STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: November 20, 2013)

802 PARTNERS, LLC,	:	
FORTY 1° NORTH, LLC	:	
Plaintiffs	:	
	:	
vs.	:	**C.A. No. NM 10-526**
	:	**(consolidated with)**
	:	
BEHAN BROS., INC.	:	
Defendant	:	
	:	
_____	:	
	:	
BEHAN BROS., INC.	:	
Plaintiff	:	
	:	
vs.	:	**C.A. No. NC 10-537**
	:	
802 PARTNERS, LLC	:	
Defendant	:	

DECISION

STERN, J. Plaintiffs 802 Partners, LLC (hereinafter Owner) and Forty 1° North, LLC (hereinafter Operator) (collectively Plaintiffs) sued Behan Bros., Inc. (hereinafter General Contractor) for breach of contract and seek to recover damages for lost revenue. The Plaintiffs complain that they sustained their injury when the General Contractor allegedly failed to complete construction of a hotel, restaurant, and marina project (hereinafter Project) on time, as required by the construction contract entered into by the Owner and the General Contractor (hereinafter Contract). Before this Court is the General Contractor's Motion for Summary Judgment with Regard to Damages Claims (hereinafter Motion). Both parties have submitted

memoranda in support of their positions. Jurisdiction is pursuant to Rule 56 of the Rhode Island Rules of Civil Procedure.

I

Facts and Travel

The facts of this case are as follows. The Owner and the General Contractor entered into a Contract in March 2009 for construction of the Project in Newport, Rhode Island. The General Contractor began performance of the Contract, but, over time, developed a dispute with the Owner over alleged delays in construction. On October 4, 2010, the Owner filed suit against the General Contractor, alleging that the Owner sustained losses from the operation of a hotel and restaurant on the Project's premises as a result of the delays. The Owner sought monetary damages against the General Contractor. The General Contractor countersued. Both parties subsequently modified their complaints numerous times. On April 26, 2013, this Court granted the Owner leave to file a fourth amended complaint to add the Operator as a co-plaintiff to the proceedings. On May 16, 2013, the General Contractor filed an answer and a fourth amended counterclaim.[1] On June 12, 2013, the General Contractor filed the present Motion, and the Plaintiffs objected. The parties have filed with the Court memoranda of law in support of their respective positions.

II

Standard of Review

Summary judgment is "a drastic remedy that should be cautiously applied." McPhillips v. Zayre Corp., 582 A.2d 747, 749 (R.I. 1990) (citing Commercial Union Companies v. Graham, 495 A.2d 243 (R.I. 1985); Rustigian v. Celona, 478 A.2d 187 (R.I. 1984); Steinberg v. State, 427

[1] The Court denied the Plaintiffs' Motion to Strike the General Contractor's Fourth Amended Counterclaim and granted the General Contractor's Motion to Amend.

A.2d 338 (R.I. 1981)). Under Rule 56(c) of the Superior Court Rules of Civil Procedure, this Court must determine whether there is a genuine issue of any material fact that must be resolved. Super. R. Civ. P. 56(c); see Golderese v. Suburban Land Co., 590 A.2d 395, 396 (R.I. 1991). Summary judgment is proper "only if an examination of the admissible evidence, undertaken in a light most favorable to the nonmoving party, reveals no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Visconti & Boren Ltd. v. Bess Eaton Donut Flour Co., 712 A.2d 871, 872 (R.I. 1998) (citing Rotelli v. Catanzaro, 686 A.2d 91, 93 (R.I. 1996)). "Furthermore, a litigant opposing a properly supported motion for summary judgment has the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest upon mere allegations or denials in the pleadings, conclusory statements, or legal opinions." Sullivan v. Town of Coventry, 707 A.2d 257, 259 (R.I. 1998).

III

Analysis

A

Lawfulness of Plaintiffs' Alternative Defenses

The General Contractor first argues that this Court should require the Plaintiffs to assert either that the Operator was a third party beneficiary to the Contract, or that the Operator was a successor or assign of the Owner—but not both. The General Contractor claims that since third party beneficiaries and successors and assigns are mutually exclusive designations, the Plaintiffs are trying to "have it both ways" by asserting these alternative theories in opposition to the General Contractor's Motion.

Rule 8(e)(2) of the Superior Court Rules of Civil Procedure specifically provides that "[a] party may set forth two or more statements of a claim or defense alternately or hypothetically."

Super. R. Civ. P. 8(e)(2). A party may make "as many separate claims or defenses as the party has regardless of consistency," as long as the requirements of Rule 11 of the Superior Court Rules of Civil Procedure are satisfied. Id. Here, the Plaintiffs assert two claims in their opposition to the General Contractor's Motion. On the one hand, the Plaintiffs argue that the Operator may be entitled to damages against the General Contractor because the Operator was a third party beneficiary to the Contract between the Owner and the General Contractor. On the other hand, the Plaintiffs argue that the Operator may be entitled to damages against the General Contractor under the theory that the Operator was a successor in interest or assign of the Owner with respect to the operation of the hotel, restaurant, and marina once the Project was completed. Even if these two theories are inconsistent with each other because "third party beneficiaries" and "successor and/or assigns" are mutually exclusive designations, the Plaintiffs are entitled to advance both of these theories under Rule 8(e)(2). The Court declines to require the Plaintiffs to assert one theory or the other. See DiLuglio v. Providence Auto Body, Inc., 755 A.2d 757, 777 (R.I. 2000).

B

Operator as Third Party Beneficiary

The General Contractor's first argument in support of its Motion is that the Operator may not recover damages as a result of any breach of the Contract under a theory that the Operator was a third party beneficiary to that Contract, one formed exclusively between the Owner and the General Contractor. The General Contractor contends that, as a matter of law, the Operator may not be considered a third party beneficiary. The General Contractor argues that the Contract, by its language, specifically precludes the creation of any contractual relationships other than one between the Owner and the General Contractor. The General Contractor also argues that there

was no "direct and unambiguous" intent to benefit the Operator through the Contract and that the Contract did not even make reference to the Operator in any of its provisions.

The Plaintiffs counter that the Operator was indeed a third party beneficiary under the terms of the Contract. The Plaintiffs contend that the face of the Contract clearly evidences the intent of the Owner and the General Contractor to benefit the Operator through performance. The Plaintiffs assert that the Contract does, in fact, make reference to the Operator in language defining the Contract's purpose and point to language in certain "Construction Documents" and in allegedly incorporated attachments to the Contract where the Operator is referenced by name.

The question for this Court is whether a genuine issue of material fact exists as to whether the Operator was a third party beneficiary who may recover from the General Contractor for an alleged breach. "[O]nly intended, and not incidental, third party beneficiaries can maintain an action for damages resulting from a breach of contract between two other contracting parties." Forcier v. Cardello, 173 B.R. 973, 984-85 (D.R.I. 1994) (finding that a "promissor's mere awareness that someone other than the promisee may derive a benefit from the promissor's performance under the contract is insufficient to cloak that third party with the mantle of intended beneficiary," and that "the parties directly and unequivocally intend to benefit a third party in order for that third party to be considered an intended beneficiary") (citing Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990)); Finch v. Rhode Island Grocers Ass'n, 93 R.I. 323, 329–30 (1961).[2] It is well established that when one party contracts with another "to do some act for the benefit of a third," the third party "who would enjoy the benefits[ ] may maintain an action for the breach" of that contract. Davis, 576 A.2d at 1242

[2] A valid contract requires "competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." R.I. Five v. Medical Assocs., 668 A.2d 1250 (R.I. 1996). Regardless of whether the contract is express or implied, there must be consideration. Hayes v. Plantations Steel Co., 438 A.2d 1091, 1094 (R.I. 1982).

(citing Rae v. Air-Speed, Inc., 386 Mass. 187, 195 (1982) (citing Brewer v. Dyer, 7 Cush. 337, 340 (1851))) (internal quotations omitted). However, the mere fact that a third party would likely benefit from an agreement between two principals "does not, by itself, show that [the third party] was an intended rather than an incidental beneficiary." Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 412 F.3d 215, 229 (1st Cir. 2005); see also Restatement (Second) of Contracts §§ 302 (stating, in pertinent part, that "[p]erformance of a contract will often benefit a third person[, b]ut unless the third person is an intended beneficiary as here defined, no duty to him is created") and 315 (stating, in pertinent part, that "[a]n incidental beneficiary acquires by virtue of the promise [between the parties to the contract] no right against the promisor or the promise");[3] Rodriguez v. United States, 69 Fed. Cl. 487, 493-94 (Fed. Cl. 2006) (United States Court of Federal Claims holding that plaintiff husband had no rights against the government because there was no indication that the contract between husband's wife and the government directly intended to benefit any third party, so the husband was at best an incidental beneficiary); United States v. United Servs. Auto. Ass'n, 968 F.2d 1000, 1001-02 (10th Cir. 1992) (Tenth Circuit finds that the rights of third parties are determined by analyzing the intent of the contracting parties). Moreover, the law presumes that parties contract to benefit only themselves, and a contract will not be considered as having been made for the use or benefit of a third party unless it clearly appears that such was the parties' intention. Brown v. Summerlin Assocs., Inc., 614 S.W.2d 227, 229 (Ark. 1981).

Even considered in the light most favorable to the Plaintiffs, there is no genuine issue of material fact that the Operator was not a third party beneficiary who could recover damages

[3] Example 19 in § 302 is particularly illuminating: "A contracts to erect a building for C. B then contracts with A to supply lumber needed for the building. C is an incidental beneficiary of B's promise, and B is an incidental beneficiary of C's promise to pay A for the building."

against the General Contractor. The General Contractor and the Owner did not intend the Operator to be a third party beneficiary through performance of the Contract. The law presumes that the Owner and the General Contractor intended only to benefit themselves when they entered into the Contract, and there is no indication that the Owner and General Contractor "directly and unequivocally" intended to benefit the Operator by entering into the Contract. The Contract does not reflect any direct or unambiguous intent by the Owner and the General Contractor to benefit the Operator. References to the Operator in so-called "Construction Documents" and allegedly incorporated amendments to the Contract are not enough to "cloak" the Operator "with the mantle of intended beneficiary" because those references are not reflective of a direct or unambiguous intent that the Operator be the beneficiary of the agreement between the Owner and the General Contractor. At most, the Operator was an incidental beneficiary of the Contract, and it thereby acquired no right to recover damages against the General Contractor when the General Contractor allegedly breached it. Restatement (Second) of Contracts § 315. Even though the Operator may well have been a third party that would likely realize a benefit from the agreement between the Owner and the General Contractor, Massachusetts Eye & Ear Infirmary, 412 F.3d at 229, being likely to realize a benefit from an agreement between two principals is not equivalent to being an intended third party beneficiary of those parties. Id. A third party beneficiary theory cannot be a basis for finding that the Operator is entitled to recover damages against the General Contractor for breach of contract. There is no genuine issue of material fact that the Operator was something other than an intended third party beneficiary in the Contract.

C

Operator as Owner's Successor or Assign

The General Contractor further argues in support of its Motion that the Operator may not recover damages against the General Contractor under a theory that the Operator was a "successor or assign" of the Owner because there is no evidence to support a finding that the Operator was the Owner's assign or successor in interest. The General Contractor contends, moreover, that there was no contractual relationship between the Owner and the Operator with respect to the hotel in the first place.

The Plaintiffs aver that there was a contractual relationship between the Owner and the Operator. The Plaintiffs point out that the Operator, as a company, was specifically created for the purpose of operating the hotel, restaurant, and marina; that the Operator did, in fact, begin operation of the hotel and restaurant businesses, specifically, by applying for an employer identification number, opening up bank accounts, and setting up payroll for employees. The Plaintiffs argue that the Operator qualifies under the law as a successor in interest because the Operator "took the place" of the Owner with regard to the operation of the hotel and restaurant businesses, and because the Operator has "sustained the like part or character" of the Owner through the course of its operation of the hotel and restaurant. The Plaintiffs also argue that the Operator qualifies as the Owner's assign because the Owner has assigned its rights and interests in the operation of the hotel and restaurant businesses to the Operator.

The questions before the Court are, first, whether a genuine issue of material fact exists as to whether or not the Operator was a successor in interest to the Owner; and second, whether a genuine issue of material fact exists as to whether or not the Operator was the Owner's assign. The Court will consider these two questions separately.

1

Operator as Owner's Successor[4]

A "successor in interest" is "one who follows another in ownership or control of property." Middletown Commercial Associates Ltd. P'ship v. City of Middletown, 42 Conn. App. 426, 435, 680 A.2d 1350, 1355 (1996) (citing Black's Law Dictionary (5th ed. 1979)). A "successor" "takes the place that another has left, and sustains the like part or character." Safer v. Perper, 569 F.2d 87, 95 (D.C. Cir. 1977). In Safer, the D.C. Circuit Court of Appeals found that there was "a high degree of similarity in role and interest" between a property owner and its purported successor and concluded that the purported successor was, therefore, the property owner's successor in interest. Id. at 96. In Middletown Commercial Associates Ltd. P'ship, the purported successor assumed the original developer's obligations to the extent that they were prescribed in the contract between the original developer and a third party, and thus the purported successor was found to have sustained "a like part or character" as the original developer. Middletown Commercial Associates Ltd. P'ship, 42 Conn. App. at 433.

In this case, the evidence, considered in the light most favorable to the nonmoving plaintiffs, does not present a genuine issue of material fact as to the existence of a successor-in-interest relationship between the Owner and the Operator. There is not "a high degree of similarity in role and interest" between the Owner and Operator to allow a court to find that there is a genuine issue of material fact that the Operator was the Owner's successor. Whereas, in Safer, it was the "part" of the property owner to pay money, and it was the purported successor "who ultimately completed this obligation," Safer, 569 F.2d at 95-96; here, the relationship

[4] The Plaintiffs contend that the General Contractor has not actually argued in his memorandum the issue of whether or not the Operator should be considered a successor in interest. The Court disagrees and will consider the General Contractor's arguments as applicable to both questions: whether the Operator was a successor in interest and whether the Operator was an assign.

between the Owner and Operator is different. The Owner did not have any "obligations" that the Operator ultimately became responsible for fulfilling. Instead, the Owner, by virtue of his purported ownership of the hotel and the restaurant situated on the premises of the completed Project, was entitled to exercise that ownership as he saw fit. The Operator did not "follow" the Owner in "ownership and control" of the restaurant and hotel. Middletown Commercial Associates Ltd. P'ship, 42 Conn. App. at 435. The Operator, at most, obtained the ability to run the business of the restaurant and hotel from the Owner. The Owner retained "ownership and control" of the restaurant and hotel, even after purportedly contracting with the Operator to carry out the hotel and restaurant's business operations. There was no relinquished "like part or character" for the Operator to sustain. Ownership remained in the hands of the Owner. Even after the Operator allegedly commenced operation of the hotel and restaurant on behalf of the Owner, the Owner and the Operator cannot possibly be said to have had a "high degree of similarity in role and interest" with each other. Even considered in the light most favorable to the Plaintiffs, it is clear that the Operator was not the Owner's successor in interest. There is no genuine dispute about this material fact.

2

Operator as Owner's Assign

An "assignment" is "an immediate and irrevocable transfer of all rights" in assigned property from the assignor to the assignee. In re Apex Oil Co., 975 F.2d 1365, 1369 (8th Cir. 1992); see also Flanders & Medeiros, Inc. v. Bogosian, 868 F. Supp. 412, 415 (D.R.I. 1994) aff'd in part, rev'd in part sub nom. Flanders & Medeiros, Inc. v. Bogosian, 65 F.3d 198 (1st Cir. 1995). The "assigned property" may consist of either the entirety of the assignor's rights or merely of a part of the rights the assignor has to begin with. U.S. ex rel. Eisenstein v. City of

New York, New York, 556 U.S. 928, 934 (2009). There are two requirements for an assignment of an interest in property to be valid. Flanders & Medeiros, Inc., 868 F. Supp. 412 at 420. The "subject matter of the assignment . . . [must be] described so that it is readily identifiable," id., and there must be "clear evidence of the assignor's intent to transfer [his or] her rights." Id. The assignor must "manifest an intention to transfer the right to another person without further action or manifestation of intention by the [assignor]." Restatement (Second) Contracts § 324. It is not required that the assignor manifest his intent to transfer in writing; it may be accomplished orally. Id. A court may also find that an equitable assignment has occurred if there is sufficient evidence of an intent to assign and a mutual understanding that an assignment has taken place. Goodsell v. Benson, 13 R.I. 225, 230 (1881). See also Christmas v. Russell, 81 U.S. 69, 76 (1871) (U.S. Supreme Court establishing the parameters of an equitable assignment). The assignor must have completely relinquished control over the interest in question. In re Gibraltar Res., Inc., 211 B.R. 216, 221 (Bankr. N.D. Tex. 1997). Equitable assignments may be evidenced through direct or circumstantial evidence. Id. Once an assignment is completed, the assignee steps into the shoes of the assignor "and can avail itself of the assignor's rights, no more, no less." Weybosset Hill Investments, LLC v. Rossi, 857 A.2d 231, 240 (R.I. 2004).

There is a genuine issue of material fact as to whether the Owner immediately and irrevocably transferred the right to operate the hotel and restaurant businesses to the Operator—and, hence, whether there was an assignment between those two parties. Because the Operator apparently applied for an employer identification number, opened up bank accounts, and set up payroll for employees raises a question of material fact about whether the Owner intended to assign and specifically described the subject matter of such an assignment to the Operator, in satisfaction of the Flanders & Medeiros, Inc. test. The Plaintiffs' assertion that the Operator, as a

company, was formed for the very purpose of operating the hotel, restaurant, and marina upon the completed Project raises a genuine issue of material fact regarding the Owner's intent to assign that right to the Operator without further action or manifestation of intention by the Owner. At the very least, viewing the evidence in the light most favorable to the nonmoving Plaintiffs, the Owner and Operator's conduct raises a question of material fact with respect to the existence of an equitable assignment. That the Operator began operating the hotel—and that the Owner did not—at least raises a genuine question about the Owner's intent to transfer his interest in operating the completed Project and raises a genuine question about the Owner's relinquishment of control over his interest in operating same. Therefore, having found that there is a genuine issue of material fact regarding the status of the Operator as an assign of the Owner, this Court denies the General Contractor's Motion.

IV

Conclusion

After reviewing the evidence in the light most favorable to the Plaintiffs—the non-moving party—this Court finds that there is a genuine issue of material fact as to whether or not the Operator was actually an assign of the Owner's interests in the hotel and restaurant businesses situated on the Owner's premises. This Court thereby denies the General Contractor's Motion on this ground only. This Court further finds that there is no genuine issue of material fact that the Operator was not an intended third party beneficiary of the Contract between the Owner and the General Contractor; and that there is no genuine issue of material fact that the Operator was not a successor in interest to the Owner with respect to the Contract. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**802 Partners, LLC, et al. v. Behan Bros., Inc.** **and** **Behan Bros., Inc. v. 802 Partners, LLC**
CASE NO:	**NM 10-526 consolidated with NC 10-537**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**November 20, 2013**
JUSTICE/MAGISTRATE:	**Stern, J.**

ATTORNEYS:

For 802 Partners, LLC:	**Mark W. Freel, Esq.** **Stephen J. MacGillivray, Esq.** **Raymond M. Ripple, Esq.**
For Behan Bros, Inc.:	**Neil P. Galvin, Esq.** **W. Mark Russo, Esq.** **Robert J. Humm, Esq.** **Gregory O'Neil, Esq.**