

STATE OF MICHIGAN
COURT OF APPEALS

FRANK E. BALL and FREDERICK C. BALL,

Plaintiffs-Appellees,

v

THOMAS R. CONKLIN,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 176199

Leelaunau Circuit Court

LC No. 92-003106-CZ

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment for plaintiffs, finding defendant liable to plaintiffs on their claim for contribution for expenses incurred in relation to an office building that defendant and plaintiffs had jointly owned. We reverse.

Defendant and plaintiffs had been partners in a Michigan partnership that held title to an office building. On September 14, 1990, the parties entered an agreement whereby defendant agreed to transfer his interest in the building to plaintiffs and plaintiffs in turn agreed to indemnify defendant regarding any expenses incurred in relation to the building. However, defendant refused to convey his interest because plaintiffs had failed to make certain payments promised to defendant in an earlier agreement. Plaintiffs brought this action for specific performance, asking the trial court to quiet title and order defendant to convey his interest in the office building so that an impending sale could be completed. Defendant, in turn, brought a counterclaim against plaintiffs for breach of fiduciary duty. On October 19, 1993, the trial court entered an order quieting title, ordering defendant to convey his interest in the building to plaintiffs and finding no cause of action on defendant's breach of fiduciary duty claim. The trial court indicated that this order was final as to these claims, apparently pursuant to MCR 2.604, which at the time allowed the trial court to certify certain judgments as final. Defendant did not appeal from this judgment.¹

Plaintiffs had also requested that the trial court find that their contractual obligation to indemnify defendant for his share of the expenses of the building was excused by his failure to convey his interest

to them. Plaintiffs requested that the court order defendant to pay his share of these expenses to plaintiffs. On May 22, 1994, the court issued a judgment on this claim, finding that defendant's failure to convey his interest in the building to plaintiffs excused their duty to indemnify him and ordering defendant to pay plaintiffs \$121,072 as his share of the expenses of the building. On June 10, 1994, defendant filed a claim of appeal from this judgment. On October 24, 1994, after defendant's claim of appeal had been filed, the court also ordered defendant, pursuant to plaintiffs' motion, to pay \$4,707 in attorney fees as a mediation sanction pursuant to MCR 2.403(O).

Defendant first argues that the trial court erred in finding him liable for contribution for the expenses of the building after it granted plaintiffs' request for specific performance and ordered defendant to quit claim his interest in the building to plaintiffs. We agree. Once specific performance was ordered, the trial court should have put the parties in the same position they would have been in had the contract been timely performed. *Giannetti v Cornillie (On Remand)*, 209 Mich App 96, 98; 530 NW2d 121 (1995); *Godwin v Lindbert*, 101 Mich App 754, 758-760; 300 NW2d 514 (1980). To put the parties in the same position that they would have been in had the contract been timely performed, the trial court should have found plaintiffs' promise to indemnify defendant enforceable from the date of the agreement rather than the date defendant complied with the order of specific performance. A contrary result would put plaintiffs in a better position than if defendant had timely performed his part of the bargain because they would be relieved of their promise to indemnify defendant for expenses incurred after the agreement was formed.

Although the trial court did not specify what authority it relied on to support its decision, plaintiffs advance several theories we find unpersuasive. Plaintiffs suggest that defendant's conveyance of his interest in the building was a condition precedent to their obligation to indemnify. However, the parties' agreement does not contain any language suggesting that defendant's performance was a condition precedent to plaintiffs' indemnity obligation. Courts are not inclined to construe stipulations of a contract as conditions precedent unless compelled to do so by the language of the contract plainly expressed. *Reed v Citizens Ins Co*, 198 Mich App 443, 447; 499 NW2d 22 (1993). Plaintiffs additionally argue that mutuality of obligations is distinguishable from conditions precedent but fail to articulate how that theory would apply to the case at hand.

Plaintiffs also suggest that the parties' promises were dependent covenants and that, therefore, defendant was not entitled to be indemnified until he performed his part of the bargain. However, plaintiffs fail to articulate what facts demonstrate that their promises were dependent covenants. Because plaintiffs agreed to indemnify defendant for any past, present, or future obligations related to the building, while defendant was merely required to execute a deed, these obligations do not appear dependent since they were not concurrent in nature. See *Bobenal Investments, Inc v Giant Super Markets, Inc*, 79 Mich App 31, 43; 260 NW2d 915 (1977).

Defendant next argues that the trial court was without jurisdiction to award plaintiffs costs and attorney fees because the order was entered after defendant's claim of appeal was filed and the judgment appealed from did not indicate that the court intended to award attorney fees. We agree. The trial court's May 22, 1994, order does not indicate that the trial court intended to order attorney

fees or costs beyond the \$147 awarded to plaintiffs as costs for the filing fee, witness fee and judgment fee. If the trial court fails to indicate in the final judgment that it intends to award costs and attorney fees, MCR 7.208(A) divests the trial court of jurisdiction to make such an award once the claim of appeal has been filed. *Admiral Ins v Columbia Ins*, 194 Mich App 300, 314; 486 NW2d 351 (1992); *Valance v Brewbaker*, 161 Mich App 642, 647-648; 411 NW2d 808 (1987). Therefore, the trial court was without jurisdiction to order defendant to pay \$4,707 to plaintiffs as an award for attorney fees pursuant to MCR 2.403(O) and this order should be vacated.

Reversed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski

¹ In this appeal, defendant has raised several allegations of error regarding the court's judgment granting specific performance and quieting title in plaintiffs. However, since defendant did not file a claim of appeal from the October 19, 1993, final judgment within twenty-one days and has not filed a delayed application for leave to appeal from that judgment, this Court is without jurisdiction to address defendant's allegations of error regarding the October 19, 1993, judgment. See *KLCO v Dynamic Training Corp*, 192 Mich App 39, 40-41; 480 NW2d 596 (1991).