

STATE OF MICHIGAN  
COURT OF APPEALS

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J. DIPONIO & SON, INC.,

Plaintiff-Appellant,

v

PM GROUP, INC.,

Defendant-Appellee.

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UNPUBLISHED

November 27, 2001

No. 224095

Oakland Circuit Court

LC No. 98-007654-CK

Before: Whitbeck, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff J. DiPonio & Son, Inc., appeals as of right the trial court's order granting defendant PM Group, Inc.'s motion for summary disposition. We decide this appeal without oral argument pursuant to MCR 7.214(E). We affirm.

I. Basic Facts And Procedural History

In 1994, Friendship Centers of Emmet County (FCEC) desired to establish a senior living community, which would include a community center, a congregate care facility (semi-independent senior housing), and independent senior housing. The FCEC planned to hire DiPonio as the general contractor for the project. At the FCEC's September 1994 board meeting, the FCEC "commit[ted] to working with Jerry DiPonio, a developer from downstate, on the new center/housing project until such time a decision is made to build or not build." Thereafter, the board sent DiPonio a letter that stated in part:

[T]he Board of Directors is prepared to move forward with the project as discussed between you and Bill Huber on 9/23/94. To that end the board passed a resolution agreeing to commit to work with DiPonio & Sons toward our stated goals *until such time as the Friendship Centers of Emmet County exercises the build/no build option*. In the event, DiPonio & Sons can meet our building goals in a manner that is financially consistent with our ability to meet our obligations, DiPonio & Sons will be the general contractor. *In the unfortunate event the no build option has to be exercised, our commitment will terminate.*<sup>[1]</sup>

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<sup>1</sup> Emphasis added.

In light of this communication, DiPonio contacted PM Group, which develops senior housing facilities, and invited it to join the project. PM Group presented a joint venture proposal to FCEC outlining what it could offer.

In November 1994, FCEC and PM Group entered into a written development agreement under which PM Group was to “structure a limited partnership arrangement with” FCEC to develop the property. The agreement required PM Group to draft a development and limited partnership agreement naming itself and FCEC general partners. PM Group also had to obtain zoning approval, architectural designs, and construction cost estimates. Further, PM group would have to prepare a variety of documents and enter into contracts with other individuals or entities to carry out the project, including DiPonio as the general contractor. Regarding the anticipated limited partnership agreement, the parties agreed that the initial limited partner would have a 98.5% interest in FCEC, that DiPonio and PM Group each would have a .5% interest, and that the partnership agreement would provide that “the construction contract will be performed by J. DiPonio & Sons [sic].” The development agreement between FCEC and PM Group also provided:

If at any time prior to admission to the limited partnership as the Managing General Partner, the Developer [PM Group] determines that the proposed project is not feasible or worthwhile to develop, then the Developer may terminate the Agreement effective two (2) weeks after giving written notice to FCEC and will have no further obligation in connection with this Agreement or the transactions contemplated hereby.

\* \* \*

*This Agreement is between The P.M. Group, Inc. and Friendship Centers of Emmet County only, and neither party may assign an interest or allow any other party to join or participate in this Agreement unless agreed by both parties in writing. This Agreement shall remain in effect six (6) months from the execution of this Agreement.*

The P.M. Group, Inc. and Friendship Centers of Emmet County each agree by execution of this Agreement to indemnify and hold harmless the other from any and all claims arising from any action or inaction in connection with this Agreement. The P.M. Group, Inc. and F.C.E.C. assumes [sic] no liabilities under this Agreement and is under no obligation to purchase any interests in the Partnership or property. This Agreement shall not constitute an offer to purchase.<sup>[2]</sup>

PM Group took a number of steps toward developing the project. When the feasibility study was “coming in too high,” the community center building and congregate care building had to be scaled down. FCEC representatives also met with various government officials to discuss a \$500,000 government block grant for the project. PM Group required more time than

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<sup>2</sup> Emphasis added.

originally anticipated. As a result, on May 19, 1995, FCEC agreed to extend the development agreement for two additional months.

Ultimately, the limited partnership was never formed. According to DiPonio, the limited partnership never came into existence because PM Group abandoned the FCEC project when it decided to join forces with another agency planning a similar project in the same area. According to PM Group, the limited partnership failed to be formed because the FCEC never received necessary funding. Regardless, DiPonio never received a contract to act as the general contractor for the project.

DiPonio filed this action. In Count I, DiPonio claimed that it was a third-party beneficiary of the development agreement, which PM Group breached by repudiating a construction contract. In Count II, DiPonio asserted that PM Group violated various fiduciary duties it owed to DiPonio as a member of the joint venture. PM Group subsequently moved for summary disposition. Following oral argument, the trial court took the matter under advisement and later issued a written opinion and order granting PM Group's motion.

## II. Standard Of Review

We review a trial court's ruling on a motion for summary disposition de novo.<sup>3</sup>

## III. Third-Party Beneficiary

Because DiPonio was not a party to the development agreement, it has no right to enforce the contract unless FCEC and PM Group intended for it to be a third-party beneficiary.<sup>4</sup> "Not everyone who benefits in some way from a contract can be classified as a third-party beneficiary so as to be able to stand in the promisee's shoes and recover under the contract."<sup>5</sup> Courts presume that a contract was executed for the parties' benefit.<sup>6</sup> "Where a contract is primarily for the benefit of the contracting parties, the incidental benefit that a third person derives from the contract does not vest that person with the right to sue for breach of contract."<sup>7</sup> "The Court must objectively determine 'from the form and meaning of the contract itself' whether a party is a third-party beneficiary as defined in MCL 600.1405."<sup>8</sup>

The development agreement at issue in this case was between PM Group and the FCEC. Although that agreement obligated PM Group to perform certain acts that involved DiPonio,

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<sup>3</sup> *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

<sup>4</sup> *Oja v Kin*, 229 Mich App 184, 192; 581 NW2d 739 (1998).

<sup>5</sup> *Rieth-Riley Constr Co, Inc v Dep't of Transportation*, 136 Mich App 425, 430; 357 NW2d 62 (1984).

<sup>6</sup> See *Oja*, *supra* at 193.

<sup>7</sup> *Frick v North Bank*, 214 Mich App 177, 180; 542 NW2d 331 (1995).

<sup>8</sup> *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993), quoting *Guardian Depositors Corp v Brown*, 290 Mich 433, 437; 287 NW 798 (1939).

those obligations were conditioned on the construction project going forward, an event that never happened. Even if DiPonio were a third-party beneficiary to the development agreement, its claim would still fail because the FCEC did not have a cause of action against PM Group under the contract.<sup>9</sup>

#### IV. Joint Venture

A joint venture is an association to carry out a single business enterprise for a profit.<sup>10</sup> The elements of a joint venture are (1) an agreement to undertake a joint venture; (2) a joint undertaking of a single project for profit; (3) sharing profits and losses; (4) a contribution of skills or property by the parties; and (5) community interest and control over the subject matter of the enterprise.<sup>11</sup>

Though a contract between the parties is an “essential” element of a joint venture,<sup>12</sup> there was no contract between DiPonio and PM Group. The only contract was between PM Group and the FCEC, of which DiPonio was not a third-party beneficiary. Moreover, that contract evidenced a conditional agreement to establish a joint venture and the condition was never met. Accordingly, the trial court did not err in granting PM Group’s motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

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<sup>9</sup> *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 738-739; 605 NW2d 18 (1999).

<sup>10</sup> *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983).

<sup>11</sup> *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90, 103; 295 NW 571, amended 296 Mich 733 (1941).

<sup>12</sup> *Kowal v Sang Corp*, 318 Mich 312, 322; 28 NW2d 113 (1947).