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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1488
A10-1678**

Northern National Bank n/k/a Frandsen Bank & Trust,
Respondent,

vs.

Stephen J. Wiczek, Donna L. Wiczek, ABC Partnership,
XYZ Corporation, John Doe and Mary Roe,
Appellants (A10-1488),

Nisswa Properties, L.L.C., et al.,
Appellants (A10-1678).

**Filed May 16, 2011
Affirmed in part and appeal dismissed in part
Kalitowski, Judge**

Cass County District Court
File No. 11-CV-09-2168

Crow Wing County District Court
File No. 18-CV-09-5017

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Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

In this consolidated appeal, appellants challenge the dismissal of their counterclaims against respondent on the ground that appellants were intended third-party beneficiaries of loan agreements between respondent and Nisswa Marine, Inc. We affirm in part and dismiss the appeal in part.

DECISION

Appellants Stephen J. Wiczek and Donna L. Wiczek (the Wiczeks) were owners and officers of appellant Nisswa Properties L.L.C. The Wiczeks were also shareholders and officers of Nisswa Marine Inc., which operated a boat dealership on land that it leased from Nisswa Properties.

The Wiczeks, Nisswa Properties, and Nisswa Marine each entered into separate loan agreements with respondent Northern National Bank, now known as Frandsen Bank & Trust (the bank). The Wiczeks' debt was secured by a mortgage on their homestead in Cass County. Nisswa Properties' debt was secured by a mortgage on land it owned in Crow Wing County and by personal guaranty agreements executed by the Wiczeks. Nisswa Marine's debt was secured by a second mortgage on the Wiczeks' homestead and by personal guaranty agreements executed by the Wiczeks.

The bank's loans to the Wiczeks, Nisswa Properties, and Nisswa Marine matured in June 2009. When the loans were not paid in full, the bank (1) sued the Wiczeks in Cass County, seeking to foreclose the mortgages on the homestead; and (2) sued the Wiczeks and Nisswa Properties in Crow Wing County, seeking to foreclose the mortgage

on the Crow Wing County properties and to enforce the Wiczeks' personal guaranties. The district courts in both actions granted summary judgment in favor of the bank and dismissed appellants' counterclaims that they had been damaged by the bank's alleged breach of its loan agreements with Nisswa Marine. Nisswa Marine, having filed for Chapter 11 bankruptcy, was not a party to either action.

I.

We first address whether the Wiczeks have standing to appeal the dismissal of their counterclaims in the underlying Cass County action. "Standing is a threshold consideration in determining whether a litigant is entitled to have the courts determine the merits of a dispute." *Hanson v. Woolston*, 701 N.W.2d 257, 261 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005). "A litigant has standing when he or she has suffered an actual injury or otherwise has a sufficient stake in a justiciable controversy to seek relief from a court." *Leffler v. Leffler*, 602 N.W.2d 420, 422 (Minn. App. 1999). Whether a litigant has standing is a question of law, which we review de novo. *Hanson*, 701 N.W.2d at 262.

On September 14, 2010, after the grants of summary judgment against them, the Wiczeks filed a voluntary petition for Chapter 7 bankruptcy. Upon filing such a petition,

all of the debtor's assets and interests become property of a bankruptcy estate. The bankruptcy estate encompasses all legal or equitable interests of the debtor in property as of the commencement of the case. It also includes any causes of action that have accrued to the debtor.

Leffler, 602 N.W.2d at 422 (citations and quotations omitted). Thus, the Wiczeks' counterclaims belong to the bankruptcy estate and the right to pursue those counterclaims

has vested in the bankruptcy trustee. A debtor can retain an interest in property if (1) the debtor claims an exemption from the bankruptcy estate or (2) the trustee unequivocally abandons the property. But here, when the Wiczeks filed their appeals they had not claimed an exemption for their counterclaims and the bankruptcy trustee had not abandoned them. *See id.* at 423 (noting that debtor had not met either exception at the time appeal was filed). Because the Wiczeks no longer have an interest in their counterclaims against the bank, we conclude that they do not have standing to appeal the dismissal of the counterclaims. Consequently, we dismiss the part of the appeal that challenges dismissal of the Wiczeks' counterclaims in the Cass County action.

II.

We next address whether the district court erred by granting summary judgment and dismissing Nisswa Properties' counterclaim against the bank in the underlying Crow Wing County action.

On appeal from summary judgment, we review *de novo* whether a genuine issue of material fact exists and whether the district court erred in its application of the law. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03.

Nisswa Properties argues that the district court erred by dismissing its breach-of-contract counterclaim against the bank because Nisswa Properties was an intended third-party beneficiary of the loan agreements between the bank and Nisswa Marine. We disagree.

Although a stranger to a contract generally has no rights under the contract, “a third party may sue on a contract made for his direct benefit.” *Buchman Plumbing Co. v. Regents of Univ. of Minn.*, 298 Minn. 328, 333, 215 N.W.2d 479, 483 (1974); *Hickman*, 695 N.W.2d at 369. The Minnesota Supreme Court has adopted the approach of the Restatement (Second) of Contracts in determining whether a third party is an intended beneficiary of a contract. *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). The Restatement provides:

- (1) Unless otherwise agreed between promisor and promisee, 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 promisee to pay money to the beneficiary [duty owed test]; or
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [intent to benefit test].
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Hickman, 695 N.W.2d at 369 (alterations in original) (quoting Restatement (Second) of Contracts § 302 (1979)). “Under this approach, if recognition of third-party beneficiary rights is appropriate and *either* the duty owed *or* the intent to benefit test is met, the third

party can recover as an intended beneficiary.” *Cretex*, 342 N.W.2d at 139 (quotation marks omitted). If a beneficiary does not meet either of these tests, it cannot enforce the contract. *Hickman*, 695 N.W.2d at 369-70.

Intent to benefit

To satisfy the intent-to-benefit test, Nisswa Properties must show that the bank and Nisswa Marine intended to confer a benefit on Nisswa Properties through the performance of the loan agreements. *See Cretex*, 342 N.W.2d at 139 (discussing requirements to satisfy intent-to-benefit test). This intent must be expressed in the loan agreements. *Id.* at 138; *see also Hickman*, 695 N.W.2d at 370 n.7 (stating that under the Restatement “the objective manifestation of intent controls” and that the question is “whether an intent to benefit a third person *appears from the terms of the contract*” (emphasis added) (quotation omitted)).

In ascertaining the intent of the contracting parties, a key issue is to whom the contractual performance is to be rendered. *Cretex*, 342 N.W.2d at 140. “If, by the terms of the contract, performance is directly rendered to a third party, he is intended by the promisee to be benefited.” *Buchman*, 298 Minn. at 335, 215 N.W.2d at 484; *see also Chard Realty, Inc. v. City of Shakopee*, 392 N.W.2d 716, 720-21 (Minn. App. 1986) (concluding that appellant was not an intended beneficiary under the intent-to-benefit test where there was no reference to appellant in the contract and the contract evidenced no intent to benefit appellant), *review denied* (Minn. Nov. 19, 1986).

Here, the record contains several loan agreements between Nisswa Marine and the bank. Nisswa Properties is not mentioned in any of these agreements, and Nisswa

Properties concedes that Nisswa Marine and the bank did not agree to disburse funds directly to Nisswa Properties. Instead, Nisswa Properties argues that it indirectly received funds from the bank through its lease with Nisswa Marine. But this indirect benefit is not sufficient to satisfy the intent-to-benefit test. *See Buchman*, 298 Minn. at 336, 215 N.W.2d at 484 (explaining that “performance of a contract that is beneficial to a third party does not of itself confer upon the third party a right of action based on such contract”); Restatement (Second) of Contracts § 302 cmt. e (1981) (“Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created.”).

The intent-to-benefit test is not met because Nisswa Properties has failed to show that any contract in the record between the bank and Nisswa Marine expressed an intent to directly benefit Nisswa Properties. Because the language of the loan agreements is clear, we do not reach Nisswa Properties’ arguments about extrinsic evidence. *See Hickman*, 695 N.W.2d at 369 (stating that an appellate court does not rely on extrinsic evidence where the intention of the parties is clear from the face of a contract).

Duty owed

To satisfy the duty-owed test, Nisswa Properties must show that the bank’s contractual performance discharged a duty otherwise owed to Nisswa Properties by Nisswa Marine. *See Cretex*, 342 N.W.2d at 138 (discussing test). Nisswa Properties argues that the duty-owed test is met because Nisswa Properties was financially dependent on lease payments from Nisswa Marine. But there is no evidence that the bank assumed Nisswa Marine’s obligations under the lease. *See Twin City Constr. Co. v.*

ITT Indus. Credit Co., 358 N.W.2d 716, 718 (Minn. App. 1984) (concluding that duty-owed test was met where promisor assumed an obligation that promisee owed to third party). And the supreme court has rejected the argument that the existence of a separate contract between a promisee and a third party establishes a duty owed to the third party by the promisor. *Cretex*, 342 N.W.2d at 138 (holding that subcontractors were not intended third-party beneficiaries of agreement between general contractor and owner of construction project under duty-owed test because project owner “clearly . . . ha[d] no legal responsibility to pay the subcontractors . . . who made their own separate contracts with the general contractor”). We therefore conclude that Nisswa Properties has failed to satisfy the duty-owed test.

Because Nisswa Properties was not an intended third-party beneficiary of any loan agreement between the bank and Nisswa Marine, the district court did not err by dismissing its counterclaim in the Crow Wing County action.

Affirmed in part and appeal dismissed in part.