# STATE OF MICHIGAN

# COURT OF APPEALS

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BRUCE H. BENZ and STEPHANIE KING BENZ,

Plaintiffs-Appellees/
Cross-Appellants,

v

RCK DEVELOPMENTS,

Defendant-Appellant,

and

KENNETH F. RAZNICK and KENNETH F. RAZNICK TRUST,

Defendants-Appellants/
Cross-Appellees,

and

R. RICHARD WALKER, CHRISTOPHER G. BROCHERT, and CHRISTOPHER BROCHERT TRUST,

Defendants/Cross-Appellees,

and

WEATHERFORD/WALKER DEVELOPMENTS, INC., PITTSFIELD TOWNE CENTRE, and PAUL BOSCO & SONS CONSTRUCTION, INC.,

Defendants.

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UNPUBLISHED
March 20, 1998

No. 191193
Oakland Circuit Court
LC No. 92-427857-CK

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Defendants RCK Developments, Kenneth F. Raznick, and the Kenneth F. Raznick Trust (Raznick trust) appeal as of right from the trial court's order granting summary disposition to plaintiffs on their breach of contract claim. Defendants challenge the trial court's decision granting summary disposition to plaintiffs as well as its determination of attorney fees. Plaintiffs, in their cross-appeal, also dispute the trial court's determination of attorney fees. We affirm in part, reverse in part, and remand.

This Court reviews a motion for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must examine the documentary evidence and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997).

This dispute arose over the breach of a tax agreement which essentially guaranteed that defendants would hold plaintiffs harmless from certain tax assessments on their property. The assessments were to be made for the construction of an adjacent road. Pittsfield Township required defendants to build the road in order to develop their shopping center on land abutting plaintiffs' property.[1] RCK Developments maintains that summary disposition against it was improper because R. Richard Walker, who signed the agreement on behalf of RCK Developments, did not have authority to bind the partnership. We disagree. MCL 449.9(1); MSA 20.9(1) provides:

> Every agent is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, *and the person with whom he is dealing has knowledge of the fact that he has no such authority.* [Emphasis added.]

"Knowledge," within the meaning of the Uniform Partnership Act, exists when a person dealing with the partnership either has "actual knowledge" or "has knowledge of such other facts as in the circumstances shows bad faith." MCL 449.3(1); MSA 20.3(1).

Even assuming, arguendo, that Walker did not have express authority from RCK Developments to sign the tax agreement on behalf of the partnership, there is no evidence that plaintiffs either had actual knowledge of that fact or that they acted in bad faith. Cf. *City National Bank of Detroit v Westland Towers Apartments*, 107 Mich App 213, 226-228; 309 NW2d 209 (1981), rev'd and remanded on other grounds 413 Mich 938 (1982) (holding that the plaintiff had knowledge that partner lacked authority to bind partnership where the plaintiff doubted partner's authority and had a copy of the partnership agreement). Moreover, there was no genuine factual issue concerning whether the tax agreement, albeit in the nature of a guaranty, was within the usual course of the partnership's business,

namely, the development of shopping malls. Therefore, the trial court properly found that plaintiffs were entitled to summary disposition against RCK Developments.

The Raznick trust, a general partner in RCK Developments, further argues that the trial court erred in granting summary disposition against it because (1) the Raznick trust was not itself a party to the tax agreement, and (2) the Raznick trust's liability was limited by the express terms of the partnership agreement. We disagree. First, the Raznick trust is jointly liable for all the debts and obligations of the RCK Developments partnership. MCL 449.15(b); MSA 20.15(b). Second, the Raznick trust has cited no authority for its novel claim that plaintiffs are bound by the provisions of the partnership agreement allocating liability for loans and credit among the individual partners. Accordingly, the trial court did not err in granting plaintiffs' motion for summary disposition against the Raznick trust.

However, we reverse the grant of summary disposition entered against Kenneth Raznick individually. MCL 700.818(1); MSA 27.5818(1) provides:

> Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

Here, there is no claim that any of the conditions exempting a trustee from the statute's protection apply to render Raznick personally liable. Furthermore, we reject plaintiffs' claim that the trust was invalid because Raznick retained control over the trust assets by declaring himself trustee and retaining the right to revoke the trust. See *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 439; 513 NW2d 148 (1994). Accordingly, because Raznick could not be held personally liable on the tax agreement, the trial court erred in entering judgment against him.

We next address the parties' challenges to the trial court's determinations with respect to the attorney fees plaintiffs sought under the tax agreement. Plaintiffs argue in their cross-appeal that they were entitled to an award of attorney fees for the services that Bruce Benz, a party who happens to be an attorney, performed for himself during the litigation.[2] We disagree.

The agreement at issue provided that, in the event of default, defendant would

> indemnify, defend and hold [plaintiffs] harmless of and from any and all liens, liabilities, claims, damages or causes of action related to or in any manner arising out of the default by [defendants], including without limitation all costs of enforcement of this agreement by [plaintiffs], and any claims, damages, causes of action, costs, attorney fees and costs of appeal arising out of or directly or indirectly relating to any default by [defendants] under the terms of this agreement.

The meaning of an unambiguous contract provision such as this one is a question of law that we review de novo. *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996); *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437

Mich 75, 80; 467 NW2d 21 (1991). The intent of the parties must be discerned from the words used in the instrument. *Moore v Campbell, Wyant & Cannon Foundry*, 142 Mich App 363, 367; 369 NW2d 904 (1985).

Construing the contractual term "attorney fees" in its ordinary sense, we believe that an attorney-client relationship was a necessary prerequisite to recovery:

> "For there to be an attorney in litigation there must be two people. . . . The term '*pro se*' is defined as an individual acting 'in his own behalf, in person.' By definition, the person appearing 'in person' has no attorney, no agent appearing for him before the court. The fact that such plaintiff is admitted to practice law and available to be an attorney for others, does not mean that the plaintiff has an attorney, any more than any other principal who is qualified to be an agent, has an agent when he deals for himself. In other words, when applied to one person in one proceeding, the terms 'pro se' and 'attorney' are mutually exclusive." [*Laracey v Financial Institutions Bureau*, 163 Mich App 437, 445-446; 414 NW2d 909 (1987), quoting *Duncan v Poythress*, 777 F2d 1508, 1518 (CA 11, 1985) (RONEY, J., dissenting); see also *Watkins v Manchester*, 220 Mich App 337, 341-345; 559 NW2d 81 (1996).]

Accordingly, there being no attorney-client relationship, the trial court correctly determined that plaintiffs were not entitled to recover Bruce Benz's attorney fees. While plaintiffs also make the novel claim that the value of Bruce Benz's services are recoverable under the contract as "lost opportunity costs," we do not believe that the unambiguous contractual provision at issue can be reasonably interpreted as encompassing time spent in preparation for litigation as a pro se party litigant as compensable "costs" or "damages." Indeed, the parties' inclusion of "attorney fees" as a separate form of indemnity coverage militates against construing other listed recoverable costs as also encompassing attorney fees as lost opportunity costs.

RCK Developments argues that, because Bruce Benz's attorney fees were not recoverable under the contract, the trial court erred in awarding attorney fees for the services performed by Eames Wilcox in an effort to recover Benz's pro se fees. We agree. Because we have already concluded that plaintiffs were not entitled to recover Benz's "fees" under the contract, any fees charged by Eames Wilcox relating to plaintiffs' unsuccessful attempts to recover Benz's lost opportunity costs were likewise unrecoverable. Otherwise, plaintiffs would be able to recover indirectly what they could not recover directly under the contract.

The trial court also cut off plaintiffs' right to recover any attorney fees incurred after June 30, 1993, on the ground that the costs of enforcing the parties' agreement had tolled at that time. That decision is affirmed to the extent that it precluded plaintiffs from recovering Eames Wilcox's attorney fees incurred in an attempt to recover Benz's "fees." However, we conclude that plaintiffs are entitled to recover all other fees expended in enforcing the agreement, whether those fees were incurred before or after June 30, 1993. Therefore, we are remanding this matter for a determination whether Eames Wilcox performed any services that were related to enforcement of the tax agreement after June 30, 1993, but which were unrelated to plaintiffs' attempted recovery of Benz's "fees."

The last issue raised by plaintiffs in their cross-appeal with respect to contractual attorney fees is whether the trial court erred in determining that only the RCK Developments partnership is responsible for the payment of attorney fees. We conclude that it did. The Raznick trust is liable as a partner in RCK Developments. See MCL 449.15(b); MSA 20.15(b). As we stated previously, liability does not extend to Kenneth Raznick personally. See MCL 700.818(1); MSA 27.5818(1). However, because Christopher Brochert was himself a general partner in the Pittsfield Towne Centre limited partnership, a signatory to the breached agreement, he can be held personally liable on the contract. See MCL 449.1403(b); MSA 20.1403(b).

Defendants next contend that the trial court erred in awarding prejudgment interest back to the date the complaint was filed because plaintiffs did not actually pay the tax assessment until some two years later. We disagree. The cases cited by defendants are distinguishable, and they have failed to convince us that this case is not controlled by subsection 5 of the prejudgment interest statute, MCL 600.6013; MSA 27A.6013. That statute provides, in relevant part: "[F]or complaints filed on or after January 1, 1987, if a judgment is rendered on a *written instrument*, interest shall be calculated *from the date of filing the complaint* to the date of satisfaction of the judgment . . . ." MCL 600.6013(5); MSA 27A.6013(5) (emphasis added). Thus, defendants' argument as framed must fail.

In their cross-appeal, plaintiffs also claim that the trial court erred in refusing to award them attorney fees and costs both under the contract and as mediation sanctions. We disagree. This Court has previously held that attorney fees may not be awarded as mediation sanctions to a party proceeding pro se. *Watkins, supra*. Therefore, plaintiffs are also precluded from recovering those fees incurred by Eames Wilcox in an attempt to recover Benz's pro se attorney fees. Finally, to the extent plaintiffs seek to recover as mediation sanctions those attorney fees that *were* incurred in enforcing the agreement, we find no abuse of discretion in the trial court's decision denying such an award in light of the fact that plaintiffs have already recovered those fees under the contract. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 177-178; 568 NW2d 365 (1997). The trial court certainly was not required to award mediation sanctions under the circumstances. See MCR 2.403(O)(11) ("If the 'verdict' is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.")

Finally, we reject as unfounded defendants' assertion that this case should be reassigned to a different trial judge on remand.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer

[1] We note that none of the defendants in this appeal dispute the trial court's determination that the parties' tax agreement was breached. Thus, the only dispute is over the enforcement of the agreement's guaranty provision.

[2] Plaintiffs abandoned at oral argument any claim that Stephanie Benz has a separate right to recover attorney fees.