

STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

**PHILADELPHIA INDEMNITY INSURANCE
COMPANY, AS SUBROGEE OF SPYGLASS
CONDOMINIUM ASSOCIATION; and
SPYGLASS CONDOMINIUM ASSOCIATION,**

Plaintiffs,

v

**PARK TOWNSHIP, HOLLAND BOARD OF
PUBLIC WORKS, and GMT POWER, INC.,
d/b/a WOLVERINE POWER SYSTEMS,**

Defendants,

and

PARK TOWNSHIP,

Cross-Plaintiff,

v

**HOLLAND BOARD OF
PUBLIC WORKS, and GMT POWER, INC.,
d/b/a WOLVERINE POWER SYSTEMS,**

Cross-Defendants,

and

**HOLLAND BOARD OF
PUBLIC WORKS,**

Cross-Plaintiff,

v

**GMT POWER, INC.,
d/b/a WOLVERINE POWER SYSTEMS,**

Cross-Defendant.

**OPINION AND ORDER
ON MOTION FOR PARTIAL
SUMMARY DISPOSITION**

File No. 14-4030-NI

Hon. Jon A. Van Allsburg



"14004030NI"

At a session of said court held in the Ottawa County
 Courthouse in the City of Grand Haven, Michigan,
 on the 30th day of June, 2015

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

Defendant Holland Board of Public Works (HBPW) moved for summary disposition of Count III of co-plaintiffs' complaint on the grounds that plaintiffs, Philadelphia Indemnity Insurance Company as subrogee of Spyglass Condominium Association and Spyglass Condominium Association (Spyglass) are not third-party beneficiaries of the applicable contract. Defendant's motion is GRANTED.

FACTUAL BACKGROUND

This case arose from a fire on April 7, 2012, in the water pumping station located on Spyglass's property, which was operated by Park Township and boosted the pressure of the water supplied to Spyglass condominiums from Park Township's public water supply. Spyglass entered into an agreement with Park Township, acknowledged in a letter dated July 13, 1988, which spelled out the responsibilities associated with the pumping station and stated that:

the township is responsible for costs directly associated with supplying water service to the residents. These costs include Board of Public works charges for inspections and maintenance, Consumer Power charges for electricity to operate the pumps, and Michigan Bell monthly line lease charge for the alarm system between Spyglass and the Board of Public Works Treatment Plant.

The building housing the pump equipment and costs associated with its maintenance, insurance, and heat remain the responsibility of Spyglass.¹

Park Township subsequently entered into contracts with HBPW to supply water and to provide certain operation and maintenance services to the Township. HBPW attached its current agreements with Park Township, dated August 2, 2004, to its Brief in Support of its Motion for Summary Disposition.² The services HBPW agreed to provide include "[w]ater pumping station maintenance, including checking, routine preventive maintenance, and repair."³

¹ Complaint, Ex. 1.

² HBPW Br, Ex. A and B. HBPW also filed an affidavit from its general manager, identifying Ex. A and Ex. B as the current contracts, which by their terms superseded any previous contract.

³ Ex. B, p 2.

HBPW maintains that it is not liable to plaintiffs for breach of contract because plaintiffs are not direct beneficiaries of the contracts.

LEGAL ANALYSIS

1. Standard of Review

HBPW seeks summary disposition pursuant to MCL 2.116(C)(8) and MCL 2.116(C)(10).

With respect to defendants' motions for dismissal pursuant to MCL 2.116(C)(8), for failure to state a claim on which relief can be granted, the court tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true and construing them in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817 (1999). The court may consider any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden*, 461 Mich at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

In reviewing a motion under MCR 2.116(C)(10), the court "considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ." *Nuculovic v Hill*, 287 Mich App 58, 62; 783 NW2d 124 (2010). Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Haliw v Sterling Hts*, 464 Mich 297, 302; 627 NW2d 581 (2001).

The party moving for summary disposition pursuant to MCR 2.116(C)(10) has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The burden

then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. MCR 2.116(G)(4); *Smith*, 460 Mich at 445. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*

HBPW bases its motion for summary disposition on its contract agreements with Park Township. “[I]f contractual language is clear, construction of the contract is a question of law for the court.” *Meagher v Wayne State Univ*, 222 Mich App 700, 721; 565 NW2d 401 (1997). When interpreting a contract, the primary task of the court is to give effect to the parties' intention at the time they entered into the contract. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). To determine the parties' intent, the court must examine the language of the contract according to its plain and ordinary meaning and avoid an interpretation that would render any portion of the contract nugatory. *Id.* Determining whether a contract's terms apply to a set of facts requires a “straightforward analysis of the facts and the contract terms.” *Id.*, quoting *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 356–357; 686 NW2d 756 (2004).

2. Third-Party Beneficiary

Count III of plaintiffs' complaint is entitled “Breach of Contract Pursuant to MCL 600.1405.” The referenced statute spells out the rights of third-party beneficiaries. MCL 600.1405 provides in pertinent part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

(2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied

conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.

Plaintiffs allege in paragraph 52 of their Complaint that Spyglass was “the direct and exclusively intended beneficiary of the promises made between HBPW and PARK TOWNSHIP, and specifically was a beneficiary of the promise made by HBPW and PARK TOWNSHIP to operate and maintain the water pumping equipment in safe and working order.”

HBPW maintains that Spyglass is not a direct, third-party beneficiary of the agreements. It notes that the only parties to the contracts are the City of Holland (acting through the HBPW) and Park Township. Spyglass is not mentioned in the agreements. HBPW argues that even if the parties to the contracts knew or even intended that the contractual agreements would ultimately benefit a non-party, Spyglass cannot satisfy the direct beneficiary requirement. HBPW also notes that the contracts expressly disclaim third-party beneficiary status for any non-parties to the contracts.⁴

The statute and caselaw clearly establish that a person or entity is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person. MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). By using the modifier “directly,” the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. *Id.* An objective standard is to be used in determining whether a claimant is a third-party beneficiary, and “a court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of 1405.” *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651, 654 (2003).

Review of the Water Supply and the Water System Operation and Maintenance contracts do not support plaintiffs’ contention that they are third-party beneficiaries of the contracts. On

⁴ Ex 2, Section 23; Ex 3, Section 12.

the contrary, the terms of the contracts indicate that the agreements are between and for the sole benefit of the named parties, which do not include Spyglass.

Plaintiffs do not contradict this interpretation of the 2004 contracts in their response to HBPW's motion for summary disposition. Instead, they argue that HBPW's motion should be denied because discovery is ongoing and they are seeking facts that would support waiver or estoppel and provide them with a substantive response to HBPW's motion.

Summary disposition is generally premature before discovery is completed, but it is not automatically precluded by the fact that discovery remains open. As the court explained in *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009), "The question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." The party opposing summary disposition must identify a disputed issue and support that issue with independent evidence. *Id.* "The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions." *Id.* at 292-293.

Plaintiffs have submitted an affidavit from the president of the Spyglass Condominium Association, stating that plaintiffs seek information on prior and possible subsequent contracts which may alter the third-party beneficiary analysis. In addition, they seek information from HBPW regarding the conduct of their employees, who visited the Spyglass property regularly to inspect and supervise the water pumping station, which they claim may show that HBPW waived the contractual terms it asserts in its defense. The affidavit, however, does not offer any probable testimony to support waiver or estoppel. Moreover, plaintiffs do not provide any legal support for their claim that waiver or estoppel could create a third-party beneficiary status for Spyglass.

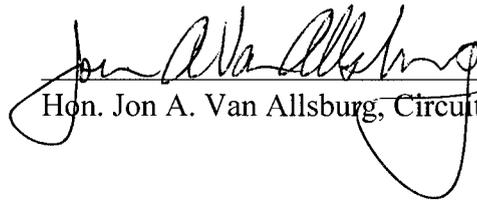
Summary disposition is appropriate in this case, at this time, because there is no issue of fact as to whether the 2004 agreements are the applicable contracts and those agreements clearly

do not afford Spyglass third-party beneficiary status. Further discovery would not aid in deciding this issue.⁵

For the reasons stated above, HBPW's motion for partial summary disposition is GRANTED.

IT IS SO ORDERED.

Dated: June 30, 2015


Hon. Jon A. Van Allsburg, Circuit Judge

⁵ See *Am Cmty Mut Ins Co v Commr of Ins*, 195 Mich App 351, 363; 491 NW2d 597 (1992) (“it would be futile to require that discovery be completed before a final decision can be made if discovery could not aid in deciding the case”).