STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
CONCORD AND CUMBERLAND HORIZONTAL PROPERTY REGIME, *And*	Civil Action No. 2010-CP-10-2271
THOMAS R. MATHER, *And*	Civil Action No. 2010-CP-10-2919
BETTY Y. SEGAL, *And*	Civil Action No. 2010-CP-10-3206
SIGNATURE CHARLESTON, LLC and WADE ROBINSON, *And*	Civil Action No. 2010-CP-10-3207
JAMES C. KIRKPATRICK, *And*	Civil Action No. 2010-CP-10-3208
PAUL A. BRIM, *And*	Civil Action No. 2010-CP-10-3209
FRED RAPPAPORT and JOYCE RAPPAPORT, *And*	Civil Action No. 2010-CP-10-3210
THOMAS R. DEBNAM, as TRUSTEE OF THE TRUST AGREEMENT OF THOMAS R. DEBNAM, *And*	Civil Action No. 2010-CP-10-9580
PAMELA L. VAUGHAN, Plaintiffs, vs. CONCORD & CUMBERLAND, LLC, *et al.*, Defendants.	Civil Action No. 2010-CP-10-9767 **ORDER GRANTING WEATHER SHIELD'S AND MUHLER'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT; DENYING SUPERIOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING JDAVIS'S MOTION FOR SUMMARY JUDGMENT**

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject

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Property"). Concord & Cumberland, LLC ("C&C") was the original owner and the developer of the property. C&C hired J. Davis Architects, PLLC ("JDavis") as the architect for the project, and Superior Construction Corporation ("Superior") as the general contractor for construction of the building shell. Superior was to construct the building shell and then the individual owners of the condominiums would "upfit" their individual units.

Superior entered into a General Contractor Subcontract with The Muhler Company, Inc. ("Muhler") for All Windows, Entry Doors, Patio Doors & Door and Window Trim ("Subcontract") to supply and install windows and exterior doors manufactured by Weather Shield, Inc. ("Weather Shield"). While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. Although Weather Shield's installation instructions called for its windows to be installed flush with the building's exterior, restrictions imposed by Charleston's Board of Architectural Review required that the windows be recessed. C&C, JDavis and water-proofing experts hired by C&C, Sutton-Kennerly Associates ("SKA"), came up with a joint resolution to this design issue, choosing a method by which the windows were flush mounted to wooden "bucks," that rested in metal sill pans, and fastening that assembly in a recessed configuration to the building's steel frame.

Muhler employed two different subcontractors, In the Wind, Inc. and Watts Builders, Inc., to install the windows. In the Wind also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans.

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In early 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into an agreement, dated June 11, 2007 ("2007 Agreement"), in which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to Muhler related to the subcontract. Superior acknowledged that it has never paid Muhler the outstanding balances referenced in the 2007 Agreement.

Construction of the building shell was substantially complete in October 2007, at which point all of the condominium units had been sold. Both during and after construction, the windows and doors were tested and various water intrusion issues were noted at the Subject Property.

Subsequently, nearly identical cases were filed by and on behalf of fourteen separately named plaintiffs and the Concord & Cumberland Horizontal Property Regime ("Plaintiffs"). In their complaints, the Plaintiffs alleged water intrusion through the window units themselves and around the windows and doors. The Plaintiffs alleged other water intrusion problems, as well as a number of other construction/design defects or deficiencies. Several of the Defendants filed cross-claims against each other alleging, among other things, claims for contractual indemnification, equitable indemnification, contribution, breach of contract, negligence, and negligent misrepresentation.

After years of litigation, including extensive discovery, the Plaintiffs settled their claims with each of the Defendants. Subsequently, various other subcontractors settled cross-claims with the remaining Defendants, which include C&C, Superior, JDavis, Muhler and Weather Shield. Counsel for Safeco Insurance Company of America,

Superior's, which provided a surety bond to Superior for its work at the Subject Property, has remained active in this case on the basis that they are representing Superior's interests in some of the remaining claims.

Motions

Superior filed a Motion for Partial Summary Judgment against Muhler seeking indemnification for amounts paid to the Plaintiffs to settle its liability with regard to the window and door issues. Superior's claim against Muhler is based on two contracts between the parties: 1) the Subcontract with Muhler, and 2) the 2007 Agreement. Superior filed a similar Motion for Partial Summary Judgment against Weather Shield based solely on the 2007 Agreement. Muhler also moved for summary judgment against Weather Shield based solely on the 2007 Agreement. Superior alleges that, under both the Subcontract and the 2007 Agreement, it is entitled to recover all amounts it paid to Plaintiffs to settle their window and door claims, even amounts attributable to Superior's own purported negligence.

Muhler and Weather Shield each opposed Superior's motions for partial summary judgment. Muhler argued that neither the Subcontract nor the 2007 Agreement indemnifies Superior for its own negligence. Weather Shield also argued that the 2007 Agreement does not indemnify Superior for its own liability. In addition, both Muhler and Weather Shield argued that the 2007 Agreement is not enforceable because Superior breached certain provisions of that Agreement, and because of impossibility, in that they were prevented from attempting to repair window and door problems as was called for in that Agreement.

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Muhler moved for partial summary judgment on the cross-claims alleged by Superior and by C&C. Muhler argued that: 1) neither the Subcontract nor the 2007 Agreement entitle Superior and C&C for their own wrong doing and, in addition, that the 2007 Agreement is not enforceable due to both breach and impossibility; 2) neither Superior nor C&C is entitled to equitable indemnity because neither can prove it has "clean hands"; and 3) C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs' claims.

Weather Shield moved for summary judgment against Superior and C&C on all of their claims for equitable indemnity and contractual indemnity, and against C&C for its cause of action for contribution. Weather Shield argued that the 2007 Agreement is unenforceable due to Superior's breach of that agreement, and that Superior's and C&C's indemnity claims are foreclosed due to a lack of special relationship, lack of adjudication as to fault, and by Superior's and C&C's "unclean hands." Weather Shield argued that C&C's contribution claim is barred because C&C has not settled any claims against Weather Shield nor has it obtained a release of any claims against Weather Shield. In the alternative, Weather Shield argued that, if the 2007 Agreement is enforceable, any indemnity owed by Weather Shield would be limited only to claims by subsequent Plaintiff owners regarding the windows and doors themselves and related attorneys' fees.

JDavis filed a motion for summary judgment seeking dismissal of the cross-claims brought against it by C&C for contractual indemnity, equitable indemnity, contribution, breach of contract, negligence, and negligent misrepresentation. JDavis also moved for summary judgment against Superior's cross-claim pursuant to the *Spearin* doctrine, which provides that, "when a party supplies plans and specifications for use by

a contractor to follow in constructing a project, said party impliedly warrants the sufficiency of the plans and specifications to construct the project." *United States v. Spearin*, 248 U.S. 132 (1918).

C&C opposed Muhler's, Weather Shield's, and J. Davis's motions for summary judgment, arguing that it was entitled to both contractual and equitable indemnification. Superior did not file a formal response to Muhler, Weather Shield's or JDavis's motions for summary judgment but addressed their motions in argument before this court.

This Court heard argument on the various motions on July 28 & 29, 2014. All parties were provided an opportunity to make and respond to the arguments and positions of the other parties.

Standard for Summary Judgment

Under Rule 56, SCRCP, summary judgment is appropriate where "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 a judgment as a matter of law." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law." *Keith v. River Consult., Inc.*, 365 S.C. 500, 505, 618 S.E.2d 302, 304 (Ct. App. 2005).

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Discussion

Under South Carolina law, parties can agree to indemnify each other for various types of damages or losses; however, neither of the agreements at issue here specifically provides indemnification for an indemnitee's own negligence. Indemnity agreements are strictly construed against the party seeking to be indemnified. *See Fed. Pac. Elec. v. Carolina Prod. Enter.*, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also East-Harding, East-Harding, Inc. v. Horace A. Piazza & Assoc.*, 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (same).

In addition, "a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms**." *Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added); *see also Murray v. Texas Co.*, 172 S.C. 399, 402, 174 S.E. 231, 234 (1934) (finding "broad and comprehensive" language was insufficient to prove the contract relieved a party from its own negligence). In order for Superior and C&C to defeat Muhler's and Weather Shield's motions for summary judgment on the contractual indemnity issue, they have to meet the very high standard of eliminating any possibility that the contract language on which they rely can be read to limit indemnification to the indemnitor's own negligence. In other words, in order to prevail on their contract claims, Superior and C&C must demonstrate that the contract language can only be interpreted to reach the result that the parties intended to indemnify the indemnitee for the indemnitee's own negligence. If any other interpretation of the contract language is reasonably possible, they cannot prevail on their contract claims as a matter of law.

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A. The Subcontract does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

The indemnity clause in the initial Subcontract between Muhler and Superior does not indemnify Superior for its own negligence. The Subcontract's indemnity provision is the form clause for AGC Document No. 600, Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Courts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence. *See, e.g., Braegelmann v. Horizon Dev. Co.*, 371 N.W.2d 644, 646-47 (Minn. Ct. App. 1985) (interpreting the same operative language as not providing indemnification to the general contractor for its own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Cabo Constr., Inc. v. R.S. Clark Const., Inc.*, 227 S.W.3d 314, 317-18 (Tex. App. 2007) (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part by acts of the subcontractor); *MT Builders, LLC v. Fisher Roofing Inc.*, 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (characterizing this form indemnity clause as "a 'narrow form' of indemnification" that "only covers the indemnitee's losses to the extent caused by the indemnitor or a person the indemnitor supervises or is responsible for," and explaining that this language creates "a comparative fault or negligence arrangement whereby the indemnitor's liability is limited 'to the extent' it and its supervisees were at fault");

Frank, 527 N.W.2d at 81 (construing practically identical language to mean the subcontractor is liable to the general contractor only "to the extent of its own negligence but is not required to indemnify" the general contractor for the general contractor's own negligence); *Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc.*, 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); *Hagerman*, 741 N.E.2d at 393-394 (similar language in AIA standard construction form contract does not "clearly and unequivocally" provide coverage for indemnitee's own negligence).

Courts have held that the language "to the extent" in this indemnification clause means that the indemnifying party is liable to the indemnitee "to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee's] negligence." *Frank v. MSI Constr. Mgrs., Inc.*, 527 N.W.2d 79, 81(Mich. Ct. App. 1995).

At the hearing, Superior presented a number of cases that it alleged supports its argument that the Subcontract indemnifies it for its own negligence. However, those cases contain language substantially dissimilar to Article 12.1 of the Subcontract which makes them of little use to Superior. In fact, the indemnification clause in the Florida case most heavily relied on by Superior, *Camp, Dresser & McKee, Inc. v. Paul N. Howard Co.*, 853 S.2d 1072 (Fla. Dist. Ct. App. 2003), broadly provided indemnification "from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the **performance of the work**," 853 S.2d at 1076 (emphasis added), whereas the Subcontract only promised to indemnify Superior "from and against all claims, damages, loss and expenses, including but not limited to

attorney's fees, arising out of or resulting from the **performance of the Subcontractor's Work**." (Subcontract, ¶ 12.1) (emphasis added).

Unlike the provision at issue in *Camp, Dresser*, here indemnity is limited to the performance of Muhler's work, whether directly or through its own subcontractors. As a result, I find that this provision does not clearly indicate intent by the parties to indemnify Superior for its own wrongdoing.

B. The 2007 Agreement does not obligate either Muhler or Weather Shield to indemnify Superior or C&C for their own wrong-doing.

Even though the 2007 Agreement contains arguably broader indemnification language than the Subcontract, it does not state clearly and unequivocally that either Muhler or Weather Shield agreed to indemnify Superior and C&C for their own negligence and/or wrong-doing.

To the extent that the provisions in the 2007 Agreement purport to indemnify Superior and C&C "unconditionally," they are unconscionably broad. *See Fisher v. Stevens*, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy"). Although *Fisher* involved a so-called exculpatory contract, or waiver, the reasoning applies equally here, where the phrase "unconditionally indemnify" is as objectionably broad, if not broader, as the phrase at issue in *Fisher*, which released "'any person in any restricted area" from liability." *Id.*

Sections 11 and 12 of the 2007 Agreement simply do not clearly and unequivocally state that either Muhler or Weather Shield is agreeing to indemnify Superior and C&C for their own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the agreement,

however, is required to contain language "**unquestionably showing the parties' intent to indemnify in the event of losses resulting from the indemnitee's negligence.**" *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 271 P.3d 850, 854 (Wash. 2012) (emphasis added).

Here, as was the case in *Snohomish County*, the indemnity provision "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. *Cox Cable Corp. v. Gulf Power Co.*, 591 So.2d 627, 629 (Fla. 1992).

The use of the term "unconditionally" does not, on its face, indicate that either Muhler or Weather Shield intended to indemnify Superior and C&C for their own negligence. At best, the inclusion of the term "unconditionally" in an indemnification provision that also contains restrictions renders that provision ambiguous, which is in direct contrast of clear and equivocal. Strictly construing the 2007 Agreement, I find that neither Section 11 nor Section 12 covers Superior and C&C for their own negligence.

The Court therefore grants Muhler's and Weather Shield's motions to the extent that they assert that neither the Subcontract nor the 2007 Agreement indemnifies Superior and C&C for their own negligence.

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C. C&C is not entitled to equitable indemnity from Muhler or Weather Shield and JDavis not entitled to summary judgment against C&C or Superior.

Superior has withdrawn its cross-claim for equitable indemnity against both Muhler and Weather Shield. However, C&C maintains that it is entitled to equitable indemnity from both Muhler and Weather Shield. Regardless of whether C&C can establish a special relationship with Weather Shield, C&C is not entitled to equitable indemnity from either Muhler or Weather Shield because there is an abundance of evidence that actions by C&C and/or its direct agents actively contributed to the problems with the windows and doors that the Plaintiffs alleged.

"Equitable indemnity cases involve a fact pattern in which the first party is at fault, but the second part is not. [citation omitted] If the second party is also at fault, he comes to court without equity and has no right to indemnity. **The most important requirement for the finding of equitable indemnity is that the party seeking to be indemnified is adjudged without fault** and the indemnifying party is the one at fault." *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999) (emphasis added).

Despite its protestations otherwise, C&C's fault goes beyond passive fault or a failure to discover latent defects. As noted above and explained in more detail below, C&C hired the architect, JDavis, the general contractor, Superior, and waterproofing experts, SKA and Metro Waterproofing. There is substantial evidence that actions by Superior, JDavis, SKA and Metro Waterproofing contributed to the water intrusion issues, and are responsible for damage caused to the windows and doors themselves.

C&C engaged Richard Andrews of Estates Management to serve as its "owner's representative." Mr. Andrews described his role as "working with the contractors,

helping them to understand the project, working with architects to ... get projects on the plans and specs and get the products spaced .... The owner's rep has to make sure that the contractor has the information they need to build the job with ..." In other words, as Mr. Andrews described it, he was a conduit for information from the architect to the contractor. He and Theresa Hodges, another Estates Management employee, worked directly with JDavis and Superior to make sure they had what they "needed to build the job." Mr. Andrews testified that JDavis, SKA and Estates Management were involved in coming up with the design for the installation of the Weather Shield windows on the project. Additionally, Mr. Andrews confirmed that he performed "fairly thorough" walk-throughs of the building prior to processing pay applications.

Mr. Glick reviewed the allegations contained in the Plaintiffs' Amended Complaint and opined that each alleged defect was the result of design deficiencies, contract administration and/or construction. Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct obvious issues with the Subject Property, including the windows. "Those are contractual obligations and the contractor didn't do things right and that's well documented and the architect didn't catch things that were wrong and that's documented because we wouldn't be here today. If no one violated the standard of care, we wouldn't be here today." Mr. Glick testified that installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code.

In defense of his own company, Superior, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

> Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed .... That's the design issue .... I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect .... I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." JDavis, SKA, and Metro Waterproofing, all hired directly by C&C, were responsible for waterproofing.

Given the substantial evidence by witness testimony, C&C is partially at fault for the conditions the Plaintiffs alleged regarding the windows and doors. C&C therefore comes to the court with unclean hands and is not entitled to equitable relief. Therefore, I find as a matter of law that C&C is not entitled to equitable indemnification.

As to the motion for summary judgment filed by JDavis, I find that the deposition testimony of Mr. Glick alone shows that there exist genuine issues of material facts that would make the granting of summary judgment improper.

Conclusion

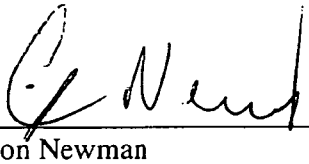
Muhler's and Weather Shield's motions for partial summary judgment are GRANTED to the extent that they seek to have the Court find as a matter of law that neither the Subcontract nor the 2007 Agreement clearly and unequivocally provides

indemnification for Superior's and/or C&C's own negligence. Muhler's and Weather Shield's motions for summary judgment are GRANTED to the extent that they seek to have the Court find that C&C is not entitled to equitable indemnity. Except to the extent specifically granted herein, all other motions for summary judgment filed by Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by Superior against Muhler and Weather Shield are hereby DENIED.

The motions for summary judgment filed by JDavis against C&C and Superior are hereby DENIED.

AND IT IS SO ORDERED.



Clifton Newman
Presiding Judge

Columbia, South Carolina

September 25, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Concord and Cumberland Horizontal Property Regime, et. al.,

Plaintiffs,

vs.

Concord & Cumberland, LLC, et. al.,

Defendants.

Civil Action No. 2010-CP-10-2271

ORDER DENYING SUPERIOR CONSTRUCTION CORPORATION'S MOTION FOR RECONSIDERATION

THIS MATTER comes before the Court on a Motion for Reconsideration filed by Superior Construction Corporation. The original Order of this Court granted Partial Summary Judgment to The Muhler Company, Inc. on the claim by Superior Construction Company for indemnity.

Having fully considered the submissions and arguments of counsel, this Court finds no error of law or facts in its original Order. The motion should therefore be denied.

IT IS THEREFORE ORDERED that the Motion for Reconsideration is hereby DENIED.

AND IT IS SO ORDERED.

Clifton Newman
Presiding Judge

Columbia, South Carolina
January 12, 2016