STATE OF MICHIGAN

COURT OF APPEALS

BARRETT CAMP 33, INC., d/b/a CAMPBELL-CARLYLE PARTNERSHIP,

Plaintiff/Counterdefendant-Appellant,

v

CORPORATE DESIGN GROUP, INC.,

Defendant, Counterplaintiff-Appellee,

and

ROBERT W. DAVERMAN and BAYSHORE ENGINEERING, INC.,

Defendants-Appellees,

and

JERRY FIGHTER and GOURDIE FRASER & ASSOCIATES, INC.,

Defendants,

and

EARL LEGAULT,

Defendant/Counterplaintiff/
Third-Party Plaintiff-Appellee,

and

ED GROH, d/b/a ED GROH TRUCKING,

UNPUBLISHED
November 13, 1998

No. 202347
Luce Circuit Court
LC No. 94-002222 NZ

Third-Party Defendant.

BARRETT CAMP 33, INC., d/b/a CAMPBELL-CARLYLE PARTNERSHIP, LARK NICHOLS and BARRETT LUDLOW,

Plaintiffs-Appellants,

v

No. 206656
Luce Circuit Court
LC No. 97-002536 CH

ARCHITECTS DESIGN GROUP, INC., ROBERT W. DAVERMAN, BAYSHORE ENGINEERING, INC., and EARL LEGAULT,

Defendants-Appellees.

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

In Docket No. 202347, plaintiff Barrett Camp 33, Inc. ("Barrett") appeals by leave granted the orders granting summary disposition in favor of defendants under MCR 2.116(C)(8) and (10), and denying its motion for leave to file a third amended complaint. In Docket No. 206656, plaintiffs appeal as of right the order granting summary disposition in favor of defendants under MCR 2.116(C)(7). The cases were consolidated for this Court's consideration. We affirm.

No. 202347

I

Plaintiffs claim that the trial court's finding that Barrett lacked standing because it was not a real party in interest under MCR 2.201(B) is erroneous. The trial court did not err. The "real party in interest" is the one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Blue Cross and Blue Shield of Mich v Eaton Rapids Community Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997). In *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992), our Supreme Court, quoting 59 Am Jur 2d, Parties, § 30, p 414, explained "standing" as follows:

> "One cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as 'standing.'"

See also *Sirovey v Campbell*, 223 Mich App 59, 67; 565 NW2d 857 (1997); *Mich Nat'l Bank v St Paul Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

Here, Barrett lacks standing because it is not a signatory to any of the contracts in question. Rather, Ms. Lark Nichols, in her individual capacity, entered into the contract with Corporate Design Group ("CDG") to design the facility. Ms. Nichols, in her capacity as the CEO of the Campbell-Carlyle Partnership, also entered into the contract with Mr. Earl LeGault to build the facility. At the time, Barrett was not yet in existence. Indeed, Barrett did not come into existence as a corporate entity until approximately two weeks before the construction of the facility was completed, and did not acquire the facility until March 1, 1991. As Ms. Nichols admits, at no time was there an assignment of rights in the contracts to Barrett. Nor is there any evidence that Barrett has been conducting business under the name of the Campbell-Carlyle Partnership, as no certificate of d/b/a was presented in this case. Thus, although Barrett owns the property in question, it was not a real party in interest and, therefore, it lacked standing to sue.

II

Barrett argues that it was a third-party beneficiary under the contracts, and that it therefore has standing to bring this action. MCL 600.1405; MSA 27A.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) (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

While mere beneficial interest in a contract is not sufficient to confer standing, a party having the status of a third-party beneficiary to the contract has the same right to enforce that contract as a promisee. *Stillman v Goldfarb*, 172 Mich App 231, 238; 431 NW2d 247 (1988). When

determining whether parties to a contract intended to make a third person a third-party beneficiary, this Court should examine the contract under an objective standard. *Dynamic v Barton Malow*, 214 Mich App 425, 427; 543 NW2d 31 (1995). To be an intended third-party beneficiary of a contract, the promisor must have undertaken to do something to, or for the benefit of, the party asserting such status. An objective test is used to determine the status of the party making the assertion, and the test focuses upon the contract itself. *Paul v Bogle*, 193 Mich App 479, 491; 484 NW2d 728 (1992). Because the law presumes that a contract has been executed for the benefit of the parties thereto, Barrett bears the burden of proving that it was an intended beneficiary of the contract. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998).

Here, there is no objective evidence that defendants promised to do anything for the benefit of Barrett. Thus, Barrett is not a third-party beneficiary under the contracts in question.

III

Barrett also contends that defendants CDG, Daverman and LeGault are estopped from arguing that it is not a real party in interest because they filed counterclaims against it or received payment from it. We need not review this issue, because Barrett did not properly preserve this issue by raising it in the trial court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Alford v Pollution Control Inds*, 222 Mich App 693, 699; 565 NW2d 9 (1997). In any event, there is no merit to this issue. Simply because these defendants may have received payments from Barrett pursuant to the contracts does not show that they consented to Barrett being substituted as a party to the contracts, or that they consented to being sued by Barrett.

Plaintiffs also raises two issues which have not been preserved: defendants' standing to challenge any alleged assignment of Nichols' and Campbell-Carlyle Partnership's contractual rights to Barrett, and the doctrine of election as a bar to CDG and Legault's summary disposition motions. Again, both issues lack merit. It is undisputed that there has not been any assignment of contractual rights to Barrett, and therefore defendants' standing to challenge an assignment is irrelevant. Furthermore, the mere fact that defendants cashed checks that Barrett sent to them under the contracts in question does not show that defendants exercised any election. *In re Beglinger Trust*, 221 Mich App 273, 276; 561 NW2d 130 (1997). Barrett's reliance on *Beglinger Trust* is misplaced because the doctrine of election is inapplicable to this case.

IV

There is also no merit to Barrett's claim that it was prejudiced by the length of time between the filing of its complaint and defendants' summary disposition motion. In this regard, Barrett has not made any showing of prejudice arising from the delay. Further, there is no merit to Barrett's contention that the doctrine of laches should bar defendants from seeking summary disposition on the basis of lack of standing. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992). Moreover, although Barrett puts forward the theory that "estoppel by silence" bars defendants from seeking dismissal of this case on the ground of lack of standing, *Commercial Union Ins v Medical Protective Co*, 136 Mich App 412, 422; 356 NW2d 648 (1984), aff'd in part and rev'd in part 426 Mich 109; 393 NW2d 479

(1986), does not support plaintiff's contention. As defendants correctly observe, they were under no affirmative duty to advise or assist Barrett or its counsel in drafting pleadings that would withstand dispositive motions. Indeed, counsel for defendants have an ethical obligation to represent their clients with zeal; this obligation would be undermined were we to hold that defense counsel should assist plaintiff's counsel regarding proper pleading.[1]

V

Finally, Barrett argues that the trial court abused its discretion in denying its motion for leave to file a third amended complaint. This Court will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion which resulted in injustice. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Generally, a court should freely grant leave to amend a complaint where justice so requires. MCR 2.118(A)(2); *Weymers, supra; Fyke v Gunter Company*, 390 Mich 649, 658; 213 NW2d 134 (1973). Ordinarily, amendment should be denied only for particularized reasons, such as undue prejudice to the opposing party, undue delay, or where the amendment would be futile. Mere delay, without undue prejudice, does not dictate the denial of a motion to amend. "The prejudice justifying the denial of a motion to amend is not prejudice arising from the amendment's effect on the result of trial or loss of a meritorious claim or defense, but is, rather, prejudice preventing a party from having a fair trial." *Traver Lakes Community Maintenance Ass'n v Douglas Co.*, 224 Mich App 335, 343; 568 NW2d (1997).

Here, the trial court denied the motion on the basis that the amendment would be unduly prejudicial to defendants and that the proposed amendment would be futile because the relation-back doctrine is not available and because the claims by the proposed additional plaintiffs are time-barred. We do not agree that allowing the amendment would have unduly prejudiced defendants' ability to present a defense, and conclude that the trial court erred in finding prejudice. Nevertheless, the trial court correctly denied leave to amend on the basis of futility. As defendants argued, the addition of the new plaintiffs would be futile because their claims are time-barred by the applicable six-year statute of repose, MCL 600.5839(1); MSA 27A.5839(1). Here, it is undisputed that the facility in question was completed in July 1990, and that the proposed third amended complaint was filed more than six years after Barrett, or the proposed added parties, accepted the facility as substantially complete.

Barrett argues that the claims proposed by the added plaintiffs are not barred by the statute of repose under the relation-back doctrine set forth in *Hayes-Albion Corp v Whiting Corp*, 184 Mich App 410, 417-418; 459 NW2d 47 (1990). This argument is fatally flawed for two reasons. First, as the trial court recognized, the relation-back doctrine is not applicable because Barrett did not have an interest in the subject matter of the controversy because "[it] was not in existence . . . at that time." Second, and more importantly, after *Hayes-Albion* was decided, this Court held that the relation-back doctrine does not extend to the addition of new parties.[2] *Employers Mutual Casualty Co v Petroleum Equipment, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991). See also *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996). Accordingly, the trial court properly denied the motion for leave to amend the complaint.

No. 206656

The trial court properly granted summary disposition under MCR 2.116(C)(7) on the basis of the six-year statute of repose, MCL 600.5839(1); MSA 27A (5839(1), because plaintiffs did not bring suit until more than six years after the facility was accepted as substantially complete. *Beauregard-Bezou v Pierce*, 194 Mich App 388, 391-392; 487 NW2d 792 (1992). Plaintiffs' reliance on *Stamp v Mill Street Inn*, 152 Mich App 290, 298-300; 393 NW2d 614 (1986), is misplaced; unlike *Stamp*, the statute of repose was not tolled here because Barrett was not a real party in interest and did not have an interest in the subject matter of the dispute.

Affirmed.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] "A lawyer should act . . . with zeal in advocacy upon the client's behalf." Comment, MRPC 1.3.

[2] *Hayes-Albion* was issued before November 1, 1990, so subsequent panels of this Court were not bound by its rule of law. MCR 2.715(H). Because *Employers Mutual* was decided after this date, the *Hurt* Court was constrained to follow it, as we are.