STATE OF MICHIGAN

COURT OF APPEALS

RESORT CONDOMINIUMS MARKETING, INC., AKRAM M. SIDHOM and GLENN BUNNELL,

Plaintiffs-Appellants,

v

CROSSWINDS, INC., H. GRANT ROWE, BELLAIRE GROUP LIMITED PARTNERSHIP, SHANTY CREEK PROPERTIES, INC., d/b/a SHANTY CREEK RESORT MARKETING, REAL ESTATE PLACE OF BELLAIRE, INC., d/b/a VACATION PROPERTIES NETWORK, FIRST NORTHERN HOLDING CORPORATION, RIDGEWALK ASSOCIATES and RIDGEWALK II, INC.,

Defendants-Appellees.

UNPUBLISHED
April 30, 1999

No. 209018
Antrim Circuit Court
LC No. 97-007338 CK

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this third-party beneficiary action. We affirm.

Plaintiffs argue that the trial court erred in dismissing their claim that they were entitled to damages as third-party beneficiaries pursuant to a contract between defendants and Aggressive Marketing Services, Inc. ("AMS"), which defendants breached. Plaintiffs essentially argue that because the marketing agreement required AMS to utilize real estate brokers, and plaintiffs were the brokers hired by AMS, they are third-party beneficiaries. In Michigan, the rights of third-party beneficiaries are prescribed by MCL 600.1405; MSA 27A.1405, which provides in 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.

In determining third-party beneficiary status, we must objectively determine from the form and meaning of the contract itself, *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176; 504 NW2d 635 (1993), whether the promisor of a contract promised to do or refrain from doing something for the benefit of the party claiming third-party beneficiary status. *Alcona Community Schools v Michigan*, 216 Mich App 202; 549 NW2d 356 (1996); *Alden State Bank v Old Kent Bank—Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 599 (1989). The promise must be an express promise. *Dynamic Const Co v Barton Marlow Co*, 214 Mich App 425; 543 NW2d 31 (1995); see also *Downriver Internists v Harris Corp*, 929 F2d 1147 (CA 6, 1991).

No promise was ever made to plaintiffs pursuant to the marketing agreement. The language of the agreement evidences an intent by defendants to hire AMS as a marketing organization to market and sell the interval ownership interests in the condominiums. The rest of the agreement provides how such sales will be accomplished, including the requirement that licensed real estate brokers be utilized. The agreement specifically stated that AMS will hire and train employees and real estate brokers, and that it will be the sole responsibility of AMS to determine appropriate wages and pay such wages. Furthermore, the agreement specifically stated that defendants would pay AMS a commission of forty-seven percent of the actual sale price of the units. The agreement simply does not reveal any express promise on defendants' part to benefit the licensed real estate broker to be hired by AMS pursuant to the agreement. Defendants were not responsible for hiring or compensating the broker under the agreement. No benefit or duty flowed directly from defendants to plaintiffs pursuant to the agreement.

It is true that whichever real estate broker was retained stood to benefit from this agreement, and plaintiffs likely did benefit from the agreement. However, these benefits were incidental to the contract, *Rieth-Riley Const Co, Inc v Dep't of Transportation*, 136 Mich App 425; 357 NW2d 62 (1984), and did not confer rights on plaintiffs as third-party beneficiaries. *Koenig v South Haven*, 221 Mich App 711; 562 NW2d 509 (1997), citing *Alcona, supra* at 205; *Paul v Bogle*, 193 Mich App 479; 484 NW2d 728 (1992).

The record indicates that it is almost certain that defendants and AMS had an understanding that plaintiffs would be hired as the licensed real estate broker pursuant to the agreement. However, nothing to this effect was set forth in the agreement, and whatever subjective motives and intentions defendants and AMS had are irrelevant to determining plaintiffs' third-party beneficiary status. *Alcona, supra* at 205. In addition, although plaintiffs argue that their course of dealing is relevant, the law specifically states that the courts must look to the contract itself for answers. *Kammar, supra* at 176. Here, it is clear from the language of the agreement that defendants and AMS, the signatories to the agreement, were the primary beneficiaries of this agreement to market and sell the interval units. Thus, plaintiffs, as

incidental beneficiaries, are not entitled to third-party beneficiary status. *Paul*, *supra* at 492; see also *Taggart v United States*, 880 F2d 867 (CA 6, 1989).

Plaintiffs further argue that they must be intended beneficiaries because they were necessary parties to the agreement. Many contracts require the involvement of other parties for successful completion. However, these other actors are generally not considered third-party beneficiaries of the prime contract; rather, they are incidental beneficiaries. See, e.g., *Dynamic Const*, *supra* at 425; *Kammer*, *supra* at 176. Thus, that the agreement required a licensed real estate broker to conduct the closings on the units did not make plaintiffs anything other than incidental beneficiaries. We conclude that no record could be developed that would leave open an issue upon which reasonable minds could differ regarding plaintiffs' alleged third-party status. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Accordingly, summary disposition on this issue was appropriate.

Plaintiffs also argue that defendants were judicially estopped from claiming that plaintiffs were not third-party beneficiaries based on what defendants alleged in a prior lawsuit between defendants and AMS. "In Michigan, the doctrine of judicial estoppel prohibits a party who has successfully and unequivocally asserted a position in a prior proceeding from asserting a wholly inconsistent position in a subsequent proceeding." *Driver v Hanley*, 226 Mich App 558, 563; 575 NW2d 31 (1997), citing *Paschke v Retool Industries*, 445 Mich 502, 509-510; 519 NW2d 441 (1994). In the prior case between defendants and AMS, defendants apparently argued that since part of the forty-seven percent commission that AMS would have earned on the sales of the units but for the breach would have been shared with the plaintiffs in this case, any damage award to AMS should have been reduced by whatever amount was owed to plaintiffs. Plaintiffs apparently argue that defendants are judicially estopped from arguing that plaintiffs are not third-party beneficiaries because defendants previously recognized that plaintiffs were owed money out of AMS' forty-seven percent commission, maintaining that these claims are inconsistent. This Court fails to see how these two "claims" are inconsistent. The question of whether plaintiffs were third-party beneficiaries was apparently never raised in the prior lawsuit, and it does not appear that defendants somehow asserted such a contention. Defendants simply argued that AMS' damage award should be reduced by the amount of money AMS would had to have paid plaintiffs as commissions for unit sales, apparently pursuant to some separate agreement between AMS and plaintiffs. These arguments were not inconsistent, and the trial court did not err in finding the doctrine of judicial estoppel inapplicable to the facts here.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins