STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN PRESIDENTIAL ESTATES, INC.,

Plaintiff-Appellee,

v

VAN BUREN TOWNSHIP,

Defendant,

and

WASTE MANAGEMENT OF MICHIGAN, f/k/a AREA DISPOSAL,

Defendant-Appellant.

UNPUBLISHED
May 15, 2001

No. 213282
Wayne Circuit Court
LC No. 93-306323-CK

AMERICAN PRESIDENTIAL ESTATES, INC.,

Plaintiff-Appellee,

v

VAN BUREN TOWNSHIP,

Defendant-Appellant,

and

WASTE MANAGEMENT OF MICHIGAN, f/k/a AREA DISPOSAL,

Defendant-Appellee.

No. 213364
LC No. 93-306323-CK

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

In these consolidated appeals, defendants Waste Management of Michigan and Van Buren Township appeal as of right, challenging the trial court's order granting plaintiff summary disposition of its breach of contract and constitutional claims, as well as injunctive relief, and the trial court's judgment awarding plaintiff damages of $64,276.52. We reverse.

Plaintiff is the owner and operator of Presidential Estates Mobile Home Community and Capital Hills Mobile Home Community (collectively referred to as "Presidential Estates")[1] located in Van Buren Township ("the Township"). On October 27, 1989, the Township entered into a trash hauling agreement with defendant Waste Management, wherein Waste Management agreed to provide weekly collection and disposal of garbage, rubbish and mixed refuse from all residential units within the Township for a certain fee. This 1989 agreement expressly excluded mobile home parks. Presidential Estates was therefore excluded from the weekly garbage pickup and disposal and had to arrange its own contract for garbage pickup. On May 14, 1990, defendants executed the Host Community Agreement ("HCA"), wherein Waste Management agreed to provide free garbage collection to certain residents of the Township in exchange for Waste Management being permitted to construct and operate a sanitary landfill in the Township. The HCA~~'s~~ became effective immediately on that date.

Since the effective date of the 1989 trash hauling agreement, plaintiff has demanded that defendant Waste Management provide garbage collection services to Presidential Estates at the Township's expense on numerous occasions. Defendants, however, have refused plaintiff's demands. As a result of being denied garbage collection services, plaintiff paid contractors to collect its residents' garbage. Plaintiff eventually filed suit, alleging that defendants' failure and refusal to provide the residents of Presidential Estates garbage collection services under both the 1989 agreement and the 1990 HCA violated its equal protection and due process rights under the Michigan Constitution, and that defendants' failure to provide garbage collection services under the HCA amounted to a breach of contract. The trial court agreed on all points, and ultimately granted plaintiff summary disposition, injunctive relief, and damages.

We first consider the contractual claims regarding the 1990 HCA. Defendants argue that the trial court erroneously concluded that the HCA unambiguously entitled Presidential Estates to free garbage collection. We agree. This Court reviews a trial court's ruling on a motion for summary disposition de novo on appeal. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim, and may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of doubt to the nonmovant, this Court must determine whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Id.*

The initial question of whether contractual language is ambiguous is a question of law, which is also reviewed de novo. *Port Huron Ed Ass'n v Port Huron Area School District*, 452 Mich 309, 323; 550 NW2d 228 (1996). A contract is ambiguous if its language may reasonably

[1] As of 1997, Presidential Estates had 471 sites, consisting of mostly double-width homes, owned by the residents.

be understood in different ways. *UAW-GM Human Resource Center v KSL Recreation Corporation*, 228 Mich App 486, 491; 579 NW2d 411 (1998). Contractual language must be construed according to its plain and ordinary meaning, and technical or strained constructions should be avoided. *Id*. at 491-492. If the contractual language is clear and unambiguous, its meaning is a question of law. *Id*. at 491. Parol evidence is not admissible to vary a contract that is clear and unambiguous. *Id*. at 492.

The pertinent part of the 1990 HCA, ¶ 8(b), provides:

> Upon Opening Day, Waste Management will provide weekly curbside collection and disposal, including toters and recycling containers, throughout the remaining term of this Agreement *for all privately owned and occupied residential properties within the Township including owner occupied condominiums, residential cooperative and townhouses*. This collection and disposal will be provided without charge to the Township and/or its residents for a minimum of 20 years or the life of the Landfill Facility, whichever is longer. All recyclable materials collected under the curbside recycling program shall be transported to a recycling processing facility. [Emphasis added.]

We conclude that ¶ 8(b) clearly and plainly provides that all privately owned and occupied residential properties within the Township are entitled to free garbage collection. Evidence was introduced that Presidential Estates is zoned for residential use, and that the mobile homes within Presidential Estates are privately owned and occupied. Nowhere in the 1990 HCA did defendants exclude privately owned and occupied dwellings located within mobile home parks. Further, contrary to defendants' claim, the term "continue" used in ¶ 8(a) does not signify that the entire 1990 HCA is merely an extension of the 1989 agreement (which expressly excluded mobile home parks from garbage collection services).[2] Rather, ¶ 8(a) distinctly denotes the terms of defendants' agreement in the interval between the execution of the 1990 HCA and the subsequent opening day of the landfill. The terms of ¶ 8(b) clearly begin "[u]pon Opening Day." We therefore hold that the trial court properly concluded that, under the 1990 HCA, mobile homes are entitled to free garbage collection commencing on "Opening Day."

However, if a plaintiff is not a party to a contract, it has no right to enforce the contract unless it can show that it was an intended third-party beneficiary. *Koenig v South Haven*, 460 Mich 667, 679; 597 NW2d 99 (1999). Third-party beneficiary status requires an express promise to act directly for the benefit of the third party. MCL 600.1405; MSA 27A.1405; *Koenig, supra* at 676-677. The fact that a third-party receives an incidental benefit from the performance of a contract or is injured by its breach is irrelevant. *Koenig, supra* at 679. The intent to benefit a third party must be objectively manifest; the subjective intent of the parties to the contract is irrelevant. *Id.* at 680. The plaintiff has 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).

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[2] The language of ¶ 8(a) provides that "Waste Management shall continue to provide weekly pickup for all Township residents" at the current rate.

The trial court concluded that plaintiff is a third-party beneficiary of the 1990 HCA and awarded plaintiff damages on a breach of contract theory. We disagree. Plaintiff has failed to demonstrate that it was an intended third-party beneficiary of the 1990 HCA. Viewed objectively, the 1990 HCA contains no direct promises to benefit plaintiff. Rather, ¶ 8(b) of the 1990 HCA contains an express promise to act for the benefit of the particular class of persons who own and occupy private residences within the Township, and to provide collection and disposal "without charge to the Township [and] its residents."[3] Plaintiff is the owner and operator of certain mobile home parks, not an individual resident or owner of private property within the Township. Compare *Greenlees v Owen Ames Kimball Co*, 340 Mich 670; 66 NW2d 227 (1954). Further, the fact that plaintiff will indirectly and incidentally derive financial benefits from its residents receiving free garbage collection services is insufficient to provide third-party beneficiary status. *Alcona Community Schools v Michigan*, 216 Mich App 202, 205; 549 NW2d 356 (1996). We also note that ¶ 29 of the 1990 HCA explicitly states that "[n]othing in this Agreement shall grant any rights to third parties, except as expressly set forth herein." We therefore conclude that the trial court erred in finding, as a matter of law, that plaintiff was entitled to enforce the 1990 HCA as a third-party beneficiary and that it was entitled to damages on a breach of contract theory.[4]

We next address the constitutional questions. Defendants argue that the trial court erred in concluding the 1989 trash hauling agreement, which excluded mobile home parks, violated plaintiff's equal protection and due process rights. We agree. Constitutional issues are reviewed de novo on appeal. *Saginaw County v John Sexton Corporation of Michigan*, 232 Mich App 202, 222; 591 NW2d 52 (1998).

Equal protection and due process of law are guaranteed by the Michigan Constitution. Const 1963, art 1, §§ 2, 17. The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987). Where, as in the instant case, neither a suspect classification nor a fundamental right is involved, the rational basis test applies. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 349; 578 NW2d 274 (1998); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 381; 533 NW2d 373 (1995). Under the rational basis test, the plaintiff must demonstrate that the challenged classification is discriminatory and arbitrary and without reasonable justification. *Brittany Park Apartments v Harrison Charter Twp*, 432 Mich 798, 804; 443 NW2d 161 (1989). A rational basis will be found to exist if any set of facts reasonably can be conceived to justify

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[3] Thus, the only third parties expressly intended to benefit from the HCA are residents who own and occupy their own property.

[4] Plaintiff's and the trial court's reliance on *American Presidential Estates, Inc v Waste Management*, unpublished opinion per curiam of the Court of Appeals, issued 8/14/96 (Docket No. 175012), is misplaced. In that decision, the Court held that plaintiff had standing to bring a *constitutional* claim against defendants as the owner and operator of Presidential Estates based on the exclusion of mobile home parks in the 1989 trash hauling agreement. Nowhere in that decision did the Court discuss or decide whether plaintiff was a third-party beneficiary of the 1990 HCA.

the alleged discrimination. *Syntex Laboratories v Dep't of Treasury*, 233 Mich App 286, 290; 590 NW2d 612 (1998).

We find that defendants provided a rational basis to justify exclusion of mobile home parks from receiving garbage collection services from the Township under the 1989 trash hauling agreement. A comparison of the General Fund taxes paid by single-family residences with the amount of the taxes paid by each mobile home pad shows that, under the 1989 agreement, garbage collection services for mobile home owners would have been subsidized by the single-family residence owners' tax dollars. Based on the disparity in the taxes paid into the Township's General Fund by each class, we find that the exclusion of mobile home parks in the 1989 agreement was not arbitrary or unreasonable.[5] The 1990 HCA, as noted above, did not exclude mobile home parks and therefore was not discriminatory. Even if Waste Management discriminated against plaintiff by not picking up garbage from the mobile home park in violation of the HCA, in order to maintain a constitutional claim, plaintiff must show that this was an action of the state and not merely private conduct. *Shavers v Kelley*, 402 Mich 554, 597; 267 NW2d 72 (1978). Although Waste Management's acts can be held as "state action" if there is a sufficiently close nexus between the state and the challenged action, the record is sufficiently developed for us to determine that no such nexus exists here. *Id*. at 597; *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997); see also *Morris v Metriyakool*, 418 Mich 423, 452-453; 344 NW2d 736 (1984) (Ryan, CJ, concurring). We therefore conclude that plaintiff was not entitled to summary disposition on its equal protection and due process claims.

Reversed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald

[5] We decline to address defendants' remaining proffered rationales for excluding mobile home parks in the 1989 trash hauling agreement.