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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF BERKELEY<br><br>Builders Firstsource-Southeast Group, LLC<br><br>Plaintiff,<br><br>V<br><br>MI Windows And Doors, INC.; ECC Contracting, LLC; Hurley Services, LLC; and Charleston Exteriors, LLC,<br><br>Defendant, | IN THE COURT OF COMMON PLEAS<br>NINTH JUDICIAL CIRCUIT<br><br>CIVIL CASE NO. 2018-CP-08-02547<br><br>**AMENDED ORDER GRANTING CHARLESTON EXTERIORS, LLC'S AND ECC CONTRACTING, LLC'S MOTION FOR SUMMARY JUDGMENT** |
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SC Court of Appeals

This matter came before the Court on Friday, October 18th on the Motion for Summary Judgment of the Defendant Charleston Exteriors, LLC seeking dismissal of the Plaintiff's causes of action for breach of contract, negligence, breach of warranties, and indemnity. Present and participating in the argument were the movants counsel, C. Clay Olson, Esquire of Harper Little, PLLC and the Plaintiff was represented by Witt Cox, Esquire of Howell Gibson & Hughes.

ECC Contracting filed a similar, if not identical motion which was also heard. Counsel for ECC, Heyward Grimball, Esquire of Richardson Plowden was in attendance to advocate and advance the arguments of ECC Contracting. The ECC Motion for Summary Judgment was heard concurrently with the Charleston Exteriors motion. The Court hereby rules on both Charleston Exteriors, LLC's Motion for Summary Judgment as well as ECC's Motion for Summary Judgment.

## BACKGROUND

The Plaintiff, Builders First Source Southeast Group, Inc. ("BFS") is a supplier of building materials and components, as well as a provider of construction services for new construction and remodeling projects. BFS provided materials and services at a construction

project known as the "Abbey at Spring Grove" which is located in Moncks Corner, South Carolina.

The Abbey at Spring Grove (the "Abbey") is a 69-home residential community situated in Berkeley County, South Carolina. The Abbey was developed by Lennar Carolinas[1]. To be precise, the Abbey is a portion, or phase, of the larger Spring Grove Plantation development.

A lawsuit was filed in 2014 by Patricia Damico on behalf of herself and other owners within the Abbey at Spring Grove. *See Patricia Damico and Lenna Lucas, individually and behalf of all other similarly situated v. Lennar Carolinas, LLC, et al., Case No. 2014-CP-08-02424 (the "Underlying Class Action").* The underlying matter was amended on more than one occasion as the Plaintiff asserted exterior window claims on November 23rd, 2015.

On November 25th, 2015, Lennar Carolinas answered the Amended Complaint and asserted Third-Party claims against several of its contractors and suppliers. Among these Third-Party Defendants was Builders First Source who signed its responsive pleading on December 15th, 2015 and filed it on December 21st, 2015.

The case before the Court was filed on December 21st, 2018 in Berkeley County, South Carolina. The allegations made against Charleston Exteriors, LLC are derived from allegations made by the Plaintiff Damico and Lennar in the underlying lawsuit. Specifically, the Plaintiff and Lennar Carolinas have alleged that BFS was negligent in the installation of windows at the Abbey; that BFS breached its subcontract agreement with Lennar by virtue of the allegations made by the Plaintiff against Lennar; that BFS breached express and implied warranties as alleged in the underlying lawsuit; that Lennar is entitled to both contractual indemnification or, alternatively, equitable indemnification from BFS due to the claims made in the underlying

[1] Lennar Carolinas is not a party to this litigation. Lennar is a Defendant in the matter styled Damico v. Lennar Carolinas, LLC.

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lawsuit. As a consequence of these claims made in the underlying lawsuit, BFS has brought this lawsuit alleging that Charleston Exteriors and ECC breached their subcontract with BFS, that Charleston Exteriors and ECC breached certain implied and/or express warranties with BFS; that BFS is entitled to contractual/equitable indemnification from Charleston Exteriors and ECC; and that Charleston Exteriors and ECC were negligent in the installation of the windows at the Project.

## FINDINGS OF FACT

1. Builders First Source "BFS" was on actual notice of potential claims against Charleston Exteriors, LLC on December 15, 2015. There can be no other conclusion with regard to this issue upon reviewing the Answer of Builders First Source dated December 15th, 2015. See Exhibit "A"

2. BFS has not submitted a Memorandum of Law to rebut Charleston Exteriors argument that BFS was on notice of a potential claim against Charleston Exteriors on or before December 15th, 2015.

3. Uncontroverted testimony from the hearing, coupled with a review of the D'amico record shows that at no time did BFS attempt to amend its pleadings in the underlying suit against Charleston Exteriors, LLC.

4. BFS began defending the underlying lawsuit on or before December 15, 2015.

5. BFS began incurring costs and attorneys fees when it began to defend this case on or before December 15, 2015.

6. The Subcontract Agreements entered into by ECC and Charleston Exteriors with BFS contain language concerning indemnity and the prospect of these Defendants being forced to indemnify BFS for the negligence of BFS.

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7. The contractual indemnification language referenced in Paragraph 6 is both confusing and contradictory at times. The language fails to clearly and unequivocally explain that these Defendants are obligated to indemnify BFS for BFS's negligence.

8. BFS failed to present any evidence suggesting that this lawsuit seeks damages for any acts or omissions which are separate or distinct from the underlying lawsuit. The Court concludes that the claims made in this lawsuit are wholly derivative of those brought in the Damico litigation.

9. BFS entered into a Master Subcontractor Agreement with Charleston Exteriors on October 17th, 2012.

## LEGAL STANDARD APPLICABLE TO RULE 56 MOTIONS

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), SCRCP; 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).

A. **THE CLAIMS OF THE PLAINTIFF FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTIES ARE TIME BARRED**

South Carolina recognizes the "discovery rule" when considering an action to be time barred. Under the discovery rule, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto. *Burgess v. American Cancer Society*, 300 S.C. 182, 386 S.E.2d 798 (Ct. App. 1989). Also, Abba Equip., Inc. v. Thomason, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999) The statute of limitations for negligence, breach of contract, and breach of warranties is three years. Compelling portions of the record in the underlying matter were presented by the Defendants which illustrates that the Plaintiff was on direct and actual notice of its potential claims against Charleston Exteriors and ECC on December 15th, 2015. Subsequently, more than three years went by before this lawsuit was filed on December 21st, 2018. These causes of action fail for being untimely.

B. **DISGUISED INDEMNITY CLAIMS**

Although the Court has already determined that claims of BFS for negligence, breach of contract, breach of warranties ("Non-Indemnity Claims) are each barred by the three-year statute of limitations, the Court will consider the Defendants' additional argument. The Defendants have alleged that the Non-Indemnity claims must fail pursuant to the "Stoneledge Defense" which bars claims that are disguised indemnification claims cloaked within separate

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causes of action.[2] Upon hearing the oral arguments and reviewing memoranda presented to the Court, it is evident that the Plaintiff's Non-Indemnity claims do not exist outside of the derivative Damico lawsuit. They must, therefore, fail.

The allegations in this case make no separate or unique contention(s) which are in addition to the allegations made by Lennar and the Plaintiff in the *Damico* matter. Builders First Source has failed to provide any admissible record evidence that it sustained any separate or independent damages outside the scope of the Damico lawsuit. *See Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015) (holding that, where general contractor did not "suffer their own damages independent of their obligation to defend themselves in the underlying lawsuit," trial court "properly granted summary judgment on [general contractor's] breach of contract and breach of warranty cross- claims because they are not independent causes of action from [the general contractor's] equitable indemnity claim");*

C. <u>MASTER SUBCONTRACT AGREEMENT INDEMNITY PROVISIONS ARE NEITHER CLEAR NOR EQUIVOCAL</u>

The Defendants seek Summary Judgment as to Builders First Source's contractual indemnification claim on the ground that it violates South Carolina rules of contract construction. Section 5 of the Master Subcontract Agreement is confusing at best and deceptive at worst.

Section 5 contains two Paragraphs. The first paragraph seems to suggest that BFS may only seek indemnification for damages.......

**ONLY TO THE EXTENT CAUSED.IN WHOLE OR-IN PART BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR**

[2] Counsel for ECC and Charleston Exteriors presented memoranda and oral arguments consistent with the reasoning in a recent S.C. appellate case which is known as "Stoneledge" and is specifically cited as *Stoneledge at Lake Keowee Owners' Ass'n v. Builders FirstSource-Southeast Grp., 776 S.E.2d 434, 439 (S.C. Ct. App. 2015)*

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**INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE.**

Below this lengthy paragraph is an almost identically constructed paragraph which is slightly altered to indicate that BFS may seek indemnification from Charleston Exteriors for damages caused by the negligence of any person or entity. Specifically, the second paragraph suggests a duty to indemnify BFS.....

**REGARDLESS OF WHETHER SUCH CLAIM, DAMAGE, LOSS, OR EXPENSE IS CAUSED, OR IS ALLEGED TO BE CAUSED, IN WHOLE ORIN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES.**

The Court can only conclude that the Master Subcontract Agreement is not what our courts had in mind when setting precedent regarding "anti-indemnity" clauses in contracts. Typically, courts will construe an indemnification contract *"in accordance with the rules for the construction of contracts generally." Campbell, 313 S.C. at 453, 438 S.E.2d at 272. However, when an indemnity clause purports "to relieve an indemnitee from the consequences of its own negligence," our case law requires strict construction of the clause. Laurens, 355 S.C. at 111, 584 S.E.2d at 378-79. "Indeed, most courts agree with the basic rule that 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." Fed. Pac. Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989). See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 647, 819 S.E.2d 166, 170-71 (Ct. App. 2018) 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).*

BFS has failed to persuade the Court that its indemnity clause(s) in either subcontract meet the elevated standard of being a clear and unequivocal statement which leaves no question

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as to BFS seeking indemnification for its own negligent acts or omissions. BFS has failed to 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 contractual indemnity claims.

As South Carolina precedent requires that the party seeking to be indemnified bear the burden of proving that the indemnity language be clear and unequivocal when seeking to be indemnified for its own negligence, the Court rules that the specific language from the Master Subcontractor Agreement is confusing, conflicting, and neither unclear or unequivocal. The Defendants' Motions for Summary Judgment as to the contractual indemnity claims is hereby granted.

**D. BUILDERS FIRST SOURCE'S CONTRACTUAL INDEMNIFICATION CLAIM IS ALSO BARRED PURSUANT TO THE RELEVANT STATUTE OF LIMITATIONS**

The contractual indemnity claim(s) made by Builders First Source against ECC and Charleston Exteriors have also been challenged pursuant to the statute of limitations. As to indemnity, the statute of limitations generally runs from the time judgment is entered against the defendant. *Choate v. United States, 233 F. Supp. 463 (D.C. Okla. 1964) First Gen. Servs. v. Miller, 314 S.C. 439, 444, 445 S.E.2d 446, 449 (1994).* Our courts, however, have recognized two types of indemnity contracts: (1) a contract for indemnity against liability and (2) a contract for indemnity against loss. *See Piper v. Am. Fid. & Cas. Co.*, 157 S.C. 106, 112 (1930). In a contract for indemnity against liability, the obligation to indemnify arises when the liability is incurred, whereas in a contract for indemnity against loss, the indemnitee must have made some form of payment before he can assert a breach of the contract. *Jones v. Builders Inv. Grp.*, LLC, 415 S.C. 321, 330 (Ct. App. 2015). In this case, BFS has pled that it is "entitled to full

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contractual and common law indemnification for and against Liability". *See Complaint, Paragraph 34.*

The Court draws further distinction in this case because the relief prayed for in the BFS complaint seeks consequential damages for attorney's fees. Specifically, the Complaint against ECC and Charleston Exteriors states that, "....BFS has been subjected to liability and has incurred consequential damages in having to expend attorney's fees and costs in defending against the claims of the Plaintiffs and/or Lennar Carolinas, LLC in the underlying action." *See Complaint, Paragraph 33; See also Paragraph 34* ("...entitling BFS to recover from ECC Contracting, LLC, Charleston Exteriors, LLC and Hurley Services, LLC its attorney's fees, costs, and other expenses incurred in defending the underlying action... ")

BFS began to incur liability for attorney's costs and fees – damages it seeks in this litigation when its Answer was drafted and served. BFS's Answer was executed and served more than three years prior to the filing of the present action. Thus BFS's claims for "contractual and common law indemnification against Liability" are barred by the three year statute of limitations. SC. Code § 15-3-530 et seq.

The facts before the Court are distinguishable from the *First General Services* case in that BFS is seeking indemnification for damages which have begun to accrue more than three years prior to filing and, as a result, the Court is inclined to agree with the Defendants that consequential damages, as defined by the Complaint, began to accrue prior to December 15th, 2015 and, therefore, these damages cannot be recovered as Builders First Source discovered them more than three years prior to the filing of its lawsuit against Charleston Exteriors and ECC.

IT IS ORDERED that the Defendants Charleston Exteriors, LLC and ECC Contracting,

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LLC's Motion for Summary Judgment is granted as to the following causes of action only:

a. Negligence

b. Breach of Contract

c. Breach of Warranties

d. Contractual Indemnity

IT IS ORDERED that these causes of action are hereby dismissed with prejudice and this ruling should serve precedent in the Damico matter as well.

THIS COURT FINDS THAT two claims remains which are subject to the Motion to Consolidate brought simultaneously by Builders First Source. The claims are for equitable indemnification and contribution. The Court finds that these claims are subject to consolidation with the related D'Amico matter which remain stayed until further notice or order.

IT IS FURTHER ORDERED that the cause of action for equitable indemnification involves a question for the jury and the Motion for Summary judgment is, therefore, denied as to that cause of action. The Plaintiff's Contribution claim survives as it was not before me as part of this motion for summary judgment.

AND IT IS SO ORDERED this_____day of_,2020, at_____, South Carolina.

Clifton B. Newman Presiding Judge

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Berkeley Common Pleas

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| **Case Caption:** | Builders Firstsource-Southeast Group, Llc VS Mi Windows And Doors, Inc. , defendant, et al |
| **Case Number:** | 2018CP0802547 |
| **Type:** | Order/Summary Judgment |

So Ordered

s/ Clifton B. Newman, 2127