STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	C/A NO. 2019-CP-10-00772

Dag Pavic and Stela Susac-Pavic,

Plaintiffs,

vs.

Carolina Cottage Homes, LLC d/b/a Saussy Burbank; SB Holding, LLC d/b/a Saussy Burbank; Saussy Burbank GC, LLC; American Residential Services, LLC; Builders FirstSource-Southeast Group, LLC; Hurley Services, LLC; Simons Contractors, LLC and Cohen's Drywall Company, Inc.

Defendants.

Builders FirstSource-Southeast Group, LLC,

Third Party Plaintiff,

vs.

MW Manufacturers, Inc.,

Third Party Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF HURLEY SERVICES, LLC

This matter came on before me on September 28, 2020 as Presiding Judge of the Ninth Judicial Circuit on Motion of Hurley Services, LLC, hereinafter "Hurley", for partial summary judgment with respect to crossclaims filed by Builders FirstSource-Southeast

Group, LLC, hereinafter "BFS", for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity.

This is a construction defects suit relating to a single-family residence. Plaintiffs allege, among other things, defective/improper installation of windows and related flashing, causing water infiltration and damage to the substrate. Hurley was a labor-only subcontractor to BFS under a master subcontractor agreement drafted by BFS. BFS sold doors and MW 800 Series windows to the general contractor and provided them to Hurley for installation in Plaintiffs' residence. These windows are the subject of a class-action suit and settlement. *See Gulbankian v. MW Mfrs., Inc., United States District Court, District of Massachusetts, Civil Action No. 10-10392-RWZ (D. Mass. Dec. 29, 2014).*

Plaintiffs and BFS entered into a stipulation filed October 31, 2019, that Plaintiffs "are not alleging or asserting any defect and/or deficiency in the development, design, manufacture, production, sale and/or distribution of the aforesaid windows and/or any component parts thereof, or in any MW installation instructions or requirements for the windows."

An abbreviated procedural history is helpful in understanding the facts of the case:

1. Plaintiffs filed a Third Amended Complaint against the general contractor, BFS, Hurley, and others on April 2, 2019.

2. On April 19, 2019, BFS filed an Answer to the Third Amended Complaint, crossclaims against Hurley, and a third-party complaint against the window manufacturer,

MW Manufacturers, Inc.

3. On July 29, 2019, MW Manufacturers, Inc. filed an Answer to the Third-Party Complaint of BFS interposing as a defense the *Gulbankian* class-action settlement and attaching orders and documents relating to the settlement.

4. On January 28, 2020, BFS filed a dismissal of its third-party complaint against MW Manufacturers, Inc. without prejudice and under a tolling agreement.

5. On August 5, 2020, the general contractor filed an Amended Answer to Plaintiffs' Third Amended Complaint and crossclaims against BFS for negligence, contractual indemnification, and breach of express and implied warranties in connection with labor, materials, and products furnished by BFS in connection with the construction of Plaintiffs' residence.

6. On August 26, 2020, BFS filed an answer to crossclaims of the general contractor and also crossclaimed against Hurley for contractual and equitable indemnity, express and implied warranties, negligence, and breach of contract.

BFS CROSSCLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES, BREACH OF CONTRACT, AND NEGLIGENCE

In its oral arguments and memorandum of law filed on September 25, 2020, BFS concedes that its crossclaims against Hurley 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. 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 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.

CONTRACTUAL INDEMNITY

Hurley contends that there are no issues of material fact and that the indemnification provisions contained in the BFS master subcontractor agreement violate South Carolina public policy and the provisions of §32-2-10 S.C. Code and are unconscionable. Hurley also contends that these indemnity provisions fail to meet the "clear and unequivocable" standard enunciated by *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018)*, and that BFS is collaterally estopped from contending otherwise.

BFS asserts that *Concord & Cumberland* is inapplicable because BFS is not seeking indemnification for its own sole or concurrent negligence, but is only seeking indemnification against liability for loss or damage arising from Hurley's negligence. BFS also argues that the doctrine of collateral estoppel is inapplicable because there is no final order of a court deciding whether its indemnification provisions meet the "clear and unequivocable standard". BFS also contends that there are issues of material fact relating to installation of windows by Hurley.

The master subcontractor agreement between BFS and Hurley is a contract of adhesion. *Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).*

BFS drafted the agreement, and any ambiguous language in the contract should be construed liberally and interpreted strongly in favor of the non-drafting party. *Southern Atlantic Financial Services, Inc., 356 S.C. 444, 590 S.E.2d 27 (2003); Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981).*

Although the indemnity provisions in "Section 5. INDEMNITY" are printed in all capital letters, another indemnification provision is buried in the fine print of "Section 3. Warranty". The language of this section is set out, in pertinent part, as follows:

> **"Section 3. Warranty.**
> ... subcontractor guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns ... If demand is made upon Subcontractor to perform under this warranty, Subcontractor at its sole cost and expense will expeditiously repair or replace, at Contractor's sole option, any defective or nonconforming Work and indemnify Contractor and any other party for any costs incurred by any party relating to such demand. This warranty shall extend to all consequential damages resulting from such faults and/or defects of design, material, and workmanship ... including, without limitation, property damage to the homes or properties into which the Work is incorporated ..."

BFS is a merchant within the meaning of §36-2-104(1) S.C. Code which provides as follows:

> "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Thus, BFS has superior knowledge regarding the products it sells. Hurley had nothing to do with the selection, design, sale, and manufacture of the doors and windows which BFS sold to the general contractor and gave to Hurley for installation in Plaintiffs' residence. The aforementioned provision allows BFS to seek indemnity for its sole negligence in selecting and selling products which are defective or are the subject of class-action litigation. This is a clear violation of §32-2-10 S.C. Code, is against public policy, and it is also unconscionable within the meaning of *Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)*.

In finding contract provisions unconscionable in *Simpson*, the Court observed, in pertinent part, as follows:

> "While certain phrases within other provisions of additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) ... we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law ..." [644 S.E.2d at 670]

BFS denies asserting claims against Hurley for deficiencies in windows and doors it gave Hurley for installation in Plaintiffs' residence:

> "... However, at no time, EVER, has BFS filed a claim against a subcontractor seeking for the subcontractor to indemnify BFS for claims relating to alleged manufactured material or component deficiencies. This case is no exception ..." [Memorandum BFS, p. 19]

Notwithstanding this assertion by BFS, on April 19, 2019, it filed a third-party complaint against the window manufacturer, MW Manufacturers, Inc., alleging multiple claims for defective windows. In the same pleading, it filed multiple crossclaims against Hurley for materials it provided to Hurley that may be inadequate, poor quality, not in compliance with the contract documents, industry standards, and building codes. BFS reiterated these same claims against Hurley in its crossclaims filed on August 26, 2020, although the window manufacturer had already been dismissed from the suit.

Although Plaintiffs have stipulated with BFS not to claim damages against defendants arising from class-action windows, there may be testimony and evidence at trial that any moisture damage is the result of defective windows rather than installation deficiencies. The general contractor has filed breach of warranty claims against BFS as to the windows and BFS, despite its denial, is attempting to transfer that risk to the installer through the fine print in the master subcontractor agreement.

Section 5 of the master agreement contains multiple paragraphs dealing with indemnity and a duty to defend. The first paragraph plainly states that BFS may seek indemnification:

> "ONLY TO THE EXTENT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE."

The next paragraphs 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 OR IN PART, BY THE NEGLIGENCE OF ANY OF THE INDEMNITEES."

The following paragraph provides that:

> "THE DUTY TO DEFEND EXISTS REGARDLESS OF ANY ULTIMATE LIABILITY OR NEGLIGENCE OF THE CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES."

The aforementioned paragraphs in Section 5 are ambiguous, conflict with each other, and do not meet the elevated clear and unequivocable standard found in *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).*

In addition, the provisions of paragraph 5 conflict with the indemnification provisions found in the fine print of Section 3. All of these provisions violate South Carolina public policy and §32-2-10 S.C. Code.

Read together, the provisions of Section 3 and Section 5 of the agreement are also unconscionable because they permit BFS to seek indemnity and a defense from labor-only subcontractors such as Hurley for materials selected and sold by BFS to third parties. Under the agreement, even if BFS were solely liable for causing the loss that gives rise to the claim for defense, the Master Agreement purports to place the entire duty to defend and responsibility to indemnify for the cost to defend upon BFS's subcontractor Hurley.

Other courts have considered the identical language of the BFS master agreement and have found that the indemnification provisions fail to meet the clear and unequivocable standard. *See Order of the Honorable Roger M. Young, Sr. filed April 29, 2020, in the Charleston County Court of Common Pleas in the case of Six Fifty-Six Owners' Association, Inc. v. Windsor South, LLC, 2016-CP-10-3455 and the order of the Honorable Clifton Newman filed February 3, 2020, in the Court of Common Pleas for Berkeley County in the case of Builders FirstSource-Southeast Group, LLC v. M.I. Windows and Doors, Inc., et al. as Civil Action No. 2018-CP-08-2547 which are attached.*

It appears that the aforementioned orders are final orders and that BFS is collaterally estopped from contesting the findings and conclusions in the aforementioned Orders.

To invoke collateral estoppel, a party need not have been a party to the prior action; the law only requires that the party against whom estoppel is applied have been a party to that action and have a full and fair opportunity to litigate the issue in the prior action. *South Carolina Property Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (S.C. 1991).* Here the contract terms have been actually litigated, directly determined in the prior action, and the issues were essential to the judgment such that collateral estoppel should apply.

The law is well settled that the pendency of an appeal has no effect on the finality or binding effect of a trial court's judgment, and thus, will not be a barrier to applying collateral estoppel. *See Huron Holding Corporation v. Lincoln Mine Operating Co., 312*

U.S. 183, 61 S.Ct. 513, 85 L.Ed. 725 (1941). A final judgment is one that finally determines the rights of the parties. *First Union National Bank v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct. App. 1991), affirmed 308 S.C. 421, 418 S.E.2d 545 (1992).* Rule 201(a) SCACR, provides that an "appeal may be taken as provided by law, from any final judgment, appealable order, or decision".

Summary judgment is appropriate if the court finds that there is no genuine issue of any material fact. *Rule 56(c) SCRCP.* This Court finds that there are no issues of material fact with regard to the following:

1. The language of the master subcontractor agreement;
2. That BFS drafted the master subcontractor agreement;
3. The language of the pleadings and stipulations filed by the parties;
4. That BFS gave Hurley windows and doors for installation in Plaintiffs' residence which it had sold to the general contractor for installation in Plaintiffs' residence;
5. That the windows BFS provided to Hurley were the subject of a class-action suit and settlement;
6. That other courts have issued final orders holding that the master subcontractor agreement of BFS fails to meet the clear and unequivocable standard for indemnity contracts.

Although BFS contends that there are material issues of fact because of alleged installation deficiencies on the part of Hurley, those alleged deficiencies have no bearing on whether the language of the contract is against public policy, violates §32-2-10 S.C. Code, is unconscionable, and fails to meet the clear and unequivocable standard. This

Court's dismissal of the claims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity, does not leave BFS without a remedy. BFS still has its equitable indemnity claim against Hurley.

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 crossclaims of BFS 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 provisions of the master subcontractor agreement are unconscionable, ambiguous, unintelligible, conflicting, oppressive, and are unenforceable.

3. That the indemnity and duty to defend provisions of the master subcontractor agreement violate South Carolina public policy and §32-2-10 S.C. Code.

4. That the indemnity and duty to defend provisions of the master subcontractor agreement are neither clear nor unequivocable, and fail as a matter of law.

5. That BFS is collaterally estopped by prior decisions from contending that the indemnity provisions contained in its Master Subcontractor Agreement are clear and unequivocable and meet the requirements of South Carolina law.

IT IS, THEREFORE,

ORDERED, that the motion of Hurley Services, LLC for partial summary judgment with regard to the crossclaims of BFS for breach of express and implied warranties, breach of contract, negligence, and contractual indemnity be and it is hereby granted.

AND IT IS SO ORDERED.

Document prepared for Electronic Signature

Charleston Common Pleas

Case Caption:	Dag Pavic , plaintiff, et al VS Carolina Cottage Homes LLC , defendant, et al
Case Number:	2019CP1000772
Type:	Order/Summary Judgment

So Ordered

s/Jennifer B. McCoy #2764