STATE OF MICHIGAN

COURT OF APPEALS

RONALD J. MAXHEIMER, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED November 18, 2004
v	No. 250485 Bay Circuit Court
JEFFERY STEFFENS and ROBERT WILLIAMS, Defendants/Counter-Plaintiffs-Appellees.	LC No. 01-003454-CK

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment in his favor in the amount of $9,709.52. Plaintiff had requested a judgment in the amount of $43,750. We affirm.

This case involves the management of a bar/restaurant owned by plaintiff. Plaintiff and defendants entered into a contract whereby defendants agreed to manage plaintiff's bar/restaurant for a one-year period, with the possibility of defendants purchasing the bar/restaurant at the end of the year. The parties entered into a management agreement on March 15, 2000, which expired on March 15, 2001. Business did not do as well as defendants hoped and on April 26, 2001, the parties entered into a termination of management agreement. The termination agreement is the subject of this appeal.

Plaintiff first argues that the trial court erred in interpreting the termination agreement as not requiring defendants to pay plaintiff $34,050 that defendants owed plaintiff under the management agreement for non-payment of rent. We disagree.[1] Interpretation of a contract is a

[1] Plaintiff also states in the statement of the issues section of his brief on appeal that the trial court erred in its interpretation of the management agreement. The trial court dismissed plaintiff's breach of contract claim regarding the management agreement. However, plaintiff fails to meaningfully address how the trial court erred in regard to the management agreement. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then (continued…)

question of law that this Court reviews de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). "The primary goal in interpreting contracts is to determine and enforce the parties' intent. To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000) (internal citation omitted). "[T]he law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Zurich Ins Co v CCR & Co*, 226 Mich App 599, 604; 576 NW2d 392 (1997). If a contract is clear and unambiguous, this Court must not make a different contract for the parties or consider extrinsic evidence to determine the parties' intent. *Id.*

Plaintiff contends that the termination agreement unambiguously requires defendants to pay plaintiff the $34,050 that defendants owed plaintiff for rent. We disagree. The termination agreement contains a handwritten provision that states: "As of May 6th 2001 the managers [defendants] will not be responsible for any other outstanding debts." The termination agreement lists two debts that defendants were responsible to pay: (1) "any outstanding monies owed to any suppliers," and (2) "the sales taxes for the months of March & April 2001." Although the termination agreement specifically stated that defendants violated the management agreement by failing to pay the $34,050 debt, the termination agreement nonetheless did not list the $34,050 as an obligation or debt that defendants were required to pay. Under the plain and unambiguous terms of the termination agreement, then, the $34,050 constituted an "other outstanding debt" which, under the express terms of the agreement, defendants were not responsible to pay. We decline to read into the termination agreement a provision that the agreement clearly and unambiguously did not contain. If a contract is plain and unambiguous, this Court must enforce it according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). We therefore reject plaintiff's argument that the trial court erred in interpreting the termination agreement as not requiring defendants to pay the $34,050 debt.

Plaintiff next argues that the termination agreement lacked consideration and, therefore, is an invalid contract. We disagree. In order for a contract to be valid, there must be legal consideration. *Yerkovich v AAA*, 461 Mich 732, 740; 610 NW2d 542 (2000). "To have consideration there must be a bargained-for exchange." *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). Consideration requires "'a benefit on one side, or a detriment suffered, or service done on the other.'" *Id.*, 239, quoting *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). "The performance of a pre-existing duty or legal obligation is generally held not to be sufficient consideration for a return promise." *Green v Millman Brothers, Inc*, 7 Mich App 450, 455; 151 NW2d 860 (1967).

Plaintiff contends that because defendants had a legal duty to pay rent under the management agreement, there was no consideration for plaintiff's promise to forgive defendants'

(…continued)

leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Id.*, quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Because defendant has abandoned any argument regarding the trial court's interpretation of the management agreement, we decline to address that issue and address only the trial court's interpretation of the termination agreement.

payment of that $34,050 debt under the termination agreement. We disagree. The management agreement, which obligated defendants to pay, among other things, rent, sales tax and supplier debts, expired by its own terms on March 15, 2001. When the parties entered into the termination agreement, there was additional consideration. Defendants agreed to manage the restaurant until May 6, 2001, and then vacate and pay the outstanding supplier debts and the sales taxes. In exchange, plaintiff agreed to pay defendants for the remaining inventory and release defendants from paying the other debts except those already agreed upon in the termination agreement. Both parties received additional benefits and suffered additional detriments under the termination agreement. Therefore, there was consideration for the termination agreement. See *Gen Motors Corp, supra*, 239.

Plaintiff finally argues that because defendant Williams did not sign the termination agreement and was not a third-party beneficiary under the termination agreement, defendant Williams is therefore still liable to pay plaintiff the $34,050 debt owed for rent. We disagree.

MCL 600.1405, Michigan's third-party beneficiary law, states:

> 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.

The statute distinguishes between intended third-party beneficiaries and incidental third-party beneficiaries; intended beneficiaries may sue under the contract, while incidental beneficiaries may not. *Brunsell v Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002). "By using the modifier 'directly,' 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." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003) quoting *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). The test for determining a third party beneficiary is objective and the subjective intent of the parties is irrelevant. *Oja v Kin*, 229 Mich App 184, 193; 581 NW2d 739 (1998).

The language of the termination agreement supports the conclusion that defendant Williams was an intended third-party beneficiary of plaintiff's agreement to release the $34,050 debt owed by defendants to plaintiff. In the termination agreement, plaintiff agreed to release the "managers" from "any other outstanding debts." The termination agreement named the managers as defendants Steffens and Williams. The fact that the agreement refers to plural managers and not a single manager indicates that plaintiff intended for defendant Williams to benefit from his promise to release the "managers" from their $34,050 debt to him. Moreover, the fact that defendant Williams did not sign the termination agreement or know about its provisions before the agreement was executed is irrelevant to whether he was an intended third-party beneficiary. MCL 600.1405 does not require the signature of the person benefiting from a promise and does not require the person benefiting from a promise to know about the terms of the agreement beforehand. MCL 600.1405(1) only requires plaintiff to have "undertaken to give

or to do or refrain from doing something directly to or for" defendant Williams. The use of the word "managers" clearly indicates that plaintiff undertook to directly give defendant Williams the benefit of release from the $34,050 debt. We therefore reject plaintiff's contention that defendant Williams was not an intended third-party beneficiary of plaintiff's release of the $34,050 debt under the termination agreement.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff