

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Carl Owens Contracting, Inc.)
(X) Plaintiffs)
v.)
)
Gulfside Supply, Inc., et al.,)
() 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.

SM

8/14/18

Signature of Attorney for Plaintiff

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, SCRCP)
() 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,
Weyerhaeuser NR Company, and Dixie
Contracting, LLC,

Defendants.

and

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

Third-Party Plaintiff,

vs.

Dixie Contracting, LLC and Don Ross, LLC,

Third-Party Defendants.

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

FILED
2019 AUG 15 AM 11:04
CLERK OF COURT
SOUTH CAROLINA

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

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

PLEASE TAKE NOTICE that the Plaintiff, pursuant to Rule 12(b)(6), SCRPC, 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") amended counterclaim(s) against the Plaintiff.

In its amended counterclaims, Gulfside has made allegations that the Plaintiff, or its subcontractors, both now named in this action, were negligent in the installation of the roof on the home at issue in this action. (Gulfside Counterclaims, ¶¶ 13). Gulfside then claims, "Carl

Owens, Dixie Contracting 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 has been forced to incur and will continue 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, Dixie Contracting and Don Ross are the cause of the alleged damages." (Id. at ¶ 14). 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 as counterclaims against the Plaintiff what actually amount to defenses against Carl Owens, claims against the other parties, and potential judge or jury questions regarding setoff, contribution, and apportionment,

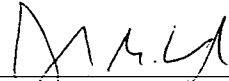
Gulfside's "contribution" cause of action or prayer for relief is without logic. In effect, Gulfside is asking the court to perform a completely circular exchange of damages, alleging, "Carl Owens [is] liable to equitably indemnify Gulfside for any sums which may be adjudged against Gulfside..." This may be an appropriate allegation against the other parties, and Gulfside can request the judge or jury to apportion fault or seek contribution from them, but this claim cannot survive against the Plaintiff. For example, if the judge or jury finds that Gulfside, along with the other parties, are liable for the Plaintiff's damages, or some portion thereof, then Gulfside could seek contribution from the others based on 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 not 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 this cause of action against the other Defendants. 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 the other Defendants) 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 the other Defendants, 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.



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843-760-0220

Attorneys for the Plaintiff

August 14, 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,
Weyerhaeuser NR Company, and Dixie
Contracting, LLC,

Defendants.

and

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

Third-Party Plaintiff,

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IN THE COURT OF COMMON PLEAS
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JULIE J. ARMSTRONG
CLERK OF COURT

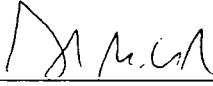
CERTIFICATE OF SERVICE

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

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August 14, 2019
18-213



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August 14, 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

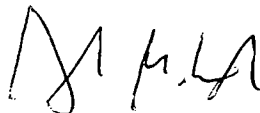
Dear Clerk:

Enclosed please find an original and one copy of the Plaintiff's Renewed 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.