IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JAMES R. J. PETTIT	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03C-03-026-RFS
	)	
COUNTRY LIFE HOMES, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Upon Defendant's Motion for Summary Judgment. Granted.

Submitted:February 18, 2009
Decided:March 31, 2009

William D. Fletcher, Jr., Esq., and B. Brian Brittingham, Esq., Schmittinger & Rodriguez, P.A., Dover, Delaware, Attorneys for Plaintiff, James Pettit.

Colin M. Shalk, Esq., Casarino, Christman & Shalk, Wilmington, Delaware, Attorney for Defendant, Country Life Homes, Inc.

STOKES, Judge

This is my decision regarding Country Life Homes, Inc.'s ("Defendant") Motion for Summary Judgment. For the reasons set forth herein, the motion is granted.

STATEMENT OF FACTS

James R. J. Pettit ("Plaintiff" or "Pettit"), was an employee of Wilson Builders ("Wilson"). Wilson, a siding subcontractor, had a contract with Defendant to perform work on a residential townhouse construction project named Plantations East in Sussex County. Quality Mechanical was the electrical subcontractor for the project.

On the construction site, Country Life Homes provided a temporary power source for its subcontractors' use. It was installed by Delaware Electrical Cooperative. By law, the temporary power source, or junction box, must be set up by a licensed electrician and inspected by a state inspector. Only the electrician and the power company know a junction box's electrical capacity.

On April 6, 2001, Plaintiff was working on the job site, cutting pieces of cedar siding with a miter saw. Plaintiff was familiar with this saw as he had used it on prior occasions. In order for the saw to operate, the trigger on the saw must be continuously depressed. If the trigger is released, power to the saw is simultaneously cut-off. The saw Pettit was using was plugged into and powered by the junction box that had been placed by Delaware Electrical Cooperative.

Michael Cooper, an employee of Quality Mechanical, plugged an extension cord into an empty outlet on the junction box while Pettit was operating his saw. Pettit's saw immediately lost power. Pettit yelled to Cooper that his saw shut off, and Cooper hit the reset buttons on the junction box. During this time, Pettit was continuously depressing the trigger on the saw. Power was briefly restored to the saw before the electrical circuit was tripped again. After the saw came on and shut off for the third and final time, Pettit released the trigger and began walking away

from the table. Pettit testified that at that moment, the saw activated itself and cut off his right thumb. According to Pettit, he was not depressing the trigger when the saw sliced off his right thumb.

On December 12, 2001, Plaintiff filed a workers' compensation claim against Wilson for his injury. The Industrial Accident Board found that Plaintiff was an employee of Wilson and awarded him $72,670.65 in benefits. Wilson did not have workers' compensation insurance and filed for bankruptcy, leaving Plaintiff without the payment he was awarded. On December 15, 2000, Wilson had entered into a sub-contractor agreement with Defendant. That contract obligated Wilson to maintain liability and workers' compensation insurance and to provide proof to Defendant.

Plaintiff brought a negligence claim against Defendant and Quality Mechanical. This Court granted both Quality Mechanical's and Defendant's motions for summary judgment on August 19, 2005. The Court reasoned that Pettit's failure to identify and provide an expert that would explain how the miter saw could reactivate without the trigger being depressed was fatal to his allegations. On August 25, 2005, Pettit filed a motion for reargument, which was denied by this Court on November 29, 2005. Plaintiff appealed the grant of summary judgment to the Supreme Court, which affirmed on the negligence claims which had been brought. The Supreme Court remanded the case to this Court to decide whether Plaintiff's amendment to the complaint claiming third-party beneficiary rights to the contract between Defendant and Wilson. This Court permitted the amendment on October 3, 2006.

STANDARD OF REVIEW

Summary judgment can only be granted when there is no material issue of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). The moving party bears the initial burden of showing that no such issue is present. *Id*. If the moving party is able to meet this burden, it then shifts to the non-moving party to demonstrate a material issue of fact. *Id.* 681. If the non-moving party can show that an issue of material fact is disputed, summary judgment will not be granted. *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). To meet its burden, the non-moving party may not simply rest on its pleadings; evidence must be provided to show an issue of material fact. *Brandt v. Rokeby Realty Co.*, 2004 WL 2050519 at *4, (Del. Super. Sept. 8, 2004).

DISCUSSION

Plaintiff has argued his claim based on two alternative legal theories. The first is that the contract that was signed between Wilson and Defendant conferred a third-party beneficiary status on Plaintiff, entitling him to recover from Defendant as a result of his alleged breach of the contract. The second theory is that Defendant is liable to Plaintiff for his unpaid benefits due to the provisions of 19 *Del. C.* § 2357 and 19 *Del. C.* § 1105. Defendant has filed a Motion for Summary Judgment.

I. Summary judgment is appropriate for Plaintiff's contractual claim because the material facts are not in dispute. The relevant provision of the contract states the following:

> Sub-contractor will maintain current liability and workman's compensation insurance and provide proof of liability insurance from the insurance company. Sub-contractor further agrees to hold Country Life Homes harmless from any acts

> of sub-contractor's employees and/or liability from materials supplied. In the event of an accident or property damaged while on Country Life Homes job site, sub-contractor agrees to hold Country Life Homes harmless and provide liability coverage for same.

App. to Motion for Summary Judgment Ex. C. This provision imposes an obligation on Wilson to maintain insurance, but does not impose an obligation on Defendant to make sure that Wilson does so. Plaintiff has conceded that Wilson is the promisor and that Defendant is the promisee. Transcript of Oral Argument at 16-17. In fact, the entire paragraph solely imposed obligations on Wilson; none of its language required Defendant to do anything. While there is no doubt that this provision of the contract was breached, the breaching party was Wilson, not Defendant. Plaintiff's only plausible recovery under this contract, if any, is against Wilson.

In *Hostetter v. Hartford Ins. Co.*, the Court addressed the rights of third parties to sue for contractual breaches. The Court stated the following:

> In Delaware, a third-party may recover on a contract made for his benefit. (citation omitted). When it is the intention of the promisee to secure a performance for the benefit of another, then that third person has the right to enforce the contract against the promisor. (citation omitted). If the parties to the contract do not intend to benefit the third person, the third person has no rights under the contract even though he might otherwise be an incidental beneficiary of the contract.

1992 WL 179423 (Del. Super. 1992) at *6.

Plaintiff uses the same reasoning as that in *Hostetter* to support his claim. There is no reasonable reading of the contract, however, in which Defendant could be considered the promisor. Delaware law only grants third-party beneficiaries the right to recover against promisors; Plaintiff has not cited any cases or statutes which would indicate that a third-party has the right to recover from a promisee absent a surety relationship which is not present here.

Plaintiff has asserted rights as a third-party beneficiary to the contract by claiming that it was made for his benefit. There is a difference, though, between intended beneficiaries and incidental beneficiaries. It is a crucial distinction, since *Hostetter* only allows recovery for intended beneficiaries. *Hostetter* at * 6. "Third parties who may well benefit from a contract, but are not part of any beneficial intent by the contracting parties, are merely incidental beneficiaries." *McClements v. Savage*, 2007 WL 4248481 (Del. Super. 2007) at *1. The Court in *McClements* required a showing that the contracting parties intended to benefit the plaintiffs specifically when the contract was formed. *Id.* This showing had to "establish affirmatively" that the benefit was intentional and that "the failure of the Plaintiffs to obtain such testimony or memorandum will be fatal to their claims." *Id.* at *2.

At oral argument and in his brief, Plaintiff claimed to be a creditor beneficiary, a term which is described in the Restatment (Second) of Contracts. § 302 cmt. b (1981). If Plaintiff were a creditor beneficiary, that would mean that Defendant owed an obligation to Plaintiff at the time of the contract and would have provided for Wilson to satisfy its responsibility. *Id.* Clearly Defendant had no obligation to provide Plaintiff with workers' compensation coverage, which was admitted. Transcript of Oral Argument at 11.

Consequently, at most, Plaintiff's claim is that he is a donee beneficiary, a term which is described in the Restatement (Second) of Contracts. § 302 cmt. c (1981). A donee beneficiary is a type of intended beneficiary, one whose promised performance "is not paid for by recipient, discharges no right that he has against anyone, and is apparently designed to benefit him." *Id.* An incidental beneficiary, however, "acquires by virtue of the promise no right against the promisor or the promisee." Restatement (Second) of Contracts § 315 (1981). Thus the fact that

performance was promised has no bearing on whether or not Plaintiff is an incidental beneficiary or a donee beneficiary; the key is whether the promise was made with the intent to benefit him.

Plaintiff was required under *McClements* to show that the provision at issue was placed into the contract with the intent of benefiting him. Plaintiff has failed to produce evidence that shows there was intent among the contracting parties to confer a benefit on him. By his own admission, he does "not believe that there is any specific statement by any of the people who were present … to speak on this issue". Transcript of Oral Argument at 8. Plaintiff's argument centers on Defendant's practice of enforcing that provision of the contract against other sub-contractors, but failing to enforce it against Wilson. While it does seem odd that Defendant would only choose this one instance not to follow its usual procedures, that does not relate in any way to the intent to confer a benefit on Plaintiff at the formation of the contract. It also does not relate to the roles and duties of a promisee and a promisor; in fact, with commendable candor, Plaintiff's counsel acknowledged that the third-party beneficiary argument did not "neatly" fit with traditional principles. Transcript of Oral Argument at 19. Plaintiff has failed to make the showing required under *McClements* that he was an intended beneficiary of the contract. Even if he had been able to make such a showing, Delaware law only provides for recovery against the promisor, not the promisee in these circumstances.

II. Summary judgment for Plaintiff's statutory claim is appropriate because there is no issue of fact, only an issue of law. If Defendant's position on the relevant statutes were to be followed by this Court, Plaintiff would have no claim under pertinent statutes. The legislation at issue comes from the Workers' Compensation Act ("WCA") and the Wage Payment and Collection

Act ("WPCA"). The relevant part of the WCA states the following:

> If default is made by the employer for 30 days after demand in the payment of any amount due under this chapter, the amount may be recovered in the same manner as claims for wages are collectible.

19 *Del. C.* § 2357. The relevant part of the WPCA states the following:

> Whenever any person shall contract with another for the performance of any work which the contracting person has undertaken to perform, the person shall become civilly liable to employees engaged in the performance of work under such contract for the payment of wages, exclusive of liquidated damages, as required under this chapter, whenever and to the extent that the employer of such employees fails to pay such wages, and the employer of such employees shall be liable to such person for any wages paid by the employer under this section.

19 *Del. C.* § 1105. Plaintiff was awarded workers' compensation benefits by the Industrial Accident Board which were supposed to be paid by Wilson. Plaintiff's contention is that since Wilson defaulted on these benefits, the WCA makes them recoverable in the same way as wages and thus subject to the remedies of the WPCA. Since the WPCA holds the contractor civilly liable for the unpaid wages of a sub-contractor employer, Plaintiff argues that the combined application of these two statutes allows him to recover his unpaid benefits from Defendant.

A similar claim was made and rejected in *Charley v. Lomascola*, 1995 WL 656800 (Del. Super. 1995). The Court found:

> [I]t is clear that an employee of a subcontractor cannot recover compensation from a general contractor under the Workmen's Compensation Act. While 19 *Del. C.* § 2357 allows an employee to bring an action under the Wage Payment and Collection Act, 19 *Del. C.* § 2311 is clearly intended to govern the application of the entire Workmen's Compensation Act, including § 2357. Hence 19 *Del. C.* § 2357 cannot be utilized to bring an action under the Wage Payment and Collection Act in order to hold a general contractor liable to the employee of a subcontractor.

Id. at *3. Plaintiff has argued that *Huffman v. C.C. Oliphant & Son, Inc.*, 432 A.2d 1207 (Del. 1981), joins these two statutes together. The *Charley* Court reached its decision finding *Huffman* did not change Delaware's policy, expressed in *Dickinson v. Eastern R.R. Builders, Inc.*, 403 A.2d 717, 720 (Del. 1979), that insulated contractors from workers' compensation claims. *Charley* at *3. *Huffman* was purely a subject matter jurisdictional case which enabled the Superior Court to award damages for unpaid compensation benefits due from an employer or its insurer. The precedent set in *Charley* controls the decision here. To say "wages" in the WPCA was the same as unpaid workers' compensation benefits would be to stand the law and policy on its head.

Plaintiff has argued that *Charley* is no longer persuasive due to the Superior Court ruling in *Harrigan v. City of Wilmington*, 2006 WL 258061 (Del. Super. 2006), and the Supreme Court ruling in *Turner v. City of Wilmington*. 919 A.2d 562 (Del. 2007). In *Turner*, as in *Harrigan*, the Court held that since political subdivisions were exempt from the WPCA, Turner could not bring a claim against Wilmington for *Huffman* damages under the Act. *Id.* The City was his employer. Turner's argument had been that since he had not been paid his worker's compensation benefits, the WCA was the controlling statute, and it had no such limitation for political subdivisions. *Id.* That argument was rejected, as it also was in *Harrigan*. Plaintiff believes that since the WPCA's limitation on remedies applies to worker's compensation claims, then any civil actions available under the WPCA also apply to worker's compensation claims. This is not a reasonable position for the previously expressed reasons.

Further, nowhere in *Turner* does the Court make mention of the decision in *Charley*. It would be a stretch to say that *Charley* was overruled by *Turner*. The *Charley* Court expressly

declined to apply the WCA to contractors, allowing it only to be applied to employers. The decision in *Turner* only related to claims against employers. By attempting to use two statutes, it is logical that any limitation found in either statute would apply to such a claim; that does not mean conversely that any claim against a contractor in the position of Defendant available in either statute would be applicable to unpaid worker's compensation benefits. The *Charley* and *Turner* precedents are compatible and *Charley* is not eviscerated by *Turner*.

The appropriate judicial role is to apply the policies of the legislature, not to suggest its own. At all times relevant to this action, § 2311 stated the following:

> No contractor or subcontractor shall receive compensation under this chapter, but shall be deemed to be an employer and all rights of compensation of the employees of any such contractor or subcontractor shall be against their employer and not against any other employer.

19 *Del. C.* § 2311 (1953). This Court will not circumvent the clear intent of this statute by overruling a fourteen year old decision on the grounds that an unrelated Supreme Court opinion made it inoperable. The General Assembly saw fit to change this long-standing policy by amending § 2311 on January 17, 2007. After that amendment, unpaid benefits from an uninsured sub-contractor became recoverable from the general contractor. *McKirby v. A & J Builders*, 2009 WL 713887 (Del. Super. 2009) at *4. It must be presumed that the General Assembly amended the statute to provide workers like Plaintiff with relief that had not been available. Clearly this policy did not exist prior to 2007, and this Court cannot retroactively apply it to earlier cases.

CONCLUSION

Considering the foregoing, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.