could come from improperly installed gutters or downspouts, which were part of Gale's "Work." Other allegations are more general, such as "failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices; ... and [o]ther deficiencies or failures as will be proven at trial." (Record __, Complaint, Paragraph 67) That could relate to insulation and garage doors, which were part of Gale's "Work," as well as gutters and downspouts.

Gale was a target in the class action and its "Work" was part of the "claim, demand" in the lawsuit. Were it otherwise, Gale would have extricated itself from the litigation long before the eve of trial. Instead, Gale's "Work" was not dropped until Plaintiff's counsel filed a last minute written stipulation limiting its claims. (Record __, Plaintiff's Stipulation As To Limitation On Claims, filed July 20, 2023). Until then, Gale was in the case and is responsible for the attorneys' fees, expenses and costs incurred by D. R. Horton for Gale's "Work." At the very least, this is a jury issue, which D.R. Horton's attorney argued to the court. "Your Honor,

[it's] a factual issue of whether or not they've breached this part of the contract." (Record ____, July 20-21, 2023 TR p. 169, lines 7-9)

Finally, Gale complains that D. R. Horton's discussion of insurance is "improper." Certainly, not. Insurance is in their contract. Indeed, it is central to their contract. It is a requirement that D. R. Horton be named as an "Additional Insured" to relieve Gale from the expense of its contractual obligations. The resistance to D. R. Horton in this case is from Gale's insurance carrier, which is obligated to protect D. R. Horton as an Additional Insured. The separate lawsuit by D. R. Horton against that insurance company does not, however, erase Gale's direct obligation to D. R. Horton under their contract. Again, at minimum, this is a jury issue.

CONCLUSION

This is a simple appeal. It is only about D. R. Horton's contractual claim against Gale for attorneys' fees, expenses and costs incurred before Plaintiff's eve-of-trial written stipulation limiting the class action claims. All the pages in Gale's brief about everything else are irrelevant because of that stipulation and D. R. Horton's resulting acknowledgement that its other claims should no longer stand. Contrary to Gale's brief, its duty to defend and obligation to D.R. Horton as an additional insured are separate and distinct from the duty to indemnify, but D.R. Horton prevails either way as shown by the judge's other rulings on identical contract provisions. This is an appeal from the grant of Gale's motion for summary judgment. The standard for that is exceedingly high, with all reasonable inferences required to be decided in favor of D. R. Horton and most strongly against Gale. It is a standard that Gale has not met. Even the trial judge in this case has so decided on other similar motions by other subcontractors at the Rose Hill subdivision. D. R. Horton requests that the grant of summary judgment be reversed and that

the case be remanded for trial on its claim, including its contractual right to attorneys' fees and expenses for enforcing that claim.

May 13, 2024

Respectfully,

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