STATE OF MICHIGAN

COURT OF APPEALS

NHNE, LLC,

Plaintiff/Counterdefendant-Appellee,

v

ROBERT H. ORLEY,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
June 17, 2021

No. 352800
Oakland Circuit Court
LC No. 2018-165853-CB

Before: MURRAY, C.J., and FORT HOOD and RICK , JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order of judgment in favor of plaintiff. On appeal, defendant argues the trial court erred in granting summary disposition in favor of plaintiff; erred in earlier orders by finding defendant's company, FNH, LLC, lacked good and marketable title to a membership interest that defendant agreed to give plaintiff in exchange for a release of claims; and, consequently, erred in finding the measure of damages owed to plaintiff by defendant amounted to $174,496.52. In addition, defendant argues the trial court erred by finding that defendant had to indemnify plaintiff for losses caused by plaintiff's own conduct. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case arises out of the aftermath of the sale of a business to plaintiff. In 2014, plaintiff entered into an asset purchase agreement with defendant, FNH,[1] and FNH's subsidiaries for the

[1] At the time, FNH was known as NH Northeast, LLC. The company changed its name in February 2015.

purchase of substantially all of FNH's and the subsidiaries' assets. As part of the agreement, plaintiff agreed to give to FNH a 2% membership interest in plaintiff's ownership. The agreement included an indemnity provision that stated:

> Section 8.1 Indemnification by [Plaintiff]. . . . [Plaintiff] shall indemnify and hold harmless [FNH] . . . from and against any and all Losses incurred by or asserted against [FNH or its subsidiaries] in connection with or arising from (a) any breach by [plaintiff] of its covenants and agreements contained herein; (b) any breach by [plaintiff] of its representations and warranties contained herein; (c) the Assumed Liabilities; or (d) the operation of the Business after the Closing.
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> Section 8.2 Indemnification by [FNH] and Defendant. . . . [FNH] and Defendant, jointly and severally, shall indemnify and hold harmless [plaintiff] . . . from and against any and all Losses incurred by or asserted against [plaintiff or its affiliates] in connection with or arising from (a) any breach by [FNH or its subsidiaries] of their covenants and agreements contained herein; (b) any breach by [FNH or its subsidiaries] of their representations and warranties contained herein; (c) the Excluded Liabilities; or (d) the operation of the Business prior to the Closing.

In July 2014, the parties closed on the purchase agreement.

After the closing, plaintiff incurred third-party claims and undisclosed liabilities during the operation of the business, totaling $174,496.52. Plaintiff sought indemnification from FNH and defendant, resulting in a settlement agreement whereby FNH and defendant agreed to return the 2% membership interest to plaintiff in "full satisfaction of [FNH's] indemnification obligations[.]" The settlement agreement stated that it did not:

> effect [plaintiff's] right to indemnification from [defendant] under the Purchase Agreement for any Losses incurred by or asserted against [plaintiff] in connection with or arising from (i) any breach by [FNH or a subsidiary] of their covenants and agreements contained in the Purchase Agreement; (ii) any breach by [FNH or a subsidiary] of their representations and warranties contained in the Purchase Agreement; (iii) the Excluded Liabilities; or (iv) the operation of the Business prior to the Closing.

The settlement agreement further represented that FNH had good and marketable title to the 2% membership it was returning, "free and clear of any security interest, pledge, mortgage, lien, charge, restriction, or other encumbrance, including any tax lien."

Approximately two weeks after the settlement agreement was executed, FNH filed for Chapter 7 bankruptcy. As a result, FNH's bankruptcy trustee requested that plaintiff return the 2% membership interest as an improper and avoidable preferential transfer of FNH's assets. Initially, plaintiff refused the request, but later surrendered the membership interest to the trustee in February 2017. One year later, the bankruptcy court approved a settlement between FNH's bankruptcy estate and plaintiff, allowing plaintiff to "pay $15,000 in exchange for reassignment of the [membership] [i]nterest . . . and settlement of the estate's rights in a disputed deposit and any other mutual claims[.]"

Meanwhile, in July 2015, plaintiff was sued in a Massachusetts trial court by Xavier Ortiz for an alleged failure to honor vouchers for plaintiff's computer training courses.[2] The vouchers were originally issued to Ortiz by FNH in 2003. In 2012, Ortiz initially attempted to redeem some of the vouchers by registering for FNH's training courses and FNH denied him from registering; however, the parties later resolved the issue, permitting Ortiz to redeem the vouchers.[3] After the sale of FNH to plaintiff in 2014, Ortiz again attempted to register for a training course using a voucher, which plaintiff refused to honor. After Ortiz contacted plaintiff, plaintiff's employee, Jay Consiglio, assured Ortiz that he would be able to register for a comparable training course using his voucher. Because Ortiz alleged that no comparable training course was offered by plaintiff, and plaintiff continued to refuse to honor the vouchers, Ortiz filed suit against plaintiff. Plaintiff notified defendant and FNH of the lawsuit, and defendant purportedly indicated that he would take up the defense and any resulting liability from the suit, but later refused. In 2016, a default judgment was entered against plaintiff. Plaintiff moved to vacate the default judgment; however, the trial court did not find a sufficient basis to vacate the judgment, awarding damages and attorney fees to Ortiz. Plaintiff appealed the order; and, on January 21, 2020, the Appeals Court of Massachusetts affirmed the judgment in favor of Ortiz. *Ortiz v NH Boston, LLC*, unpublished opinion of the Massachusetts Appeals Court, issued January 21, 2020 (Docket No. 19-P-177), pp 1-3.

Plaintiff filed suit against defendant, alleging breach of contract and misrepresentation claims. In count I, plaintiff alleged defendant unreasonably refused to indemnify plaintiff for losses related to third-party claims, the membership interest, and the *Ortiz* litigation, resulting in a breach of the asset purchase agreement. In count II, plaintiff alleged defendant breached the settlement agreement by representing FNH had good and marketable title to the 2% membership interest it returned to plaintiff when it did not. In counts III, IV, and V, plaintiff alleged defendant falsely, negligently, or recklessly represented that FNH had good and marketable title to the membership interest and that he would undertake the defense and responsibility for the *Ortiz* litigation. Defendant responded that plaintiff failed to mitigate its damages with respect to Ortiz, there was no duty to indemnify plaintiff's postclosing conduct, and there was no breach of contract. Defendant counterclaimed against plaintiff, alleging plaintiff unreasonably refused to indemnify defendant for losses related to the *Ortiz* litigation, resulting in a breach of the asset purchase agreement. Plaintiff denied defendant's counterclaim, asserting there was no breach of contract and defendant's claim was barred because he was the first party to breach the parties' agreements.

Defendant moved for summary disposition under MCR 2.118(C)(8), arguing there was no misrepresentation or breach as to the 2% membership interest because FNH had good and marketable title to the property when FNH transferred it back to plaintiff and the bankruptcy trustee could only assert a preferential transfer claim if FNH held good title when it was transferred. Even if he made misrepresentations in the settlement agreement, defendant argued FNH's actions were

[2] The lower court case number in the Suffolk County trial court is SUCV2015-02203.

[3] The terms of this resolution included the following: (1) Ortiz would redeem one voucher for the training course he attempted to register for in August 2012, (2) each of Ortiz's remaining three vouchers would be good for one technical training course, and (3) Ortiz would be entitled to enroll in two additional training courses at a later date.

not in breach of the asset purchase agreement executed seven months earlier. Defendant asserted plaintiff's claims as to the *Ortiz* litigation were similarly without merit because defendant never agreed and had no responsibility to indemnify plaintiff for its own postclosing conduct. Defendant further argued that plaintiff's misrepresentation claims were independently barred by the existence of the asset purchase and settlement agreements. In response, plaintiff argued defendant's indemnity obligations were set forth in the plain language of the asset purchase agreement, which defendant specifically acknowledged by entering into the settlement agreement, and defendant's defenses relative to the membership interest did not extinguish his responsibility. Plaintiff also requested summary disposition under MCR 2.116(I)(2) as to its breach-of-contract claim for defendant's failure to indemnify for damages related to the undisclosed liabilities, membership interest, and *Ortiz* litigation.

The trial court granted defendant's motion for summary disposition in part and denied the motion in part. The trial court granted summary disposition as to plaintiff's breach-of-contract claim for the failure to indemnify plaintiff for the costs associated with the membership interest, stating "where the membership interest was transferred back to [p]laintiff pursuant to the [s]ettlement [a]greement, which contained no indemnity provision, [d]efendant is not obligated to indemnify for the costs associated with defending against the preferential transfer, which were incurred well after the execution of the [asset purchase agreement]." The trial court also granted summary disposition as to the misrepresentation claims, finding plaintiff failed to allege any harm from the misrepresentations that was different from the harm alleged in the breach-of-contract claims. The trial court denied summary disposition as to the breach-of-contract claim, finding there was a question of fact as to whether defendant was aware of the threat of Ortiz's lawsuit. Further, the trial court denied plaintiff's motion for summary disposition, finding that, because defendant sought summary disposition under MCR 2.116(C)(8), plaintiff was not entitled to summary disposition under MCR 2.116(I)(2).

Shortly thereafter, plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing there was no genuine issue of material fact as to whether defendant breached the settlement agreement and was required to indemnify plaintiff for the costs associated with the *Ortiz* litigation. Plaintiff also asserted that defendant did not present evidence that refuted the trustee's preferential interest and ability to reclaim the membership interest from plaintiff, and defendant and FNH were aware of the threat of Ortiz's lawsuit before FNH was sold to plaintiff. Plaintiff further argued there was no issue of material fact to be decided as to defendant's counterclaim regarding the *Ortiz* litigation because he was not a party nor presented a defense in the case, and any claim that FNH may have, if not barred by indemnity, belonged to the trustee of FNH's bankruptcy estate.

In response, defendant argued plaintiff failed to establish that defendant misrepresented the title to the membership interest because FNH had not filed for bankruptcy at the time of the transfer and, therefore, truthfully represented good and marketable title. Defendant contended that plaintiff was attempting to obtain indemnification against all future claims, which the trial court had already dismissed in its previous order, under the guise of a breach-of-contract claim. Alternatively, defendant argued if plaintiff's claim was not dismissed, then plaintiff was not entitled to the $174,496.52 in damages that it requested. Because plaintiff only paid $15,000 to obtain clear title to the 2% membership interest from the trustee, defendant argued this was the proper measure of damages. Defendant further argued the breach-of-contract claim related to the *Ortiz* litigation warranted dismissal because plaintiff's costs associated with the litigation were not indemnifiable

claims nor did defendant agree to indemnify plaintiff for its own postclosing conduct. In reply, plaintiff argued defendant breached the settlement agreement at the time of its execution when FNH transferred the membership interest at a time when it was legally insolvent. As a result, plaintiff asserted the proper measure of damages was the value of the membership interest at the time of defendant's breach, i.e., $174,496.52, and, in no event, was the proper measure of damages the amount plaintiff paid to the trustee to retrieve the membership interest almost three years after the settlement agreement. Plaintiff further argued the *Ortiz* Court's conclusion that Ortiz was entitled to damages for FNH's actions before the closing date established that plaintiff's costs associated with the litigation arose from matters before the closing date and required indemnification.

The trial court granted plaintiff's motion for summary disposition in its entirety. Specifically, the trial court concluded the reasoning the trial court gave in the previous order warranted summary disposition for plaintiff's breach-of-contract claim regarding the membership interest. The court stated:

> [T]his court's predecessor specifically held, "The court agrees that the 2 percent membership interest was not free and clear of any restrictions or other encumbrances where the transfer was made while FNH was insolvent and the transfer was therefore subject to avoidance under bankruptcy laws." Having found that the 2 percent membership transferred by FNH and defendant Orley to plaintiff as consideration and was done so in the absence of good and marketable title, no genuine issue of material fact exists relative to whether defendant indeed violated its [s]ettlement [a]greement with plaintiff, compelling summary disposition[.]

As a result, the trial court found the proper measure of damages for the breach was $174,496.52, stating:

> The fact that plaintiff accepted a payment from the bankruptcy trustee in a lesser amount than the amount due and owing by defendant under the terms of the parties [sic] [s]ettlement [a]greement is not determinative of damages and defendant cited no case law authority which would support such a finding. Rather, . . . plaintiff shall be placed in as good a position as if the [s]ettlement [a]greement had been fully performed by the parties and with plaintiff made whole.

The trial court next concluded there was no genuine issue of material fact as to plaintiff's breach-of-contract claim regarding the *Ortiz* litigation, stating:

> Defendant . . . fails to address the fact that the actual allegations in the [*Ortiz*] litigation, and indeed, the findings of fact by the Massachusetts court, provide that the [*Ortiz*] litigation arose out of or is related to matters of or event[s] occurring prior to the [asset purchase agreement] closing date, and therefore, this court finds that they are clearly and unequivocally covered by the indemnity provision of the [asset purchase agreement] set forth in section 8.2.

The trial court further concluded summary disposition was warranted in plaintiff's favor for defendant's counterclaim because defendant did not meet his burden to survive summary

disposition by failing to address plaintiff's arguments. Written orders memorializing the trial court's ruling were entered the same day.[4]

The trial court conducted a brief bench trial regarding the amount of damages associated with plaintiff's costs in the *Ortiz* litigation. Plaintiff's chief executive officer, Mark McManus, was the sole witness and testified that plaintiff's total costs from the *Ortiz* litigation amounted to $207,380.59. The trial court found plaintiff was entitled to judgment, awarding damages of $182,380.59, and indicating that it would amend the award to include Ortiz's appellate attorney fees when plaintiff submitted the demand.[5] A written order memorializing the trial court's ruling was entered.

II. ANALYSIS

The trial court did not err in granting summary disposition, finding FNH lacked good and marketable title to the membership interest, and concluding the proper measure of damages amounted to $174,496.52. In addition, the trial court did not err in finding that defendant had an indemnity obligation to plaintiff for losses caused by plaintiff's postclosing conduct.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v Pontiac No 2*, 309 Mich App 611, 617-618; 873 NW2d 783 (2015). When deciding a motion for summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Likewise, contract interpretation is a question of law reviewed de novo. *White v Taylor Distrib Co, Inc*, 289 Mich App 731,734; 798 NW2d 354 (2010). Courts will enforce contracts in accordance with their terms, and give the words of the contract their plain and ordinary meanings. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902

[4] After the trial court's order, defendant moved for reconsideration as to plaintiff's breach-of-contract claim regarding the *Ortiz* litigation and the amount of damages awarded for the breach-of-contract claim regarding the membership interest. Defendant argued the trial court erroneously concluded defendant had an indemnity obligation to plaintiff for costs associated with the *Ortiz* litigation because the trial court mistakenly believed Ortiz's claims exclusively arose before the sale of FNH to plaintiff. Defendant also reasserted the proper measure of damages was the repurchase price plaintiff paid the trustee for the membership interest because allowing plaintiff to retain the membership interest and collect $174,496.52 from defendant would put plaintiff in a better position than contemplated by the settlement agreement. The trial court denied defendant's motion for reconsideration, stating defendant's motion merely restated issues already considered and rejected by the trial court and failed to demonstrate a palpable error.

[5] The trial court later amended the order to include $10,693.50 in appellate costs and attorney fees after plaintiff submitted the proper documentation.

(2009). The unambiguous language of a contract is found to reflect the intent of the parties, as a matter of law, and will be enforced in accordance with its terms. *Id.*; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-52; 664 NW2d 776 (2003).

In addition, this Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). In interpreting a statute, the reviewing court's role is to determine the legislative intent that may reasonably be inferred the express language in the statute. *Id*. If the statutory language is unambiguous, then the statute must be applied as written without judicial interpretation. *Id*. It is presumed "the Legislature intended the meaning it plainly expressed . . . ." *Cox v Hartman*, 322 Mich App 292, 298-299; 911 NW2d 219 (2017) (quotation marks and citation omitted).

Further, this Court reviews "the trial court's determination of damages following a bench trial for clear error." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007) (citation omitted). "In other words, a finding of clear error means that the trial court made a mistake." *Id*. (citation omitted).

A. GOOD AND MARKETABLE TITLE

Defendant first argues FNH had good and marketable title to the membership interest at the time the settlement agreement was executed because FNH had not yet filed for bankruptcy; and therefore, there was no misrepresentation, nor did anyone have authority to avoid FNH's transfer. We disagree.

In general, at the time of filing a petition for bankruptcy, "all legal and equitable interests" in property owned by the debtor becomes property of the bankruptcy estate, which is vested with the trustee and held for the benefit of the debtor's creditors. 11 USC 541(a); see *Young v Indep Bank*, 294 Mich App 141, 143-144; 818 NW2d 406 (2011). Section 547(b) of the Bankruptcy Code authorizes a trustee to avoid transfers of a debtor's interest in property "if five conditions are satisfied and unless one of seven exceptions defined in subsection (c) is applicable." *Union Bank v Wolas*, 502 US 151, 154; 112 S Ct 527; 116 L Ed 2d 514 (1991), citing 11 USC 547(b) (quotation marks and emphasis omitted). The five conditions of a voidable preference include any transfer of an interest in the debtor's property:

> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) *made while the debtor was insolvent*;
>
> (4) *made*—
>
> > (A) *on or within 90 days before the date of the filing of the petition*; or

> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title. [11 USC 547(b) (emphasis added).]

In general, insolvent means a

> financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title[.] [11 USC 101(32)(A).]

The trial court did not err in finding that FNH did not have good and marketable title to the membership interest at the time it was transferred to plaintiff and the settlement agreement was executed. A review of the settlement agreement indicates the parties agreement that "good and marketable title" was intended to mean being "free and clear of any security interest, pledge, mortgage, lien, charge, restriction, or other encumbrance, including any tax lien." Additionally, caselaw has similarly defined marketable title as "one of such character as should assure to the [buyer] the quiet and peaceful enjoyment of the property, which must be free from incumbrance." *Madhaven v Sucher*, 105 Mich App 284, 288; 306 NW2d 481 (1981). "A title may be regarded as 'unmarketable' where a reasonably prudent man, familiar with the facts, would refuse to accept title in the ordinary course of business, and it is not necessary that the title actually be bad in order to render it unmarketable." *Id*. (citation omitted).

While defendant argues that FNH had good and marketable title to the membership interest when the settlement agreement was executed, we disagree. Because FNH filed for bankruptcy two weeks after the settlement agreement, there is little doubt that FNH was insolvent at the time defendant represented that FNH had good and marketable title. Further, the transfer of the membership interest to plaintiff plainly fell within the 90-day preference period. Accordingly, the membership interest was not "free and clear" of all security interests, liens, restrictions, or encumbrances because it was subject to the trustee's voidable preference. As a result, the trial court properly concluded that defendant breached the settlement agreement by transferring the membership interest without good and marketable title.

B. MEASURE OF DAMAGES

Alternatively, defendant argues that, even to the extent there was a breach of the parties' agreement, the proper measure of damages amounted to the purchase price that plaintiff paid the trustee to obtain the membership interest and not the entire $174,496.52. We disagree.

"In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Id.* (quotation marks and citation omitted). "[A] plaintiff's remedy for breach of contract is limited to damages that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 426 n 3; 751 NW2d 8 (2008). "[T]he purpose of compensatory damages . . . is to make the plaintiff whole[.]" *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 631; 769 NW2d 911 (2009).

The trial court did not err in finding plaintiff was entitled to $174,496.52 for defendant's breach of contract. A review of the record indicates that the parties entered into a release of claims in the settlement agreement. Specifically, defendant and FNH agreed to indemnify plaintiff for $174,496.52 in losses incurred from operation of the business between the closing date and February 2015, and plaintiff agreed to release defendant and FNH from any further obligations from those losses. Rather than compensating plaintiff directly, FNH transferred the membership interest from the asset purchase agreement back to plaintiff as full satisfaction of the indemnity obligation. Accordingly, plaintiff's benefit-of-the-bargain gleaned from the settlement agreement was the reimbursement of losses sustained from operating the business between the closing date and the execution of the settlement agreement. As established, defendant's breach of the parties' agreements warranted damages in the amount plaintiff would have received if the agreements had not been breached. *Ferguson*, 273 Mich App at 54. Because plaintiff would have enjoyed a reimbursement of losses of $174,496.52, in the form of the membership interest, if defendant had not breached, the trial court properly concluded that plaintiff was entitled to damages for the entire $174,496.52.

Defendant argues that allowing plaintiff to collect $174,496.52 and retain the membership interest erroneously allows a windfall to plaintiff, surpassing its expected benefit-of-the-bargain. However, we highlight the distinction between FNH and the trustee of FNH's bankruptcy estate. As stated, the membership interest was subject to a restriction and encumbrance from the time of transfer to plaintiff, until plaintiff was forced to surrender the membership interest to the trustee, preventing plaintiff from outright possession and enjoyment of its benefit from the settlement agreement. When the trustee cleared the title of the membership interest—about three years after the settlement agreement was executed—plaintiff was permitted to purchase the membership interest from FNH's bankruptcy estate. Because the purchase of the membership interest from the estate was an entirely separate transaction from the settlement agreement, it is of little relevance that the trustee permitted plaintiff to purchase the membership interest for a significantly less amount than the parties agreed it was worth in February 2015. Therefore, the trial court did not clearly err in awarding plaintiff $174,496.52 in damages.

C. INDEMNITY

Defendant further argues the trial court erred by finding that defendant had to indemnify plaintiff for losses caused by plaintiff's own postclosing conduct. We disagree.

"As a general proposition, parties are free to enter into any contract at their will, provided that the particular contract does not violate the law or contravene public policy." *Cudnick v*

William Beaumont Hosp, 207 Mich App 378, 383-384; 525 NW2d 891 (1994). "In a variety of settings, this Court has upheld the validity of exculpatory agreements or releases that absolve a party from liability for damages caused by the party's negligence." *Id*. "Contractual indemnity is an area of law guided by well-settled general principles. Nonetheless, each case must ultimately be determined by the contract terms to which the parties have agreed." *Grand Trunk Western R, Inc, v Auto Warehousing Co*, 262 Mich App 345, 351; 686 NW2d 756 (2004). "Michigan law provides contracting parties with broad discretion in negotiating the scope of indemnity clauses." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 173; 848 NW2d 95 (2014). "Where the parties have contracted to create duties that differ or extend beyond those established by general principles of law, and the terms of the contract are not otherwise unenforceable, the parties must abide by the contractual duties created." *Grand Trunk Western R, Inc*, 262 Mich App at 351.

The trial court did not err in finding that defendant had to indemnify plaintiff for losses incurred from the *Ortiz* litigation. We note that the parties do not appear to dispute the general enforceability of the indemnity agreement within the asset purchase and settlement agreements. In reviewing the asset purchase agreement, defendant expressly agreed to indemnify plaintiff from any losses in connection with or arising from:

> (a) any breach by [FNH or its subsidiaries] of their covenants and agreements contained herein;
>
> (b) any breach by [FNH or its subsidiaries] of their representations and warranties contained herein;
>
> (c) the Excluded Liabilities; or
>
> (d) the operation of the Business prior to the Closing.

Defendant further agreed to this indemnity provision when he entered the settlement agreement with plaintiff, which restated the indemnity provision from the asset purchase agreement. On this basis, defendant's indemnity obligation includes plaintiff's losses *arising from and connected to* FNH's operation of the business before the closing date.

Defendant maintains that the indemnity provision does not create an indemnity obligation for plaintiff's own conduct during the *Ortiz* litigation. Specifically, defendant points to Consiglio's assurance, and later refusal, to allow Ortiz to register for his desired training course with his voucher, suggesting that the lawsuit directly resulted from plaintiff's own dealings with Ortiz. In opposition, plaintiff argues the indemnity provision was all encompassing of any losses related to the vouchers that were originally issued by FNH.

Because any and all losses "in connection with or arising from" are undefined contract terms, this Court may consult a dictionary. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). "Arise" is defined as "to result; spring or issue[,]" and "does not mean proximate cause in the strict legal sense; rather, almost any causal connection will suffice if it is more than merely incidental or fortuitous." *Random House Webster's College Dictionary* (2001); *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 497; 892 NW2d 467 (2016). Connection is defined as "the act or state of connecting" or "anything that connects; link[.]" *Random House Webster's College Dictionary* (2001). Accordingly, these

definitions make clear that defendant must indemnify plaintiff for losses alleged to have been sustained as a result of, or linked to, FNH's operation of its business before the closing date. A review of the record indicates that a causal connection exists between FNH's issuance and initial refusal to honor Ortiz's vouchers and the *Ortiz* litigation. Notably, the indemnity provision does not reveal any exception to defendant's indemnity obligation when plaintiff's loss is triggered or exacerbated by plaintiff's own conduct. Because "contract language should be given its ordinary and plain meaning[,]" we opine that the broad language of the indemnity provision encompasses indemnification for the *Ortiz* litigation. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 590; 683 NW2d 233 (2004).

Further, defendant argues that his indemnity obligation was extinguished by plaintiff's failure to mitigate the vast majority of its losses. Specifically, defendant maintains that plaintiff waited an unreasonable amount of time to obtain an attorney in the *Ortiz* litigation, plaintiff never offered to refund Ortiz for the vouchers, and plaintiff did not discuss the lawsuit with defendant during the settlement agreement negotiations. "Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." *Landin v Healthsource Saginaw, Inc*, 305 Mich App 519, 538; 854 NW2d 152 (2014). "Specifically, when one has committed a legal wrong against another, the latter has an obligation to use reasonable means under the circumstances to avoid or minimize his or her damages and cannot recover for damages that could thus have been avoided." *Id*. We cannot conclude that defendant has established a failure to mitigate damages.

First, a review of the record indicates that plaintiff did not immediately retain an attorney in the *Ortiz* litigation because of defendant's assurance that he would indemnify and defend plaintiff in the litigation. Notably, defendant did not inform plaintiff that he would no longer indemnify plaintiff until about a week before the default judgment was entered against plaintiff. Second, although plaintiff did not offer to refund Ortiz's money to avoid litigation—partially because plaintiff did not receive the money from Ortiz when he purchased the vouchers—plaintiff did attempt to allow Ortiz to register for other training courses; however, McManus testified that Ortiz refused because the training courses he intended to take when he purchased the vouchers were no longer offered. Third, we are not convinced that a discussion about a potential lawsuit with Ortiz between plaintiff and defendant at the time of the settlement agreement would have had any effect on the damages later awarded to Ortiz. Therefore, defendant's mitigation argument is without merit.

Affirmed.

/s/ Christopher M. Murray
/s/ Karen M. Fort Hood
/s/ Michelle M. Rick