IN THE COURT OF APPEALS OF IOWA

No. 3-976 / 13-0151
Filed November 20, 2013

ALEXANDER SHCHARANSKY,
Plaintiff/Counterclaim Defendant-Appellant,

TATIANA SHCHARANSKY,
Plaintiff-Appellant,

BORIS SHCHARANSKY, ZOYA STAROSELSKY, LEONID SHCHARANSKY, and SLAVA STAROSELSKY,
Cross-Petition Defendants-Appellants,

vs.

VADIM SHAPIRO, BORIS PUSIN, ILYA MARKEVICH, ALEX KOMM, and DMITRY KHOTS,
Defendants/Counterclaim Plaintiffs/
Cross-Petition Plaintiffs-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The appellants appeal from the district court's entry of summary judgment in favor of the appellees. **REVERSED AND REMANDED.**

Mark Weinhardt and Danielle M. Shelton of Weinhardt & Logan, P.C., Des Moines, for appellants.

Catherine M. Chargo, Todd A. Strother, and Timothy N. Lillwitz of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellees.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

Alexander Shcharansky, Tatiana Shcharansky, Boris Shcharansky, Zoya Staroselsky, Leonid Shcharansky, and Slava Staroselsky (the Shcharansky Group) appeal from the district court's entry of defensive summary judgment in favor of Vadim Shapiro, Boris Pusin, Ilya Markevich, Alex Komm, and Dmitry Khots (the Shapiro Group) on Alexander and Tatiana Shcharansky's claim for equitable contribution, and offensive summary judgment in favor of the Shapiro Group on its breach of contract counterclaim/cross-claim against the Shcharansky Group. Because genuine issues of material fact exist on both these claims, summary judgment was not appropriate. We reverse and remand for further proceedings.

I. Background Facts and Proceedings

As described by the appellants in pleadings prior to this appeal, "Although it occurs in the context of a history that rivals that of the Hatfields and McCoys, the present dispute between the Shcharansky Group and the Shapiro Group is straightforward." The following undisputed facts can be gleaned from the record.

Continuous Control Solutions, Inc. (CCS), based in Urbandale, designs software for the oil and gas industry. In 2005 and 2006, CCS borrowed a total of $900,000 from Wells Fargo Bank. Eight CCS shareholders personally guaranteed the debt: Vadim Shapiro, Boris Pusin, Ilya Markevich, Alex Komm, and Dmitry Khots (of the Shapiro Group), and Alexander Shcharansky, Boris Shcharansky, and Zoya Staroselsky (of the Shcharansky Group).[1]

[1] Although the Shcharansky Group now includes more people in this appeal, for all practical purposes, the interests of these respective groups have been aligned, or

In September 2007, CCS was in financial straits. The Shapiro Group, comprising the majority of the shareholders, began to prepare for bankruptcy. The Shcharansky Group agreed to purchase the Shapiro Group's shares in CCS.[2] The deal was executed per a Stock Purchase Agreement (SPA) entered on September 16, 2007.

Paragraph 7.1(a) of the SPA provided that the Shcharansky Group would cause CCS to:

> Use best efforts to, and prior to the payment of any existing or new debt obligations payable by the Corporation to any Buyer or any Buyer's immediate relative of any entity affiliated with any Buyer or any Buyer's immediate relative, satisfy and repay in full all debt obligations of the Corporation owed to Wells Fargo Bank, N.A.

CCS did not make any principal payments to Wells Fargo from September 2007 through May 2009.

In October 2008, Wells Fargo filed a petition (Case No. EQCE 60256) seeking to collect $900,000 of principal for two defaulted notes executed by CCS and personally guaranteed by the eight former CCS shareholders—members of the Shapiro Group and the Shcharansky Group. In April 2009, the district court granted summary judgment in favor of Wells Fargo on its claims against CCS and all of the guarantors in the amount of $909,338.27 plus interest.[3]

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disaligned, for years prior to this appeal. Accordingly, we continue to refer to the Shcharansky Group as such, even with the additional members.

[2] The Shcharansky Group purchased CCS "for fifty-four dollars total." *See Wells Fargo Bank*, *Nat'l Ass'n v*. *Continuous Control Solutions*, *Inc*., No. 10-1070, 2011 WL 2695269, at *3 (Iowa Ct. App. July 13, 2011).

[3] Meanwhile, the Shapiro Group filed cross-claims and a cross-petition against the Shcharansky Group, and the Shcharansky Group filed counter cross-claims against the Shapiro Group. *See Wells Fargo Bank*, 2011 WL 2695269, at *3. Following a trial on the claims that survived summary judgment, the jury awarded $1.4 million in damages in favor of the Shapiro Group on its claims of fraudulent misrepresentation, omission, and/or inducement, as well as $1.4 million in punitive damages. The Shcharansky

In June 2009, Alexander and Tatiana Shcharansky[4] entered into a Forbearance Agreement (FA) with Wells Fargo and CCS, in which they personally guaranteed the obligations of CCS. Per the FA, CCS paid $400,000 to Wells Fargo and agreed to pay the remaining amount in eight quarterly payments of $76,022.11 beginning September 1, 2009, and ending June 1, 2011.

CCS made quarterly payments to Wells Fargo in September and December 2009 and March 2010. Alexander made a quarterly payment in June 2010. Tatiana made a quarterly payment in September 2010, as well as a final, accelerated payment in December 2010. At that time, Wells Fargo filed a satisfaction of judgment in favor of CCS and the personal guarantors.

In the meantime, several loans were made to CCS that were paid back prior to CCS's satisfaction of the Wells Fargo debt obligation:

- Lenny Shcharansky (Alexander's father) loaned CCS $112,000 in 2008, $40,000 in 2009, and $145,000 in 2010. By June 2010, $172,000 of the loans had been repaid by CCS.
- Alexander Shcharansky loaned CCS $95,000 from 2008 to 2010. By October 2010, that amount was repaid by CCS.
- Tatiana Shcharansky loaned CCS $25,000 in September 2010. That amount was repaid one month later.
- Zorass, L.L.C. (an entity owned by Alexander Shcharansky, Lenny Shcharansky, and Slava Staroselsky) loaned CCS $90,000 in 2008. That amount was repaid in 2009.

Group appealed, and this court affirmed the judgment entered by the district court. *See id.* at *4-7.

[4] To avoid confusion with references to the Shcharansky Group, we refer to Alexander and Tatiana Shcharansky by their first names.

Alexander and Tatiana subsequently filed a petition seeking "equitable contribution from each member of the Shapiro Group" for the Shapiro Group's "5/9ths share"[5] of the Wells Fargo debt they paid.

The Shapiro Group filed an answer, affirmative defenses, counterclaim and cross-petition against the Shcharansky Group,[6] claiming the Shcharansky Group breached the SPA by its actions in making "improper and excessive payments to themselves and/or to entities which they own or are affiliated with, rather than using their best efforts to satisfy and repay in full all debt obligations of CCS owed to Wells Fargo."[7] The Shapiro Group also raised claims of tortious interference, contribution for the Wells Fargo debt,[8] and fraud.[9] The Shapiro Group alleged it would incur damages on these claims, but only if the district court awarded contribution to Alexander and Tatiana.

The Shapiro Group subsequently filed a motion for partial summary judgment. Following a hearing, the district court entered an order granting the Shapiro Group defensive summary judgment on Alexander and Tatiana's claim

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[5] Alexander and Tatiana seek 5/9ths of the amount they paid because the five Shapiro Group members and three Shcharansky Group members plus Tatiana equal nine; they do not seek contribution from Boris Shcharansky or Zoya Staroselsky of the Shcharansky Group.

[6] The Shapiro Group also raised the claims against Leonid Shcharansky and Slava Staroselsky, who were not part of the original Shcharansky Group. For our purposes, we will refer to the cross-petition defendants collectively as the Shcharansky Group, which includes Alexander and Tatiana. Alexander and Tatiana will still be referred to separately, however, in regard to their contribution claim.

[7] Specifically, the Shapiro Group claimed the Shcharansky Group breached paragraph 7.1(a) of the SPA when it paid new or existing debt obligations of CCS before it satisfied the debt obligation to Wells Fargo.

[8] The district court eliminated the Shapiro Group's contribution claim in a November 2011 ruling "[b]ased on the Shapiro Group's concession" following an admission by the Shcharansky Group that it was only seeking "a pro rata 5/9ths share of any amounts paid by Alex[ander] or Tatiana."

[9] The district court denied the Shcharansky Group's motion for partial summary judgment on the Shapiro Group's counter and cross-claims all but for the Shapiro Group's contribution claim. That ruling was not appealed.

for contribution, and offensive summary judgment on the Shapiro Group's breach of contract claim against the Shcharansky Group. It is from this order that the Shcharansky Group appeals.[10]

II. Scope of Review

We review the district court's grant of summary judgment for correction of errors at law. *See Sallee v. Stewart*, 827 N.W.2d 128, 132 (Iowa 2013). This is true even where the underlying action was equitable in nature. *See Kucera v. Baldazo*, 745 N.W.2d 481, 483 (Iowa 2008). A party is entitled to summary judgment when the record shows no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *See* Iowa R. Civ. P. 1.981(3). The burden is on the moving party to demonstrate it is entitled to judgment as a matter of law, and we view the evidence in the light most favorable to the nonmoving party. *See Sallee*, 827 N.W.2d at 132.

III. Contribution

Alexander and Tatiana[11] contend the district court erred in granting summary judgment in favor of the Shapiro Group on their claim for equitable contribution. The crux of their claim on appeal is that in reaching its ruling, the district court erroneously resolved factual disputes at the summary judgment stage.

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[10] To be clear, the ruling before us on review is the district court's "amended and substituted order," which the court filed after the parties filed a joint motion for procedural clarification following the court's initial ruling. We further note Alexander and Tatiana filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking the court to reconsider its ruling, which the district court denied.

[11] The appellants filed a single brief on appeal and are represented by the same counsel. Alexander and Tatiana are the only appellants, however, that raise the issue regarding contribution.

Iowa recognizes the right of contribution as an equitable claim to prevent unjust enrichment. *See Hills Bank & Trust Co*. *v*. *Converse*, 772 N.W.2d 764, 772-73 (Iowa 2009) ("[W]e approve the Restatement's treatment of contribution between cosureties." (citing Restatement (Third) of Suretyship and Guaranty § 55, at 236 (1006))); *see also State ex rel*. *Palmer v*. *Unisys Corp*., 637 N.W.2d 142, 149 (Iowa 2001). Generally speaking, "one party who satisfies a claim can seek reimbursement through contribution." *Hills Bank*, 772 N.W.2d at 772.

"Under the Restatement, each cosurety [to an obligation] has the right of contribution against other cosureties." *See id.* at 772-73. ("It would be inequitable to allow one cosurety to pay the entire debt to the obligee, without an agreement requiring such an obligation."). If there is no agreement between cosureties limiting the amount of contribution, either express or implied, then "each cosurety's contributive share is equal to the 'aggregate liability of the cosureties to the obligee divided by the number of cosureties.'" *Id.* at 773 (quoting Restatement (Third) of Suretyship and Guaranty § 57, at 243). A cosurety is also entitled to "the reasonable costs of performing, including incidental expenses." *See id.*

In this case, judgment was entered in favor of Wells Fargo in the amount of $909,338.27 on defaulted notes executed by CCS and personally guaranteed by the eight CCS shareholders, including the members of the Shapiro Group. Alexander and Tatiana used some amount of their personal funds to satisfy the Wells Fargo judgment through a forbearance agreement.

In summarily denying Alexander and Tatiana's claim for contribution, the district court focused on the source of the funds used by Alexander and Tatiana

to pay Wells Fargo. Specifically, the court noted: (1) Alexander and Tatiana "did not use their own money to satisfy the Wells Fargo obligation," and instead, "were mere conduits for their parents' money that was transferred to them specifically for the purpose of paying off the Wells Fargo obligation," (2) Alexander and Tatiana's claim was "not ripe" because they had not repaid any of the money they received from their parents to satisfy the loan, and (3) they did not show they had "any legal obligation to repay the money that was transferred to them by their parents."[12]

We believe these "facts" miss the point. The claim at issue is Alexander and Tatiana's claim for contribution. It is apparently undisputed the funds at issue that were used to pay Wells Fargo came directly from Alexander and Tatiana's bank accounts. As the Shapiro Group's attorney stated at the summary judgment hearing:

> [W]hat we have is a situation where no-co-obligors, we submit, actually paid these loans, *but the money passed through co-obligors* in order to create a claim for equitable contribution. So we think there's no factual dispute here, and it's really just a legal question for the Court, and that question is whether or not a co-obligor can get money from a third party, *have it pass through them to pay a common debt*, and then go seek equitable contribution from the other co-obligors.

(Emphasis added.)

In light of the undisputed fact that some payments were made from the personal bank accounts of Alexander and Tatiana to satisfy the Wells Fargo obligation, if the finder of fact determines the members of the Shapiro Group

[12] The court further found Alexander "comes to the Court with unclean hands due to the breach of contract [the SPA], and therefore, cannot recover in equity." This aspect of the court's ruling will be discussed below.

were coguarantors (and therefore cosureties) of the obligation of CCS to Wells Fargo, then we believe a genuine issue of material facts exists as to whether Alexander and Tatiana have a right to contribution (and how much) against them under Restatement (Third) of Suretyship and Guaranty section 55. *See id.* ("The right to contribution can only occur between persons who are both liable on the same indivisible claim.").

In any event, even if it is determined that the source of the funds is critical to Alexander and Tatiana's claim of contribution, whether the funds were loans or gifts (or distributed as a part of an underlying conspiracy[13]) is a disputed factual issue that needs to be fleshed out at trial and is likely dependent on credibility determinations that should be left for the jury. "In granting summary judgment, the district court is not to make credibility assessments, as such assessments are 'peculiarly the responsibility of the fact finder.'" *Frontier Leasing Corp. v. Links Eng'g, L.L.C.*, 781 N.W.2d 772, 776 (Iowa 2010) (citation omitted). Normally it is for a jury to resolve discrepancies in deposition testimony and affidavits, and this province of the jury should not be invaded by a court on summary judgment. *See Smidt v. Porter*, 695 N.W.2d 9, 22 (Iowa 2005).

For these reasons, we determine genuine issues of material fact exist concerning Alexander and Tatiana's contribution claim against the Shapiro Group. The purpose of summary judgment procedure is to determine whether a genuine issue of material fact exists. *See* Iowa R. Civ. R. 1.981(3). If it is

[13] At oral arguments, counsel for the Shapiro Group described the transfer of the funds as part of a "scheme" to create claims of contribution against the Shapiro Group. However, as counsel for the Shcharansky Group aptly pointed out, that question should be evaluated by the trier of fact.

determined there is a genuine issue of material fact, the case must be litigated, and the court considering the motion for summary judgment cannot pass on the merits of the fact question. *See Brubaker v*. *Barlow*, 326 N.W.2d 314, 315 (Iowa 1982). Accordingly, we reverse the judgment of the district court on this claim and remand for further proceedings in accordance with this decision.

IV*. *Breach of Contract

In its ruling on the Shapiro Group's offensive motion for summary judgment, the district court concluded the Shapiro Group "established its breach of contract counterclaim as a matter of law." The court determined the parties' SPA "clearly and unambiguously" required CCS to satisfy the debt obligations to Wells Fargo "prior to the payment of any existing or new debt obligations payable by the corporation to any buyer or buyer's immediate relative." The court observed the undisputed facts to present several "irrefutable violations" of this provision—including CCS's repayment of loans to Lenny Shcharansky, Alexander Shcharansky, Tatiana Shcharansky, and Zorass, L.L.C. (an entity owned by Alexander Shcharansky, Lenny Shcharansky, and Slava Staroselsky)—prior to the satisfaction of CCS's debt obligations to Wells Fargo in December 2010.

The court further stated because the Shapiro Group's breach of contract counterclaim "is established as a matter of law," it followed that the Shcharansky Group's claims of contribution "are moot." The court also concluded that because it rejected the Shcharansky Group's contribution claim, there were no damages to award on Shapiro Group's breach of contract claim, rendering that claim, although established, moot.

The Shcharansky Group contends the record, viewed in the light most favorable to them, creates a genuine issue as to whether Alexander breached the SPA, and even if he did, the Shapiro Group "suffered no damages."

To prove its claim for breach of contract, the Shapiro Group must show: (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the Shcharansky Group's breach of the contract in some particular way; and (5) that it has suffered damages as a result of the breach. *See Molo Oil Co*. *v*. *River City Ford Truck Sales*, *Inc*., 578 N.W.2d 222, 224 (Iowa 1998).

> The legal effect of a contract is always a matter for court determination. Interpretation, the meaning of contractual words, is also an issue for the court unless it is dependent upon extrinsic evidence or upon a choice among reasonable inferences from the extrinsic evidence. Extrinsic evidence is admissible as an aid to interpretation when it throws light on the parties' situation, antecedent negotiations, the attendant circumstances, and the objectives the parties were trying to attain. Questions of performance or breach are generally for the jury.

Id. (citations omitted).

Even if we were to assume, without deciding, the language of the SPA is unambiguous and Alexander's conduct breached the SPA,[14] the fact remains that an essential element for the Shapiro Group's claim is a showing it suffered damages as a result of the alleged breach of contract—a showing not made under these facts.[15] To the contrary, as the Shapiro Group stated in its pleadings in support of its claim, "*If* the Shapiro Group is held liable in equitable contribution

[14] For purposes of this appeal, we decline to express an opinion concerning the clarity of the SPA provision at issue, or Alexander's conduct under the SPA.

[15] Moreover, we question what damages the Shapiro Group could raise and prove in regard to this claim, considering the alleged breach stems from a completely different contract than that which allegedly caused the damages it is seeking to offset.

. . . , *then* [the Shcharansky Group]'s breach of contract *will have been* the actual and proximate cause of damages incurred by the Shapiro Group." (Emphasis added.)

In light of our determination that genuine issues of material fact exist on the Shcharansky Group's contribution claim, it necessarily follows that the Shapiro Group is unable to establish a breach of contract claim predicated on damages stemming from the contribution claim at the summary judgment stage. Accordingly, we reverse the district court's grant of summary judgment on the Shapiro Group's breach of contract claim and remand for further proceedings consistent with this opinion.

V. Conclusion

We determine genuine issues of material fact exist concerning Alexander and Tatiana's contribution claim against the Shapiro Group, as well as the Shapiro Group's breach of contract claim against the Shcharansky Group. Accordingly, we reverse the judgment of the district court on these claims and remand for further proceedings in accordance with this decision.

REVERSED AND REMANDED.