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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2024-000772

Waterfall Investment and Construction Group, LLC,

Appellant,

v.

A&E Construction & Maintenance, LLC, Jeronimo Ponce d/b/a JP & Sons Builders,
Creative Drafting and Designs, Defendants
Of which Jeronimo Ponce d/b/a JP & Sons Builders is the

Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. ARE APPELLANT'S CLAIMS FOR NEGLIGENCE AND BREACH OF CONTRACT DISGUISED OR REPEATED CLAIMS FOR EQUITABLE INDEMNITY?

2. IS APPELLANT'S RIGHT TO CONTRIBUTION BARRED UNDER SECTIONS 15-38-20 AND 15-38-40 OF THE SOUTH CAROLINA CODE OF LAWS?

3. IS APPELLANT BARRED FROM MAINTAINING ANY INDEPENDENT BREACH OF WARRANTY, BREACH OF CONTRACT, OR NEGLIGENCE CLAIMS AS THE STATUTE OF LIMITATIONS FOR SUCH CLAIMS EXPIRED?

4. IS RESPONDENT ENTITLED TO SUMMARY JUDGMENT AS TO APPELLANT'S EQUITABLE INDEMNITY CLAIM AS APPELLANT ADMITS THAT IT IS RESPONSIBLE FOR THE ALLEGED DEFICIENT WORK PERFORMED BY RESPONDENT?

STATEMENT OF THE CASE

On March 3, 2017, Waterfall Investment & Construction, LLC (hereinafter "Appellant") entered into a contract with James and Frances Smith (hereinafter "the Smiths") to design and construct a home at 365 Waterfall Circle in Little River, South Carolina. Appellant's Compl., p. 1 (R. __). During construction, Appellant and the Smiths disputed the payment of draws for work performed on site. Id. at 3 (R. __). Appellant filed an action against the Smiths to collect funds allegedly due to it under the contract on June 7, 2019. See Id. (R. __). The Smiths counterclaimed alleging deficient construction and other fraudulent activity on Appellant's behalf. See Smith Ans., pp. 4-5 (R. __). On October 24, 2019, Appellant filed third-party claims for Equitable Indemnity, Negligence, and Contribution against various subcontractors that allegedly performed work on the Smiths' home, including Jeronimo Ponce d/b/a JP & Sons Builders (hereinafter "Respondent"). See Appellant's Reply & Third-Party Compl., pp. 8-14 (R. __).

On January 13 2022, the Smiths filed an amended pleading, and Appellant filed a response re-iterating the same third-party claims against Respondent for Equitable Indemnity, Negligence, and Contribution on January 28, 2022. See Smith Am. Ans. (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl., pp. 17-21 (R. __). At no point did the Smiths bring direct claims against Respondent. See Smith Ans. (R. __); Smith Am. Ans. (R. __)

Appellant and the Smiths settled the claims between them by agreement executed on December 29, 2022, over three years and two months after Respondent was named as a party. See Resp't Mot. Summ. J - Ex. A (R. __). Specifically, the settlement agreement provided that:

> All Settling Parties are hereby releasing the other Settling Parties...yet specifically preserving any and all claims that [Appellant] has or may have against [Respondent]. [Respondent]...will NOT be a party to any release relevant to this Settlement agreement. The Smiths, as part of this Settlement, assign any

> and all claims and potential claims they have or may have against [Respondent] to [Appellant] as part of this settlement. No Party to this Settlement Agreement is releasing [Respondent] from any liability or potential liability related to [this litigation].
>
> Resp't Mot. Summ. J. – Ex. A, pp. 3-4 (R. __).

Following settlement of the Smiths' claims, Appellant filed an Amended Complaint on August 21, 2023 asserting Equitable Indemnity, Negligence, Contribution, Breach of Contract, and Breach of Warranty claims against Respondent. See Appellant's Am. Compl., pp. 3-9 (R. __).

Respondent moved for Summary Judgment as to all of Appellant's claims on August 6, 2023. See Resp't Mot. for Summ. J. (R. __). Respondent's Motion was heard by the Honorable Judge William H. Seals, Jr. on March 11, 2024 and granted by written order on April 17, 2024. Ord. Granting Resp't Mot. Summ. J. (R. __). In its order, the lower court held that Appellant's claims for Negligence, Breach of Contract, and Breach of Warranty were either disguised claims for equitable indemnity or barred by the applicable statute of limitations. Id. p. 3 (R. __). Additionally, the court held that Respondent's Contribution claim was barred as Appellant failed to discharge any common liability in the settlement agreement and as the statute of limitations for any direct claims the Smiths may have had expired prior to Appellant's settlement. Id. (R. __). Finally, the court found that Appellant was, at most, a joint tortfeasor as to the alleged construction deficiencies present at the Smiths' home, and as such, Appellant's claim for Equitable Indemnity was also barred. Id. (R. __). This appeal followed.

STANDARD OF REVIEW

Appellate courts apply the same standard of review applied by the trial court to review the grant of summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure. Knight v. Austin, 396 S.C. 518, 521, 722 S.E.2d 802, 804 (2012). Summary judgment is proper when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. See Rule 56(c), SCRCP; Knight, 396 S.C. at 521-22, 722 S.E.2d at 804; Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (eliminating the "mere scintilla" standard and holding the proper standard is the "genuine issue of material fact" standard set forth in the text of Rule 56(c), SCRCP). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ARGUMENT

1. APPELLANT'S CLAIMS FOR NEGLIGENCE AND BREACH OF CONTRACT ARE DISGUISED OR REPEATED CLAIMS FOR EQUITABLE INDEMNITY.

As this Court determined in the Stoneledge series of cases, claims for equitable indemnity, though pled under separate or multiple headings, theories, or descriptions, will be dismissed and consolidated into a single equitable indemnity claim as a matter of law. See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Southeast Group, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015); Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015).

As this Court noted in those matters, "[t]he character of an action is primarily determined by the allegations contained in the complaint." 413 S.C. 630, 635, 776 S.E.2d 434, 437 (citing Seebaldt v. First Fed. Sav. & Loan Ass'n, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977)). With regard to its Negligence claim, Appellant pled as follows in its first and second third-party complaints filed in 2019 and 2022 and its latest amended pleading filed in 2024:

> As a result of Subcontractors' negligence, Plaintiff has incurred, and will continue to incur actual damages in an amount to be determined by the court and may incur settlement costs in settling Defendants' claims, plus the costs associated with investigating Defendants' claims and defending this action as well as special and consequential damages, including damage to its business and business reputation, in an amount to be proven at trial.
>
> Appellant's Reply & Third-Party Compl., p 13 (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl., p. 19 (R. __).
>
> As a result of Subcontractors' negligence, Waterfall incurred, and will continue to incur actual damages in an amount to be determined by the court and did incur settlement costs in settling the Smiths' claims, plus the costs associated with investigating the Smiths' claims and defending the Smiths' action as well as special and consequential damages, including damage to Waterfall's business and business reputation, in an amount to be proven at trial.
>
> Appellant's Am. Compl., p. 7 (R. __).

In its Amended Answer, Appellant made the same allegations as to its Breach of Contract claim:

> As a result of the breach by each of the Subcontractors, Waterfall incurred, and will continue to incur actual damages in an amount to be determined by the court and did incur settlement costs in settling the Smiths' claims, plus the costs associated with investigating the Smiths' claims and defending the Smiths' action as well as special and consequential damages, including damage to Waterfall's business and business reputation, in an amount to be proven at trial.

Id. at 8-10 (R. __).

In all three pleadings, Appellant's alleged damages stem directly from the claims asserted against it by the Smiths or those amounts paid by Appellant to the Smiths in settlement of the Smiths' claims against it. Appellant's Reply & Third-Party Compl., pp. 10-13; (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl., pp. 17-21 (R. __); Appellant's Am. Compl., pp. 3-9 (R. __). Further, on March 3, 2021, the lower court held that that Appellant's Negligence claim was a disguised claim for Equitable Indemnity as a matter of law. Ord. Granting Atl. Elec. Svcs.' Mot. Summ. J., p. 1 (R. __). Appellant has not appealed this order following the final determination of this case by the lower court on April 17, 2024, and as such, its holding should be affirmed. See Ord. Denying Appellant's Mot. for Reconsideration (R. __); Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance) (citation omitted).

As Appellant's Negligence and Breach of Contract claims stem from Appellant's own liability to and settlement with the Smiths and as Appellant has not appealed the lower court's holding that its Negligence claim is merely a disguised claims for equitable indemnity, the lower court's order granting summary judgment as to those claims should be affirmed.

2. APPELLANT'S RIGHT TO CONTRIBUTION IS BARRED UNDER SECTIONS 15-38-20 & 15-38-40 OF THE SOUTH CAROLINA CODE OF LAWS.

In each of its pleadings, Appellant has brought a cause of action for Contribution against Respondent. Appellant's Reply & Third-Party Compl., p. 13; (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl., pp. 20-21 (R. __); Appellant's Am. Compl., pp. 7-8 (R. __). "The common law rule against contribution was abrogated in 1988 when our General Assembly enacted the South Carolina Uniform Contribution Among Tortfeasors Act." Vermeer v. Wood/Chuck Chipper, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct.App.1999). Because the Act is in derogation of the common law, it must be strictly construed. See Watson v. Sellers, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989).

Respondent's only statutory basis for contribution is found in Section 15-38-20 of the South Carolina Code of Laws, which states:

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

S.C. Code Ann. § 15-38-20(D) (1988).

In this case, the settlement agreement between Appellant and the Smiths is clear that Respondent was specifically and fully excluded from any release in its favor by either the Smiths or Appellant:

> All Settling Parties are hereby releasing the other Settling Parties...yet specifically preserving any and all claims that [Appellant] has or may have against [Respondent]. [Respondent]...will NOT be a party to any release relevant to this Settlement agreement....No Party to this Settlement Agreement is releasing [Respondent] from any liability or potential liability related to [this litigation].

Resp't Mot. Summ. J. – Ex. A, p. 4 (R. __).

This Court has specifically addressed whether a settling party may maintain a contribution claim against an alleged joint tortfeasor without settling that alleged joint tortfeasor's liability in the settlement itself. G & P Trucking v. Parks Auto Sales Service & Salvage, Inc., 357 S.C. 82, 591 S.E.2d 42 (Ct.App.2003). That answer is unambiguously "no." Id. at 88, 591 S.E.2d at 45 ("The plain language of section 15–38–20(D) yields only one interpretation, namely that extinguishment of the defending joint tortfeasor's liability must have resulted directly from the settlement itself.") (emphasis added).

Further, Section 15-38-40 of the South Carolina Code of Laws also bars Appellant's right to contribution as it only permits Appellant to bring such a claim when, assuming a settlement agreement does extinguish a common liability, Appellant has "discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him." S.C. Code Ann. § 15-38-40(D) (1988) (emphasis added).

In its initial third-party complaint filed on October 24, 2019, Appellant pled that Respondent was a subcontractor that performed work at the Smiths' home, and Respondent was added as a party to the case at that time. Appellant's Reply & Third-Party Compl., pp. 8-10 (R. __). Therefore, October 24, 2019 was the latest date by which the Smiths were put on notice that Respondent was a party against which they had or may have had claims for deficient construction. Pursuant to Section 15-3-530 of the South Carolina Code of Laws, the statute of limitations for the Smiths to bring such direct claims expired on October 24, 2022, more than two months before Appellant's settlement with the Smiths was executed. S.C. Code Ann. § 15-3-530 (2001). Thus, any settlement payment by Appellant was for its own liability as any liability Respondent may have had to the Smiths was extinguished as a matter of law prior to such settlement. Appellant concedes this in its affidavit in opposition to Respondent's Motion. Aff. of

David A. Brown, p. 4 (R. __).

This case presents relevant facts almost identical to those analyzed by our Supreme in Progressive Max Ins. Co. v. Floating Caps, Inc. 405 S.C. 35, 747 S.E.2d 178 (2013). In Progressive, a pedestrian brought claims against a driver for injuries sustained in an accident. Id. at 39. 180. The pedestrian executed two settlement agreements with the driver approximately five months and eight months respectively after the statute of limitations expired on the pedestrian's claims. Id. at 40-41, 180. After execution of the settlement agreements, the driver's insurance carrier, Progressive, brought a contribution action against a bar, Silver Dollar, for serving the driver alcohol. Id. at 41, 181. The circuit court granted summary judgment to Silver Dollar under Sections 15-38-20 and 15-38-40 because Silver Dollar's liability was not extinguished by the operative settlement agreements and because the statute of limitations for the pedestrian's claims expired prior their execution. Id. at 42-43, 182-183. After reviewing both statutes, our Supreme Court affirmed the circuit court for the same reasons as Progressive failed to execute the settlement agreements prior to the running of the statute of limitations and failed to extinguish Silver Dollar's liability in the settlement agreements themselves. Id. at 53-54, 188.

Because Appellant's right to contribution is barred by the terms of Sections 15-38-20 and 15-38-40 of the South Carolina Code of Laws and as interpreted by this Court and our Supreme Court, the circuit court's grant of summary judgment as to Appellant's Contribution claim should be affirmed.

3. APPELLANT IS BARRED FROM MAINTAINING ANY INDEPENDENT BREACH OF WARRANTY, BREACH OF CONTRACT, OR NEGLIGENCE CLAIMS AS THE STATUTE OF LIMITATIONS FOR SUCH CLAIMS EXPIRED BEFORE THEY WERE FILED.

As discussed above, Appellant brought the same Equitable Indemnity, Negligence, and Contribution claims against Respondent in its Amended Complaint as it did in its first and second third-party complaints. However, in its amended pleading, Appellant asserted new Breach of Warranty and Breach of Contract claims, which should also be dismissed. Appellant's Am. Compl., pp. 8-9 (R. __).

Our Supreme Court has long held that a builder who contracts to construct a dwelling impliedly warrants that the work undertaken will be performed in a careful, diligent, and workmanlike manner. Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989). However, in this case, Appellant was the builder, and it defended and settled breach of warranty claims brought by the Smiths' against it. Appellant's Ans. & Third-Party Compl., pp. 6-7 (R __); Resp't Mot. Summ. J. – Ex. A, p. 6 (R. __); Aff. of David A. Brown, p. 3 (R. __). While Appellant allegedly agreed to purchase the home as part of the settlement, there is no evidence in the record that Appellant has ever owned the subject property such that it can maintain any claim for breach of warranty. Even if true, Appellant's claim would be barred as Appellant would have purchased the property with full notice of the construction deficiencies allegedly related to Respondent's work. Aff. of David A. Brown, p.3 (R. __).

To the extent Appellant asserts that its Breach of Warranty claim is an assigned claim from the Smiths, the statute of limitations for such a claim as to Respondent ran over two months prior to the execution of the Smiths' assignment. S.C. Code Ann. § 15-3-530 (2001); Resp't Mot. Summ. J. – Ex. A, p. 4 (R. __). Thus, at the time of settlement, there was no Breach of Warranty

claim in existence for the Smiths to assign.

Appellant's Breach of Contract claims fails for similar reasons. Of note, Appellant has only alleged the existence and breach of a contract since settling its claims with the Smiths, and Appellant cannot split its causes of action arising from the construction of the Smiths' home. See Appellant's Reply & Third-Party Compl. (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl. (R. __); Appellant's Am. Compl. (R. __); Floyd v. F.I.T. Corp., 191 S.C. 518, 5 S.E.2d 299, 301 ("A single cause of action cannot be split either as to relief demanded or grounds on which recovery is sought") (citation omitted).

Even had the contract existed, the statute of limitations for breach expired, at its latest, September 9, 2022, three years from the filing of the Smiths' Answer & Counterclaims, at which point Appellant was put on notice that there were alleged deficiencies with Respondent's alleged work at the residence. See Smith Ans., p. 5 (R. __); S.C. Code Ann. § 15-3-530 (2001). In the event Appellant asserts its Breach of Contract claim was an assigned claim from the Smiths, such is also barred by the expiration of the statute of limitations prior to assignment. Id.; Resp't Mot. Summ. J. – Ex. A, pp. 4, 7 (R. __) Finally, Appellant failed to present any admissible evidence that a contract between Appellant and Respondent existed and merely repeated the allegations in its Amended Complaint in opposition to Respondent's Motion. Aff. of David A. Brown, pp. 2-3 (R. __); See Appellant's Am. Compl. (R. __).

To the extent Appellant's Negligence claim arises from (1) the alleged purchase of the Smith residence as part of Appellant's settlement agreement or (2) the assignment of any such claims from the Smiths, Appellant's Negligence claim would also be barred as (1) no evidence was presented to the lower court that Appellant owned the subject property as to maintain such a claim; (2) even if true, Appellant purchased the property with notice of the alleged defects

therein; and (3) any negligence claim the Smiths may have maintained against Respondent expired under the statute of limitations before it could have been assigned to Appellant. Aff. of David A. Brown, pp. 2-3 (R. __); S.C. Code Ann. § 15-3-530 (2001).

As the applicable statute of limitations for Appellant's Breach of Contract and Breach of Warranty claims expired either prior to Appellant filing its Amended Complaint or as an "assigned claim" from the Smiths, the lower court's grant of summary judgment should be affirmed. Further, all three claims for Negligence, Breach of Contract, or Breach of Warranty based on Appellant's alleged position as an owner of the subject property following settlement fail as Appellant bought the Smith residence with clear notice of the alleged deficiencies in its construction. Monroe v. Wood, 186 S.C. 507, 197 S.E. 39, 43 (1938) ("It seems wholly useless to cite other authorities to establish the postulate that it is the rule long established in this jurisdiction that: "That if one accept an article the defect of which is obvious, or discernable upon reasonable inspection, and nevertheless accepts the article, he waives the right to complain of the patent defects.").

4. RESPONDENT IS ENTITLED TO SUMMARY JUDGMENT AS TO APPELLANT'S EQUITABLE INDEMNITY CLAIM AS APPELLANT ADMITS THAT IT IS ULTIMATELY RESPONSIBLE FOR THE ALLEGED DEFICIENT WORK PERFORMED BY RESPONDENT.

Finally, in all three pleadings, Appellant asserted a claim for Equitable Indemnity against Respondent. Appellant's Reply & Third-Party Compl., pp. 10-11; (R. __); Appellant's Reply to Am. Ans. & Third-Party Compl., pp. 17-18 (R. __); Appellant's Am. Compl., pp. 3-4 (R. __). A right of indemnity can exist under equitable principles where one person is exposed to liability by the wrongful act of another in which he does not join. Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 24, 301 S.E.2d 552, 553 (1983). Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second party is not. Town of Winnsboro v.

Wiedeman–Singleton, Inc. (Winnsboro I), 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990) (aff'd 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II)). If the second party is also at fault, he comes to court without equity and has no right to indemnity. Id.

In opposition to Respondent's Motion, Appellant presented the sworn affidavit of its owner, David A. Brown. Mr. Brown asserts that Appellant contracted with the Smiths to construct their home and further worked with the Smiths "to design" and "have engineered" the residence while ultimately obtaining the building permit necessary to construct it. Aff. of David A. Brown, p. 1. (R. __). Mr. Brown does and must concede that Respondent, which contracted to build the home and pulled the permit to do so, was the ultimate party responsible for the Smiths' home. Id. at 2 (R. __). Further, Appellant asked the circuit court to order Respondent to "at least contribute" to the settlement amount paid by Respondent to the Smiths, which was only paid to extinguish Appellant's liability, not Respondent's alleged liability to the Smiths as the statute of limitations on such liability had expired. Id. at 4 (R. __); Resp't Mot. Summ. J. – Ex. A, (R. __); S.C. Code Ann. § 15-3-530 (2001).

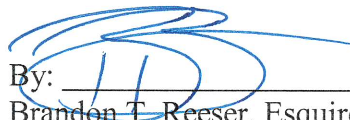
As determined by the circuit court, the numerous admissions in Mr. Brown's affidavit appear to establish that Respondent was a joint tortfeasor as to the alleged construction defects, fraud, and breaches of contract and warranty alleged by the Smiths. As joint tortfeasors are not entitled to equitable indemnity from each other as a matter of law, the circuit court's grant of summary judgment should be affirmed.

CONCLUSION

For the reasons stated in the above paragraphs, this Court should affirm the lower court's grant of summary judgment as to Appellant's Negligence, Breach of Warranty, Breach of Contract, Contribution, and Equitable Indemnity claims as: (1) the statute of limitations for any independent or assigned negligence, breach of warranty, or breach of contract claims has expired; (2) Appellant's Negligence and Breach of Contract claims are disguised or repeated claims for equitable indemnity; (3) Appellant's right to contribution is statutorily barred; and (4) Appellant was, at most, a joint tortfeasor, and therefore cannot maintain a claim for equitable indemnity.

Respectfully submitted:

WILSON HEYWARD & REESER, LLC



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