

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE OCONEE COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay

Appellate Case No. 2013-001404

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SC Court of Appeals

STONELEDGE AT LAKE KEOWEE OWNERS' ASSOCIATION, INC., C. DAN CARSON, JEFFREY J. DAULER, JOAN W. DAVENPORT, MICHAEL FURNARI, DONNA FURNARI, JESSY B. GRASSO, NANCY E. GRASSO, ROBERT P. HAYES, LUCY H. HAYES, TY HIX, JENNIFER D. HIX, PAUL W. HUND, III, RUTH E. ISAAC, MICHAEL D. PLOURDE, MARY LOU PLOURDE, CAROL C. POPE, STEVEN B. TAYLOR, BETTE J. TAYLOR, AND ROBERT WHITE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED.....PLAINTIFFS,

v.

IMK DEVELOPMENT CO., LLC, KEOWEE TOWNHOUSES, LLC, LUDWIG CORPORATION, LLC, SDI FUNDING, LLC, MEDALLION AT KEOWEE, LLC, INTEGRYS KEOWEE DEVELOPMENT, LLC, MARICK HOME BUILDERS, LLC, BOSTIC BROTHERS CONSTRUCTION, INC., MILLER/PLAYER & ASSOCIATES, JOHN LUDWIG, CLEAR VIEW CONSTRUCTION, LLC, MICHAEL FRANZ, MHC CONTRACTORS, MIGUEL PORRAS CHONCOAS, BUILDERS FIRST SOURCE SOUTHEAST GROUP, MIKE GREEN, SOUTHERN CONCRETE SPECIALTIES, CARL COMPTON D/B/A COMPTON ENTERPRIZE A/K/A COMPTON ENTERPRISES, GUNTER HEATING & AIR, ALL PRO HEATING, A/C & REFRIGERATION, LLC, COLEMAN WATERPROOFING, HEYWARD ELECTRICAL SERVICES, INC., TINSLEY ELECTRICAL, LLC, HUTCH N SON CONSTRUCTION, INC., CARL CATOE CONSTRUCTION, INC., T.G. CONSTRUCTION, LLC, DELFINO CONSTRUCTION, FRANCISCO JAVIER ZARATE D/B/A ZARATE CONSTRUCTION, ALEJANDRO AVALOS CRUZ, HERBERTO ACROS HERNANDEZ, MARTIN HERNANDEZ-AVILES, FRANCISCO VILLALOBOS LOPEZ, AMBROSIO MARTINEZ-RAMIREZ, ESTER MORAN MENTADO, SOCORRO CASTILLO MONTEL, UPSTATE UTILITIES, INC., SOUTHERN BASEMENTS, INC., MJG CONSTRUCTION AND HOMEBUILDERS, INC. D/B/A MJG CONSTRUCTION, KMAC, INC., D/B/A KMCA NORTH CAROLINA, EUFACIO GARCIA, EVERADO JARMAMILLO, GARCIA PARRA INSULATION, INC., J&J CONSTRUCTION, JOSE NINO, JOSE MANUEL GARCIA, EASON CONSTRUCTION, INC., AND VINCENT MORALES D/B/A MORALES MASONRY,DEFENDANTS,

OF DEFENDANTS MARICK HOME BUILDERS, LLC, AND RICK THOENNES.....APPELLANTS,

OF DEFENDANTS, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALITIES, INC., CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ,.....RESPONDENTS.

**INITIAL BRIEF OF RESPONDENTS BUILDERS FIRSTSOURCE-
SOUTHEAST GROUP AND SOUTHERN CONCRETE SPECIALTIES, INC.**

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STATEMENT OF THE CASE

Stoneledge at Lake Keowee (“Stoneledge” or the “Project”) is a townhome community located along the shores of Lake Keowee in Oconee County. The Project consists of nineteen (19) residential buildings, representing eighty (80) individual units and a clubhouse.

This lawsuit was instituted on May 29, 2009. *See* Complaint. It is a construction defect lawsuit brought on behalf of the homeowners and homeowners’ association at Stoneledge. The plaintiffs sued Appellant (hereinafter “Marick) and Respondents, (who will hereinafter be referred to as “BFS” and “Southern Concrete”) among many others, alleging negligence and breach of warranty causes of action. *See* April 3, 2012 Third Amended Complaint. Marick then instituted cross-claims for negligence, breach of warranty and equitable indemnity against Respondents and many other defendants. *See* April 5, 2012 Cross-Claim. Respondents denied the cross-claims asserted by Marick. *See* Answer to Cross-Claim.

All of the cross-claim defendants, including Respondents, filed motions to dismiss and motions for summary judgment as to Marick’s cross-claims. *See* Respondents August 23, 2012 Motion and Memorandum in Support. In the motions to dismiss, Respondents contend that Marick’s breach of warranty and negligence claims were merely disguised claims for equitable indemnity. In the motion for summary judgment, Respondents contended that there was no genuine issue of material fact on the equitable indemnification cross-claims. On September 5, 2012, the trial court heard Respondents’ motions. However, Marick conceded its’ position on Respondents’ motion to dismiss, leaving only the motions for summary judgment as to equitable indemnification.

On January 14, 2013, the trial court issued an order granting Respondents’ motions to dismiss and motions for summary judgment, along with the motions filed by all of the other cross-

claim defendants. *See* January 14, 2013 Order. On or about January 23, 2013, Marick filed a Motion for Reconsideration under Rule 59(e), SCRCP. *See* Motion for Reconsideration. The trial court conducted a hearing on this motion on April 10, 2013. On May 21, 2013, the trial court denied Marick's motion for reconsideration. *See* Order dated May 21, 2013.

Marick filed and served a Notice of Appeal on June 6, 2013.

STATEMENT OF FACTS

The Project was developed in two phases. Phase I was built during 2003-2004 and consists of eight (8) buildings representing thirty-seven (37) individual units. At that time, the primary developer was Keowee Townhouses, LLC and the general contractor was Bostic Brothers Construction, Inc. Phase II was built during 2006-2007 and consists of eleven (11) residential buildings representing forty-three (43) units. At that time, the developer was IMK Development Co., LLC, The Appellant, Marick Home Builders, LLC, was the general contractor for Phase II.

Marick hired BFS to perform the following scope of work on Phase II: (1) exterior and interior framing; (2) trusses; (3) prefabricated stairs; (4) deck and column framing; (5) decorative arches; (6) gypsum wallboard; (7) some exterior sheathing; (8) gypsum fire walls; (9) Tyvek building wrap; (10) windows and associated flashing; (11) exterior doors and associated flashing; (12) screen porch framing; and (13) balcony railings. Marick hired Southern Concrete to perform certain concrete work which was primarily assisted with the balconies and decks. Respondents completed their work on the Project in January 2007.

In its complaint, Marick asserted claims against BFS and Southern Concrete for equitable indemnity, negligence and breach of contract. *See* Third Amended Complaint. Marick did not

assert a claim for contractual indemnity, nor did Marick allege the existence of a written contract between it and either BFS or Southern Concrete.

As reflected in other briefs submitted to the Court, the evidence in circuit court established that Marick was, not free from fault with respect to the deficiencies giving rise to the claim. On that basis, the circuit court ruled that Marick could not recover against either BFS or Southern Concrete in equitable indemnity. *See* Order dated January 14, 2013. It should be noted that Marick was adjudicated negligent in a two-week trial of the Phase I aspect of this case. *See* Verdict Form filed November 8, 2013.

Marick's remaining claim, for breach of contract and negligence, are the subject of this appeal.

STANDARD OF REVIEW

Summary judgment shall be granted when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. Rule 56, *SCRCP*. The movant must first demonstrate that there is no genuine dispute of material fact. *See Miller v. Blumenthal Mills, Inc.*, 336 S.C. 204, 220, 616 S.E.2d 181 (Ct. App. 2005) (citing *McCall v. State Farm Mut. Auto. Inc. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *See Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Rather, to defeat the motion, the party opposing summary judgment must present evidence of specific facts from which the finder of fact could reasonably find for him, thereby showing that there is a genuine issue for trial. *See Miller*, 365 S.C. at 220, 225, 616 S.E.2d at 730, 732.

When only one reasonable inference can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for a jury. *See National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co.*, 173 S.C. 1, 174 S.E. 581 (1934). Moreover, “a court ‘cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be *reasonably* possible under the facts.’ *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citing *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d, 305, 307 (Ct. App. 1996)). (emphasis added).

ARGUMENT¹

I. THE LOWER COURT DID NOT ERR IN GRANTING RESPONDENT’S MOTION TO DISMISS AS TO APPELLANT’S CROSS-CLAIM FOR NEGLIGENCE AND BREACH OF WARRANTY.

The trial court correctly dismissed Marick’s cross-claims for negligence and breach of warranty against BFS and Southern Concrete by concluding that the negligence and breach of warranty claims asserted by Marick are merely disguised claims for equitable indemnity and must be dismissed.

A. Marick’s Negligence and Breach of Warranty Claims Are Merely Disguised Claims For Equitable Indemnification.

Marick’s negligence and breach of warranty claims against BFS and Southern Concrete are simply disguised indemnity claims. Marick’s cross-claim for breach of warranty against Respondents seek nothing more than indemnification:

Should Plaintiffs prevail on their claims, Appellant will be damaged as a direct and proximate result of the above named parties breach of their express and/or implied warranties; as a result, Appellant is informed and believes that it is entitled to recover from [Respondents] such as it may incur in legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

¹ BFS and Southern Concrete adopt all relevant portions of the Initial Brief of Respondent Clear View Construction and Michael Franz.

Marick's Answer to Plaintiffs' Third Amended Complaint & Cross-Claims, ¶ 174. Similarly, Marick's cross-claim for negligence states:

Should Plaintiff's prevail on their claims, Appellant will be damaged as a direct and proximate result of [Respondents] negligence; as a result, Appellant is informed and believe that it is entitled to recover from [Respondents] such as it may incur legal fees and costs or is ordered to pay to the Plaintiffs for which they sue.

Id. at ¶169.).

The character of an action is determined by the allegations contained in the complaint, specifically "the nature of the issues and the remedies which are sought. *State v. Yelsen Land Co.*, 257 S.C. 401, 403 (1972); *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The character of an action is not to be determined by the terminology which the pleaders may chance to give it. On the contrary, [it] is fixed by the events which the pleaders have recited. *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E.2d 546, 548 (1919). Courts may use the allegations in the complaint to determine the correct character of an action. *See Seebaldt*, 269 S.C. at 692, 239 S.E.2d at 727. ("The character of an action is primarily determined by the allegations contained in the complaint.")

The character of Marick's negligence and breach of warranty cross-claims is clear from the very wording of the pleading. Marick seeks to be reimbursed for damages associated with Plaintiffs' claims which Marick contends flow from Respondents' conduct. This fits the clear definition of "indemnify. Black's Law Dictionary 837 (9th ed. 2009) ("To reimburse (another) for a loss suffered because of a third party's or one's own act or default.") As noted by the United States District Court for the District of South Carolina, "a rose by any other name is still a rose" and legal claims, whether denominated as negligence or breach of warranty, which assert damages arising out of one's liability to a third party are "nothing more than claims for . . .

indemnification with a slight change in wording.*SCNB v. Stone*, 749 F.Supp. 1419, 1433 (D.S.C. 1990); *See also United States Fidelity & Guaranty Comp. v. Patriot's Point Dev. Auth.*, 788 F.Supp. 880 (D.S.C. 1992).

Further, Appellate courts in other states, in similar cases, have also concluded that a cross-claim or third-party claim couched in terms of indemnity folds into and is absorbed by an overarching cause of action for indemnification. *Dodge Trucks, Inc. v. Wilson*, 231 S.E.2d 818, 821 (Ga. Ct. App. 1976)*aff'd*, 235 S.E.2d 142, 144 (Ga. 1977);*Frazer v. A.F. Munsterman, Inc.*, 527 N.E.2d 1248, 1258-59 (Ill. 1983)(stating “regardless of what [Plaintiff] may name [his claim], it is an action for contribution and indemnity”), (observing that, although the claims were “stated as counts for breach of implied warranty,” they could be regarded as claims for indemnity); *Warner v. Reagan Buick, Inc.*, 483 N.W.2d 764, 770 (Neb. 1992) (noting that, although the third-party plaintiff made claims for breach of contract, “[t]he gravamen of the [buyer’s] third party petition is indemnification, and we shall treat it as such”); *Adkinson v. Int’l Harvester Co.*, 975 F.2d 208, 216 (5th Cir. 1992) (treating third-party plaintiff’s claim for breach of warranty as one for indemnity) (internal citations omitted).

Marick argues that recovery of litigation expenses may be had at law in the form of special damages or in equity under a theory of equitable indemnification. In so arguing, Marick cites *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971) court clearly held that reimbursement for expenses is in the nature of indemnification:

Based upon the foregoing authorities we conclude that in actions of indemnity, brought where the duty to indemnify is either implied by law or arises under contract, and no personal fault of the indemnitee has joined in causing the injury, reasonable attorneys’ fees incurred in resisting the claim indemnified against may be recovered as part of the damages and expenses.

Id. at 34, 183 S.E.2d at 710. This language clearly refers to a right of indemnity and not an independent cause of action, regardless of the label used. Likewise, the case of *Griffin v. Van Norman*, also cited by Marick, involved recovery of settlement proceeds paid by an innocent homeowner in a lawsuit brought against that homeowner and the at-fault exterminator who provided a faulty home inspection. *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). The Court of Appeals held that “[w]here, as here, the person seeking indemnity was exonerated at trial from all liability, indemnity is allowed.”*Id.* at 524, 397 S.E.2d 378, 380. It further held that “[i]t was this freedom from any fault that created the equity in Home Seller’s favor and entitled him to equitable indemnity.”*Id.* at 527, 397 S.E.2d at 382.

Marick seeks recovery from Respondents for damages Marick has or will have to pay to a third party. Regardless of the cause of action pled, such claims are in the nature of equitable indemnity, and Marick has no other claims for recovery against Respondents. As such, the trial court properly dismissed Marick’s disguised indemnity claims for negligence and breach of warranty.

B. Marick Has No Claims For Contractual Indemnity

Nowhere in its Answer and Cross-Claims does Marick allege an entitlement to contractual indemnity. Rather, Marick’s Breach of Contract cause of action is premised on the notion that if Plaintiffs’ allegations are proven true, then BFS and Southern Concrete provided defective materials or services in breach of their contract with Marick (Marick’s Answer to the Third Amended Complaint ¶161), and such actions have “resulted or could result in damage to Plaintiff, which could or will be assessed against Marick.” (*Id.*¶162.) There is no mention of a contract between it and BFS, Clear View, or Southern Concrete which contains contractual indemnification provisions which it is attempting to enforce.

Further, to the extent Marick argues that it does have contracts with these parties that contain indemnification provisions, it has offered no evidence that the contracts applied to the Project or would otherwise be enforceable in this matter.² Finally, Marick has presented no evidence to rebut evidence demonstrating that such contracts were not supported by consideration. The documents in questions were signed after the subcontractors completed their work and Marick appears to have paid the subcontractors only for the work performed.³

In its brief, Marick suggests that the October, 2007 contracts between it and BFS and Southern Concrete were discussed in depositions. This is disingenuous at best. Marick did not refer to those contracts in any of its complaints nor did Marick get any party to admit the existence of those contracts, or their applicability to work at Stoneledge, at those depositions. For example, Marick cites the testimony of Terry Rosamond from BFS as supporting its contention that the October, 2007 contract related to the Stoneledge project (See brief, pp 6 & 14). In fact, the testimony, elicited by counsel for Southern Concrete, was as follows:

- Q: Can you tell me what the scope of your, if you know it – and I can understand that some of these questions are maybe better be put to Mr. Greene so just let me know if that’s the case. Can you tell me what the scope of the contract with Marick was?
- A: My understanding from the review of the documents, our scope was to provide turnkey framing, installation of exterior doors and windows and also the exterior siding and trim work. And the framing consisted of the walls, floor to roof systems, anything to do with the framing.

² The Court made note in its Order of January 14, 2013 that Marick’s claim for Equitable Indemnity was disposed of by separate order, based primarily on Marick’s inability to show that it was without fault as to the relevant construction deficiencies at the project.

³ Marick submitted a Supplemental Memorandum in Opposition to their Motion, which included BFS, Southern Concrete and Clear View’s “contracts” with Marick. While Marick argued a “hold harmless” provision in these contracts should apply, the Court notes that Marick provided no support evidence for the application of these documents to the Stoneledge Project and that they do not postdate the work performed by BFS, Southern Concrete and Clear View.

There is no mention of the contract dated October, 2007 in that deposition. Further, Marick offered no proof in the form of affidavits, or otherwise, establishing that any October 2007 agreement was applicable to the work at Stoneledge by BFS or Southern Concrete.

For the foregoing reasons, Marick's arguments relative to breach of contract and for contractual indemnity, even based on the 2007 agreement, must fail.


CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the trial court's order dated January 14, 2013 granting the motion for Summary Judgment of BFS and Southern Concrete, as well as the order denying Marick's Motion for Reconsideration and to Alter Judgment, dated May 21, 2013.

Respectfully submitted,

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April 18, 2014

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THE STATE OF SOUTH CAROLINA
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OF DEFENDANTS, BUILDERS FIRST SOURCE-SOUTHEAST GROUP, LLC, SOUTHERN CONCRETE SPECIALITIES, INC., CLEAR VIEW CONSTRUCTION, LLC AND MICHAEL FRANZ,.....RESPONDENTS.

PROOF OF SERVICE

I certify that I have served the Respondents BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, and SOUTHERN CONCRETE SPECIALTIES, INC., INITIAL BRIEF AND DESIGNATION OF MATTER on all counsel of record by delivering same electronically, via email, or in the alternative by depositing a copy of it in the United States Mail, First Class postage prepaid, this 18th day of April, 2014, addressed to the following:

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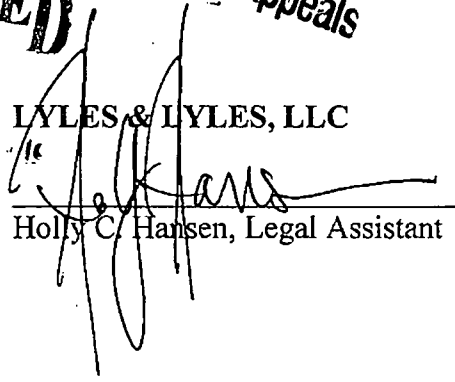
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