



Intended vs. incidental third-party beneficiary status - by Bret McCabe

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During the course of real estate development and construction operations, one issue that may arise during contract negotiation (and potential subsequent litigation) is whether or not the parties intend(ed) to confer beneficiary status to a non-signatory third-party.

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This concept of whether said third-party is in fact granted “Intended Third Party Beneficiary” status may dictate whether or not the third-party has the right to enforce the obligations of the contract.

In the absence of explicit language that the parties intended to benefit a third party, New York Courts have articulated that ‘the third party is merely an incidental beneficiary with no right to enforce the particular contracts’ (Dormitory Authority of the State of NY vs. Samson Construction Co., 30 N.Y.3d 704 (2018) citing Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652, 655 [1976] at 656).

In this vein, within its 2018 Dormitory decision, the NYS Court of Appeals ruled that in the context of construction contracts, express contractual language is required “stating that the contracting parties intended to benefit a third party ‘to enforce a promisee’s contract with another’” (Id.)

This distinction between “Incidental” and “Intended” status makes it clear that contractual language must be unambiguous and obvious regarding the intent to include a third-party beneficiary.

The Court of Appeals in the Dormitory decision rejected the premise that a party was an intended beneficiary if language does not exist within the Agreement expressly stating such intention.

Additionally, in 2019, in the matter of HTRF Ventures, LLC v. Permasteelisa N. Am. Corp., 2019 NY Slip Op. 32095(U), the honorable Joel Cohen of the Supreme Court of New York County further opined: “The Court of Appeals has held that a third party has the “right to enforce a contract in two situations: [(1)] when the third party is the only one who could recover for the breach of contract; or [(2)] when it is otherwise clear from the language of the contract that there was ‘an intent to permit enforcement by the third party’ (id., quoting Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 N.Y.2d 38, 45 [1985])...With respect to the latter situation, the First Department has held that “a third party cannot be deemed an intended beneficiary of a contract unless ‘the parties’ intent to benefit the third party [is] apparent from the face of the contract” (Commissioner of the Dep’t of Social Servs. of the City of N. Y. v New York-Presbyt. Hosp., 164 A.D.3d 93, 98 [1st Dep’t 2018], lv denied 33 N.Y.3d 901 [2019] [internal quotation marks and citation omitted]).”

Judge Cohen further articulated that: “Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent” (HTRF citing LaSalle Natl. Bank v Ernst & Young, 285 A.D.2d 101, 108-109 [1st Dep’t 2001]).

As such, any argument for third-party beneficiary status is contingent upon whether or not the contractual provisions unmistakably and clearly state such intent between the signatories.

Therefore, it is imperative the parties to a contract are aware that for such status to be extended to a third-party, clear language is required which on its face makes such intent explicit.

This issue often arises throughout the course of construction contract negotiation, and some litigation related thereto, as well as in the context of specific litigation between a condominium homeowner association (or building manager) and particular unit owners as related to the remittance and collection of building common charges.

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