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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0092**

Gregory A. Lasica,
individually for himself and derivatively
on behalf of Home Savers Group of Minnesota, LLC,
Appellant,

vs.

Savers Group of Minnesota, LLC,
Nominal Defendant,

vs.

Dale I. Francis, et al.,
Defendants,

Brian R. Thompson,
Respondent,

RMA Investment, LLC,
Appellant.

**Filed August 20, 2012
Affirmed in part, reversed in part
Worke, Judge**

Hennepin County District Court
File No. 27-CV-10-12557

Michael C. Mahoney, Mahoney Anderson LLC, Wayzata, Minnesota; and

Jill Eleanor Clark, Golden Valley, Minnesota (for appellants Gregory A. Lasica and
RMA Investments, LLC)

Christopher P. Parrington, Patrick D. Boyle, Andrew S. Dossdall, Skjold Parrington, P.A.,
Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's enforcement of a settlement agreement providing for respondent's indemnification, arguing that indemnification is neither included in the parties' settlement agreement nor available by statute. Appellant also argues that the district court abused its discretion by ordering him to deposit \$75,000 with the court and his attorney to deposit \$1,238.56 with the court to cover future indemnification claims made by respondent. We affirm the district court's interpretation and enforcement of the settlement agreement. But we reverse the district court's requirement that appellant and his attorney deposit sums to the court when no claim for indemnification has been asserted.

FACTS

In May 2010, appellant Gregory A. Lasica filed a complaint against his business partner respondent Brian R. Thompson and others, alleging that respondent and a third partner misappropriated company funds. On December 14, 2010, appellant and respondent entered into a settlement agreement. Respondent agreed to pay appellant \$75,000 and to transfer all rights, title, and interest in the parties' companies and related real property to appellant. The parties agreed to a mutual release of all claims, with the exception to any right of defense, indemnification, or advancement, whether under

contract, common law, or statute, including rights under the Minnesota Limited Liabilities Act. Respondent complied with the terms of the agreement and subsequently moved to enforce the settlement agreement, alleging that appellant failed to comply with its terms.

Appellant and his attorney appeared for a motion hearing scheduled for July 13, 2011, not having received notice that the hearing was rescheduled by respondent's attorney. Respondent's attorney volunteered to pay \$1,238.56 in fees and costs associated with appellant's and his attorney's preparation and appearance.

On August 15, 2011, the district court held a hearing on respondent's motion. Respondent's attorney argued that respondent had personally guaranteed every business loan, approximately \$3 million. He stated that because respondent transferred all rights, title, and interest in the entities to appellant, respondent should be indemnified on the personal guarantees; indemnification was essential because the entities failed to make payments and lenders had contacted respondent regarding his default on the personal guarantees. The district court ordered respondent to produce evidence that he signed the guarantees for business loans only in his official capacity. Appellant's attorney suggested that the indemnification issue could be quickly resolved by presenting it to a special committee. He stated that the indemnification-approval process begins with respondent's demand for indemnification, which he accepted at the hearing. The special committee's proceedings failed to resolve whether respondent was entitled to indemnification.

On January 6, 2012, the district court granted respondent's motion to enforce the settlement agreement after finding that the special committee was "unhelpful at best, useless at worst" in working to resolve the indemnification issue. The district court found that the settlement agreement created an implied obligation that respondent did not remain a personal guarantor for the debts of the companies, because "the record is undisputed . . . that [respondent] executed personal guarantees solely in his capacity as a governor, and manager of [the companies] and not for any personal reason." The district court determined that respondent is entitled to indemnification on the loans that he guaranteed in his official capacity as a business partner. The district court further concluded that by refusing to indemnify respondent, appellant breached the settlement agreement and ordered appellant to pay to the court the \$75,000 that respondent had tendered, to be used to cover potential indemnification claims. The court further ordered appellant's attorney to "return to the pot the fine of \$1,238.56" that respondent's attorney paid in costs and fees for the rescheduled hearing. This sum was to cover indemnification "if more money is needed to satisfy the duty that [appellant] breached." This appeal follows.

D E C I S I O N

Settlement Agreement

Appellant argues that the district court erred in enforcing the settlement agreement. This court reviews the interpretation of a settlement agreement de novo. *Booth v. Gades*, 788 N.W.2d 701, 705 (Minn. 2010).

A settlement agreement is a contract. *Ryan v. Ryan*, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971). We review the language of a contract to determine the intent of the parties. *Valspar Refinish, Inc., v. Gaylord's, Inc.*, 764 N.W.2d 359, 364 (Minn. 2009). When the language is clear and unambiguous, we enforce the agreement of the parties as expressed in the language of the contract. *Id.* at 364-65.

The parties dispute whether the settlement agreement provides for indemnification of respondent for claims arising from personal guarantees that he made to secure the debts of the companies. The settlement agreement provides for respondent to “assign and transfer to [appellant] all rights, title and interest” he has or may have in the companies, including “membership interests, notes, advances, claims, and rights of any kind whatsoever, and any real property owned by the same.” The import of this language is that respondent will have no further legal connection or obligation to the companies after payment of \$75,000 to appellant.

The settlement agreement includes a release that excludes indemnification or advancement “whether under contract, common law, statute, contractual or otherwise, including, without limitation, any such rights under the Minnesota Limited Liabilities Act.” Under the act,

a limited liability company shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines, including, without limitation, excise taxes assessed against the person with respect to an employee benefit plan, settlements, and reasonable expenses, including attorney’s fees and disbursements, incurred by the person in connection with the proceeding.

Minn. Stat. § 322B.699, subd. 2(a) (2010). The individual seeking indemnification must have acted in good faith and must not have received an improper personal benefit. *Id.* at subds. 2(a)(2), (3).

The act also provides a process to determine whether an individual is eligible for indemnification. *Id.*, subd. 6 (2010). Under this process, a board of governors may decide whether the criteria in subdivision 2 have been satisfied and whether to indemnify an individual. *Id.*, subd. 6(a)(1). If a board of governors is unable to decide, then a special committee may make the decision. *Id.*, subd. 6(a)(3). If a decision is not reached within 60 days, a court may make the determination. *Id.*, subd. 6(a)(5). In a court proceeding, the individual seeking indemnification has the burden to establish that he is entitled to indemnification. *Id.*

A special committee was used in this matter, but did not reach a decision. The district court determined that respondent satisfied his burden to show entitlement to indemnification. This decision is supported by the record, in the form of documentation from lenders demonstrating that respondent made the personal guarantees in his official capacity as a partner and manager of the companies, and not as an individual. Based on the language in the settlement agreement that does not preclude indemnification, combined with respondent's indemnification rights under the act, we conclude that respondent is entitled to indemnification for any claims arising out of his execution of personal guarantees to secure the debts of the companies.

Additionally, at the hearing in August 2011, appellant's attorney indicated that the main issue with regard to indemnification was not entitlement to indemnification, but

whether respondent had followed the statutory procedure for making a claim for eligibility. The district court ordered respondent to produce evidence of eligibility, which he did. The district court also provided appellant an opportunity to form a special committee to determine respondent's eligibility for indemnification. The parties failed to follow through with this process, and the district court then determined the indemnification issue. The court determined that respondent is entitled to indemnification, which is supported by the parties' agreement. Respondent agreed to pay appellant \$75,000 to withdraw from the companies. Appellant was entitled to all rights associated with the companies, but that also implies that he is absorbing all responsibilities. It does not make sense to hold respondent responsible for the personal guarantees for companies for which he no longer has any interest. If that were the case, respondent would have paid appellant \$75,000, would remain liable for loans that benefitted the companies, and yet would receive no future benefit from the companies.

Deposit of \$75,000

To indemnify respondent in the event of a claim, the district court required appellant to deposit with the court the \$75,000 that respondent paid appellant to settle their controversy. The district court ordered this because, "By refusing to indemnify [respondent] on these guarantees which were solely for business purposes . . . [appellant] has breached [the] settlement agreement."

However, requiring the \$75,000 to be deposited with the court at this stage is premature because no claim for indemnification has yet been asserted. The district court's order stated that appellant shall deposit "\$75,000 into the Court for the limited

purpose of defending and indemnifying [respondent] against any *potential* actions.” (Emphasis added.) If no claims against respondent have been asserted, appellant has not refused to indemnify respondent, and there has been no contract breach. While the district court may have assumed that appellant would breach the settlement agreement if a claim arose, the evidence does not show that there has been an anticipatory breach. *See In re Haugen*, 278 N.W.2d 75, 79 n.6 (Minn. 1979) (defining anticipatory breach as the “unconditional repudiation of a contract, either by words or acts, which is communicated to the other party prior to the time fixed for his performance”).

Respondent asked the district court to enforce the settlement agreement by making a determination that appellant must indemnify respondent if a claim arises. This appeal relates to the district court’s determination that appellant must indemnify respondent. But since the district court’s determination that respondent is eligible for indemnification, the record is silent as to whether appellant has refused to indemnify respondent. Without an actual breach of the settlement agreement, the district court abused its discretion by ordering the \$75,000 indemnification funds to be deposited with the court.

Deposit of \$1,238.56

The district court also found that if more money is needed to indemnify respondent, appellant’s attorney shall “return to the pot the fine of \$1,238.56, which was self-imposed and paid by [respondent’s attorney] . . . for having missed a court appointment by mistake.” Similar to the abuse-of-discretion standard that applies in review of a district court’s order for costs, we review the court’s reversal of a fee award

for an abuse of discretion. *See Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 426 N.W.2d 214, 217 (Minn. App. 1988).

The district court abused its discretion in ordering appellant's attorney to deposit \$1,238.56 to the court to cover indemnification of respondent if a claim arose. The payment of fees is entirely unrelated to the reason the district court ordered the deposit to the court. The fees were proffered for failure to provide notice of cancellation of a court hearing, but the court ordered the deposit with the court to cover potential indemnification of a future claim. Again, this action by the court is premature, and is an abuse of discretion.

We affirm the district court's enforcement of the settlement agreement with the inclusion of an indemnification provision. But we reverse the district court's order that appellant deposit \$75,000 to the court and appellant's attorney deposit \$1,238.56 to the court.

Affirmed in part, reversed in part.