

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

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PETFREEDOM.COM, L.L.C.,

Plaintiff-Appellant,

v

NET GENERATION, INC.,

Defendant,<sup>1</sup>

and

VIRTUAL SYSTEMS SOLUTIONS, INC., d/b/a  
SOFTURA, and MARK MURPHY,

Defendants-Appellees,

and

JUDD SEIDA,

Defendant.

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Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants, Virtual Systems Solutions, Inc., d/b/a Softura, and Mark Murphy. We affirm in part and reverse in part.

Defendant Net Generation, Inc., contracted with plaintiff to develop plaintiff's website. Contrary to the terms of its contract with plaintiff, and without plaintiff's knowledge or approval, Net Generation subcontracted with defendants Virtual Systems Solutions, Inc., d/b/a Softura, and

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<sup>1</sup> According to the trial court's Opinion and Order, a default judgment was entered against defendant Net Generation, Inc.

Mark Murphy, the president of Softura (hereinafter collectively referred to as “defendants”) to create the computer code for plaintiff’s website. Plaintiff first argues that the trial court erred when it granted defendants’ motion for summary disposition and denied plaintiff’s motion for partial summary disposition on the basis of its conclusion that plaintiff was not an intended third-party beneficiary of the contract between defendants and Net Generation. We agree.

This Court reviews a trial court’s decision to grant or deny a motion for summary disposition de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). The interpretation of a contract presents a question of law that this Court reviews de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003).

MCL 600.1405 provides, in relevant 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 has undertaken to give or to do or refrain from doing something directly to or for said person.

An intended third-party beneficiary may maintain an action pursuant to MCL 600.1405 when a promise made in their favor has been breached. *Kisiel v Holz*, 272 Mich App 168, 170; 725 NW2d 67 (2006). However, where a contract allows “the possibility of some incidental benefit to members of the public at large[,]” but does not establish that “a promisor has undertaken a promise directly to or for that person[,]” that person is an incidental beneficiary, and cannot maintain his action to enforce the promise. *Schmalfeldt, supra* at 427-429. “By using the modifier directly [in MCL 600.1405], the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.” *Id.* at 428, quoting *Kammer Asphalt v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993). Whether a contract identifies a third-party beneficiary through a direct promise to the third party is to be ascertained by “an objective review of the form and meaning of the contract itself.” *Kisiel, supra* at 171. A plaintiff’s status as a third-party beneficiary is a separate and distinct issue from questions involving whether a defendant has otherwise breached the contract, whether the plaintiff sustained damages, and whether the breach of contract was a proximate cause of the alleged damages. *Vanerian v Charles L Pugh Co*, 279 Mich App 431, 443; 761 NW2d 108 (2008).

In concluding that plaintiff was merely an incidental beneficiary of the oral contract between Net Generation and Softura, the trial court, in its opinion, focused on the description of the terms of the contract by Net Generation’s president, Bryan Hanson, as follows:

Just standard, keep the client happy, let’s get them what they want regardless of changes, make it successful, that type of arrangement, you know, payment terms were flexible.

The trial court observed that it examined the conduct of the parties as established by the record, and concluded that Softura, in its role as Net Generation's subcontractor, had minimal direct contact with plaintiff.

This Court has held that a contract between a contractor and a subcontractor that required the subcontractor to "tear out water damaged flooring and subfloor and haul away debris from the family room and the bar room[,] [s]upply and install a plywood floor in the same above rooms[, and] [s]upply and install a plywood subfloor in the same above room[s, and] [s]upply, install, sand, stain, seal and finish maple flooring in the same above rooms[,]" was made for the direct benefit of the homeowner for whom this work was performed. *Vanerian, supra* at 433-441. In *Vanerian*, the general contractor entered into an agreement to repair damages to the plaintiff's home. *Id.* at 433. The general contractor then contracted with a subcontractor to repair the basement floor. *Id.* Concluding that the contract between the general contractor and the defendant "expressly related to repairs in plaintiff's basement[,]" this Court concluded that the plaintiff was an intended third-party beneficiary. *Id.* at 434. The *Vanerian* Court reasoned that the contract did not benefit some "expansive group or unidentified party[,]" but instead, provided that the defendant would perform specific work for a specifically identified party. *Id.* at 438.

Here, plaintiff contracted with the general contractor, Net Generation, for the ultimate delivery of an Internet website. Net Generation then contracted with Softura, which performed about 95 percent of the coding work on plaintiff's main website. According to Softura's president, Mark Murphy, Softura employees had direct contact with plaintiff's representatives during the website's development phase. Murphy also acknowledged that he was aware that plaintiff was the "ultimate client or receiver" of Softura's work product. Additionally, Net Generation's president described Net Generation's contract with Softura as one intended to "keep the client happy," referring to plaintiff. This evidence reveals that plaintiff was an intended third-party beneficiary of the contract between Net Generation and Softura. The trial court erred when it granted defendants' motion for summary disposition on the basis of its conclusion that plaintiff was not an intended third-party beneficiary of the contract between defendants and Net Generation.

Plaintiff also argues that the trial court improperly granted defendants' motion for summary disposition on its fraudulent misrepresentation and negligent misrepresentation claims. We disagree. The elements of fraudulent misrepresentation are: "(1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage." *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004), quoting *M&D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). The elements of silent fraud, also known as fraudulent concealment, are the same as the elements for fraudulent misrepresentation. *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988). "In order for the suppression of information to constitute silent fraud there must be a legal or equitable duty of disclosure." *Hord v Environmental Research Institute*, 463 Mich 399, 412; 617 NW2d 543 (2000). Negligent misrepresentation requires "proof that a party justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a

duty of care.” *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989). In addition, fraud claims must be pleaded with particularity, and must be proved by clear and convincing evidence. MCR 2.112(B)(1); *Cooper v Auto Club Ins Ass’n*, 481 Mich 399, 414; 751 NW2d 443 (2008).

Here, the trial court granted summary disposition in Softura’s favor, in part, because of the absence of proof that any Softura employee made any material misrepresentation of fact. The trial court explained that the only misrepresentation plaintiff identified was the statement of Net Generation’s president, Hanson, that he “may have misled plaintiff regarding the ownership of the Novi office.” Hanson’s statement demonstrated to the trial court that although Net Generation may have made a misrepresentation, Hanson’s statement did not show that either Softura or Murphy made a misrepresentation. The trial court further observed that Murphy and two of Softura’s employees stated that neither Murphy, nor anyone else at Softura, misrepresented the relationship between Softura and Net Generation. Thus, the trial court reasoned, because plaintiff could not show that Murphy or a Softura employee made a misrepresentation, it could not satisfy the elements of fraudulent misrepresentation.

The trial court correctly concluded that, in the absence of evidence that any employee of Softura made any material misrepresentation, summary disposition was appropriate because plaintiff could not make out a prima facie case of fraudulent misrepresentation. *Bergen, supra* at 382. We further observe that plaintiff’s insistence that its fraud claims are not premised on a particular misrepresentation made by Softura or Murphy, but rather on Softura and Murphy’s general “fraudulent conduct,” underscores plaintiff’s inability to establish the elements of fraudulent misrepresentation. *Id.* In other words, plaintiff’s argument that Softura and Murphy’s “fraudulent conduct,” without more, was sufficient to allow plaintiff to proceed to trial on his fraudulent misrepresentation claim, further persuades us that plaintiff did not, and cannot, establish that Murphy or a Softura employee “made a material representation” and that the “representation was false.” *Id.*

Although the trial court did not provide a rationale for its decision to grant Softura and Murphy’s motion for summary disposition regarding plaintiff’s negligent misrepresentation claim, we conclude that summary disposition was nonetheless proper because plaintiff failed to identify any information provided by Softura or Murphy, much less demonstrate that such information was provided in the absence of reasonable care, or that plaintiff justifiably, and detrimentally, relied upon such information. *Rose, supra* at 33. Further, plaintiff fails to identify a duty owed to it by Murphy or Softura that is separate and distinct from the contract. MCL 600.1405; *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 469-470; 683 NW2d 587 (2004); *Kisiel, supra* at 170. Because plaintiff cannot show that it “justifiably relied to [its] detriment on information provided without reasonable care by one who owed the relying party a duty of care[,]” we conclude that summary disposition was properly granted on plaintiff’s negligent misrepresentation claim. *Rose, supra* at 33.

With respect to plaintiff’s silent fraud claim, the trial court correctly concluded that plaintiff failed to demonstrate that Softura or Murphy were under a legal or equitable duty to disclose information to plaintiff. At his deposition, Hanson testified that he provided a copy of the contract between plaintiff and Net Generation to Softura employees, which may have included Murphy. However, plaintiff cannot establish that this contact, in turn, gave rise to an affirmative duty by Softura or Murphy to disclose Softura’s subcontractor status, and fails to

establish that a duty of disclosure arose independently of the contract between Net Generation and plaintiff, and we conclude that summary disposition in favor of Murphy and Softura with respect to plaintiff's silent fraud claim was proper. *Hord, supra* at 412.

Affirmed in part, reversed in part, and remanded for trial on plaintiff's breach of contract claim. Jurisdiction is not retained.

/s/ Michael J. Talbot  
/s/ E. Thomas Fitzgerald  
/s/ Joel P. Hoekstra