STATE OF MICHIGAN

COURT OF APPEALS

COMERICA BANK,

Plaintiff,

v

SHAKIR W. ALKHAFAJI,

Defendant/Cross-Defendant-Appellee,

and

MUKHLES KARMO, MASOUD A. KARIM, LAYLA KARIM, and HANNA SHINA,

Defendants,

and

ANWAR SEMAN,

Defendant/Cross-Defendant,

and

HAYTHAM BESHI,

Defendant/Cross-Plaintiff/Third-Party Plaintiff/Appellant-Cross-Appellee,

v

JALAL JAMIL,

Third-Party Defendant-Appellee,

and

SAUD BARBAT,

Third-Party Defendant/Appellee-Cross-Appellant.

UNPUBLISHED
June 28, 2007

No. 268046
Oakland Circuit Court
LC No. 01-036485-CK

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Haytham Beshi appeals as of right a judgment entered in his favor and requiring defendants Alkhafaji, Jamil and Barbat to indemnify him with respect to a settlement he reached with Comerica, but denying Beshi's request for costs and attorney fees incurred in the action. Barbat cross-appeals from the same judgment. Because the trial court correctly found that the indemnity agreement at issue did not encompass the payment of attorney fees and costs, and because the settlement payment Beshi rendered to Comerica was involuntary and reasonable under the circumstances, we affirm.

In January of 1999, Choice Properties No. 2 LLC (of which Beshi, Alkhafaji, and others were members) borrowed approximately $2,000,000.00 from Comerica. Beshi, Alkhafaji, and the other members of Choice Properties personally guaranteed the Comerica loan. In March 2001, Beshi, Shina, Karmo, and Seman sold their interest in Choice Properties to Alkhafaji, Jamil and Barbat pursuant to a purchase agreement. The purchase agreement contained an indemnification provision whereby Alkhafaji, Jamil and Barbat agreed to indemnify the sellers from any losses that may be incurred with respect to the personal guarantees they had signed for the Comerica loan. On November 28, 2001, Comerica sued defendants for $1,976,141.49 plus costs and attorney fees, as guarantors of the loan to Choice Properties, after Choice Properties had defaulted on that loan.

On February 4, 2003, Beshi filed a third-party complaint against Barbat and Jamil for indemnification under the indemnification provision for any amount Beshi might pay to Comerica as a result of his personal guaranty, including Beshi's costs and attorney fees, and filed a cross-complaint against Alkhafaji for contribution and indemnification. Thereafter, Comerica's complaint was dismissed due to its failure to file a witness or exhibit list. The order dismissing Comerica's complaint contained provisions dismissing Beshi's cross-claims for contribution as moot, and scheduling Beshi's cross-claims and third-party claims for indemnification for trial.

In November 2003, Beshi indicated the he and Comerica had a reached a settlement. The remaining third-party claims and cross-claims involving indemnification were thereafter dismissed without prejudice, to be reinstated 30 days following a complete settlement between Comerica and the remaining guarantors, or a final decision from an appellate court. On November 25, 2003, Comerica appealed as of right, challenging the trial court's order dismissing its complaint. In December 2003, while the appeal was pending, the purported verbal settlement agreement between Beshi and Comerica was memorialized indicating that Beshi agreed to pay Comerica $30,000 in exchange for Comerica dismissing its suit against him. On August 18, 2005, this Court affirmed the order dismissing Comerica's complaint. *Comerica Bank v Alkhafaji*, unpublished opinion per curium of the Court of Appeals, issued August 18, 2005 (Docket No. 252472).

Following this Court's decision, the trial court reinstated Beshi's third-party complaint and cross-complaint involving indemnification. All involved parties agreed to have the trial court decide the indemnification issues based solely upon the parties' briefs. The trial court

ultimately ruled that Alkhafaji, Barbat, and Jamil were required to indemnify Beshi for the Comerica settlement, but that the language of the indemnification provision did not entitle Beshi to costs and attorney fees incurred in the action. A judgment consistent with the trial court's opinion was thereafter entered. Beshi now appeals the trial court's refusal to award him his costs and fees, and Barbat cross-appeals the trial court's ruling that he must indemnify Beshi for the Comerica settlement.

A question of contract interpretation is reviewed de novo. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453, lv den 471 Mich 920 (2004). Indemnity contracts are construed in the same manner as contracts generally. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). The purpose of contract interpretation is to enforce the parties' intent, and if language of the document is unambiguous, interpretation is limited to the actual words used. *Burkhardt, supra*, 260 Mich App at 656. Accordingly, a clear contract must be enforced according to its terms. *Id*. Unless otherwise defined, contractual language is given its plain and ordinary meaning. *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 471; 688 NW2d 523 (2004), lv den 472 Mich 937 (2005).

If provisions of a contract irreconcilably conflict, the contractual language is ambiguous, and the meaning of the ambiguous contractual language presents a question of fact to be decided by the trier of fact. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467, 469; 663 NW2d 447 (2003), lv den 470 Mich 887 (2004). When there is a true ambiguity in the contract and the parties' intent cannot be discerned through all conventional means, including extrinsic evidence, the contract is to be construed against the drafter. *Id.* at 470-472.

Generally, attorney fees are not recoverable unless a statute, court rule, or common-law exception provides to the contrary. *Schoensee v Bennett*, 228 Mich App 305, 312; 577 NW2d 915 (1998), lv den 459 Mich 945 (1999). "Exceptions to the general rule are construed narrowly." *Burnside v State Farm Fire & Cas Co*, 208 Mich App 422, 427; 528 NW2d 749, lv den 450 Mich 891 (1995). An exception exists when parties specifically contract for the indemnification of attorney fees that arise out of litigation. See, e.g., *Redfern v R.E. Dailey & Co*, 146 Mich App 8,19-20; 379 NW2d 451 (1985).

The relevant indemnity provision provides:

> C. *Mutual Indemnification.* Purchasers shall indemnify and hold harmless Hanna, Mukhles, Anwar and Haytham [Beshi], personally and individually, from any and all losses that may occur in connection with certain personal guarantees that the Individual Owners (excepting Shakir [Alkhafaji]) may have signed in connection with the Comerica Construction Loan/Mortgage.

The ultimate question is whether "any and all losses" includes litigation costs[1] and attorney fees that Beshi incurred as a result of Comerica suing him for the remaining balance of

[1] The trial court awarded certain taxable costs, but not all of Beshi's litigation costs concerning (continued…)

the loan that Beshi and others personally guaranteed. The trial court found that the indemnity language was not sufficiently broad to encompass attorney fees and costs. We agree.

In *Redfern, supra*, this Court held that language in an indemnity contract where a contractor agreed to indemnify and hold harmless another "against all claims, liabilities, losses, damages and expenses, of every character whatsoever. . ." encompassed attorney fees. *Id*. at 19. In the present case, the indemnity provision applies to "any and all losses that may occur," but contains no language (such as "of every character") indicating an intent that the language include attorney fees, costs, or other expenses. Keeping in mind that exceptions providing for the recovery of attorney fees are to be construed narrowly (see *Burnside, supra)*, we conclude that the trial court appropriately denied Beshi's request for attorney fees and costs under the indemnity provision because the provision does not expressly or impliedly provide for such a recovery.

On cross-appeal, Barbat argues that the trial court erred in finding that Beshi's payment to Comerica was involuntary and thus constituted a loss under the parties' indemnity agreement. We disagree.

As explained in *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354-355; 686 NW2d 756 (2004), lv den 474 Mich 915 (2005):

> Two general principles of law, applicable to contractual indemnity in this context, are well-established. First, if an indemnitee settles a claim against it before seeking the approval of, or tendering the defense to, the indemnitor, then the indemnitee must prove its *actual* liability to the claimant to recover from the indemnitor. However, the indemnitee who has settled a claim need show only *potential* liability if the indemnitor had notice of the claim and refused to defend.
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> * * *
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> Potential liability actually means nothing more than that the indemnitee acted reasonably in settling the underlying suit. The reasonableness of the settlement consists of two components, which are interrelated. The fact finder must look at the amount paid in settlement of the claim in light of the risk of exposure. The risk of exposure is the probable amount of a judgment if the original plaintiff were to prevail at trial, balanced against the possibility that the original defendant would have prevailed. If the amount of the settlement is reasonable in light of the fact finder's analysis of these factors, the indemnitee will have cleared this hurdle. [Emphasis in original; internal citations omitted.]

Here, Barbat was a party in the litigation and was aware of his contractual requirement to indemnify Beshi. He thus had sufficient notice of Comerica's claim against Beshi and of his duty to defend. See *Detroit v Grant*, 135 Mich 626, 628-629; 98 NW 405 (1904). Therefore, the

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(…continued)

the Comerica litigation.

issue is whether Beshi acted reasonably in settling the suit, considering that Comerica's claims had been dismissed and Comerica's claim of appeal was still pending.

As to its reasonableness, the trial court stated as follows:

> . . .contrary to the assertion of the opposing parties, the settlement was reasonable. This Court, of course, was confident that its decision to dismiss the case would be affirmed on appeal, and the Court is flattered by the opposing party's confidence in that decision as well. Nevertheless, the issue of whether the payment was reasonable cannot be judged with 100% hindsight. At the time in which the case settled, Beshi had very little likelihood of prevailing if a trial had been ordered by the Court of Appeals. The amount paid was approximately 50% of Beshi's total exposure at trial. The risk of exposure was very high if the Court of Appeals reversed this Court, and nil if the Court of Appeals affirmed. In light of the foregoing circumstances, this Court cannot find that Beshi's actions were unreasonable.

Beshi's exposure was potentially much higher than $60,000.00, given the fact that he was jointly and *severally* liable under the personal guarantee for that amount. However, that fact lends further support to the reasonableness of the settlement in light of the even greater potential exposure. And while this Court's review of the trial court's decision to dismiss Comerica's complaint was for an abuse of discretion, the decision to dismiss is a drastic sanction that should be imposed only when just and proper. *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). In light of the sanction imposed and the great potential exposure, the trial court did not err in concluding that the settlement was reasonable.

Barbat argues that the trial court erred by awarding Beshi $30,000 because the indemnity provision did not require Barbat to indemnify Beshi for monies that were voluntarily paid. In that regard, Barbat argues that the settlement agreement did not amount to a loss for purposes of the indemnification provision, relying on a dictionary definition that purportedly defines the word "loss" as "physical, emotional, or esp. economic harm or damage sustained; as something unintentionally destroyed or placed beyond recovery." While focusing on the phrase "unintentionally destroyed," Barbat argues that the settlement cannot constitute a loss under the provision because Beshi voluntarily settled. As aptly noted by the trial court, however, although Beshi made a conscious decision to settle, he did not volunteer to be sued or simply give away $30,000. Thus, while the settlement was entered into voluntarily, this does not take into account the potential liability. The fact that Beshi ultimately would have had no liability as a result of this Court affirming the trial court's dismissal of Comerica's complaint does not render Beshi's decision to settle voluntary in light of the potential liability at the time the settlement was made.

Affirmed.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette