

STATE OF MICHIGAN
COURT OF APPEALS

L. E. DIEHL,

Plaintiff-Appellant,

v

R. L. COOLSAET CONSTRUCTION
COMPANY and LIBERTY MUTUAL GROUP,

Defendants-Appellees.

UNPUBLISHED

November 29, 2005

No. 253596

Wayne Circuit Court

LC No. 03-313538-CZ

Before: Whitbeck, C.J., and Saad and O’Connell, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting summary disposition in favor of defendants. We affirm.

In July 1998, Ameritech hired Coolsaet Construction Company (“Coolsaet”) to install plastic conduit in certain utility easements in the city of Westland. During the course of the installation, Coolsaet dug a ditch across the width of plaintiff’s property and, as a result, damaged or removed some tree roots, causing trees on plaintiff’s property to die. Both Coolsaet and Liberty Mutual, Coolsaet’s insurer, refused to replace the trees or reimburse plaintiff for the cost of the trees. Plaintiff brought an action in contract and under the Michigan Consumer Protection Act (MCPA) against defendants seeking damages for the loss of the trees and for medical expenses incurred as a result of anxiety, frustration, and stress. In response, defendants filed a motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Defendants argued that plaintiff’s claims were barred by the statute of limitations, plaintiff was not a third-party beneficiary of the contract between Coolsaet and Ameritech or of the contract between Coolsaet and Liberty Mutual, and that the MCPA did not apply. After a hearing on defendants’ motion, the trial court granted summary disposition in favor of defendants.

On appeal, plaintiff argues that summary disposition was inappropriate because he was an intended third-party beneficiary of both the contract between Ameritech and Coolsaet and the insurance agreement between Liberty Mutual and Coolsaet. We disagree. We review de novo a trial court’s decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). By statute, a third party may only enforce a contract if “the promisor . . . has undertaken to give or to do or refrain from doing something directly to or for [the third party].” MCL 600.1405(1). Therefore, only intended, not incidental, third-party beneficiaries may enforce a contract. *Koenig v City of South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999).

Plaintiff failed to offer any proof that he was an intended third-party beneficiary of the contract between Ameritech and Coolsaet. Plaintiff alleged in his complaint that Coolsaet had a contractual obligation to install the conduit without damaging plaintiff's property. However, plaintiff failed to produce a copy of the contract or any other documentary evidence regarding the relevant terms or provisions of the contract between the parties. In the absence of such evidence, plaintiff has failed to substantiate his claim that he was an intended beneficiary. Because plaintiff failed to present documentary evidence establishing a genuine issue of material fact, defendants' motion for summary disposition was properly granted on this issue.

Similarly, plaintiff failed to produce any evidence that he was an intended third-party beneficiary of the insurance agreement between Liberty Mutual and Coolsaet. When an insurance agreement fails to specifically denominate an individual, or a particularly defined class to which the individual belongs, as an intended third-party beneficiary, the individual does not have a right to sue for contract benefits. *Schmalfeldt v North Pointe Insurance Co*, 469 Mich 422, 429; 670 NW2d 651 (2003). The insurance coverage at issue was clearly provided for the sole purpose of protecting Coolsaet, and the contract's terms simply do not suggest that the parties intended to enter into the contract to benefit plaintiff directly. Therefore, the trial court correctly granted defendants summary disposition on plaintiff's claim that he is a third-party beneficiary to these contracts.

Plaintiff argues that he has a cause of action under the MCPA. We disagree. Under the MCPA, it is unlawful to use unfair or unconscionable practices in the conduct of trade or commerce. MCL 445.903(1). The MCPA defines "trade or commerce" as "the conduct of a business providing goods, property, or service primarily for personal, family, or household purposes" MCL 445.902(d). The intent of the act is "to protect consumers in their purchases of goods which are primarily used for personal, family or household purposes." *Noggles v Battle Creek Wrecking, Inc*, 153 Mich App 363, 367; 395 NW2d 322 (1986). If an item is purchased primarily for commercial purposes, then the MCPA does not apply. *Zine v Chrysler Corp*, 236 Mich App 261, 273; 600 NW2d 384 (1999).

Here, Ameritech hired Coolsaet to install plastic conduit along certain utility easements in the city of Westland. The installation of the plastic conduit was for commercial purposes, so the MCPA does not apply. Moreover, contrary to plaintiff's assertions, he was not a "party to the transaction" under MCL 445.903(1)(n) and (1)(y), so these sections do not apply to him. Because plaintiff failed to establish that he was a third-party beneficiary of either contract and because the MCPA does not apply, the trial court did not err when it granted defendants' motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Peter D. O'Connell