



**In the Missouri Court of Appeals
Eastern District
DIVISION TWO**

HILLIKER CORPORATION,	)	No. ED109549
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	Cause No. 19SL-CC05171
	)	
WATSON PROPERTY, LLC,	)	Honorable Thomas C. Albus
	)	
Respondent.	)	Filed: January 11, 2022

OPINION

This case concerns the right of a third party to seek relief under a contract. Plaintiff Hilliker Corporation (Hilliker), a real estate broker, claims it was a third-party beneficiary of a commercial real estate contract (the Contract) between Defendant Watson Property, LLC (Watson) and Star United, LLC (Star United), and is entitled to receive its commission under that Contract. The trial court granted summary judgment in favor of Watson, and Hilliker appeals. We reverse the trial court's entry of summary judgment and remand for further proceedings.

Facts and Procedural Background

On August 27, 2019, the parties entered into the Contract, in which Watson Property agreed to sell to Star United a piece of commercial real estate property located in Webster Groves, Missouri. The Contract named Hilliker as Star United's broker in the transaction. Star United deposited earnest money and Watson's due diligence period began on August 28, 2019.

The Contract states that Watson “covenants, represents and warrants to [Star United]” that, among other things, there are “no recorded or unrecorded contracts *and/or options* to which Seller is a party pertaining to or affecting title to or the sale of the Property” (emphasis added). The Contract requires Watson to pay a broker’s commission of two percent to Hilliker. Further, the Contract provides that upon Watson’s “failure to close due to [its] default, [Watson] shall immediately pay in full the commissions or fee due to Broker(s).”

In the course of conducting due diligence, Hilliker discovered a lease agreement between Watson and the property’s existing tenant. The lease contained an option granting the tenant a right of first offer to purchase the property. In a September 26, 2019 email, Hilliker contacted Watson about the right of first offer. On October 10, 2019, Star United more formally raised the issue with Watson, raising the prospect of Watson’s “potential breach.” That same day, Watson responded, acknowledging the tenant purchase agreement but further explaining that it was unaware of the problem until Hilliker’s inquiry. Watson’s response included a signed contract with the tenant, executed pursuant to the tenant’s first offer right. Watson stated there was “absolutely no malice” and that it was “just as surprised as [Star United] upon the right of first offer being presented.” Watson offered to compensate Star United only for its due diligence costs in order to terminate the contract. Ultimately, Star United and Watson agreed to terminate the contract, with Watson paying Star United in an amount of \$13,000 and both parties signing a Termination of Contract agreement (Termination Agreement).¹

Subsequently, Hilliker demanded payment of its commission by Watson. Watson refused and Hilliker filed suit, claiming it was a third-party beneficiary under the contract. The parties filed cross-motions for summary judgment. The trial court granted summary judgment in favor

¹ At oral argument, Hilliker indicated that it did not receive any of the \$13,000 proceeds.

of Watson and against Hilliker, concluding the Termination Agreement eliminated Watson's obligations under the Contract. Hilliker appeals.

Standard of Review

The propriety of summary judgment is an issue of law, and this Court's review of a grant of summary judgment is essentially *de novo*. *ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The court "review[s] the record in the light most favorable to the party against whom judgment was entered." *Id.* Summary judgment is proper only if the moving party establishes there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.* at 376; *see also* Rule 74.04(c)(6).² A genuine issue exists when the record contains competent materials supporting two plausible, but contradictory, accounts of the essential facts. *ITT Com. Fin. Corp.*, 854 S.W.2d at 382. A genuine issue is a dispute that is real, not merely argumentative, imaginary or frivolous. *Id.* The court accords the non-movant the benefit of all reasonable inferences from the record. *Id.* at 376.

Discussion

The court considers two primary questions. First, did Hilliker have an enforceable third-party beneficiary right under the Contract? Second, did the Termination Agreement eliminate Hilliker's third-party beneficiary right? Since we conclude that the record raises a material and genuine factual dispute regarding the second of these questions, we reverse summary judgment.

Third-Party Beneficiary

A third-party beneficiary is one who is not privy to a contract but may nonetheless pursue a cause of action for breach of contract. *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 260 (Mo. banc 2002). The rights of a third-party beneficiary depend on the

² All references are to Missouri Supreme Court Rules (2021).

terms of the contract itself. *Id.* The beneficiary does not need to be named in the contract, but the terms of the agreement must clearly and directly express an intent to benefit an identifiable person or class. *Id.* A party claiming rights as a third-party beneficiary has the burden of showing that provisions in the contract were intended for his direct benefit. *Fed. Deposit Ins. Corp. v. G. III Invs., Ltd.*, 761 S.W.2d 201, 204 (Mo. App. W.D. 1988). The contract rights are only enforceable if the promisor assumed a direct obligation to the third-party beneficiary. *Id.*

Missouri case law distinguishes “incidental beneficiaries” from two other classes of third-party beneficiary, the “donee beneficiary” and the “creditor beneficiary.” See *OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. App. W.D. 1995); *Stephens v. Great S. Sav. & Loan Ass’n*, 421 S.W.2d 332, 335 (Mo. App. Spr. 1967); *Kansas City Hisp. Ass’n Contractors Enter., Inc. v. City of Kansas City*, 279 S.W.3d 551, 555 (Mo. App. W.D. 2009). “Incidental beneficiaries” cannot maintain an action to recover under the contract; the other two classes of third-party beneficiary can. *Kansas City Hisp. Ass’n Contractors Enter.*, 279 S.W.3d at 555. An “incidental beneficiary” is one who will benefit from the performance of a promise but who is not an identified promisee or an intended beneficiary. *OFW Corp.*, 893 S.W.2d at 879.³ A creditor or donee beneficiary, in contrast, is one of the parties to the underlying contract intended to benefit for the purpose of discharging an obligation of one of the parties (a creditor beneficiary) or making a gift (a donee beneficiary). See *id.*; *Realty Res., Inc. v. True Docugraphics, Inc.*, 312 S.W.3d 393, 398 (Mo. App. E.D. 2010); *Fed. Deposit Ins. Corp.*, 761 S.W.2d at 204.

³ An example of an incidental contract beneficiary may be found in the *Stephens* case. *Stephens* involved a loan agreement; the proceeds were intended to pay a contractor for road work. The loan agreement fell through and the contractor sued, claiming to be a third-party beneficiary. This claim was rejected as a matter of law because the contractor was an incidental beneficiary, and the contract was indistinguishable from “any executory contract whereby a debtor expects to receive money to pay his creditors.” *Stephens*, 421 S.W.2d at 336. The *Stephens* facts are distinguishable from the current case, where Hilliker was specifically named in the Contract and performed services directly relating to the Contract transaction.

The facts here establish Hilliker as a third-party beneficiary. The language of the Contract expressed an intent to benefit Hilliker, by name, calling for a two percent commission for Hilliker. More specifically, Hilliker was a creditor beneficiary. The two percent commission was intended to discharge the obligation to pay Hilliker for performing services as broker. As a matter of law and based on the summary judgment facts, Hilliker had an enforceable third-party beneficiary right under the Contract.

Termination Agreement

Although we conclude that Hilliker had an enforceable third-party beneficiary right under the Contract, that does not end the analysis. The remaining question is whether Hilliker's third-party rights were eliminated by the Termination Agreement between Watson and Star United. Watson argues the Termination Agreement modifies or extinguishes all obligations under the original Contract, including the third-party payment obligation to Hilliker.

The validity of Watson's argument turns on the power of contracting parties to amend an existing contract to modify or eliminate the rights of a third-party beneficiary. This issue was considered by the court in *Lunceford v. Houghtlin*, 326 S.W.3d 53, 78 (Mo. App. W.D. 2010). As recognized in *Lunceford*, the parties to a contract generally have the right to modify its terms, including terms creating a third-party beneficiary. *Id.* There are, however, "limits . . . on when an intended third-party beneficiary's rights can be varied." *Id.* *Lunceford* quoted and applied the RESTATEMENT (SECOND) OF CONTRACTS § 311 (1981), which states in relevant part as follows:

- (1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.
- (2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.
- (3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the

promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

The Contract in this case does not contain language prohibiting Star United and Watson from discharging or modifying a duty to Hilliker. Applying *Lunceford*, Paragraphs (1) and (2) of this section therefore do not apply. Thus, the question is whether the parties' right to modify the Contract "terminate[d]" under Paragraph (3) prior to the parties signing the Termination Agreement.

Paragraph (3) of RESTATEMENT § 311 contains multiple distinct circumstances where the power to change a third-party beneficiary's rights comes to an end. Specifically, the right terminates when the beneficiary (i) materially changes his position on justifiable reliance on the promise, (ii) brings suit, or (iii) manifests assent to the contract at the request of one or more of the contract parties. If any one of these three conditions are met before the beneficiary is notified of the contract change, the ability to change the third-party beneficiary's rights terminates.

Under *Lunceford* and the RESTATEMENT, determining the applicability of one or more of these conditions to the Termination Agreement is materially important to the entry of summary judgment. If one or more of the RESTATEMENT conditions is satisfied, the Termination Agreement could not discharge or modify the obligation to pay Hilliker the two percent commission. Yet the record regarding these facts is ambiguous and not fully developed. Specifically, the record contains evidence indicating that Hilliker did perform services as broker for Star United. We infer those services were performed in reliance on the commission provision contained in the Contract. The summary judgment record does not adequately address whether in

doing so Hilliker “material[ly] change[d]” its position in justifiable reliance on the Contract, as specified in Paragraph (3) of the RESTATEMENT § 311.⁴

Thus, we conclude that summary judgment was not properly entered because the record raises genuine issues of material fact regarding Hilliker’s right to recover its commission under the Contract.

Conclusion

The entry of summary judgment by the trial court is reversed and the matter is remanded for further proceedings consistent with this Opinion.



Thomas C. Clark, II, Judge

Robert M. Clayton III, P.J., concurs.

Gary M. Gaertner, Jr., J., concurs.

⁴ Likewise, the record suggests that Hilliker may have “manifest[ed] assent” to the Contract, but this issue is not squarely addressed.