

STATE OF MICHIGAN
COURT OF APPEALS

SACHSE CONSTRUCTION & DEVELOPMENT
CO, LLC,

UNPUBLISHED
April 3, 2014

Plaintiff-Appellant,

v

AZD ASSOCIATES, INC, a Michigan corporation
and L & A, INC d/b/a L&A STRUCTURAL
ENGINEERS, a Michigan corporation,

No. 310026
Oakland County Circuit Court
LC No. 11-121946-CH

Defendants-Appellees.

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

I. INTRODUCTION

Plaintiff, the general contractor for a Royal Oak condominium project that the owners say has many defects, sued the project’s architect (AZD) and the structural engineer (L&A) for common law indemnification. Specifically, plaintiff asserts that any damages the owners might recover or claim against it are, in reality, the fault of AZD and L&A, not Sachse. But the evidence shows that the owners have not claimed or recovered, nor do they seek to claim or recover, damages against Sachse for any malpractice attributable to defendants. Rather, the owners have pursued remedies against Sachse for damages attributable only to Sachse’s conduct. Accordingly, the trial court properly dismissed Sachse’s indemnification suit because the owners’ claims against Sachse are direct, not derivative.

Because all other counts of Sachse’s suit are essentially restated assertions of its right to indemnification—premised on its mistaken theory that the owners’ claims against it are derivative—the trial court properly dismissed the remaining counts of plaintiff’s suit, as do we. Simply stated, a claim for common law indemnification, of the nature asserted here, must be founded on derivative, not direct liability.

II. FACTS AND PROCEDURAL HISTORY

This construction-law action springs from a dispute over Main Street Lofts, a condominium development in Royal Oak. RSW Development Group II, LLC (“RSW”) is the original owner and developer of the condo project. It hired plaintiff Sachse Construction and

Development Co, LLC (“Sachse”) to serve as the general contractor. RSW also selected defendant AZD Associates, Inc (“AZD”) as the project’s architect, and defendant L&A, Inc (“L&A”) as the project’s structural engineer. Each party contracted separately with RSW for its respective duties—Sachse did not contract with AZD or L&A.

The owners say that the completed project contained numerous defects, which prompted the Main Street Lofts Condominium Association (“Main Street”) to sue RSW in 2009.¹ In turn, RSW filed a third-party complaint against Sachse and AZD, and later added L&A to the action. Sachse was dismissed from the RSW-Main Street lawsuit in March 2010, because its contract with RSW contained an arbitration clause. RSW subsequently assigned its claims (including its arbitral claim against Sachse) to Main Street in December 2010, and Main Street settled with AZD and L&A for an undisclosed amount.²

As the arbitration between Sachse and Main Street proceeded, Sachse brought this lawsuit against AZD and L&A in the Oakland County Circuit Court. It alleged a host of claims against defendants, including: (1) common-law indemnification; (2) third-party beneficiary; (3) unjust enrichment; and (4) negligence. Sachse particularly stressed the possibility that it could be held liable in the arbitration proceeding for AZD and L&A’s malpractice. Both defendants moved for summary disposition in March 2012 under MCR 2.116(C)(10). The trial court granted the motion a month later, and held that Sachse lacked a valid claim against both defendants, as it had not been held liable for any of defendants’ actions. Also, the trial court emphasized that Main Street’s arbitration demand sought only damages for Sachse’s actions that caused the project defects—not AZD or L&A’s.³

Sachse appeals the trial court’s ruling, and once more Sachse—contrary to the affidavits and record statements of Main Street’s attorneys—emphasizes that it could be held liable, in arbitration, for AZD and L&A’s actions, and implies that this liability could exceed \$700,000.⁴

¹ In its amended complaint against RSW, dated February 1, 2011, Main Street alleged numerous defects in the condominiums, including problems with the siding and flashings, parking garage ceiling, and water damage. In its demand for arbitration with Sachse, Main Street mentions excessive “bowing” in the third and fourth floors of the condo building, crushed wood headers, problems with sliding doorwalls and windows, uneven elevation, and water damage.

² The details of the settlement are also undisclosed.

³ The trial court requested that Main Street’s attorney, Nathaniel Abbate, speak on the record at the April 2012 motion hearing, and detail exactly what Main Street demanded of Sachse in the arbitration. Abbate stated that Main Street did *not* seek “damages [in arbitration] from Sachse for things that these two other parties [AZD and L&A] did.” This statement echoes Abbate’s affidavit, which says the same. It also corresponds with Main Street’s initial demand for arbitration, which focuses only on Sachse’s alleged contractual breach—not AZD or L&A’s.

⁴ Main Street’s initial demand for arbitration against Sachse does state that Main Street’s damages from Sachse’s alleged contractual breaches “will in all likelihood exceed \$700,000.” But, as noted, the demand only references Sachse’s failures, and does not mention AZD or L&A. Indeed, the arbitral award, made in May 2013, implies that it is premised on Sachse’s actions, as

It also asserts that the trial court's grant of summary disposition to defendants was premature, as discovery had not yet been completed.

III. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim, and is granted where "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). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *Id.* A court must consider the pleadings, affidavits, depositions, admissions, and other "evidence submitted by the parties" in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).

IV. ANALYSIS

Indemnification is a common-law claim that springs from equity: namely, that an innocent party should not be liable for the wrongful acts of another.⁵ *Lakeside Oakland Dev, LC v H&J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002). It is intended "only to make whole . . . a party held vicariously liable to another through no fault of his own." *Peeples v City of Detroit*, 99 Mich App 285, 292; 297 NW2d 839 (1980). Accordingly, indemnity is only available to parties that can "plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence." *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1982). This rule is quite strict: a common-law indemnification action "cannot lie where the [party seeking indemnification] was even .01 percent actively at fault." *St. Luke's Hospital v Giertz*, 458 Mich 448, 456; 581 NW2d 665 (1998); see also *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992) (noting that "common-law indemnity . . . require[s] that the person seeking indemnification be free from any active negligence"). Again, this is because indemnity is only available to "a party who faces vicarious liability for the negligent act of another." *Sawka v Prokopowycz*, 104 Mich App 829, 833; 306 NW2d 354 (1981). In its determination of whether the party seeking indemnification is free of fault, "a court must review the underlying complaint against that party as well as the complaint which seeks indemnity." *Fishbach-Natkin, Inc v Shimizu America Corp*, 854 F Supp 1294, 1301 (1994), citing *Oberle v Hawthorne Metal Prod*,

opposed to defendants': the award "takes into consideration set-offs to which Sachse Construction would be entitled as a result of Main Street's prior settlement of its claims against AZD . . . and L&A Structural Engineers." The amount of the award (\$78,981.60) reflects this analysis. It is also far less than the \$700,000 mentioned in Main Street's initial arbitral demand, and for which Sachse claims it is at risk of liability.

⁵ For a recent summary and explanation of the Michigan common law of indemnification, see *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 62–63; 807 NW2d 354 (2011).

192 Mich App 265, 270; 480 NW2d 330 (1991); and *Skinner v D-M-E Corp*, 124 Mich App 580, 586; 335 NW2d 90 (1983).⁶

Therefore, to prevail on a claim for common-law indemnification, the party seeking indemnification must show that: (1) it has been held liable for the acts of another; and (2) it is free from fault in the underlying wrongful act that gave rise to the liability at issue.⁷

Here, Sachse is unable to demonstrate that it has been held liable for any actions (or lack thereof) taken by AZD and/or L&A.⁸ And Main Street has asserted claims against Sachse that arise from Sachse's own alleged negligence—not AZD or L&A's. At the time Sachse submitted its brief, Sachse and Main Street were in the midst of an arbitration process—which, by Main Street's own admission, only involved direct claims against Sachse for actions taken by Sachse.

Sachse attempts to elide this issue in its brief by emphasizing the possibility that it *might* be held liable for AZD and L&A's malfeasance, because Main Street's arbitral demand seeks damages for all the defects in the condo development—not just those defects (if any) caused by Sachse. However, the record contradicts this assertion: Main Street's attorneys stated in affidavits and sworn statements before the trial court that their arbitral demand sought only

⁶ “Lower federal court decisions are not binding on this Court, but may be considered on the basis of their persuasive analysis.” *People v Fomby*, 300 Mich App 46, 50 n 1; 831 NW2d 887 (2013).

⁷ Each party makes extensive reference to *US v Spearin*, 248 US 132; 39 S Ct 59; 63 L Ed 166 (1918) which is the “seminal case recognizing a cause of action for breach of contractual warranty of specifications. . .” *Hercules, Inc v US*, 516 US 417, 424; 116 S Ct 981; 134 L Ed 2d 47 (1996). As explained by Justice BRANDEIS:

[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work. . . .” [*Spearin*, 248 US at 136 (citations omitted).]

Here, this analysis has the effect of reinforcing what is already the rule from the Michigan cases described above: Sachse cannot be held liable for alleged design errors or omissions committed by AZD or L&A—beyond those allocated to Sachse for its *own* active fault in building and overseeing the construction as general contractor. Sachse concurs with this analysis in its brief, but avers that the arbitrator could misapply the law.

⁸ Sachse made this appeal before *any* damages had been assessed against it. In fact, the arbitral process was still ongoing when Sachse submitted its brief. Accordingly, Sachse's claim is an exercise in extrapolation—it repeatedly makes reference to the *possibility* of harm, which has not yet taken place. As the trial court noted, Sachse's inability to point to a specific injury weakens its claim and makes its arguments particularly frustrating.

damages for Sachse’s wrongdoing, independent and distinct from that of AZD and L&A. Indeed, as noted, Main Street’s assertions are supported by the arbitration demand itself (which never mentions AZD or L&A, and focuses only on Sachse’s alleged negligence). Moreover, the ultimate arbitral award strongly implies that it was based solely on Sachse’s actions: the award takes “into consideration set-offs to which Sachse Construction would be entitled as a result of Main Street’s prior settlement of its claims against AZD . . . and L&A Structural Engineers.” In addition, the relatively small amount of the award (\$78,981.60) further suggests that the arbitrator made his determination solely on the basis of Sachse’s negligence—not any actions taken by AZD or L&A. Given the wide array of structural problems at the condo development, if the arbitrator had assigned liability for all the defects to Sachse—as Sachse claimed the arbitrator would—the award would have been much higher. And, most importantly, Sachse failed to introduce any evidence, including evidence regarding the arbitral proceedings or award, that it was held responsible for defendants’ conduct.

Despite Sachse’s assertions to the contrary, no amount of discovery will change the fact that it has not been found liable for any action committed by AZD and L&A, and that it cannot bring a claim against AZD or L&A for liability incurred from its *own* active negligence. Again, Main Street’s arbitral demand, affidavits, and sworn statements before the trial court stressed that Main Street sought damages from injuries caused by Sachse’s own actions, not those of AZD or L&A. The trial court’s grant of summary disposition to defendants per MCR 2.116(C)(10) was accordingly not premature, as there is not a “fair likelihood that further discovery would yield support for the nonmoving party’s position.” *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002).⁹

V. CONCLUSION

Sachse’s claim of common-law indemnification necessarily fails: it has been sued for its own active negligence and has not been held liable for the wrongdoing of another party. Accordingly, the trial court correctly dismissed Sachse’s action for common-law indemnification.

⁹ Sachse’s other claims—for unjust enrichment, third-party beneficiary, and negligence—are all different formalistic legal headings for what here is the same substantive claim: indemnification. In its confusing sections on these additional claims, Sachse quotes inapposite case law on the concept du jour (unjust enrichment, third-party beneficiary, negligence), and then restates its assertion that AZD and L&A must compensate Sachse because Sachse is being held liable for their malfeasance—in other words, indemnification. We need not address this attempt to use formalistic labels to manufacture other claims where none exist. See *Attorney Gen v Merck Sharp & Dohme Corp*, 292 Mich App 1, 9–10; 807 NW2d 343 (2011) (citations omitted) (“a court is not bound by a party’s choice of labels. Rather, we determine the gravamen of a party’s claim by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading”).

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Henry William Saad

/s/ Karen M. Fort Hood