

## STATE OF MICHIGAN

## SIXTEENTH JUDICIAL CIRCUIT COURT

GSR 1, LLC, GS ROUSSILLON, LLC and  
MODE DEVELOPMENT, INC.,

Plaintiffs/Counter-Defendants,

Case No. 2017-3315-CB

vs.

THE BELDEN BRICK SALES COMPANY,

Defendants/Counter-Plaintiffs,

and

THE BELDEN BRICK SALES COMPANY,

Third-Party Plaintiff,

vs.

O.L. BOLYARD LUMBER COMPANY,

Third-Party Defendant.

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OPINION AND ORDER

Defendant/Counter-Plaintiff/Third-Party Plaintiff The Belden Brick Company ("Defendant") has filed a motion for summary disposition against Plaintiffs/Counter-Defendants GSR 1, LLC, GS Roussillon, LLC and Mode Development, Inc. (collectively, "Plaintiffs") pursuant to MCR 2.116(C)(8) and (10). Plaintiffs and Third-Party Defendant O.L. Bolyard Lumber Company ("Third-Party Defendant") have filed a joint response and request that the motion be denied. Defendant has also filed a reply brief in support of its motion.

In addition, Plaintiffs have filed a motion for partial summary disposition of Count

I of the Complaint against Defendant pursuant to MCR 2.116(C)(10). Defendant has filed a response and requests that the motion be denied. In addition, Plaintiffs have filed a reply brief in support of their motion.

### I. Factual and Procedural History

Plaintiff GS Roussillon, LLC ("Plaintiff GS") is the record owner of four industrial properties at the center of this matter, all of which are located within the Cherry Creek Corporate Park located in Shelby Twp., MI (the "Properties"). Plaintiff GS allegedly intended to transfer ownership of the Properties to Plaintiff GSR 1, LLC ("Plaintiff GSR"). Plaintiff Mode Development, Inc. ("Plaintiff Mode") was responsible for designing and developing the Properties.

On or around May 2016 and January 2017, Plaintiff Mode allegedly ordered "Belden Sea Gray Velour Utility Bricks" from Defendant. The bricks were delivered over the course of multiple dates. Allegedly while installing the bricks it became known that the bricks were not uniform in color.

On September 7, 2017, Plaintiffs filed their complaint in this matter ("Complaint"). The Complaint contains the following claims: Count I- "Breach of Contract by Plaintiffs as Third Party Beneficiaries against Defendant", Count II- "Breach of Implied Warranties by Plaintiffs as Third Party Beneficiaries against Defendant", Count III- Revocation of Acceptance by Plaintiffs, Count IV- Slander of Title by Plaintiff GS as to 52888 Shelby Parkway, and Count V- Slander of Title by Plaintiff GS as to 52674 Shelby Parkway.

On October 27, 2017, Defendant filed its counterclaim and third-party complaint ("Counterclaim"). In the Counterclaim, Defendant alleges that Third-Party Defendant is the entity which purchased the bricks, not any of the Plaintiffs. In the Counterclaim,

Defendant asserts a claim seeking to foreclose on construction liens it has placed on 52888 and 52674 Shelby Parkway (Count I). Further, Defendant alleges that Third-Party Defendant breached its contract with it (Count II). Finally, Defendant states a claim for unjust enrichment against Plaintiffs (Count III).

On October 1, 2018, Defendant filed its instant motion for summary disposition. On October 10, 2018, Plaintiffs filed their motion for partial summary disposition of Count I of the Complaint. The parties have filed responses to the opposing side's motions. In addition, each side has filed a reply brief in support of their respective motions. On November 19, 2018, the Court held a hearing in connection with the motions and took the matters under advisement.

## II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

### III. Law and Analysis

#### A. Third Party Beneficiaries (Counts I, II and III of Complaint)

In this matter, the parties agree that the contract at issue consists of several purchase orders (the "POs"). (See Complaint, at ¶¶15-16, Plaintiff's motion, at p. 9, Defendant's Response, at p. 5.) (See *also*, POs, Plaintiffs' Exhibit 4.) In their motion, Plaintiffs first maintain that while they are not parties to the contract(s) at issue they may nevertheless pursue a breach of contract claim against Defendant because they are intended third party beneficiaries of Defendant's contract(s) with Third-Party Defendant.

MCL 600.1405 is the statute which governs a third party to a contract's ability to enforce that contract. Specifically, MCL 600.1405 provides:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

(2)(a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.

(b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

The test for determining whether someone is a third party beneficiary is an objective one, determined from the form and meaning of the contract. *Guardian Depositors Corp*

*v Brown*, 290 Mich 433, 437; 287 NW 798 (1939). “A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person.” *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). “By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.” *Id.* at 428. “A court should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary within the meaning of [the statute]”. *Id.*

In this matter, the POs do not refer to any of the Plaintiffs directly, or directly to a class of persons/entities to which any of the Plaintiffs are included. While Plaintiffs seek to rely on various types of extrinsic evidence to establish that one or more of them were intended third party beneficiaries, such evidence is irrelevant to the Court’s inquiry, as the question of whether a person/entity is a third party beneficiary is to be determined by looking at the contract itself alone. *Schmalfeldt*, 469 Mich at 427-428. Based on the POs alone, this Court is convinced that Plaintiffs are not intended third party beneficiaries of the subject contract(s). As a result, Plaintiffs may not maintain Counts I-III of the Complaint and they must be dismissed.

#### B. Breach of Contract (Count II of Third Party Complaint)

The remaining argument at issue in the instant motions is Defendant’s (Third Party Plaintiff) argument that it is entitled to \$126,390.42 from Third Party Defendant. In support of its argument, Defendant relies on an 8/31/17 “Statement” which shows a balance owed by Third Party Defendant in the amount of \$126,390.42. (See

Defendant's Exhibit 43.) However, Defendant also concedes that the parties' dispute whether the color inconsistency of the bricks violated the terms of the contracts. Third-Party Defendant's first affirmative defense is that Defendant's claims are barred because it committed a first material breach of the contract(s). Defendant has not proven that providing bricks of an inconsistent color does not amount to a breach of the contract(s). Consequently, a genuine issue of material fact remains with respect to this issue, thereby requiring this Court to deny Defendant's motion for summary disposition of Count II of the Third-Party Complaint.

### III. Conclusion

Based on the foregoing, Defendant's motion for summary disposition is GRANTED, IN PART and DENIED, IN PART. Specifically, Defendant's motion for summary disposition of Counts I-III of the Complaint is GRANTED. Defendant's motion for summary disposition of Count II of the Third-Party Complaint is DENIED. Further, Plaintiff's motion for partial summary disposition is DENIED. The Court states this Opinion and Order neither resolves all pending matters nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: JAN 03 2019

Kathryn A. Viviano  
Hon. Kathryn A. Viviano, Circuit Court Judge