

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2008-0865

WILLOWDALE PLACE COOPERATIVE

V.

KILBURN CRAGS, LLC

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Appeal from Final Order of Grafton County Superior Court

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**BRIEF OF THE DEFENDANTS**

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## QUESTIONS PRESENTED

- I. For plaintiff's issues, See Plaintiff's Brief. The defendants raised the following issue in their cross appeal: Whether the Trial Court erred (although ultimately reaching the correct result in its merits decision) in its ruling on the defendants' Motion for Summary Judgment and in its ruling on the merits by holding that language in the relevant Purchase and Sale Agreement ("Agreement") explicitly negating and excluding third party rights under the Agreement did not bar the plaintiff's claim as a third party beneficiary of the Agreement.

**STATEMENT OF THE FACTS AND OF THE CASE**

The defendants below, Austin W. Smith and David Groom, are principals of the defendant entity, Kilburn Craggs, LLC (hereinafter referred to as "defendants" or "Buyers"). On or about March 30, 2005, the defendants entered into a Purchase and Sales Agreement ("Agreement") with Joyce Towle Varney (hereinafter referred to by name or as "Seller"). The Agreement was a purchase and sale agreement for the sale of land from Seller to Buyers on which a mobile home park known as Towle's Trailer Park ("Park") is located. The tenants of the Park form the plaintiff, the Willowdale Place Cooperative, Inc.

The Agreement contains the following language regarding mobile homes at the Park:

It is a condition of this Agreement that the Buyer complete the development [sic] the "Back Land" above and to the west of the existing mobile home park on the premises and provide the residents of the mobile homes situated in that park with alternative mobile home rental sites in the newly developed area.

See Plaintiff's Appendix at p 3 (the "Relocation Provision").

The Agreement contains the following language concerning the rights (or lack thereof) of non-parties to the agreement:

This Agreement is solely for the benefit of the parties, and nothing in this Agreement shall be deemed to create enforceable rights in favor of third parties or shall be referred to in interpreting independent rights and obligations of third parties.

See Plaintiff's Appendix at pp 6-7 (the "No Third Party Rights Provision"). The No Third Party Rights Provision was not in the initial version of the Agreement. It was added at the request of the Buyers to address their concern that they had not undertaken an investigation of the feasibility of relocating mobile homes and they "wanted to be sure that this agreement was solely between Joyce Varney and [the buyers]." See Trial Transcript at p 138.

During their due diligence, the Buyers learned that it would not be feasible to relocate the residents of the Park. See Trial Transcript at p 126. Austin Smith testified, and the Trial Court found, that at the closing of the sale of the Park, he informed Joyce Towle Varney that the Buyers would not relocate the mobile homes. See Trial Transcript at p 143; Decision at p 10. Joyce Towle Varney proceeded with the closing nonetheless.

During the fourteen months between execution of the Agreement and the actual sale of the Park, Jocyce Towle Varney made no inquiry whatsoever as to the status of the Buyer's plans for developing the back land or relocating mobile homes. See Trial Transcript at pp 166-167. Since the sale of the Park, Joyce Towle Varney has never demanded that the defendants develop the back land or relocate mobile homes, even after park residents specifically requested her to do so. See Trial

Transcript at pp 166-168. Indeed, the plaintiff sued Joyce Towle Varney as a result of the defendants failure to develop the back land and relocate mobile homes and she has never demanded or sought indemnification from the Buyers. See Trial Transcript at pp 144, 171.

The plaintiff sued, seeking specific performance of the Relocation Provision. The defendants moved for summary judgment based in part upon the No Third Party Rights Provision, which was denied. A trial was held and the Trial Court denied the plaintiff's claims for relief. This appeal followed. All other facts relevant to this appeal shall be referred to in the defendant's brief or have been presented in the factual summary of the plaintiff's brief.

### SUMMARY OF THE ARGUMENT

New Hampshire law recognizes and honors "no third party rights" provisions in contracts. Specifically, this Court has held that even where a third party benefits from a contract, if the contract evidences an intent to exclude such rights in the form of a "no third party rights" provision, this intent should be honored. See Hrushka v. State Department of Public Works, 117 N.H. 1022 (1997). Given the No Third Party Rights Provision in the Agreement, it was error for the Trial Court to deny the defendants' motion for summary judgment.

Assuming, arguendo, that Hrushka is not dispositive of this case, the Trial Court did not commit legal error. It is defendants' position that the Agreement is absolutely unambiguous on the narrow issue of whether it provides enforceable rights to third parties - it does not. However, assuming this is not the case, the Agreement is at minimum ambiguous on the issue of third party rights. On the one hand, it contains a promise that, if honored, might conceivably benefit a third party - the tenants of the Park. On the other hand, the Agreement clearly states it is not intended to create enforceable rights in favor of third parties. There is an obvious ambiguity on the face of the Agreement on the issue of whether the parties intended to establish rights for third parties.

Having recognized this ambiguity, the Trial Court properly relied upon extrinsic evidence in determining the Agreement did not confer third party rights. There was ample evidence supporting the Trial Court's decision in this regard. There can be little question that the Court's interpretation of the Agreement, using this extrinsic evidence, was well founded and supported by the evidence.

As the Trial Court denied the plaintiff's claims for relief, the defendants are satisfied with the outcome below irrespective of how it was reached. However, the defendants urge this Court to find they were entitled to summary judgment based upon Hrushka and the No Third Party Rights Provision. Private parties in this state should be able to include "no third party rights" language in an agreement or contract and know with certainty that they are protected from third party claims.

## ARGUMENT

The principal issue this case required the Trial Court to decide was whether the Agreement provided enforceable rights to the plaintiff's members - the tenants of the Park. This required the plaintiff to prove that "...the [Agreement] is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract." Tamposi v. Star Market Company, 119 N.H. 630, 633 (1979). "A benefit to a third party is a 'motivating cause' of entering into a contract only where the promisee intends to give the beneficiary the benefit of the promised performance." Grossman v. Murray, 144 N.H. 345, 348 (1999) (quoting RESTATEMENT (SECOND) of CONTRACTS, §302(1)(b)(1981)). "As a general rule, the rights of a third party are dependent upon the intent of the parties who executed the Agreement." Hrushka v. State Department of Public Works, 117 N.H. 1022, 1024 (1977).

Thus, the Trial Court had to determine whether the Agreement (a) was expressed in such a fashion that the buyers would have known the seller intended to confer a benefit upon a third party; and (b) that the parties intended to give the park residents the benefit of the promised performance - the relocation of mobile homes. Absent ambiguity, the parties' intent should be ascertained from the plain meaning of the

language used in the Agreement. See Ryan James Realty v. Villages At Chester Condo. Assoc., 153 N.H. 194, 197 (2006).

I. As the Agreement was clear and unambiguous with respect to the issue of third-party rights, the defendants should have been awarded summary judgment.

After the plaintiff filed suit, the defendants moved for summary judgment. The purpose of summary judgment is to end litigation expeditiously when there is no genuine issue of material fact and a moving party is entitled to judgment as matter of law. See RSA 491:8-a; Brown v. John Hancock Mut. Life Ins. Co., 131 N.H. 485, 490 (1989); Carbur's Inc. v. A&S Office Concepts, 122 N.H. 421, 423 (1982). The Court is to review all pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits and exhibits submitted by the parties, in determining whether there exists any genuine issue of material facts. See Coburn First Equity Associates, 116, N.H. 522, 524 (1976). An issue of fact is "material" if it affects the outcome of the litigation. See DesRoches v. United States Postal Service, 631 F. Supp. 1375, 1379 (D.N.H. 1986).

The defendants asked the Trial Court to award them summary judgment on the issue of whether the plaintiff had enforceable rights as a third-party beneficiary to the Agreement. The basis for this aspect of the defendants' Motion for Summary Judgment was the Relocation Provision, which provided:

This Agreement is solely for the benefit of the parties, and nothing in this Agreement shall be deemed to create enforceable rights in favor of third parties or shall be referred to in interpreting independent rights and obligations of third parties.

(emphasis added). See Plaintiff's Appendix at pp 6-7.

The Trial Court compared the language of the Relocation Provision to the language of the No Third Party Rights Provision. The Trial Court found that the two provisions created "contrary indications as to the parties' intent concerning the third party" and thus presented a disputed question of material fact. On this basis, the Trial Court denied the defendants' motion for summary judgment on the issue of the plaintiff's third party beneficiary status.

It was error for the Trial Court to do so. The law in New Hampshire regarding "no third party rights" contractual provisions is clear. "If two contracting parties expressly provide that some third party who will benefit by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy." Hrushka, 117 N.H. at 1024 (emphasis added).

In Hrushka, the plaintiff, a worker on a bridge repair project, sought damages claiming he was a third party beneficiary to a contract between the State of New Hampshire and Northeast Erectors, Inc. See Hrushka at 1022. That contract called for the State Department of Public Works and Highways to

supervise its contractor, North East Erectors, Inc., to ensure safe working conditions at the project and to stop the project if unsafe working conditions existed. Id. at 1023. It is important to note that the Court assumed, for purposes of its analysis, that the supervisory role on the part of the State was a promise. Id. at 1024. Obviously, this promise - to stop work if unsafe conditions existed - would directly benefit someone in Mr. Hrushka's position - a worker on the project that was the subject of the contract.

That contract provided:

NO THIRD PARTY BENEFICIARY. It is specifically agreed between the parties executing this contract that it is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this contract. The duties, obligations, and responsibilities of the parties to this contract with respect to third parties shall remain as imposed by law.

Id. at 1024. The Court upheld the dismissal of Mr. Hrushka's claim of third party beneficiary status. It referred to this language as an "insurmountable hurdle" to the plaintiff's third-party beneficiary claim, as it made "...clear that the parties did not intend to confer a benefit on any third party which could be enforced in a court." Id. at 1024. Hrushka remains good law in New Hampshire.

The Trial Court rationalized its denial of the defendants' Motion for Summary Judgment by distinguishing the plaintiff here from the plaintiff in Hrushka. Specifically, the Trial Court noted that the plaintiff in Hrushka was merely an incidental beneficiary of the relevant contract, while the plaintiff in this case could be deemed an intended beneficiary by virtue of the relocation provision.

However, Hrushka makes no distinction between intended or incidental beneficiaries. Instead, Hrushka specifically applies to any "third party who will benefit by performance". Hrushka at 1024. Hrushka stands for the proposition that a "no third party rights" provision bars all non-parties from recovering under contracts, even where that third party would benefit by performance of the contract.

The range of potential beneficiaries, either incidental or direct, under any given contract can be tremendous. Here, it is clear that the Agreement, as written, required the defendants to relocate mobile homes. It is conceivable that such relocation would benefit the Park's tenants.<sup>1</sup> However, on the narrow question of whether the parties to the Agreement intended to

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<sup>1</sup> However, given the lack of specificity in the relocation provision, including its omission of any detail of the relationship between the Park's new owners and the relocated tenants in terms of rent, duration of tenancy, and/or the defendants' right to recoup the cost of relocation it is also conceivable that a relocation would not benefit the park's tenants at all. For example, nothing would have prohibited the park's new owners from dramatically raising rents to recover relocation costs.

give third parties enforceable rights, the written document is clear and unambiguous: it did not. The defendants urge this Court to follow its holding in Hrushka and remand this case to the Trial Court with instructions to award the defendants summary judgment. Private parties should have the ability under the law to prevent non-party claims by inserting "no third party rights" provisions in their contracts, irrespective of how great a benefit a third party might receive by virtue of the contract. To hold otherwise would substantially reduce the ability of contracting parties to know with any level of certainty who, or why, they might face claims from in the performance of their contracts.

II. At a minimum, the Agreement was ambiguous on the issue of third party rights and the Trial Court correctly interpreted the Agreement using this Court's well-established rules governing the interpretation of ambiguous contracts.

To answer the question of whether the Agreement was intended to extend an enforceable right to a third party, the Trial Court was required to interpret the Agreement "...reading the document as a whole." Ryan James Realty, 153 N.H. at 197. At a minimum, there was conflicting language on this point within the Agreement. The Agreement's Relocation Provision in fact required an act on the part of the Buyers that might benefit the residents of the Park. However, on the narrow issue

of whether the parties intended to confer enforceable rights upon non-parties, the Agreement specifically states "this Agreement is solely for the benefit of the parties, and nothing in this Agreement shall be deemed to create enforceable rights in favor of third parties...". See Plaintiff's Appendix at 6 (Paragraph XVI). In reviewing the Agreement as a whole, the Trial Court could not simply ignore this contradictory language on the issue of whether the actual parties to the Agreement intended or understood they were conferring rights upon non-parties to the Agreement.

When language in an agreement is such that contracting parties could reasonably differ as to its meaning, the agreement is ambiguous. See Appeal of Town of Durham, 149 NH 486, 487 (2003); Behrens v. S.P. Constr. Co. 153 NH 498, 503 (2006). Obviously, a contract is ambiguous "...where the terms of the contract are ambiguous on their face." 17 Am Jur 2<sup>nd</sup> Contracts §331 Here, the Trial Court determined that the Agreement was ambiguous on the issue of conferring rights upon third parties. Given the seemingly contradictory terms in the Agreement as regards third parties, it is difficult to see how the Trial Court could have reached any other conclusion.<sup>2</sup>

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<sup>2</sup>Except finding that the Agreement clearly did not confer third party rights.

III. Having properly determined that an ambiguity existed in the Agreement with respect to enforceable third party rights, the Trial Court correctly made a determination, well supported by extrinsic evidence, that the parties to the Agreement, and particularly Joyce Towle Varney, did not intend to give enforceable rights to third parties.

Once it determined that an ambiguity existed in the Agreement, the Trial Court was required to look to extrinsic evidence to ascertain the parties' intent. See Spectrum Enterprises, Inc. v. Helm Corp., 114 N.H. 773, 775 (1974). It is important to note that the standard of review for this portion of the Trial Court's analysis is much more relaxed than that for the Trial Court's review of the Agreement for ambiguities. A Trial Court's interpretation of a contract, including its determination as to the existence of an ambiguity within the contract, is reviewed de novo. However, where "...the terms of a contract are indeed ambiguous, and the fact finder has properly looked to extrinsic evidence to determine the intent of the parties, [the] standard of review is more differential." See Behrens 153 N.H. at 500 (citing Galloway v. Chicago - Soft, 142 N.H. 752, 756 (1998)). As there can be little question that the Agreement was ambiguous on the issue of conferring third party rights, this Court should sustain the Trial Court's decision if there was any extrinsic evidence supporting it. See Red Hill Outing Club v. Hammond, 143 N.H. 284, 289 (1998); Heston v. Ousler, 119 NH 58, 60 (1979) (Supreme

Court cannot substitute its own judgment for that of the trier of fact if it is supported by the evidence).

Given the ambiguous language in the Agreement, the Trial Court had to resort to extrinsic evidence to determine whether (a) the parties, particularly Joyce Towle Varney, intended to confer enforceable rights to the park's tenants; (b) whether the defendants had reason to know Joyce Towle Varney intended to give the Park's tenants enforceable rights vis-a-vis the Agreement; and (c) whether the granting of these third party rights was a motivating cause of Ms. Varney marking the Agreement. See Tamposi Assocs., 119 N.H. at 633.

In ascertaining what parties intended as to contractual ambiguities, a trial court should examine the contract itself, as well as the circumstances surrounding the execution of the contract and the object intended by the agreement. See General Linen Services v. Franconia Inv. Assocs., 150 N.H. 595, 598 (2004) The Trial Court correctly emphasized that it should consider the parties' actions after the contract was signed, that is "how the parties acted with regard to the contract." See Spectrum Enterprises Inc., 114 N.H. 776; Leclair v. Bancroft, 121 N.H. 393, 395 (1981); Gay v. Hanley, 111 N.H. 73, 75 (1971). As the Trial Court further correctly noted, "there is no surer way to find out what the parties meant, than to see what they have done." See Decision at p 9 (quoting Grayson v.

Labranche, 107 N.H. 504, 505-06 (1967); Brooklyn Life Insurance v. Dutcher, 95 U.S. 269, 273 (1877).

Upon examination of the evidence, the Trial Court concluded that Joyce Towle Varney did not intend to give the plaintiff or its members the benefit of the promise contained in the Relocation Provision. The Trial Court further concluded that the relocation provision was not a motivating factor in Ms. Varney's making the Agreement. See Decision at pp 9-10. There was ample evidence supporting this conclusion:

- The "no third party rights" provision in the Agreement was added at the request of the buyers, (with no objection from the seller) for the specific purpose of negating what otherwise might be rights of third parties with no objection from Jocye Towle Varney. See Trial Transcript at pp 138-139; Trial Transcript at pp 165-166.
- A lack of testimony from Joyce Towle Varney stating that she intended to confer upon the plaintiff the benefit of the promised performance (the relocation of mobile homes) or the right to enforce that promise or that she was motivated to enter into the Agreement by the Relocation Provision. Instead, Ms. Varney simply testified that she understood the Relocation Provision to mean "[j]ust as it...says." See Trial Transcript at p 159.
- The fact that during the fourteen months between execution of the Agreement and the actual sale of the Park Joyce Towle Varney made no inquiry whatsoever as to the status of the defendant's plans for developing the back land or relocating mobile homes. See Trial Transcript at pp 166-167.
- At the closing for the sale of the park, Austin Smith informed Joyce Towle Varney that the defendants would not be relocating mobile homes due to excessive cost.

Joyce Towle Varney elected to proceed with the sale of the park nonetheless. See Trial Transcript at pp 142-143.

- Since the sale of the park, Joyce Towle Varney has never demanded that the defendants develop the back land or relocate mobile homes, even after park residents specifically requested her to do so. See Trial Transcript at pp 166-168.
- Despite having been sued by the plaintiffs as a result of the defendant's failure to develop the back land or relocate mobile homes, Ms. Varney has not sought indemnification from the defendants. See Trial Transcript at pp 144, 171.
- The Agreement lacked any manner of detail as to the specifics of any relocation, including the amount of lot rent to be paid going forward, the duration of any new tenancy between the park members and the defendants, who was to bear the costs of relocation. See Petitioner's Appendix at pp 1-7.

Finally, perhaps the best evidence of all supporting the Trial Court's decision is the Agreement itself - which explicitly prohibits third party claims. Given the ample evidence supporting the Trial Court's conclusion that the Relocation Provision was (a) not a motivating factor in Joyce Towle Varney's execution of the Agreement, and (b) not intended by the parties to establish enforceable rights for a third party, the Trial Court's Decision should be sustained.

- IV. The plaintiff's arguments go to the weight of the evidence, misconstrue the evidence, ignore the ample evidence supporting the Trial Court's Decision, or misconstrue the proper third party beneficiary analysis.
- A. The fact that there were negotiations regarding the language of the Relocation Provision does not confer third party beneficiary rights to the plaintiff.

The plaintiff emphasizes the fact that there was evidence of negotiations on the language on the relocation provision in earlier drafts of the Agreement. See Plaintiff's Brief at pp 10-12. The plaintiff claims that "the only conclusion that can be drawn by reviewing the various drafts of the Purchase and Sale Agreement is that the relocation language was a negotiated term of the Agreement that was important to both the Seller and Buyers." See Plaintiff's Brief at p 12.

The fact that there were negotiations over the language of the relocation provision might indicate that the parties to the Agreement were concerned about the relocation of mobile homes. However, this evidence does not directly address or answer the question of whether the parties, and particularly Joyce Towle Varney, intended to extend the benefit of this promise as an enforceable right to the owners of those mobile homes. On this point, there was further language negotiated for in the Agreement specifically stating that nothing in the Agreement was intended to create enforceable third party rights. Furthermore,

even if negotiations concerning the Relocation Provision did evidence an intent to create enforceable rights for the mobile home park residents, there was ample contrary evidence supporting the Trial Court's conclusions as discussed above.

**B. RSA 205-A does not give third party beneficiaries a right to specific performance.**

The plaintiff claims that the notification requirements of RSA 205-A "...in essence created a third party beneficiary status for the residents of the Towle's Trailer Park." See Petitioner's Brief at p 13. The plaintiff does not cite any case or statute in support of this argument.

Nowhere does RSA 205-A give tenants of a mobile home park the right to specifically enforce a purchase and sale agreement. Indeed, the statute is specific as to what remedies it does provide. Those remedies are set forth in RSA 205-A:22 and entitle the tenants to damages in the amount of ten thousand dollars or ten percent of the total sale price of the mobile home park as against the seller of the park only. The statute further provides "[t]his civil penalty shall constitute the sole and exclusive remedy of a violation of RSA 205-A:21 and the failure by a park owner to comply with said section shall not affect the validity of any sale or transfer of title nor shall such noncompliance constitute grounds to set aside a sale or transfer in any court proceedings". (emphasis added) The

plaintiff's unsupported argument that RSA 205-A somehow gives the plaintiff the right to specifically enforce the Agreement is incorrect. The statute itself states otherwise.

C. The plaintiff ignores language in the Agreement clearly intending to cut off any third party rights the Agreement might otherwise provide.

The plaintiff argues "the relocation language contained in the Agreement was plain, clear, and simple." See Plaintiff's Brief at p 14. The plaintiff claims Austin Smith's interpretation of the Agreement was "unreasonable and unbelievable" (id. at p 15) and that Joyce Towle Varney's testimony made it clear that the defendants' promise to relocate mobile homes was a "motivating cause" for her to enter the Agreement. See generally Plaintiff's Brief at pp 13-16. The record demonstrates that this is not the case.

First, Joyce Towle Varney never testified that the Relocation Provision was in fact a "motivating factor" in terms of her deciding to sign the Agreement. Indeed, Ms. Varney was never asked that specific question. When asked generally about the Relocation Provision, Ms. Varney testified as follows:

Q. Okay. That's fine. So what is your understanding of the meaning of that paragraph [the relocation provision]?

A. (no verbal response.)

Q. Just as it says?

A. Just as it - - as it says, yes.

See Trial Transcript at p 159. Ms. Varney was never directly asked, nor did she ever specifically testify, as to whether the relocation provision played any role in her decision to enter into the Agreement. She furthermore testified that she had no objection when the buyers asked for the No Third Party Rights Provision in the Agreement. See Trial Transcript at pp 165-166. Ms. Varney's testimony can hardly be characterized as an unequivocal statement that she was "motivated" by the Relocation Provision, or that she specifically intended to extend enforceable third party beneficiary status to the residents of the park vis-à-vis the Relocation Provision. Indeed, based upon her overall testimony, a fact finder could reasonably conclude that the creation of enforceable third-party rights of the plaintiff was not a "motivating factor" in Ms. Varney's decision to execute the Agreement.

Moreover, there was nothing "unreasonable or unbelievable" with respect to Mr. Smith's interpretation of the Agreement. While perhaps not precisely articulated, Mr. Smith's interpretation of the Relocation Provision and the No Third Party Rights Provision was essentially this: at the time he entered into the Agreement, Mr. Smith wanted to relocate mobile homes. However, the Agreement was executed at the beginning of a lengthy due diligence period and at a time when Mr. Smith knew

little about the property. See Trial Transcript at pp 139-142 (describing due diligence performed following execution of Agreement). While he hoped to be able to relocate mobile homes, Mr. Smith did not know at the time of the Agreement whether such relocation was feasible. He therefore wanted to be sure that he and his partner could not successfully be sued by Park residents in the event they discovered that the relocation of mobile homes was not feasible. See Trial Transcript at p 138 (Austin Smith's testimony that "in this [A]greement is an obligation to relocate the tenants that we had not vetted in terms of its feasibility, and I wanted to be sure that this [A]greement was solely between Joyce Towle Varney and David and I). Instead, the Buyers wanted to be able to address the issue with Joyce Towle Varney without interference from the residents of the mobile home park. There is nothing "unreasonable or unbelievable" with respect to this interpretation of the Agreement, particularly given its explicit exclusion of third-party rights.

D. The Trial Court did not err in considering the intentions of the Buyers in determining whether or not the Relocation Provision was intended to benefit the Park residents.

The plaintiff claims "[t]he Court incorrectly focused on the intentions of the Buyers in determining whether or not the relocation provision was intended to benefit the residents. The Court should have focused on the intentions of the Seller, as it

is her intentions in inserting this relocation provision that are key to the determination of the third party beneficiary status." See Petitioner's Brief at p 15. New Hampshire case law suggests otherwise. See Hrushka, 117 N.H. at 1024 ("as a general rule, the rights of a third party are dependent upon the intent of the parties who executed the agreement" (emphasis added)).

Furthermore, this argument overlooks a key component of the third party beneficiary analysis: whether the Agreement was "...so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract." See Tamposi, 119 N.H. at 633 (emphasis added). Accordingly, the focus in any third party beneficiary analysis should not be solely limited to what the promisee intended. It should include consideration of what the promisor could have reasonably believed as to the promisee's motivation for the promisee entering into the contract. This requires an examination of the promisor's intent and understanding. In this case it required an examination of what the Buyers understood and intended the Agreement to mean with respect to third party rights.

Here, the defendants bargained for, and received, language in the Agreement specifically excluding third party rights. The Trial Court correctly noted this. See Decision at p 10. The

defendants' understanding that the Agreement was not conferring rights upon third parties was appropriate, particularly given the inclusion of this language in the Agreement. It was not error, and indeed necessary, for the Court to consider the buyers' understanding and intent with respect to the Agreement. Given Austin Smith's testimony and the plain language of the Agreement it was furthermore not error for the Trial Court to conclude that "[t]he Agreement was not so expressed as to give...the defendants reason to know that a benefit to a third party was contemplated as one of the motivating causes of [Ms. Varney] making the contract" See Decision at p 13.

**E. The Trial Court did not err in considering the "hands off" approach the seller took with respect to enforcing the Agreement, nor did the Trial Court err in considering the interpretation of the Relocation Provision by the Cooperative and the Loan Fund.**

The plaintiff incorrectly faults the Trial Court for relying upon Ms. Varney's failure to enforce the Relocation Provision as a factor in reaching its decision. See Plaintiff's Brief at pp 17-18. First, it should be noted that this was not the sole basis upon which the Trial Court found that the Relocation Provision was not a "motivating factor" in Joyce Towle Varney's entering into the Agreement. As discussed above, there was ample evidence demonstrating her lack of intent to confer third party beneficiary status upon the plaintiff. Furthermore, while the plaintiff may be correct that the

Agreement did not obligate Ms. Varney to enforce the Relocation Provision, the Trial Court never suggested that this was the case. Instead, the Trial Court simply noted that "the seller's "hands-off" approach to the relocation clause in dispute...indicate[s] that the relocation provision benefit to mobile home tenants under Clause VI was hardly a motivating cause of her making the contract." The Trial Court did not reach an incorrect conclusion of law here, as the plaintiff suggests. It simply made a factual conclusion based upon the evidence - the fact that Ms. Varney took no steps whatsoever to enforce the relocation provision indicated it probably was not that important to her. Such a conclusion can hardly be disputed, and this was not error on the part of the Trial Court.

As part of its overall criticism of the Trial Court's focus on Ms. Varney's "hands off" approach to the Relocation Provision, the plaintiff argues that the Trial Court erred in finding that "...the relocation of the residents of the Towle Trailer Park was to occur prior to the closing" See Plaintiff's Brief at p 17. This is not correct. The Trial Court made no such finding. Instead, the Trial Court simply observed, as an evidentiary matter, that "[d]uring the fourteen months prior to the closing, the Seller made no inquiry whatsoever about the defendants' plans for developing the back land or about the status of the relocation issue." See Decision at p 10. This is

not a finding that the relocation was required to occur prior to the closing. It is simply another correct observation by the Trial Court that if the relocation provision was truly a "motivating factor" for Ms. Varney, she might have asked what progress the defendants had made toward that end prior to her closing on the sale of the Park. It was not error for the Trial Court to make this observation.

The plaintiff claims that the Trial Court's observations of the plaintiff's and the New Hampshire Community Loan Fund's interpretation of the Agreement were "...factually incorrect and completely irrelevant to the third party beneficiary issue." See Plaintiff's Brief at p 18. This is not the case. First, the Court's observations in this regard were factually correct. The plaintiff's president, Linda Brady, was asked "so the language in [the Agreement] that says no third party shall have rights under this Agreement did not cause you any concern at all?" She replied "yes it did give me some concern." See Trial Transcript at p 44. From this testimony, the Trial Court can and did properly conclude that the "no third party rights" provision in the Agreement caused "...her some concern about the plaintiff's ability to enforce the relocation provision in Clause VI." See Decision at p 4.

Similarly, the Trial Court's comments that a representative of the Loan Fund had doubts about the enforceability of the Relocation Provision were supported by the following testimony:

Q. Okay. This is a document entitled "Willowdale Place Cooperative, Inc., Third Interim Board Meeting, Meeting Minutes," and is it the habit or the practice of the board of directors of the Willowdale Place Cooperative to keep minutes of their meetings when they have them?

A. Yes.

Q. And is this a copy of the minutes for a meeting that was held on Friday, May 13<sup>th</sup>, 2005?

A. Yes.

Q. And it was held in the Lakeview Elementary School in Littleton, New Hampshire?

A. Lakeway Elementary.

Q. If you could turn to the fourth page of this document. In the middle of the page there's a large paragraph. Could you take a moment and review that paragraph, please?

A. (Witness reviews paragraph.)  
Okay

Q. Now this is the treasurer, i.e., you, relaying a conversation that you had with Mr. Rhodes (phonetic) from the New Hampshire Community Land Fund to your fellow board members, correct?

A. Yes.

Q. And you're informing the board that Mr. Rhodes from the New Hampshire Community Loan Fund informed you that, in the middle of the paragraph "As we sit, here absolutely nothing legally binding with the buyer," correct?

A. That's what this says, yes.

Q. And so that was what you informed the fellow board members on May 13<sup>th</sup>, 2005, just after this purchase and sale agreement had been circulated from my clients, correct?

A. As I related a conversation between Peter Rhodes and myself, yes.

Q. And so Mr. Rhodes clearly did not believe that you had any legally enforceable rights under this purchase and sale agreement, correct?

A. That's what he believed, yes.

Q. Okay. And that's what you informed the fellow members of the board, correct?

A. I was relating to them what Peter Rhodes had told me.

See Trial Transcript at pp 45-47.

Moreover, the Trial Court's observations of the plaintiff's and Community Loan Fund's understanding of the Agreement were offered as dicta. It was clear that the Trial Court was not placing a great deal of emphasis, if any, on these observations in reaching its decision. However, it was appropriate for the Trial Court to include these observations in its decision if only to highlight the ambiguous nature of the Agreement - the very entity that now claims that the Agreement absolutely and clearly confers third party beneficiary rights to the plaintiff was previously expressing significant doubt in that regard.

- V. The plaintiff's argument that the Trial Court erred as a matter of law when it found a lack of certainty in the Relocation Provision is erroneous because the Trial Court did not find that the Relocation Provision, in and of itself, was uncertain or ambiguous.

On page 19 of its brief, the plaintiff frames the following issue: "The Court erred as a matter of law and/or abused its discretion when it found a lack of certainty in the relocation clause that precluded the Court from enforcing the relocation provision under the doctrine of third party beneficiaries." The plaintiff devotes a portion of its brief to its argument that the relocation provision, standing alone is clear. See Plaintiff's Brief at pp 20-23. This argument fails for a very simple reason: the Trial Court never found that the relocation provision itself was ambiguous. Rather, the Trial Court found that the Agreement, when read in its entirety (as the Trial Court was required to do) was ambiguous on the issue of whether or not the parties intended to create enforceable rights for the tenants of the mobile home park. To say the Trial Court found "a lack of certainty in the relocation clause" in and of itself is a mischaracterization of the Trial Court's order.

The plaintiff does address what the Trial Court actually did find - that the No Third Party Rights Provision created an ambiguity within the Agreement as to whether the parties

intended the residents to have enforceable rights under the Agreement - as a "remaining issue". See Plaintiff's Brief at p 23. The plaintiff suggests that no reasonable, objective person could find that an ambiguity existed in a contract which (a) contained a promise directed toward a third party, but then (b) stated the Agreement was not intended to create third party rights. The defendants submit that the opposite is true. No objective reasonable person could read this Agreement and reach any conclusion other than it was, at a minimum, ambiguous on the issue of extending rights to third parties.

The plaintiff argues that:

The no third party language was general language that was not inserted to defeat the negotiated language contained in the relocation provision. It was clearly general language that was inserted into the Agreement to defeat any assertions that may be brought forward by other third parties other than the residents of the Towle Trailer Park. An example of other third parties that may come forward would be other real estate brokers with claims, or other undisclosed partners with potential claims.

See Plaintiff's Brief at p 23.

This argument is incorrect as a matter of law and is not supported by the record in this case. When interpreting a contract to determine whether it is ambiguous, a Trial Court must look to the plain language of the agreement. It cannot speculate as to what the parties might have meant or intended as the plaintiff seems to suggest. Instead, the court reads the contract, gives the words used therein their plain, ordinary,

and intended meaning, and determines whether an ambiguity exists. Only once that ambiguity is found can a trial court look to extrinsic evidence. The plaintiff's suggestion that the Trial Court should have ignored the No Third Party Rights Provision based upon what would amount to speculation that it was not intended to apply to the park's residents, but rather to "real estate brokers with claims, or other undisclosed partners with potential claims" is simply wrong as a matter of law.

Moreover, the plaintiff's argument is not supported by the record. There was no evidence that the parties inserted the No Third Party Rights Provision to ward off claims by real estate brokers or undisclosed partners. While Joyce Towle Varney did not recall the No Third Party Rights Provision when she testified at trial, she also testified that she had had no objection to the defendants' request to include it in the Agreement. See Trial Transcript at p 165. Moreover, Austin Smith testified that the no third party rights provision was added due to his specific desire to have the obligation to relocate tenants "...solely between Joyce Towle Varney and David and I [i.e. the parties to the Agreement]". See Trial Transcript at p 138.

Finally, the plaintiff's claim that "as a matter of contract interpretation, specific terms typically trump general ones" is incorrect. See Plaintiff's Brief at p 24. That is a

rule of statutory construction, not contract interpretation. The case upon which the plaintiff relies, Edmond v. United States, 520 U.S. 651, 657 (1997) did not deal with the interpretation of a contract. It dealt with an interpretation of Article 66 (a) of the UCMJ, 10 U.S.C. §866 (a). Id. at 656-657. See also In Re: Dufton, 973 A. 2<sup>nd</sup> 271, 275 (N.H. 2009) (specific statute controls over more general statute relative to same subject). This Court has never instructed Trial Courts to simply disregard general language in favor of more specific terms in interpreting a written agreement. Instead, a Trial Court is "give the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. See Ryan James Realty v. Villages at Chester Condo. Assoc., 153 N.H. 194, 197 (2006). It was not error for the Trial Court to consider the language of the no third party rights provision in the context of the parties' overall Agreement.

VI. The plaintiff's claim that "the Court unsustainably exercised its discretion when it found that the plaintiff had sued the Seller as a consequence of the failure to relocate" is not supported by the record, and in any event, even if accurate does not warrant reversal.

The plaintiff argues that the Trial Court erred in relying upon Joyce Towle Varney's failure to seek indemnification from

the defendants for a lawsuit the plaintiff has brought against Ms. Varney. The plaintiff claims "the lawsuit brought by the Cooperative against Joyce Towle Varney had nothing to do, whatsoever, with the fact that Austin Smith and David Groom had failed to relocate the tenants to the back land. The Court completely misunderstood this issue."

Joyce Towle Varney's failure to seek indemnification from the defendants in response to the plaintiff's lawsuit against her was but one evidentiary factor the Trial Court considered in reaching its conclusions. This Court should not disturb a Trial Court's ruling when it is supported by the evidence. See Town of Harrisville v. Patrick Clooney, 122 NH 586, 587 (1982). Even if the Trial Court erred on this indemnification issue, its decision was otherwise supported by the evidence below and should not be reserved.

Moreover, the Trial Court's evidentiary finding in this regard was supported by the record. On cross examination, the plaintiff's president testified as follows:

Q. Now, the Cooperative has brought a lawsuit against Joyce Towle Varney, correct?

A. We have.

Q. And the basis of that lawsuit is the fact that my clients have not relocated mobile homes per the relocation provision, correct?

A. Yes.

Q. And your point in the lawsuit is that somehow, the purchase and sale agreement got changed without notification to the park, correct?

A. That is correct.

Q. And you are familiar with the proceedings in that lawsuit, as the president of the Cooperative, I gather?

A. Yes.

Q. And it's true, is it not, that at no time has Ms. Varney attempted to bring my clients into that lawsuit, to compel them to do what it is the Cooperative seeks, correct?

A. Not that I know of, no.

See Trial Transcript at pp. 61-62. It is clear from this testimony that there was evidence supporting the Trial Court's findings with respect to the lawsuit filed by the plaintiffs against Joyce Towle Varney, Joyce Towle Varney's failure to seek indemnification from the defendants for the plaintiff's claims, and the significance the Trial Court places upon this. The record in this case makes clear that, while the plaintiff's lawsuit against Joyce Towle Varney may have been styled as an action under RSA 205-A:22, its genesis was the defendants' failure to relocate mobile homes. It was not unreasonable for the Trial Court to conclude that had Joyce Towle Varney intended the relocation provision to be an enforceable obligation that survived the closing of the sale of the park, she would have

sought indemnification from the party supposedly owing that obligation in response to the plaintiff's lawsuit against her.

**CONCLUSION**

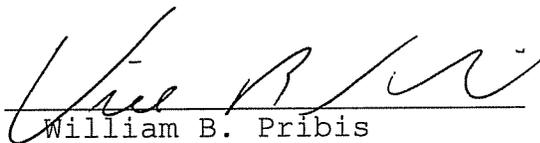
For all the foregoing reasons, the defendants request this Honorable Court remand this case to the Trial Court with instructions to award the defendants summary judgment or, alternatively, affirm the Trial Court's decision.

Respectfully submitted,  
Kilburn Crags, LLC

By and through its Attorneys,  
CLEVELAND, WATERS AND BASS, P.A.

Date: August 21, 2009

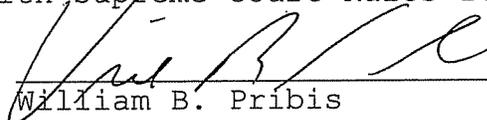
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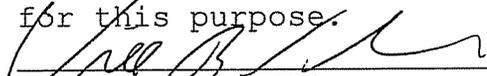
**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Brief of the Defendants have been furnished via first-class mail, postage pre-paid, U.S. Mail delivery to Robert M. Shepard, Esquire, this 24<sup>th</sup> day of August, 2009. I further certify that the foregoing Brief for the Appellant conforms with Supreme Court Rules 16(3).

  
William B. Pribis

**ORAL ARGUMENT**

William B. Pribis will argue the case for the defendant and fifteen minutes are requested for this purpose.

  
William B. Pribis

**THE STATE OF NEW HAMPSHIRE**  
Grafton Superior Court  
3785 Dartmouth College Highway  
N. Haverhill, NH 03774  
603 787-6961

**NOTICE OF DECISION**

WILLIAM B PRIBIS ESQ  
CLEVELAND WATERS & BASS  
PO BOX 1137  
CONCORD NH 03302-1137

**DOCKETED**

07-E-0124 Willowdale Place Coop., Inc. vs. Kilburn Crags LLC, et al

Enclosed please find a copy of the Court's Order dated 5/07/2008  
relative to:

**Motion for Summary Judgment**

05/09/2008

Robert B. Muh  
Clerk of Court

cc: Robert M. Shepard, Esq.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 07-E-124

Willowdale Place Cooperative, Inc.

v.

Kilburn Crags, LLC, Austin W. Smith and David Groom

ORDER ON MOTION FOR SUMMARY JUDGMENT

The plaintiff, an association consisting of a cooperative including all of the tenants of a mobile home park on land recently purchased by the defendants, brings suit against the defendants for specific performance of the contract between the defendants and the seller of the land. The defendants move for summary judgment, alleging (1) that the contract cannot be enforced by a third-party beneficiary, (2) that the plaintiff is not an intended third-party beneficiary, and (3) the plaintiff has no cognizable claim in estoppel. For the reasons detailed below, the Motion for Summary Judgment is denied.

STANDARD OF REVIEW

In acting upon a motion for summary judgment, a court is required to construe the pleadings, discovery, affidavits and all inferences properly drawn from them in the light most favorable to the non-moving party to determine whether the moving party has established the absence of a dispute over any material fact and the right to judgment as a matter of law. *Estate of Joshua T. v. State of New Hampshire*, 150 N.H. 405, 407 (2003). The party objecting to a motion for summary judgment “may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue [of material fact] for trial.” RSA 491:8-a, IV (1997). “An issue of fact is material if it affects the outcome of the litigation.” *Panciocco v. Lawyers Title Ins. Corp.*, 147 N.H. 610, 613 (2002).

FACTUAL BACKGROUND

Taking all of the factual allegations in the light most favorable to the plaintiff, the Court finds the following facts relevant. The plaintiff is a consumer cooperative formed

pursuant to RSA 301-A by the tenants and residents of Towle's Trailer Park (hereinafter the "Park"), located in Littleton, New Hampshire. All residents and tenants of the Park are members of the plaintiff cooperative.

Joyce Towle Varney (hereinafter the "Seller") owned the Park. On or about March 30, 2005, she entered a Purchase and Sale Agreement (hereinafter "Agreement") for the sale of the property containing the Park to defendants Austin Smith and David Groom for a price of \$1,000,000. Article VI of the sales contract between the Seller and the defendants, entitled "Existing Mobile Homes," provides:

This sale and closing is subject to "Tenants Right to Notification Prior to Park Sale", RSA 205-A:21, including Tenants' right to 60 days' notice prior to Seller's final unconditional acceptance of Buyer's offer contained herein. Seller agrees to cooperate with and assist Buyer in arranging a meeting between Buyer and the tenants of the existing mobile home park at the Premises within 10 days of expiration of RSA 205-A:21 proceedings or sooner if the tenants waive their right to purchase the manufactured housing park prior to the expiration of the 60 days notice period.

It is a condition of this Agreement that the Buyer complete the development [of] the 'Back Land' above and to the west of the existing mobile home park on the premises and provide the residents of the mobile homes situated in that park with alternative mobile home rental sites in the newly developed area.

Agreement, Article VI. The Agreement further provided, in a section entitled "Miscellaneous": "This Agreement is solely for the benefit of the parties, and nothing in this Agreement shall be deemed to create enforceable rights in favor of third parties or shall be referred to in interpreting independent rights and obligations of third parties." Agreement, Article XVI.

The defendants and the Seller initially complied with the requirements of RSA 205-A:21 by notifying each tenant that the Seller planned to sell the property, and by notifying them of "the price, terms and conditions for which the park owner intends to sell the park." RSA 205-A:21 (Supp. 2007). The notice, including the Agreement, was mailed to the plaintiff's members on April 4, 2005. Following receipt of the Agreement, the plaintiff actively worked to pursue the purchase of the Park. It borrowed \$25,000 to use as a deposit to make the matching offer contemplated in RSA 205-A:21. It entered into a manufactured

housing park service contract with the New Hampshire Community Loan Fund, and obtained a \$1,500 loan from the Fund for predevelopment expenses, secured by a note. It obtained a pro forma estimate for the acquisition costs of purchasing the Park. It submitted an offer matching the defendants' offer within the sixty-day window set by RSA 205-A:21. However, the plaintiff was ultimately deemed ineligible for certain grants and favorable-rate loans, due in part to the Article VI provision in the Agreement providing for the tenants' relocation at the defendants' expense. Because the cost of securing financing without these grants was prohibitive, the plaintiff withdrew its offer to purchase the property from the Seller, relying in part on the Article VI "Existing Mobile Homes" relocation provision.

On or about June 2, 2006, the defendants closed on the property. On or about June 20, 2006, the defendants provided an eighteen-month Notice to Quit to the tenants within the Park. On or about June 22, 2006, the defendants informed the plaintiffs that the defendants would not construct a new development on the "back land" as provided in Article VI of the Agreement because a ledge on the property made development fiscally unreasonable. The plaintiffs then brought this suit for specific performance of the Agreement or for damages due to the defendants' breach.

#### DISCUSSION

The defendants argue that the "Miscellaneous" provision of the Agreement bars the plaintiff's recovery under the contract as a potential third-party beneficiary to the contract. If this plaintiff could recover despite the "Miscellaneous" provision, the defendants assert, contracting parties will be left with no means of preventing any potential remote beneficiary of a contract from enforcing a contract to which it is not a party. Furthermore, the defendants assert, the fact that an express contract exists prevents the plaintiff from recovering under an estoppel theory. Thus, the defendants say the only remedy available to the plaintiff is under RSA 205-A:22, which allows the plaintiff to recover up to 10% of the purchase price from the *seller*, not from the defendants.

The plaintiff responds that the conflicting provisions of the Agreement, including one provision, Article VI, expressly for its benefit and one provision, Article XVI, barring third-party enforcement of the Agreement, result in contractual ambiguity. As between

the two provisions, the plaintiff suggests that the Article VI “Existing Mobile Homes” provision, which is specific to this case, should be considered more revelatory of the parties’ intent than the Article XVI “Miscellaneous” provision. The plaintiff asserts that genuine issues of material fact exist, and that the case is not appropriate for disposition by summary judgment.

Plaintiffs’ Ability to Sue as a Third-Party Beneficiary to the Agreement

“The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for this court to decide.” *Duke/ Fluor Daniel v. Hawkeye Funding, Ltd. P’ship*, 150 N.H. 581, 582 (2004) (quoting *Appeal of Reid*, 143 N.H. 246, 249 (1998)). The Court “will determine the meaning of the contract based on the meaning that would be attached to it by reasonable persons.” *Gamble v. University Sys.*, 136 N.H. 9, 13 (1992) (quoting *Goodwin Railroad, Inc. v. State*, 128 N.H. 595, 602 (1986)). “In interpreting the terms of the contract, we will consider the objective intent of the parties at the time the contract was made.” *Id.* (citing *C & M Realty Trust v. Wiedenkeller*, 133 N.H. 470, 476 (1990)). “Any determination of the intent of the parties is ultimately to be made by this court.” *Id.* (quoting *R. Zoppo Co. v. City of Dover*, 124 N.H. 666, 670 (1984)).

“The third-party beneficiary doctrine is an exception to the general rule that a non-party to a contract has no remedy for breach of the contract.” *Arlington Trust Co. v. Estate of Wood*, 123 N.H. 765, 767 (1983). “A third-party beneficiary relationship exists if (1) the contract calls for a performance by the promisor which will satisfy some obligation owed by the promisee to the third party, or (2) the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract.” *Tamposi Assocs. v. Star Mkt. Co.*, 119 N.H. 630, 633 (1979) (citing 4 A. Corbin, *Contracts* 776 (1951)). “A benefit to a third party is a ‘motivating cause’ of entering into a contract only where the promisee intends ‘to give the beneficiary the benefit of the promised performance.’” *Grossman v. Murray*, 144 N.H. 345, 348 (1999) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) (1981)).

(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; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) an incidental beneficiary is a beneficiary who is not an intended beneficiary.

*Public Service Co. of N.H. v. Hudson Light & Power*, 938 F.2d 338, 341 (1st Cir. 1991) (emphasis in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302).

The promise and its circumstantial setting must evince an intent on the part of the promisee to confer the benefit of the promised performance on the would-be beneficiary. “In such cases, if the beneficiary would be reasonable in relying on the *promise as manifesting an intention to confer a right on him* [to enforce the promise], he is an intended beneficiary.”

*Id.* at 342 (emphasis in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 302, comment d). “A promisor owes a duty of performance to any *intended* beneficiary of the promise, and ‘the intended beneficiary may enforce the duty,’ *Restatement (Second) of Contracts* § 304, whereas an *incidental* beneficiary acquires ‘no right against the promisor or the promisee.’ *Id.* § 315.” *Id.* (emphasis in original) at 341 n. 8.

The distinction between intended and incidental beneficiaries undermines the defendants’ argument that a decision for the plaintiff opens the field of attack on contracts to any party who may potentially benefit from such a contract. If the would-be litigant is not an intended beneficiary, he has no enforcement rights under a contract to which he is not a party. *See id.*

The issue in determining the plaintiff’s power to enforce the contract as a third-party beneficiary is therefore an issue of the intent of the parties to the contract, specifically whether the benefit conferred was a motivating cause for the promisee (the Seller) to enter this contract.

The defendants cite *Hrushka v. State of New Hampshire, Dept of Public Works and Highways*, 117 N.H. 1022, 1024 (1977), for the premise that “the plaintiff faces an insurmountable hurdle in establishing himself as a third-party beneficiary” in the form of the provision in the contract eliminating the contractants’ responsibility to third parties.

However, the *Hrushka* court's basis for granting summary judgment against a plaintiff suing as a third-party beneficiary was that "the parties did not intend to confer a benefit on any third party which could be enforced in a court." *Id.*

Hrushka worked as a laborer for North East Erectors, Inc., which performed repair work on bridges owned by the state of New Hampshire pursuant to a contract with the State Department of Public Works and Highways. The contract between the department of public works and North East Erectors, Inc. specified that no worker was to be employed by North East Erectors, Inc., or by any subcontractors, under conditions dangerous to the worker's health or safety. Those conditions were to be determined by the federal health and safety standards set forth by the Occupational Safety and Health Administration of the United States Department of Labor. The contract between the State and North East Erectors, Inc. also provided:

NO THIRD PARTY BENEFICIARY. It is specifically agreed between the parties executing this contract that it is not intended by any of the provisions of any part of the contract to create the public or any member thereof a third party beneficiary hereunder, or to authorize anyone not a party to this contract to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this contract. The duties, obligations, and responsibilities of the parties to this contract with respect to third parties shall remain as imposed by law.

*Hrushka*, 117 N.H. at 1024. Hrushka was injured in connection with the job, and sued the State as a third-party beneficiary to a contract whose provisions required compliance with safety codes. The Court held that the "NO THIRD PARTY BENEFICIARY" provision precluded the plaintiff's status as a third-party beneficiary, reasoning: "If two contracting parties expressly provide that some third party who will be benefited by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy." *Id.* (citing 4 A. Corbin, *Contracts* 777 (1951)). The Court's analysis in *Hrushka* does not change the analysis employed in prior cases. If the contractants' agreement manifests an intent benefit a third party, the beneficiary has enforceable rights; the power to enforce a contract is otherwise limited to its signatories.

The present contract is distinguishable from the contract at issue in *Hrushka*. The

contract between the State and Hrushka's employer mandated compliance with statutory and regulatory requirements for worker safety, and did not otherwise confer third-party rights on either workers or the public. If Article VI of the present Agreement between the defendants and the Seller, "Existing Mobile Homes," were limited to reciting the parties' pre-existing statutory obligations, then it would be analogous to the contract at issue in *Hrushka*. However, beyond reciting the parties' obligations under RSA 205-A:21, the "Existing Mobile Homes" provision goes on to state: "It is a condition of this Agreement that the Buyer complete the development [of] the 'Back Land' above and to the west of the existing mobile home park on the premises and provide the residents of the mobile homes situated in that park with alternative mobile home rental sites in the newly developed area." Where the contract provides that a provision to benefit a non-signatory to the contract has the status of "a condition of this Agreement," it is reasonable to conclude that "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance," making the beneficiary an intended, rather than incidental, beneficiary. RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b).

Article VI is at odds with the Article XVI "Miscellaneous" provision, which would prevent non-signatories from attempting to enforce the contract. The court considers "extrinsic evidence and the circumstances surrounding a conveyance to determine the parties' intent only if the language of the relevant documents contains either patent or latent ambiguity." *Berthiaume v. McCormack*, 153 N.H. 239, 248 (2005). Here, the Agreement is reasonably susceptible to differing meanings, and is accordingly ambiguous. See, e.g., *Appeal of N.H. Dep't of Safety (N.H. Pub. Empl. Labor Rels. Bd.)*, 155 N.H. 201, 208 (2006) (citations omitted). Because the Agreement reveals contrary indications as to the parties' intent concerning the third party, whether it is intended to benefit the plaintiff is a disputed question of material fact.

For the foregoing reasons, the motion for summary judgment requested on the ground that the Agreement precludes the plaintiff's status as a third-party beneficiary is denied.

#### Verbal Modification of the Contract

Although not included in the parties' pleadings, at the hearing in the present case

on the plaintiff's motion to attach, the defendants stated on the record that, even if the "Existing Mobile Homes" language in the Agreement were enforceable, the Agreement was verbally modified at the closing to excise that entire provision. Whether this occurred is a disputed issue of material fact, and this issue is therefore not appropriate for disposition by summary judgment. Accordingly, to the extent the motion for summary judgment is requested on the ground that the Agreement was modified to strike the clause arguably conferring on the plaintiff the status of intended third-party beneficiary, the motion is denied.

#### Plaintiff's Estoppel Claims

The defendants assert that the plaintiff cannot recover in promissory estoppel because: (1) promissory estoppel only applies in the absence of an express agreement and an express agreement exists in the present case, and the express agreement prohibits recovery by third-party beneficiaries; (2) the plaintiff cannot show reliance upon the defendants' promise in that the plaintiff attempted to purchase the Park itself; and (3) the plaintiff's reliance, if there was any, was not reasonable because the Agreement did not grant the plaintiff status to sue.

Promissory estoppel is a remedy for "breach of a legally binding promise." *Jackson v. Morse*, 152 N.H. 48, 51 (2005). "It serves to impute contractual stature based upon an underlying promise, and to provide a remedy to the party who detrimentally relies on the promise." *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 290 (1992). A promise which may be enforced under the doctrine of promissory estoppel is one which "reasonably induces action or forbearance." *Jackson v. Morse*, 152 N.H. 48, 52 (2005). "[A]pplication of promissory estoppel is appropriate only in the absence of an express agreement. It serves to impute contractual stature based upon an underlying promise, and to provide a remedy to the party who detrimentally relies on the promise." *Great Lakes*, 135 N.H. at 290 (citing 2A Corbin on Contracts 196A, at 55-56 (Supp. 1991)).

In the present case, the Agreement in writing exists between the defendants and the Seller. There is no written agreement between the plaintiff and the defendants. At least in part because of the relocation language, the plaintiff did not qualify for certain

grants and loans to purchase the Park, on the rationale that under the terms of the Agreement the tenants would not be homeless. Without these grants and loans, the plaintiff was unable to acquire the Park at the price offered in the Agreement. Taking the facts in the light most favorable to the plaintiff, as required on a defendant's motion for summary judgment, the plaintiff's reliance on this provision therefore resulted in the plaintiff's inability to secure financing that would allow it to buy the land from the Seller.

The defendants assert that the plaintiff's reliance, if any, was unreasonable because Attorney Peter Rhoades informed the tenants that they had no legal rights under the Agreement. The plaintiff disputes the defendants' factual allegation, and responds that Attorney Rhoades suggested that the plaintiff seek representation, but never stated that the plaintiff lacked recourse under the Agreement. On the contrary, the plaintiff asserts that Attorney Rhoades told the plaintiff's members: "The one thing he knows is that the Buyer is committed to building a 22-unit park, and moving what can be moved." (Δ Aff, Ex. 4, p. 4 of Meeting Minutes). The plaintiff has introduced evidence in the form of newspaper articles and correspondence indicating that the Park's residents believed that they would be relocated to the back of the property, not that they lacked recourse under the Agreement.

The defendants have not shown an absence of dispute of material fact sufficient to prevail on a motion for summary judgment on the plaintiff's claim of promissory estoppel. The motion for summary judgment on this ground is accordingly denied.

"Equitable estoppel serves to forbid one to speak against his own act, representations or commitments communicated to another who reasonably relies upon them to his injury." *Cphoon v. IDM Software, Inc.*, 153 NH 1, 9 (2005). The party asserting estoppel has the burden of proof. *Id.* The elements of equitable estoppel are the following:

- (1) a representation or a concealment of material facts;
- (2) the representation must have been made with knowledge of the facts;
- (3) the party to whom it was made must have been ignorant of the truth of the matter;
- (4) it must have been made with the intention that the other party should act upon it; and
- (5) the other party must have been induced to act upon it to its prejudice.

*Hawthorne Trust v. Maine Sav. Bank*, 136 N.H. 533, 538 (1992) (bracket omitted).

The defendants argue that equitable estoppel is inapplicable to the present case, which concerns the plaintiff's alleged reliance on an alleged promise rather than representation or concealment of a material fact. The defendants also assert that the "Miscellaneous" provision illustrates that any representation the defendants may have made was not made with the intent that the plaintiff act upon it. Furthermore, the defendants assert that the plaintiff did not rely on any representations, since it attempted to purchase the property.

The court agrees. The plaintiff has not shown that the defendants should be bound to their agreement to develop the "back land" under equitable estoppel principles. The plaintiff has not argued, for example, that the defendants knew of the ledge on the back land that would make development excessively costly, or that they deliberately ignored the risk of such an obstacle. As the parties do not allege a concealment or misrepresentation of material facts, equitable estoppel will not lie.

The motion for summary judgment is granted as to any claim in equitable estoppel.

#### CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is granted as to the issue of equitable estoppel, but because as to all other claims genuine issues of material fact exist, the motion for summary judgment is otherwise denied.

SO ORDERED.

May 7, 2008



Steven M. Houran,  
Presiding Justice

**THE STATE OF NEW HAMPSHIRE**  
**Grafton Superior Court**  
3785 Dartmouth College Highway  
N. Haverhill, NH 03774  
603 787-6961

**NOTICE OF DECISION**

**DOCKETED**

WILLIAM B PRIBIS ESQ  
CLEVELAND WATERS & BASS  
PO BOX 1137  
CONCORD NH 03302-1137

07-E-0124 Willowdale Place Coop., Inc. vs. Kilburn Craggs LLC, et al

Enclosed please find a copy of the Court's Order dated 6/04/2008  
relative to:

**Motion to Reconsider**

06/05/2008

Robert B. Muh  
Clerk of Court

cc: Robert M. Shepard, Esq.

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS.

SUPERIOR COURT

No. 07-E-125

Willowdale Place Cooperative, Inc.

v.

Kilburn Craggs, LLC, Austin W. Smith and David Groom

ORDER ON MOTION FOR RECONSIDERATION

The defendants move this court to reconsider its order of May 7, 2008 denying the defendants' motion for summary judgment. The defendants assert that the court misread *Hrushka v. State of New Hampshire, Dept of Public Works and Highways*, 117 N.H. 1022, 1024 (1977), and that a proper reading of that case would result in an award of summary judgment for the defendants. The defendants further assert that the plaintiff's reliance upon the contract at issue was not reasonable, and that summary judgment should therefore be awarded in the defendants' favor on the issue of promissory estoppel. The plaintiff objects. For the reasons detailed below, the motion for reconsideration is denied.

The purpose of a motion for reconsideration is to bring to the court's attention points of law or fact that the court has overlooked or misapprehended. *See* Super. Ct. R. 59-A.

The defendants allege that *Hrushka*, 117 N.H. at 1024, bars the plaintiff's recovery, and that the court misread *Hrushka* in ruling on the motion for summary judgment. Specifically, the defendants read the court's order as construing *Hrushka* "to involve a situation where the contract at issue did not confer an intended benefit upon third parties." Def. Mot. to Reconsider Order on Mot. Sum. J. at 2. The defendants then point out that the *Hrushka* Court "assum[ed] without deciding that the State's authority over the supervision of the construction constituted a promise," and "if two contracting parties expressly provide that some third party who will be benefited by performance shall have no legally enforceable right, the courts should effectuate the expressed intent by denying the third party any direct remedy." *Hrushka*, 117 N.H. at 1024. The defendants further assert that *Hrushka* makes no distinction between intended and incidental third-party beneficiaries, and restricts recovery by

any third-party beneficiary, no matter how direct or intended, where a contract provides that it may be enforced only by its signatories.

The *Hrushka* plaintiff was benefited by the agreement between his employer and the State. The agreement specifically required compliance with statutory safety standards in order to protect the public and the construction workers on the project, a class to which Hrushka properly belonged. However, the obligation to comply with a statute intended for the protection of the public and construction crews is a preexisting duty; the contract between Hrushka's employer and the State did not create any additional burdens or obligations for the benefit of Hrushka or those in his position. The *Hrushka* Court held: "It is clear that the parties did not intend to confer a benefit on any third party which could be enforced in a court." *Hrushka*, 117 N.H. at 1024. Thus, Hrushka's claim was properly dismissed. *Id.*

However, in *Hrushka*, as in *Public Service Co. of N.H. v. Hudson Light & Power*, 938 F.2d 338, 342 (1st Cir. 1991), "the rights of a third party are dependent upon the intent of the parties who executed the contract." *Hrushka*, 117 N.H. at 1024 (citing *Knapp v. New Haven Road Construction Co.*, 189 A.2d 386 (Conn. 1963); 17 Am.Jur.2d Contracts s 304 (1964)). "Any determination of the intent of the parties is ultimately to be made by this court." *Gamble v. University Sys.*, 136 N.H. 9, 13 (1992) (quoting *R. Zoppo Co. v. City of Dover*, 124 N.H. 666, 670 (1984)).

The present case is distinguishable from *Hrushka* in several ways. First, the benefits intended to be conferred upon the plaintiff in the present case exceeded and were distinct from any statutory remedy. Rather than simply agreeing to obey the notice and sale provisions of RSA 205-A:21, the contract between the buyer and seller of land provided for the buyer to relocate the Park on which the plaintiff's members reside. Second, construing the record before the court in the light most favorable to the non-moving party, *e.g.*, *Purdie v. Attorney General*, 143 N.H. 661, 663 (1999), the plaintiff and third parties with whom the plaintiff dealt in attempting to exercise rights under RSA 205-A:21 both relied upon the contractual language, and that language interfered with the plaintiff's eligibility for certain grants and loans that would have enabled it to acquire the property. That factor is further informed by the policy repercussions that would result from a contrary decision in the present

case. It would be contrary to the policy underlying RSA 205-A:21 to allow a buyer and seller to include a contractual provision that would short-circuit tenants' remedies under RSA 205-A:21 and RSA 205-A:22, while simultaneously holding that tenants have no recourse against the buyer in such a case.

For the foregoing reasons, to the extent that the motion for reconsideration is based on *Hrushka*, it is denied. Because the motion for reconsideration based on promissory estoppel does not bring to the court's attention any points of law or fact that the court has overlooked or misapprehended, *see* Super. Ct. R. 59-A, it is denied as to that basis as well.

So ordered.

June 4, 2008



Steven M. Houran,  
Presiding Justice