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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1452**

Rogelio Onofre,
plaintiff and counterclaim defendant,
Respondent,

vs.

Marcos Hernandez, et al.,
defendants, counterclaimants and third-party plaintiffs,
Appellants,

vs.

Douglas E. Nepp,
third-party defendant,
Respondent.

**Filed May 6, 2019
Affirmed in part and reversed in part
Ross, Judge**

Hennepin County District Court
File No. 27-CV-16-15286

Michael Gavigan, Wilson Law Group, Minneapolis, Minnesota (for respondent Onofre)

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Daniel R. Shulman, Amanda M. Sicoli, Gray, Plant, Mooty, Mooty & Bennett, P.A.,
Minneapolis, Minnesota (for appellants)

Thomas A. Hackert, Nepp & Hackert, LLC, Minneapolis, Minnesota (for respondent
Nepp)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

ROSS, Judge

A dispute over the sale of a restaurant member of a cooperative led to this multiparty fraud and breach-of-contract lawsuit. Three years after the sale agreement, the seller accused the two buyers of reneging on their agreement to pay, while the buyers accused the seller of misrepresenting the restaurant's profitability and they accused the seller's attorney of submitting false documents to mislead the cooperative into approving the sale. The district court dismissed the fraud claim against the seller's attorney as a matter of law, and a jury found that the buyers breached their purchase agreement by failing to pay the agreed-upon price. The district court granted the seller's motion for attorney fees. The buyers appeal the district court's decisions to dismiss their fraud claim and to award attorney fees. We affirm in part because the buyers failed to produce and identify evidence supporting their fraud claim against the seller's attorney. But we reverse in part because the purchase agreement includes no language entitling the seller to attorney fees he incurred enforcing his contract rights.

FACTS

In January 2013 Marcos Hernandez and Luisa Violante agreed to purchase a Minneapolis restaurant—Cocina El Mexicano—from Rogelio Onofre. The restaurant was a member of a retail cooperative, the Cooperativa Mercado Central, whose approval was necessary for the sale. Onofre's attorney, Douglas Nepp, sent a letter to the cooperative to

demonstrate that the buyers, Hernandez and Violante, had the finances to operate the business. Nepp's letter included the buyers' personal financial statements, tax returns, and several recent pay stubs, including pay stubs supposedly for work that Luisa Violante had performed as an employee of the restaurant.

In October 2016 Onofre sued Hernandez and Violante, alleging that they had breached the purchase contract by failing to pay. Hernandez and Violante filed a counterclaim, alleging that, among other things, Onofre defrauded them by misrepresenting the restaurant's profitability, the assets to be transferred in the sale, and the value of the menu. They also filed a third-party claim against Nepp for fraud, alleging that the Violante pay stubs he gave the cooperative to approve the sale were fabrications.

The parties presented their evidence to a jury. The district court decided motions for judgment as a matter of law by dismissing the fraud claim against Nepp, concluding that Hernandez and Violante had failed to plead that he conspired with Onofre to induce them to agree to a fraudulent transaction and that they failed to present evidence of his alleged direct fraud. The jury split its decision. It found for Onofre by concluding that Hernandez and Violante breached the purchase agreement by failing to pay Onofre the contracted price. And it found for Hernandez and Violante by concluding that Onofre intentionally engaged in fraud by making it appear that he paid Violante more wages than he actually paid her.

Onofre moved for the attorney fees he incurred in bringing his breach-of-contract claim. The district court interpreted the indemnity provision of the purchase agreement as

providing Onofre the right to the attorney fees he incurred in suing for breach of contract, and it awarded him \$30,705 in attorney fees.

Hernandez and Violante appeal.

DECISION

Hernandez and Violante raise two issues. They argue first that the district court erred by interpreting the purchase agreement as providing Onofre the right to recover the attorney fees he incurred in litigating his breach-of-contract claim. They argue second that the district court erred by granting judgment as a matter of law in Nepp's favor. Only the attorney-fee argument warrants reversal.

I

Hernandez and Violante challenge the district court's decision ordering them to pay contract-based attorney fees that Onofre incurred in his suit to recover damages against them for failing to pay the purchase price. Attorney fees are generally not recoverable unless a contract specifically authorizes recovery. *Midway Nat'l Bank v. Gustafson*, 165 N.W.2d 218, 224 (Minn. 1968). We interpret contract language de novo. *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 504 (Minn. 2018). We attempt to determine and enforce the intent of the parties, and, to do so, we look to the plain language of the written agreement. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). We therefore look to the contract terms to determine whether the purchase agreement entitles Onofre to the attorney fees he incurred in his breach-of-contract suit.

The contract's "Default" provision does not provide a basis for the fee award. It specifies the seller's remedy for a failure-to-pay breach without expressly including the seller's right to recover attorney fees:

If Buyer fails to make the required payment . . . , then Seller shall have the right, in addition to all other rights under the law, to re-enter the business, resume ownership of the assets, and resume operating the business without interference from Buyer.

That Onofre is entitled to "all . . . rights under the law" does not trigger any right to an award of attorney fees for the buyers' nonpayment breach because "the law" in Minnesota affords no general right to an award of attorney fees in a contract-breach suit either by statute or precedent.

The only language in the contract purportedly authorizing an award of attorney fees exists in the context of the provision entitled, "Indemnity":

Buyer shall indemnify, defend and hold Seller harmless from and against any and all losses, liabilities, damages, costs and obligations (or actions or claims in respect thereof) (including reasonable counsel fees), which Seller may suffer or incur arising out of or based upon . . . the breach of any representation, warranty, covenant or agreement of Buyer contained in this Agreement

Onofre argues that the indemnity provision authorized the district court to order Hernandez and Violante to pay his attorney fees. The argument is not compelling because "indemnify" in context does not clearly evidence the parties' intention to allow for fee recovery. The current edition of a common legal dictionary at the time of the contract defined "indemnify" primarily as, "To reimburse (another) for a loss suffered because of a third party's or one's own act or default; HOLD HARMLESS." *Black's Law Dictionary* (9th ed. 2009).

Although this common definition includes the possibility that the term may encompass losses caused by a contracting party, the context here implies the narrow, more typical application as to losses caused by a third person. The contract refers to losses specifically “arising out of or based upon . . . the breach,” not losses incurred to enforce rights under the contract or costs to prove a breach of the contract. The provision also implies a three-part duty to “indemnify, defend *and* hold Seller harmless” for the kind of loss contemplated. The two problems this phrase poses to Onofre’s argument are that a party’s duty to “defend” the other generally applies to third-party litigation, and the duty does not commonly refer to a party’s pursuit of his own claims. *See Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 255–56 (3rd Cir. 2010) (reasoning that the word “indemnify” in relation to the words “defend” and “hold harmless” indicates only third-party indemnity). Given the presumption against the court’s authority to order one party to pay another’s attorney fees and given the need for specific contract language to activate that authority, the indemnity provision here is insufficient.

Our conclusion is consistent with caselaw applying somewhat similar language, where the verbs “indemnify, defend, and hold harmless” are typical of contracts that provide specifically for third-party indemnity. *See, e.g., Hurlburt v. N. States Power Co.*, 549 N.W.2d 919, 922 (Minn. 1996) (discussing third-party indemnity provision that stated, “Subcontractor further agrees to indemnify, defend and save harmless Contractor”); *Logefeil v. Logefeil*, 367 N.W.2d 114, 116 (Minn. App. 1985) (discussing attorney-fee liability in third-party indemnification action where contractual language stated that respondent agreed “to indemnify, defend, and save appellant harmless from all suits in

connection with the premises”). But we add that our opinion does not rest on any case in particular because we are interpreting and applying the unique contract language the parties included in their agreement. We must reject Onofre’s assertion that the language “clearly and unequivocally” notified Hernandez and Violante that they would be responsible for Onofre’s “attorney fees incurred to enforce the [a]greement.”

II

Hernandez and Violante argue also that the district court erred by granting Nepp’s motion for judgment as a matter of law on their fraud claim against him. We review a district court’s judgment as a matter of law independently to determine whether the evidence establishes a prima facie case. *See Reinhardt v. Colton*, 337 N.W.2d 88, 94 (Minn. 1983). We apply the facts derived from the evidence favorably to the party against whom the district court entered judgment. *Id.* Because Hernandez and Violante offered and cited no evidence at trial from which the jury could reasonably find that they were harmed by Nepp’s alleged fraud, their argument fails.

Nepp contends that we should not even address the argument because Hernandez and Violante waived their right to appeal the district court’s judgment as a matter of law by failing to move for a new trial. Nepp’s premise is flawed. Unlike our review of a challenge to trial procedure, our review of a judgment as a matter of law does not require a motion for a new trial. *Doan v. Medtronic, Inc.*, 560 N.W.2d 100, 106 (Minn. App. 1997), *review denied* (Minn. May 14, 1997). We turn to the merits.

Hernandez and Violante maintain that they offered sufficient evidence to pass their fraud claim against Nepp to the jury. A fraud claim survives a motion for judgment as a

matter of law and reaches the jury only if the plaintiff offers evidence that the defendant misrepresented a material fact, knowing of its falsity, intending to induce the plaintiff to rely on the misrepresentation, causing the plaintiff's reliance, and resulting in the plaintiff's pecuniary damages. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). But Hernandez and Violante failed to point the district court to facts satisfying each of these elements. They instead argued that these elements did not control their fraud claim and that they produced sufficient evidence that Nepp, as Onofre's attorney, "knowingly assisted" Onofre's fraud, making Nepp jointly liable as a co-conspirator. The district court was rightly unpersuaded by the argument.

It is true that an attorney is not entitled to professional immunity against third parties when the attorney knowingly participates in his client's wrongdoing against those parties. *See McDonald v. Stewart*, 182 N.W.2d 437, 440 (Minn. 1970). But the district court accurately observed that Hernandez and Violante had not pleaded particularly that Nepp was liable as a co-conspirator in Onofre's fraud. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. Hernandez and Violante's fraud claim against Nepp claimed plainly that Nepp directly defrauded them, not that he participated in Onofre's alleged fraud:

Nepp defrauded Hernandez and Violante when he knowingly included fake paychecks and pay stubs for Violante in the documents that he submitted to Mercado Central to obtain approval of the restaurant sale and did not disclose that to Hernandez or Violante.

This assertion failed to put Nepp on notice to defend anything other than his own alleged fraud. And Hernandez and Violante failed to identify any evidence they presented on each

element of their claim. For example, they offered no evidence of any damages they suffered from Nepp's allegedly fraudulent submission of the pay stubs in his role in submitting documents to the cooperative to support the purchase. By failing to offer any evidence (or even a theory) as to how they were harmed by Nepp's pay stub submission, Hernandez and Violante failed to present a prima facie case of fraud against Nepp. The district court therefore did not err by granting Nepp's motion for judgment as a matter of law.

Affirmed in part and reversed in part.