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

CAMBRIDGE SWINERTON, LLC, Plaintiff,	)	
v.	)	CIVIL ACTION FILE NO.: 2016CV274513
GILBANE BUILDING CO., TRAVELERS CAS. & SURETY CO. OF AMERICA, LLC, and WHOLESALE BUILDING PRODUCTS, INC., Defendants,	)	Bus. Ct. Div. 1
WHOLESALE BUILDING PRODUCTS, INC., Third Party Plaintiff,	)	
v.	)	
NEW ALENCO WINDOWS, LTD., Third Party Defendant.	)	

ORDER ON PENDING MOTIONS

The above styled matter is before the Court on: (1) New Alenco Window, Ltd.'s Motion for Reconsideration of the Court's Order Granting Gilbane Building Company's Motion to Compel ("New Alenco's Motion for Reconsideration"); (2) Defendant/Third Party Plaintiff Wholesale Building Products, Inc.'s Motion for Partial Summary Judgment ("Wholesale's Summary Judgment Motion"); and (3) Third Party Defendant New Alenco Window, Ltd.'s Motion for Summary Judgment ("New Alenco's Summary Judgment Motion"). Having considered the entire record, the Court finds as follows:

SUMMARY OF ALLEGATIONS

Cambridge Swinerton, LLC ("CS") was a subcontractor hired by Gilbane Building Co. ("Gilbane") for a mixed use construction project known as Emory Point Phase II ("Project"), owned by EP II, LLC ("EP"). Gilbane served as the general contractor and construction manager

while CS was the "trade contractor" responsible for the completion of certain scopes of work. As part of its scope of work CS was to procure Ply Gem 1100 series windows for the Project which they purchased from Defendant/Third-Party Plaintiff Wholesale Building Products ("Wholesale"). Wholesale, a construction materials supplier, purchased the Ply Gem windows from New Alenco Windows Ltd. a/k/a PlyGem Industries ("New Alenco") for $387,013.06.

CS and Wholesale's agreement concerning the windows was memorialized in a Purchase Order dated Dec. 31, 2013 ("Wholesale Purchase Order").[1] The Wholesale Purchase Order contained a description of the required windows and two "General Comments": (1) "All window assemblies shall be Ply Gem Series HP 1100 Almond, Vinyl, **per approved submittals**" (emphasis added); and (2) "NOTE: Window pricing is good through September 19, 2014, for the items and quantities as listed on WBP quote #1218gk2, dated December 18, 2013."

Before the Wholesale Purchase Order was executed, CS provided a window submittal to Gilbane and EP's representative concerning the windows required for the Project that contained plans and specifications related to the Ply Gem windows ("Window Submittal"). The Window Submittal was ultimately approved by CS on Jan. 17, 2014, approved by Gilbane on Jan. 27, 2014, and approved by the owner's representative on Feb. 7, 2014. The Window Submittal includes a consumer limited warranty ("Ply Gem Warranty" or "Warranty") that states in pertinent part:

> This Limited Warranty covers 1110 single hung, 1120/30 sliding window, 1140 casement, 1150 double hung, 1160 awning and 1180 sliding patio door series products and extends only to the Original Purchaser. This Limited Warranty cannot be assigned or transferred by operation of law or otherwise and shall not be extended to any subsequent owners.

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[1] Wholesale's Motion for Partial Summary Judgment ("MPSJ"), Ex. B.

WINDOW and DOOR

Ply Gem Windows, warrants, subject to the conditions and restrictions contained herein, that Ply Gem Windows fenestration products shall be guaranteed against defects in materials and workmanship for a period of one (1) year. This warranty does not include parts that have been abused, misused, or not used for the purpose intended nor parts that have been damaged in shipments that are not the responsibility of Ply Gem Windows.

INSULATED GLASS

Ply Gem Windows insulated glass units to which this Limited Warranty applies contained in insulated glass windows and doors manufactured by Ply Gem Windows, shall be free from material obstruction of vision as a result of film accumulation on interior glass surfaces resulting exclusively from failure of the hermetic edge seal (from sources other than glass breakage or cracking) due to faulty manufacture by Ply Gem Windows for a period of ten (10) years from date of manufacture of the Ply Gem Windows insulated window or door containing the unit.

If the unit fails to perform in accordance with the above statements during the applicable warranty period, Ply Gem Windows shall, upon written notification and validation of the complaint by inspection by its designated representative, supply a replacement for the nonconforming unit or grant a credit for a portion of the cost of the unit as hereinafter specified. Ply Gem Windows' obligation under this Limited Warranty is to supply a replacement unit for the nonconforming unit FOB Ply Gem Windows' nearest active dealer to the installation during the first year of the Limited Warranty period. During the second year through the end of the tenth year of the Limited Warranty period, Ply Gem Windows' obligation is to issue a credit to the Original Purchaser toward purchasing a replacement unit manufactured by Ply Gem Windows.

Labor of any kind or other costs to remove the non-conforming unit and/or to install the replacement unit is not included in this Limited Warranty. Ply Gem Windows shall bear no other expense of any kind and the Original Purchaser's exclusive remedy shall be replacement or credit on the basis stated. The Original Purchase shall pay and all labor costs necessary to install replacement units…

ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE LIMITED IN TIME TO THE DURATION OF THIS EXPRESS LIMITED WARRANTY. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. PLY GEM WINDOWS SHALL NOT BE

> LIABLE FOR ANY CONSEQUENTIAL DAMAGES OR INCIDENCTAL DAMAGES FOR BREACH OF ANY EXPRESS, WRITTEN, ORAL OR IMPLIED WARRANTIES. YOUR EXCLUSIVE REMEDY SHALL BE REPLACEMENT OR CREDIT ONLY ON THE TERMS STATED IN THE EXPRESS LIMITED WARRANTY. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU.

Further, in an email exchange between CS Project Manager, Zachary Brehm, and a Wholesale agent, Jennifer Collins, Mr. Brehm stated: "Warranty shall be 1 year on the frame and 10 years on the glazing per Plygem [sic]."[2]

In response to the Wholesale Purchase Order, Wholesale then procured windows from New Alenco, the window manufacturer. Wholesale and New Alenco's agreement is memorialized in two purchase orders, both dated May 7, 2014 ("New Alenco Purchase Orders"). However, the New Alenco Purchase Orders contain no terms and conditions and no warranty and did not include the Window Submittal or the Ply Gem Warranty contained therein.

According to CS, the Ply Gem windows were defective from the outset in terms of window pressure rating and in terms of performance. The windows were to be designed pressure ("DP") rated to "DP 40" but they allegedly were not.[3] Further, the windows were installed in October 2014 and allegedly leaked from the moment they were installed. The windows were tested by third parties for the ability to withstand water leaks, penetrations and intrusions and failed chamber testing in early October 2014. CS asserts New Alenco and Wholesale were immediately notified of the deficient windows, and Mr. Brehm avers that on the day the windows were discovered to be defective, Oct. 6, 2014, he requested that New Alenco and Wholesale replace any defective windows.[4] However, New Alenco and Wholesale did not

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2 Wholesale's MPSJ, Ex. C.

3 Brehm Aff., ¶15. *See also* Brehm Depo., p.135; *compare* Lloyd Depo., pp. 37-41.

4 Brehm Aff., ¶16.

replace the defective windows or offer a credit but instead sought to identify and repair the problem. According to CS, on or about Oct. 21, 2014, New Alenco technicians began repairs on the windows at buildings D1 and D2 and completed those repairs on or about Nov. 12, 2014. However, a "major rain event" on Nov. 17, 2014 resulted in water penetration at repaired windows in Building D1. Continued leaks were observed at the windows in building D1 Nov. 23-24, 2014 and the installed windows failed additional field leak tests on Dec. 1, 2014 and Dec. 18, 2014.

CS asserts EP declared Gilbane in default on Jan.9, 2015 because of the leaking Ply Gem windows and Gilbane, in turn, declared CS in default due to the windows. In February 2015, EP directed Gilbane to replace the windows on the Project with more expensive windows manufactured by a different company. On Dec. 3, 2015, CS sent a letter notifying Wholesale and New Alenco of its intent to back charge Wholesale for the allegedly deficient Ply Gem windows, claiming $2,452,327.80 in damages including direct and indirect damages.

Although it appears undisputed the Ply Gem windows leaked after installation, the parties dispute the cause of the leaks and who is liable for any resulting damages. In this litigation, Gilbane has alleged CS and its supplier provided defective Ply Gem windows that leaked and did not meet the Project requirements and failed to provide any acceptable solution to cure the deficiency, requiring Gilbane to replace the windows and incur damages. CS has alleged Wholesale breached their supplier contract by providing defective goods and materials. In its Third Party Complaint, Wholesale asserts if it breached its supplier agreement with CS by providing defective goods and materials, New Alenco breached its agreement with Wholesale by providing it defective goods and materials. New Alenco previously has asserted CS's installation errors and/or improper storage of the Ply Gem windows caused or contributed to the leaks.

ANALYSIS

I. NEW ALENCO'S MOTION FOR RECONSIDERATION

On Jul. 11, 2018, the Court granted Gilbane and CS's Motion to Compel Deposition Testimony from New Alenco Windows, Ltd., therein compelling New Alenco to identify an appropriate representative to be deposed regarding claims or issues on other projects involving similar Ply Gem windows or other windows manufactured at the same facilities and granting Gilbane its reasonable attorney's fees incurred in filing the Motion to Compel. New Alenco now seeks reconsideration of that ruling, citing the changed procedural posture of the case (*i.e.*, a settlement as between Gilbane, CS, and Travelers Casualty and Surety Company of America, LLC) and Wholesale and New Alenco's respective pending summary judgment motions. In the alternative, New Alenco asks the Court to narrow the scope of its prior order granting the Motion to Compel and limit any additional inquiry into incidents involving other Ply Glem windows to the specific windows at issue in this litigation.

Having considered the record, for the reasons stated in Gilbane and CS's response briefs opposing the instant motion and given the Court's rulings on Wholesale and New Alenco's summary judgment motions (*see* Parts II and III, *infra*), New Alenco's Motion for Reconsideration is hereby DENIED to the extent it seeks reconsideration or a narrowing of the Court's prior ruling and the award of attorney's fees to Gilbane under O.C.G.A. §9-11-37(a)(4). However, the Court will schedule a hearing as to the necessity and reasonableness of Gilbane's attorney's fees but will defer that hearing until the conclusion of any trial on the remaining claims at issue in this litigation.

II. WHOLESALE'S SUMMARY JUDGMENT MOTION

A. Standard on Summary Judgment

Summary judgment should be granted only when the movant shows "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." O.C.G.A. § 9-11-56(c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case. Scarbrough v. Hallam, 240 Ga. App. 829, 830, 525 S.E.2d 377, 378 (1999) (quoting Lau's Corp. v. Haskins, 261 Ga. 491, 491, 405 S.E.2d 474, 475–76 (1991). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial." O.C.G.A. §9-11-56(e).

Nevertheless, "at the summary judgment stage, courts are required to construe the evidence most favorably towards the nonmoving party, who is given the benefit of all reasonable doubts and possible inferences." Smith v. Tenet Health Sys. Spalding, Inc., 327 Ga. App. 878, 879, 761 S.E.2d 409, 411 (2014) (citations and punctuation omitted). *See* Word v. Henderson, 220 Ga. 846, 848, 142 S.E.2d 244, 246 (1965) ("Where the evidence on motion for summary judgment is ambiguous or doubtful, the party opposing the motion must be given the benefit of all reasonable doubts and of all favorable inferences and such evidence construed most favorably to the opposing party opposing the motion").

B. Analysis and Conclusions of Law

Wholesale moves the Court for partial summary judgment to limit CS's recovery, if any, against Wholesale to the remedies set forth in Ply Gem's Warranty—replacement of the

windows or a credit for the amount paid for the windows. It argues the Wholesale Purchase Order incorporates by reference the Ply Gem Warranty insofar as it provides: "All window assemblies shall be PlyGem Series HP 1100 Almond, Vinyl, **per approved submittals**" (emphasis added). Since the Window Submittals included the Ply Gem Warranty, Wholesale contends the Warranty applies to contractually limit any recovery by CS against Wholesale for defective windows to window replacements or a credit for the purchase price. Wholesale asserts Mr. Brehm's Apr. 2, 2014 email indicating that "Warranty shall be 1 year on the frame and 10 years on the glazing **per Plygem**" [sic] (emphasis added) further confirms the parties' intent that the Ply Gem Warranty would apply as between Wholesale and CS.

The Court finds questions of material fact preclude summary judgment. Wholesale is attempting to invoke the Ply Gem Warranty in order to restrict CS's remedies against it. However, "[p]rovisions severely restricting remedies act as exculpatory clauses." Imaging Sys. Int'l, Inc. v. Magnetic Resonance Plus, Inc., 227 Ga. App. 641, 644–45, 490 S.E.2d 124, 128 (1997) "Because exculpatory clauses waive substantial rights, could amount to an accord and satisfaction of future claims and require a meeting of the minds on the subject matter, they must be 'explicit, prominent, clear and unambiguous.'" Parkside Ctr., Ltd. v. Chicagoland Vending, Inc., 250 Ga. App. 607, 611, 552 S.E.2d 557, 562 (2001) (quoting Dept. of Transp. v. Arapaho Constr., 180 Ga. App. 341, 343(1), 349 S.E.2d 196 (1986)).

Here, Wholesale argues the language "per approved submittals" in the Wholesale Purchase Order incorporates by reference the Ply Gem Warranty and exculpates it from any liability other than the replacement of the windows or a credit. Essentially Wholesale is attempting to avail itself of an exculpatory clause that, if applicable, expressly exculpates another party without any reference to Wholesale or a party that may resell the windows. Such is

impermissible given that to be enforceable exculpatory clauses must be "explicit, prominent, clear and unambiguous." Parkside Ctr., Ltd., *supra*; Arapaho Constr., *supra*. The emails exchanged between the parties' representatives in March-April 2014 further highlight that questions of material fact exist as to whether CS and Wholesale intended the Ply Gem Warranty to apply to their transaction.

Notably, even if the Ply Gem Warranty is enforceable as between Wholesale and CS, material questions of fact exists as to whether the windows were ever accepted or if they were timely rejected and, thus, whether the warranty applies to the parties' dispute. Pursuant to O.C.G.A. §11-2-601: "[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: (a) Reject the whole; or (b) Accept the whole; or (c) Accept any commercial unit or units and reject the rest."

O.C.G.A. §11-2-602 provides the manner and effect of a rightful rejection:

> (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
>
> (2) Subject to the provisions of Code Sections 11-2-603 and 11-2-604 on rejected goods:
>
> (a) After rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
> (b) If the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this article (subsection (3) of Code Section 11-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
> (c) The buyer has no further obligations with regard to goods rightfully rejected.
>
> (3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this article on seller's remedies in general (Code Section 11-2-703).

Further, O.C.G.A. §11-2-608 allows for the revocation of a buyer's acceptance:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it:
>
> (a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
>
> (b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

But see Griffith v. Stovall Tire & Marine, Inc., 174 Ga. App. 137, 138, 329 S.E.2d 234, 236 (1985) ("[A]ny post-rejection exercise of ownership by the buyer with respect to the goods is wrongful as against the seller…Moreover, when a buyer fails to make an effective rejection or when he does any act inconsistent with the seller's ownership of goods, he has accepted them") (citing O.C.G.A. §§ 11–2–602(2)(a), 11–2–606(1)(b), (c)).

Here, Mr. Brehm, avers that in October 2014 when the windows were installed and tested and it was determined that they were defective, Wholesale and New Alenco were immediately notified[5] and he requested that the defective windows be replaced, stating in an Oct. 6, 2014 email: "A Plygem [sic] window failed the field test today at Emory Point II. See preliminary report from Brade below. We expect the factory to replace any windows that were not mulled correctly or do not perform to design criteria. Give me a call to discuss the next step."[6] Rather

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[5] Plaintiff Cambridge Swinerton, LLC's Memorandum of Law in Opposition to Defendant/Third Party Plaintiff Wholesale Building Products, Inc.'s Motion for Partial Summary Judgment ("CS Response to Wholesale MPSJ"), Ex. 1 (Brehm Aff.) at ¶¶ 15-16.

[6] CS Response to Wholesale MPSJ, Ex. 11 (Brehm emails)

than replace the windows, New Alenco tried to identify and repair the problem between October 2014 and January 2015.[7]

However, according to CS, when New Alenco's attempts to remediate the defective windows failed, the defective windows were rejected and the owner instructed that the windows be replaced with windows from another manufacturer. Whether there was an acceptance or a timely rejection of the windows under these alleged facts and whether CS, Gilbane, and/or ES took action with respect to the Ply Gem windows inconsistent with the seller's ownership of goods are material questions of fact that preclude summary judgment regarding the remedies available as against Wholesale. *See* Henco Advert., Inc. v. Geographics, Inc., 155 Ga. App. 571, 271 S.E.2d 704 (1980) (in action on account to recover amount owing for printing of advertising brochures, question of whether buyer's rejection was within reasonable time after delivery was for jury). Accordingly, having considered the entire record and given the above Wholesale's Summary Judgment Motion is hereby DENIED.

III. NEW ALENCO'S SUMMARY JUDGMENT MOTION

A. Standard on Summary Judgment

As noted in Part II.A, *supra*, summary judgment may only be granted when the movant shows "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." O.C.G.A. § 9-11-56(c).

B. Analysis and Conclusions of Law

Third-Party Defendant New Alenco moves for summary judgment as to all claims asserted against it by Wholesale, specifically: (1) breach of contract; (2) indemnity; and (3) attorneys' fees pursuant to O.C.G.A. §13-6-11. New Alenco argues the Ply Gem Warranty applies as between it and Wholesale, limiting the remedies available to Wholesale, and that it is

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[7] Brehm Aff. at ¶¶ 16-17.

undisputed New Alenco did not breach the Ply Gem Warranty as it never refused to replace the windows or provide a credit. New Alenco also argues Wholesale is not entitled to indemnity or contribution because Georgia law does not recognize a common law cause of action for contribution, there is no contract of indemnity, and there is no agent-principal or employer-employee relationship on which to base vicarious liability. Finally, New Alenco contends Wholesale's claim for attorneys' fees fails as a matter of law as attorney's fees can only be obtained on a prevailing claim where the party making the claim has shown that the opposing party acted in bad faith and, here, no evidence of bad faith has been introduced but rather the parties' claims evidence a bona fide dispute.

1. Breach of contract

Construing the evidence most favorably to Wholesale and giving it the benefit of all reasonable doubts and possible inferences, the Court finds questions of material fact preclude summary judgment as to its "breach of contract" claim. Although New Alenco asserts the Ply Gem Warranty applies as between it and Wholesale and that its compliance with the Warranty bars Wholesale's breach of contract claim as a matter of law, it is undisputed that the Warranty was not included with or expressly referenced in the New Alenco Purchase Orders.[8] Further, although New Alenco asserts "the conduct of the parties clearly evidences…[an] intention for the [Ply Gem] [W]arranty to become part of the agreement,"[9] whether an express warranty was created thereby is not a matter that can be determined as a matter of law based on the record. *See generally* O.C.G.A. §11-2-313.[10]

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[8] *See* Deposition of Ryan Robertson, p. 81 (testifying the contract at issue between the parties as the New Alenco Purchase Orders which did not include the Warranty form at the time).

[9] Third Party Defendant New Alenco Window, Ltd.'s Reply Brief in Support of Motion for Summary Judgment, p. 9.

[10] To the extent New Alenco argues Wholesale should be estopped from denying the applicability of the Ply Gem Warranty given Wholesale's reliance on the Warranty in its Summary Judgment Motion (through the reference in the Wholesale Purchase Order to the Window Submittals which included the Ply Gem Warranty), a material

Moreover, even assuming the Ply Gem Warranty applies to limit Wholesale's remedies against New Alenco, there are material questions of fact as to whether New Alenco satisfied its obligations under the Warranty. There is at least some evidence in the record that in October 2014 when the Ply Gem windows were installed and first failed field tests CS expressed its expectation that the "factory…replace any windows that were not mulled correctly or do not perform to design criteria."[11] However, shortly thereafter, New Alenco began attempts to repair the windows, apparently with the knowledge and consent of EP, Gilbane, CS, and Wholesale. It was not until months later, in February 2015, that EP decided to replace the windows entirely, allegedly due to continued leaks and problems with the windows. Although New Alenco asserts Wholesale's breach of contract claim is barred insofar as it was not given a final opportunity to repair the windows, whether New Alenco's actions comport with its obligations under the Ply Gem Warranty and whether it was given reasonable time to address the window leaks are jury questions which would still preclude summary judgment.

Finally, if the Ply Gem Warranty does not apply as between New Alenco and Wholesale, the Court finds Wholesale may pursue a breach of implied warranty claim. In its Third Party Complaint and with respect to its "breach of contract" claim Wholesale alleges, *inter alia*: "[i]f [it] breached the [Wholesale] Purchase Order by providing defective goods and materials as alleged by [CS] in the Complaint, [New Alenco] breached its contract with [Wholesale] by providing defective goods and materials to [Wholesale]"; and "[i]f it is determined that [Wholesale] breached the [Wholesale] Purchase Order by providing defective goods and

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question of fact would exist as to whether Wholesale through its conduct is estopped from arguing the Warranty does not apply. *See* Smith v. Direct Media Corp., 247 Ga. App. 771, 773, 544 S.E.2d 762, 764 (2001) ("Whether a party is estopped by his conduct is generally a question for the factfinder to resolve") (citations omitted); AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 218–19, 707 S.E.2d 508, 521 (2011) ("The existence of estoppel is generally a question for the factfinder to resolve") (citations omitted).

[11] CS Response to Wholesale MPSJ, Ex. 11 (Brehm emails).

materials as alleged by [CS] in the Complaint, [New Alenco] is liable to [Wholeale] for all of [CS]'s claims against [Wholesale]."[12] *Compare* O.C.G.A. §11-2-314(1) ("Unless excluded or modified (Code Section 11-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this Code section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale"); O.C.G.A. §11-2-315 ("Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under Code Section 11-2-316 an implied warranty that the goods shall be fit for such purpose").

The Court finds Wholesale's allegations are broad enough to encompass a claim for breach of implied warranty and are sufficient to place New Alenco on notice of same. *See* Rogers v. Rockdale Cty., 187 Ga. App. 658, 660, 371 S.E.2d 189, 191 (1988) ("[T]he well established rule in Georgia is that, under our system of notice pleading, the substance, rather than the nomenclature, of legal pleadings determines their nature") (citing Cotton v. Fed. Land Bank, 246 Ga. 188, 191, 269 S.E.2d 422 (1980)). Given all of the above, New Alenco's Summary Judgment Motion is DENIED as to the breach of contract claim.

2. Indemnity

"Georgia law defines indemnity 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." Douglas Asphalt Co. v. Georgia Dep't of Transp., 319 Ga. App. 47, 49, 735 S.E.2d 86, 89 (2012) (quoting Lanier at McEver v. Planners & Engineer's Collaborative, 284 Ga. 204, 206(2), 663 S.E.2d 240 (2008)). Further, Georgia law recognizes "two broad categories of indemnity:

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[12] Third-Party Complaint, ¶¶ 15-16.

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." District Owners Ass'n, Inc. v. AMEC Environmental & Infrastructure, Inc., 322 Ga. App. 713, 715 (2013).[13]

An action arising under the common law of vicarious liability may be maintained when a person is compelled to pay damages because of negligence imputed to him as a result of a tort committed by another. Id. at 715-16. However, to be liable under an imputed negligence or vicarious liability theory, a legally recognized relationship such as that of a principal and an agent or an employer and an employee must be present. Id. at 716; McKinney v. Burke, 108 Ga.App. 501, 504 (1963). ("[I]mputed negligence must rest on an agency relationship"). The relationship of a principal and an agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another on his behalf. *See* O.C.G.A. § 10-6-1. Further, in order for a principal relationship to be present, the principal must have the right to control the acts of the agent, without this control, there is no relationship. *See* Fulton C.S.R. Co. v. McConnell, 87 Ga. 756, 759 (1891) ("The latter company . . . was not to be subject to the direction or control of the former company. This made [the company] an independent contractor, and not the servant or agent of [the former company]"). Imputation in the 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. *See* Anthony v. Am. Gen. Fin. Servs., Inc., 287 Ga. 448, 450, 697 S.E.2d 166, 169 (2010).

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[13] Notably, Georgia no longer recognizes claims for common law contribution. *See* Dist. Owners Ass'n, Inc. v. AMEC Envtl. & Infrastructure, Inc., 322 Ga. App. at 715 ("[O]ur Supreme Court has held that "[a]s to contribution, O.C.G.A. §51–12–33(b) flatly states that apportioned damages 'shall not be subject to any right of contribution'") (quoting McReynolds v. Krebs, 290 Ga. 850, 852(1)(b), 725 S.E.2d 584 (2012)).

Here, no contractual indemnity exists as between New Alenco and Wholesale because the New Alenco Purchase Orders did not include an indemnification provision. Further, vicarious liability does not apply because there is no employer/employee or principal/agent relationship as between the parties. Although the parties had a contractual relationship, there is no indication Wholesale was acting as an agent of New Alenco (*e.g.*, that New Alenco directed or controlled Wholesale's work) such that the acts of one would be imputed on the other for liability purposes under a theory of vicarious liability. As a mere purchaser of goods manufactured by New Alenco, no principal/agent or employer/employee relationship existed between the parties, precluding indemnity under a theory of imputed negligence. Insofar as, here, there is no basis for contractual indemnification nor indemnification under the common law of vicarious liability, Wholesale's indemnity claim fails as a matter of law. Accordingly, New Alenco's Summary Judgment Motion is GRANTED with respect to Wholesale's claim for indemnification.

3. Attorneys' fees

"An award of attorney fees [and] costs…is derivative of a plaintiff's substantive claims." Racette v. Bank of Am., N.A., 318 Ga. App. 171, 181, 733 S.E.2d 457, 466 (2012) (citing DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 52(5), 668 S.E.2d 737 (2008)). Specifically, with respect to bad faith fees under O.C.G.A. § 13-6-11, that Code Section provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

"As indicated by the plain language of the statute, the determination of whether there has been bad faith in support of an award pursuant to O.C.G.A. § 13-6-11 is normally an issue for a jury."

Metro Atlanta Task Force for the Homeless v. Ichthus Community Trust, 298 Ga. 221, 238 (5), 780 S.E.2d 311 (2015). Here, insofar as Wholesale's breach of contract claim remains for adjudication and given the record, the Court will DENY New Alenco's Summary Judgment Motion with respect to Wholesale's claim for attorney's fees at this time. Upon presentation of the evidence at trial, New Alenco may if appropriate raise the issue via an appropriate motion.

IV. Case Management and Trial Schedule

In light of the Court's rulings above and the Court's Order Granting Plaintiff Cambridge Swinerton, LLC's Motion for Leave to Amend the First Amended Complaint to Add Direct Claims Against Third-Party Defendant New Alenco Windows, Ltd. (being entered contemporaneously herewith), the Court directs the parties to confer with respect to any remaining case management issues (including the deposition ordered by the Court with respect to Gilbane and CS's Motion to Compel as well as proper service of CS's Second Amended Complaint and any limited discovery needed with respect to the newly asserted direct claims of CS against New Alenco) and report back to the Court with a proposed scheduling order within fifteen (15) days of this order.

SO ORDERED this 12 day of October, 2018.

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

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