

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROHAN B. GOLDSON & SUZETTE
HOLNESS, Individually and as Personal
Representatives for the Estate of DAVIE
GOLDSON

Plaintiff(s),

vs.

Case No. 8:17-CV-340-T-24 AEP

KB HOME, a Delaware Corporation, and
KB HOME TAMPA, LLC, a Florida
Limited Liability Company

Defendant(s).

**REPLY TO DEFENDANT'S RESPONSE OPPOSING
PLAINTIFF'S MOTION FOR LEAVE
TO FILE A SECOND AMENDED COMPLAINT**

Plaintiffs, ROHAN B. GOLDSON & SUZETTE HOLNESS, Individually and as
Personal Representatives for the Estate of DAVIE GOLDSON, by and through their undersigned
attorneys file this Reply pursuant to this Court's Order (Doc. No. 9), directing Plaintiffs to file a
Reply to Defendant's Response (Doc. No. 8) to Plaintiff's Motion to file a Second Amended
Complaint (Doc. No. 6).

I. Standard of Review

Leave to amend a complaint "shall be freely given when justice so requires."
Fed.R.Civ.P. 15(a), *See Moore v. Baker*, 989 F.2d 1129 (11th Cir. 1993). While a decision
whether to grant leave to amend is clearly within the discretion of the district court, a justifying
reason must be apparent for denial of a motion to amend. *Nolin v. Douglas County*, 903 F.2d
1546, 1550 (11th Cir.1990). When the amendment affects the jurisdiction of the Federal Court,
Plaintiff agrees that the standard of review is outlined in *Hensgens v. Deere & Co.*, 833 F. 2d
1179 (5th Cir. 1987), *but see, Rivet v. Regions Bank of La., F.S.B.*, 1999 U.S. App. LEXIS 38344

(5th DCA 1999)(explaining that the ruling as it pertains to awardable costs has been superseded by statute). In *Hensgens* the court outlined the four relevant factors as stated in Defendant's response. Therefore, Plaintiff addresses each factor as stated below.

II. The Extent to Which the Purpose Is To Defeat Jurisdiction

Plaintiff does not deny that the ultimate result of the amendment will defeat this Court's jurisdiction, but that is not dispositive. The issue is the *extent* to which the *purpose* is this issue, which it is not. Plaintiff continues to investigate this claim, both legally and factually, in an attempt to determine the parties which are at fault for the mold which caused the deadly complications to Davie Goldson. Plaintiff has no doubt that during further litigation and discovery in this action, Defendants will begin to blame additional subcontractors involved in the installation of the drywall, stucco, windows, etc. which may necessitate further amendments. The purpose of the amendment is to require all parties who Plaintiff has a good faith belief, bear direct responsibility for the damages, to be parties in this action. Further, this amendment's purpose is to anticipate affirmative defenses which will likely be brought by KB Home in an attempt to avoid direct responsibility for its actions.

III. Whether The Plaintiff Has Been Dilatory

Plaintiff clearly has not been dilatory with this amendment. It was made within months of the filing and removal of this action. Further, upon receipt of the indemnity agreement between KB Home and its general contractor, Marshall Gray, new issues have come to light which did not exist before disclosure of this document on March 15, 2017. *See infra*.

IV. Whether Plaintiff Will Be Prejudiced

One of the primary factors at issue is the inability of Plaintiff to be able to achieve a full, fair and complete result if the General Contractor, Marshall Gray, is not made a party to this action. In an attempt to expand beyond the four corners of the Complaint, Defendants provide a copy of an indemnity agreement between Marshall Gray and Defendant KB Home. This agreement is provided in an attempt to somehow prove that KB Home "will be responsible to satisfy the amount of any judgment entered against Mr. Gray in this case." *See* D.E. 8 at pg. 5-6.

As a result, the Defendant argues that Plaintiff “will not be harmed by a denial here.” *Id.* This is not true.

Initially, the attached agreement clearly states that KB Home will only indemnify Gray “so long as....Gray acted in good faith and a manner he reasonably believed to be in, or not opposed to, the best interests of the Company.....Company shall not indemnify Gray for dishonest, fraudulent, or grossly negligent conduct; willful misconduct; or acts that fall outside of Gray’s scope of employment.” (D.E. 8 – Attachment #1). At this stage of the litigation, it is completely unknown whether Defendant KB Home will claim that the defects alleged are the result of bad faith, dishonesty, fraud, etc., which would fall outside of this indemnity agreement.

Finally, the entire indemnity agreement is questionably void. *See* Fla. Stat. § 725.06. Florida law provides:

§ 725.06. Construction contracts; limitation on indemnification.

(1) Any portion of any agreement or contract for or in connection with, or any guarantee of or in connection with, any construction, alteration, repair, or demolition of a building, structure, appurtenance, or appliance, including moving and excavating associated therewith, between an owner of real property and an architect, engineer, general contractor, subcontractor, sub-subcontractor, or materialman or any combination thereof wherein any party referred to herein promises to indemnify or hold harmless the other party to the agreement, contract, or guarantee for liability for damages to persons or property caused in whole or in part by any act, omission, or default of the indemnitee arising from the contract or its performance, shall be void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any. Notwithstanding the foregoing, the monetary limitation on the extent of the indemnification provided to the owner of real property by any party in privity of contract with such owner shall not be less than \$1 million per occurrence, unless otherwise agreed by the parties. Indemnification provisions in any such agreements, contracts, or guarantees may not require that the indemnitor indemnify the indemnitee for damages to persons or property caused in whole or in part by any act, omission, or default of a party other than:

(a) The indemnitor;

(b) Any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees; or

(c) The indemnitee or its officers, directors, agents, or employees. However, such indemnification shall not include claims of, or damages resulting from, gross negligence, or willful, wanton or intentional misconduct of the indemnitee or its officers, directors, agents or employees, or for statutory violation or punitive damages except and to the extent the statutory violation or punitive damages are caused by or result from the acts or omissions of the indemnitor or any of the indemnitor's contractors, subcontractors, sub-subcontractors, materialmen, or agents of any tier or their respective employees

Essentially, if an indemnity agreement does not contain a monetary limitation, it is void and unenforceable. This provision applies to any combination of the parties named therein (e.g. a general contractor, owner, subcontractor, etc.). See *Griswold Ready Mix Concrete, Inc. v. Tony Reddick, & Pumpco, Inc.*, 134 So. 3d 985 (Fla. 1st DCA 2012). The indemnity agreement attached as Exhibit A to the Defendant's response clearly contains no such monetary limitation. As a result, there is a question whether any such indemnity exists, and if so, to what extent.

Therefore, if the Defendant KB Home is successful in preventing the Amended Complaint, it could just as likely either claim that their general contractor acted intentionally, grossly negligent or otherwise outside the contract. Even if he did not, it is possible that KB Home could deny indemnity at some later time arguing that its agreement with Gray is void or unenforceable. Either possibility would severely harm Plaintiff's ability to continue with this action and obtain full and fair relief.

V. Any Other Factors Bearing On The Equities

In addition to the above mentioned factors, this Court should permit this amendment because eventual destruction of diversity and remand, if it does not occur now, will likely occur within the next few months regardless. Plaintiff has made a statutory demand on the Defendants, owner and contractor pursuant to Fla. Stat. § 713.165 and 713.16, to provide a list of names and a copy of contracts with all subcontractors for the building of Plaintiffs' home at issue. (See Ex. A). Defendants now have ten (10) days to provide such a list. The issues in this case involve stucco, flashing and/or window leaks, so at the very least, it is anticipated that there will be two

or three subcontractors, likely Florida residents, who will be joined in this action. Because of the previously argued statute of limitations, Plaintiff must file such an amendment to add a negligent wrongful death claim against these parties before the two year deadline from the death of Davie Goldson, i.e. June 9, 2017.¹ Therefore, denying this amendment as to Marshall S. Gray, likely would just postpone the inevitable.

VI. Conclusion

For the above stated reasons, Plaintiff believes that they have satisfied the factors as stated in *Hensgens* such that an Amendment to include potential defendant Marshall Gray, should be permitted. If permitted, this amendment will destroy diversity and this matter must be remanded to the State court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served and E-filed to: Benjamine Reid, Carlton Fields, Miami Tower, 100 S.E. Second Street, Suite 4200, Miami, FL 33131 this 27TH day of March, 2017.

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By: _____

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¹ Davie Goldson died on June 9, 2015. Florida's wrongful death statute, Fla. Stat. § 768.16 *et.seq.* provides for a two year statute of limitations.



CRAIG GOLDENFARB, P.A.

PERSONAL INJURY · WRONGFUL DEATH · NURSING HOME ABUSE

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March 27, 2017

VIA E-MAIL & CERTIFIED MAIL RETURN RECEIPT REQUESTED

Benjamin Reid, Esq.
Carlton Fields
Miami Tower, 100 S.E. Second Street, Suite 4200
Miami, FL 33131

RE: Goldson, Davie (Deceased Minor) v. KB Home

Dear Mr. Reid:

I am sending this to you as counsel for the owner and contractor. If this needs to be directed to KB Home and/or KB Home Tampa, LLC directly please advise me at once.

My clients hereby request from KB Home, KB Home Florida, and KB Home Tampa, LLC, pursuant to Fla. Stat. §§ 713.165 and 713.16 a list of all contractors, sub-contractors and suppliers who worked on their home located at 1608 Atlantic Drive, Ruskin, FL [Blacksone @ Bay Park, Lot/Block 4/F, Tract/Phase 0] (hereinafter the "Home"), supplied products for their home and/or had any contract with KB Home, KB Home Florida or KB Home Tampa, LLC (or any of its parents and/or subsidiaries).

Please be advised, that pursuant to the aforementioned Florida Statutes, failure to provide both a list and copy of all contracts, sub-contracts, and/or supply contracts, will result in "any person who suffers any detriment thereby [having] a cause of action against the person refusing or neglecting to furnish the same."

We agree to pay for the reproduction of any such contracts, and would merely ask that you please provide an estimate for such reproduction prior to making copies.

Sincerely,

SPENCER T. KUVIN

STK:stk

cc: Marshall S. Gray, 11815 Glen Wessex Ct., Tampa, FL 33626 (via certified mail)
Marshall S. Gray, 3 Easton Oval Columbus, OH 43219 (via certified mail)
Marshall S. Gray, 11806 Shire Wycliffe Ct., Tampa, FL 33626 (via certified mail)

