STATE OF MINNESOTA
IN COURT OF APPEALS
A09-930

Ronald S. Carlson, et al.,
Appellants,

vs.

Anthony Lee Schmitt, et al.,
Respondents.

Filed February 17, 2010
Affirmed
Stoneburner, Judge

Stearns County District Court
File No. 73CV085756

Kim A. Pennington, Michael S. Gaarder, Pennington, Lies & Cherne, P.A., St. Cloud, Minnesota (for appellants)

David T. Shay, Shay Law Office, Ltd., St. Cloud, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellants challenge the district court's grant of summary judgment to respondents based on its conclusion that, as a matter of law, appellants do not have standing to sue respondents for alleged breach of a non-competition agreement that appellants had assigned to a third party. We affirm.

FACTS

In December 2002, appellant Ronald S. Carlson[1] purchased from respondent Anthony Schmitt,[2] business assets, including all rights and interests in all patents and patent applications related to the stackable "poly tank," designed, patented and sold by Schmitt under the assumed name of Tote-A-Lube, LLC (TAL). The purchase agreement included a non-assignable non-competition agreement in which Schmitt agreed, for a specified period, not to engage or be interested, directly or indirectly, with any entity in any phase of a competing business.

Carlson owned and operated TAL from January 3, 2003 until January 2007. During this time Rhino, Inc., owned by Richard Johanneck, manufactured the tanks for TAL, as it had during Schmitt's ownership of TAL. Carlson hired Johanneck to help

[1] Carlson appears to be the sole owner of appellant LAGR, Inc. Carlson asserts claims as an individual and on behalf of LAGR, which are referred to in this opinion collectively as "Carlson."

[2] Schmitt, at the time of the sale to Carlson, was the sole owner of respondent Davtone, Inc., now named U.S. Solutions, which are referred to in this opinion collectively as "Schmitt."

design improvements to the product, and Carlson obtained a revised patent for the enhanced tank design. By 2006 Rhino, Inc. was only producing the enhanced tanks.

In January 2007, Carlson sold TAL, including all of the involved patents, to a third party (the purchaser). Carlson obtained consent from Schmitt to assign the non-competition agreement contained in the Carlson-Schmitt purchase agreement to the purchaser. With Schmitt's consent, Carlson assigned all of his interest in the non-competition agreement to the purchaser as part of the sale.

After Carlson sold TAL, Rhino, Inc. no longer manufactured the tanks, and Johanneck, the sole owner of Rhino Tuff Tanks, LLC (RTT),[3] decided to produce and market a similar product. Johanneck hired TAL's former sales manager and began to distribute literature that offered a new tank design "that comes to you factory direct from the **original designer and manufacturer** of the stackable poly tanks . . . ."

The purchaser sued RTT in federal court asserting a claim of false advertising. RTT answered, asserting that its advertising was not false because Johanneck was, in fact, an original designer of the stackable poly tank. In connection with this litigation, Schmitt provided a letter to Johanneck, dated May 24, 2007, addressed "To Whom It May Concern," stating that Johanneck helped Schmitt with the design of the original stackable poly tank.

In response to the federal litigation, the purchaser suspended payments due to Carlson under their purchase agreement, noting that a significant portion of the purchase price for TAL was based on a single, clear, and exclusive title and use of the TAL name,

[3] RTT did not exist prior to Carlson's asset sale to the purchaser.

patents, designs, and brand; and RTT's claims, if true, would seriously reduce the value of the assets acquired. The federal lawsuit settled under an agreement that, in relevant part, acknowledged that although Johanneck participated with Schmitt in designing the tanks, Johanneck claimed no legal interest in the patents. The settlement agreement assigned any legal interest Johanneck might have had in the patents to TAL. The purchaser then demanded indemnification from Carlson for attorney fees and costs incurred in the federal litigation and withheld $45,000 for those expenses from royalty and interest payments owed to Carlson. Carlson then sued Schmitt for breach of the non-competition agreement asserting the amounts claimed by the purchaser as damages.

On cross-motions of Carlson and Schmitt for summary judgment, the district court granted summary judgment to Schmitt, holding that Carlson lacked standing to sue for breach of the non-competition agreement because he had assigned all of his rights under the agreement to the purchaser. This appeal followed.

DECISION

I. Standard of Review

"Where the facts are undisputed, standing is a legal question, which is reviewed de novo on appeal." *Eagle Creek Townhomes, LLP v. City of Shakopee*, 614 N.W.2d 246, 250 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). Contract interpretation is also subject to de novo review. *Hertz Corp. v. State Farm Mut. Ins. Co.*, 573 N.W.2d 686, 688 (Minn. 1998).

II. Assignment

On appeal, Carlson claims standing to sue Schmitt as a party to the original non-competition agreement. Carlson argues that his rights and obligations under the agreement were never effectively assigned because the agreement provides that the rights and obligations are non-assignable. This issue appears to be raised for the first time on appeal: in the district court, Carlson only argued standing as a third-party beneficiary of the agreement. Generally, this court will not address issues raised for the first time on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally, an appellate court will not consider a matter not argued to and considered by the district court). We therefore decline to address this issue except to note that the purchase agreement between Carlson and Schmitt provided that it could be modified in writing and the record demonstrates that Carlson obtained Schimtt's written consent to assignment. The "Consent of Assignment" signed by Schmitt was supported by consideration and provides that "Schmitt hereby consents to the assignment by Carlson to [the purchaser] of the Non-competition Agreement." And the record demonstrates that Carlson did "assign[], sell[], transfer[], convey[] and deliver[]" to the purchaser all of his "contract rights and benefits" under the non-competition agreement when he sold TAL to the purchaser. Carlson's argument is meritless.

III. Third-party beneficiary status

After the assignment of the non-competition agreement, the purchaser and Schmitt were the only parties to the non-competition agreement: Carlson was no longer a party to that agreement. Schmitt was the promisor, and the purchaser stepped into Carlson's shoes as the promisee. Carlson, acknowledging the general rule that an assignor cannot

maintain an action for breach of a contract that the assignor has assigned to another party,[4] argues that he nonetheless retained standing to sue to enforce this agreement as a third-party beneficiary. We disagree.

In Minnesota and in other jurisdictions in the United States, it is the prevailing rule that a third party may sue on a contract made for that party's direct benefit. *Buchman Plumbing Co., Inc. v. Regents of the Univ. of Minnesota*, 298 Minn. 328, 334, 215 N.W.2d 479, 483 (Minn. 1974). Minnesota uses the two tests set out in *Buchman* to determine the enforceability of contracts by third-party beneficiaries: the intent-to-benefit test and the duty-owed test. *Cretex Companies, Inc. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 138–39 (Minn. 1984) (describing the intent-to-benefit and duty-owed tests outlined in *Buchman*, and adopting an approach recognizing, if appropriate, third-party beneficiary rights if either the duty-owed or the intent-to-benefit test is met).

Under the intent-to-benefit test, the contract must contain "some expression of intent on the part of contracting parties that the person asserting such rights is to be a beneficiary of that contract." *Buchman*, 298 Minn. at 334, 215 N.W.2d at 483. Under the duty-owed test, the promisor's performance must discharge a duty owed by the promisee to the third party. *Id.* at 335, 215 N.W.2d at 484.

In his brief on appeal, Carlson appears to concede that the non-competition agreement does not express an intent to benefit Carlson because Carlson states that

[4] *See Dunn v. Nat'l Beverage Corp.*, 729 N.W.2d 637, 648 (Minn. App. 2007) (stating that "[a] breach-of-contract claim cannot be maintained when the rights vested in the contract have been assigned to another party"), *aff'd*, 745 N.W.2d 549 (Minn. Mar. 6, 2008).

"Carlson could only be an incidental beneficiary."[5] And Carlson correctly states that "[g]enerally, an incidental beneficiary does not have standing to pursue a breach of contract claim." *See Wurm v. John Deere Leasing Co.*, 405 N.W.2d 484, 486 (Minn. App. 1987) (stating that "[u]nless the contract expresses some intent by the parties to benefit a third party through contractual performance, a beneficiary is no more than an incidental beneficiary and cannot enforce the contract" (citation omitted)). Nonetheless, Carlson argues standing as a creditor-beneficiary under the duty-owed test.

"The duty-owed test is met if the promisor's performance under the contract discharges a duty otherwise owed the third party by the promisee." *Twin City Constr. Co. of Fargo, N.D. v. ITT Indus. Credit Co.*, 358 N.W.2d 716, 718 (Minn. App. 1984). "Discharge" means, in pertinent part, "the payment of a debt or satisfaction of some other obligation." *Black's Law Dictionary* 530 (9th ed. 2009). When a debt or obligation is satisfied, it has been "[p]aid . . . *in full*." *The American Heritage Dictionary of the English Language* 1604 (3d ed. 1992) (emphasis added). Therefore, the duty-owed test can only be satisfied where the promisor's duty under the contract with promisee encompasses or is identical to the duty that the promisee owes the third party, such that the promisee's obligation is *fully discharged* by the promisor's performance. *See, e.g.*, *Twin City Constr.*, 358 N.W.2d at 718 (holding that a contractor could enforce a loan

[5] At oral argument, Carlson's counsel asserted that this statement in the appellate brief must be a "typographical error." But a plain reading of the brief belies this assertion. To the extent Carlson claims to be a third-party beneficiary under the intent-to-benefit test, the claim is without merit. The language of the non-competition agreement plainly demonstrates that there is no expression in the agreement of an intent to benefit Carlson.

agreement between a lender and property owner because, under the agreement, lender assumed the owner's duty to pay the contractor as work progressed).

Carlson appears to assert that because the non-competition agreement added value to assets purchased by the purchaser, who agreed to make royalty and purchase-price payments to Carlson, and the value of the assets would be irreparably harmed without the protection of the non-competition agreement, Schmitt's duty under the non-competetition agreement affected the purchaser's duty to Carlson. We conclude that this argument is nothing more than a reiteration that Carlson is, at most, an incidental beneficiary of the non-competition agreement. Under the agreement, Schmitt's performance fulfills a duty to the purchaser. But the purchaser's duty to Carlson is not encompassed by, or identical to, Schmitt's duty to the purchaser. Schmitt's performance does not fulfill the purchaser's obligation to Carlson. The district court did not err by concluding that Carlson lacks standing as a third-party beneficiary to sue Schmitt for alleged breach of the non-competition agreement.

Affirmed.