

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS)
NINTH JUDICIAL CIRCUIT)

C/A NO.: 2016-CP-10-03783)

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, Builders FirstSource-)
Southeast Group, LLC, Americo Roofing)
Concepts, Inc., DVS, Inc., Advanced Building)
Connections, LLC, Guy C. Lee Building)
Materials, LLC, WS Contractors, LLC, Dino)
Schwartz, Individually, Charleston Exteriors,)
LLC, ECC Contracting, LLC, Hurley Services,)
LLC, McDaniel Construction Co., LLC, AC)
Construction Corp, AC Construction, Inc., L&G)
Construction Group, LLC, Liollo Architecture,)
JC Contractors, LLC, Soto & Vazquez)
Construction, LLC, Costa De Oliveira)
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 Homes of)
SC, Inc., Collen 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 Construction,)
Carolos Marroquin, Carolos and Marroquin and)
Jessica Marroquin d/b/a Marroquin)
Construction, Feliciano Cruz Silva, Garcia)
Roofing, LLC, Givair De Caris, and Mario)
Salgado,)

Defendants.)

Builders FirstSource-Southeast Group, LLC,)

Third-Party Plaintiff,)

RECEIVED

SEP 27 2021

SC Court of Appeals

ORDER GRANTING IN PART)
THE SECOND AMENDED)
MOTION FOR SUMMARY JUDGMENT)
OF POHLMAN QUALITY EXTERIORS, INC.)
AS TO THE CLAIMS OF)
BUILDERS FIRSTSOURCE –)
SOUTHEAST GROUP, LLC)
(CLAIM FOR EQUITABLE INDEMNIFICATION)
REMAINS PENDING)

v.)
)
)
 Pohlman Quality Contractors, Pohlman Quality)
 Exteriors, Palmetto Trim and Renovation,)
 Edward Bruce Witham, and East Coast)
 Carpentry,)
)
 Third-Party Defendants.)
)
)
)
)
)
)
)
)

This matter comes before me upon a motion filed by Pohlman Quality Exteriors, Inc. (hereinafter Pohlman) seeking an Order pursuant to Rule 56 dismissing the third-party claims asserted against it by Builders FirstSource-Southeast Group, LLC's (hereinafter BFS). For the reasons set forth herein, the Motion is GRANTED IN PART.

A hearing on this matter was held before me on November 6, 2020. Present and participating in the hearing on Pohlman's Motion were Glenn Elliott, counsel for Pohlman, and Steve Hughes, counsel for BFS.

This case arises out of the construction of a condominium project. BFS, as a subcontractor to the General Contractor, agreed to accomplish a scope of work which included rough framing and the installation of windows, doors, and other components for some of the buildings at the project. BFS then entered into subcontracts with a several parties, including Pohlman, to provide labor to accomplish BFS's scope of work. Plaintiffs filed the above-captioned lawsuit alleging deficiencies in the work provided by BFS. BFS then brought a third-party action against its subcontractors, including Pohlman. The Third-Party Complaint seeks recovery from the subcontractors on the theories of Contractual and Common Law Indemnity, Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract. Pohlman argues it is entitled to Summary Judgment on the following grounds:

1. BFS's claims for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract are merely disguised aims for indemnity" and fail as a matter of law pursuant to *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630,634, (Ct. App. 2015).

2. The subcontract produced by BFS between it and Pohlman is dated after Pohlman completed its work at this project, so the only viable claim BFS may have against Pohlman is for equitable indemnification.
3. Even if the subcontract is applicable, 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), and § 32-2-10 Code of Laws of South Carolina (1976, as amended).

Each of these contentions is discussed below.

Applicability of the *Stoneledge* case

For a common law claim such as negligence, breach of contract, or breach of warranty to be viable and independent from a claim for indemnification, the claimant must identify and prove it has incurred damages which do not arise exclusively from the claims made against it. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 413 S.C. 615, 776 S.E.2d 426 (SC Appeals 2015).

On November 13, 2019 BFS filed its Third-Party Complaint. In each of its Third-Party causes of action BFS describes the damages it seeks to collect from Pohlman as follows

That BFS is entitled to judgment against the Third-Party Defendants in the amount of any judgment which the Plaintiffs may obtain against BFS, or which Builders FirstSource-Southeast Group, LLC may pay in satisfaction of such claims, for breach of any express warranties on the part of the Third-Party Defendants, plus BFS costs for defense, inclusive of attorneys' fees.
Cause of action for Breach of Express Warranties paragraph 173; Cause of action for Breach of Implied Warranties paragraph 177; Cause of action for Negligence paragraph 181; Cause of action for Breach of Contract paragraph 185.

BFS's description of the damages it is seeking via each of these causes of action makes it clear that the alleged damages arise out of, and are not "independent" of, the claims made against Centex by Plaintiff.

Applicability of the Subcontract

On September 12, 2019, two months prior to filing of the Third-Party Complaint, Counsel for BFS sent a letter to Pohlman advising of the litigation. That letter refers to "The relevant subcontract agreement" and makes a number of demands upon Pohlman, including defense and indemnification. Sent to Pohlman with that letter was a copy of a subcontract between Pohlman and BFS dated October 16, 2007.

Payment records produced to Pohlman by BFS as part of discovery in this case show that Pohlman installed windows in building numbers 11 and 21 at the project. Those records indicate that Pohlman completed the installation of windows in building 11 on "02/09/07" and that Pohlman completed the installation of windows in building 21 on "03/02/07".

Pohlman argues the October 16, 2007 subcontract is not applicable or relevant to this case because it was entered into by the parties after Pohlman completed its work at the project.

During the hearing Counsel for BFS referred to a subcontract between BFS and Pohlman dated August 18, 2006. Counsel for Pohlman told the Court that document had not been produced prior to the hearing. During the hearing Counsel for BFS could not provide proof that the 2006 contract had been produced to opposing Counsel. However, after being provided with an opportunity to review the document, Counsel for Pohlman acknowledged that the copy 2006 subcontract appears to contain the same language and provisions as the 2007 version and his client's signature appears to be the same on both documents. Based upon those observations, and the representation by Counsel for BFS that his client assures him the document is genuine, Counsel for Pohlman withdrew his argument that there was no written subcontract between Pohlman and BFS applicable to Pohlman's work at this project.

Validity of Indemnification Provisions of the Subcontract

Section 5 of the 2006 subcontract between BFS and Pohlman, labeled "INDEMNITY", consists of four lengthy paragraphs. However, for purposes of this analysis the Court need only consider the first two paragraphs which read as follows

SECTION 5. INDEMNITY

TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES FROM AND AGAINST ANY AND ALL CLAIMS, SUITS, LOSSES, CAUSES OF ACTION, DAMAGES, LIABILITIES, FINES, PENALTIES, AND EXPENSES OF ANY KIND WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, ARBITRATION OR COURT COSTS AND 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

OR DEATH OF ANY PERSON, OR 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 SUBCONTRACTOR'S PERFORMANCE OF THE WORK OR OTHER ACTIVITIES OF THE SUBCONTRACTOR, BUT ONLY TO THE EXTENT CAUSED IN WHOLE OR IN PART BY AND NEGLIGENT ACT OR OMISSION OF THE SUBCONTRACTOR OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THE SUBCONTRACTOR OR ANYONE FOR WHOSE ACTS THE SUBCONTRACTOR MAY BE LIABLE. THE CONTRACTOR'S INSURANCE REQUIREMENTS WHICH SUBCONTRACTOR IS SUBJECT TO UNDER THIS AGREEMENT ARE SEPARATE AND DISTINCT FROM THE REQUIREMENT OF INDEMNIFICATION HEREUNDER.

NOTWITHSTANDING THE FOREGOING, TO THE FULLEST EXTENT PERMITTED BY LAW, THE SUBCONTRACTOR SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS, THE CONTRACTOR, THE OWNER, AND ALL OF THEIR OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES (THE "INDEMNITEES"), 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 SUBCONTRACTOR, 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 ANY OF THE INDEMNITEES, IT BEING THE EXPRESSED INTENT OF THE CONTRACTOR AND THE SUBCONTRACTOR THAT IN SUCH EVENT THE SUBCONTRACTOR IS TO INDEMNIFY, DEFEND, AND HOLD HARMLESS THE INDEMNITEES FROM THE CONSEQUENCES OF THEIR OWN NEGLIGENCE. WHETHER IT IS OR IS ALLEGED TO BE 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 SUBCONTRACTOR UNDER WORKERS COMPENSATION ACTS, DISABILITY BENEFITS ACTS, OR OTHER EMPLOYEE BENEFITS ACTS. THESE SUBCONTRACTORS SHALL PROCURE LIABILITY INSURANCE COVERING ITS OBLIGATIONS UNDER THIS SECTION 5. [emphasis added]

The South Carolina Court of Appeals has held that the “clear and unequivocal” standard must be applied when interpreting a contractor’s claim against a subcontractor seeking indemnification for alleged negligent construction of a condominium project, and that the “clear and unequivocal” standard must be applied any time an indemnitee seeks indemnification for its negligence, whether sole or concurrent. *Concord and Cumberland HPR v. Concord and Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (SC Appeals 2018).

The highlighted language of Section 5 of the subcontract show that the indemnification provisions of the subcontract are not “clear and unequivocal”. The first paragraph states that Pohlman must indemnify BFS for claims or damages “but only to the extent caused in whole or in part” by any negligent act or omission of Pohlman or anyone employed by Pohlman. However, the second paragraph contradicts the first paragraph by purportedly requiring Pohlman to indemnify BFS, and others, even if it is alleged that the loss was caused in whole by BFS. The language of those two paragraphs are in conflict and cannot be reconciled.

However, even if the conflicting language could be reconciled the indemnification provision of the subcontract is still invalid. § 32-2-10 Code of Laws of South Carolina (1976, as amended) provides that any promise or agreement related to the design or construction which of a building which requires a party to indemnify another party even if the loss or damage was caused by the sole negligence of the indemnity is “against public policy and unenforceable”.

This Court finds that the indemnification provisions of the 2006 subcontract between Pohlman and BFS

- do not meet the “clear and unequivocal” standard of review, and
- violate the provisions of § 32-2-10.

The Court notes that the rulings contained within this Order do not leave BFS without a remedy. BFS has articulated a claim against Pohlman for equitable indemnification and that claim remains viable.

DUE TO THE FOREGOING, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT

- The Third-Party claims of BFS for Breach of Express Warranties, Breach of Implied Warranties, Negligence, and Breach of Contract are dismissed with prejudice;
- The Indemnification provisions of the August 18, 2006 subcontract between BFS and Pohlman are deemed unenforceable because those provisions do not meet the “clear and unequivocal” standard of review, and because those provisions are against public policy pursuant to § 32-2-10 Code of Laws of South Carolina (1976, as

amended);

- BFS's cause of action against Pohlman for Equitable Indemnification remains pending and viable.

IT IS SO ORDERED!

JENNIFER B. MCCOY
Circuit Court Judge

Charleston, South Carolina
May _____, 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/Other

So Ordered

s/Jennifer B. McCoy #2764