IN THE COURT OF APPEALS OF IOWA

No. 1-752 / 10-1986
Filed December 21, 2011

DONALD G. DEWAAY JR., DANIEL C. MULLAN, and RALPH RUDOLPH,
Plaintiffs-Appellants/Cross-Appellees,

vs.

STEVEN W. DALLENBACH,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Plaintiffs appeal from the district court's ruling regarding breach of contract claim and dismissal of future damages claim. **AFFIRMED IN PART, REVERSED IN PART.**

Margaret C. Callahan of Belin McCormick, P.C., Des Moines, and Kenneth Butters, West Des Moines, for appellants.

Jason D. Walke of Gunderson, Sharp & Walke, L.L.P., Des Moines, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

"Losses were not discussed and not assumed." That is how Steven Dallenbach described the rosy outlook of a four-person Iowa partnership formed to purchase, remodel, and sell an upscale residence on Florida's Gulf Coast. But the "perfect storm"—both figuratively and literally—of a plummeting real estate market and hurricane winds between 2006 and 2008 created unexpected losses for the partnership. Now three partners (Don DeWaay, Daniel Mullan, and Ralph Rudolph) are seeking to recoup capital contributions they paid into the partnership to cover Dallenbach's share of the continuing expenses to maintain the property.

Because we find that the partnership agreement did not contemplate such a recovery from the defaulting partner, we affirm the division of the district court's order refusing to assess Dallenbach for the $81,000 in capital calls that the other partners paid on his behalf. We also agree with the district court that Dallenbach has not shown he is entitled to have the plaintiffs pay his attorney fees. But we reverse the portion of the order declining to grant the plaintiffs' motion to voluntarily dismiss the count of their petition alleging future damages from the eventual sale of the Florida property under Iowa Rule of Civil Procedure 1.943. Because Dallenbach did not establish that the separate action would be barred on res judicata grounds, we disagree with the district court's concerns about impermissible claim splitting.

I. Background Facts and Proceedings

Dallenbach manages a construction company that builds custom homes and remodels distressed properties in the Des Moines area. He also has had experience buying, remodeling, and selling residential properties in Florida.

DeWaay resides in West Des Moines and runs a capital management company. DeWaay had a business relationship with Dallenbach and learned of Dallenbach's successful activities in Florida with "purchasing family vacation type homes, renovating those properties and then flipping them for sale." In the fall of 2004, Dallenbach approached DeWaay about forming a partnership to focus on the renovation of one particular waterfront property in Destin, Florida. DeWaay recruited two of his clients, Daniel Mullan and Ralph Rudolph, to join in the partnership. Mullan lives in Buffalo, New York, and operates a private equity firm. Rudolph lives in LaGrange, Illinois, and works as a wholesaler for financial products.

In early 2005, these four men signed an agreement to enter a general partnership with its principal place of business as West Des Moines.[1] The aim of the partnership was to use Dallenbach as the general contractor for a project to purchase, renovate, and resell a parcel of real estate at 160 Cover on the Bay in Walton County, Florida. DeWaay advanced $50,000 in earnest money, and the partnership purchased the property for approximately $1.6 million. The four partners each made an initial capital contribution of $100,000 to the partnership and the partnership borrowed the balance of the purchase price from Wells

[1] The district court found that all four partners acknowledged signing the agreement, "though a fully executed copy cannot be located now."

Fargo Bank. The partnership also established a line of credit at Legacy Bank to fund the remodeling. Under a separate "development agreement" executed by the partners, Dallenbach performed and received payment for all of the general contracting work on the Florida house.

Dallenbach described the optimistic outlook of the business venture:

> We had no experience with losses on anything in Florida up to this time period of the late 2000s. No one was talking about losses; no one was anticipating losses. We were much more concerned on what was the profit going to be, how would that be disbursed. Losses were not discussed and not assumed. We were, we were very enthusiastic.

But by 2007, the controller for DeWaay Capital Management realized the four investors were not going to be able to "flip" the house as planned:

> [A]fter a while . . . things started happening in the marketplace that it became evident to everybody that this wasn't a we're going to sell it today type of deal, this is going to be a long-term hold. . . . [F]or Steve's sake, he was just saying: Look, this, this isn't my game; I didn't plan on this really.

Initially, the partnership used the Legacy Bank line of credit to cover mortgage payments and other expenses associated with the remodeling. The partnership increased the line of credit several times, up to the bank's limit of $400,000. Then the partners covered expenses with personal checks, and eventually with additional capital contributions. Starting in 2007, one of DeWaay's employees would estimate the partnership's expenses and send a notice to each partner requesting a payment of one-fourth of that amount.

On March 30, 2009, an accountant from DeWaay Capital Management emailed Dallenbach, asking him to send in his "2nd Qtr FL payment along with the other payments" he still owed. The email asserted: "As of today, . . . I still

show you as partner in Dallenbach Partnerships. The total you owe is $31,156.48."

Later that day, the accountant emailed Dallenbach with the following subject line: "Please call Don ASAP." The rest of the message said: "He would like to talk to you about the Florida property."

Dallenbach responded: "Just so you know, there has been no change in my situation. None of my properties have sold or any other activity. SD." The next day the DeWaay accountant emailed back: "Steve, You need to let Don know this. You also need to set something up to make payments to the FL property. Dan, Don and Ralph can't afford to continue to pay your portion."

On April 15, 2009, Dallenbach sent a letter to DeWaay concerning the Florida property. Dallenbach explained why he was no longer able to contribute cash to the project:

> The slow economy has severely impacted my construction and development activities. This has lead to partnership failures in many of my real estate ventures and a strain on cash flow. That fact has precluded me from making capital calls for the Florida house. I realize this puts a strain on the other partners.

In the letter, Dallenbach declined DeWaay's suggestion that Dallenbach use his retirement fund to "assure the Florida house." Dallenbach offered to "quit claim" his interest in the property if DeWaay so desired. Dallenbach closed the letter by saying: "I see no end in sight to these issues which would allow me to function as a full partner. I hope for better days ahead for all of us in the real estate and investment business." DeWaay testified that he viewed Dallenbach's

offer to "quit claim" his interest in the Florida property as an offer to quit the partnership.

In May 2009 the partnership applied for a loan from Legacy Bank, listing only DeWaay, Mullan, and Rudolph as partners. Also that spring, those three partners removed Dallenbach's name from the insurance policy on the Florida property.

On June 16, 2009, DeWaay wrote to Dallenbach asking him to "collateralize" his obligation to the partnership by giving the partners a first lien on unencumbered property he owned in Chicago. DeWaay explained he was attempting to "function as a buffer" between Dallenbach and the other two partners who had a "strong preference to take immediate legal action." Dallenbach responded by email on June 22, 2009, saying: "I do understand your bind with the other partners. It turns out that I am the weakest link here and cannot hold up my end as I have stated." Dallenbach repeated his offer to "deed my interest to all of you now."

DeWaay, Mullan, and Rudolph (collectively the plaintiffs) filed a petition in Polk County district court on October 15, 2009, alleging four counts: (1) breach of contract under the written partnership agreement, (2) breach of oral contract, (3) promissory estoppel, and (4) breach of an implied covenant of good faith and fair dealing. The plaintiffs sought a judgment against Dallenbach "in an amount to be shown by competent proof at trial, interest, attorney fees, costs of this action and other relief as the Court deems equitable." Dallenbach answered the

petition and asserted a counterclaim alleging that he had dissociated himself from the partnership.

The parties tried the matter to the bench from September 8 through September 10, 2010. The plaintiffs notified Dallenbach the day before trial that they wished to dismiss counts III and IV of their petition. Dallenbach objected that the dismissal was untimely under Iowa Rule of Civil Procedure 1.943. The plaintiffs explained: "We are making no claim whatsoever for damages for the sale of the property because it hasn't sold." Dallenbach argued dismissal would result in an improper splitting of actions if he was forced to defend against a later claim for damages arising from the dismissed counts. Dallenbach's counsel argued before trial:

> I am as sure as I am sitting here what they are going to try to do is get the first part of their damages now and now that they have realized they can't get them here, come back later and try to do it all over again in a separate law suit and that's not permissible.

The district court took the question of dismissal under advisement, waiting to rule until after the trial.

On October 29, 2010, the district court issued its ruling. At the outset, the court denied the plaintiff's motion to dismiss counts III and IV. The court also ruled for Dallenbach on the merits of the suit, finding

> there is nothing in the [partnership] agreement requiring, or even suggesting, that "additional capital contributions" had to be in equal 25% parts from each partner. In fact, the agreement specifically contemplates the possibility that the partners' interest might change over time due to the fact that their "additional capital contributions" might not be in equal 25% parts.

While the district court did not believe Dallenbach's April 15, 2009 letter served as a "written termination notice" under the terms of the partnership agreement, it did view the communication as an offer to quit. The court went on to determine that the plaintiffs "from mid-2009 forward, have acted in such a way as to clearly evidence their acceptance of Mr. Dallenbach's offer to quit the partnership." Accordingly, the district court rejected the plaintiff's claim Dallenbach breached the partnership agreement, given the "de facto termination of the partnership prior to the initiation of the lawsuit."

The court denied Dallenbach's request for attorney fees, finding—in the absence of fraud—no basis in the law to order the plaintiffs to pay Dallenbach's attorney fees and costs. The court remarked: "If the parties intended such an award be available, they should have written it into their Partnership Agreement."

DeWaay, Mullan, and Rudolph now appeal. They asks us to reverse the district court's decision finding Dallenbach not liable for equal capital contributions under the partnership agreement and declining to dismiss the third and fourth counts of the petition. Dallenbach cross appeals, challenging the court's refusal to award attorney fees as a damage award.

II. Scope and Standards of Review

The parties agree that our review of the first issue is for errors at law. *See* Iowa R. App. P. 6.907; *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 780 (Iowa 2002). We are not bound by the district court's legal conclusions and application of legal principles to the facts. *See Land O'Lakes, Inc. v. Hanig*, 610 N.W.2d 518, 522 (Iowa 2000). But we are

bound by the district court's factual findings if they are supported by substantial evidence. *Id*. "Evidence is substantial for purposes of sustaining a finding of fact when a reasonable mind would accept it as adequate to reach a conclusion." *Id*. "We view the evidence in a light most favorable to the district court's judgment." *Id.*

We also review the district court's decision that it was not authorized to award attorney fees for errors at law. *FNBC Iowa, Inc. v. Jennessey Group*, *L.L.C*., 759 N.W.2d 808, 810 (Iowa Ct. App. 2008).

We review the district court's denial of the plaintiffs' motion to dismiss the promissory estoppel claim for an abuse of discretion. *See Lawson v. Kurtzhals*, 792 N.W.2d 251, 257 (Iowa 2010) (holding that trial court ruling under second sentence of Iowa Rule of Civil Procedure 1.943 is reviewed for an abuse of discretion).

III. Analysis

A. Was Dallenbach liable under the partnership agreement for the additional capital calls paid on his behalf by the other partners?

Under Iowa law, the partnership agreement governs the relations among partners and between partners and the partnership. Iowa Code § 486A.103 (2009). To the extent that a partnership agreement does not otherwise provide, chapter 486A governs those relations. *Id*.

In this case, paragraph 6(a) of the partnership agreement established that each of the four partners "shall contribute in cash to the capital of the Partnership" in the amount of $100,000. Paragraph 6(b) addressed the situation

where supplemental cash contributions were needed from the partners, as follows:

> If additional capital contributions are required, in the judgment of the Partner or Partners owning a majority in interest of the Partnership, to meet anticipated Partnership expenses, such Partners shall call upon each other for additional capital contributions, and except as otherwise set forth herein, such amounts shall be contributed in cash or cash equivalents to the bank account established in the name of the Partnership within five (5) days of notification.

The next paragraph of the agreement spelled out the consequences for a partner not providing additional capital:

> If a partner fails to make his required additional capital contributions (a "contribution default") then the Partnership may collect the contribution default by setting off against any distributions to the defaulting Partner, the amount of such contribution default.

The agreement then allowed DeWaay a $50,000 credit toward his initial capital contribution because he paid that amount as "earnest money/down payment" on the Florida property. The agreement also made an exception for Dallenbach's additional capital contributions, permitting him to meet his obligation under section 6(b) "by delivery of a signed promissory note in the amount of the additional capital contribution(s)" with "the grant to the Partnership of a security interest(s) in real estate owned by Mr. Dallenbach" provided that the real estate had sufficient equity to cover the amounts of the additional capital contributions.

The plaintiffs contend the partnership's call for additional capital contributions from all four partners was "mandatory, not optional" under paragraph 6 of the partnership agreement. They argue the language of

paragraph 6(b) must be enforced by awarding them damages for Dallenbach's failure to respond to past capital calls.

The district court acknowledged that the partnership agreement contemplated the need for additional capital contributions, but the court determined the agreement did not specify that the contributions "had to be in equal 25% parts from each partner." The court pointed to paragraph 5(h) as anticipating that one partner's interest might increase to more than fifty percent of the credited capital contributions. The court reasoned that such a provision would not make sense or be necessary "if the partners had to make 'additional capital contributions' in equal 25% shares."

The district court also concluded that under section 9 of the partnership agreement the plaintiffs could not recover from Dallenbach the capital contributions they made to the partnership. The last paragraph in section 9 provides:

> Each Partner shall look solely to the assets of the Partnership for the return of such Partner's capital contributions and if the Partnership property remaining after the payment or discharge of the prior debts, liabilities and distributions of the Partnership is insufficient to return such capital contributions, no Partner shall have any recourse against any other Partner.

On appeal, the plaintiffs dispute both lines of reasoning relied upon by the district court. They first contend the agreement's recognition that at some point the partners may no longer hold equal shares does not lead to the court's conclusion that "calls for equal additional contributions are therefore impermissible, and unenforceable." In support of their argument they should be reimbursed for paying Dallenbach's share, the plaintiffs point to the pattern of

equal capital contributions made from the start of the venture and continuing until late 2008 when Dallenbach "simply determined he would delay payment on, and ultimately default on, his obligations under the additional capital calls due to his personal financial situation."

The plaintiffs also argue that section 9 of the partnership agreement "cannot be read as relieving Dallenbach of his paragraph 6(b) obligation." They assert that the court reads the last paragraph of section 9 out of context. The opening paragraph in that section provides: "In the event of the dissolution and termination of the Partnership, the proceeds shall be allocated as follows" and then lists the payment priority in descending order. The plaintiffs also assert their suit is not about recouping their own capital contributions from the partnership, but is about recovering from Dallenbach the amounts the other partners paid on his behalf.

We are hesitant to agree with the district court's reasoning that paragraph 6(b) does not necessarily create an obligation by all partners to contribute equally. The district court's interpretation of the definition of "partner" in 5(h) seems subordinate to possible ramifications resulting from the language within section 6. Because under paragraph 6(b), a partner's failure to make a capital contribution results in setting off the amount defaulted from the distributions to that partner, some definite amount must be ascertained to subtract from the defaulting partner's distributions. If equal contribution is assumed, the "contribution default" calculation is made with relative ease. But if the agreement

does not establish a contribution baseline, nothing would prevent a defaulting partner from claiming any amount he wishes to be set off.

But ultimately we believe that determining the appropriate proportion of partners' contributions is immaterial, given the remedy for default specified in the agreement. The agreement addresses default situations in the second paragraph of section 6(b) by allowing the partnership to "collect the contribution default by setting off against any distribution to the defaulting Partner the amount of such contribution default." The remedy the plaintiffs seek—recovery of the defaulted amounts from Dallenbach—is not provided for in the partnership agreement.

As our supreme court has repeatedly stated:

> The court may not rewrite the contract for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice, or under the rule of liberal construction, make for the parties a contract which they did not make for themselves, or make for them a better contract than they chose, or saw fit, to make for themselves, or remake a contract, under the guise of construction, because it later appears that a different agreement should have been consummated in the first instance, or in order to meet special circumstances or contingencies against which the parties have not protected themselves.

Ehlers v. Iowa Warehouse Co., 188 N.W.2d 368, 376 (Iowa 1971) (citation omitted).

We agree with the plaintiffs that when Dallenbach failed to answer the capital calls, he breached the partnership agreement. But the partnership agreement does not anticipate the other partners will be able to unilaterally decide to pay his share and then recover that amount in a breach-of-contract

action. Therefore, the remedy sought by plaintiffs for defendant's breach is not available.

We also agree with the plaintiffs that section 9 applies only to instances of dissolution and termination, and should not be considered a remedy for other provisions within the agreement. While the first paragraph of section 9 explains the manner in which proceeds will be paid to creditors, expenses, and partners, the second paragraph encompasses recovery of a partner's capital contribution, a consideration also contemplated when dissolving a partnership. *See* Iowa Code § 486A.807(1) (requiring partnership assets and partner contributions first "be applied to discharge its obligations to creditors . . . . Any surplus must be applied to pay in cash the net amount distributable to partners . . . ."). Moreover, the second paragraph of section 9 refers to "prior debts, liabilities and distributions of the Partnership," obligations typically occurring upon dissolution or termination of the partnership. This paragraph is properly read as relating solely to dissolution and termination. The record in this case does not show whether the partnership went through the steps of dissolution and termination.

The question remains whether the plaintiffs can recoup Dallenbach's defaulted capital contributions under the agreement. Dallenbach's counsel suggested at oral argument that the other partners' recourse may have been a "short sale"[2] of the property rather than continuing to pay his share of the mounting expenses. Whatever their recourse, the plaintiffs have not pointed to

[2] "A short sale is, in its simplest definition, a sale by a willing seller to a willing buyer for less than the total encumbrances on the home with the consent of the underlying lienholders who agree to take less than what they are owed." *In re Booth*, 417 B.R. 820, 824 n.3 (Bkrtcy. M.D.Fla. 2009)

language in the partnership agreement allowing them to recover the capital contributions they voluntarily paid on Dallenbach's behalf.[3] Because the partnership agreement did not include any provision for the non-defaulting partners to seek reimbursement from the defaulting partner, we affirm the district court's determination that the plaintiffs are not entitled to recover under their breach-of-contract theory.

B. Did the district court abuse its discretion in declining to allow plaintiffs to voluntarily dismiss the count of its petition that alleged damages from the eventual sale of the property?

The plaintiffs next claim the district court abused its discretion in denying their request to dismiss a claim for damages based upon an anticipated "mortgage deficiency" upon the ultimate sale of the Florida property. On the eve of trial, the plaintiffs notified Dallenbach's attorney they intended to dismiss counts III (promissory estoppel) and IV (breach of implied good faith and fair dealing) of their petition.

Plaintiffs' counsel explained at a pre-trial hearing:

> The only place in the Petition that the word "sale" comes up is in the promissory estoppel count. We talked in there about that by his conduct he's estopped to deny he was a partner. And in that count, we talk about, we are looking for the damages for developing, rehabilitating the property and sale.
>
> As we present evidence in this case, we are making no claim whatsoever for damages for the sale of the property because it hasn't sold. It is too speculative. So the only damages that we are seeking are $81,000, which are capital calls that the defendant

[3] We acknowledge the Iowa Uniform Partnership Act governs relations between and among partners "to the extent the partnership agreement does not otherwise provide." Iowa Code § 486A.103(1). But in this case, the parties have not relied on any provision in chapter 486A nor have we found a provision that affords the plaintiffs any remedy.

> didn't make or live up to and the other partners had to pony up the money to pay bank mortgages and expenses.

Dallenbach's attorney objected to the plaintiffs' voluntary dismissal of the promissory estoppel count, alleging it would allow "the splitting of the cause of action" and require his client to later defend against a separate lawsuit.

The district court took the question "under advisement"—not deciding whether to permit the dismissal until the post-trial ruling. In that ruling, the court reasoned the plaintiffs' belated filing of the motion to dismiss the promissory estoppel count gave the court discretion to deny the dismissal. The district court then noted Dallenbach's objection to the dismissal because it "could subject [him] to subsequent litigation on the issue presented at trial." The court denied the dismissal "in the interests of justice." *See* Iowa R. Civ. P. 1.943.[4]

We agree the district court had discretion to grant or deny the belated motion to dismiss. *See Lawson,* 792 N.W.2d at 257. But for the reasons outlined below, we conclude the district court's justification for denying the dismissal constituted an abuse of discretion.

The district court described the plaintiffs' claim for a potential mortgage deficiency:

> [T]he second part of their claimed damages are the future "additional capital contributions" they hypothesize in the event of a sale of the property in question at a price insufficient to cover the outstanding debt on the same.

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[4] The parties assume without any analysis that rule 1.943 applies to the voluntary dismissal of one or more claims within a petition, as well as the petition as a whole. While the rule refers only to dismissing a "petition" or "an action," the comment following the rule cites to a federal case, stating: "Trial motions for the voluntary dismissal of one or more claims are likewise addressed to the sound discretion of the court." *Young v. John McShain, Inc.*, 130 F.2d 31, 34 (4th Cir. 1942).

Again relying on the last sentence of paragraph 9 of the partnership agreement, the district court concluded that the plaintiffs had no recourse against another partner for the return of their capital contributions. The court went on to state: "Iowa law is clear that parties may not split their causes of action and file matters in a piecemeal [manner]."

On appeal, the plaintiffs allege the district court abused its discretion by not permitting them to dismiss the promissory estoppel count that involved future damages from a potential mortgage deficiency. They outline Iowa cases rejecting the defense of claim preclusion even when a subsequent action was based on a breach of the same contract. *See, e.g.*, *Williams v. Davenport Commc'ns Ltd. P'ship*, 438 N.W.2d 855 (Iowa Ct. App. 1989). Based on that law, they assert the district court "misapplied Iowa law when it held that the voluntary withdrawal of the claim for anticipated 'mortgage deficiency' damages would prejudice Dallenbach by exposing him to the threat of impermissible claim-splitting."

Dallenbach argues the district court properly exercised its discretion in denying the plaintiffs' motion to dismiss. He characterizes the motion to dismiss as "a thinly veiled attempt to *try* to preserve the Plaintiffs' ability to pursue recovery from Mr. Dallenbach in a piecemeal fashion." He asserts the plaintiffs tried to abandon their "future" damages claim only after realizing they did "not have the necessary evidence to recover those damages." He quotes testimony from DeWaay that they could have verified their future damages through expert testimony. In a footnote in his brief, Dallenbach draws a distinction between the

concept of claim preclusion (which would be litigated in a second lawsuit) and claim-splitting (which requires parties to litigate all of their claims in a single case).

Our supreme court has listed several factors a district court should consider when deciding whether to allow a motion for voluntary dismissal, specifically, "the expense and inconvenience to the defendant, legal prejudice suffered by the defendant, and whether terms and conditions imposed by the court can make the defendant reasonably whole." *Lawson*, 792 N.W.2d at 257, n.3. At trial, Dallenbach did not identify any present expense or inconvenience he would have incurred from the dismissal of the future-damages claim. Instead he focused on the future refiling of that cause of action if the plaintiffs sell the property at a loss. Likewise, the district court did not point to prejudice suffered by Dallenbach from dismissal of the promissory estoppel count of the petition. Instead the court accepted Dallenbach's contention the plaintiffs were impermissibly attempting to "split their causes of action" by dismissing their claim for future damages.

To determine if the district court abused its discretion, we must ask whether the plaintiffs could have originally filed two separate lawsuits: one for the action against Dallenbach for his failure to meet past capital calls and one for any future damages the other partners encounter for his share of a potential mortgage deficiency based on the sale of the Florida property. If the second suit constituted a related, yet different cause of action, it would not be barred by claim preclusion and would not be an impermissible attempt to split or try their claims

piecemeal. *See Iowa Coal Mining Co. v. Monroe Cnty*, 555 N.W.2d 418, 441 (Iowa 1996) (recognizing "[t]he right to join related causes of action does not bar subsequent litigation of a distinct cause of action that was not joined"). The party invoking the defense of claim preclusion must show:

> (1) the parties in the first and second action are the same parties or parties in privity, (2) there was a final judgment on the merits in the first action, and (3) the claim in the second suit could have been fully and fairly adjudicated in the prior case (i.e., both suits involve the same cause of action).

Pavone v. Kirke, ___ N.W.2d ___, ___, (Iowa 2011) (citing *Iowa Coal Mining Co.*, 555 N.W.2d at 440). To determine if the causes of action are the same for res judicata purposes, courts must examine (1) the protected right, (2) the alleged wrong, and (3) the relevant evidence. *Iowa Coal Mining Co.*, 555 N.W.2d at 441. In objecting to the voluntary dismissal of the promissory estoppel count, Dallenbach did not establish the future claim involving the mortgage deficiency would be the same cause of action as the instant breach-of-contract suit. Under these circumstances, where the anticipated mortgage deficiency has not yet been realized and plaintiffs have yet to initiate their second suit, it would be premature to decide if the same right is infringed by the same wrong in both actions or whether the same evidence would support both actions. *See id.*, 555 N.W.2d at 443.

The district court held that paragraph 9 of the partnership agreement prevented the plaintiffs from recovering damages from Dallenbach based on the eventual sale of the property if it brings in proceeds less than the outstanding debt. The plaintiffs contend: "No basis exists for a conclusion that any, let alone

all, 'mortgage deficiency' damages would involve the return to DeWaay, Mullen and Randolph of their own capital contributions." We agree with the plaintiffs' contention.

It is not clear to us that the plaintiffs' claim for recovery under the doctrine of promissory estoppel based on the eventual sale of the property would be barred by the adjudication of their breach-of-contract claim for past capital contributions. Because Dallenbach cannot yet show that res judicata would bar a second suit, the court abused its discretion in concluding that dismissal would allow impermissible claim splitting. We reverse the portion of the district court order denying the partial motion to dismiss.

C. Cross Appeal: Was Dallenbach entitled to attorney fees?

Dallenbach claims he is entitled to have the other partners pay his attorney fees in the amount of $36,000 as damages for breaching the partnership agreement. The district court concluded that no provision in Iowa law provided for the plaintiffs to pay Dallenbach's attorney fees. We agree.

Each party is generally responsible for its own attorney fees in the absence of a statute or enforceable contractual provision allowing for fee-shifting. *Lara v. Thomas,* 512 N.W.2d 777, 786 (Iowa 1994). Dallenbach cites to *Peters v. Lyons*, 168 N.W.2d 759, 769 (Iowa 1969) for the proposition that an award of attorney fees can be recovered as damages for the breach of a contract. We find *Peters* distinguishable from the instant facts. *Peters* involved the necessity of defending an action brought by third party. Dallenbach is seeking fees in connection with litigation involving the parties to the partnership agreement,

which did not provide for such an award. In this situation, we find the district court correctly denied his request for attorney fees.

AFFIRMED IN PART, REVERSED IN PART.