1-4-2018

STARWOOD HOTELS & RESORTS WORLDWIDE, LLC et al., ORDER ON CERTAIN PENDING MOTIONS

Alice D. Bonner
Fulton County Superior Court Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

STARWOOD HOTELS & RESORTS WORLDWIDE, LLC and SLC ATLANTA, LLC f/k/a WESTIN PORTMAN PEACHTREE II, LLC, Plaintiffs, v. NEWCOMB & BOYD, LLP and SKANSKA USA BUILDING, INC., Defendants; SKANSKA USA BUILDING, INC., Third-Party Plaintiff, v. B & W MECHANICAL CONTRACTORS, INC., Third-Party Defendant and Fourth-Party Plaintiff, v. BOILER SUPPLY COMPANY, INC., CLEAVER-BROOKS, INC., and BHW SHEET METAL COMPANY, Fourth-Party Defendants.	Civil Action File No. 2017CV285939 Bus. Case Div. 1

ORDER ON CERTAIN PENDING MOTIONS

The above styled matter is before the Court on various pending motions, *to wit*: (1) Defendant Newcomb & Boyd, LLP's ("N&B") Partial Motion to Dismiss Plaintiffs'

Complaint and, in the Alternative as to Count Nine Only, Motion for a More Definite Statement ("Partial Motion to Dismiss"); (2) Defendant N&B's Renewed Motion to Dismiss and Reply in Support of its Partial Motion to Dismiss Plaintiffs' Complaint and, in the Alternative as to Count Nine Only, Motion for a More Definite Statement ("Renewed Partial Motion to Dismiss"); (3) Plaintiffs' Motion to Strike and/or Dismiss Defendant N&B's Counterclaim; (4) Defendant N&B's Motion for Leave to Amend its Answer to Assert a Counterclaim; (5) Fourth-Party Defendant Cleaver-Brooks, Inc.'s ("Cleaver-Brooks") Motion to Dismiss the Fourth-Party Complaint, Motion to Dismiss the First Amended Fourth-Party Complaint, and Motion to Dismiss Second Amended Complaint for Failure to State a Claim; and (6) Boiler Supply Company, Inc.'s ("Boiler Supply") Motion to Dismiss B&W Mechanical Contractors, Inc.'s ("B&W") Fourth-Party Complaint, Motion to Dismiss B&W's Amended Fourth-Party Complaint, and Motion to Dismiss B&W's Second Amended Fourth-Party Complaint.[1]

SUMMARY OF PLEADINGS

This action arises from alleged defects in the steam boiler system ("Boiler System") installed at the Westin Peachtree Plaza Hotel ("Westin") located at 210 Peachtree Street, N.W., Atlanta, Georgia, 30303, which is owned by Plaintiff SLC Atlanta, LLC ("SLC"). In April 2009, Plaintiffs retained Defendant Skanska USA Building, Inc. ("Skanska") to provide construction management services for a re-glazing project, which involved replacing 6,350 panes of glass damaged during a tornado.

Following the re-glazing project, Plaintiffs proceeded with an upgrade of the Westin's heating and cooling system to replace most of the major mechanical and electrical equipment in

[1] BHW Sheet Metal Company ("BHW") filed a Motion to Dismiss Fourth-Party Plaintiff's Claims of Common Law Contribution and Indemnification, but the motion was subsequently withdrawn. Plaintiffs filed a Motion to Terminate or Modify the Stay of Discovery Imposed by O.C.G.A. §9-11-12(j)(1) which was unopposed by the other parties such that discovery has proceeded pursuant to the Case Management Order entered on December 6, 2017.

the Westin's central plant ("Central Plant Project"). The Central Plant Project included the new Boiler System, which was intended to replace the original 35-year old chillers, boilers, pumps, and controls with a new system to increase heating and cooling efficiency and provide a more sustainable process for water flow and water recycling, among other benefits. The Boiler System includes eight Cleaver-Brooks FLX-1200 steam boilers arranged in two banks of four among other components.

Beginning in the summer of 2008 and continuing over the course of several years, Plaintiff and Defendant N&B executed a series of contracts and amendments thereto related to the Central Plant Project under which N&B provided engineering, design, and commissioning services for the replacement of the Westin's Central Plant, including a replacement Boiler System, over the course of various phases. Pursuant to these agreements, in addition to providing the foregoing services, during the course of the Central Plant Project N&B was to provide a variety of drawings and documents, such as: design and bidding documents; initial, supplemental, and final "Engineering Documents" including plans, specifications and working drawings; initial and updated "Deliverables"; "Contract Documents"; "Drawings"; and "Commissioning Plans" and "Commissioning Reports."[2]

In October 2011, during the Central Plant Project, Skanska was notified by a subcontractor that excessive ambient temperature had been observed in the boiler room. As a result, the Boiler System experienced "hot spots" and other repetitive problems throughout the acceptance phase commissioning performed by N&B. In May 2013, N&B delivered its "Commissioning Report," which described N&B's activities related to the Boiler System, including "verifying and documenting proper performance and compliance of all equipment and all systems installed, verifying that the owner's operating personnel were all adequately trained,

[2] The foregoing terms are as defined in the parties' agreements and the amendments thereto.

and verifying that the operation and maintenance documentation left on site was complete." However, Plaintiffs allege that before and after N&B issued its Commissioning Report the Boiler System continued to experience problems, including: deformation, warping, and failures of the outer panels of the Boiler System and high operating temperatures within the mechanical room; issues with the combustion system and the exhaust system such as improper wiring of exhaust fans, "VFD" failures, improper location sensors, damaged exhaust fan impellers and motors, and the improper set up of draft and combustion rates.

Plaintiffs retained Horizon Engineering Associates, LLP ("HEA") to provide consulting services relating to the problems with the Boiler System. HEA identified several issues ranging from the inadequate design of the Boiler System to a lack of oversight during the Central Plant Project. In 2014, Plaintiffs retained BAA Mechanical Engineers, Inc. ("BAA") to inspect and assess the boiler room combustion air/ventilation system and to provide a report detailing any problems or unsafe conditions and to provide alternative methods to repair and/or correct the identified problems ("Boiler Room Ventilation Project"). Plaintiffs retained HEA to provide a peer review of the documents prepared by BAA and hired Boiler Supply Company of Georgia, Inc. to rebuild and/or repair five of the boilers. However, in 2015 while the Boiler Room Ventilation Project was underway, Boiler Nos. 3 and 4 suffered catastrophic failures while in operation. In January 2016, while the Boiler Room Ventilation Project was ongoing and Boiler Nos. 3 and 4 were still under reconstruction, Boiler Nos. 5 and 6 exploded while in operation and Boiler No. 6 exploded in June 2016.

Plaintiffs initiated this action in February of 2017 alleging that Defendants advertised, planned, engineered, designed, constructed, distributed, sold, supplied, installed, and commissioned a Boiler System that is defective. Plaintiffs allege that as a result of the defective

goods and services provided by Defendants, the Boiler System has never performed as warranted, is unsuitable for use and requires substantial additional alterations, repairs, and/or replacement for safe operation. Plaintiffs assert claims for: (1) breach of contract (against Skanska); (2) breach of contract (against N&B); (3) breach of express warranty (against Skanska and N&B); (4) breach of implied warranty of merchantability (against Skanska and N&B); (5) breach of implied warranty of fitness for particular purpose (against Skanska and N&B); (6) negligence (against Skanska and N&B); (7) fraudulent misrepresentation, concealment and failure to disclose (against Skanska and N&B); (8) negligent misrepresentation (against Skanska and N&B); (9) violation of the Georgia Fair Business Practices Act (against Skanska and N&B); and (10) attorneys' fees (against Skanska and N&B).

Third-Party Pleadings

In April 2017, Skanska filed a Third-Party Complaint against B&W, asserting it entered into a written subcontract with B&W whereby B&W agreed to provide all necessary labor, materials, supervision and equipment for the mechanical and plumbing work for the Central Plant Project, including furnishing and installing the boilers at issue in this action. Skanska contends the work involving the boilers which Plaintiffs allege was not performed in accordance with Skanska's contract was performed by B&W or its subcontractors and the boilers Plaintiffs allege were defective were furnished by B&W or its subcontractors. Thus, Skanska asserts under the parties' contract any recovery by Plaintiffs against Skanska would entitle Skanska to recover against B&W.

Fourth-Party Pleadings

In May 2017, B&W filed a Fourth-Party Complaint against Boiler Supply, Cleaver-Brooks, and BHW, which was subsequently amended. According B&W's amended fourth-party

pleadings, Boiler Supply, Cleaver-Brooks and BHW each sold, supplied, manufactured, and/or installed some of the Boiler System components that were sold to B&W and which are at issue in this litigation and in the third-party claims asserted by Skanska against B&W. B&W asserts a contractual relationship with each of the Fourth-Party Defendants pursuant to various Purchase Orders, a change order and subcontract agreement executed by the parties,[3] agreements which include express warranty provisions.

B&W alleges Boiler Supply, Cleaver-Brooks, and BHW were on notice of the overheating and alleged defects with the Boiler System but did not repair or replace their work or products after notification of the boilers' inability to function as intended as alleged by Plaintiffs. Although B&W denies any liability, it asserts that if Skanska recovers against it in this action, B&W would be entitled to recover against Boiler Supply, Cleaver-Brooks, and/or BHW based upon breach of contract, breach of express and implied warranties, and contractual indemnity and/or common law indemnity for all amounts recovered against B&W by Skanska.

ANALYSIS AND CONCLUSIONS OF LAW

I. Plaintiffs' Motion to Strike and/or Dismiss N&B's Counterclaim and N&B's Motion to Amend Answer to Complaint to Assert Counterclaims

Plaintiffs filed their original complaint on February 10, 2017. N&B filed a Motion to Dismiss and its Answer on March 20, 2017 but at that time did not assert a counterclaim. Nevertheless, N&B's initial Answer included a prayer of relief including, *inter alia*, "that the Court dismiss Plaintiff's [sic] Complaint with all costs being cast against Plaintiffs, including reasonable attorney's fees and costs."[4]

Thereafter Plaintiffs filed their First Amended Complaint on April 24, 2017, which omitted two previously pled causes of action and included additional facts in support of their

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3 B&W's First Amended Fourth-Party Complaint, Exhibits B-D.

4 Defendant N&B's Answer to Plaintiffs' Complaint, p. 29.

remaining claims, including new contractual allegations and claims premised upon a 2008 Engineering Services Agreement. On May 24, 2017, N&B filed an Answer to the First Amended Complaint and therein for the first time asserted a counterclaim for attorneys' fees based on a "prevailing party" provision contained in the parties' 2008 Engineering Services Agreement and 2010 Engineering Services Agreement. Plaintiffs, here, move the Court to strike and/or dismiss N&B's counterclaim as procedurally defective and N&B, in turn, seeks leave of Court to amend its answer to assert its counterclaim.

O.C.G.A. §9-11-13 provides in relevant part:

> (e) Counterclaim maturing or acquired after pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.
>
> (f) Omitted counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, **or when justice requires**, he may by leave of court set up the counterclaim by amendment.

(Emphasis added).

Our appellate courts have held trial courts "should be very liberal in allowing amendments to include compulsory counterclaims, and even permissive counterclaims where no prejudice would result." *See* Williams v. Buckley, 148 Ga. App. 778, 779, 252 S.E.2d 692, 693 (1979); Kitchens v. Lowe, 139 Ga. App. 526, 528, 228 S.E.2d 923, 925 (1976); Blount v. Kicklighter, 125 Ga. App. 159, 161, 186 S.E.2d 543, 545 (1971). Importantly,

> when justice requires furnishes an independent ground for setting up an omitted counterclaim. Thus, a trial court should grant leave to set up an omitted counterclaim 'when justice ... requires' even though the other grounds, 'oversight, inadvertence, or excusable neglect' are not present." White v. Fidelity Nat. Bank, 188 Ga. App. 539, 540(1), 373 S.E.2d 640 (1988) (citation omitted)...Moreover, because the failure to plead a compulsory counterclaim can result in loss of that counterclaim forever, the

> courts generally should be forgiving when leave is sought to add compulsory counterclaims, at least so long as the plaintiff makes no showing of prejudice.

Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 641–42, 755 S.E.2d 675, 678 (2014) (citations omitted).

Here, having considered the pleadings, the Court finds grounds exist under O.C.G.A. §9-11-13(e) and (f) to grant N&B leave to assert its counterclaim. In their amended pleadings, Plaintiffs voluntarily abandoned certain claims N&B had moved the Court to dismiss and added contractual allegations and claims regarding the 2008 Engineering Services Agreement not previously made in the original Complaint. To the extent N&B's counterclaim is predicated on the 2008 Engineering Services Agreement which was placed at issue for the first time in Plaintiffs' amended pleadings, permitting the counterclaim is proper under O.C.G.A. §9-11-13(e).

To the extent N&B's counterclaim is predicated on the 2010 Engineering Services Agreement which was placed at issue in the original Complaint, N&B's counterclaim seeking attorneys' fees based on a contractual provision of that same agreement is compulsory. *See* Steve A. Martin Agency, Inc. v. PlantersFIRST Corp., 297 Ga. App. 780, 782, 678 S.E.2d 186, 188–89 (2009) ("[I]f a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, such claim must be asserted as a compulsory counterclaim. The broad test to be applied in determining whether a counterclaim is compulsory is whether a logical relationship exists between the respective claims asserted by the opposing parties. In making this determination, we look to see whether judicial economy and fairness dictate that all the issues be resolved in one lawsuit. A logical relationship arises when (1) the same aggregate or operative

facts serve as the basis for both claims, or (2) the case facts supporting the original claim activate legal rights of the defendant that would otherwise remain dormant").

However, given the "liberal" and "forgiving" standard when leave is sought to add a compulsory counterclaim (Williams, *supra*; Boyd, *supra*) and whereas even in its initial Answer N&B requested that all costs, including reasonable attorney's fees and costs, be cast against Plaintiffs such that no prejudice or surprise can be shown, the Court finds justice requires that leave be granted to allow N&B to amend its answer to assert its counterclaim. Accordingly, Plaintiffs' Motion to Strike and/or Dismiss Defendant N&B's Counterclaim is hereby DENIED and N&B's Motion for Leave to Amend its Answer to Assert a Counterclaim is hereby GRANTED.

II. N&B's Partial Motion to Dismiss and Renewed Partial Motion to Dismiss

N&B moves to dismiss Counts III (breach of express warranty), IV (breach of implied warranty of merchantability), V (breach of implied warranty of fitness for a particular purpose), and IX (violation of the Georgia Fair Business Practices Act) of Plaintiffs' First Amended Complaint.[5]

> [A] motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought . . . .

[5] Plaintiffs' First Amended Complaint moots N&B's initial Partial Motion to Dismiss with respect to Counts II and III of the original Complaint (strict liability and unjust enrichment, respectively) given those claims were abandoned in Plaintiffs' amended pleadings. The Court herein focuses on N&B's Renewed Partial Motion to Dismiss Plaintiffs' current, operative pleading—the First Amended Complaint—and the claims asserted therein, but has also considered arguments made in N&B's initial motion to the extent referenced in and relevant to the issues raised in the Renewed Partial Motion to Dismiss.

Radio Perry, Inc. v. Cox Communications, Inc., 323 Ga. App. 604, 605 (2013). *See also* O.C.G.A. § 9-11-12(b)(6). In ruling on a motion to dismiss, the Court must accept as true all of plaintiff's well-pleaded factual allegations, and draw all reasonable inferences in plaintiff's favor. Radio Perry, Inc., 323 Ga. App. at 605. *See* Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017).

a. ***Claims brought under Article 2 of the Uniform Commercial Code***

N&B asserts Plaintiffs' claims for breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose—claims brought under Article 2 of the Uniform Commercial Code ("UCC")—should be dismissed because the parties' agreements do not fall under Article 2. The Court agrees.

> Article 2 of Title 11, Georgia's enactment of the Uniform Commercial Code, applies to actions for the breach of a contract…[T]he provisions of Article 2 are applicable both to a contract that involves only the sale of goods and a contract that contains a blend of sale and non-sale elements "if the dominant purpose behind the contract reflects a sales transaction." (Citation and punctuation omitted.) Ole Mexican Foods, Inc. v. Hanson Staple Co., 285 Ga. 288, 290, 676 S.E.2d 169 (2009). To make the determination of the "dominant purpose," a court "must look to the primary or overall purpose of the transaction." (Citation and punctuation omitted.) Id. at 290, 676 S.E.2d 169.
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> "When presented with two elements of a contract, each absolutely necessary if the subject matter is to be of any significant value to the purchaser, it is a futile task to attempt to determine which component is 'more necessary.' Thus, [we must look] to the predominant purpose, the thrust of the contract as it would exist in the minds of reasonable parties. There is no surer way to provide for predictable results in the face of a highly artificial classification system." [Cit.] J. Lee Gregory, Inc. v. Scandinavian House, L.P., 209 Ga. App. 285, 288, 433 S.E.2d 687 (1993).

Suntrust Bank v. Venable, 299 Ga. 655, 657, 791 S.E.2d 5, 7 (2016).

"Factors to be considered in determining the predominant element of a contract include the proportion of the total contract cost allocated to the goods and whether the price of the goods are segregated from the price for services. A smaller proportion of the total price assignable to services, or a failure to state a separate price for services rendered, suggest a contract for the sale of goods with services merely incidental." D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Corp., 233 Ga. App. 252, 255, 504 S.E.2d 70, 73 (1998) (citations and punctuation omitted). *See, e.g.,* Mail Concepts, Inc. v. Foote & Davies, Inc., 200 Ga. App. 778, 780, 409 S.E.2d 567, 569 (1991) (UCC inapplicable to contract under which plaintiff's predecessor agreed to make rubber plates to imprint magazines with recipients' names, box magazines in cartons, prepare cartons for shipment and ship them to recipients; the primary purpose of the transaction was the imprinting, packaging, labeling and shipping of magazines, not the production of imprinting plates); Dixie Lime, etc., Co. v. Wiggins Scale Co., 144 Ga. App. 145(2) (1977) (UCC inapplicable to contract to construct a pit and install a truck scale); Mingledorff's, Inc. v. Hicks, 133 Ga. App. 27, 27, 209 S.E.2d 661, 662 (1974) (UCC inapplicable to contract for the installation of heating and air conditioning systems in an apartment complex). *Compare* D.N. Garner Co. v. Georgia Palm Beach Aluminum Window Corp., 233 Ga. App. 252, 253, 504 S.E.2d 70, 72 (1998) (UCC applicable to contract between general contractor and subcontractor for the sale and installation of windows as the sale of windows was the predominant purpose of the transaction); J. Lee Gregory, Inc. v. Scandinavian House, L.P., 209 Ga. App. 285, 288, 433 S.E.2d 687, 689 (1993) (same); Alco Standard Corp. v. Westinghouse Elec. Corp., 206 Ga. App. 794, 426 S.E.2d 648 (1992) (UCC inapplicable to relationship between owner of autotransformers and corporation which agreed to repair and rewind autotransformers, where materials furnished in connection with repair were an incidental part of services provided).

Where the predominant element of an agreement is for the provision of design and engineering work, the agreement is a services contract which is not subject to Article 2 of the UCC. *See* Fruin-Colnon Corp. v. Air Door, Inc., 157 Ga. App. 804 (1981) (UCC inapplicable to agreement for engineering work to provide load bearing calculations and to redesign the load bearing supports for subway steel grating and framework). *See also* Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262 (D. Me. 1977) (contract for design and installation of heat and chemical recovery boiler and associated equipment at pulp mill, which involved predominantly the rendition of services, not the sale of goods, was not "transaction in goods" and therefore fell outside the scope of Article 2 of the UCC); Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n, 964 So. 2d 1100 (Miss. 2007) (UCC inapplicable to breach of contract case involving defective combustion turbine control system, where only 40% of contract dealt with hardware, while 60% of contract dealt with services, including the testing and design of the turbine); De Matteo v. White, 233 Pa. Super. 339, 346 (Pa. Super. Ct. 1975) (UCC inapplicable to contract to construct residence).

Here, the parties' agreements and the amendments thereto clearly establish the purpose for Plaintiffs and N&B's contractual relationship was for the provision of engineering services related to the Central Plant Project. The agreements executed in 2008 and 2010 are in fact titled "Engineering and Services Agreement." Articles I and II of those agreements detail the engineering services N&B as "Engineer" was retained to provide. For example, Article I of the 2008 Engineering Services Agreement outlines the "General Services" to be provided:

> **1.01 Engineering Services**. [N&B]'s "Services" shall consist of, and pursuant to this Agreement [N&B] agrees to provide, those services for the Project required by the terms and conditions hereof, including but not limited to engineering and designing the Work, and providing Construction Phase Services as set forth herein. **In this**

> **regard, [N&B] shall be responsible to design and engineer (and as used herein the term "Work" shall mean) all work, labor, materials, finishes, systems, equipment and services necessary to construction the following amenities, systems, features and aspects of the Project as more particularly described on Exhibit A**, a copy of which is attached hereto and incorporated herein by reference. As used herein the term "Engineering Documents" shall mean all plans and specifications and all other drawings, designs, models, prints, computations, instructions and other materials prepared by or through [N&B] (or any of [N&B]'s Consultants) specifying, describing or relating to the Work, including but not limited to the working drawings and other documents to be prepared by [N&B] during the Engineering Documents Phase pursuant to Section 2.02 herein. **[N&B] shall be responsible for the professional quality, technical accuracy and the coordination of all Engineering Documents and other Services provided by or through [N&B] or [N&B]'s Consultants under this Agreement and for the coordination of the Services performed by [N&B] or [N&B]'s Consultants** with services provided by the Owners, Owner's Consultants, Contractor or any other entity retained by the Owner for and necessary to the Project. [N&B]'s Services shall conform to, and **the Work shall be engineered and designed in accordance with the requirements set forth in the Program attached hereto as Exhibit A**...

Exhibit A to the 2008 Engineering Services Agreement further describes the "Program" for the Central Plant Project and the engineering related services Plaintiffs contracted N&B to provide:

> The Project generally consists of all engineering and other design and related services necessary to produce design and bidding documents sufficient to fully replace and refurbish the HVAC central plant at the Westin Peachtree Plaza located at 210 Peachtree Street, NW, Atlanta, Georgia (the "Hotel") in accordance with the System Requirements and Qualifications, as set forth below...**[N&B] shall provide all engineering services and disciplines necessary to fully engineer the Project, including but not limited to hearing, ventilating and air conditioning, plumbing, fire protection, electrical, and noise and vibration control.** In addition, as part of the Secondary Engineering Phase (as described in more detail below and in the Agreement), Engineering will develop alternatives for the chiller

> plant and boiler plant and automatic digital controls for new central plant equipment.

Nevertheless, Plaintiffs urge the "deliverables" required under the parties' agreements (*e.g.*, drawings, plans, documents, commissioning report, etc.) are considered goods such that the agreements should be considered hybrid or mixed contracts. Relying on S. Tank Equipment Co. v. Zartic, Inc., 221 Ga. App. 503, 503-04 (1996) (hereinafter "Tank Equipment"), Plaintiffs contend the failure to state a separate price for services rendered, as here, suggests a contract for the sale of goods with services merely incidental. Even assuming, *arguendo*, that such "deliverables" are goods for sale within the meaning of Article 2, Tank Equipment does not stand for the broad proposition that all contracts where a separate price for services is not specified are contracts for the sale of goods. Rather, as noted in Heart of Texas Dodge, Inc. v. Star Coach, LLC, 255 Ga. App. 801 (2002), "[w]hether the price of goods is segregated from the price of services is but one factor to be considered." Id. at 804. In evaluating mixed contracts, courts must "[c]onsider[] the totality of the circumstances presented" to determine whether the rendition of goods or services was merely incidental to the contract. Id.

In the present case, although in performing its work N&B was required to produce certain "deliverables", the overall purpose and thrust of the agreements as between Plaintiffs and N&B was to "provide all engineering services and disciplines necessary to fully engineer the [Central Plant] Project" rather than for the sale of the deliverables.[6] The contracts themselves—including the title to the agreements, descriptions throughout of the "Services" to be provided, and denominations therein of Starwood Hotels and Resorts Worldwide, Inc. as Owner and N&B as Engineer (rather than as buyer and seller)—clearly demonstrate the parties' contractual relationship was predominantly for the provision of engineering services, with the production of

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[6] 2008 Engineering Services Agreement, Exhibit A, p. 15.

drawings, engineering documents, and related documents and reports being merely incidental thereto. Further, while the 2008 and 2010 Engineering Services Agreements do not segregate fees owed to N&B for goods/deliverables produced versus services rendered, notably, payments were not due at the time plans, drawings, documents, etc. were delivered. Rather, N&B was to be paid a "Basic Fee" payable "in monthly installments, measured by the percentage of completion for the preceding month," further supporting the conclusion the parties' agreements were predominantly for the provision of services rather than the production and sale of engineering drawings, documents, and reports.[7] Given the essence and dominant purpose of the parties' agreements was for the provision of services, the Court finds they do not fall within the purview of Article 2 of the UCC.

b. ***Claim for violation of the Georgia Fair Business Practices Act***

N&B also moves to dismiss Count IX, brought under the Georgia Fair Business Practices Act, O.C.G.A. §§ 10-1-390 *et seq.* ("FBPA"), as time barred. Pursuant to O.C.G.A. §10-1-401:

> (a) No private right of action shall be brought under this part:
> (1) More than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; or
> (2) More than two years after the termination of any proceeding or action by the State of Georgia, whichever is later.

"The true test to determine when the cause of action accrued is to ascertain the time when the plaintiff could first have maintained his action to a successful result." Weinstock v. Novare Group, Inc., 309 Ga. App. 351 (2011).

Here, the pleadings establish Plaintiffs were well aware of problems with the Boiler System in 2013. In a letter dated March 8, 2013, N&B informed Plaintiffs that "the boiler problems f[e]ll into three broad categories – controls, refractory, and casing."[8] N&B provided its

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7 2008 Engineering Services Agreement, Art. 3.01; 2010 Engineering Services Agreement, Art. 3.01.

8 First Amended Complaint, ¶95.

Commissioning Report in May 2013 and Plaintiffs acknowledge they "experienced severe repetitive problems with the Boiler System and its related components" both before and after receiving the Commissioning Report.[9] Further, in 2013 Plaintiffs first retained HEA "to provide consulting services relating to the problems with the Boiler System" and HEA's analysis revealed "several issues" with the Boiler System that were detailed in a July 2013 Boiler Summary Report, issues that were then conveyed to Defendants by Plaintiffs via letter dated September 12, 2013.[10]

In short, the pleadings demonstrate that, at the latest, the FBPA claim accrued in 2013 when Plaintiffs knew or should have known of the existence of the problems with the Boiler System. The applicable 2-year statute of limitations, thus, expired in 2015, nearly two years before this action was initiated, such that the FBPA claim is time barred.

Given all of the above, N&B's Renewed Partial Motion to Dismiss is GRANTED and Counts III, IV, and V, to the extent predicated on Article 2 of the UCC, and IX of Plaintiffs' First Amended Complaint are hereby DISMISSED.

III. Fourth-Party Defendants Boiler Supply and Cleaver-Brooks' Motions to Dismiss Fourth-Party Plaintiff B&W Fourth Party Pleadings

In their respective motions, Fourth-Party Defendants Boiler Supply and Cleaver-Brooks move this Court to Dismiss Fourth-Party Plaintiff B&W's claims for contractual and common law indemnity and express and implied warranty for failure to state a claim.[11]

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9 First Amended Complaint, ¶101.

10 First Amended Complaint, ¶¶ 105-108; Original Complaint, Exhibit H.

11 In its Second Amended Fourth-Party Complaint, B&W abandons a contribution claim previously asserted against Fourth-Party Defendants Boiler Supply and Cleaver-Brooks. The Second Amended Fourth-Party Complaint, thus, moots some of the arguments raised in Boiler Supply and Cleaver-Brooks' motions to dismiss B&W's Fourth-Party Complaint and First Amended Fourth-Party Complaint. The Court herein focuses on Boiler Supply and Cleaver-Brooks' respective motions to dismiss B&W's current, operative pleading—the Second Amended Fourth-Party Complaint—and the claims asserted therein, but has also considered arguments made in Boiler Supply and Cleaver-Brooks' previous motions to the extent referenced in and relevant to the issues raised in their most recent motions to dismiss.

a. *Indemnity claims*

> [U]nder Georgia law indemnity is defined as the obligation or duty resting on one person to make good any loss or damage another has incurred by acting at his request or for his benefit. And despite the enactment of O.C.G.A. § 51–12–33, it is well settled that Georgia law continues to recognize two broad categories of indemnity: as created by contract, as between a surety and a debtor; and **under the common law of vicarious liability, as between principals and agents**. Specifically with regard to the latter category, [i]f a person is compelled to pay damages because of **negligence imputed to him as the result of a tort committed by another**, he may maintain an action for indemnity against the person whose wrong has thus been imputed to him.

Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. 713, 715–16, 747 S.E.2d 10, 13 (2013) (citations, footnotes and punctuation omitted; emphasis added) (affirming dismissal of common law indemnity claim where claimant did not allege contractual indemnity or vicarious liability based on any agent-principal or employer-employee relationship). *See* Old Republic Nat. Ins. Co. v. Panella, 319 Ga. App. 274, 276, 734 S.E.2d 523, 526 (2012) ("This Court has held that "indemnity" means "reimbursement, restitution, or compensation," and Black's Law Dictionary uses a similar definition: Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty") (citations omitted).

Under a contractual indemnification provision, "the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person, or against loss resulting from such liability." Id. at 277. Georgia follows "the well established rule that contracts of express indemnity are construed strictly and absent plain, clear and unequivocal language will not be interpreted to indemnify against acts attributable to the indemnitee's own negligence." Binswanger Glass Co. v. Beers Const. Co., 141 Ga. App. 715,

717, 234 S.E.2d 363, 365 (1977) (citing Batson-Cook v. Georgia Marble Setting Co., 112 Ga. App. 226, 144 S.E.2d 547 (1965)). *See* Foster v. Nix, 173 Ga. App. 720, 724, 327 S.E.2d 833, 837 (1985).

With respect to common law indemnity, under Georgia law, "[f]or the negligence of one person to be properly **imputable to another**, the one to whom it is imputed must stand in such a relation or privity to the negligent person **as to create the relation of principal and agent**." O.C.G.A. § 51-2-1 (emphasis added). "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1. *See also* Anthony v. Am. Gen. Fin. Servs., 287 Ga. 448, 450 (2010) (imputation in an employment context arises under the doctrine of vicarious liability, in which the employer-principal becomes liable for the tortious acts of its employee-agent if such acts occur in the course of employment).

Here, the Purchases Orders which B&W asserts form the basis of its contractual relationship with Boiler Supply and Cleaver Brooks, respectively, do not contain any provision which would indemnify B&W from liability for the types of losses alleged in this action related to the Boiler System.[12] Although B&W urges in its briefs that the existence of an express warranty in the Purchase Orders gives rise to an implied contract of indemnity, there is no contractual language shifting responsibility or liability in the warranty provision or otherwise from which such an obligation to indemnify may be inferred or implied. Moreover, the fourth party pleadings do no allege a principal-agent or employer-employee relationship such as would support a claim for common law indemnity under the doctrine of vicarious liability or imputed

[12] The only reference to indemnification in the Purchase Orders is with respect to claims based on "actual or alleged infringement of letters patents or any litigation based thereon," a matter not at issue in this litigation.

negligence. The Court finds B&W has failed to state a claim for contractual or common law indemnification against Boiler Supply or Cleaver-Brooks.

b. ***Warranty claims***

Boiler Supply and Cleaver Brooks also move to dismiss B&W's claims for breach of express and implied warranties, asserting the allegations of the fourth-party pleadings fail to state such claims and that they are time barred.

B&W's Purchase Orders, which appear to have been executed by Boiler Supply and Cleaver-Brooks, respectively, each contain warranty language. Specifically with respect to Boiler Supply, the General Conditions for Purchase Orders B1004-E002 and B1004-E006 state in part:

> All material and equipment furnished under this order shall be guaranteed by the Seller to the Purchaser and Owner to be fit and sufficient for the purpose intended, and that they are merchantable, of good material and workmanship and free from defects, and **Seller agrees to replace without charge to Purchaser or Owner said material and equipment, or remedy any defects** latent or patent not due to ordinary wear and tear or due to improper use or maintenance, **which may develop within one (1) year from [sic] date of acceptance by the Owner, or within the guarantee period set forth in applicable plans and specifications, whichever is longer**. The warranties herein are in addition to those implied by law…All material and equipment furnished shall be in strict compliance with plans, specifications, and job requirements, and the Seller shall be bound thereby in the performance of this contract.[13]

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13 (Emphasis added). Attachments "A" to these Purchase Orders further provide:

> **IV. Warranties and Guarantees**
> A. All warranties and guarantees shall be in accordance with the contract documents. Validated warranties shall be furnished by the supplier. The date of substantial completion as determined by the Architect shall be the date of commencement for all equipment warranties and all guarantees, unless specifically provided otherwise in the certificate of substantial completion.
>
> **The warranty for this project is <u>One</u> year from date of substantial completion, unless stated otherwise in the Purchase Order.**

With respect to Cleaver-Brooks, the General Conditions for Purchase Order B1004-E005 provides in part:

> All material and equipment furnished under this order shall be guaranteed by the Seller to the Purchaser and Owner to be fit and sufficient for the purpose intended, and that they are merchantable, of good material and workmanship and free from defects, and **Seller agrees to replace without charge to Purchaser or Owner said material and equipment, or remedy any defects** latent or patent not due to ordinary wear and tear or due to improper use or maintenance, **which may develop within one (1) year from [sic] date of start-up or 18 months from shipment whichever is first.** The warranties herein are in addition to those implied by law…All material and equipment furnished shall be in strict compliance with plans, specifications, and job requirements, and the Seller shall be bound thereby in the performance of this contract.[14]

However, Change Order 1 of Purchase Order B1004-E005 includes the same warranty language under its General Conditions as stated in the General Conditions to the Boiler Supply Purchase Orders.

Notably, the foregoing warranty language does not specify the time or manner in which a request to replace or repair must be made but rather only provides that the Seller agrees to

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> B. the supplier shall be responsible for all parts repair and/or replacement for the entire warranty period.

(Emphasis in original).

14 (Emphasis added). Attachment "A" to this Purchase Order provides:

> **IV. Warranties and Guarantees**
> A. All warranties and guarantees shall be in accordance with the contract documents. Validated warranties shall be furnished by the supplier. The date of substantial completion as determined by the Architect shall be the date of commencement for all equipment warranties and all guarantees, unless specifically provided otherwise in the certificate of substantial completion.
>
> **The warranty for this project is <u>One</u> year from date of start-up or 18 months from shipment whichever is first.**
>
> B. The supplier shall be responsible for all parts repair and/or replacement for the entire warranty period.

(Emphasis in original).

replace materials and equipment or remedy any defects "which may develop" within the warranty period. Having considered the pleadings and arguments presented and given the warranty language summarized above, the Court finds the issues raised in Boiler Supply and Cleaver-Brooks' motions with respect to B&W's express and implied warranty claims are more appropriately considered and addressed at the summary judgment stage after relevant discovery is completed. Accordingly, at this juncture the Court will reserve ruling on B&W claims for breach of express and implied warranties.

CONCLUSION

Having considered the pleadings and as outlined above, the Court hereby: DENIES Plaintiffs' Motion to Strike and/or Dismiss Defendant N&B's Counterclaim; GRANTS N&B's Motion for Leave to Amend its Answer to Assert a Counterclaim; GRANTS N&B's Renewed Partial Motion to Dismiss, dismissing Counts III (breach of express warranty), IV (breach of implied warranty of merchantability), V (breach of implied warranty of fitness for a particular purpose), and IX (violation of the Georgia Fair Business Practices Act) of Plaintiffs' First Amended Complaint as asserted against N&B; and GRANTS Fourth-Party Defendants Boiler Supply and Cleaver-Brooks' motions to dismiss with respect to the fourth-party claims for contractual and implied indemnification and RESERVES RULING on the fourth-party claims for breach of express and implied warranties.

SO ORDERED this 4 day of January, 2018.

JUDGE JOHN J. GOGER, *on behalf of*
ALICE D. BONNER, SENIOR JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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