

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

The Retreat At Charleston National Country Club Home Owners Association, Inc. And The Retreat At Charleston National Country Club Horizontal Property Regime,

Plaintiffs,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, Individually, C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, Builders Firstsource-Southeast Group, LLC; Builders FirstSource, Inc., Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Liollo Architecture, JC Construction d/b/a JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC, Soto & Vasquez Construction, LLC a/k/a Costa De Oliveira Construction, LLC, Solesmar Jesus De Oliveira, Wilson Lucas Sales d/b/a Miracle Siding, Miracle Siding, LLC, Royal Hornes of SC, Inc., Colleen Batissa, Christopher Batissa, Norma Ferreira Bruno, Mendez Construction, LLC, Juan Garza Ramos, Juan Garza Ramos d/b/a Juan Constructors, Jessica Marroquin, Jessica Marroquin d/b/a Marroquin Construction, Carlos Marroquin, Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction, Feliciano Cruz Silva, Garcia Roofing, LLC, Givair De Caris, and Mario Salgado,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

RECEIVED

Sep 22 2021

SC Court of Appeals

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
PALMETTO TRIM AND
RENOVATIONS**

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Pohlman Quality Contractors; and Pohlman
Quality Exteriors, Inc.; Palmetto Trim and
Renovation; Edward Bruce Witham; and
East Coast Carpentry,

Third-Party Defendants.

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of PALMETTO TRIM AND RENOVATION, hereinafter “Palmetto”, for summary judgment with respect to cross-claims filed by Builders First Source-Southeast Group, LLC, hereinafter “BFS”, for equitable and contractual indemnity, breach of express and implied warranties, breach of contract, and negligence. For the reasons set forth herein below, Palmetto’s motion is GRANTED as to BFS’s claims for contractual indemnification, breach of express and implied warranties, breach of contract and negligence, and is DENIED as to BFS’s claim for equitable indemnification:

FACTUAL BACKGROUND

This litigation arises out of alleged construction defects at Retreat at Charleston National Country Club, a thirty-one building townhome community in Mount Pleasant, SC (“the Retreat Project” or “the Project”). Plaintiffs allege, *inter alia*, defective/improper installation of framing components, windows and doors, building paper/weather resistive barrier, and related flashing, have caused water infiltration and damage to the substrate and other building components at all buildings throughout the Project.

BFS is a Delaware limited liability company that furnishes building supplies and turn-key contracting services as a licensed general contractor. It is undisputed that BFS holds an unlimited commercial general contractor's license (License No. 112969) with the South Carolina Labor Licensing & Regulation ("SC-LLR"), and Terry Rosamond is BFS's representative that serves as the "qualifying party" for such licensure in this state. It is undisputed that BFS furnished the framing lumber, house-wrap, windows, doors, related flashings, and caulk and BFS provided superintendents to oversee and inspect the installation of such materials for construction of the Project on Buildings 5-21, 2200, 2300, 2500, 2600, 2700, 2800, and 2900. Palmetto served as a subcontractor of BFS and in that capacity performed window installation work on Units 500, 700 and 1000. Palmetto did not perform any other work on the Project. Certificates of Occupancy were issued for building 500 on July 21, 2006; building 700 on July 25, 2006 and building 1000 on July 25, 2006.

According to BFS, Palmetto executed a BFS "Master Subcontractor Agreement" dated May 16, 2005 (hereafter "Master Agreement"). The Master Agreement at issue here is a BFS contract form bearing "Version - 2/16/04." BFS seeks to recover from Palmetto and BFS's subcontractors in indemnity under the terms of the applicable BFS Master Agreement.

ABBREVIATED PROCEDURAL HISTORY

Plaintiffs filed their initial Complaint on July 22, 2016. BFS filed third-party claims against Palmetto on May 1, 2017 asserting third-party claims against Palmetto for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. BFS's operative third-party claims are now contained in BFS's Amended Answer and Third-Party Complaint to Plaintiffs' Fourth Amended Complaint filed on November 13, 2019. BFS's third-Party claims allege that BFS is entitled to be indemnified in the amount which BFS "may pay in satisfaction" of Plaintiffs' claim "plus [BFS's] costs of defense, inclusive of attorneys' fees", without regard for the fault of either Palmetto or BFS.

Palmetto filed its Amended Motion for Summary Judgment as to BFS's third-party claims on October 22, 2020 asserting the arguments contained in its original brief and adopting those of East Coast Carpentry. BFS did not file a memorandum in opposition to Palmetto's Amended Motion for Summary Judgment but opposed the motion at oral arguments on November 6, 2020.

LEGAL STANDARD

A trial court should grant a motion for summary judgment when "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." Rule 56(c), SCRPC; see Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998) (quoting Tupper v. Dorchester Cnty., 326 S.C. 318, 487 S.E.2d 187 (1997)). "Once the moving party meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, 370 S.C. 138, 150, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 151. Unsupported allegations or denials that simply create an inference are insufficient to withstand summary judgment. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Hedgepath v. AT&T, 348 S.C. 340, 354, 559 S.E.2d 327 (Ct. App. 2001).

I. **BFS's CROSS-CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE ARE DISGUISED CLAIMS FOR EQUITABLE INDEMNITY.**

Although BFS did not submit a memorandum of law in opposition to Palmetto's Amended Motion for Summary Judgment¹, during oral arguments on November 6, 2020, BFS conceded that its

¹ It should be noted that BFS, in its memorandum in opposition to Polhman Quality Exteriors' Second Amended Motion for Summary Judgment, which was heard at the same time as ECC's Amended Motion for Summary Judgment, BFS conceded that its cross-claims for breach of express and implied warranties, breach of contract, and negligence against

cross-claims against Palmetto for breach of express and implied warranties, breach of contract, and negligence are merely disguised claims for equitable indemnity and that they are subject to dismissal pursuant to Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. BuildersirstSource-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 Constr., LLC, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015). Therefore, the Court will grant summary judgment with respect to those claims.

II. BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018)

Paragraphs 165 of the Third-Party Complaint alleges that the subcontract between BFS and Palmetto “provided for contractual indemnification in favor of Builders FirstSource”. The language contained in the “Master Subcontract Agreement” indemnity provision states:

Section 6. Waiver, Release, and Indemnification. Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims. Accordingly:

- a. Waiver. [omitted because it applies to workers comp]
- b. Release and Indemnity.
 - (1) [Omitted bc applies to personal injury]
 - (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or

Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

materials provided in connection with the Work; or (iii) omissions resulting from Indemnitees failure to supervise Subcontractor's operations.

This language is inherently confusing insofar as it calls for Palmetto to indemnify BFS for BFS's sole negligence. Thus, the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

In footnote 6 to the Cumberland case the South Carolina Court of Appeals noted that standard AIA form indemnity clause does not meet this standard.

We recognize the challenges lawyers often face in drafting indemnity provisions that can meet the strict "clear and unequivocal" test. In fact, none of our precedents appear to have found a provision that has met the standard. The provision here derived from an American Institute of Architects (AIA) form. The AIA is a respected organization, and its forms are used regularly in the construction industry. Nevertheless, the indemnity clause at issue here may have been influenced by the "clear and unequivocal" standard. 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." Because South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal," parties and their lawyers have little guidance. This is why the Texas Supreme Court discarded the "clear and unequivocal" standard in favor of one they call "express negligence," although we are uncertain how much that clears things up. See id. at 708. There may be better alternatives to the "clear and unequivocal" standard, but we must leave that to our legislature or Supreme Court.

CONCLUSION

After carefully considering the pleadings in the case, the arguments of counsel, the memoranda of law and exhibits submitted by the parties, I find and conclude as follows:

1. That the cross-claims of BFS against Palmetto for breach of express and implied warranties, breach of contract, and negligence are disguised equitable indemnity claims and are not viable as alternative causes of action.
2. That the indemnity and duty to defend provision of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/16/04]") are unconscionable, ambiguous, unintelligible, conflicting, and are unenforceable.

3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/6/04]") violate South Carolina public policy and S.C. Code § 32-2-10.
4. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 2/16/04]") are neither clear nor unequivocal and, thus, fail as a matter of law.
5. That BFS's third-party claim against Palmetto for equitable indemnification remains, as a genuine issue of material fact still exists as to the arguments set forth by Palmetto with regard to their arguments for summary judgment on that claim.

IT IS, THEREFORE, ORDERED that the amended motion of Palmetto Trim and Renovations for summary judgment with regard to the Third-Party Claims of Builders FirstSource-Southeast Group, LLC for contractual indemnification, breach of express and implied warranties, breach of contract, and negligence be and is hereby **GRANTED**; and that the amended motion of Palmetto Trim and Renovations for summary judgment with regard to the Third-Party Claim of Builders FirstSource-Southeast Group, LLC for equitable indemnification be and is hereby **DENIED**.

AND IT IS SO ORDERED.

The Honorable Jennifer B. McCoy
Judge, Ninth Judicial Circuit

Charleston, South Carolina
_____, 2021



Charleston Common Pleas

Case Caption: Retreat at Charleston National Country Club Home Owners Asso ,
plaintiff, et al VS Winston Carlyle Charleston National LLC ,
defendant, et al

Case Number: 2016CP1003783

Type: Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764