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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38426-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

JOHN H. KIM, MIN H. KIM, and EUGENE H. KIM, Appellants

v.

FRANK C. MOFFETT and "JANE DOE" MOFFETT, husband and wife,
and T.A.A., INCORPORATED, Respondents

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

Assignments of Error No. 1:

The trial court erred in denying Appellant's Motion to Reconsider its ruling that Chul M. Kim was not a real party in interest.

Issue No. 1:

Is Chul M. Kim a beneficiary under the contract?

Issue No. 2:

Is Chul M. Kim a third party beneficiary under the contract?

Assignments of Error NO. 2:

The trial court erred in dismissing the claims of the JME Limited Partnership.

Issue No. 1:

Is JME Limited Partnership a third party beneficiary under the contract?

Assignments of Error No. 3:

The trial court erred in dismissing the claims of John H. Kim, Min H. Kim and Eugene H. Kim.

Issue No. 1

May an undisclosed principal sue for damages on a

personal services contract?

Issue No. 2

Is the contract assignable to the Sons?

Issue No. 3

May the Sons enforce damage claims under the contract?

II. STATEMENT OF THE CASE

On April 28th 2001, the Plaintiff, Chul M. Kim (“Kim”), and the Defendant, Frank C. Moffett (“Moffett”), signed an agreement in which Kim authorized Moffett to begin to gather information and develop program requirements for architectural services for two residences to be constructed on real property in Orinda California. CP 77,121.

Moffett preformed work under the contract and was paid \$5,200.00 by Kim. CP 85, 86. Kim provided Moffett copies of the minutes of the Orinda Planning Commission approving the preliminary design of the houses. CP 122-132. The minutes listed Chul Kim as the applicant and the Strykoeski Limited Partnership as the owner of the real properties.

On October 19th 2001, Kim and Moffett formalized their agreement with two documents dated October 19th 2001. CP 33,

35-37, 133-136. These agreements provided that Moffett provide a variety of architectural and structural engineering services related to two residences on the properties known as 2 Alice Court and 7 Alice Court in Orinda California. CP 133-136. Moffett performed work under the contract. He was paid an additional \$4,244.04 by Kim. CP 89, 90, 92, 93.

If February of 2002, Moffett quit working for Kim and moved to California. CP 45, 46, 108. Moffett referred Kim to R. Chandler Sogge ("Sogge") to finish the work. CP 96, 108, 109. There was never a meeting with Moffett, Kim and Sogge together. CP 47, 109. The only reason Kim went to Sogge was that Moffett refused to finish the job. CP 46, 109. Contrary to the contract, Moffett quit working without giving written notice as required by the contract. CP 46.

Kim and his wife, Sun Hae Kim, owned 2 Alice Court and 7 Alice Court in Orinda, California. They conveyed 2 Alice Court to trusts for the benefit of their three son on December 28th 1989. They conveyed 7 Alice Court to the trusts for the benefit of their sons on December 15th 1992. CP 105, 106. The real property was later conveyed out of the trusts to the Strykoeski Limited Partnership on August 13th 1999. The Strykoeski Limited

Partnership consisted of Kim as the general partner and his three sons as the limited partners. CP 106. On September 7th 2001, the properties were conveyed by the Strykoeski Limited Partnership to John Ho Kim, Min Ho Kim and Eugene Ho Kim, Chul Kim's three sons ("Sons"). On December 30th 2002, the Sons signed a Grant Deed conveying title to the real property to the JME Limited Partnership ("JME"). CP 53-56, 106.

On April 28th 2001, when Kim and Moffett signed the first contract, title to the real property was in the name of the Strykoeski Limited Partnership. CP 106, 107. The partnership consisted of Chul Kim as the general partner and the Sons as the limited partners. CP 106. On October 19th 2001, when the two subsequent contracts were signed, title to the real property was held in the name of the Sons. CP 106, 107.

When Kim hired Moffett to do the design work he informed Moffett that he had one year in order to obtain building permits from the city of Orinda. CP 109. The reason Kim hired Moffett was because Moffett was licensed in the State of California as an architect and an engineer. CP 107. Sogge was not licensed in California. CP 109. Sogge was a principal in T.A.A Inc. ("T.A.A."), one of the Respondents herein. CP 259. Sogge and his associate

Sean McCormick could not provide architectural drawings acceptable to the City of Orinda within that year time limit. CP 109.

On May 18th 2006, Chul M. Kim filed a Complaint in the Thurston County Superior Court under cause number 06-2-00911-5 against Frank C. Moffett, "Jane Doe" Moffett, husband and wife and T.A.A. Inc, Defendants. He alleged that Moffett and T.A.A. failed to complete the contract and breached the contract. CP 3-5. Moffett and T.A.A. filed an Answer and Affirmative Defenses denying Kim's allegations. CP 6-7. On May 25th 2007, Kim filed an Amended Complaint adding JME as a party plaintiff. The reason for adding JME as a party plaintiff was that JME is the current owner of the property in California. CP 8-10.

On December 14th 2007, Defendant filed a Motion for an Order of Dismissal, Summary Judgement on the Pleadings and Summary Judgement. CP 11-12. The Court entered an order granting Summary Judgement against JME and dismissing its claims. It further dismissed Chul M. Kim as a real party in interest but allowed Kim to amend the Complaint to add the Sons as the real party in interest. CP 175, 176.

On February 12th 2008, a Second Amended Complaint was filed naming the Sons, John H. Kim, Min H. Kim and Eugene Kim,

as the Plaintiffs.

On June 2nd 2008, Kim filed a Motion for Reconsideration. CP 177. The order denying Kim's Motion for Reconsideration was entered September 12th 2008.

Moffett filed a Motion for an Order of Summary Judgement on June 20th 2008. CP 221-222. An Order on Defendants Motion for an Order on Summary Judgement was entered September 12th 2008. The Order granted Defendant's Motion for Summary Judgement and dismissed the claims of the Sons herein. CP 267-269.

It is from the Order Denying Plaintiff's Motion for Reconsideration filed September 12, 2008 and the Order on Defendant's Motion for an Order of Summary Judgement filed September 12, 2008 which Appellants are hereby appealing.

III. ARGUMENT

1. Standard of review.

This appeal concerns two orders of the trial court. The first is the order denying Plaintiff's Motion for Reconsideration. CP 175-176, 177. The second matter is the appeal from the Order Granting Summary Judgement, dismissing the claims of John H. Kim, Min H. Kim and Eugene Kim. CP 267-269.

Normally the standard of review for an order denying a Motion for Reconsideration is whether or not the Court abused its discretion. *Detrick v. Garretson Packing Co.*, 73 Wash. 2d 804, 812, 440 P. 2d 834 (1968). The Motion for Reconsideration was based upon the Court's Order granting Summary Judgement. CP 175-176, 177, 270. Due to the fact that the Motion for Reconsideration was based upon the Court's Summary Judgement ruling, de novo review should apply. *Schneider v. City of Seattle*, 24 Wn. App. 251, 255 (Wash. App. Div. 1 1979), 600 P 2d 666. *Griffin v. West RS Inc.*, 143 Wn. 2d 81, 87, 18 P. 3d 58, (2001).

The standard review for the Order granting Summary Judgement (CP 267-269) is de novo. *Griffin id.* at 87.

2. Chul Kim is a real party in interest.

A. Kim is a direct beneficiary under the contract.

A real party in interest is defined as a person or entity who has a present and substantial interest in the matter and is able to show he, she or it will benefit from the relief granted. *State Rel. Hays v. Wilson*, 17 Wn. 2d 670, 672, 137 P. 2d 105 (1943). A motion to dismiss for failure to state a claim must be denied unless it appears that the Plaintiff could prove no set of facts consistent with the Complaint which would entitle him to relief. *Dennis v.*

Haggen, 35 Wn. App. 432, 434, 667 P. 2d 131 (1983).

Kim has alleged that due to Moffett's breach of contract that he has been damaged. He has had additional expenses and the amount he is to receive, by way of managing the projects, is decreased due to Moffett's breach of contract . CP 109, 110.

A contracting party has three legally protected interests. *Vol. 25 Washington Practice Series*, Section 14.3. The restitution represents a person's interest in the benefits he has conferred upon the other. *Bill v. Gatavara* 34 Wn. 2d 645, 209 P. 2d 457 (1949). Part of Kim's damages under this theory are the sums paid by him to Moffett. This amounts to over \$9,000.00. CP 108.

There is the reliance interest, which represents the detriment of the aggrieved party may have incurred by changing his position. *Sliverdale Hotel Associates v. Lomas & Nettleton Company* 36 Wn. App. 762, 772, 677 P. 2d 773 (1984). In this case, Kim changed his position by relying upon Moffett to provide him with the necessary drawings to obtain a building permit from the City of Orinda. Had Moffett not agreed to the contract in the first place, Kim could have hired someone else who would have completed the contract. CP 140. When Moffett withdrew, five months had already elapsed. Kim now had to rely upon Sogge to complete the

project within the allotted time. Since Sogge was unable to do so, all of the fees paid to Moffett and Sogge by Kim, along with the decrease in future income, caused by Moffett are damages suffered by Kim. CP 140.

The last interest is expectation interest which represents the prospect of gain from the contract. *Gagliebari v. Denny's Restaurants, Inc.*, 117 Wn. 2d 426, 449, 815 P. 2d 1362 (1991). The expectation here is the amount Kim would have earned had Moffett completed the contract. This amount would equal the difference between what he will earn had the contract been completed by Moffett versus the amount he will earn if the houses can be completed. CP 110.

Kim, as the promisee under the contract, has a right against the promisor. *Farnsworth on Contract*, Section 10.7 (2d ed. 1990).

In applying the law the trial court erred in determining that Kim was not a beneficiary under the contract with Moffett and therefore not a party.

B. Chul M. Kim is a third party beneficiary.

Not only was Kim the signor on the contract with Moffett, he was acting as the contractor for the residence to be built on the real property owned by the Sons. CP 110. Kim suffered damages due

to the fact that Moffett breached the contract. CP 109, 110. As the contractor in the case, it can be reasonably contemplated that Kim would be a third party beneficiary of the contract with Moffett.

A third party beneficiary contract exists when the contracting parties intend to create one. *Postlewait Construction, Inc v. Great American INS. Companies*, 106 Wash. 2d 96, 99, 720 P. 2d 805 (1986). The test of intent is an objective one: Whether performance under the contract would necessarily and directly benefit the third party. *Postlewait*, *id.* at 99. The contracting parties intent is determined by the terms of the contract as a whole, in light of the circumstances under which it was made. *Postlewait id.* at 99-100.

“One of the critical questions is whether the benefits flow directly from the contract or whether they are merely incidental, indirect or consequential.” *McDonald Const. Co. v Murray*, 5 Wn. App. 68, 71 (1971). The benefit must be the direct result of performance and so within the contemplation of the parties. *McDonald Construction*, *id.* 70.

A third person, beneficially interested in the contract, may maintain an action to recover thereon, even though the identity of the person may not be known at the time of the execution of the

contract. *Bosie Cascade Corp. v. Pence*, 64 Wn. 2d 798, 802 (1964).

The contracts signed between Kim and Moffett require Moffett to provide structural and design work for two residences to be constructed on the property owned by JME. CP 134, 136. The contracts call for payments by Kim totaling \$26,000.00. CP 136. The intent of the contract is to benefit Kim, who Moffett has designated as the owner on the contract, and the owners of the real property in Orina, California. Even if the Court does not consider Kim to be a direct beneficiary he is a third party beneficiary as there is an intent to benefit Kim who is the contractor. It is reasonable to consider that the purpose of the contract is to obtain the permits to build two residences. The residences are going to be build by a contractor. That a contractor would benefit from obtaining the building permits and building the residences. The benefits of this contract flow directly to Kim. Kim is beneficially interested in this contract.

Even if one does not consider Kim a direct beneficiary, he should be considered a third party beneficiary under the contract. Not only did the trial court misapply the law in this case but it also abused it's discretion in dismissing the claims of Kim.

3. JME Limited Partnership is a Third Party Beneficiary Under the Contract.

In order to create a third party beneficiary contract, the parties must intend that the promisor assume a direct obligation to the intended beneficiary at the time they entered into the contract.

Burk & Thomas, Inc. V. International Organization of Masters, Mates & Pilots, West Coast and Pac. Region Inland Division, Branch 6, 92 Wn. 2d 162, 167, 600 P. 2d 1282, (1979). How can it not be said that the owner of the real property is the beneficiary of the contract.

JME is a successor to the Strykoeski Limited Partnership and the Sons individually. When Kim originally contracted with Moffett, Kim was the general partner of the Strykoeski Limited Partnership. CP 106. As general partner he was one of the owners of the real property at the time of the original contract, dated April 28th 2001. The limited partners consisted of Chul Kim's Sons. The ownership was then transferred to Kim's Sons and then to JME in which the the Sons are the limited partners. CP 105, 206. At all times herein the Sons were owners of the property, either directly or as limited partners.

When the Moffett signed the contract dated October 19th

1991, he agreed to preform services related to design modification and construction documentation for two residences to be constructed on the property owned by the Sons. CP 105-108. At the time the contract was signed, Moffett had documentation in his possession that indicated that the owners of the real property included a third party. CP 108 It should be noted that Moffett prepared both the letter dated October 19, 2001 on Kim's letterhead and the contract dated October 19, 2001, listing Kim as the owner. CP 107, 108, 244, 246.

He listed Kim as the owner due to the fact that it was Kim he was dealing with. CP 108.

At the time Moffett prepared the contracts that were dated October 19th 2001, he knew, or should have known that ownership of the real property was held in the name of a third party. CP 108. He created an ambiguity when he listed Kim as the owner. Any ambiguity in a document is construed against the drafter. *Riss v. Angel*, 80 Wn. App. 553, 556, 912, P. 2d 1028 (1996). Therefore it should be presumed for a summary judgement motion, that Moffett had knowledge that Kim was not the owner of the real property.

Even though Kim's Sons were not identified at the time the contract was made, they are identifiable at the time the contract

was executed and therefore are third party beneficiaries. *Bosie Cascade Corp. v. Pence* 64 Wn. 2d 802.

As a successor in interest, JME has a right to enforce the Sons' claims for damages. *Rainier Avenue Corporation v. City of Seattle* 76 Wn. 2d 800, 804, 459 P. 2d 40 (1969).

3. The Court Errored in Dismissing the Claims of John H. Kim, Min H. Kim and Eugene Kim, the Sons.

A. Sons are not undisclosed principals.

As stated above, JME and the Sons are successors in interest to the Strykoeski Limited Partnership. CP 108. The Sons were identifiable at the time the contract was executed and therefore are not undisclosed principals. *Bosie Cascade Corp. v. Pence* 64 Wn. 2d 802.

B. The Contract is Assignable to the Sons.

Section 317 (2) of the restatement of contract states: "a contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, ..., or materially reduce it's value to him, ..., or (c) the assignment is validly precluded by the contract."

In this case none of the limitations, which would effect the assignment to a third party beneficiary or to a successor interest are present here. Moffett's duty is to provide the services as outlined in the contract. The assignment does not increase the burden or risk composed nor does it reduce the value to Moffett. An assignment is not precluded by the contract. There being a disclosed principal, Strykoeski Limited Partnership, the assignment of the contract to it's predecessor in interest, the Sons and/or JME, are not precluded and the Sons and/or JME may enforce the contract.

C. The Sons may enforce damage claims under the contract.

The trial court in it's ruling on Respondent's Motion for Summary Judgement, found that Kim was the agent for his Sons. It further found that the Sons were not disclosed to Moffett. It stated that if an undisclosed principal can not enforce a contract the undisclosed principal can not be damaged by the failure of the third party to act and therefore the undisclosed principal may not recover for such failure to act. CP 268.

All Appellants have a right to bring an action for damages. A personal services contract, even if it is not assignable, the right to

damages for breach of the contract is assignable. *Bershouer /Phillips Construction Co. V. Seattle School Dist. No. 1*, 124 Wn. 2d 816, 829, 881 P. 2d 986, (1994). The courts there stated that there was a distinction between an assignment for performance and an assignment for damages. *Bershouer /Phillips Construction Co. v. Seattle School Dist. No. 1*, Supra 830.

Here the appellants are not seeking performance. They are seeking damages for the breach of performance. These types of claims are assignable.

IV. ATTORNEY'S FEES

The Appellants hereby request that they be awarded attorney's fees and cost pursuant to statute.

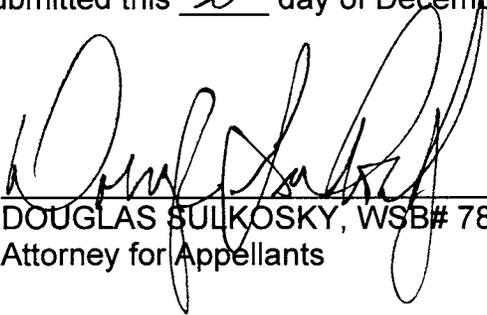
V. CONCLUSION

Chul M. Kim, one of the parties to the contract and JME Limited Partnership, the third party beneficiary under the contract, were dismissed by the trial court as real parties in interest. CP 175-176. The Complaint was amended and the three Sons were substituted as Plaintiffs pursuant to the direction of the Court. CP 175-176. The court then determines that the Sons do not have a claim against Moffett. CP 267-269. In essence what the trial court has done is determined that there is no party that may enforce the

contract or claim damages for Moffett's breach thereof.

Based upon the above this court should reverse the trial court's denial of Appellant's Motion for Reconsideration wherein it dismisses and it's dismissal of Kim and JME as real parties in interest and it's Order of Summary Judgement dismissing the claims of the Sons.

RESPECTFULLY submitted this 30th day of December,
2008.



DOUGLAS SULKOSKY, WSB# 7855
Attorney for Appellants

CERTIFICATE OF MAILING

I, EMILY FAIN, certify under penalty of perjury under the laws of the State of Washington that on the 30th day of December, 2008, I caused to be deposited in the US Mail, with postage prepaid, a copy of this document addressed to the following:

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DATED: 12/30/08

Emily Fain
EMILY FAIN, Legal Assistant

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