STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLY DIANNE GREENE,

Plaintiff-Appellant,

v

STERLING WOODS CONDOMINIUM ASSOCIATION, STAMPER & COMPANY, and STERLING 1, L.L.C.,

Defendants/Third-Party Plaintiffs-Appellees,

and

EVERGREEN EXTERIORS, INC.,

Defendant/Third-Party Defendant-Appellee.

UNPUBLISHED
April 7, 2011

No. 294784
Macomb Circuit Court
LC No. 2008-000742-NO

KIMBERLY DIANNE GREENE,

Plaintiff,

v

STERLING WOODS CONDOMINIUM ASSOCIATION, STAMPER & COMPANY, and STERLING 1, L.L.C.,

Defendants/Third-Party Plaintiffs-Appellants,

and

EVERGREEN EXTERIORS, INC.,

Defendant/Third-Party Defendant-Appellee.

No. 295030
Macomb Circuit Court
LC No. 2008-000742-NO

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

In Docket No. 294784, plaintiff appeals by right the trial court's order of dismissal. Plaintiff argues that the trial court erred by granting summary disposition of her premises-liability claim against defendant/third-party defendant Evergreen Exteriors, Inc. ("Evergreen") on the ground that Evergreen did not owe her any duty separate and distinct from its contractual obligations. In the alternative, plaintiff argues that she was a third-party beneficiary of Evergreen's contract with defendant/third-party plaintiff Sterling Woods Condominium Association ("Sterling Woods"). We disagree with plaintiff and affirm.

In Docket No. 295030, defendants/third-party plaintiffs Sterling Woods, Stamper & Company, and Sterling 1, L.L.C. (collectively "the Sterling defendants") also appeal by right the trial court's order of dismissal. The Sterling defendants argue that the trial court erred by granting summary disposition in favor of Evergreen with respect to their third-party claim for indemnification. The Sterling defendants also argue that the trial court erred by denying their motion to amend their third-party complaint to add a claim of breach of contract. We disagree in part, but reverse and remand for further proceedings with respect to the Sterling defendants' motion to amend.[1]

Plaintiff filed this premises-liability action against Sterling Woods (her condominium association), Stamper & Company (the management company for Sterling Woods Condominiums), Sterling 1, L.L.C. (the company from which she had purchased her condominium), and Evergreen (the contractor hired by Sterling Woods to perform snow and ice removal). Plaintiff alleged that she slipped and fell on an icy sidewalk outside her condominium, resulting in serious injury. The Sterling defendants filed a third-party complaint against Evergreen for indemnification.

I. DOCKET NO. 294784

Plaintiff argues that the trial court improperly granted summary disposition in favor of Evergreen on the basis of the doctrine set forth in *Fultz v Union-Commerce Associates*, 470 Mich 460, 466-467; 683 NW2d 587 (2004), requiring plaintiff to demonstrate that Evergreen owed her a duty "separate and distinct" from its contractual obligations to Sterling Woods. Plaintiff argues that *Fultz* is inapplicable under the facts of this case.

Plaintiff first asserts that she was actually a party to the contract and that *Fultz* only applies to non-parties to a contract. We decline to address this unpreserved issue because there

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[1] This Court consolidated these appeals on November 25, 2009. *Greene v Sterling Woods Condo Assoc*, unpublished order of the Court of Appeals, entered November 25, 2009 (Docket Nos. 294784; 295030).

has been no factual development of plaintiff's argument, which she has raised for the first time on appeal. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

Plaintiff next asserts that she was a third-party beneficiary of the contract between Evergreen and Sterling Woods. This argument fails for two separate reasons.

We review de novo the trial court's decision to grant a motion for summary disposition. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). Summary disposition is properly granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Contract interpretation presents a question of law that we review de novo. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

Even if plaintiff can demonstrate that she is a third-party beneficiary of the contract between Evergreen and Sterling Woods, she would merely gain the rights of the promisee—Sterling Woods—as against Evergreen. MCL 600.1405. However, plaintiff's claims sound in negligence, not breach of contract. "[T]he threshold inquiry is whether the plaintiff alleges violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's v Michigan Bell*, 454 Mich 65, 84; 559 NW2d 647 (1997). *Fultz* merely extends this rule to non-parties to a contract. See *Kisiel v Holz*, 272 Mich App 168, 172-173; 725 NW2d 67 (2006). Thus, even if plaintiff could establish that she has the same contractual rights against Evergreen as Sterling Woods, this would be no defense to the trial court's application of the rule stated in *Fultz*. In fact, we note that plaintiff does not dispute the application of the rule in *Fultz*, as she plainly acknowledges that Evergreen's duty to her arose only out of the contract: "In this case, [Evergreen's] duty to [p]laintiff was not separate and distinct from the contract."

Moreover, plaintiff has not presented any evidence from which one could reasonably conclude that she was a third-party beneficiary of the contract. MCL 600.1405 defines an intended third-party beneficiary as "any person for whose benefit is made by way of contract," and further provides that "[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." This Court has noted that in order to be a third-party beneficiary of a contract, a party must not only be in a position to benefit from the performance of the contract, but there must be "an express promise to act to the benefit of the third party." *Kisiel*, 272 Mich App at 171.

Plaintiff's argument that she was an intended third-party beneficiary rests primarily on her contention that, as a resident and member of Sterling Woods, the contract for snow and ice removal was clearly for her benefit. However, as plaintiff's counsel acknowledged to the trial court, any member of the public would have received this same benefit upon visiting the property. Indeed, the owner of property has a general duty to protect all invitees from an unreasonable risk of harm. *Bialick v Megan Mary, Inc*, 286 Mich App 359, 362; 780 NW2d 599 (2009). Plaintiff also cites testimony from the property manager to support her theory that she was an intended beneficiary of the contract. In fact, the property manager merely testified that plaintiff was "one of the people that the contract was intended to benefit." As this Court has

observed, "[a]bsent clear contractual language to the contrary, a property owner does not attain intended third-party-beneficiary status merely because the parties to the subcontract knew, or even intended, that [performance of the contract] would ultimately benefit the property owner." *Kisiel*, 272 Mich App at 171. Plaintiff has not presented any evidence from which one could reasonably conclude that she was an intended third-party beneficiary of the contract.

II. DOCKET NO. 295030

The Sterling defendants first argue that the trial court improperly concluded that the indemnification provision in Evergreen's contract did not encompass Evergreen's conduct in this case. We disagree.

Our Supreme Court has recently reiterated that "[a]n indemnity contract is to be construed in the same fashion as other contracts. The extent of the duty must be determined from the language of the contract, itself." *Zahn v Kroger*, 483 Mich 34, 40; 764 NW2d 207 (2009) (internal citations omitted). As with all contracts, if the language of the contract is "clear and unambiguous, it is to be construed according to its plain sense and meaning." *Id*. at 41. When interpreting the provisions of a contract, our goal is to "give effect to the intentions of the parties." *Id*. at 40-41.

Section D(18) of the service contract between Sterling Woods and Evergreen provided in relevant part, "Contractor shall hold harmless Stamper and Company, [its] agents, [its] representatives, and [its] employees[,] as well as the condominium association, [its] agents, [its] representative and [its] employees for prop[ert]y damage or personal injury as a result of snow removal operations." Section C of the service contract defined the "operations to be performed":

> 1. Plowing with truck of all roadways and drives.
>
> 2. Removal of snow accumulations from areas covered (see above). Removal of any show accumulations from any blocked area.
>
> 3. Cleaning of smaller areas with tractor, snowblower[,] or hand shovels.
>
> 4. Removal of ice from walk surfaces with chemical ice melt and removal of ice from roadways with salt.

The trial court concluded that "[p]laintiff's injury did not occur 'as a result of' or 'consequence of' any of the snow removal operations listed under the terms of the contract." We agree with the trial court's conclusion in this regard.

The Sterling defendants rely primarily on language from two previously decided cases, *Zahn*, 483 Mich at 38-41, and *DaimlerChrysler Corp v G-Tech Prof'l Staffing, Inc*, 260 Mich App 183, 186-187; 678 NW2d 647 (2003). However, the indemnification language in this case is clearly distinguishable from the language at issue in *Zahn* and *DaimlerChrysler Corp.* Notably, the indemnification language at issue in *Zahn* and *DaimlerChrysler Corp* expressly covered any negligent *omissions* by the promisor. In contrast, the indemnification language at issue in the present case does not cover negligent omissions by Evergreen. As explained previously, the language provides merely that Evergreen will hold Sterling Woods and Stamper

& Company harmless "for [property] damage or personal injury as a result of snow removal operations."

Plaintiff has alleged that her injuries resulted from Evergreen's *failure* to perform its contractual duties—i.e., an omission—*not* that her injuries resulted in any way "as a result of [Evergreen's] snow removal operations." The language of the contract expressly limits indemnification to injuries resulting from Evergreen's "snow removal operations," a phrase which is plainly defined in § C of the agreement. Because plaintiff's injury did not arise out of Evergreen's performance of any of the contractually defined "[o]perations to be performed," we cannot conclude that the trial court erred by granting summary disposition in favor of Evergreen on this issue.

The Sterling defendants also argue that the trial court improperly denied their motion for leave to amend their third-party complaint to add a claim of a breach of contract. We agree. We review the trial court's decision to grant or deny leave to amend the complaint for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

The trial court viewed the proposed amendment with suspicion, suggesting that the Sterling defendants were merely trying to circumvent the limitations of the contractual indemnification provision by seeking to add another theory of liability. The trial court noted that the damages sought under the proposed breach of contract claim would be the same as those sought under the indemnification claim. The court concluded that this was simply a broader claim for indemnification, which was precluded by the express contractual limitation on the scope of indemnification, and that the amendment would therefore be futile.

Although it is clear that the Sterling defendants *were* seeking to circumvent the limitations of the express indemnification provision, we are unable to find support for the trial court's apparent belief that adding a claim of breach of contract would be futile or otherwise improper simply because the measure of the Sterling defendants' damages for breach of contract would be the same as under their indemnification claim. The two claims—contractual indemnification and breach of contract—have different elements and require different proofs. The precondition for contractual indemnification was not whether Evergreen breached the contract, but rather whether Evergreen's omissions fell within the indemnification provision, which they did not. To support the proposed breach of contract claim, on the other hand, the Sterling defendants would first be required to establish that Evergreen failed to perform a duty required under the contract. Further, the Sterling defendants would be required to show that their damages were caused by Evergreen's breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). Consequently, the trial court erred when it concluded that it would be futile to add a breach of contract claim. The court's holding that the contractual indemnification provision was inapplicable in this case had no bearing on whether Evergreen had breached the contract. Indeed, the trial court never even considered the Sterling defendants' allegations with respect to breach of contract. We conclude that the trial court abused its discretion by denying the Sterling defendants' motion for leave to amend their complaint.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. In Docket No. 294784, defendants may tax costs

pursuant to MCR 7.219. No taxable costs in Docket No. 295030, none of the parties having prevailed in full.

/s/Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Deborah A. Servitto