STATE OF MICHIGAN

COURT OF APPEALS

PARTNER & PARTNER II, INC. and ALI BAZZY,

Plaintiffs/Cross-Defendants-Appellants,

v

AYAR PROPERTY MANAGEMENT, L.L.C., LAKEVIEW OIL, INC., and FAIZ AYAR,

Defendants/Cross-Plaintiffs/Third-Party-Plaintiffs-Appellees,

and

MARATHON OF PLYMOUTH, INC. and NASHWA T KATTOUAH,[1]

Third-Party-Defendants-Appellees.

UNPUBLISHED
August 16, 2011

No. 298693
Wayne Circuit Court
LC No. 07-723188-CK

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

Ali Bazzy is the sole shareholder of Partner & Partner II, Inc. (P&P), which he started for the lone purpose of purchasing a gas station from defendants.[2] Following the sale, a third party (Petrol, Inc.) filed suit against the current plaintiffs, defendants and third-party defendants for nonpayment of a "finder's fee." Defendants rejected plaintiffs' requests to defend and indemnify them in the "finder's fee" suit, and plaintiffs filed the current action for indemnity under

[1] The claim of appeal designates the appellees as "Ayar Property Management, L.L.C. et al," which presumably includes the third-party defendants. However, none of the issues raised on appeal relate to the third-party defendants.

[2] The trial court dismissed plaintiffs' claims against Faiz Ayar in his individual capacity and plaintiffs do not appeal that ruling. Accordingly, we will refer only to the two corporate defendants in this opinion.

common law, implied contract, and express contract theories. The circuit court summarily dismissed plaintiffs' indemnification claims. P&P was entitled to indemnification under an express provision of the purchase agreement, which was incorporated by reference into its final contract with defendants for the sale of the property. Accordingly, we vacate the circuit court's ruling to the contrary, but affirm the remainder of the circuit court's summary disposition decision.

I. FACTUAL BACKGROUND

This case involves the sale of a gas station, which was owned by defendant Ayar Property Management (APM), and was situated on land owned by defendant Lakeview Oil, Inc. (Lakeview). Faiz Ayar is the sole shareholder of both APM and Lakeview. At some point in time, defendants entered into a land contract to sell the land and gas station to Marathon Oil. Marathon, in turn, leased the station to Petrol. Petrol could not maintain a profitable business and abandoned operations at the gas station. As a result, Petrol defaulted on its lease and Marathon defaulted on the land contract.

Bazzy subsequently contacted Petrol to inquire about purchasing the gas station. An agent for Petrol introduced Bazzy to Ayar. In November 2004, Bazzy formed P&P, which entered into a month-by-month lease agreement with defendants pending a sale. P&P also entered into a purchase agreement with defendants, under which the parties were required to close the sale by January 31, 2005, or the purchase agreement would become null and void.

On January 4, 2005, defendants entered into a separate agreement with Petrol to acknowledge Petrol's default under the lease and to reclaim their property interests. Defendants contractually agreed to share the proceeds of the pending sale with Petrol (the "finder's fee" agreement) as long as the sale was closed by July 1, 2005. If the property sold for $950,000 or more, defendants would transfer $100,000 to Petrol. If the sale was less than $950,000, Petrol would be entitled to the balance of any leftover proceeds.

January 31, 2005 passed without P&P closing the sale with defendants, and the purchase agreement was cancelled by its own terms. P&P retained possession of the gas station and paid rent on a monthly basis while the parties continued to negotiate the sale. On June 9, 2005, defendants finally closed the sale. P&P paid $950,000 for the property, but defendants returned a credit of $83,000 to reflect the cost borne by P&P to conduct extensive repairs. Defendants issued a "Bill of Sale" to P&P stating, "The seller warrants and conveys to the buyer and the buyer's successors and assigns all the seller's rights, title, and interests in the following property." Following this statement and before the description of the real property in question, defendants inserted the handwritten comment "per purchase agreement." Defendants also issued a warranty deed for the property in P&P's favor.

Because of the credits given to P&P in the sale, there were no remaining proceeds to distribute to Petrol as its finder's fee. In January 2006, Petrol filed suit against APM, Lakeview, P&P, Marathon, and the corporations' managing partners, alleging that they engaged in secret negotiations to lower the price of the property and wrongfully deny Petrol's finder's fee. Bazzy, as an individual, and P&P requested that defendants defend and indemnify them in that suit, but defendants refused. In March 2008, following a jury trial, the court entered judgments of $4,466

plus interest and costs against APM, Lakeview and P&P on the theory of unjust enrichment, dismissed the claims against Ayar as an individual, and entered a judgment of no cause of action in favor of Bazzy as an individual.

While Petrol's lawsuit was still pending, the current plaintiffs filed this action against the current defendants seeking indemnification. Plaintiffs alleged that defendants breached their express contractual duty under the purchase agreement to defend and indemnify them in any suit related to the purchase of the property. Plaintiffs further argued that the duty to defend and indemnify was implied in a warranty deed. Plaintiffs sought common law indemnity as well because they were not parties to Petrol's finder's fee arrangement and, therefore, Petrol's financial injury was caused only by the current defendants.[3]

Defendants later filed a motion for partial summary disposition of plaintiffs' claims. Defendants argued that Bazzy lacked standing as an individual because his claims were merely derivative of P&P's claims. Defendants contended that P&P's contractual indemnity claim failed because the purchase agreement was cancelled effective January 31, 2005. Defendants further contended that P&P was precluded from seeking indemnification under an implied contract or the common law because a jury had found P&P liable to Petrol.

Bazzy responded that he had standing to pursue indemnification because Petrol named him as an individual defendant and he was entitled to indemnity for the cost of his defense because the jury deemed him free from fault. P&P continued to argue that it was held accountable for defendants' actions against Petrol and, therefore, defendants were required to indemnify P&P under equitable principles. P&P also continued to rely on the purchase agreement, bill of sale, and warranty deed as sources of express and implied contractual promises to defend and indemnify.

The circuit court ultimately granted defendants' motion for partial summary disposition.[4] In doing so, the court made two errors. First, the court inaccurately stated that the current plaintiffs and defendants were all found liable to Petrol in the earlier lawsuit without distinguishing that Ayar and Bazzy were relieved from liability in their individual capacities. Second, the court indicated that the parties provided the November 2004 purchase agreement for the court's review. In fact, the parties provided all relevant contracts *except* the November 2004 purchase and lease agreements.

The court ruled that Bazzy's claims actually belonged to the corporation and that Bazzy, as an individual shareholder, lacked standing to raise an individual indemnification claim pursuant to the Business Corporation Act (BCA). MCL 450.1101 *et seq.* The circuit court dismissed P&P's common law and implied contract indemnification claims because its active

[3] Defendants also filed a cross-complaint against plaintiffs and a third-party complaint against Marathon and its managing agent. Those claims are not at issue in this appeal.

[4] The circuit court later resolved the remainder of plaintiffs' claims against defendants, but that order is not at issue in this appeal.

fault against Petrol precluded such relief. The court dismissed P&P's express contract claim because it was based on the cancelled November 2004 purchase agreement.

II. LEGAL ANALYSIS

We review a trial court's decision on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (internal citations omitted).]

We also review de novo the underlying issues of statutory and contract interpretation and matters of equity. *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004).

"Indemnity relates to the obligation of one person or entity to make good a loss another has incurred while acting for its benefit or at its request." *Langley v Harris Corp*, 413 Mich 592, 596; 321 NW2d 662 (1982). The right to indemnity may arise from three possible sources: common law, an implied contract, or an express contract. *Id.* at 596-597; *Williams v Litton Systems, Inc*, 164 Mich App 195, 198; 416 NW2d 704 (1987), aff'd *Williams v Litton Systems, Inc*, 433 Mich 755, 758; 449 NW2d 669 (1989) (*Williams II*).

A. INDEMNIFICATION TO P&P UNDER EXPRESS CONTRACT

The corporate plaintiff, P&P, asserts that it is entitled to indemnification under the purchase agreement as incorporated into the bill of sale. We agree. It is well established that the parties to a contract may incorporate by reference an extraneous writing to provide additional contract terms. *Norman Forge & NMF, Inc v Smith*, 458 Mich 198, 207; 580 NW2d 876 (1998), citing *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922). Under such circumstances, the two documents must be read together as one contract, regardless of whether the parties physically attach the extraneous writing. *Norman Forge*, 458 Mich at 207, citing *Whittlesey*, 217 Mich at 628, and *United California Bank v Prudential Ins Co*, 140 Ariz 238, 258; 681 P2d 390 (1983).

In this case, the bill of sale expressly provided that defendants were "conveying and assigning" their property rights to P&P "per the purchase agreement." While the purchase agreement became null and void on January 31, 2005, defendants drafted the new contract of sale between the parties, and revived the purchase agreement by incorporation. Accordingly, the purchase agreement became part of the bill of sale and the two documents must be read together as one contract.

While neither party entered the purchase agreement into evidence in the trial court, both parties quoted the relevant provisions in their various pleadings. The purchase agreement included an express indemnification provision:

> **Mutual Indemnification.** Each of the parties will hold and indemnify each other harmless against all losses, damages, costs, and expenses, including reasonable attorney's fees, resulting from any breach of any warranty, representation, or covenant contained in this Agreement.

P&P requests indemnification "resulting from" defendants' breach of its "warranty, representation, or covenant" that P&P was "not assuming and shall not assume any liabilities of the sellers of any kind . . . ." P&P characterizes the "finder's fee" agreement between defendants and Petrol as such a "liability."

"Freedom from active fault is not a prerequisite to maintaining an action for express contractual indemnity." *Williams II*, 433 Mich at 758. It is therefore irrelevant that the jury found P&P liable to Petrol in the finder's fee lawsuit. Defendants contractually agreed to defend and indemnify P&P if they breached their promise that P&P would not be responsible for "any liabilities of [defendants] of any kind." Defendants' contractual duty to pay Petrol a finder's fee is a liability against defendant. Accordingly, the trial court erred in dismissing P&P's claim for indemnification based on an express contract.

B. OTHER GROUNDS FOR INDEMNIFICATION TO P&P

Unlike express contractual indemnity, a party is only entitled to common law or implied contractual indemnification when it is free from active negligence or fault. *Farmer v Christensen*, 229 Mich App 417, 426; 581 NW2d 807 (1998); *Skinner v D-M-E Corp*, 124 Mich App 580, 585-586; 335 NW2d 90 (1983). "Common law indemnification" is "the equitable right to restitution of a party held liable for another's wrongdoing." *Hamilton v Telford*, 219 Mich App 225, 229; 556 NW2d 180 (1996). Even though P&P was not a party to the "finder's fee" agreement between Petrol and defendants, the jury in the earlier lawsuit could have found that P&P knew about the agreement or joined in defendants' bad faith attempt to avoid payment of Petrol's fee. Accordingly, it is not axiomatic that P&P was free from fault in relation to Petrol. As such, we affirm the trial court's dismissal of P&P's claim for common law indemnification.

P&P also claims a right to indemnification on an implied contract theory based on the covenants made in the warranty deed. Even if an implied contract for indemnification could be discerned from the warranty deed, P&P would not be entitled to indemnification due to its fault in causing Petrol's financial injury. *Farmer*, 229 Mich App at 425; *Skinner*, 124 Mich App at 585. We therefore affirm the trial court's dismissal of P&P's claim for implied contract indemnification.

C. EXPRESS AND IMPLIED CONTRACT INDEMNIFICATION CLAIMS OF INDIVIDUAL PLAINTIFF BAZZY

Petrol hailed Bazzy, as an individual, into court along with P&P. Bazzy was thereby forced to fund his personal defense against Petrol's action. Bazzy, as an individual, seeks

indemnification from defendants for the cost of this defense. We reject Bazzy's claim to express or implied contractual indemnity pursuant to the purchase agreement, bill of sale, and warranty deed. P&P was a party to these documents, not Bazzy. And, Bazzy has not cited sufficient reason to avoid the corporate structure and make him a party to the corporations' contracts.

A corporation is its own "person" under the law; a distinct and separate entity from its owners, even where the corporation is held by a single shareholder. *Jones v Martz & Meek Constr Co, Inc*, 362 Mich 451, 455; 107 NW2d 802 (1961); *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950); *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). However, "[c]omplete identity of interest between the sole shareholder and corporation may lead courts to treat them as one for certain purposes." *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). Usually, a court will treat the corporation and shareholder as one person to protect the interests of the corporation's debtors, or other third parties, by allowing them to "pierce the corporate veil." When a plaintiff pierces the defendant's corporate veil, it may reach the pockets of shareholders who have abused the protection of the corporate form to avoid legal obligations or to engage in other wrongful or fraudulent actions. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650-651; 364 NW2d 670 (1984); *Foodland Distributors*, 220 Mich App at 456-457. On a rare occasion, the court may employ "reverse piercing" and treat two separate corporate entities, or a corporation and its shareholder, as a single unit. "[I]t may be appropriate to invoke the doctrine [of reverse piercing] for the benefit of the shareholder where the equities are compelling." *Wells*, 421 Mich at 650-651; see also *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 685 n 3; 594 NW2d 447 (1999).

Our Supreme Court has found "compelling equities" to invoke "reverse piercing" where an employee of a wholly owned subsidiary tried to circumvent the exclusive remedy provision of the Worker's Disability Compensation Act by seeking tort damages from the parent company in addition to his WDCA benefits from the subsidiary. The Court allowed the corporations to avoid the "general principle" that they were separate entities to defend against the employee's tort claim because "of the important public policies underlying the" exclusive remedy provision of the WDCA. *Wells*, 421 Mich at 650-651.

The Supreme Court also allowed the use of "reverse piercing" in *Montgomery v Central Nat'l Bank & Trust Co of Battle Creek*, 267 Mich 142; 255 NW 274 (1934). Montgomery was the sole shareholder of the Post Tavern Co., which owned and managed the Post Tavern. Montgomery, as an individual, owned vacant land directly across the street from the tavern. *Id.* at 143. Montgomery sold her vacant lot to the defendant bank subject to a deed restriction proscribing the establishment of any business that served food, so as not to compete with the Post Tavern. *Id.* at 144. The bank tried to avoid the deed restriction on the ground that it was made for the benefit of the Post Tavern, which was a stranger to the deed from Montgomery. *Id.* at 146. The Supreme Court "reverse pierced" the corporate veil and treated Montgomery and the Post Tavern Co. as one entity under the deed and restrictive covenant because the bank was fully aware of this relationship at the time of contracting. *Id.* at 147. Therefore, treating Montgomery and her corporation as one entity furthered "the ends of justice." *Id.* at 147-148.

Unlike in *Wells* and *Montgomery*, there are no "compelling equities" to employ "reverse piercing" in this case. Bazzy, like many business people, created P&P to protect his personal

resources from anyone pursuing payment against his business. If defendants sought to pierce the corporate veil and seek recompense against Bazzy individually, they would be denied because there is no evidence that Bazzy used P&P for any fraudulent or wrongful reason. See *Klager v Robert Meyer Co*, 415 Mich 402, 411 and n 5; 329 NW2d 721 (1982); *Cinderella Theater Co, Inc v United Detroit Theaters Corp*, 367 Mich 424, 440; 116 NW2d 825 (1962); *Gledhill v Fisher & Co*, 272 Mich 353, 358-360; 262 NW 371 (1935). See also MCL 450.1317(4) ("[A] shareholder . . . is not personally liable for the acts or debts of the corporation except . . . by reason of his or her own acts or conduct."). Bazzy cannot have it both ways; he wants to claim that he cannot be held liable for any wrongdoing because he is an individual separate from the P&P corporation, but he wants defendants to treat him as one with P&P so he can seek indemnification under P&P's contracts. Bazzy cannot "pick and choose" in this manner. He was not a party to the contracts and deed related to the purchase of the gas station and, therefore, he may not pursue indemnification pursuant to those documents.

D. COMMON LAW INDEMNIFICATION CLAIM OF BAZZY AS AN INDIVIDUAL

Bazzy also raises a claim for common law indemnification as an individual. Common law indemnification is available when a party has been "held liable for another's wrongdoing," but was personally free from active negligence or fault. *Farmer*, 229 Mich App at 426; *Hamilton*, 219 Mich App at 229; *Skinner*, 124 Mich App at 585-586. Bazzy's claim must fail, however, because he was not held liable for another's wrongdoing. The jury in Petrol's finder's fee lawsuit actually adjudged Bazzy to be free from liability. Therefore, Bazzy faced no liability for which defendants could indemnify.

Moreover, the common law duty to indemnify does not encompass a separate duty to defend. Absent a finding of liability, there can be no claim for indemnification or for the attendant costs of defense. 18 Michigan Law & Practice (2d ed), § 4, p 373, citing *American Fidelity & Casualty Co v Priebe*, 157 F Supp 904, 910 n 1 (WD Mich, 1956); see also *Hayes v General Motors Corp*, 106 Mich App 188, 201-202; 308 NW2d 452 (reasoning that the plaintiff's indemnification was based on an express contract that included a defend and indemnify provision, and was not based on common law indemnity). Accordingly, the trial court properly dismissed Bazzy's claims for indemnification as an individual.

We vacate the trial court's judgment to the extent it dismissed the corporate plaintiff, P&P's, claim for indemnification under an express contract. In all other respects, we affirm the trial court's judgment. We remand to the trial court for further proceedings consistent with this opinion and do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher