

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CATHERINE M. FECHIK,

Plaintiff-Appellant,

v

DELTA LAND SURVEYING AND  
ENGINEERING, INC.,

Defendant-Appellee.

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UNPUBLISHED

July 26, 2002

No. 232059

Genesee Circuit Court

LC No. 99-065321-NZ

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition entered by the trial court in this negligence and breach of contract action. We affirm.

In May of 1993, defendant compiled a mortgage report for Republic Bank, formerly known as Guardian Mortgage Company, Inc., a potential mortgagee, regarding property that plaintiff was interested in purchasing. Titled "Mortgage Report for the Exclusive Use of the Mortgagee: Guardian Mortgage Company, Inc., Grand Blanc, Michigan," the report further provided:

We hereby certify that the improvements as shown are entirely within the property lines and that there are no visible encroachments upon the lands described other than shown. We further certify that this MORTGAGE REPORT was prepared for IDENTIFICATION PURPOSES only for the Mortgagee, in connection with a new mortgage and no responsibility is intended herein to the present or future land owner or occupant. NOTE: This report is for Mortgage purposes only and since no property corners were set, it should not be used or relied upon for establishing property lines. All distances to property and/or lot lines are estimates.

Thereafter, plaintiff purchased the property that was the subject of the mortgage report. Subsequently plaintiff determined that, contrary to the mortgage report, an improvement located on the property, a deck, did in fact protrude over her property line, encroaching onto her neighbor's property.

In May of 1999, plaintiff commenced this negligence and breach of contract action against defendant alleging injuries as a consequence of her reliance on defendant's mortgage report. Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (C)(10), alleging that: (1) it did not owe a duty to plaintiff because she was not a party to the contract between it and Republic Bank, (2) plaintiff's alleged reliance on the mortgage report was unjustifiable, and (3) the contract contained an express disclaimer regarding any liability to third parties who may have incidentally benefited from the contract between defendant and Republic Bank.

In response to defendant's motion, plaintiff argued that, pursuant to MCR 2.116(I)(2), she was entitled to judgment as a matter of law with regard to defendant's liability. In particular, plaintiff argued, first, that defendant owed her a duty of care because it was foreseeable that its negligence would harm her and, second, that she was a third-party beneficiary of the contract because it involved her mortgage transaction. However, the trial court agreed with defendant, holding that defendant did not owe a duty to plaintiff, that she was only an incidental beneficiary of the contract between Republic Bank and defendant, and that defendant had expressly disclaimed any intent to benefit her, a third party, by its performance of the contract. Thereafter, the trial court entered an order summarily disposing of the case and this appeal followed.

On appeal, plaintiff first argues that the trial court improperly dismissed her negligence claim because defendant owed her a duty of care, although she was not a party to the contract regarding the mortgage report. We disagree. This Court reviews a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion pursuant to MCR 2.116(C)(10), the documentary evidence is considered in a light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Ritchie-Gamester v Berkley*, 461 Mich 73, 75; 597 NW2d 517 (1999); *Spiek, supra*. Further, whether a duty exists is a question of law considered de novo on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

To establish a prima facie case of negligence, one of the elements that must be proved is that the defendant owed the plaintiff a duty to avoid negligent conduct. See *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). The requisite duty may arise from a contract because accompanying every contract is a common-law duty to perform agreed upon obligations with ordinary care. See *Courtright v Design Irrigation, Inc*, 210 Mich App 528, 530; 534 NW2d 181 (1995); *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 707-708; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999). Consequently, a party to a contract may be liable in tort to a third party who was foreseeably injured by the negligent performance of the contract. See *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 212; 565 NW2d 907 (1997), quoting *Osman, supra* at 708.

In this case, plaintiff argues that defendant owed her a duty of care because it was foreseeable she would be harmed by defendant's negligent performance of its contractual obligations. However, the mortgage report that plaintiff allegedly relied on unambiguously indicated its limited purpose, scope, and trustworthiness, and expressly disclaimed any responsibility to present or future landowners. Consequently, plaintiff's alleged reliance on the report was unjustified and her resulting injuries were not foreseeable because it was not

foreseeable that plaintiff would disregard the clearly expressed cautionary notice regarding the reliability of the mortgage report. Plaintiff could have made her own arrangements to have a survey performed before purchasing the property. Therefore, plaintiff failed to show that defendant owed her a duty and the trial court properly dismissed plaintiff's negligence claim.

Next, plaintiff argues that the trial court improperly dismissed her breach of contract claim because she was a third-party beneficiary of the contract between defendant and Republic Bank. We disagree.

A person who is not a party to a contract has no right to enforce it unless he demonstrates that he was an intended third-party beneficiary of the contract. See *Krass v Tri-County Security, Inc.*, 233 Mich App 661, 665; 593 NW2d 578 (1999), quoting *Rhodes v United Jewish Charities of Detroit*, 184 Mich App 740, 744; 459 NW2d 44 (1990); *Oja v Kin*, 229 Mich App 184, 192; 581 NW2d 739 (1998). An objective test is used to determine third-party beneficiary status, which is conferred under MCL 600.1405(1) "whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." See, also, *Krass*, *supra*.

In this case, plaintiff argues that she was a third-party beneficiary of the contract because the mortgage report was prepared to allow her to obtain financing for the subject property. However, as discussed above, plaintiff clearly was not an intended third-party beneficiary of the contract. The mortgage report unambiguously provided that it was prepared for the exclusive use and benefit of the mortgagee, for identification purposes only. Although plaintiff may have incidentally benefited from the performance of the contract, the contract did not provide for something to be done directly to or for plaintiff. Accordingly, the trial court properly dismissed plaintiff's breach of contract claim. Considering our resolution of these issues, we need not consider plaintiff's claim that she was entitled to summary disposition regarding defendant's liability.

Affirmed.

/s/ Hilda R. Gage  
/s/ Mark J. Cavanagh  
/s/ Kurtis T. Wilder