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,

v.

Winston Carlyle Charleston National, LLC; Colin R. Campbell Construction, Inc.; Colin Campbell, Individually, C.R. Campbell Construction Co., Inc., Colin Campbell Construction, LLC, Builders Firstsource-Southeast Group, LLC; Builders FirstSource, Inc., Americo Roofing Concepts, Inc.; DVS, Inc.; Advanced Building Connection, LLC; Guy C. Lee Building Materials, LLC; WS Contractors, LLC; Dino Schwartz, Individually, ECC Contracting, LLC, Hurley Services, LLC, McDaniel Construction Co., LLC, AC Construction Corp., AC Construction, Inc., L&G Construction Group, LLC, Liollio Architecture, JC Construction d/b/a JC Construction, LLC a/k/a JC Contractors a/k/a JC Contractors, LLC, Soto & Vasquez Construction, LLC a/k/a Costa De Oliveira Construction, LLC, Solesmar Jesus De Oliveira, Wilson Lucas Sales d/b/a Miracle Siding, Miracle Siding, LLC, Royal Hornes of SC, Inc., Colleen Batissa, Christopher Batissa, Norma Ferreira Bruno, Mendez Construction, LLC, Juan Garza Ramos, Juan Garza Ramos d/b/a Juan Constructors, Jessica Marroquin, Jessica Marroquin d/b/a Marroquin Construction, Carlos Marroquin, Carlos Marroquin and Jessica Marroquin d/b/a Marroquin Construction, Feliciano Cruz Silva, Garcia Roofing, LLC, Givair De Caris, and Mario Salgado,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2016-CP-10-03783

ORDER GRANTING PARTIAL SUMMARY JUDGMENT IN FAVOR OF EAST COAST CARPENTRY

Builders FirstSource-Southeast Group, LLC,

Third-Party Plaintiff,

v.

Pohlman Quality Contractors; and Pohlman Quality Exteriors, Inc.; Palmetto Trim and Renovation; Edward Bruce Witham; and East Coast Carpentry,

Third-Party Defendants.

This matter came on before me on November 6, 2020 as Presiding Judge of the Ninth Judicial Circuit on Amended Motion of East Coast Carpentry, hereinafter "East Coast", 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, East Coast's motion is GRANTED IN PART as to BFS's claims except those for equitable indemnity:

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 2900. East Coast served as a subcontractor of BFS and in that capacity performed window installation on Buildings 6, 8, 9, 12, 13, 14, 16, 17, 18. East Coast did not perform any other work on the Project. Per the 'Gemini' records, this work was all completed in 2006. .

According to BFS, East Coast executed a BFS "Master Subcontractor Agreement" dated October 21, 2005 (hereafter "Master Agreement"). The Master Agreement at issue here is a BFS contract form bearing "Version – 4/20/05." BFS seeks to recover from East Coast 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 East Coast for contractual and equitable indemnity, breach of express and implied warranties, breach of contract, and negligence with its Amended Answer and Third-Party Complaint to Plaintiffs' Fourth Amended Complaint filed on November 13, 2019. BFS's third-Party 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 East Coast or BFS.

East Coast filed its Motion for Summary Judgment on January 7, 2020 and its Amended Motion for Summary Judgment as to BFS's third-party claims on October 15, 2020 asserting the arguments contained in its original Motion and supplementing those arguments with a Statute of Repose defense. BFS did not file a memorandum in opposition to East Coast's Motion or 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), 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).

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 East Coast's Amended Motion for Summary Judgment[1], during oral arguments on November 6, 2020, BFS conceded that its cross-claims against East Coast 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.

[1] 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.

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.

II. **BFS's claims for contractual indemnity are based on contractual provisions that are neither clear nor unequivocal and thus they fail as a matter of law. Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018):**

Third-Party Complaint alleges that the subcontract between BFS and East Coast "provided for contractual indemnification in favor of Builders FirstSource". The language contained in the "Master Subcontract Agreement" indemnity provision states:

> **Section 6. Waiver, Release, and Indemnification.** Subcontractor agrees that Subcontractor, and not Contractor, shall be responsible for all injuries, losses, or damages to Subcontractor, its employees, agents, and subcontractors and to any other parties arising from or relating in any way to the performance of the Work or the actions or inactions of Subcontractor or its agents, employees, and subcontractors. Subcontractor will indemnify, defend, and hold Contractor harmless against any such injuries and claims. Accordingly:
>
> a. Waiver. [omitted because it applies to workers comp]
> b. Release and Indemnity.
>
> (1) [Omitted bc applies to personal injury]
> (2) For all Claims not covered by (1) above and to the fullest extent permitted by law, Subcontractor agrees to release, indemnify, defend, and hold harmless Indemnitees [defined as Contractor and Owner and their affiliates and employees, directors, officers, agents, and invitees in (1)] for, and to save them harmless against, any and all Claims (together with reasonable attorneys' fees), to the extent of liability resulting from Subcontractor's negligence or willful misconduct incurred by the Indemnitees which arise out of or relate to (i) any alleged personal injury, death or property damage arising from or connected with the Work; (ii) any alleged defect or malfunction in any of the services or materials provided in connection with the Work; or (iii) omissions resulting from Indemnitees failure to supervise Subcontractor's operations.

This language is inherently confusing insofar as it calls for East Coast to indemnify BFS for BFS's sole negligence while also claiming to limit the indemnity "to the extent" of East Coast's negligence. Thus, the language contained in the indemnity clause does not clearly and unequivocally provide for indemnity for BFS's own negligence. See Concord and Cumberland HPR v. Concord and Cumberland, LLC, 2018 WL 3748616 (S.C. Ct. App. 2018).

In footnote 6 to the Cumberland case the South Carolina Court of Appeals noted that standard AIA form indemnity clause does not meet this standard.

> We recognize the challenges lawyers often face in drafting indemnity provisions that can meet the strict "clear and unequivocal" test. In fact, none of our precedents appear to have found a provision that has met the standard. The provision here derived from an American Institute of Architects (AIA) form. The AIA is a respected organization, and its forms are used regularly in the construction industry. Nevertheless, the indemnity clause at issue here may have been influenced by the "clear and unequivocal" standard. As the Texas Supreme Court has observed, this strict construction test has caused drafters of indemnity provisions to write them in a way that can be read as indemnifying the indemnitee for its own negligence, "yet be just ambiguous enough to conceal that intent from the indemnitor." Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 707-08 (Tex. S. Ct. 1987). What results are law suits that burden courts with deciding whether the parties' intent was camouflaged or "clear and unequivocal." Because South Carolina appellate courts have never upheld an indemnity clause as "clear and unequivocal," parties and their lawyers have little guidance. This is why the Texas Supreme Court discarded the "clear and unequivocal" standard in favor of one they call "express negligence," although we are uncertain how much that clears things up. See id. at 708. There may be better alternatives to the "clear and unequivocal" standard, but we must leave that to our legislature or supreme court.

III. BFS's claims for contractual indemnity are based on contractual provisions that are illegal and unenforceable:

The contract between BFS and East Coast 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. The relevant indemnity provision is above. Section 6 explicitly calls for East Coast to unconditionally defend and indemnify BFS in subsection (1) and then calls for East Coast to indemnify BFS for BFS' failure to supervise in subsection (2). These provisions explicitly violation of SC Code Ann. §32-2-10 as they require East Coast to indemnify BFS for BFS' sole negligence: Indemnification provisions calling for the Indemnitor to indemnify the Indemnitee "for damages caused by its [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, 810 S.E.2d 41, 45-6 (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, the 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 the contracts between BFS and ECC require ECC to indemnify BFS for BFS' sole negligence, BFS' contracts are illegal, and thus unenforceable and ECC is entitled to summary judgment.

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 East Coast 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 Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 4/20/05]") violate South Carolina public policy and S.C. Code § 32-2-10.
3. That the indemnity and duty to defend provisions of the Master Agreement (i.e., BFS's Master Subcontractor Agreement "[Version 4/20/05]") are neither clear nor unequivocal and, thus, fail as a matter of law.
4. Genuine issues of material fact exist as to the Statute of Repose argument raised by East Coast Carpentry.

IT IS, THEREFORE, ORDERED that the amended motion of East Coast Carpentry for summary judgment with regard to the Third-Party Claims of Builders FirstSource-Southeast Group, LLC is hereby **GRANTED IN PART as to all claims on all grounds except for those sounding in equity.** 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