

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STREET SEARCH PARTNERS, L.P.,)
)
 Plaintiff,)
)
 v.) C.A. No. 04C-09-156 PLA
)
RICON INTERNATIONAL, L.L.C.,)
 and **ENVIRO BOARD CORPORATION**)
)
 Defendants.)

Submitted: July 29, 2005
Decided: August 1, 2005

UPON DEFENDANT'S
MOTION TO DISMISS
GRANTED IN PART / DENIED IN PART.

Anne S. Gaza, Esquire, Richards Layton & Finger P.A., Wilmington, Delaware,
and Joseph P. DiVincenzo, Esquire, Hodgson Russ LLP, Buffalo, New York,
Attorneys for Plaintiff.

Joseph J. Bodnar, Esquire, Mozack and Monaco, P.A., Wilmington, Delaware,
Attorney for Defendant Enviro Board Corporation

ABLEMAN, JUDGE

On this breach of contract action, the plaintiff has failed to adequately plead that it was a third party beneficiary to the contract between the defendants. The plaintiff has, however, successfully pled that one defendant has been unjustly enriched at the plaintiff's expense by its breach of the contract between defendants. Defendant Enviro Board Corporation's Motion To Dismiss is hereby **GRANTED IN PART / DENIED IN PART**.

Facts

Plaintiff Street Search Partners ("Street Search"), L.P. is a New Jersey Limited Partnership in the business of investment management and consulting. Defendant Ricon International, L.L.C. ("Ricon") is a Missouri Limited Liability Company in the same business. Defendant Enviro Board Corporation ("EBC") is a Delaware Corporation, operating principally in California, in the business of manufacturing building materials.

In June 2001, EBC executed a financing contract ("the Contract") with Ricon. The agreement required Ricon to loan EBC \$250,000, in exchange for a bond ("the Bond") promising to repay the loan at 24% annual interest. Payment was due on October 4, 2001, a date tied to a separate deal unrelated to this case. EBC made interest payments on the loan in June and July 2001, and then stopped paying altogether. Ricon issued a notice of default in December 2001, allegedly prompting EBC to make several empty promises to pay throughout 2002.

Ricon received the \$250,000 that it loaned to EBC as a loan from Street Search, and had promised to repay it under the same terms that EBC was repaying Ricon. In other words, Ricon functioned as a middleman between Street Search and EBC, profiting only by its commission for brokering the deal. Street Search alleges that EBC knew that Street Search was the source of the \$250,000, a contention that EBC denies. Neither the Contract nor the Bond between Ricon and EBC reference Street Search in any way. Street Search has sued Ricon, alleging that it breached the agreement between the two regarding the \$250,000 loan. Street Search has also sued EBC, alleging that Street Search was the intended third party beneficiary of the Contract between Ricon and EBC.

Street Search filed its complaint on September 22, 2004. As of this time, Ricon has not filed an answer, leaving EBC the only defendant at bar.

Standard Of Review

On a motion to dismiss, the trial court “must determine whether it appears with reasonable certainty that, under any set of facts which could be proven to support the claim, the plaintiffs would be entitled to relief.”¹ This analysis is limited to the facts alleged in the complaint, which are taken as true and interpreted in a light most favorable to the non-moving party.²

¹ *Vanderbilt Income & Growth Assoc., L.L.C. v. Arvida/JMB Mangers, Inc.*, 691 A.2d 609, 612 (Del. 1996).

² *Id.*

Discussion

Street Search has made four claims against EBC: (1) breach of the Contract between Ricon and EBC on a third party beneficiary theory; (2) unjust enrichment; (3) “money had and received;” and (4) action on the Bond between Ricon and EBC on a third party beneficiary theory. Of these, “money had and received” is an ancient cause of action subsumed by modern law regarding breach of contract. Moreover, it could be made only against a party in privity (Ricon), and not against third parties who did not receive money from the plaintiff.³ Finally, this cause of action requires proof that the defendant did not use the money for an agreed purpose.⁴ The Complaint does not make that allegation, or even indicate what the agreed purpose was, but only protests EBC’s failure to repay. Count Seven must therefore be dismissed.

Street Search’s contract and bond claims, Counts Five and Eight, depend on whether the Complaint adequately alleges that Street Search was an intended third party beneficiary of the Contract between Ricon and EBC. Phrased another way, the only question is whether Street Search’s allegation that EBC knew that Ricon was only a middleman, and that it was Street Search’s \$250,000 that EBC was refusing to repay, is enough to defeat the plain language of the Contract, which purports to create obligations solely between Ricon and EBC.

³ See *e.g. Guthrie v. Hyatt*, 1 Del. 446 (Del.Super. 1834).

A. Ricon Subjectively Intended To Benefit Street Search

Generally, a stranger to a contract has no rights under that contract.⁵

However, the non-party may enforce the Contract as a third party beneficiary if it can prove that “it is the intention of the promisee to secure performance of the promised act for the benefit of [the third party], either as a gift or in satisfaction or partial satisfaction of an obligation to that person, and the promisee makes a valid contract to do so. If, however, it was not the promisee's intention to confer direct benefits upon a third person, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then such third party beneficiary will be held to have no enforceable rights under the contract.”⁶

It is clear that Ricon subjectively intended to benefit Street Search by entering the Contract. Street Search is an archetypical creditor beneficiary; it fronted money pursuant to a written contract that required Ricon to repay per the terms of its Contract with EBC. The only income for Ricon contemplated in the Street Search-Ricon agreement is its broker fee; all of the money EBC owed under the Contract was to pass through Ricon to Street Search. The question remains, however, whether Ricon’s intent alone can support a finding that Street Search was a third party beneficiary of the Contract.

⁴ *Id.*

⁵ *Insituform of North America, Inc. v. Chandler*, 534 A.2d 257, 268 (Del. Ch. 1987).

⁶ *Id.* at 268-9 (internal citations omitted).

B. The Contract Does Not Show That EBC Intended To Benefit Street Search

“It is settled in Delaware that a third-party may recover on a contract made for his benefit. But in order for there to be a third party beneficiary, the contracting *parties* must intend to confer a benefit.”⁷ “[A]n intent to benefit a third-party must depend on the language of the contract. Furthermore, ... where the contract specifies which documents are to be included as part of the agreement, implicitly then, there is an exclusion of any consideration of extrinsic evidence.”⁸

The Contract does not objectively indicate any intent to benefit Street Search, nor even acknowledge that company’s existence. The Contract also contains standard merger and no oral modification clauses. The only possible evidence that could indicate EBC’s knowledge of or intent to benefit Street Search is therefore extrinsic to the Contract and barred by the parole evidence rule. Under *Delmar News, Inc., Crow v. Erectors, Inc.*, and similar cases, the Motion To Dismiss these claims should be granted because there is no admissible evidence that both parties to the Contract agreed to create a third party beneficiary.

C. The Contract Precludes Street Search As A Third Party Beneficiary

The conflict of language in the above-cited cases creates a problem in interpreting this Contract. Specifically, does the law require only that the promisee

⁷ *Delmar News, Inc. v. Jacobs Oil Co.*, 584 A.2d 531, 533 (Del. Super. 1990)(internal citations omitted)(emphasis added); *Insurance Co. of North America v. Waterhouse*, 424 A.2d 675 (Del.Super.1980).

(Ricon) intend to create a third party beneficiary, which clearly occurred, or must both parties contractually state an intention to create a third party beneficiary? In the Court's view, the latter interpretation is the correct one. Basing a third party's right to enforce a contract on the subjective intent of the promisee, unexpressed in the Contract itself, would unfairly expand liability for the promisor, inject an inefficient level of uncertainty into contract law, and render the parole evidence rule meaningless.

This is especially true because Street Search did not have to structure the deal in this obtuse fashion. It could have chosen to pay Ricon a finder's fee and then have loaned the \$250,000 directly to EBC. Street Search's decision not to do so very likely reflects a business decision to distance itself - by interposing Ricon as an extra "pocket" - from EBC, a company that apparently had serious solvency problems. The Third Party Beneficiary doctrine is not meant to rescue a sophisticated corporate entity from its contractual appraisal of a business risk. Because the Contract prevents Street Search establishing itself as a third party beneficiary, Counts Five and Eight must be dismissed.

D. Street Search Has Stated A Claim For Unjust Enrichment

"The elements of unjust enrichment are (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and impoverishment; (4)

⁸ *Crow v. Erectors, Inc.*, 1988 WL 7617 (Del. Super.); *citing Oliver B. Cannon & Sons, Inc. v.*

the absence of justification; and (5) the absence of a remedy at law. The Court of Chancery has held ... that where plaintiff has pled the first four elements of the claim but sought money damages in order to be made whole, Chancery has no jurisdiction because no equitable remedy is sought.”⁹ If a plaintiff seeks only damages to correct an unjust enrichment, jurisdiction lies in Superior Court even though the claim is fundamentally an equitable one.

Street Search has successfully pled a claim for unjust enrichment. The Complaint alleges that EBC functionally stole \$250,000 of Street Search’s money by its unjustifiable refusal to repay Ricon. Street Search’s proposed remedy is straightforward; it wants its \$250,000 repaid with interest. All the elements of unjust enrichment have therefore been pled, and the Superior Court’s jurisdiction properly invoked. Count Six must therefore be permitted to proceed.

E. EBC’s Statute Of Limitations Defense Is Frivolous

EBC argues that, since it stopped making payments on the loan in July 2001, the three-year statute of limitations for contract actions¹⁰ began to run at that time, leaving Street Search’s September 2004 complaint two months late. This reasoning is refuted by the Contract, which plainly states that EBC was required to pay Ricon by October 4, 2001. The Contract ties default status entirely to that date

Dorr-Oliver, Incorporated, Del.Supr., 336 A.2d 211 (1975)(internal citation omitted).

⁹ *Grace v. Morgan*, 2004 WL 26858 (Del. Super.); citing *Jackson Nat’l. Live Ins. Co. v. Kennedy*, 741 A.2d 377, 393 (Del. Ch.1999).

¹⁰ 10 Del. C. § 8106.

and not to monthly payments, which are nowhere mentioned. Street Search's complaint was therefore filed within the statute of limitations period.

F. EBC's Counsel's Attempt To Mislead The Court

Unfortunately, the Court also finds it necessary to address a matter not germane to the Motion to Dismiss: EBC's continuing problems with counsel. EBC was represented in this case by James E. Huggett, Esquire, a Delaware attorney operating from the Delaware office of Flaster/Greenberg L.P. Mr. Huggett apparently left that law firm sometime in May 2005, but never filed a formal motion to withdraw. The only reason the Court discovered the problem was that the Prothonotary questioned why an EBC filing was signed by a different, non-Delaware Flaster/Greenberg attorney. That attorney then let slip that Mr. Huggett had left and that the firm was without Delaware counsel.

Acting on that conversation, the Court sent a letter to Robert Washburn, Esquire, who was purporting to act as the firm's Delaware attorney in an "of counsel" role. The letter informed Mr. Washburn of the conversation with the Prothonotary and asked him to certify compliance with Supreme Court rules regarding out-of-state practitioners. Mr. Washburn sent back a clip response indicating that, as he was a member of the Delaware bar, there were no problems with Delaware representation, such that the Court should never have questioned the status of representation.

Later that week, the Prothonotary discovered that Mr. Washburn operates solely out of an office in Cherry Hill, New Jersey, and insists on being contacted only at that office. As such, Mr. Washburn does not meet the standard for local counsel set by Supreme Court Rule 12. The Court also received a letter from Street Search's counsel indicating that Flaster/Greenberg had acknowledged that Mr. Washburn was not appropriate local counsel, and that the firm was searching for a Delaware attorney to fill the breach before the hearing on this Motion on July 29, 2005. Street Search refused to pass the motion, stating that it had already done so on numerous occasions to accommodate EBC's counsel problems and would not do so again. Reading between the lines, it is clear that Street Search's counsel recognized the breach of ethics committed by EBC's various lawyers, and did not want to facilitate further attempts to mislead the Court.

The Court considers the conduct of EBC's counsel, Flaster/Greenberg L.P. and Robert Washburn, Esquire, to be intended to mislead the Court into believing that the firm had complied with Delaware court rules, when, in fact, it had not. As such, Flaster/Greenberg L.P. has forfeited the right to represent EBC in this case. The court will not grant a *pro hac vice* application, made necessary by the departure of Mr. Huggett and the inadequacy of Mr. Washburn, from any

Flaster/Greenberg attorney to pursue this case, and shall henceforth accept contact exclusively from local counsel.¹¹

Conclusion

Because “Money had and received” is no longer a legally cognizable claim, and was not properly pled in any event, EBC’s Motion To Dismiss Count Seven of the Complaint must be **GRANTED**. Because the Contract gives no indication of intent to designate Street Search as a third party beneficiary of the agreement between Ricon and EBC, EBC’s Motion To Dismiss Counts Five and Eight of the Complaint must be **GRANTED**. Because Street Search has properly pled a claim for unjust enrichment, EBC’s Motion To Dismiss Count Six of the Complaint is **DENIED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary – Civil
cc: Allen M. Terrell, Jr. Esquire
Joseph J. Bodnar, Esquire

¹¹ Joseph Bodnar, Esquire, of the firm Manzack and Monaco, P.A. appeared at the July 29, 2005 hearing on this motion, and thereby entered his appearance as attorney for EBC.