STATE OF MICHIGAN

COURT OF APPEALS

HARVEY TENNEN and SAMUEL SCHEINFIELD, Plaintiffs-Appellees/Cross-Appellants, v J. LEONARD HYMAN and MORRIS MARGULIES, Defendants-Appellants/Cross-Appellees.	UNPUBLISHED June 26, 2007 No. 268173 Oakland Circuit Court LC No. 2001-036689-CZ

Before: Murphy, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

In this case involving a real estate partnership agreement, defendants appeal as of right the entry of judgment in favor of plaintiffs for the reimbursement of interest on loans and a builder's fee paid from the partnership. Plaintiffs cross-appeal the denial of recovery for all legal, management, and builder fees paid to entities affiliated with defendants and the denial of attorney fees. We affirm.

I

This is the second time this commercial building partnership dispute is before this Court. In an earlier appeal, the panel (1) reversed the trial court's grant of defendants' motion for summary disposition, (2) reversed the court's denial of plaintiffs' motion to amend their complaint to include a claim of breach of contract, and (3) affirmed the court's denial of plaintiffs' motion to amend their complaint to include a claim of breach of fiduciary duty. The panel also reversed the award of case evaluation sanctions to defendants and remanded the case for further proceedings. *Tennen v Hyman* (*Tennen I*), unpublished opinion per curiam of the Court of Appeals, issued June 10, 2004 (Docket Nos. 245753 and 247985).

After a 4-day bench trial on remand, the trial court entered a judgment of $181,521.98 in favor of plaintiffs and against defendants, finding that defendants were not entitled to interest on their loans to the partnership. Additionally, the court entered a judgment of $66,998.73 in favor of plaintiffs and against defendant Margulies only, finding that Margulies' construction company was not entitled to a claimed 10 percent builder's fee, but rather a reduced fee of 5 percent.

II

We review a trial court's factual findings in bench trial for clear error; the court's conclusions of law are reviewed de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* We give due regard to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. MCR 2.613(C); *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999).

Questions involving the proper interpretation of a contract or the legal effect of a contractual clause are questions of law that are subject to de novo review by this Court. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). Likewise, the question whether the language of a contract is ambiguous and requires resolution by the trier of fact is reviewed de novo on appeal. *DaimlerChrysler Corp v G Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

The goal of contract construction is to give effect to the intent of the parties. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003). "Where the terms of a contract are unambiguous, their construction is a matter of law to be decided by the court." *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). A contract is unambiguous if it fairly admits of but one interpretation. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). "Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts*, *supra* at 375.

III

Defendants argue that the trial court essentially reformed the parties' agreement to bar the recovery of interest on defendants' loans, which was improper under the law of the case doctrine. Defendants contend that because the trial court had previously dismissed plaintiffs' reformation claim, and this Court affirmed, the law of the case precluded reformation. We disagree.

For the reasons stated below, we conclude that the court did not err in its interpretation of the Agreement, as amended. Accordingly, the court did not "reform" the Agreement, and defendants' law of the case argument fails.

IV

Defendants argue that the trial court incorrectly construed the parties' partnership agreement to deny defendants interest on their loans to the partnership because the agreement unambiguously provides that the partnership must pay interest on the loans. We disagree.

It is undisputed that in February 1988, defendants advanced the partnership $358,535 and, on January 1, 1993, advanced the partnership another $26,330.[1] The parties dispute whether defendants were entitled to interest on the funds advanced under the parties' agreement, as amended.[2]

Article III of the partnership agreement addressed partners and capital. Article IV addressed partnership obligations, including loans from partners. Sections 3.2 and 3.3 of Article III provided:

> Section 3.2 Contributions and Percentage Interests
>
> The Partners have contributed capital to the Partnership in the form of their respective ownership interests in the Property which equal their Percentage Interests in the Partnership. As of the date of this Agreement, the Partners have not made any cash contributions to the capital of the Partnership, but have from time to time advanced various sums which will be repaid upon refinancing of the Property. The respective Percentage Interests of the Partners are set forth in Exhibit "A", attached hereto and incorporated herein.
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> Section 3.3 Additional Contributions
>
> In the event the Partnership requires additional funds in order to meet its obligations or to otherwise carry out its purposes, and the Managing Partner has determined that Partnership borrowings cannot be obtained on commercially reasonable terms or are otherwise inappropriate, then the Partners, except Tennen and Scheinfield, shall be required to contribute additional funds to the Partnership, it being understood and agreed that any capital contributions required shall be provided solely by Morris Margulies and J. Leonard Hyman, it being distinctly understood and agreed that the partners Harvey Tennen and Samuel Scheinfield shall have no obligation to advance or make any additional capital contributions.

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[1] As the facts evolved on remand, and the issues became more focused, the parties' dispute centered only on purported "loans" made by defendants, in the amount of $384,865. A $450,000 contribution referenced in *Tennen I* was not at issue because it was undisputed that this contribution by defendants was placed in escrow with banks as collateral security and no interest was charged to the partnership with regard to the $450,000.

[2] The parties executed 2 separate agreements over the course of their partnership, each of which was subsequently amended. Any distinctions between the agreements are not at issue on appeal.

Section 4.2 of Article IV provided:

> Section 4.2 Loans from Partners
>
> In the event the Partnership requires funds in order to finance its operations or to satisfy any cash needs arising from the failure to contribute by a Defaulting Partner, then the Partners may, on a voluntary basis, loan such funds to the Partnership. To the extent that more than one Partner elects to make such a loan, each Partner shall make that portion of the loan which is proportionate to his Percentage Interest as compared to the Percentage Interests of the other Partners participating in the loan. Any loans from Partners shall be evidenced by promissory notes payable to the order of the Partner providing for payment of principal plus interest at a per annum rate equal to two (2%) percent over the prime rate of interest charged from time to time by the National Bank of Detroit, unless a different rate is agreed to between the parties. All principal and interest due on Partner loans shall be repayable from the first funds available to the Partnership, either from capital contributions or any other sources. Partner loans shall have the same status as loans from non-Partners.

Additionally, Paragraph 6.2.3 of Article VI, "Management," provided that the consent of the majority in interest of partners was required to sell the partnership property.

The Amendment to the partnership agreement consisted of 4 brief paragraphs. Paragraph 1 recognized that plaintiffs each held a 16.667 percent interest.[3] Paragraph 2 of the amendment stated:

> That the lender has required additional collateral security for advances on the construction loan, and Harvey F. Tennen and Samuel Scheinfield are not willing to contribute additional capital or make additional loans to the partnership. Morris Margulies and J. Leonard Hyman have agreed to contribute additional capital by way of loan or additional collateral security for loans in order to complete construction of the project in exchange for Harvey F. Tennen and Samuel Scheinfield's reduction of their interest in the partnership. In consideration of said agreement to provide the necessary capital by way of loans, contributions or security for any loans, including personal guarantees on said loans, it is agreed that Harvey F. Tennen and Samuel Scheinfield's interest in the partnership shall be reduced to 11 percent each as more fully set forth in Amended Exhibit A attached hereto. [Exhibit A simply listed the 4 owners and their respective percentage shares.]

Paragraph 3 stated "[t]hat as additional consideration for the reallocation of the partnership interests, the partners agree[d]": (A) that Paragraph 6.2.3 would be changed to state that the

[3] This differs from the agreements themselves, which stated that plaintiffs each had a 16.65 percent interest, but this discrepancy is not at issue.

consent all of the partners was required to sell the partnership property, and (B) defendants indemnified and agreed to hold plaintiffs harmless for any loans, guarantees or capital contributions and for all construction related debt and financing. Finally, paragraph 4 stated:

> In all other terms and conditions, the Partnership Agreement heretofore executed by the parties shall remain in full force and effect.

The trial court initially granted summary disposition, concluding that defendants were entitled to interest under § 4.2 of the Agreement. *Tennen I*, *supra*, slip op at 2. However, on appeal, this Court determined that summary disposition was improper. The *Tennen I* panel found that the partnership agreements were not ambiguous, but that a genuine issue of material fact existed regarding whether additional payments by defendants were intended as loans subject to interest under § 4.2.[4] *Id*.

Following a 4-day bench trial on remand, the trial court concluded that the payments by defendants were "loans," but "that the clear language and intent of the Amendment was that no interest would be paid":

> The Amendment states that the funds from Defendants are a loan but the provision is silent as to whether interest is required on the loan.[2] Since there is no mention of interest in the Amendment, the Court finds that the clear language and intent of the Amendment was that no interest would be paid. Defendants' consideration for providing funds they initially did not wish to provide is that their interest in the partnership was increased.
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> [2] Section 4.2 of the Original Partnership Agreement provided for the payment of interest on loan [sic] under the original agreement but this clause was not made applicable to the Amendment by the parties.

Defendants contend that the court erroneously concluded that because the amendment to the agreement was silent regarding interest on defendants' loans, no interest was required. Defendants assert that because paragraph 4 of the amendment stated that "[i]n all other terms and conditions," the provisions of the earlier agreement remained in effect. Thus, the original agreement's provision concerning interest on loans remained in effect and was not superseded by the amendment.

The essential dispute during trial was whether § 4.2 applied after the amendment of the Agreement, given that the amendment specifically pertained to defendants' provision of additional capital through loans or collateral security, but was silent concerning interest on the loans. The court concluded that the payments advanced by defendants were loans, and that the

[4] Contrary to the statement in *Tennen I* that no promissory notes existed, during trial, defendants produced a promissory note for the $384,865, which Hyman testified he dictated to Margulies' secretary in December 1994, even though the loans were made in 1987 and 1993. The trial court admitted the note into evidence. So, despite this Court's statement in *Tennen I*, the record now contains a promissory note for the $384,865.

loans were subject to the amendment provisions, which did not mention interest, but did provide for a reduction in plaintiffs' ownership shares in the partnership in exchange for the loans. The court essentially reasoned that to permit defendants to charge interest on the loans in addition to exacting a 10 percent reduction in plaintiffs' share of ownership (5 percent each) would be "double-dipping." The court concluded that the loans were not subject to § 4.2 of the original agreement, which provided for interest on loans at 2 percent over prime.

The trial court's reasoning and conclusion are sound. The parties had a full opportunity to present evidence over the course of the trial, with the trial court giving both sides great latitude in questioning witnesses and presenting documentary support. The court questioned defendants about the perceived "double-dipping" during trial. The court also expressed a concern that under the terms of the original agreement, defendants were expressly obligated to provide additional capital to complete the project, but that they later negotiated the amendment, conditioning the provision of additional capital on a reduction in plaintiffs' ownership shares. Defendants had no explanation for negotiating the amendment other than that the project grew in magnitude, requiring an infusion of large amounts of capital, which defendants should not have had to provide without remuneration, since plaintiffs were merely passive investors with no liability and had each contributed only $17,000. Defendants explained that the project originally involved renovating one building on one parcel of land, and subsequently grew to a $10 million project involving 3 parcels, the renovation of two buildings, and the construction of a third office complex. However, as the trial court pointed out, the original agreement expressly stated that the partnership involved *all three* buildings and parcels and nevertheless obligated defendants to provide any needed additional capital.

Even though § 4.2 of the original agreement provided for interest on defendants' loans if funds were needed to finance the partnership's "operations," the trial court logically concluded that defendants renegotiated the agreement to make those loans to the partnership in exchange for plaintiffs' reduction in their ownership percentage, rather than as originally contemplated. The trial court did not incorrectly construe the parties' partnership agreement to bar the recovery of interest on defendants' loans.

V

Defendants argue that the law of the case precluded the trial court's conclusion that Margulies, *as a fiduciary*, was obligated to disclose the builder's fee paid to his wholly-owned construction firm. We disagree.

Defendants assert that the trial court rejected plaintiffs' breach of fiduciary duty claim, and this Court affirmed. Defendants therefore argue that the law of the case precluded the court's conclusion on remand that because Margulies, *as a fiduciary*, failed to disclose the builder's fee, it was subject to a fifty-percent reduction.

In *Tennen I*, this Court affirmed the trial court's denial of plaintiffs' motion to amend their complaint to include a claim of breach of fiduciary duty because it would be futile. *Tennen I*, *supra*, slip op at 3. This Court noted that "[t]he claim was based solely on defendants' alleged violation of various provisions of the partnership agreement," that a claim for breach of fiduciary duty sounded in tort, and a tort action would exist only if there was a breach of a duty separate and distinct from the duties imposed by the contract. *Id*.

The generalized conclusion in *Tennen I* does not stand for the proposition that no fiduciary duties are owed by a partner. Rather, this Court simply concurred with the trial court that a separate claim based on the breach of fiduciary duty would be futile because the claims alleged by plaintiff arose out of the contract, i.e., the partnership agreement. See *Nelson v Northwestern Savings & Loan Ass'n*, 146 Mich App 505, 509; 381 NW2d 757 (1985) (no breach of duty independent from the contract was alleged, and thus, the defense of comparative negligence was not available to the defendant).

Partners are accountable as fiduciaries. 23 Michigan Law & Practice, Partnerships, § 21, p 293. Nothing in the trial court's decision or this Court's decision concerning the motion for summary disposition precluded a finding that Margulies was responsible to plaintiffs as a fiduciary. Defendants' law of the case argument is without merit.

VI

Defendants argue that the trial court's legal conclusions regarding the builder's fee were inconsistent with its factual findings and the applicable law. The trial court initially granted summary disposition in favor of defendants. However, on remand, after hearing all the evidence over the course of the 4-day trial, the court concluded that plaintiffs were entitled to an award of one-half of the 10 percent builder's fee that Margulies, as the managing partner, paid from the partnership to his wholly-owned construction firm. The trial court's award was supported by the evidence, and we find no error of law that requires reversal.

The trial court awarded plaintiffs recovery of one-half of the 10 percent builder's fee, concluding that although the fee was not a prohibited salary and, in and of itself, did violate the partnership agreement, it would have been prudent of Margulies to disclose to his partners the payment of the fee to a company he owned. The court found that based on the trial testimony, a reasonable builder's fee may range from 10 to 20 percent of the project cost, or may be waived completely. The court concluded that because Margulies did not disclose the fee as he should have, and because the fee could have been waived completely, a reasonable fee was 5 percent.

Defendants essentially argue that the court's conclusion was inconsistent with its findings because the court found no breach of the agreement, and the issue of reasonableness was not before the court. Accordingly, the court's reduction of the fee was inconsistent with its findings and applicable law.

Plaintiffs argue that defendants misconstrue the court's decision and that the court's conclusion is supported by Article VI of the Agreement, which provides that the partners have all the rights granted to partners under the Michigan Uniform Partnership Act (UPA). Because the UPA prohibits partner self-dealing and gives partners the right to consent to any transaction of this nature between a partner and an affiliate company, the court's reduction of the builder's fee was proper. Although the arguments below did not focus on the UPA and the trial court did not specifically refer to the UPA in awarding the fees, the statute and case law generally support plaintiffs' argument.

Section 20 of the UPA imposes a duty on partners to disclose information:

> Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability. [MCL 449.20.]

"Section 20 has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band v Livonia Assoc*, 176 Mich App 95, 113; 439 NW2d 285 (1989).

Section 21 of the UPA addresses partners' accountability as fiduciaries, and provides in relevant part:

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. [MCL 449.21(1).]

Partners stand in a fiduciary relationship. *Bondy v Davis*, 40 Mich App 153, 158; 198 NW2d 418 (1972). Accordingly, the UPA provides partners with the right to a formal accounting. 23 Michigan Law & Practice, Partnerships, § 21, p 293.

> An accounting in equity is an appropriate remedy, as between partners, where the suit involves a partnership relation or interest, or partnership property, especially if fraud or concealment is charged, or where the partnership affairs or assets are in a complicated condition. In a proper case, a suit may also be brought by a partner for an accounting as to the firm's assets or business. [*Id*. (footnotes omitted).]

An accounting in equity is an appropriate remedy as between partners, where the suit involves a partnership relation or interest, and invokes the equitable powers of the court. *Bondy, supra* at 158-159.

Although this action was not formally instituted as an action for an accounting, the issues of disclosure and the propriety of the fees paid to business entities owned by defendants were before the court. Plaintiffs objected to the builder's fee on the basis that it violated the partnership agreement, which incorporated by reference the rights afforded to partners under the UPA. Given the duties imposed under the UPA and plaintiffs' entitlement to an accounting, the trial court properly considered the reasonableness of the builder's fee. Further, the trial court did not err in reducing the builder's fee in light of Margulies' nondisclosure of the "self-dealing," since plaintiffs were denied any opportunity to question the payment of the fee when it was incurred.

This Court has recognized the high standards to which partners are held in their dealings with one another in partnership affairs:

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed, "connoting not mere honesty but the punctilio of honor most sensitive." 59A Am Jur 2d, Partnership, § 420, p 453. The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. 59A Am Jur 2d, Partnership, § 425. Thus, disclosure to one or several partners does not fulfill this duty as to every other partner. [*Band, supra* at 113-114.]

Despite defendants' argument to the contrary, the evidence supported the trial court's finding that a reasonable builder's fee could range between from 10 to 20 percent of the project cost, or may be waived completely. Defendants' CPA testified that a builder's fee could be waived completely.[5] The court's finding was not clearly erroneous. Accordingly, the reduction of the builder's fee to 5 percent, or $308,000, was not error.

VII

Defendants argue that the trial court's imposition of liability on Margulies individually for the reimbursement of the disallowed builder's fee requires reversal of the court's decision. Defendants complain that the trial court had no power to rule on the reasonableness of the fee charged by Margulies' construction firm because it was a nonparty. Defendants also take issue with the manner in which the court stated its decision concerning the builder's fee, including rendering a judgment against Margulies individually. However inartfully stated, the court's opinion and order, and judgment, effected the proper result with respect to plaintiffs' claim, since Margulies paid the builder's fee to his wholly-owned construction company, fifty percent of the fee paid was disallowed, and plaintiffs each were entitled to eleven percent of the fifty percent.

With respect to the builder's fee award, the court's opinion and order stated in pertinent part:

> The Court awards a 5% builder's fee in favor of Defendants. The Court also finds that Plaintiffs' interest in the partnership is 11% each . . . .
>
> * * *

[5] At oral argument, both defense counsel and plaintiffs' counsel stated that this testimony came from plaintiffs' CPA; however, the transcript indicates that the testimony came from defendants' CPA, Jeffrey Budaj during examination by the trial court. Either way, the testimony supports the trial court's finding.

> As to the reasonableness of the fee paid, testimony taken at trial indicated that a reasonable builder's fee can be anywhere from 10-20% of the cost of the project supervised or that the fee may be waived completely. In this case, Margulies' company was paid a 10% fee ($616,000.00). Had Margulies disclosed to the partnership that a builder's fee was called for, the partners would have had an opportunity to contract with another company for a lesser fee. Since Margulies, as a fiduciary, did not disclose this need for the partnership to pay a builder's fee as he should have and because the fee could have been waived completely, *the Court awards the company a reduced builder's fee of 5% ($308,000.00) for the services provided*.

Although the court's "award" to the company may be technically incorrect, the net effect achieves the result intended and effectuates the court's ruling. In turn, in entering the judgment, the court entered a judgment against Margulies only in the principal amount of $66,776, which was twenty-two percent of $308,000 (plaintiffs' share of the disallowed builder's fee), which amount was undisputed. As discussed above, the reduction in the builder's fee was proper given the evidence, and defendants have presented no valid substantive challenge to the imposition of liability against Margulies.

VIII

Defendants argue that the trial court erred in ruling that plaintiffs' claims were not barred by the statute of limitations. Defendants contend that plaintiffs knew or should have known that defendants would be collecting interest as early as 1987, and again in 1993, based on the 1987 Agreement and the 1993 Agreement, which provided for interest on loans at 2 percent above prime. However, defendants' interpretation of the Agreement and the Amendment was rejected by the trial court with regard to the loans at issue. Thus, defendants cannot reasonably rely on any purported notice from the agreements.

Defendants also argue that plaintiffs were on notice of the interest and builder's fee because of information in the partnership financial statements as early as 1993. However, plaintiffs testified that they never received the financial statements until they sought information following the sale in 1999. Further, there was only limited information in the financial statements related to the interest and builder's fee. While the 1993 statement showed loans payable, it also noted that there was no stated interest rate. Likewise, the 1993 statements showed a builder's fee payable of $73,506; the total builder's fee of $616,000 was not reflected.

Defendants are correct that the trial court erred in finding that defendants never argued or advanced the statute of limitations defense in any motion or at any point during the bench trial of this case. However, the trial court acknowledged this error in the hearings on post-trial motions, and, regardless, the trial court considered and rejected the merits of defendants' statute of limitations argument. The court concluded that plaintiffs' action was not time-barred because "Defendants' alleged breaches occurred when the interest and fees objected to were actually paid and Plaintiffs learned of the payments immediately before this lawsuit was filed."

We find no error requiring reversal in the court's conclusion. It was undisputed that the builder's fee payable of $73,506, and interest on the loans were not paid until the office complex property was sold in 1999. The trial court did not clearly err in finding that the breaches did not

occur until 1999. Further, the court did not clearly err in finding that plaintiffs did not discover the alleged breaches from the 1993 or later financial statements, either because the court credited plaintiffs' testimony that they never received the financial statements or because the information therein was insufficient to inform plaintiffs of the breach.

There is no dispute that the limitations period for breach of contract is six years. MCL 600.5807(8). A cause of action for breach of contract generally accrues when the breach occurs regardless of the time when damage results. *Scherer v Hellstrom*, 270 Mich App 458, 463, n 2; 716 NW2d 307 (2006). The breaches occurred in 1999, and plaintiffs' action was filed in 2001. Accordingly, plaintiffs' action was timely filed.

IX

On cross-appeal, plaintiffs argue that the trial court erred in its determination that the legal and management fees and one-half of the builder's fee paid to defendants' affiliated business entities was proper.

Plaintiffs complain in their cross-appeal that all of the legal, management, and builder's fees paid to defendants' affiliated entities should be disallowed based on UPA provisions that prohibit remuneration to a partner for acting in the partnership business, MCL 449.18(f), and provisions that require full and frank disclosure of all relevant information, MCL 449.20, and provide for an accounting, MCL 449.21(1). Plaintiffs did not raise these issues in the hearings below on the post-judgment motions concerning entry of the judgment and defendants' motion for reconsideration. The trial court, after initially granting summary disposition for defendants, decided on remand in favor of plaintiffs on their original claim (interest) and partially in favor of plaintiffs on the newly added claims on remand (fees). The court provided a well-reasoned explanation for its decision on the issue of the builder's fee, as discussed above, and on the issue of the management and legal fees, as follows:

> The reasoning applied here coincides with the Court ruling from the bench as to Margulies['] payment of management fees to Margulies' Construction Company, Inc and legal fees to Hyman Lippitt, PC. The Court found that those fees were also not paid to any partner but rather to companies owned by some of the partners. The Court further found that the work needed to be done, was done well and the fees paid there were eminently reasonable for the work performed. Accordingly, like the management and legal fees, the Court finds that the builder's fee was properly paid but in a reduced amount.

Ruling from the bench, the court allowed the $50,000 legal fees that were paid over fifteen years, which the court noted was the same that would be paid to any other firm under the circumstances. Likewise with the management fees, the court noted that inherent in the operation of office buildings is the duty to manage them. The court rejected plaintiffs' argument that the payment of the fees to affiliated entities in any way constituted a per se violation of the UPA, either as prohibited remuneration to partners or the retention of benefits by a partner.

The trial court's reasoning is sound. There was ample evidence to support the legal and management fees and the reduced builder's fees paid over the course of this $10,000,000 project. Margulies testified that the management fees were $503,000 over twenty years, and involved a

great deal of work, including negotiating and preparing tenant leases, employing a maintenance man for building upkeep and repairs, changing light bulbs, dealing with toilet back-ups, and overseeing snow plow, landscaping, and paving contracts. Likewise, Margulies testified that the builder's fee involved having a superintendent at a cost of $65,000 a year, another employee at the same cost and two office employees. Margulies and Hyman also testified in detail about the legal services provided by Hyman's firm, some of which were gratis, and which included litigating a federal court case against the original loan provider, in which Hyman's firm secured the right to an early payoff to refinance the project at a lower interest rate. The scope of this project warranted the services provided, and plaintiffs' arguments that the fees violate the UPA are unpersuasive, as discussed above with regard to the builder's fee.

X

Plaintiffs also argue that the trial court erred in denying them attorney fees because they were entitled to attorney fees under the indemnity clause of the parties' agreement for litigating this case. We disagree.

Plaintiffs were not entitled to attorney fees under the indemnity clause of the parties' agreement for litigating this case, and the trial court did not err in so concluding. The indemnity provisions of the Agreement, § 7.1, provide:

> 7.1.1 Each of the Partners hereby agrees to indemnify and hold harmless the other Partners (including Morris Margulies in his role as "tax matters partner") for any liability, loss, damages, costs or expenses which either of the other Partners may for any cause and at any time sustain or incur by reason of any demand, action, suit or proceeding arising as a consequence of or related to (i) either of the other Partners' status as a Partner of the Partnership or (ii) the execution and delivery (with the knowledge and consent of the majority in interest of the Partners) of either of the other Partners of any personal guaranty or indemnification in connection with a loan to or for the benefit of, the Partnership. This indemnification also extends to any settlement arising from any of the foregoing.
>
> 7.1.2 The indemnification given by each Partner hereunder however is limited to such portion of the total amount required pursuant to such demand, action, suit, proceeding or settlement which corresponds to his Percentage Interest, less any payment made directly by him as a consequence of such demand, action, suit, proceeding or settlement.

Plaintiffs argue that indemnification is required for "all costs and expenses" when incurred by any partner by reason of any suit "arising as a consequence of or related to either of the other Partners' status as a Partner of the Partnership . . . ." Thus, because plaintiffs incurred attorney fees in "having to prosecute this action to enforce its interests" as a result of defendants' breaches of contract and fiduciary duty arising from the Agreement, indemnification is required.

As defendants point out, this issue is raised for the first time on appeal. Although plaintiffs made a perfunctory request for attorney fees in their proposed findings of fact and conclusions of law, they did not raise the issue of the indemnification clause before the trial

court. This issue is therefore not properly preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992).

Regardless, plaintiffs' arguments for indemnity for attorney fees under the circumstances of this case are unpersuasive. As defendants point out, plaintiffs' reading of the indemnification provisions would likewise require plaintiffs to indemnify defendants for the latter's attorney fees, since defendants themselves prevailed in part in defending against plaintiffs' lawsuit.

Affirmed.

/s/ William B. Murphy
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald