

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Carl Owens Contracting, Inc.)
() Plaintiffs)
v.)
)
Gulfside Supply, Inc., et al.,)
(X) Defendants)
check box above indicating submitting party)

Case No. 2018-CP-10-5367
**MOTION INFORMATION FORM
AND COVER SHEET**

name, SC Bar no. and address of plaintiffs' attorney
Samuel M. Wheeler, Esq - 101008
Smith Closser, P.A.
P.O. Box. 40578
Charleston, SC 29423
telephone: 843-760-0220 fax: 843-522-2678
e-mail: swheeler@scnlaw.com

name, SC Bar no. and address of defendants' attorney
Helen B. Hester - 78742
Winer, Shearhouse, Weitz, Greenberg & Shawe, LLP
14 E. State Street
Savannah, GA 31401
telephone: 912-233-2251 fax: 912-235-5464
e-mail: hhester@wswgs.com

(X) MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)
() FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)
() PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

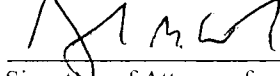
SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss Counterclaims
Estimated Time Needed: 15 minutes Court Reporter Needed: Yes

SECTION II: Motion Type

(x) Written motion attached
() Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for Plaintiff

2/26/19

Date submitted

SECTION III: Motion Fee

(x) PAID - AMOUNT: \$25.00
() EXEMPT: () Rule to Show Cause in Child or Spousal Support
(check reason) () Domestic Abuse or Abuse and Neglect
() Indigent Status () State Agency v. Indigent Party
() Sexually Violent Predator Act () Post-Conviction Relief
() Motion for Stay in Bankruptcy
() Motion for Publication () Motion for Execution (Rule 69, SCRPC)
() Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
() Other:

JUDGE'S SECTION

() Motion Fee to be paid upon filing of the attached order.
() Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____ (print name)

() MOTION FEE COLLECTION: _____

() CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Carl Owens Contracting, Inc.,

Plaintiff,

vs.

Gulfside Supply, Inc. d/b/a Gulfeagle Supply,
and Weyerhaeuser NR Company,

Defendants.

and

Gulfside Supply, Inc. d/b/a Gulfeagle Supply,

Third-Party Plaintiff,

vs.

Don Ross, LLC,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-10-5367

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO DISMISS GULFSIDE
SUPPLY, INC'S COUNTERCLAIM(S),
WITH SUPPORTING MEMORANDUM**

FILED
2019 FEB 27 PM 1:13
JULIE J. ARYSTROM
CLERK OF COURT

TO: HELEN B. HESTER, ATTORNEY FOR GULFSIDE SUPPLY, INC.

PLEASE TAKE NOTICE that the Plaintiff, pursuant to Rule 12(b)(6), SCRCP, and by and through its undersigned counsel, will move before the Presiding Judge for the Ninth Judicial Circuit, on the tenth (10th) day or as soon thereafter as counsel can be heard, for an Order dismissing Defendant and Third-Party Plaintiff Gulfside Supply, Inc. d/b/a Gulfeagle Supply's ("Gulfside") counterclaim(s) against the Plaintiff.

In its counterclaims, Gulfside has made allegations that the Plaintiff, or its subcontractor, Third-Party Defendant Don Ross, LLC ("Don Ross"), was negligent in the installation of the roof on the home at issue in this action. (Gulfside Counterclaims, ¶¶ 10, 12). Gulfside then claims, "Carl Owens and Don Ross are liable to equitably indemnify Gulfside for any sums

which may be adjudged against Gulfside and for all costs and expenses, including reasonable attorney's fees, that Gulfside is forced to incur in connection with the defense of the claims that have been brought by Carl Owens, as the negligence, acts and/or omissions of Carl Owens and Don Ross are the cause of the alleged damages." (Id. at ¶ 13). Based on this allegation, Gulfside is seeking contribution and equitable indemnity from the Plaintiff. This is confirmed by Gulfside's prayer for relief. (Id. at Prayer, ¶¶ a, b).

Gulfside is attempting to cast, inappropriately, defenses against Gulfside, claims against the other Defendant and Don Ross, and potential judge or jury questions regarding setoff, contribution, and apportionment, as counterclaims against the Plaintiff.

Gulfside's "contribution" cause of action or prayer for relief is without logic. In effect, Gulfside is asking the court to perform a completely circular exchange of damages, alleging, "Carl Owens and Don Ross are liable to equitably indemnify Gulfside for any sums which may be adjudged against Gulfside..." This may be an appropriate allegation against Don Ross, and Gulfside can request the judge or jury to apportion fault or seek contribution from Don Ross, but this claim cannot survive against the Plaintiff. For example, if the judge or jury finds that Gulfside, along with the other Defendant and Don Ross, are liable for the Plaintiff's damages, or some portion thereof, then Gulfside could seek contribution from the others based on its respective fault. But it cannot turn around and seek from the Plaintiff a return of the very same damages just awarded to the Plaintiff. Alternatively, if the Plaintiff's comparative negligence outweighs that of the Defendants, then they will obtain a defense verdict. In that scenario, Gulfside would have no damages, with the exception of fees and costs to defend this action, which explains Gulfside's misguided equitable indemnification cause of action against the Plaintiff.

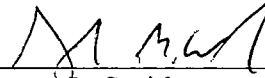
Gulfside's equitable indemnification cause of action against the Plaintiff also fails.

Again, Gulfside can, at this time, at least maintain a cause of action against Don Ross, or the other Defendant. But it cannot maintain that cause of action against the Plaintiff. In this context, equitable indemnification is based on the scenario in which a not-at-fault party (i.e., allegedly Gulfside) seeks indemnification from an at-fault party (i.e., allegedly Don Ross or the other defendant) resulting from the not-at-fault party forced to defend a lawsuit brought by a third party (i.e., the Plaintiff). see *Town of Winnsboro v. Wiedeman-Singleton, Inc.*, 303 S.C. 52, 398 S.E.2d 500 (Ct.App.1990) (stating, “[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.”); see also *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971). Gulfside is attempting to seek attorney’s fees and costs from the Plaintiff, if Gulfside is successful in this action. While Gulfside may be able to maintain that claim against Don Ross, it cannot seek attorney’s fees and costs from the Plaintiff. Gulfside is requesting that this Court ignore “[t]he general rule [] that attorney’s fees are not recoverable unless authorized by contract or statute.” *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660. (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961)). Further, if at the conclusion of this action Gulfside is void of liability, then it may move against the Plaintiff for sanctions, including fees, under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code § 15-36-10 *et seq.* Such a tactic would come in the form of a motion, made after trial or dispositive ruling, not a counterclaim.

For these reasons, and all the above stated reasons, Gulfside’s counterclaim(s) should be dismissed.

(Signature on following page)

SMITH | CLOSSER, P.A.



Steven L. Smith – ssmith@scnlaw.com
(SC Bar No.: 05173)

Zachary J. Closser – zclosser@scnlaw.com
(SC Bar No.: 74005)

Samuel M. Wheeler – swheeler@scnlaw.com
(SC Bar No.: 101008)

7455 Cross County Road, Suite 1

P.O. Box 40578

Charleston, SC 29423-0578

843-760-0220

Attorneys for the Plaintiff

February 26, 2019
Charleston, South Carolina
18-213

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Carl Owens Contracting, Inc.,

Plaintiff,

vs.

Gulfside Supply, Inc. d/b/a Gulfeagle Supply,
and Weyerhaeuser NR Company,

Defendants.

and

Gulfside Supply, Inc. d/b/a Gulfeagle Supply,

Third-Party Plaintiff,

vs.

Don Ross, LLC,

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IN THE COURT OF COMMON PLEAS
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CERTIFICATE OF SERVICE

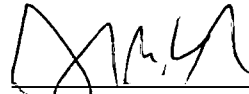
FILED
2019 FEB 27 PM 1:13
JULIE J. ARTHUR
CLERK OF COURT

I certify that on this date a copy of the Plaintiff's Notice of Motion and Motion to Dismiss was served by mailing and electronic mail on the following attorneys:

Helen B. Hester, Esq.
Weiner, Shearhouse, Weitz, Greenberg & Shawe
14 E. State St.
Savannah, GA 31401
hhester@wswgs.com

Jenna K. McGee, Esq.
Parker Poe
200 Meeting St., Suite 301
Charleston, SC 29401
jennamegee@parkerpoe.com

February 26, 2019
18-213



Samuel M. Wheeler

Smith | Closser, P.A.

Attorneys at Law
7455 Cross County Road, Suite One
Post Office Box 40578
Charleston, South Carolina 29423-0578

Samuel M. Wheeler
swheeler@scnlaw.com

Office – 843-760-0220
Fax – 843-552-2678
www.smithclosser.com

February 26, 2019

Charleston County Clerk of Court
Judicial Center
100 Broad St, Ste 106
Charleston, SC 29401

Re: Carl Owens Contracting, Inc. v. Gulfside Supply Inc., et al.
Case No. 2018-CP-10-5367
S|C File No.: 18-213

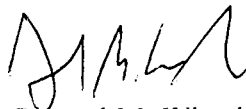
Dear Clerk:

Enclosed please find an original and one copy of the Plaintiff's Notice of Motion and Motion to Dismiss Counterclaims in the above referenced matter. I appreciate you filing the same and returning the filed copy to me in the envelope provided.

Also, enclosed is this firm's check in the amount of \$25 as filing fee.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Samuel M. Wheeler

Enclosures

cc: Carl Owens Contracting, Inc.
Helen B. Hester, Esq.
Jenna K. McGee, Esq.