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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000188-MR

CONSTRUCTION MACHINERY COMPANY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 08-CI-008779

THE NETHERLANDS INSURANCE COMPANY; PDA PROPERTY DAMAGE APPRAISERS OF LOUISVILLE, KENTUCKY INC.; AND WILSON EXCAVATION LLC — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Construction Machinery Company (CMC) brings this appeal from summary judgments entered by the Jefferson Circuit Court on July 29, 2010, and December 29, 2010, in favor of The Netherlands Insurance Company

(Netherlands) and PDA Property Damage Appraisers of Louisville, Kentucky Inc. (PDA), respectively. We affirm.

Wilson Excavation LLC (Wilson Excavation) owned a link-belt crane that was damaged by fire in 2008. John Wilson, president and member of Wilson Excavation, contacted CMC to repair the link-belt crane and to rent a replacement crane from CMC. Jason Faust, operations manager for CMC, asserted that Wilson represented to Faust that repairs of the link-belt crane were insured by an insurance policy issued by Netherlands.[1]

Some two weeks after the damaged link-belt crane was transported to CMC's repair shop, an individual named Mark Elder, an employee of PDA, met with Faust and Wilson at the shop. According to Faust, PDA was hired as an adjuster for Netherlands to appraise the damage to the crane. Faust stated that Elder directed him to proceed with the repairs and to keep Elder advised of the progress.

When CMC was near to completing the repairs on Wilson Excavation's link-belt crane, Faust claimed that he was instructed by Elder to contact a claims technician at Netherlands concerning payment for the repairs and payment for rental of the replacement crane. Faust averred that a claims technician at Netherlands directed him to submit an invoice outlining the cost of repairs to the

[1] The insurance policy was actually issued by The Netherlands Insurance Company's predecessor in interest, Indiana Insurance Company. We refer to the insurance company as Netherlands throughout our opinion for the sake of clarity.

link-belt crane ($85,892.69) and cost of the rental of the replacement crane ($29,787.39).

Subsequently, Netherlands issued a check for the full policy limits of its insurance policy in the amount of $70,000 ($60,000 for repairs and $10,000 for rental) directly to Wilson Excavation. Unfortunately, Wilson Excavation never paid CMC for either the repair work or the rental costs.

Consequently, CMC instituted the underlying civil action against Wilson Excavation, Netherlands, and PDA seeking to recover the repair cost associated with the link-belt crane and additional expenses associated with the rental of the replacement crane. By summary judgment entered July 29, 2010, the circuit court dismissed all of CMC's claims against Netherlands. And, by summary judgment entered December 29, 2010, the circuit court dismissed all of CMC's claims against PDA.[2] This appeal follows.

Our review of a summary judgment proceeds de novo. Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). We shall review CMC's contentions of error accordingly.

[2] Wilson Excavation LLC, filed for bankruptcy in 2008 in the United States Bankruptcy Court for the Eastern District of Kentucky. There is nothing in the record to reflect whether Construction Machinery Company filed a nondischargeability complaint or claim against Wilson Excavation and the insurance proceeds, or a materialman's lien against the crane.

CMC initially contends that the circuit court erred by rendering summary judgment dismissing its breach of contract claim against PDA and Netherlands. In particular, CMC argues:

> There is the written contract between WILSON and NETHERLANDS to provide damage coverage on the subject equipment. CMC became the third-party beneficiary of that agreement when PDA/NETHERLANDS authorized and directed CMC to make the repairs to the equipment and provide rental of the replacement equipment. . . .

CMC's Brief at 8-9.

Generally, there are three classes of third-party beneficiaries – (1) donee beneficiary, (2) creditor beneficiary, and (3) incidental beneficiary. Only the first two classes of beneficiary (donee and creditor) may maintain and enforce a contractual promise even though a stranger to both the contract and to the consideration. *Presnell Constr. Managers, Inc. v. E.H. Constr., LLC*, 134 S.W.3d 575 (Ky. 2004). A donee beneficiary and creditor beneficiary have been explained as:

> One is a donee beneficiary if the purpose of the promisee in buying the promise is to make a gift to the beneficiary. A person is a creditor beneficiary if the promisee's expressed intent is that the third party is to receive the performance of the contract in satisfaction of any actual or supposed duty or liability of the promisee to the beneficiary.

Sexton v. Taylor County, 692 S.W.2d 808, 810 (Ky. App. 1985) (quoting *King v. National Industries, Inc.,* 512 F.2d 29, 33 (6th Cir. 1975)). With either a donee or creditor beneficiary, it must be demonstrated that the contract was entered into by

the parties for the intended and direct benefit of the beneficiary. Otherwise, where a third party indirectly benefited from a contract or the parties to a contract did not originally intend to directly benefit a third party, the third party is said to be a mere incidental beneficiary. *Sexton*, 692 S.W.2d 808. An incidental beneficiary has no standing to bring a direct action under a contract. *Id.*

In this case, the uncontroverted facts demonstrate that CMC was merely an incidental beneficiary. The insurance policy was issued by Netherlands to Wilson Excavation and covered the link-belt crane owned by Wilson Excavation. The record is devoid of any facts demonstrating that the insurance policy was originally entered into by the parties for the direct benefit of CMC. Rather, it was clearly the intent of the parties that the insurance policy inures to the benefit of Wilson Excavation, who owned the link-belt crane. In the absence of any evidence to the contrary, we hold that CMC was an incidental beneficiary and lacked standing to bring a direct action for breach of the insurance policy. Thus, the circuit court properly rendered summary judgment dismissing CMC's breach of contract claim.

Next, CMC maintains that the circuit court erred by rendering summary judgment dismissing its claim for fraud and misrepresentation against PDA and Netherlands. CMC argues that PDA and Netherlands knowingly and intentionally misrepresented to CMC that payment from the insurance proceeds would be made directly to CMC for repairs to the crane and for rental of a replacement crane, rather than to Wilson Excavation. CMC alleged that

Netherlands and PDA knew that such representation was false or disregarded the truth thereof and that CMC reasonably relied upon the misrepresentation of payment from the insurance proceeds.

CMC, however, failed to specify who made this alleged misrepresentation on behalf of PDA or Netherlands and failed to specify the exact statement(s) constituting the alleged misrepresentation(s). CMC filed the affidavit of Faust, the company's operations manager in support of its position. Therein, Faust related that John Wilson, president of Wilson Excavation, informed him of the insurance policy and that the policy "covered" both the repairs to the link-belt crane and the rental costs. According to Faust, Elder represented that he was hired as an adjuster for Netherlands to assess the damage to the link-belt crane and to coordinate its repair. Faust stated that he was "authorized by Elder to make repairs." When the repairs to the link-belt crane were nearly completed, Faust maintained that Elder directed him to contact a Netherlands' claims technician and that the claims technician then directed CMC to submit an invoice for the repair and rental costs, which CMC did.

Conspicuously missing from Faust's affidavit is any statement averring that CMC or PDA represented that payment under the insurance contract would be made directly to CMC instead of to Wilson Excavation. The essence of CMC's fraud claim is that PDA and/or Netherlands misrepresented to CMC that payment under the insurance contract would be made directly to CMC. However, there are no facts in the record to support this allegation.

Additionally, to support a claim of fraud, it must be demonstrated by clear and convincing evidence the following elements:

> a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999)(quoting *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978)). To constitute fraud, the material misrepresentation must relate to a present or preexisting fact; a misrepresentation as to a future fact is not generally actionable. *Bear, Inc v. Smith*, 303 S.W.3d 137 (Ky. App. 2010). Thus, a misrepresentation as to a future fact or, specifically, a promise to pay in the future does not constitute fraud, unless when making the promise, the promisor had no intention of fulfilling the promise in the future. *Bear*, 303 S.W.3d 137.

Here, there are simply no facts in the record that either PDA or Netherlands made a promise to directly pay CMC the insurance proceeds. But, even if there were facts evidencing such promise, there is additionally no evidence that either PDA or Netherlands did so with the intent not to fulfill said promise in the future.

Accordingly, we conclude that the circuit court properly rendered summary judgment dismissing CMC's fraud claims against PDA and Netherlands.

CMC also contends that the circuit court erred by rendering summary judgment dismissing its claim under the Unfair Claims Settlement Practices Act (UCSPA) found in Kentucky Revised Statutes 304.12-230. In support of its

argument, CMC maintains that "[t]here is simply no justification for Netherlands failure to pay CMC the repair bill and rental bill up to the limits of the policy." CMC's Brief at 10.

In this Commonwealth, it is generally recognized that a third-party beneficiary may maintain an action under the UCSPA. *State Farm Mut. Auto. Ins. Co. v. Reeder*, 763 S.W.2d 116 (Ky. 1988). Nonetheless, we think it axiomatic that only a donee beneficiary or creditor beneficiary may maintain an action under the UCSPA, as these third-party beneficiaries may, likewise, only maintain an independent action for breach of contract. *See Sexton v. Taylor County*, 692 S.W.2d 808. As we have previously determined that CMC is an incidental beneficiary and this could not maintain an independent action upon a contract, we conclude that CMC similarly may not maintain an action under the UCSPA.

In sum, we are of the opinion that the circuit court properly rendered summary judgment dismissing CMC's claims against PDA and Netherlands.

For the foregoing reasons, the Summary Judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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