

Opinion issued April 21, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00102-CV

WHITE LION HOLDINGS, L.L.C., Appellant

V.

SHARON TUBE CORPORATION D/B/A SHARON TUBE CO., Appellee

**On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Case No. 05-CV-146366**

MEMORANDUM OPINION

Appellant, White Lion Holdings, L.L.C. (“White Lion”), filed a motion for rehearing and for en banc reconsideration of our December 23, 2010 opinion. We deny White Lion’s motion for rehearing, withdraw our opinion and judgment of

December 23, 2010, and substitute this opinion and judgment in their place. Because we issue a new opinion in connection with the denial of rehearing, White Lion's motion for en banc reconsideration of our December 23, 2010 opinion is rendered moot. *See Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 472 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Appellant, White Lion Holdings, L.L.C. (“White Lion”), challenges the trial court’s take-nothing judgment entered, after a jury trial, in favor of appellee, Sharon Tube Corporation doing business as Sharon Tube Co. (“Sharon Tube”), in White Lion’s suit against Sharon Tube for breach of an auction sale contract that they had independently entered with an auctioneer, Daley-Hodkin Corporation (“Daley-Hodkin”). In three issues, White Lion contends that the trial court erred in denying its motion for partial judgment notwithstanding the verdict and to disregard the jury’s finding that White Lion and Sharon Tube had not made an agreement between them by agreeing to the “terms of the auction sale”; submitting to the jury the question of whether White Lion and Sharon Tube had made an agreement between them without including a reference to a bankruptcy court’s “Order Approving Sale” as part of the alleged contract; and not submitting to the jury a question asking whether White Lion was a third-party beneficiary of the “Terms of the Sale.”

We affirm.

Factual and Procedural Background

The critical facts are largely undisputed. In February 2004, at a bankruptcy sale of the assets of Vision Metals, Inc. (“VMI”), Bernard Morello purchased real property, which included several buildings owned by VMI. Shortly thereafter, Morello conveyed the real property and buildings to White Lion, an entity of which he was a principal. Sharon Tube, at the same bankruptcy sale, purchased some of VMI’s equipment located in the buildings, and it contracted with Dixie Cullen Interests (“DCI”) to remove the equipment.

At trial, White Lion presented evidence that, in the course of removing the equipment, DCI damaged its buildings and property. Sharon Tube, in its pleadings and at trial, contended that it did not have a contract with White Lion and White Lion was barred from pursuing any breach of contract claims against it. Sharon Tube presented evidence disputing White Lion’s claim that it had damaged White Lion’s buildings in the manner complained of by White Lion.

In support of its breach of contract claim, White Lion asserted that all buyers of equipment at the bankruptcy sale, including Sharon Tube, had agreed that the removal of any equipment would be completed in accordance “with the terms stated” by the auctioneer, Daley-Hodkin, including the Terms of Sale, which Daley-Hodkin had furnished to each buyer and posted at the time of the sale. In its petition and at trial, White Lion highlighted the provisions of the Terms of Sale

that provided that a buyer's removal of any personal property had to be completed in accordance with the terms set forth by Daley-Hodkin, at the buyer's own risk and expense, and in compliance with all applicable laws; the buyer was to disconnect and cap electrical and water lines in a professional and reasonable manner and "failure to do so" would result in the buyer being held responsible for any costs or damages incurred; and modification of any portion of the Terms of Sale or additional terms and conditions of sale could be made by Daley-Hodkin at any time.

White Lion asserted that, under the bankruptcy court's subsequent "Order Approving Sale," which was signed on March 31, 2004, all buyers were vested with the right, title, and interest previously held by VMI and that the "Transaction Documents" and the Order Approving Sale bound and inured to the benefit of all debtors, buyers, their respective affiliates, successors, and assigns, and any affected third parties. Relying upon the Terms of Sale and Order Approving Sale, White Lion argued that "it was in privity with VMI" as a good faith purchaser of the property and buildings, the bankruptcy sale vested it with all right, title, and interest held by VMI at the time of the sale, and it was "a third-party beneficiary of the Terms of Sale" between Sharon Tube, VMI, and Daley-Hodkin. White Lion asserted that Sharon Tube had breached the Terms of Sale in a number of ways, including damaging walls, doors, and "door closers" in multiple locations, failing

to disconnect and cap electrical wires and electrical, air, gas, and water lines in a professional and reasonable manner and in compliance with all laws, and failing to require DCI to remove the property in accordance with the Terms of Sale. White Lion sought damages for repair costs, and it presented testimony on the amount of damage allegedly caused by Sharon Tube.

After both sides had rested and closed, the trial court asked the jury, in question number one, “Did Bernard Morello/[White Lion] and [Sharon Tube] agree to the Terms of Sale?” The jury answered, “Yes.”¹ The trial court then asked the jury in question number two whether “[b]y agreeing to the Terms of Sale do you find that there was *an agreement made by and between Bernard Morello/[White Lion] and [Sharon Tube].*” (Emphasis added.) During deliberations, the jury submitted a question to the trial court asking if it “were to answer ‘no’ to question number two,” would it still “need to answer question number four,” which was the damages question. In response to the question, the trial court instructed the jury to “read the instructions,” which provided that the jury could only reach the following question if answered “yes” to question number two. The jury then answered question number two, “no,” finding that there was no agreement “between Morello/White Lion and Sharon Tube.” Accordingly, the jury did not reach questions number three and four, which asked the jury

¹ The parties agreed in closing arguments that the answer to this question was “Yes.”

whether Sharon Tube had “fail[ed] to comply with the Terms of Sale” and, if so, the proper amount of damages that the failure caused Morello/White Lion.² In accord with the jury’s findings, the trial court entered a take-nothing judgment in favor of Sharon Tube.

Judgment Notwithstanding the Verdict

In its first issue, White Lion argues that the trial court erred in denying its motion for partial judgment notwithstanding the verdict and to disregard the jury’s negative answer to question number two because, “as a matter of law,” the Terms of Sale and Order Approving Sale created “a binding obligation for Sharon Tube to be responsible to White Lion for damages” caused by the removal of Sharon Tube’s equipment, White Lion was in “privity” with VMI and the bankruptcy sale vested White Lion with “all right, title and interest of [VMI],” and “White Lion was a third-party beneficiary of the Terms of Sale.” In response, Sharon Tube argues that it is not responsible for White Lion’s damages because it, as a matter of law, did not contract with White Lion or Morello for either the sale or removal of the assets purchased at the bankruptcy sale, all contracts for the sale and removal of assets were between Daley-Hodkin and the individual buyers, the consideration for the purchase and removal of assets was exchanged between Daley-Hodkin and

² The parties presented conflicting evidence on whether Sharon Tube breached the Terms of Sale and damaged White Lion’s property in the manner alleged, but based upon the issues presented, an in-depth review of this evidence is not necessary to the disposition of this appeal.

the individual buyers, and the Order Approving Sale, at most, constituted a “condition precedent” to start the date for the buyers to remove their assets. Sharon Tube also asserts that there is no evidence that the parties intended to make White Lion a third-party beneficiary and White Lion is not a third-party beneficiary as “a matter of law.”

A judgment notwithstanding the verdict is proper when a directed verdict would have been proper. TEX. R. CIV. P. 301; *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). A party challenging the legal sufficiency of an adverse finding on which that party had the burden of proof at trial must demonstrate that the evidence conclusively established, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *Wagner v. Edlund*, 229 S.W.3d 870, 874 (Tex. App.—Dallas 2007, pet. denied). In reviewing a matter of law challenge, we first examine the record for evidence that supports the adverse finding and ignore contrary evidence. *Dow Chem.*, 46 S.W.3d at 241 (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)). We indulge every reasonable inference to support the finding, crediting favorable evidence if a reasonable jury could and disregarding contrary evidence unless a reasonable jury could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 822 (Tex. 2005). If there is no evidence to support the adverse finding, we then review the entire record to determine if the contrary proposition is

established as a matter of law. *Dow Chem.*, 46 S.W.3d at 241 (citing *Sterner*, 767 S.W.2d at 690). The test for legal sufficiency is the same for directed verdicts, judgments notwithstanding the verdict, and no-evidence review. *City of Keller*, 168 S.W.3d at 823.

White Lion first asserts that it formed a direct contractual relationship with Sharon Tube through the Terms of Sale and the subsequent Order Approving Sale and, as a result, Sharon Tube had a contractual responsibility to compensate White Lion for damages it caused in removing the equipment from White Lion's buildings and property. Based upon this assertion, White Lion argues that the jury was required to find that, by agreeing to the Terms of Sale, an agreement was made "*by and between Bernard Morello/[White Lion] and [Sharon Tube].*" (Emphasis added).³

In support of its claim that it had a direct contractual relationship with Sharon Tube, White Lion emphasizes the following language in the Terms of Sale:

. . . The purchaser of the Real Property will be required, if necessary, to provide the Auctioneer with unrestricted use and occupancy of the Real Property through June 30, 2004 or completion of delivery of the Personal Property, whichever is later.

. . . .

Removal of the Personal Property must be completed in accordance with the terms stated by the Auctioneer. All of the Personal Property is required to be removed by the purchaser at its own risk and expense

³ White Lion did not seek recovery through a negligence claim.

and in compliance with all applicable laws, regulations or ordinances including State and Federal Environmental laws. . . . Removal of Personal Property will begin immediately following approval of the sale by the US Bankruptcy Court. . . .

....

All purchasers and their agents involved in the removal of the Personal Property may, at the Auctioneer's discretion, be required to provide a Certificate of Insurance naming Daley-Hodkin Corporation and [VMI] as loss payee . . . All purchasers are required to disconnect and cap electrical and water lines in a professional and reasonable manner. Failure to do so will result in the purchaser being held responsible for any costs or damages incurred.

....

. . . All bids are subject to the approval of the US Bankruptcy Court District of Delaware.

. . . . Modification or waiver of any portion of these Terms of Sale or additional terms and conditions of sale may be made by Auctioneer at any time and said modification shall not affect any other portion of the Terms of Sale. A successful bid is considered acceptance of the above terms and is a binding contract.

White Lion also relies upon several provisions in the bankruptcy court's Order Approving Sale, including those that state that the buyers of the personal and real property were "good faith purchasers" and the terms and provisions of the "Transaction Documents" and Order Approving Sale were binding upon and inured to the benefit of the debtors and their creditors, the buyers, their respective successors and assigns, and any affected third parties, including all persons asserting an interest in the assets sold to the buyers. White Lion emphasizes that

the bankruptcy court, in its Order Approving Sale, ordered all buyers to “cooperate and take steps reasonably necessary with Seller and Seller’s agents to implement and facilitate the removal of personal property” located at the buildings and property purchased by White Lion and that, “in connection with the foregoing,” all buyers were ordered to provide “to Seller’s agent, Daley-Hodkin, prior to taking possession” of the assets, certificates of insurance “evidencing the following as loss payees: Debtors, Daley-Hodkin and *Bernard J. Morello*.”⁴ (Emphasis added.)

In addition to the Terms of Sale and Order Approving Sale, the record also contains a copy of the February 27, 2004 Real Estate Purchase Agreement “by and between” VMI and Morello and the amendment to the Real Estate Purchase Agreement between VMI and Morello. In the Real Estate Purchase Agreement, which was executed only by Morello and VMI, Morello agreed to, after closing, “reasonably cooperate and assist [*VMI*] and its creditors in [*VMI*’s] liquidation of any assets which remain upon [*Morello*’s] premises.” (Emphasis added.) Morello further agreed to provide *VMI and its creditors* “with reasonable access to [*Morello*’s] facilities during normal business hours to effectively remove and liquidate any such assets, at no cost to [*VMI*].” In return, VMI agreed to “provide

⁴ The evidence at trial revealed that, despite this provision in the Order Approving Sale, Sharon Tube never presented a certificate of insurance naming White Lion or Morello as a loss payee but was allowed to remove the personal property that it purchased.

a member of its staff to oversee any such removal,” the removal would be completed by June 30, 2004 unless mutually extended, and VMI would reimburse Morello for utilities for the property until removal was completed. The Real Estate Purchase Agreement and the amendment thereto contained no reference to other buyers of personal property from VMI. Moreover, although the Real Estate Purchase Agreement required cooperation between Morello and VMI in the course of liquidation and removal of personal property from the real property, it contained a provision specifically entitled “No Third Party Beneficiaries,” which stated that terms of the Real Estate Purchase Agreement are “intended solely for the benefit of the parties” and successors and that the parties did not intend to confer third-party beneficiary rights upon any other person.

The elements of a valid contract are “(1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) each party’s consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.” *DeClaire v. G & B McIntosh Family Ltd. P’Ship*, 260 S.W.3d 34, 44 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A contract must be based upon a valid consideration—in other words, mutuality of obligation. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997). “Consideration is a bargained for exchange of promises” and

“consists of benefits and detriments to the contracting parties.” *Id.* at 408–09. A contract that lacks consideration is unenforceable.⁵ *Id.* at 409.

The evidence presented at trial conclusively established that Daley-Hodkin, as the designated auctioneer for the bankruptcy sale of VMI’s assets, made the offers to sell the personal and real property of VMI to the potential buyers bidding at the bankruptcy sale. Daley-Hodkin required all bidders to register and all successful bidders, along with the second-highest bidders for certain assets, to make a deposit by cash, check, or certified funds “made payable to Daley-Hodkin.” Certain bidders, including bidders for real property, were required to deliver an acceptable “Purchase Agreement,” or Daley-Hodkin could offer the assets for rebid. White Lion and Sharon Tube made their respective bids to purchase the assets of VMI in accordance with the Terms of Sale directly to Daley-Hodkin. It is undisputed that White Lion and Sharon Tube did not have any dealings or negotiations with each other in the course of bidding and their purchase of the assets. Moreover, it is undisputed that the parties made their respective payments for their purchases to Daley-Hodkin, not to each other. There is no evidence that, prior to these purchases being made, White Lion or Sharon Tube had any dealings with the other.

⁵ The trial court, in the jury charge, included instructions on the elements of a valid contract consistent with the above-quoted law.

Although the Terms of Sale contained contractual obligations pertaining to the removal of personal property from the properties that were purchased by Morello and ultimately conveyed to White Lion, there is nothing in the Terms of Sale, or in the other evidence presented at trial, that would support an affirmative finding to question number two that “by agreeing to the Terms of Sale” there was an agreement made “*by and between Bernard Morello/White Lion and Sharon Tube.*” In sum, Daley-Hodkin, as the Auctioneer for VMI, made the offers to the individual buyers to purchase VMI’s assets; the individual buyers accepted the offers made by Daley-Hodkin by dealing directly with Daley-Hodkin and tendering consideration to Daley-Hodkin; and the required “meeting of the minds” occurred between Daley-Hodkin and the individual buyers.

Even assuming that, because the Terms of Sale provided Daley-Hodkin with the authority to modify its agreement with the buyers, the bankruptcy court’s Order Approving Sale could have served to modify the Terms of Sale in some respect, the Order Approving Sale could not have resulted in the creation of an agreement *between Morello/White Lion and Sharon Tube.* This is because, as explained above, such an agreement between these parties never previously existed. Again, the Terms of Sale evidenced an agreement only between the individual buyers and Daley-Hodkin, as Auctioneer for VMI; nothing in the Terms of Sale evidenced an agreement between or among the buyers themselves. For example, there were

multiple buyers of VMI's personal property, none of whom had direct contractual relationships with each other. If one of the buyers of some of VMI's personal property had damaged another piece of personal property purchased by another buyer, there is nothing in the record before us to indicate that those buyers could be held contractually responsible to each other for any damages incurred. Although Sharon Tube, like the multiple other buyers of VMI's assets, was identified in an attachment to the Order Approving Sale, it was not a party to the bankruptcy proceedings, and its mere identification in the Order Approving Sale as a buyer does not constitute any evidence that "by agreeing to the Terms of Sale" there was of an offer, acceptance, and meeting of the minds by and between White Lion and Sharon Tube.

This, of course, is not to say that Sharon Tube did not agree to be bound by the Terms of Sale, including the provisions regarding the removal of property. Even Sharon Tube agrees that it was bound by these terms, although it disputes to whom it was contractually bound and that it breached the Terms of Sale in the manner and scope alleged. There is no evidence that Sharon Tube reached an agreement to be contractually bound directly to White Lion through the Terms of Sale, which is what the jury was asked to find in question number two. The provisions of the Order Approving Sale emphasized by White Lion simply stated that White Lion and the other buyers were good faith purchasers and that the terms

and provisions of the Transaction Documents, including the Terms of Sale and the Order Approving Sale itself, were binding upon and inured to the benefit of the debtors and buyers. Although the bankruptcy court imposed certain additional orders through the Order Approving Sale,⁶ it did not create a direct contractual relationship between White Lion and Sharon Tube.

In the alternative, White Lion argues that because it was in privity with VMI as a good faith purchaser, it was vested with all right, title and interest of VMI in the buildings and property that it purchased. White Lion seems to suggest that it was an assignee of any damage claims previously held by VMI. However, the evidence presented at trial was that Sharon Tube caused the alleged damage to the buildings after Morello's closing and at the time when either Morello or White Lion owned the real property and buildings. White Lion's "privity" argument does not provide this Court with a basis to hold that the trial court erred in not disregarding the jury's negative answer to question number two.⁷

⁶ Most relevant of these additional orders was the additional requirement for the buyers to provide Daley-Hodkin with certificates of insurance naming Morello as a loss payee. As discussed above, it is undisputed that Sharon Tube failed to provide a certificate of insurance naming Morello as loss payee.

⁷ Again, in question number two, the jury was asked whether or not, "[b]y agreeing to the Terms of Sale," there "was *an agreement made by and between Bernard Morello/[White Lion] and [Sharon Tube].*" (Emphasis added.) On rehearing, White Lion more forcefully argues matters that do not directly address whether the trial court erred in denying "White Lion's motion for partial judgment notwithstanding the verdict" and disregarding the jury's answer to question number two. For example, White Lion stresses that it "stepped into the shoes of

Finally, White Lion argues that the trial court should have disregarded the jury's negative answer to question number two because White Lion was "a third-party beneficiary of the Terms of Sale" between Sharon Tube and VMI and Daley-Hodkin. However, to the extent that there is any evidence that White Lion was a third-party beneficiary of the contract between these parties, which we address below, such evidence would not have provided a basis for the trial court to disregard the jury's negative answer to question number two. Again, question number two asked the jury whether there was an agreement made *between White Lion and Sharon Tube* through the Terms of Sale. There is simply no evidence of such an agreement and, in fact, the evidence cited by the parties conclusively established that there was no direct contractual relationship formed between White Lion and Sharon Tube as a result of agreeing to the Terms of Sale.⁸ Accordingly, we hold that the trial court did not err in not disregarding the jury's answer to question number two and in denying White Lion's motion for partial judgment notwithstanding the verdict.

VMI" and that Sharon Tube is "liable as a matter of law." White Lion also asserts that, despite the language of question two, its argument for Sharon Tube's liability "is not based on a contract between [White Lion] and Sharon Tube." But this is precisely what the jury was asked: whether, by agreeing to the Terms of Sale, White Lion and Sharon Tube had formed a contractual relationship. This is also the finding that White Lion asked the trial court to disregard and that White Lion challenges in its first issue in its appellant's brief.

⁸ We address below White Lion's contention in its third issue that it was entitled to a separate question on its status as a third-party beneficiary.

We overrule White Lion's first issue.

Instruction on Order Approving Sale

In its second issue, White Lion argues that the trial court erred in submitting question number two to the jury because it improperly omitted reference to the "Order Approving Sale" as part of the contract. White Lion asserts that question number two should have read, "By agreeing to the Terms of Sale *and the Bankruptcy Court Order* do you find that there was an agreement made by and between Bernard Morello/White Lion Holdings, L.L.C. and Sharon Tube Corporation?"⁹ (Emphasis added.) White Lion asserts that "any time multiple documents are alleged to constitute a contract, the jury question must name all the documents." White Lion further argues that because it gave Daley-Hodkin and the buyers, including Sharon Tube, access and entry to its property pursuant to the Terms of Sale and Order Approving Sale, consideration flowed between White Lion and Sharon Tube in that it gave Sharon Tube and its contactor, DCI, under these documents, "access to the property based on their promise to assume the risk of the damages and to disconnect and cap water and electrical lines in a professional and reasonable manner."

Accordingly, because there is no evidence that a contractual relationship existed between White Lion and Sharon Tube as reflected in the Terms of Sale and

⁹ White Lion requested inclusion of the emphasized portion.

bankruptcy court's Order Approving Sale, we hold that the trial court did not err in not referencing the Order Approving Sale in question number two.

We overrule White Lion's second issue.

Question on Third-Party Beneficiary Status

In its third issue, White Lion argues that the trial court erred in not submitting to the jury a question asking whether White Lion was a third-party beneficiary of the Terms of the Sale because White Lion and Morello "were required to be named as loss payees" in the buyers' insurance policies and this condition was imposed "prior to removal and was expressly required" in the Order Approving Sale."¹⁰ White Lion notes that the Order Approving Sale provides that "Terms of Sale inured to the benefit of all Buyers" and that "[c]ertain provisions in the Terms of Sale were clearly for the benefit of the property owner."

"Texas law recognizes that third parties have standing to recover under a contract that is clearly intended for their direct benefit." *City of Houston v. Williams*, No. 09-0770, 2011 WL 923980, at *14 (Tex. Mar. 18, 2011) (citing *Stine*

¹⁰ White Lion presents this argument in the alternative to its argument in its first issue that the trial court should have disregarded the jury's answer to question number two for a number of reasons, including that it was "a third-party beneficiary of the Terms of Sale." We have previously held that even if evidence existed to support a finding that White Lion was a third-party beneficiary, such evidence would not have provided a basis for the trial court to disregard the jury's answer to question number two. The jury was not asked any question about third-party beneficiary status, and the parties' assertion that question number two was broad enough to include whether White Lion was an intended third-party beneficiary ignores the plain language of that question.

v. Stewart, 80 S.W.3d 586, 589 (Tex. 2002) (per curiam)). In determining whether a third party can enforce a contract, the intention of the contracting parties is controlling. *Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc.*, No. 08–0244, 2011 WL 1206376, at *3 (Tex. Apr. 1, 2011). Although a contract need not have been executed solely to benefit a noncontracting party, we will “not create a third-party benefit by implication.” *Williams*, 2011 WL 923980, at *14; *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651–52 (Tex. 1999). The presumption is that parties contract only for themselves, absent a clear showing of intent otherwise. *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007); *MCI Telecomms. Corp.*, 995 S.W.2d at 651. An intent to confer a direct benefit upon a third party must be clearly and fully spelled out or enforcement by the third party must be denied. *Basic Capital Mgmt., Inc.*, 2011 WL 1206376, at *3; *S. Tex. Water Auth.*, 223 S.W.3d at 306 (citing *MCI Telecomms. Corp.*, 995 S.W.2d at 651).

White Lion and Sharon Tube, like the other buyers at the bankruptcy sale, entered into a contract with Daley-Hodkin, the auctioneer of VMI’s assets, to purchase certain assets. There is no evidence of any dealings or negotiations between Sharon Tube and White Lion or Morello prior to the purchase. There is nothing in the Terms of Sale stating that any buyers of the assets would be considered the third-party beneficiaries of other buyers. We recognize that the

Terms of Sale required buyers to remove their purchased personal property at their own risk and expense and in compliance with all applicable laws. However, contrary to White Lion's assertion, this specific term did not "clearly and fully spell[] out" the rights of other third-party buyers to bring suit for breach of any specific enforceable commitments. Moreover, the Terms of Sale also reflect that Daley-Hodkin, the auctioneer, was charged with conducting and overseeing the removal process. The Terms of Sale expressly provided that "[r]emoval of the Personal Property must be completed in accordance with the terms stated by the Auctioneer." The Terms of Sale imposed specific deadlines set by Daley-Hodkin for removing purchased personal property and provided Daley-Hodkin with the discretion to extend the deadlines set forth. The Terms of Sale provided Daley-Hodkin with the discretion to require the buyers and their agents who were involved in the removal process to provide certificates of insurance naming Daley-Hodkin and VMI as loss payees. Nothing in the Terms of Sale contemplated any other loss payees. Finally, the Terms of Sale provided the auctioneer with the discretion to modify or waive the contractual terms. Although the Terms of Sale did provide that buyers would be "held responsible for any costs or damage incurred" in the event that they failed to "disconnect and cap electrical and water lines in a professional and reasonable manner," nothing in this provision indicated that White Lion, the eventual buyer of the real property, would be entitled to hold

these other buyers *contractually* liable for damages caused during the removal process.

We further note that the Terms of Sale obligated Morello and White Lion, as the eventual purchaser of the real property, to provide Daley-Hodkin with “unrestricted use and occupancy” of the real property throughout the designated removal period. While such an obligation would have a benefit to the buyers of the personal property, this promise, made by Morello to Daley-Hodkin, assured Daley-Hodkin and VMI’s creditors access to the property in order to effectively liquidate VMI’s assets. The Real Estate Purchase Agreement executed by VMI and White Lion provided consistent obligations that required White Lion, after closing, to “reasonably cooperate and assist” VMI and VMI’s creditors in the liquidation of any assets remaining on the property, and VMI, in return, agreed to “provide a member of its staff to oversee any such removal” and to reimburse Morello for utilities for the removal period. Yet, the Real Estate Purchase Agreement also expressly stated that VMI and White Lion did not intend to confer third-party beneficiary rights upon any other person, including, necessarily, Sharon Tube and all the other buyers of VMI’s assets. These documents establish that, despite the benefit of access, the parties did not intend to confer third-party beneficiary status on the personal property buyers. The “Transaction Documents” conclusively establish that such buyers would not be able to sue White Lion for

recovery under a third-party beneficiary claim. Similarly, the documents before us do not reveal that Daley-Hodkin and Sharon Tube possessed an intent “to confer a direct benefit” upon Morello and White Lion. Because Morello and White Lion’s third-party beneficiary status was not “clearly and fully spelled out,” White Lion may not sue for enforcement of the contract as a third-party beneficiary. *See S. Tex. Water Auth.*, 223 S.W.3d at 306.

Finally, we address White Lion’s argument that its status as a third-party beneficiary is evidenced by the fact that the bankruptcy court’s Order Approving Sale required buyers to provide Daley-Hodkin, prior to taking possession of the purchased assets, certificates of insurance naming Morello, in addition to VMI and Daley-Hodkin, as loss payees. First, we note that this requirement was not in the Terms of Sale. Second, the testimony presented at trial reveals that Sharon Tube never provided a certificate naming White Lion as a loss payee and was allowed to remove the property under Daley-Hodkin’s direction. Here, White Lion has not sued Daley-Hodkin for its conduct in the removal process. There is also no indication in the record before us that White Lion has sought to recover any potentially available insurance proceeds under policies naming Daley-Hodkin or VMI as loss payees.

Accordingly, we hold that the trial court did not err in not submitting to the jury a question asking whether White Lion was a third-party beneficiary of the Terms of the Sale.

We overrule White Lion's third issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings and Bland.¹¹

¹¹ Justice Hanks resigned from the Court effective September 13, 2010 and is now a magistrate judge for the United States District Court for the Southern District of Texas, Houston Division. This case has been decided by the two remaining justices. TEX. R. APP. P. 41.1(b).