

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR KENT COUNTY**

STACY McCLEMENTS, VICTORIA OPEL, :  
THE ESTATE OF NORMAN W. WINDSOR, : C.A. NO: 07C-03-017 RBY  
JR., by and through it Administratrix, STACY :  
McCLEMENTS, JUDY G. WALSH, and :  
THE ESTATE OF DONALD J. WALSH, by and :  
through its Administratrix, JUDY G. WALSH, :

Plaintiffs, :

v. :

RON D. SAVAGE, individually, RONALD D. :  
SAVAGE, INC., t/a RON'S PLACE, a :  
Delaware corporation, and MILLER'S :  
FURNITURE INDUSTRIES, INC., a :  
Delaware corporation, :

Defendants. :

*Submitted: September 7, 2007*

*Decided: November 29, 2007*

Jeffrey J. Clark, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware for Plaintiffs

George T. Lees, III, Rawle & Henderson, LLP, Wilmington Delaware for Defendants.

*Upon Consideration of Defendants'*

*Motion to Dismiss*

**DENIED**

**OPINION AND ORDER**

Young, J.

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This is a Motion to Dismiss two sections of a complaint stemming from a fatal fire. In order to prevail, the Defendants must show there is no reasonable possibility that Plaintiffs were the intended third party beneficiaries of the lease contract at issue. The Motion is DENIED because there is a possibility, even if remote, that the Plaintiffs could discover the necessary evidence through testimony or documents.

On December 30, 2005, a fatal fire occurred at Ron's Place Restaurant and Lounge (hereinafter "Ron's Place") at 403 North DuPont Highway, Manor Park Shopping Center, New Castle, DE 19720. Norman W. Windsor, Jr. and Donald J. Walsh were both killed. The State Fire Marshall declared the fire accidental. It started when Windsor plugged in lights on a live cut Christmas tree located on the dance floor. The fire ignited the tree immediately, spreading quickly to the walls and ceiling. The Restaurant filled with heavy smoke. An unknown male unsuccessfully attempted to put out the fire using an extinguisher found in the office. The building was not equipped with an automatic fire suppression system.

Plaintiffs are Stacy McClements, daughter of Windsor and his Estate's Administratrix, Victoria Opel, daughter of Windsor and Judy G. Walsh, wife of Walsh and his Estate's Administratrix ("Plaintiffs"). In addition, Judy Walsh is also a plaintiff in her own right. Defendants are Ronald D. Savage, owner of Ron's Place, Ronald D. Savage, Inc. t/a Ron's Place and Miller's Furniture Industries, Inc., owner of the building rented by Ronald D. Savage, Inc. ("Defendants").

Plaintiffs initiated this action on March 12, 2007. Defendant Miller's Furniture filed this Motion to Dismiss on June 1, 2007. The Motion is based on Superior Court Civil Rule 12(b)(6) applying only to Count II, Paragraph 20(d) and

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Count III of Plaintiffs' Complaint. These sections allege liability on the part of Miller's Furniture due to a failure to ensure that Ron's Place fulfilled its lease obligation to carry liability insurance on the leased premises. At issue in this Motion is whether Plaintiffs were the intended third party beneficiaries to the lease contract between Miller's Furniture and Ron's Place.

A third party beneficiary is created when parties to a contract intend to benefit a third party; the benefit is intended as a gift or in satisfaction of a pre-existing obligation; and the intent to benefit is material to the purpose of entering into the arrangement.<sup>1</sup> The status of the third party is measured solely by the intent of the contracting parties.<sup>2</sup> Third parties who may well benefit from a contract, but are not part of any beneficial intent by the contracting parties, are merely incidental beneficiaries.<sup>3</sup>

\_\_\_\_\_ Plaintiffs argue that they are intended third party beneficiaries of the lease obligation to carry liability insurance on the leased premises. This argument requires a showing that Miller's Furniture and Ron's Place intended to benefit the Plaintiffs specifically when the lease was contracted. Defendants respond by showing that injured third parties are not intended beneficiaries of a contract between an insured and his insurance carrier.<sup>4</sup> However, the Defendants do not address the possibility of an intended third party beneficiary status under the lease obligation to carry insurance.

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<sup>1</sup>Madison Realty Partners 7, LLC v. AG ISA, LLC, 2001 Del. Ch. LEXIS 37.

<sup>2</sup>Hostetter v. Hartford, 1992 Del. Super. LEXIS 284.

<sup>3</sup>Insituform of N. Am., Inc. v. Chandler, 534 A.2d 257 (1987).

<sup>4</sup>Hostetter, 1992 Del. Super. LEXIS 284.

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A Motion to Dismiss for failure to state a claim on which relief can be granted requires no reasonably possible circumstances allowing the non-moving party to prevail on the issue.<sup>5</sup> Unlike the settled law relating to injured third party status for an insurance contract, this determination relies on the specific intentions of Miller's Furniture and Ron's Place in negotiating the lease contract. Plaintiffs attempted to ascertain the intentions of the parties by scheduling a deposition of Defendant Savage. However, Plaintiffs claim Savage failed to appear despite a subpoena.

\_\_\_\_\_Conceivably, the Plaintiffs could find a memorandum between Miller's Furniture and Ron's Place where Miller's Furniture specifically indicates that the lease provision is in place to protect the future patrons and/ or employees. Deposition testimony could also elicit the same information. Such evidence could be sufficient to create a jury question as to the existence of a third party beneficiary claim.

Viewing the case in the light most favorable to the non-moving party, it is possible to envision that Plaintiffs will uncover the circumstances showing an intention to benefit patrons and/or employees at the negotiation of the lease contract. Because of this possibility, the Motion to Dismiss is DENIED. Nevertheless, it is the obligation of the Plaintiffs to establish affirmatively that their decedents were the clearly intended beneficiaries. Here, the failure of the Plaintiffs to obtain such testimony or memorandum will be fatal to their claims. Following the applicable depositions, or after a reasonable time elapses without their being taken, Defendant

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<sup>5</sup>Klein v. Sunbeam Corp., 94 A.2d 385 (Del. 1952).

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Miller may re-file this Motion, presumably as a Motion for Summary Judgment.

SO ORDERED.

/s/ Robert B. Young  
J.

RBY/sal

oc: Prothonotary

cc: Opinion Distribution