

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,

vs.

Builders FirstSource-Southeast Group, LLC; et al.,

Defendants.

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Palmetto Trim and Renovations, LLC, et. al.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A No.: 2016-CP-10-03783

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SC Court of Appeals

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
ECC CONTRACTING, LLC**

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of ECC Contracting, LLC, hereinafter "ECC", for summary judgment with respect to cross-claims filed by Builders FirstSource-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, ECC'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 2900¹. ECC served as a subcontractor of BFS and in that capacity performed deck repair work on Unit 2001², and installed windows and doors on Units A1 & A2³ pursuant. ECC did not perform any other work on the Project.

According to BFS, ECC executed a BFS “Master Subcontractor Agreement” dated February 26, 2008 (hereafter “Master Agreement”). The Master Agreement at issue here is a BFS

¹ The building numbering system changed during the project.

² No deficiencies have been documented by Plaintiffs at Unit 2001.

³ A1 & A2 correspond to Units 2200 & 2201 located at 3036 and 3038 Fraserburg Way, Mt. Pleasant SC.

contract form bearing “Version – 5/17/06.” BFS seeks to recover from ECC 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 ECC on June 30, 2017. Subsequently, ECC was made a direct defendant by Plaintiffs and BFS then asserted cross-claims against ECC for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence. BFS’s operative cross-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 cross-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 ECC or BFS.

ECC filed its Amended Motion for Summary Judgment as to BFS’s cross-claims on October 15, 2020. ECC submitted its memorandum of law in support of its Amended Motion for Summary Judgment on October 23, 2020. BFS did not file a memorandum in opposition to ECC’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 ECC’s Amended Motion for Summary Judgment⁴, during oral arguments on November 6, 2020, BFS conceded that its cross-claims against ECC 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, this Court will grant summary judgment with respect to those claims.⁵

⁴ 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 Polhman Quality Exteriors were merely disguised claims for equitable indemnification pursuant to the Stoneledge cases cited herein.

⁵ While the Court has relied on BFS’s consent to the applicability of the Stoneledge cases to grant summary judgment as to the claims discussed in this section, it also notes that the doctrine of collateral estoppel would also permit summary judgment as to BFS’s cross-claims against ECC for breach of express and implied warranty, breach of contract, and negligence due to this Court’s prior decisions. See Amended Order Granting Charleston Exteriors, LLC

II. THE TERMS OF BFS'S MASTER SUBCONTRACT ARE NEITHER CLEAR NOR UNEQUIVOCAL.

Under South Carolina law, courts will refuse to enforce contractual indemnity provisions that fail to meet the standard of being clear and unequivocal when seeking to recover for an indemnitee's concurrent negligence; indemnification clauses that do not meet this standard are against public policy. See Concord & Cumberland Horizontal Prop. Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 643-644, 819 S.E.2d 166, 168-169 (Ct. App. 2018) (reh'g denied) (Affirming trial court's grant of summary judgment in favor of subcontractor dismissing contractual indemnity crossclaims of contractor based upon the application of the clear and unequivocal standard.)

"Section 5. INDEMNITY" of the Master Agreement contain multiple paragraphs dealing with indemnity and the 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 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 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

and ECC Contracting, LLC's Motions for Summary Judgment in the matter of Builders FirstSource-Southeast Group, LLC v. MI Windows & Doors, Inc., Case No. 2018-CP-08-02547 (S.C. Com. Pl. Feb. 3, 2020); Order Granting Hurley Services, LLC's and Charleston Exteriors' Motion for Summary Judgment in Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., Case No. 2016-CP-10-03455 (S.C. Com. Pl. April. 29, 2020)

CONTRACTOR, THE OWNER, OR ANY OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES.”

Additionally, the Master Agreement contains an indemnification provision buried in the fine print of “Section 3. Warranty”, which provides:

“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 ...”

The indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are ambiguous, conflict with each other and the indemnification provision in the fine print of “Section 3. WARRANTY”, and do not meet the elevated clear and unequivocal standard found in Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018).

III. BFS’S CLAIMS FOR CONTRACTUAL INDEMNITY ARE BASED ON PROVISIONS WHICH VIOLATE S.C. CODE § 32-2-10 AND, THUS, ARE ILLEGAL AND UNENFORCEABLE.

The Master Agreement between BFS and ECC contains multiple indemnity provision including those which require ECC to indemnify BFS for damages incurred as a result of BFS’ sole negligence in violation of S.C. Code Ann. § 32-2-10.

There is nothing in South Carolina law that separates a subcontractor’s duty to defend from its duty to indemnify its upstream contractor in the context of a contractual indemnification agreement. Indeed, the Anti-Indemnity Statute, S.C. Code Ann. § 32-2-10 speaks solely of

“damages” while limiting the ability of the Indemnitor to indemnify the Indemnitee. The Anti-Indemnity statute bars indemnity agreements wherein the Indemnitee seeks to be indemnified from “...damages arising out of bodily injury or property damage...” proximately caused by the indemnitee’s sole negligence. SC Code Ann. §32-2-10. Further, BFS claims its attorney’s costs and fees as damages in its complaint.

Section 5 of the Master Agreement, as set forth above, explicitly calls for ECC to pay BFS’s attorney’s fees “regardless of any ultimate liability or negligence of the contractor, the owner, or any of their officers, directors, agents and employees.” This is an explicit violation of SC Code Ann. §32-2-10 as it requires ECC to indemnify BFS for BFS’s sole negligence. The fact that it limits the claimed damages to attorney’s fees, as opposed to a judgment cost, is immaterial. Under South Carolina law, recoverable damages may include attorneys’ fees when so provided by contract or statute. See Rimer v. State Farm Mut. Auto. Ins. Co., 148 S.E.2d 742, 746 (S.C. 1966). However, when recovery of attorneys’ fee is by contract, the contractual terms providing for indemnification of such damages must still comply with South Carolina law and, here, the Master Agreement fails to do so.

Additionally, the middle paragraph of Section 5 of the Master Agreement, as shown above, calls for the Subcontractors to “indemnify, defend, and hold harmless” 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.” This provision also obviously violates SC Code Ann. §32-2-10.

As BFS should well know, indemnification provisions calling for the Indemnitor to indemnify the Indemnitee “for damages caused by [the Indemnitee’s] negligence or the negligence of its subcontractors” are void as against public policy. D.R. Horton, Inc. v. Builders FirstSource-

Se. Grp., LLC, 422 S.C. 144, 152 (Ct. App. 2018). Further, our Court of Appeals has held that “[A]n illegal contract is unenforceable.” Id. (citing Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 866-867 (Ct. App. 2002)). In D.R. Horton, this Court held that the indemnification agreement “purports to require BFS to indemnify D.R. Horton for its own negligence in violation of section 32-2-10” and went on to conclude that “[b]ecause the agreement violates the statute, we cannot require BFS to pay for damages caused by D.R. Horton.” Id. This case is no different.

Because the indemnity provisions of Master Agreement between BFS and ECC require ECC to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and ECC is entitled to summary judgment.

IV. BFS’S CROSS-CLAIM AGAINST ECC FOR CONTRACTUAL INDEMNIFICATION IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984).

During oral arguments and within its memorandum of law, ECC argued that the indemnification provisions contained Master Agreement fail to meet the “clear and unequivocal” standard enunciated by Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018), that such provisions

violate South Carolina public policy and S.C. Code § 32-2-10, that the terms are unconscionable, and that BFS is collaterally estopped from contending otherwise. This Court agrees.

In three recently decided cases – Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al. case number 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas (“BFS v. MI Windows”); Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al., case No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas (“Six Fifty Six”); and Pavic v. Carolina Cottage Homes, LLC, et al., case number 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas (“Pavic”) – this court evaluated similar motions for summary judgment brought by BFS’s subcontractors in regard to cross-claims asserted by BFS that were nearly identical to those asserted in this case.⁶

In BFS v. MI Windows, the Honorable Clifton B. Newman held that the indemnity provision in the Master Agreement contains language concerning indemnity and the prospect of BFS’s subcontractors being forced to indemnify BFS for BFS’s negligence, and that such language “is confusing at best and deceptive at worst.” See Amended 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 & Doors, Inc., et al., Civil Action No. 2018-CP-08-2547, p. 6-7 (the “Newman Order”). As a result, Judge Newman held that the indemnity language in Master Agreement did not meet the “clear and unequivocal” standard required by Concord & Cumberland. Id.

In Six Fifty Six, the Honorable Roger M. Young, Sr. held that BFS’s contractual indemnification claims against its subcontractors were barred by the Newman Order pursuant to

⁶ ECC’s motion for summary judgment was at issue in the first of these cases, while motions of Hurley Services, LLC, who is a party to this litigation that had its motion for summary judgment as to BFS’s cross-claims heard and granted at the same time as ECC’s in this litigation, were at issue in all three.

the doctrine of collateral estoppel. 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, Civil Action No. 2016-CP-10-3455, p. 3 (the "Young Order"). Judge Young also held that BFS's cross-claim for contractual indemnity was based on contractual provisions in BFS's master subcontractor agreement that "are neither clear nor unequivocal, are against public policy and the laws of South Carolina, and thus, fail as a matter of law." Id. (citing Concord & Cumberland).

In Pavic, the Honorable Jennifer B. McCoy held that BFS's master subcontractor agreement is an adhesion contract; that BFS's master subcontractor agreement contains multiple indemnity provisions, including multiple provisions in "Section 5. INDEMNITY" and another "buried in the fine print of "Section 3. Warranty"; that the indemnity provisions in BFS's master subcontractor agreement are unconscionable within the meaning of Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644, S.E.2d 663 (2007); that the indemnification provisions in Section 5 of BFS's master subcontractor agreement are ambiguous, conflict with each other and the provisions found in Section 3, do not meet the clear and unequivocal standard of Concord & Cumberland, and violate South Carolina public policy and S.C. Code § 32-2-10. See Order of the Honorable Jennifer B. McCoy filed January 25, 2021, in the Charleston County Court of Common Pleas in the case of Pavic v. Carolina Cottage Homes, LLC, et al., Civil Action No. 2019-CP-10-00772, p. 4-8 (the "McCoy Order"). In Pavic, Judge McCoy also confirmed that the Newman Order and the Young Order are final orders that collaterally estop BFS from contesting the findings therein as BFS had a full and fair opportunity to litigate the issues in BFS v. MI Windows and Six Fifty Six, and that the contract terms were "actually litigated, directly determined in the prior

[actions], and the issues were essential to the [judgments] such that collateral estoppel should apply. Id. at p. 9-10.

In the present case, the Master Agreement and indemnity provisions that BFS now wishes to assert against ECC as part of its contractual indemnification cross-claim involve the same master subcontractor agreement and indemnity provisions that were at issue in all three cases referenced above (i.e., BFS Master Subcontractor Agreement “[Version 5/17/06]”). Moreover, BFS seeks full contractual indemnification from ECC for any liability BFS is found to have to Plaintiffs or others in this action, which is identical to the relief sought by BFS in BFS v. MI Windows, Six Fifty Six, and Pavic. As such, this Court finds that BFS had a full and fair opportunity to litigate identical issues involving the same exact contract in BFS v. MI Windows, Six Fifty Six, and Pavic, and that, in each of the prior cases, the contract terms were actually litigated, directly determined, and the issues were essential to the judgments rendered therein. Therefore, this Court finds that collateral estoppel bars BFS’s cross-claim against ECC for contractual indemnification.

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 ECC 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 5/17/06]”) 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 5/17/06]”) are neither clear nor unequivocal and, thus, fail as a matter of law.
4. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS’s Master Subcontractor Agreement “[Version 5/17/06]”) violate South Carolina public policy and S.C. Code § 32-2-10, and thus, are illegal and unenforceable.

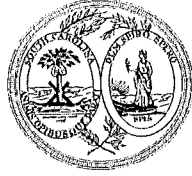
5. That BFS is collaterally estopped by prior decisions from contending that the indemnity provisions contained in its Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 5/17/06]") are clear and unequivocal, do not violate South Carolina public policy, and/or meet the requirements of South Carolina law.

IT IS, THEREFORE, ORDERED that the amended motion of ECC Contracting, LLC for summary judgment with regard to the cross-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 ECC Contracting, LLC for summary judgment with regard to the cross-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