STATE OF MICHIGAN

COURT OF APPEALS

MILTON H. GOLDRATH, HENRY WHITING, JR., CLARA G. WHITING, SEYMOUR GORDON, MARILYN GORDON, ROBERT W. APPLEFORD, MARY M. WHITING, MACAULEY WHITING, JR., SARA WHITING, D. EUGENE THOMPSON, ANNE A. THOMPSON, MARVIN D. SIEGEL, GLORIA J. SIEGEL, BRUCE A. KRESGE, PEGGY KRESGE, STUART K. JESKE, BARBARA H. JESKE, JAMES B. JACKSON, ROSEMARY JACKSON, JOSEPH L. HARDIG, JR., D. LARRY SHERMAN, JANE F. SHERMAN, PILGRIM INVESTMENT CO., VINCENT C. SECONTINE, HALPERIN FAMILY PARTNERSHIP, MARVIN GORDON and SYLVIA A. GORDON,

Plaintiffs-Appellants,

v

PATRICK L. BEACH,

Defendant-Appellee.

UNPUBLISHED
April 21, 2000

No. 212009
Washtenaw Circuit Court
LC No. 93-000963-CK

Before: Markey, P.J., Murphy, and R. B. Burns*, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order issued on remand dismissing plaintiffs' complaint with prejudice and granting summary disposition in favor of defendant. Review of the trial court's decision on a motion for summary disposition is de novo. *Baker v Arbor Drugs, Inc.*, 215 Mich App 198, 202; 544 NW2d 727 (1996). We affirm.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

This case arises out of a dispute over responsibility for the payment of a mortgage debt. The trial court on remand believed that it could not address the merits of plaintiffs' statutory indemnity claim because of our earlier opinion in this case.[1] The trial court's belief was based on the following section of our opinion:

> At oral argument in this Court, the parties agreed that there is no viable theory of implied indemnity. Accordingly, we need only address the issue whether there was a valid assignment (or at least a genuine issue of material fact concerning the assignment). We agree with defendant that there was not.
>
> An assignment is valid only if, at the time of the assignment, the assignor possessed the rights which he is assigning. [Citations omitted.] The bank had discharged the mortgage on April 16. Therefore, it had nothing to assign on April 17.
>
> Reversed and remanded for further proceedings consistent with this opinion.

It is clear that we did not address plaintiffs' statutory indemnity claim. It is also clear that the lower court, before remand, granted summary disposition for plaintiffs based at least in part on the statutory indemnity claim: "[w]hile Plaintiffs in the instant case have borne the loss, Michigan statutory law provides for payment by Defendant. The Court is of the Opinion the Plaintiffs are entitled to indemnification by Defendant." Therefore, on this appeal, we must review the issue of whether the trial court was correct in finding that plaintiffs were entitled to summary disposition under a theory of statutory indemnity. Only by reviewing this issue can we determine whether after remand the trial court correctly granted defendant summary disposition.

Plaintiffs' claim that defendant is liable to them for the sums they paid to Comerica under the mortgage note is based on MCL 449.18(b); MSA 20.18(b), which states:

> The partnership shall indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him or her in the ordinary and proper conduct of its business, or for the preservation of its business or property.

Plaintiffs claim that they incurred personal liability as guarantors of the loan from Comerica in the ordinary and proper course of CCPLP's business. Thus, plaintiffs believe that defendant, who was a general partner of CCPLP at the time of the loan, is obligated to indemnify them according to § 449.18(b) of the Uniform Partnership Act (hereinafter "UPA"). We find this argument to be without merit.

The articles of CCPLP state that "[t]he liability of each Limited Partner for the losses, debts, liabilities and obligations of the Partnership shall, so long as the [sic] such Partner complies with the provisions of Section 5.1B, be limited to such Partner's Capital Contribution, such Partner's share of any undistributed profits of the Partnership, and such Partner's liability under a Guaranty of secondary financing." The agreement also states that the general partner "shall, except as otherwise provided in

this Agreement, have all the rights and powers to be subject to all the restrictions and liabilities of a partner in a partnership without limited partners."

Plaintiffs, who were limited partners in CCPLP, became guarantors of the Comerica loan in the ordinary and proper course of CCPLP's business. The partnership was apparently formed for the sole purpose of purchasing the City Center building. Comerica required plaintiffs to personally guarantee the loan for the purchase of the building. Thus, plaintiffs reasonably incurred secondary liability under the mortgage note in the ordinary course of the partnership's business. Accordingly, the partnership was obligated to indemnify them for their payments to Comerica under § 449.18(b) of the UPA.

Because CCPLP was obligated by statute to indemnify plaintiffs for their payments to Comerica, the sums paid by plaintiffs became a debt of the partnership based on statutory indemnity. Also, because plaintiffs, as guarantors, became personally and primarily liable on the Comerica loan when CCPLP defaulted, that is the point in time that the partnership became bound to indemnify plaintiffs under § 449.18(b) of the UPA. However, it is clear from the record that defendant had no interest in the partnership, and therefore was not personally liable for the debts of the partnership, when CCPLP defaulted on the loan from Comerica. Thus, we conclude that the trial court on remand did not err in granting summary disposition for defendant.

CCPLP did not become obligated to indemnify plaintiffs until more than a year after defendant had assigned his partnership interest to another. On July 20, 1990, defendant assigned his general partnership interest in CCPLP to BRG Management, Incorporated. At that time, the partnership recognized that defendant would have no liability for partnership obligations arising after the date of the assignment. CCPLP made its last payment on the Comerica loan in August 1991. Therefore, defendant was not personally liable for the partnership's obligation to indemnify plaintiffs.

Plaintiffs appear to believe that the partnership's statutory obligation to indemnify plaintiffs arose when Comerica granted the loan to CCPLP because it was at that point that plaintiffs reasonably incurred personal liability. Because defendant was a general partner at the time the loan was made, plaintiffs claim that defendant is obligated to indemnify them for the payments they made to Comerica pursuant to the loan agreement. However, an action for indemnity is intended to make whole a party held vicariously liable to another through no fault of his or her own. *Cutter v Massey-Ferguson, Inc*, 114 Mich App 28, 33; 318 NW2d 554 (1982). The partnership's obligation to indemnify plaintiffs did not arise in this case until the partnership defaulted and Comerica held plaintiffs personally liable for the debt. If plaintiffs had been held personally liable on the debt while defendant still had a general partnership interest in CCPLP, then defendant would have been obligated to indemnify plaintiffs pursuant to § 449.18(b) of the UPA. However, because the partnership's statutory obligation to indemnify plaintiffs did not arise until after defendant had assigned his general partnership interest, defendant is not personally liable to plaintiffs for the sums they paid to Comerica.

There is no genuine issue of material fact with regard to whether defendant is liable to plaintiffs under a theory of statutory indemnity. Defendant has no duty to indemnify plaintiffs under § 449.18(b) of the UPA. Furthermore, as our previous opinion indicates, defendant is not

liable to plaintiffs under the mortgage note, or under a theory of implied indemnity. Therefore, the trial court correctly granted summary disposition in favor of defendant.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns

[1] *Goldrath v Beach*, unpublished opinion per curiam of the Court of Appeals, issued January 31, 1997 (Docket No. 185562).