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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	FOR THE NINTH JUDICIAL CIRCUIT
The Retreat at Charleston National Country Club Home Owners Association, Inc. and The Retreat at Charleston National Country Club Horizontal Property Regime, Plaintiffs, vs. Winston Carlyle Charleston National, LLC; Builders FirstSource, WS Contractors, LLC, East Coast Carpentry, L&G Construction Group, LLC, et al., Defendants.	Civil Action No. 2016-CP-10-3783 **ORDER** **granting** DEFENDANT L&G Construction Group, LLC **partial summary judgment**

RECEIVED
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SC Court of Appeals

This matter came before me on the defendant L&G Construction Group, LLC's ("L&G") joinder in the defendants East Coast Carpentry's and WS Contractors, LLC's ("WSC") amended motions for summary judgment as to defendant Builders FirstSource-Southeast Group, LLC's ("BFS") crossclaims. In its notice of joinder, L&G adopted East Coast's and WS's arguments in support of the motions: that BFS claims for breach of contract, negligence, breach of express and implied warranties, are merely disguised claims for equitable indemnity; and that BFS's claim for contractual indemnity must fail as a matter of law because it is based on a contractual provision that is unenforceable and that BFS's is collaterally estopped from arguing otherwise.

The motions were heard on November 6, 2020. Based on the record before the court,

the applicable law, and the arguments of counsel, I find that L&G is entitled to a judgment as a matter of law in regard to BFS's claims for breach of contract, breach of implied and express warranties, negligence, and contractual indemnity. Summary judgment is denied as to the remaining claim for equitable indemnity.

BACKGROUND

Winston Carlyle Charleston National, LLC was a single purpose entity that developed the Retreat at Charleston National Country Club subdivision ("the Retreat"). Sometime around 2012, Winston Carlyle engaged Colin R. Campbell Construction, Inc. (Campbell) to serve as the general contractor on the project. The project was developed in four phases with a total of 31 sets of townhouses.

After completion of the first phase, Campbell (or Winston Carlyle) contracted with BFS for "dry-in" construction of most of the remaining buildings. BFS was responsible for framing the buildings, which included installation of the sheathing as well as the installation of windows and doors, and the installation of weather-resistive barrier (WRB). BFS supplied all materials and hired several subcontractors to perform its scope of work. L&G, a residential framer, was one of those subcontractors.

In August 2013, BFS and L&G, entered into a Master Subcontractor Agreement[1] ("Master Agreement"), drafted by BFS, which provides, among other things, that L&G "warrants and guarantees the Work will conform to any specifications provided by Contractor

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[1] This is a standard form used by BFS in its contracts with other subcontractors, including WS Contractors, LLC, in whose motion for summary judgment L&G joined.

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and . . . guarantees the Work against defects in design, workmanship, and materials for the benefit of Contractor and its successors and assigns," and that L&G

> shall indemnify, defend and hold harmless [BFS] . . . against any and all claims . . . arising out of or resulting from . . . property damage, including loss of use of property, arising or alleged to arise out of or in any way related to this agreement or the [L&G]'s performance of the work or other activities of [L&G], but only to the extent caused in whole or in part by any negligent act or omission of [L&G] . . . . Notwithstanding the foregoing, to the fullest extent permitted by law, [L&G] shall indemnify, defend, and hold harmless, [BFS] from and against any and all claims, damages, losses, and expenses, including, but not limited to, attorney's fees (such legal expenses to include costs incurred in establishing the indemnification and other rights agreed to in this paragraph) arising out of or resulting from bodily injury to, or sickness, disease, or death of the subcontractor, any agent, employee, or representative of the subcontractors, or any of its subcontractors, 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 . . . [BFS], it being the expressed intent of BFS and [L&G] that in such event [L&G] is to indemnify, defend, and hold harmless [BFS] from the consequences of their own negligence, whether it is or is alleged to be the sole or concurrent cause of the bodily injury, sickness, disease, or death of the subcontractor, subcontractor's agent, employee, or representative, or the agent, employee, or representative of any of its subcontractors. The indemnification obligations under this paragraph shall not be limited by any limitation on the amount or type of damages, compensation, or benefits payable by or for [L&G] under workers compensation acts, disability benefit acts, or other employee benefit acts. [L&G] shall procure liability insurance covering its obligations under this section 5. The duty to defend under this section 5 is independent and separate from the duty to indemnify, and the duty to defend exists regardless of any ultimate liability or negligence of [BFS], the owner, or any of their officers, directors, agents, and employees. The duty to defend arises immediately upon presentation of a claim by any party indemnified hereunder and written notice of such claim being provided to [L&G]. [L&G]'s obligation to indemnify, defend, and hold harmless under this section 5 will survive the expiration or earlier termination of this agreement until it is finally determined by a court of competent jurisdiction or arbitration panel that a claim against [BFS], the owner, and any of their officers, directors, agents, and employees for the matter indemnified hereunder is fully and finally barred by the applicable statute of limitations.

Sometime after executing the Master Agreement, BFS contacted L&G's general manager, Miguel Loarca, inquiring if L&G would be interested in providing its services for the Retreat project. BFS then issued to L&G purchase orders for framing two of the Retreat's buildings. Several years after completion of the Retreat, a number of the unit-owners started to notice a variety of construction defects and experienced water intrusion and related damage. Acting through their association, the homeowners retained counsel and filed this action.

The plaintiffs sued all parties involved in the development of the Retreat, including BFS and its subcontractors. BFS in turn crossclaimed[2] against L&G and other subcontractors for breach of contract, breach of implied and express warranties, negligence, and equitable and contractual indemnity. L&G has since settled with the plaintiffs and their claims against L&G have been dismissed with prejudice.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the South Carolina Rules of Civil Procedure, the judgment sought by the moving party "shall be rendered forthwith if 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." Rule 56(c), SCRCP. The rule further provides that "[w]hen a motion for

[2] BFS's pleading that contains the crossclaims is styled "Answer of Defendant Builders FirstSource Southeast Group, LLC and Builders FirstSource, Inc., to Plaintiffs Fourth Amended Complaint, and Reasserted and/or other Cross Claims of Builders FirstSource-Southeast Group, LLC against WS Contractors, LLC, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Company, LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC"; this pleading is hereinafter referred to as the Cross-Complaint.

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summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP.

"In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party." *Gilmer v. Martin*, 323 S.C. 154, 156, 473 S.E.2d 812, 813 (Ct. App. 1996). It is not sufficient, however, that a non-moving party creates an inference that is not reasonable or raises an issue of fact that is not genuine. *Evans v. Stewart*, 370 S.C. 522, 636 S.E.2d 632, 635 (Ct. App. 2006). "To justify departure from the course of the trial of an issue of fact and the award of summary judgment, the court must be convinced that the issue is not genuine but feigned and that there is in truth nothing to be tried. . . . The fact that there is a factual dispute is not enough to preclude a summary judgment." *Saluda Motor Lines, Inc. v. Crouch*, 300 S.C. 43, 46, 386 S.E.2d 290, 292 (Ct. App. 1989) (quoting 73 Am. Jur. 2d *Summary Judgment* § 27).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 453, 499 S.E.2d 238 (Ct. App. 1998). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. In that way, a motion for summary judgment is akin to a motion for a directed verdict because in each instance, one

party must lose as a matter of law." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868 (2001) (internal citations and quotation marks omitted).

DISCUSSION

I. BFS's crossclaims for negligence, breach of contract, and breach of express and implied warranties.

L&G argues that despite setting forth—under separate headings—claims for contractual indemnity, equitable indemnity, breach of contract, breach of express and implied warranties, and negligence, BFS's Cross-Complaint articulates in essence only two causes of action: equitable indemnity and contractual indemnity. L&G is correct in its assessment. The causes of action for breach of contract, breach of express and implied warranties, and negligence are indeed superfluous and merit dismissal.

Under South Carolina law, "[t]he character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). In other words, not the heading given a cause of action in the pleading, or even legal terms of art used throughout, but rather the content of the allegations and their implications for the parties, if proven true, determines what cause of action is actually being asserted. Accordingly, in some cases a close reading of the allegations may lead to a conclusion that several differently articulated causes of actions are indeed one and the same. The appellate opinions in the sister cases of *Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction, LLC*, 413 S.C. 615, 776 S.E.2d 426 (Ct. App. 2015), and *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders FirstSource-Southeast Group*, 413 S.C. 630, 776 S.E.2d 434 (Ct. App. 2015), perfectly illustrate this point.

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In *Stoneledge*, which was a single case at the trial level, the court granted summary judgment of the subcontractors in regard to the general contractor's crossclaims for breach of contract and breach of warranty, "finding these claims [to be] 'merely disguised . . . claims for equitable indemnity[,] not viable as alternative causes of action." *Id.* at 634, 776 S.E.2d at 436. By a separate order, the trial court dismissed the negligence crossclaim holding that despite its styling it was nothing but a claim for equitable indemnity. *Stoneledge v. Clear View Construction*, 413 S.C. at 619, 776 S.E.2d at 428.

In its de novo review of the orders, the South Carolina Court of Appeals scrutinized the cross-complaint and found that the allegations, such as, "[s]hould [plaintiff] prevail on its claims, [the general contractor] is entitled to recover legal fees and costs or any amount it is ordered to pay to [plaintiff]," *id.* at 621, 776 S.E.2d at 429 (quotation and alteration marks omitted), demonstrated the contingent nature of the claims. The allegations indicated that the general contractor did not sustain its own damages as a result of the alleged negligence, breach of contract, or breach of warranty on the part of its subcontractor but was merely exposed to potential liability to the plaintiff and incurred the costs of its own defense. *Stoneledge v. Builders FirstSource*, 413 S.C. at 636, 776 S.E.2d at 437. The *Stoneledge* court held that because these claims were not independent of the equitable indemnity cause of action, summary judgment in favor of the subcontractors was appropriate. *Id.* at 637, 776 S.E.2d at 438; *Stoneledge v. Clear View Construction*, 413 S.C. at 619, 776 S.E.2d at 428.

Here, BFS's crossclaims for negligence, breach of warranties, and breach of contract, are indeed couched in conditional terms that do not articulate causes of action that are actually distinct from the claim for equitable indemnity. For example, ¶ 142 of BFS's Cross-Complaint

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(pleading a cause of action for breach of express warranties) opens with the phrase "*That in the event Plaintiffs prove . . . .*" (Cross-Compl. ¶ 142) (emphasis added). In the subsequent paragraph, BFS alleges that it "is entitled to judgment against the Cross Claim Defendants *in the amount of any judgment which the Plaintiffs obtain against BFS* . . . ." (Cross-Compl. ¶ 142.) (emphasis added) This pattern of pleading repeats throughout the remainder of the Cross-Complaint: ¶¶ 146 and 147 (breach of implied warranties); ¶¶ 150 and 151 (negligence); and ¶¶ 154 and 155 (breach of contract).

Even though BFS alleges breaches of contract and warranties and negligence on its subcontractors' part, hardly a close reading of the Cross-Complaint reveals that BFS has not sustained distinct injuries as a result of those breaches, separate from the burdens of Plaintiffs' lawsuit. According to its own allegations, BFS has not yet been damaged by L&G; it will have been damaged only in conjunction with the undesirable outcome of the plaintiffs' case against it: ¶ 147, "to the extent that the Plaintiffs may obtain judgment against BFS"; ¶ 151, "[i]n the event that the Plaintiffs obtain judgment against BFS . . . ."

The language of these allegations leaves no doubt that BFS's crossclaims for breaches of contract and warranties and for negligence are entirely dependent on the outcome of the plaintiffs' case against BFS. Consequently, they are merely disguised claims for equitable indemnity.

II. Contractual indemnity.

Under South Carolina law, "[i]ndemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990),

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aff'd, 307 S.C. 128, 414 S.E.2d 118 (1992). "A right of indemnity may arise by contract (express or implied) or by operation of law as a matter of equity." *Id.* Contractual indemnity is "an obligation that arises by virtue of express contractual language establishing a duty in one party to save another harmless upon occurrence of specified circumstances." 41 Am. Jur. 2d *Indemnity* § 7 (2015).

Indemnity contracts are construed "in accordance with the rules for the construction of contracts generally." *Campbell v. Beacon Mfg. Co., Inc.*, 438 S.E.2d 271, 313 S.C. 451 (Ct. App. 1993). Thus, "if the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Schulmeyer v. State Farm Fire and Cas.*, 353 S.C. 491, 579 S.E.2d 132, (2003).

But the parties' freedom to contract for indemnification is not unconstrained. Under South Carolina law, a clause in a construction contract that purports "to indemnify the promisee . . . against liability for damages arising out of bodily injury or property damage proximately caused by or resulting from the *sole negligence of the promisee* . . . is against public policy and unenforceable." S.C. Code Ann. § 32-2-10 (emphasis added). Furthermore, a contractual indemnity provision whereby a general contractor seeks indemnity from its subcontractors for the general contractor's concurrent negligence is also unenforceable unless the parties' intent to so provide is stated in clear and unequivocable terms. *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).

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Here, the language of Section 5 of the BFS's Master Agreement, entitled "Indemnity," does not meet the clear-and-unequivocal standard. Moreover, by providing for indemnity against liability arising from BFS's own negligence, it violates § 32-2-10.

Section 5 comprises several paragraphs that deal with indemnity and the duty to defend. According to its first paragraph, 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, however, imposes on L&G 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." Furthermore, according to the Master Agreement, "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."

Apart from Section 5, the Master Agreement contains an additional indemnification provision that is embedded in Section 7, "Warranty":

> 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 . . . ."

These verbose indemnification provisions, spread throughout several pages of the agreement, hardly constitute clear and unequivocal terms required by the South Carolina law. *See id.* Furthermore, by providing for indemnity and duty to defend BFS regardless of its

ultimate liability or negligence, the agreement violates the proscription set forth in § 32-2-10 of the South Carolina Code and is therefore unenforceable. *See D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 152 (Ct. App. 2018).

In addition, BFS is collaterally estopped from arguing otherwise: it litigated the issue of enforceability of the Master Agreement's indemnity clause and lost on summary-judgment motions of its subcontractors in three cases. *See Builders Firstsource-Southeast Group, LLC v. MI Windows and Doors, Inc. et al.* C/A No. 2018-CP-08-02547, filed in the Berkeley County Court of Common Pleas; *Six Fifty Six Owners Association, Inc., et. al. v. Winsor South, LLC, et al.*, C/A No. 2016-CP-10-03455, filed in Charleston County Court of Common Pleas; and *Pavic v. Carolina Cottage Homes, LLC, et al.*, C/A No. 2019-CP-10-00772, filed in the Charleston County Court of Common Pleas.

CONCLUSION

For the foregoing reasons, L&G's motion for summary judgment on BFS's crossclaims, with the exception of equitable-indemnity claim, is **GRANTED**.

IT IS SO ORDERED.

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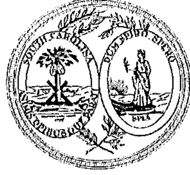

Charleston Common Pleas

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

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP1003783

Retreat at Charleston National Country Club Home Owners Asso et al
PLAINTIFF(S)

Winston Carlyle Charleston National LLC et al
DEFENDANT(S)

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DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

Defendant filed a Motion to Reconsider the Court's July 7, 2021 Order granting L&G Construction Group, LLC partial summary judgment with this Court on July 19, 2021. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court Denies Defendant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/23/2021 .

Solesmar Jesus De Oliveira
Costa De Oliveira Construction LLC
ECC Contracting LLC
East Coast Carpentry Company
Rodrigo Assis
Edward Bruce Witham
Pohlman Quality Exteriors Inc
Yesenia Alvarez Penaloza
Sixto Melchor Ayala
Mario Salgado
Givair De Caris
Dino Schwartz
Advanced Building Connnection LLC
Garcia Roofing LLC
Feliciano Cruz Silva
Carlos Marroquin
Marroquin Construction
Jessica Marroquin
Juan Constructors
Juan Garza Ramos

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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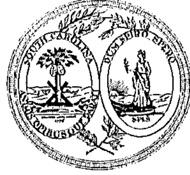

Charleston Common Pleas

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/Electronic Form 4

So Ordered

s/Jennifer B. McCoy #2764