

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

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SEP 27 2021

SC Court of Appeals

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT IN FAVOR OF
AC CONSTRUCTION, INC. A/K/A AC
CONSTRUCTION, CORP.**

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 before me on defendants AC Construction, Inc. a/k/a AC Construction, Corp.'s (collectively "AC Construction") Motion for Summary Judgement as to Cross-Claims Asserted by Builders FirstSource Southeast Group, LLC filed on October 29, 2020. In addition to the arguments raised therein, AC Construction, pursuant to Rule 10(c), SCRCP, adopted by reference the arguments set forth in East Coast Carpentry ("ECC") and WS Contractors, LLC's ("WSC") amended motions for summary judgment as to defendant Builders FirstSource-Southeast Group, LLC's ("BFS") crossclaims. These arguments include, *inter alia*: that BFS' claims for breach of contract, negligence, breach of express and implied warranties, are merely disguised claims for equitable indemnity; and that BFS' 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 AC Construction 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.

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. AC Construction served as a subcontractor of BFS and in that capacity performed framing services on Buildings 5 through 22. AC Construction did not perform any other work on the Project. Buildings 5 through 21 were completed in 2007. Buildings 22 through 30 were completed between 2012 and 2015.

According to BFS, AC Construction executed a BFS “Master Subcontractor Agreement” dated November 7, 2007 (hereafter “Master Agreement”). The Master Agreement at issue here is a BFS contract form bearing “Version – 5/17/06.” BFS seeks to recover from AC Construction and BFS’s subcontractors in indemnity under the terms of the Master Agreement.

PROCEDURAL HISTORY

Plaintiffs initiated this suit on July 22, 2016. Plaintiffs brought claims against Colin R. Campbell Construction, Inc. and BFS in their Amended Complaint filed on May 1, 2017. BFS asserted third-party claims against AC Construction and BFS's other subcontractors for contractual indemnity, breach of express and implied warranties, breach of contract, and negligence in its Amended Answer and Third-Party Complaint filed on June 30, 2017. BFS filed an Answer to Plaintiffs' Second Amended Complaint and Cross-Claims Against multiple subcontractors, including AC Construction, on July 3, 2018. BFS's contractual indemnity claim is based upon the indemnity provisions in the subject Master Agreements.

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.

During oral arguments on November 6, 2020, BFS conceded its cross-claims against AC Construction 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, the Court will grant summary judgment with respect to those claims.

II. BFS'S CROSS-CLAIM AGAINST AC CONSTRUCTION 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, the moving parties argued that the indemnification provisions contained in the 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.

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 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, this Judge 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 unclear, 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, I also found and ruled 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 AC Construction 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 AC Construction 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 AC Construction for contractual indemnification.

III. 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 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 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 ...”

On one hand, BFS Master Agreement contemplates indemnification of all attorneys’ fees incurred in the defense of the BFS as well as all amounts paid in settlement or to satisfy demands – each without any regard to the fault of the subcontractor or any reference to the negligence of BFS; in other areas the Master Agreement refers to indemnification in favor of BFS regardless of the sole or concurrent negligence of BFS; and yet other provisions qualify indemnification to the extent the loss is caused in whole or part by the negligence of Subcontractor. The terms are confusing at best, contradictory at times, and arguably misleading. As such, the Master Agreement’s indemnity clauses are unenforceable as a matter of law.

This Court finds that the indemnification provisions in “Section 5. INDEMNITY” of the Master Agreement, as set forth above, are unclear, 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). As a result, the indemnification provisions of the Master Agreement are unenforceable and AC Construction is entitled to summary judgment.

IV. 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 AC Construction contains multiple indemnity provision including those which require AC Construction to indemnify BFS for damages incurred as a result of BFS's 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 soles 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 AC Construction 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." Section 8.i. of the Master Agreement also provides for indemnification of attorneys' fees and expenses and amounts paid in settlement without regard to the fault of BFS. These terms explicitly violate SC Code Ann. §32-2-10 as they require AC Construction to indemnify BFS for BFS's sole negligence. 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 AC Construction require AC Construction to indemnify BFS for BFS’s sole negligence, the Master Agreement is illegal, and thus unenforceable and AC Construction 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 AC Construction 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 5/17/06]”) 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 5/17/06]”) are neither clear nor unequivocal and, thus, fail as a matter of law.

IT IS, THEREFORE, ORDERED that the motion of AC Construction for summary judgment with regard to the Cross-Claims of Builders FirstSource-Southeast Group, LLC is hereby **GRANTED**

with only the equitable indemnity claim of BFS against AC Construction surviving. 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