STATE OF MICHIGAN

COURT OF APPEALS

THEOPHLIS DUCKETT and DIANA DUCKETT, Plaintiffs, v PHYILLIS L. PETERS, as Trustee of the PHYILLIS L. PETERS TRUST UAD 12-13-89, and as Trustee of the NEIL W. PETERS TRUST UAD 12-13-89, Defendants/Cross-Defendants-Appellees, and KALWARDS, LLC., Intervenor/Cross-Plaintiff-Appellant.	UNPUBLISHED April 24, 2007 No. 273527 Kalamazoo Circuit Court LC No. 06-000104-CK

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

PER CURIAM.

Intervenor Kalwards, LLC, appeals the trial court's order that granted summary disposition to defendants on Kalwards's claim for indemnification.

I. Facts and Procedural History

This case arises out of a purchase agreement for property owned by the Phyllis L. Peters Trust and Neil W. Peters Trust.[1] Kalwards claims that it had a valid contract to buy the property from Peters but that, shortly before closing, Kalwards discovered an underground storage tank on the property. According to Kalwards, the presence of the storage tank amounted to a breach of

[1] Phyllis Peters is the trustee for both trusts. Accordingly, we refer to plaintiffs, collectively, as "Peters" throughout this opinion.

contract and, because it was Peters's responsibility to remove the tank, Kalwards chose not to close on the property on the designated closing date of January 13, 2006.

A few days after the closing date passed, Peters entered into a conditional purchase agreement with Jim Roberts, who later assigned his interest in the purchase agreement to plaintiffs, Theophlis and Diana Duckett. The purchase agreement was subject to the resolution of any of Kalwards's claims to the property under the original purchase agreement. Notwithstanding this contingency, the Ducketts filed this action against Peters for specific performance and asked the trial court to order Peters to sell the property to them. Kalwards intervened in the action. The trial court denied the Ducketts's motion for a preliminary injunction to prevent Peters from selling the land to Kalwards.

Thereafter, and despite the fact that Kalwards and Peters eventually closed on the sale of the property, Kalwards filed a cross-claim against Peters for costs and attorney fees. According to Kalwards, Peters breached the original purchase agreement when Peters failed to disclose the presence of the underground storage tank and when Peters entered into the purchase agreement with the Ducketts. Kalwards maintains that these wrongful acts required Kalwards to defend against the Ducketts's lawsuit filed against Peters and, therefore, Kalwards is entitled to indemnification from Peters. The trial court disagreed and correctly granted summary disposition to Peters.

II. Analysis

A. Applicable Law[2]

As a preliminary matter, the parties disagree about which legal principles apply to Kalwards's request for attorney fees and costs. In its cross-claim, Kalwards specifically asserted that Peters is "liable to *indemnify or otherwise reimburse* Kalwards for the attorneys' fees and other costs Kalwards has incurred, and will incur, in connection with the Ducketts' claims." (Emphasis added.) Kalwards argues that it is entitled to the fees under the rule that a party may recover attorney fees as damages if the party has been forced to defend a lawsuit because of the wrongful acts of a third party. *In re Thomas Estate*, 211 Mich App 594, 602; 536 NW2d 579 (1995). In contrast, Peters asserts that Kalwards's claim is for common-law indemnification. "The right to common-law indemnity is based upon an equitable principle: where the wrongful act of one party results in another being held liable, the latter party is entitled to restitution from the wrongdoer." *Paul v Bogle*, 193 Mich App 479, 497; 484 NW2d 728 (1992). The common law indemnity rule generally applies if "the party entitled to indemnification was a 'passive' tortfeasor as opposed to the 'active' tort of some other party." *Warren v McLouth Steel Corp*, 111 Mich App 496, 504; 314 NW2d 666 (1981), quoting *Dale v Whiteman*, 388 Mich 698, 705; 202 NW2d 797 (1972). Here, Kalwards was not found to be passively responsible for the Ducketts's alleged injury and Kalwards was not "held liable" for another party's wrongdoing.

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[2] "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Accordingly, the doctrine of "common-law indemnification" does not apply and we analyze this issue under the legal principles advanced by Kalwards.

"Attorney fees are not recoverable unless expressly authorized by statute or court rule." *In re Thomas Estate, supra* at 602. The parties do not cite a statute or court rule that authorizes the recovery of attorney fees here. Therefore, to recover these fees, Kalwards's claim must fall within the exception cited above: "[a]n exception to the general rule exists when the party seeking attorney fees as damages has been forced to expend money to prosecute or defend a prior lawsuit because of the wrongful acts of the third party." *Id.* at 602. Though the exception may apply in breach of contract or tort claims, *State Farm Mut Auto Ins Co v Allen*, 50 Mich App 71, 78; 212 NW2d 821 (1973), it has been "sparingly allowed," *Warren, supra* at 507, and must be narrowly construed, *G & D Co v. Durand Milling Co, Inc*, 67 Mich App 253, 257-258; 240 NW2d 765 (1976). "Where there is no evidence to support a claim that a third party's wrongdoing caused the prior litigation, recovery of attorney fees under this exception is improper." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 469; 487 NW2d 807 (1992). Moreover, the majority of our cases hold that, to prevail under the exception, the party seeking attorney fees must show that the wrongdoer's conduct was malicious, fraudulent or similarly wrongful. *G & D Co, supra* at 260; *Scott v Hurd-Corrigan Moving & Storage Co, Inc*, 103 Mich App 322, 347-348; 302 NW2d 867 (1981); *Mieras v DeBona*, 204 Mich App 703, 710; 516 NW2d 154 (1994), rev'd on other grounds 452 Mich 278 (1996); see also *In re Thomas Estate, supra* at 602.[3]

B. Application of Law

The exception for the recovery of attorney fees does not apply here because Peters's alleged conduct did not cause the litigation by the Ducketts against Peters, Kalwards was not forced to defend a prior lawsuit, and the alleged conduct was not malicious, fraudulent or similarly wrongful.

The Ducketts filed their complaint against Peters after the Ducketts learned that Peters continued to negotiate to sell the property to Kalwards. The Ducketts sought specific performance and alleged that Peters breached their purchase agreement because the Ducketts agreed to defend any future actions brought by Kalwards. According to the Ducketts, notwithstanding that the purchase agreement was "conditional" and contingent on the resolution

[3] It appears that the only opinion in which this Court held that attorney fees may be recovered if the wrongdoer's conduct is merely negligent was in *Warren, supra*. See *Corduroy Rubber Co v The Home Indemnity Co*, unpublished opinion per curiam of the Court of Appeals, issued March 12, 1999 (Docket No. 191846) (declining to follow *Warren* because "the weight of authority" requires that the conduct must be fraudulent or malicious, not merely negligent). If we could extrapolate a rule from *Warren* that something akin to negligence, albeit in a contract action, is enough to warrant application of the exception, *Warren* is not binding on this Court because it was issued before November 1, 1990. MCR 7.215(J)(1). Further, as noted, in opinions issued after November 1, 1990, this Court has ruled that a party must show that the wrongdoer acted fraudulently or maliciously and those opinions are controlling.

of any claims by Kalwards, because the Ducketts agreed to defend any claims by Kalwards, the "condition precedent" to the Peters-Ducketts agreement occurred and Peters should be forced to sell the property to the Ducketts. Kalwards's theory here is that (1) the Duckett litigation never would have occurred if Peters had not breached the Peters-Kalwards contract by entering into the purchase agreement with the Ducketts and (2) Kalwards had to intervene in the action to defend its interest in the property.

It is undisputed that Peters signed the conditional agreement with Jim Roberts,[4] after Kalwards declined to close on the sale of the property on January 13, 2006. According to Kalwards, it could not close on the property on the designated date because it discovered the underground storage tank (UST) on the property. Kalwards further asserts that, even if it missed the closing date, the Peters-Kalwards agreement did not expire and the agreement states that Peters would not enter into any new contracts during the term of the agreement.

Kalwards's position is unavailing for several reasons. First, as Peters points out, Kalwards was aware that a UST might be on the property as early as January 2005. Kalwards's own environmental inspector informed Kalwards that a UST might be on the property and the president of the company that had occupied the building affirmatively stated that an unregistered UST was on the property. The parties signed a second amendment to the purchase agreement on September 23, 2005 in which Kalwards agreed that it was "satisfied with its inspection" and that it was "prepared to proceed to closing." Again, Kalwards signed the document notwithstanding its notice of the UST. Though the original agreement provided that closing would occur within 30 days of the expiration of the inspection period, in the second amendment, Peters granted Kalwards an additional extension and set the closing date for January 13, 2006. The Kalwards's environmental consultant verified the presence of the UST on November 8, 2005.

The record reflects that Kalwards presented Peters with a third amendment to the purchase agreement that would, once again, extend the closing date. A January 13, 2006 letter written by Kalwards's attorney to Peters's attorney states:

> Your email indicates that [Peters] is in the process of following appropriate statutory and regulatory procedures to remove the UST and we believe that is constructive. Notwithstanding [Peters's] default . . . [Kalwards] stands ready to execute the Third Amendment to Purchase Agreement *as submitted yesterday*. [Emphasis added.]

Thus, it appears that Kalwards presented the third amendment to Peters on January 12, 2006, the day before the scheduled closing. On January 13, 2006, Peters's counsel responded that the amendment was unacceptable, that Peters had assumed responsibility for the removal of the UST and that, if Kalwards did not close, Peters would consider Kalwards to have defaulted on the agreement. Nonetheless, Kalwards chose not to close on the designated date. Peters entered into the conditional purchase agreement with Jim Roberts on January 19, 2006, and Roberts assigned

[4] Again, Roberts later assigned the purchase agreement to the Ducketts.

his interest in the agreement to the Ducketts on February 21, 2006. The Ducketts filed their complaint in this case the next day, on February 22, 2006.

In the original Peters-Kalwards purchase agreement, Peters erroneously stated that the property complied with all state and federal laws because an unregistered UST was on the property. However, Kalwards cannot rely on this error to shield its own dilatory conduct when Kalwards discovered the probable presence of the UST as early as January 2005 and did nothing to verify its presence or to pursue a remedy for eleven months and until after it expressed unequivocal satisfaction with its inspection of the property. We also agree with Peters that, where the parties expressly stated in the agreement that time was of the essence as to "all undertakings and agreements," Kalwards clearly failed to perform its obligations within a reasonable time. See *Cooper v Klopfenstein*, 29 Mich App 569, 574; 185 NW2d 604 (1971). Under these circumstances, Peters was within her rights to declare Kalwards in default.[5]

Kalwards also complains that Peters breached the agreement when she signed the conditional purchase agreement with Roberts. Because Kalwards declined to close on the designated date, it was not improper for Peters to sign the other purchase agreement, particularly because it was subject to the resolution of any issues with Kalwards. Though the original Peters-Kalwards agreement states that Peters would not enter into any new contracts that might affect the property within the term of the agreement, the term of the agreement expired when Kalwards declined to close on the designated date and Peters declared a default.

Further, even were we to conclude that Peters breached the contract when she represented that the property complied with all state and federal laws and when she entered into the new agreement with Roberts, these actions do not amount to fraudulent or malicious wrongdoing, particularly in light of Kalwards's conduct during the life of the agreement. Moreover, Kalwards was not "forced" to defend in the action by the Ducketts against Peters. Kalwards was not named as a defendant in the lawsuit. Further, it was not within Peters's control that the Ducketts would so quickly seek judicial intervention to force Peters to specifically perform on a conditional purchase agreement that was clearly contingent on whether Peters could save her agreement with Kalwards. The Ducketts's complaint had little merit in light of the clear terms of the conditional agreement and Peters's alleged "wrongdoing" did not cause the litigation. Simply put, this is not a situation in which the exception for attorney fees applies because, though Kalwards wished to preserve its interest in the property by maintaining it had a valid purchase agreement as against the Ducketts, Kalwards was never forced to protect itself when faced with a claim of liability by a third party. Again, the exception allowing for the recovery of attorney fees is narrow and should only be "sparingly allowed."

Also, though Kalwards claims that Peters's counsel wanted to take a "back seat" and let Kalwards's counsel defend the litigation, Kalwards voluntarily intervened in the lawsuit. While Kalwards maintains that Peters would not have represented Kalwards's interest in the property,

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[5] The contract provides that, "[i]n the event of a default by [Kalwards] under this Agreement, [Peters] may as its sole remedy declare a forfeiture and obtain the Deposit as liquidated damages, in full termination of this Agreement . . . ."

the record shows that, on the same day Kalwards intervened and filed its brief in opposition to the Ducketts's motion for injunction, Peters filed a thorough and rigorous brief in opposition to the Ducketts's motion for injunction. Indeed, Peters also filed a counterclaim against the Ducketts and alleged that they unlawfully clouded the property's title and tortiously interfered with her agreement with Kalwards.

Finally, though Kalwards asserts that the trial court should not have granted summary disposition before the parties conducted discovery, Kalwards has not set forth any argument about what information it would pursue or unearth if discovery were permitted. And, nothing in the parties' briefs suggests that Kalwards will uncover additional evidence, such as fraudulent or malicious conduct, that would render the exception applicable to these facts.

Affirmed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski