North Dakota Law Review

Volume 27 | Number 3 Article 8

1951

Contracts - Third Party Beneficiaries - Donee, Creditor, and Incidental Beneficiaries

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contract had existed, and thus allow recovery on quantum meruit for the reasonable value of the legal services rendered.[10]

The instant case reaches a result contrary to the weight of authority by a confused application of doctrines of equity and contract. Although finding that the express contract was void, the court indicates that its terms are, nevertheless, valid to determine the services and expenditures for which recovery may be had; and by some twist of reasoning the illegal taint of the express contract is transferred so as to defeat an action to recover for the reasonable value of services rendered in good faith. It is submitted that the void original contingent fee contract is totally ineffective and should have no bearing upon plaintiff's right to recover in quantum meruit.[11][12]

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CONTRACTS—THIRD PARTY BENEFICIARIES—DONEE, CREDITOR, AND INCIDENTAL BENEFICIARIES. Plaintiff leased part of a building as a storage space for stock. The lessor subsequently contracted to have an automatic sprinkler system signalling device installed in the building by the defendant. Because of faulty operation of the system and leakage, the plaintiff's stock was damaged. Upon suit it was *held* that plaintiff was an incidental beneficiary as distinguished from a donee or creditor beneficiary and could not recover. There was no intent of the contracting parties to recognize the plaintiff as the primary person to be benefited. *Marlboro Shirt Co. v. American Dist. Tel. Co.*, 77 A.2d 776 (Md. 1951).

The majority of the courts hold that a third party donee or creditor beneficiary may sue on a contract made for his benefit,[1] but that an incidental beneficiary cannot sue on the contract.[2] This positive rule allowing a third party to sue is based on the proposition that the law operates on the act of the parties, thus creating the duty, establishing the privity and implying the promise and obligations on which the action is founded.[3] The third party's right of action is not, however, dependent upon the consideration running directly from him.[4]

The majority rule has been embodied in the statutes of several states, including North Dakota,[5] and with regard to these statutes,

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[10] McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746 (1904); Klampe v. Klampe, 137 Minn. 227, 163 N.W. 295 (1917); Lynde v. Lynde, 64 N.J. Eq. 736, 52 Atl. 694 (1902). *Contra*: Barngrover v. Pettigrew, 128 Ia. 533, 104 N.W. 904 (1905).

[11] 78 A.2d at 242 (1951): "We . . . remand . . . for further proceedings . . . The plaintiff should have an opportunity to present evidence of the services and expenditures . . . for which the original undertaking did not provide."

[12] *Cf.* Baca v. Padilla, 26 N.M. 223, 190 Pac. 730 (1920).

[1] Mackubin v. Curtiss-Wright Corporation, 190 Md. 52, 57 A.2d 318 (1948); Williston, Contracts §356 (rev. ed. 1936).

[2] Kelly v. Richards, 95 Utah 560, 83 P.2d 731 (1938).

[3] Packer v. Board of Retirement, 203 P.2d 784 (Cal. 1949), *rev'd. on other grounds*, 217 P.2d 660 (1950); Tweddale v. Tweddale, 116 Wis. 517, 93 N.W. 440 (1903); Small v. Schaefer, 24 Md. 143, 159 (1866).

[4] McDonald v. Finseth, 32 N.D. 400, 155 N.W. 863 (1916); *In re* McCanna's Estate, 230 Wis. 561, 284 N.W. 502 (1939).

[5] N.D. Rev. Code §9-0204 (1943): "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

the courts are in accord in the view that a benefit which is purely incidental and which the parties did not contemplate, though resulting from performance of the contract, will not avail the third party of a cause of action on the contract.[6] The intent of the parties to confer a benefit upon the third party is the important element,[7] and "it must appear . . . by the direct terms of the contract, that it was made for the benefit of such (third) parties. It cannot be implied from the fact that the contract would, if carried out between the parties to it, operate incidentally to their benefit."[8] "To be a third party beneficiary entitled to recover on a contract it is not enough that it be intended by *one* of the parties to the contract and the *third person* that the latter should be benefited, but *both parties to the contract* must so intend and must indicate that intention in the contract . . . The obligation to the third party must be created, and must affirmatively appear, in the contract itself . . ."[9] Benefit without intent to benefit does not avail the third party of a cause of action.[10] But, the intent is a matter of interpretation of the contract, with all surrounding circumstances taken into consideration.[11] The tenant's right to recover from the promisor for the reason that the contract was made for his benefit might be influenced by the tenant's occupancy of the premises prior or subsequent to the contract. However, in one case the tenant was not allowed to recover where his tenancy was subsequent to the contract,[12] whereas in another case of subsequent tenancy recovery was allowed on the ground that the agreement was made in anticipation of future occupancy of the premises by a tenant.[13]

Grismore suggests that the utility of the intent test may well be doubted because of the speculation which must often attach to a search of the motives of the parties.[14] The author indicates that the test which seems to run through all of the cases, though the courts have not expressed it in this language, is this: whenever a promisor has promised to render a performance directly to the third person the latter can enforce it as having been made for his benefit; but if

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[6] Bekken v. Equitable Life Assur. Soc., 70 N.D. 122, 293 N.W. 200 (1940); State v. Padgett, 54 N.D. 211, 209 N.W. 388 (1926) citing Farmers' State Bank of Gladstone v. Anton, 51 N.D. 202, 199 N.W. 582 (1924).

[7] Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 Pac. 898 (1928); Swift Lumber & Fuel Co. v. Hock, 124 Neb. 30, 245 N.W. 3 (1932); Parlin v. Hall, 2 N.D. 473, 52 N.W. 405 (1892); Cf. DeLuxe Glass Co. v. Martin, 208 P.2d 1127 (Utah 1949), where the court said, ". . . so long as the contract necessarily and directly benefits the third person, it is immaterial that this protection was afforded him, not as an end in itself, but for the sole purpose of securing to the promisee some consequent benefit or immunity . . . It is to be borne in mind that the parties are presumed to intend the consequences of a performance of the contract. That which is contemplated by the terms of the contract is 'intended' by the parties."

[8] Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100 (1887).

[9] Spires v. Hanover Fire Ins. Co., 364 Pa. 52, 70 A.2d 828, 830 (1950).

[10] Johnson v. Clark, 39 N.W.2d 431 (N.D. 1949); Borough of Brooklawn Housing Corporation, 124 N.J.L. 73, 11 A.2d 83 (1940).

[11] Colonial Discount Co. v. Avon Motors, Inc., 137 Conn. 196, 75 A.2d 507 (1950); Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931).

[12] Swift Lumber & Fuel Co. v. Hock, 124 Neb. 30, 245 N.W. 3 (1932).

[13] Werner v. Kent Parking Garage, 133 N.J.L. 104, 42 A.2d 707 (1945).

[14] Grismore, Law on Contracts §234 (1947).

the benefit to the third person is indirect, if it springs from a performance agreed to be rendered to the promisee, then the third party is only an incidental beneficiary and not entitled to sue on the contract.

Weston R. Christopherson

EMINENT DOMAIN—DETERMINATION OF MARKET VALUE—"GOING BUSINESS" AS ELEMENT OF VALUE. The city of Dallas instituted condemnation proceedings to secure a portion of the business property of the defendants for the purpose of widening a 20-foot gravelled roadway into a 40-foot concrete street. The trial court excluded expert testimony as to the value of defendant's grocery and liquor business, based among other elements on gross sales and net operating profit, on the ground that damage to a business is not a proper element of compensation. Upon appeal it was *held,* with one justice dissenting, that a "going business" is property for which recovery can be had in eminent domain proceedings and that the evidence should have been admitted. The error being prejudicial, a reversal was ordered. *Priolo v. City of Dallas,* 234 S.W.2d 1014 (Tex. Civ. App. 1950).

It has generally been held in the absence of statute, that the 5th amendment of the Federal constitution and similar provisions in state constitutions do not require that compensation be paid where a business is injured or destroyed in connection with the taking of property for public use under eminent domain proceedings.[1] Thus injury to a business is generally considered *damnum absque injuria*[2] either on the theory that there is no taking and the owner is free to carry on his business elsewhere,[3] or that a business is less tangible in nature than the rights which the constitution undertakes to protect.[4] However, it is proper for a government to pay going concern value where it intends to utilize the business and where the owner is, by the monopolistic nature of the enterprise, deprived of the right to carry on the business elsewhere.[5] The rationale of the so-called public utility cases—that when the taking has the inevitable effect of depriving the owner of the going concern value of his business there has been a compensable taking of property—has been applied to a

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[1] United States v. Powelson, 319 U.S. 266 (1943); Mitchell v. United States, 267 U.S. 341 (1925); United States v. Stephenson Brick Co., 110 F.2d 360 (5th Cir. 1940). For an outline of the various constitutional provisions see Lewis, Eminent Domain §15 *et seq.* (3rd ed. 1909). For an excellent article describing the growth of the concept of "property" in eminent domain proceedings see 41 Yale L.J. 221 (1931).

[2] Oakland v. Pacific Coast Lumber & Mill Co., 171 Cal. 392, 153 Pac. 705 (1916).

[3] Mitchell v. United States, 267 U.S. 341 (1925); Cobb v. Boston, 109 Mass. 438, 444 (1872); Ranlet v. Concord Ry., 62 N.H. 561, 564 (1883).

[4] Sawyer v. Commonwealth, 182 Mass. 245, 65 N.E. 52 (1902).

[5] Omaha v. Omaha Water Co. 218 U.S. 180, 202 (1910), (municipal water system taken); Monongahela Navigation Co. v. United States, 148 U.S. 312, 337-341 (1893) (lock and dam appropriated); Lebanon & Nashville Turnpike Co. v. Creveling, 159 Tenn. 147, 17 S.W.2d 22, 26 (1929), (toll turnpike condemned for public highway use).