STATE OF MICHIGAN

COURT OF APPEALS

DR. FRED LEFF and CYNTHIA LEFF,

Plaintiffs-Appellees,

v

MORGAN-HELLER & ASSOCIATES, INC. and BEN HELLER,

Defendants/Third-Party Plaintiffs-Appellants,

and

TARTAN PLUMBING, L.L.C.,

Third-Party Defendant-Appellee.

UNPUBLISHED
September 17, 2009

No. 284819
Oakland Circuit Court
LC No. 2006-074184-CK

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Third-party plaintiffs Morgan-Heller & Associates, Inc. and Ben Heller (collectively the Morgan-Heller appellants) appeal as of right the March 26, 2008 final judgment. Specifically, the Morgan-Heller appellants contend that the trial court erred in granting summary disposition to third-party defendant Tartan Plumbing, LLC (Tartan) on their third-party complaint for common-law indemnification and contribution. Because we conclude that the trial court did not err in granting summary disposition to Tartan, we affirm.

I. Basic Facts and Procedural History

Morgan-Heller & Associates, Inc. (Morgan-Heller)[1] entered into a contract with plaintiffs to renovate the master suite and a front bedroom and bathroom in plaintiffs' Bloomfield Hills home. Morgan-Heller subcontracted the plumbing work to Tartan.[2] Tartan admits that it cut a

[1] Ben Heller is an officer of Morgan-Heller.

[2] There was no written contract between Morgan-Heller and Tartan.

floor joist in the master suite. Allegedly, as a result of the cut floor joist, a newly installed granite shower overloaded the underlying support and caused floor deflection.

Plaintiffs sued the Morgan-Heller appellants for breach of contract, fraudulent misrepresentation and concealment, innocent misrepresentation, negligent misrepresentation and concealment, breach of fiduciary duty, promissory estoppel, and negligence. Plaintiffs also asserted claims for violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and the Magnuson-Moss Warranty Act (Magnuson-Moss), 15 USC 2301 *et seq*. Because of the problems resulting from the cut floor joist, the Morgan-Heller appellants subsequently filed a third-party complaint against Tartan, asserting claims of common-law indemnification and contribution.

Tartan moved for summary disposition on the third-party claims for indemnification and contribution. It argued that the only claim in plaintiffs' complaint that could support the third-party claims for indemnification and contribution was the negligence claim. Because the negligence count only alleged "active" negligence by the Morgan-Heller appellants, Tartan argued that the Morgan-Heller appellants could not sustain a claim for common-law indemnification. In addition, Tartan argued that the Morgan-Heller appellants had failed to state a claim for contribution because, pursuant to MCR 600.6304, a defendant cannot be held liable for more than its pro rata share of the damages. In response, the Morgan-Heller appellants argued that a party is entitled to common-law indemnification where its liability arises by operation of law. Relying on its claim that the cut floor joist was the cause of the damage to plaintiffs' home, the Morgan-Heller appellants argued that its liability for breach of contract, breach of express and implied warranties,[3] and violations of the MCPA and Magnuson-Moss arose without proof of fault and by operation of law.[4] The Morgan-Heller appellants also argued that MCL 600.6304 does not preclude all contribution claims, specifically those claims that "arise[] solely by operation of law and without any consideration of proof of fault."

The trial court granted Tartan's motion for summary disposition. According to the trial court, Tartan was entitled to summary disposition on the indemnification claim because the allegations in plaintiffs' complaint against the Morgan-Heller appellants sounded in active negligence. The trial court also held that because, under Michigan law, the Morgan-Heller appellants could not be obligated to pay for more than their own pro rata share of liability, the Morgan-Heller appellants were not entitled to contribution.

II. Standard of Review

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[3] Plaintiffs did not assert a separate breach of warranty claim against the Morgan-Heller appellants. Rather, in their claim for breach of contract, plaintiffs alleged that the Morgan-Heller appellants "breached the Contract and express and implied warranties and obligations arising from the Contract."

[4] The Morgan-Heller appellants did not contest Tartan's assertion that the allegations in plaintiffs' negligence claim involved active negligence by them. Similarly, the Morgan-Heller appellants did not claim that the allegations in the misrepresentation claims and the claims for breach of fiduciary duty and promissory estoppel involved alleged active negligence by them.

We review a trial court's decision on a motion for summary disposition de novo. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). Summary disposition is proper under MCR 2.116(C)(8)[5] if the complaint fails to state a claim on which relief can be granted. *A&E Parking v Detroit Metro Wayne Co Airport Auth*, 271 Mich App 641, 643-644; 723 NW2d 223 (2006). A court considers only the pleadings, and must accept as true all factual allegations in support of the claim. MCR 2.116(G)(5); *Capitol Prop Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). "The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Capitol Group, LLC, supra* at 425.

III. Indemnification

The Morgan-Heller appellants argue that the trial court erred in granting summary disposition to Tartan on their indemnification claim because plaintiffs, to establish their claims for breach of contract, breach of express and implied warranties, and violations of the MCPA and Magnuson-Moss, do not need to prove that the Morgan-Heller appellants were negligent in performing the renovation of the home. Thus, according to the Morgan-Heller appellants, their liability arises by operation of law and, therefore, they are entitled to common-law indemnification from Tartan.

"'The right to common-law indemnification is based on the equitable principle that where the wrongful act of one party results in another being held liable, the latter party is entitled to restitution.'" *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996), quoting *Cameron v Monroe Co Probate Court*, 214 Mich App 681, 689; 543 NW2d 71 (1995), rev'd on other grounds 457 Mich 423 (1998). A party is entitled to common-law indemnity when it is held liable through no fault of its own, *Wilhelm v Detroit Edison Co,* 56 Mich App 116, 157; 224 NW2d 289 (1974); its liability arises vicariously or through operation of law, *Latimer v William Mueller & Son, Inc*, 149 Mich 620, 638; 386 NW2d 618 (1986). The party must be free from any active negligence. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992); see also *St Luke's Hosp v Giertz*, 458 Mich 448, 456; 581 NW2d 665 (1998) ("An indemnification action cannot lie where the plaintiff was even .01 percent actively at fault."). "If a party breaches a direct duty owed to another and this breach is the proximate cause of the other party's injury, that is active negligence. Where the active negligence is attributable solely to another and the liability arises by operation of law, that is passive negligence." *Langley v Harris Corp*, 413 Mich 592, 597-598; 321 NW2d 662 (1982). We must look primarily at plaintiffs' complaint to determine whether plaintiffs are seeking to hold the Morgan-Heller appellants liable for active negligence or fault. See *Proassurance Corp v Nefcy*, 480 Mich 916; 739 NW2d 870 (2007).

The Morgan-Heller appellants claim that the damage to plaintiffs' home was caused by Tartan's alleged improper cutting of the floor joist. Thus, we must determine whether plaintiffs,

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[5] The trial court did not indicate whether it granted summary disposition to Tartan under MCR 2.116(C)(8) or (10). Because the parties relied solely on the pleadings below, we view the trial court's grant of summary disposition as made pursuant to MCR 2.116(C)(8).

in their claims for breach of contract and breach of warranty and violations of the MCPA and the Magnuson-Moss, are seeking to hold the Morgan-Heller appellants liable for Tartan's improper cutting of the floor joist.

In their claim for a violation of the MCPA, plaintiffs allege that Morgan-Heller made numerous false representations and nondisclosures. In the claim for a violation of Magnuson-Moss, plaintiffs allege that the Morgan-Heller appellants were required to remedy any defect in the home renovation within a reasonable time and that the Morgan-Heller appellants failed to do so. Reviewing the allegations of the two statutory violation claims, it is clear that in the claims plaintiffs are seeking to hold the Morgan-Heller appellants liable for their own active fault, i.e., the false representations and nondisclosures and the failure to remedy defects in the home renovation.

In their claim for breach of contract, plaintiffs make numerous allegations regarding how the Morgan-Heller appellants breached the contract, including the express and implied warranties contained therein. There are allegations, among others, that the Morgan-Heller appellants failed to renovate the home in accordance with the applicable building codes, failed to repair and correct structural defects, failed to use and select the building materials of the highest standard, concealed material and workmanship defects, and damaged HVAC duct work beneath the master suite. Only one of the 23 allegations specifically mentions the cut floor joist, and that allegation claims that the Morgan-Heller appellants breached the contract by failing to oversee the work of the subcontractors. Reviewing the allegations of the breach of contract claim, plaintiffs are seeking to hold the Morgan-Heller appellants liable for their own active fault in performing the home renovation. Because plaintiffs sought to hold the Morgan-Heller appellants liable for their active fault, the trial court did not err in granting summary disposition to Tartan on the Morgan-Heller appellants' claim for indemnification.

IV. Contribution

The Morgan-Heller appellants also argue that the trial court erred in granting summary disposition to Tartan on their claim for contribution. Specifically, the Morgan-Heller appellants assert that they are entitled to receive contribution from Tartan on plaintiffs' claims for breach of contract, breach of warranty, and violations of the MCPA and Magnuson-Moss because their liability on these claims arises by operation of law without any consideration of their fault.

"[W]hen 2 or more persons become jointly or severally liable in tort for the same injury to a person or property . . . there is a right of contribution among them even though the judgment has not been recovered against all or any of them." MCL 600.2925a(1). "[C]ontribution is the partial payment made by each or any of jointly or severally liable tortfeasors who share a common liability to an injured party. . . . [I]t distributes the loss among all tortfeasors, each bearing his pro-rata share." *St Luke's Hosp, supra* at 453 (internal citation omitted).

However, MCL 600.2956 provides that "in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." Similarly, MCL 600.2957(1) mandates that "[i]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated . . . in direct proportion to the person's percentage of fault." In addition, MCL 600.6304(4) provides that

"[l]iability in an action to which this section applies is several only and not joint. . . . [A] person shall not be required to pay damages in an amount greater than his or her percentage of fault . . . ."[6] The 1995 tort reform legislation, which includes the above three statutes, has rendered most contributions claims unnecessary. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 50-51; 693 NW2d 149 (2005); *Kokx v Bylenga*, 241 Mich App 655, 662-664; 617 NW2d 368 (2000).

The only case that the Morgan-Heller appellants cite to argue that their contribution claim survives the tort reform legislation is *Laurel Woods Apartments v Roumayah*, 274 Mich App 631; 734 NW2d 217 (2007). In *Laurel Woods Apartments*, the two defendants leased an apartment from the plaintiff. The lease agreement contained a provision that the "Tenant," defined as "(jointly severally) Najah Roumayah & Rebecca Roumayah," would be "liable for any damage to the Premises . . . that is caused by the acts or omissions of Tenant." A kitchen fire, which started after Rebecca Roumayah left the kitchen after doing some cooking, caused substantial damage to the apartment. The plaintiff sued the defendants for breach of contract, and subsequently moved for summary disposition, arguing that there was no question of fact that Rebecca Roumayah caused the fire and that, pursuant to the lease agreement, the defendants were jointly and severally liable for the damage to the apartment. Najah Roumayah argued that the claim against him should be dismissed because there was no evidence that he caused the fire and, pursuant to MCL 600.2956, he could not be held liable. This Court disagreed:

> By its plain terms, MCL 600.2956 does not preclude this agreement [the agreement that the defendants would be jointly and severally liable]; it applies to tort actions "or another legal theory seeking damages for personal injury, property damage, or wrongful death." While this breach of contract claim clearly seeks to recover for damage to plaintiff's property, the damages sought are pursuant to contract and therefore are contract damages that arise incidentally from property damage. MCL 600.2956 does not provide that it applies to a legal theory seeking contract damages. Nor is there any indication that the Legislature, by amending MCL 600.2956, sought to limit or eliminate the parties' freedom to contract. The parties agreed that defendants would be jointly and severally liable for any damage that either of them caused. This agreement is not precluded by MCL 600.2956. [*Id.* at 642.][7]

The Morgan-Heller appellants claim that because the Court concluded that Najah Roumayah could be held liable without any consideration of his fault, MCL 600.2956 does not preclude their claim for contribution on the claims for which they could be held liable by

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[6] MCL 600.6304 applies to any "action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person." MCL 600.6304(1).

[7] See also *Zahn v Kroger Co of Michigan*, 483 Mich 34, 40; 764 NW2d 207 (2009) ("We . . . hold that MCL 600.2956 does not apply to contract actions, and the language chosen by the parties as contained in the contract is controlling.").

operation of law and without consideration of their fault. However, in *Laurel Woods Apartments*, it was because Najah Roumayah had expressly agreed in the lease agreement to be jointly and severally liable for any damage to the apartment that he could be held liable for the fire damage without consideration of his fault. Here, however, there is no allegation that Tartan expressly agreed in any contract to be jointly and severally liable for any damage to plaintiffs' home. Accordingly, the Morgan-Heller appellants' reliance on *Laurel Woods Apartments* is unavailing, and they have not established that the trial court erred in granting summary disposition to Tartan on their claim for contribution.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra