NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JACOB WILLIAMS,

Appellant,

v.

CVT, LLC d/b/a BAY PINES AUTO MART; NGM INSURANCE COMPANY,

Appellees.

Case No. 2D18-2244

Opinion filed May 1, 2020.

Appeal from the Circuit Court for Pinellas County; Jack St. Arnold, Judge.

Richard N. Asfar of Cotney Construction Law, LLP, Tampa; and Roger D. Mason, II, and Elizabeth A. Buchwalter of Roger D. Mason, II, P.A., Tampa, for Appellant.

Erin M. Berger of McRae & Metcalf, P.A., Tampa, for Appellee, NGM Insurance Company.

No appearance for Appellee, CVT, LLC d/b/a Bay Pines Auto Mart.

SMITH, Judge.

Jacob Williams appeals the final judgment precluding him from bringing an action on a motor vehicle dealer surety bond (Bond) against the surety, NGM Insurance

Company (NGM), who issued the Bond pursuant to section 320.27(10), Florida Statutes (2016), of the Motor Vehicle Licenses chapter. The trial court determined on summary judgment that section 320.27(9) does not provide for a private cause of action on the bond to be brought by a vehicle purchaser against a surety who issues the bond. However, because the complaint filed by Mr. Williams against NGM arises under the terms of the Bond, as opposed to the statute, we reverse.

Mr. Williams purchased a 2012 Hyundai Veloster 3D from CVT, LLC d/b/a Bay Pines Auto Mart (Dealership). According to Mr. Williams, the Dealership represented to him that the vehicle had been in one minor accident but remained covered by the factory warranty. During the factory warranty period, Mr. Williams began experiencing problems with the vehicle and brought it in for repairs. To the surprise of Mr. Williams, he learned the vehicle had actually been involved in three prior accidents, which caused the underlying damage and rendered the factory warranty void.

Mr. Williams filed suit against both the Dealership and NGM. In the counts against the Dealership, he alleges claims of fraud, fraudulent concealment, negligent misrepresentation, and violations of Florida's Deceptive and Unfair Trade Practices Act (FDUTPA). §§ 501.201-.213, Fla. Stat. (2016). The FDUTPA claim alleges violations of section 320.27(9)(b), including that the Dealership (1) misrepresented or made false, deceptive, or misleading statements with regard to the sale of the vehicle; (2) failed to comply with the terms of a bona fide written, executed agreement, pursuant to the sale of a motor vehicle; and (3) perpetrated fraud upon Mr. Williams. See § 320.27(9)(b)(3), (5), (6). Mr. Williams brought one count against NGM—"Claim on Motor Vehicle Bond." Specifically, Mr. Williams alleged NGM is liable to Mr. Williams pursuant to the terms of

the Bond for the Dealership's violations of chapters 319 and 320 and the written purchase agreement where the Dealership was required to procure the Bond pursuant to section 320.27(10).

NGM moved for summary judgment on the sole ground that the purchase agreement between Mr. Williams and the Dealership contains an express waiver of any express or implied warranties and provides that the vehicle was sold "AS IS—NOT EXPRESSLY WARRANTED OR GUARANTEED, WITH ALL FAULTS." Accordingly, NGM argued, as a matter of law, Mr. Williams' claims of misrepresentation and fraud, based upon alleged verbal statements purportedly made by an employee of the Dealership, are barred by the express terms of the contract; therefore, Mr. Williams' claims against NGM, as the Bond surety, must also fail. For reasons we are unable to glean from the limited record before us, the trial court granted summary judgment in favor of NGM—not on the basis argued in NGM's motion—but upon a finding that section 320.27(9) does not provide for a private cause of action against the bond surety as a result of the principal's alleged violation(s) of that provision. The trial court further found that section 320.27(9) only provides for an administrative remedy whereby the Florida Department of Highway Safety and Motor Vehicles may take action against a dealership's motor vehicle license under certain circumstances.[1] Thereafter, the trial court rendered final judgment in NGM's favor.

We first dispense with the notion that because the statute does not

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[1]Section 320.27(9) provides for the denial, suspension, or revocation by the Department of Highway Safety and Motor Vehicles under certain circumstances, including where a dealer has made false, deceptive, or misleading misrepresentations in the sale or financing of motor vehicles.

expressly provide a private cause of action that this somehow bars Mr. Williams' action on the Bond. In this case, whether a statute provides for a private cause of action, either express or implied, is immaterial. See P.C. Lissenden Co. v. Bd. of Cty. Comm'rs ex rel. Graybar Elec. Co., 116 So. 2d 632, 635 (Fla. 1959) ("[I]t is quite clear from the record that, while the validity of this statute was raised by the appellant and actually passed upon by the trial court, it was not only not determinative of the issues or essential to the disposition thereof, but such question was wholly immaterial to the determination of the merits of the action."). Applying the same principle here, whether section 320.27(9) provides for a private cause of action against a surety is "neither dispositive of this litigation nor is it material in any way to a determination of the cause of action alleged in the complaint." Id. "The cause of action in this case does not aris[e] out of the statute but out of the [surety] bond." Id. at 633.

There is no dispute that the Bond at issue here was issued by NGM pursuant to section 320.27(10), nor that the language of the Bond is in compliance with the requirements of the statute. Section 320.27(10)(b) provides:

> Surety bonds and irrevocable letters of credit shall be in a form to be approved by the department and shall be conditioned that the motor vehicle dealer shall comply with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicle and shall not violate any of the provisions of chapter 319 and this chapter in the conduct of the business for which the dealer is licensed. Such bonds and letters of credit shall be to the department and in favor of any person in a retail or wholesale transaction who shall suffer any loss as a result of any violation of the conditions hereinabove contained. . . .

(Emphasis added). In fact, NGM obtained a separate summary judgment against the limited liability corporate member of the Dealership, in his individual capacity,

based on NGM's indemnity action under the Bond based upon the claims brought here by Mr. Williams against NGM.

One of the purposes of the statute requiring motor vehicle dealers to post a surety bond is for the "protection of [the] general buying public purchasing automobiles." Interstate Sec. Co. v. Hamrick's Auto Sales, Inc., 238 So. 2d 482, 483 (Fla. 1st DCA 1970); see also United Pac. Ins. Co. v. Berryhill, 620 So. 2d 1077, 1079 (Fla. 5th DCA 1993), abrogated on other grounds by Caufield v. Cantele, 837 So. 2d 371 (Fla. 2002). "The legislative scheme was intended to establish a very modest fund of $25,000 from which consumers could recover damages when car dealers went out of business and defaulted in their obligations." Hubbel v. Aetna Cas. & Surety Co., 758 So. 2d 94, 98 (Fla. 2000). And while section 320.27 does not explicitly create a private cause of action, it certainly contemplates an injured party's right to bring an action under the statutory surety bond. See § 320.27(10). Otherwise, there would be no point in requiring the motor vehicle dealer to post a surety bond.

Moreover, courts have recognized that in order to recover under a motor vehicle surety bond issued under section 320.27(10)(b), a party must be an "intended beneficiary" whom the statute was designed to protect. See Auto. Fin. Corp. v. RWO, Inc., 734 So. 2d 1104, 1105 (Fla. 2d DCA 1999) (holding that floor plan financier was not an intended beneficiary and, thus, lacked standing to recover under the bond because floor plan lending was not a "retail or wholesale transaction"); accord Dealers Acceptance Corp. v. United Pac. Ins. Co., 763 So. 2d 528, 530 (Fla. 4th DCA 2000). "A third party is an intended beneficiary, and thus able to sue on a contract, only if the parties to the contract intended to primarily and directly benefit the third party." Md.

Cas. Co. v. State Dep't of Gen. Servs., 489 So. 2d 57, 58 (Fla. 2d DCA 1986) (first citing Md. Cas. Co. v. State of Fla. Dep't of Gen. Servs., 489 So. 2d 54, 57 (Fla. 1st DCA 1986); then citing Clark & Co. v. Dep't of Ins., 436 So. 2d 1013, 1016 (Fla. 1st DCA 1983); then citing Clearwater Key Ass'n-South Beach, Inc. v. Thacker, 431 So. 2d 641, 645 (Fla. 2d DCA 1983); and then citing Restatement (Second) of Contracts § 302[2]).

Turning to the merits of Mr. Williams' action against NGM—Claim Against Motor Vehicle Bond—we first examine the terms of the Bond between the Dealership, as principal, and NGM, as the surety. See Crabtree v. Aetna Cas. & Sur. Co., 438 So. 2d 102, 105 (Fla. 1st DCA 1983) (explaining the rights of an intended beneficiary are derived from the terms of the bond). The recitals of the Bond provide in relevant part:

> **WHEREAS**, the above named principal [Dealership] has made to the obligee [NGM] hereunder application for a license, under Section 320.27, Florida Statutes, to engage in the business of buying, selling or dealing in motor vehicles or offering or displaying motor vehicles for sale, as defined by the said law, and
>
> **WHEREAS**, the above named principal [Dealership] is required as a condition precedent to his appointment as such dealer to deliver annually to the obligee hereto a good and sufficient surety bond for the license period conditioned that said principal shall comply with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicles and shall not violate any of the provisions of Chapter 319 and 320, Florida Statutes, in the conduct of the business for which he is licensed, and

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[2]An intended beneficiary is defined under Restatement (Second) of Contracts § 302 (1981):

> (1) Unless otherwise agreed between promisor and promise, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
> (a) The performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or
> (b) The circumstances indicate that the promisee intends to give the beneficiary the benefit of one promised performance.

> **WHEREAS**, such bond shall be in favor of any person in a retail or wholesale transaction who shall suffer any loss as a result of any violation of the conditions hereinabove contained.

(Emphasis added).

"A bond is a contract, and, therefore, a bond is subject to the general law of contracts." Am. Home Assurance Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 197 (Fla. 1992) (citing Crabtree, 438 So. 2d at 105). "A surety on a bond does not undertake to do more than that expressed in the bond, and has the right to stand upon the strict terms of the obligation as to his liability thereon." Crabtree, 438 So. 2d at 105. In Crabtree, the court recognized the right of a third party to recover under a surety bond as an intended beneficiary:

> Generally, the owner-obligee named in a bond may maintain an action thereon, and the owner-obligee's right to recover is dependent upon the terms of the bond and the ability to establish that damages were suffered under such terms. The general rule regarding third-party contracts is that a third person for whose benefit a contract has been made may maintain an action thereon and it is the undertaking of the promisor as a consideration to the promisee to benefit the third person that gives rise to a cause of action by the beneficiary against the promisor. If a contract shows its clear intent and purpose to be a direct and substantial benefit to third parties, such third parties may maintain an action for its breach, and where a contract creates a right or imposes a duty in favor of a third person, the law presumes that the parties intended to confer a benefit upon him and furnish him a remedy.

Id. at 106 (emphasis added) (citations omitted).

The Bond at issue here shows its clear intent and purpose to be a direct and substantial benefit to "any person in a retail or wholesale transaction who shall suffer any loss as a result of any violation of the conditions hereinabove contained."

The conditions "hereinabove contained" in the Bond require that the Dealership "shall comply with the conditions of any written contract made by such dealer in connection with the sale or exchange of any motor vehicles and shall not violate any of the provisions of Chapter 319 and 320, Florida Statutes, in the conduct of the business for which [Dealership] is licensed." Mr. Williams sufficiently alleges in his complaint that NGM is liable to him under the Bond for his losses sustained as a result of the Dealership's violations of section 320.27(9)(b)(3) and (9)(b)(13), dealing with claims of fraud and misrepresentations, and section 320.27(9)(b)(5), dealing with the failure to comply with the purchase agreement, as well as other subsections under chapters 319 and 320. Consequently, the trial court's holding that section 320.27(9) provides for only an administrative remedy and not a private cause of action fails to resolve any of the issues framed in the count—Claim for Motor Vehicle Bond.

Because we find that Mr. Williams sufficiently alleged a claim against the Bond as an intended beneficiary, Mr. Williams is entitled to have his case proceed so that the trial court may resolve whether NGM is liable for the Dealership's alleged breaches under the terms of the Bond. Accordingly, we reverse the summary judgment, vacate the final judgment, and remand for further proceedings.

Reversed and remanded.

SILBERMAN and MORRIS, JJ., Concur.