IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

APLUS CO., LTD,
Plaintiff-Counterclaim Defendant/Appellee,

v.

NIIZEKI INTERNATIONAL SAIPAN CO., LTD., f.k.a. NIIZEKI SAIPAN CO., LTD,
Defendant-Counterclaim Plaintiff/Appellant.

Supreme Court Appeal No. 04-022-GA
Superior Court Case No. 99-0532-D

OPINION

FOR PUBLICATION

Cite as: ***Aplus Co., Ltd. v. Niizeki Intern'l Saipan, Co., Ltd., 2006 MP 13***

Argued and submitted on September 29, 2005
Rota, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, F. PHILIP CARBULLIDO, Justice *Pro Tempore*, and FRANCES M. TYDINGCO-GATEWOOD, Justice *Pro Tempore*

DEMAPAN, Chief Justice:

I.

¶1 The issue before this court is whether Niizeki International Saipan Co., Ltd. ("NIS") is a third party beneficiary in a joint venture agreement, allowing NIS to have standing to assert counterclaims relating to the joint venture agreement. The trial court granted summary judgment in favor of Aplus Co, Ltd. ("Aplus"), finding that NIS was not an intended beneficiary and dismissed NIS's counterclaim against Aplus. We find that a material question of fact remains over whether NIS is an intended third party beneficiary. Therefore, we REVERSE and REMAND for further proceedings.

II.

¶2 Beginning in January 1989, Aplus (known at that time as Daishinpan), was interested in doing business in Saipan. An idea arose between Aplus, Niizeki Japan and Daisue Kensetsu Co., Ltd. to create a joint venture for this purpose. Aplus, through its representatives, informed Masayuki Niizeki that Aplus would provide the necessary funding in furtherance of the joint venture's purposes. This included, among other things, the purchase of various real estate properties on Saipan through NIS that would ultimately be sold to the joint venture company. NIS, owned by the Niizeki family and Niizeki Japan, was established on Saipan in August 1987 and had been doing real estate leasing and sales in Saipan since its inception.

¶3 Aplus authorized a 2 billion yen loan to Niizeki Japan, which was guaranteed by NIS. The purpose of this loan was for purchasing long-term leasehold interests in real

properties on Saipan through NIS because the joint-venture company, DND International Resort Developments, Inc., ("DND") had not yet been formed. Because leasehold title of the real properties would be held by NIS, Aplus required NIS to sign a Continuing Guaranty. Also, mortgages were taken by Aplus on NIS real estate properties as security for the 2 billion yen loan guaranty.

¶4 Aplus prepared the Continuing Guaranty for Masayuki Niizeki's signature and it was signed by him on May 29, 1989. Mr. Niizeki signed this Continuing Guaranty as President of NIS. The next day, the loan agreement was executed between Niizeki Japan and Aplus. This agreement was also signed by Mr. Niizeki.

¶5 About four months later, on October 2, 1989, Mr. Niizeki, as president of Niizeki Japan, along with Aplus (Daishinpan), and Daisue Kensetsu Co., Ltd., signed the Basic Contract for Joint-Business Project ("JVA"). This document was originally in Japanese, but was subsequently translated into English for purposes of litigation. The joint-venture company, DND, was formed in December 1989. DND rented office space from NIS, which was located at the first floor of Kim's Town Building in Garapan, Saipan. Aplus was to provide the funding for DND's operations, initial capitalization, purchasing and leasing of real estate and buildings, project managements and the construction of marina and condominium projects. Aplus was also to provide "end-user" real estate mortgage financing to the buying of the condominium units. It was understood by Aplus, Niizeki Japan and NIS that the profits NIS would make from the sale of its real properties, among other things, and the profits Niizeki Japan would be making as a member of the joint venture company would be more than sufficient to repay the 2 billion yen loan. The loan was structured to be repaid in one lump sum payment within five years.

¶6 Aplus provided the loan to DND to purchase Lot 15 L02, but failed to provide the financing to purchase Lots 1856 New-2 or 1930-1 for a total of 1.2 billion yen. Because Aplus was the sole financier of DND, the joint venture projects failed to materialize due to lack of financing. The 2 billion yen loan was not repaid in its entirety and Aplus filed suit to enforce the guaranty.

¶7 Aplus filed its complaint on September 17, 1999, naming NIS as defendant in the action to enforce the Continuing Guaranty contract. NIS filed an Answer, Defenses, Counterclaim and Demand for Jury Trial on November 3, 1999 and amendments to those filings on November 10, 1999. In its counterclaim, NIS claimed, in part, that Aplus breached the JVA contract by failing to purchase certain properties and finance the joint-venture. On July 17, 2003, Aplus filed a Motion for Summary Judgment alleging, among other things, that NIS is neither a party to nor an intended beneficiary of the JVA and thus has no standing to pursue this argument. After a hearing on the motion, the trial court issued an Order Granting Plaintiff's Motion for Summary Judgment and Dismissing Defendant's Counterclaims on May 25, 2004. In its order, the trial court determined that NIS was not an intended third-party beneficiary of the JVA. On June 9, 2004, NIS filed its Motion to Vacate Order and Reconsider the trial court's order of May 25, 2004. On September 21, 2004, the trial court issued an Order Denying Motion to Vacate Order. It is from these two orders that NIS appeals in this case.

III.

¶8 This Court has proper jurisdiction over this case pursuant to Article IV, Section 3 of the N.M.I. Constitution and 1 CMC § 3102(a).

IV.

¶9 The sole issue before this Court is whether the trial court erred in determining that there was no genuine issue of material fact as to whether NIS could prove it was an intended beneficiary under the JVA and therefore assert third-party beneficiary standing to bring its counterclaim for breach of contract against Aplus. This Court reviews de novo the granting of summary judgment by the trial court. *Wabol v. Camacho*, 4 N.M.I. 388, ¶ 2 (1996). This Court will affirm if it finds that, as to the legal basis relied upon, (1) there was no genuine issue of material fact, and (2) the trial court correctly applied the substantive law. *Apatang v. Marianas Public Land Corp*., 1 N.M.I. 36, 38 (1990).

A. Summary Judgment

¶10 As we review this issue de novo, we first look at the standards of review and burdens carried by the parties in a summary judgment motion. Summary Judgment may be granted only when the court, after viewing facts and inferences in a light most favorable to the non-moving party, finds as a matter of law that the moving party is entitled to judgment as a matter of law. *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172, 176 (1990); *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993). A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but…must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,

106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (citation omitted). "If the evidence set forth by the non-moving party is 'merely colorable…or [was] not significantly probative…summary judgment may be granted.'" *Eurotex, Inc. v. Muna*, 4 N.M.I. 280, 284 (1995) (*citing Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202).

¶11 It "is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 . A trial court cannot weigh the evidence and make findings on disputed factual issues on a motion for summary judgment. *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512 (1993).

B. Third-Party Beneficiaries

¶12 We now turn to the question of third-party beneficiaries. As there is no written or customary law on the issue of third-party beneficiary contracts in the Commonwealth, we rely upon the Restatement (Second) of Contracts. *See* 7 CMC § 3401. The Restatement divides third-party beneficiaries into two types—incidental and intended. Fundamentally, this is where the dispute in this case lies. The trial court found that NIS was an incidental beneficiary, thus precluding NIS from asserting the counterclaim. NIS argues that it is clearly an intended beneficiary of the JVA and should have standing.

¶13 An incidental beneficiary is a beneficiary who is not an intended beneficiary. RESTATEMENT (SECOND) OF CONTRACTS § 302 (2). This statement is, of course, not very helpful without understanding the definition of an intended beneficiary. All parties in

this action, and the trial court, agree that RESTATEMENT (SECOND) OF CONTRACTS § 301 (1) is the applicable law. That section reads:

> Unless otherwise agreed upon 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 promise 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.

¶14 Section 302(1) outlines a three-part test to determine whether a third party is an intended beneficiary: (1) The parties have not agreed otherwise, (2) recognition of a right to performance is appropriate to effectuate the intention of the parties; and (3) the circumstances indicate that either the performance of the promise will satisfy an obligation or discharge a duty owed by the promisee to the beneficiary or the promisee intends to give the beneficiary the benefit of the promised performance. We find that, viewing the evidence in a light most favorable to NIS, a material question of fact remains over whether NIS is an intended beneficiary.

¶ 15 First, there does not appear to be any evidence of an agreement by the parties to limit the benefits of the JVA to Daisue, Aplus and Niizeki Japan.

¶ 16 Second, recognizing a right to performance in NIS would be appropriate in light of the purposes of the JVA. The Supreme Court of Tennessee has observed:

> [P]art (2) ensures that third-party beneficiaries will be allowed to enforce the contract only when enforcement would further the parties' objectives in making the agreement. In applying this part, courts should look to what the parties intended to accomplish by their agreement, and a third party should not be deemed an intended beneficiary if so doing would undermine the parties' purposes.

Owner-Operator Indep. Drivers Ass'n, Inc. v. Concord EFS, Inc., 59 S.W.3d 63, 70-71 (Tenn. 2001). According to the Preamble and Article 2.3 of the JVA, the intention of the parties was to conduct business in Saipan, including construction of tourist facilities and condominium units. Those sections specifically provide:

> Preamble
> Based on mutual respect and through candid and sincere deliberations, Niizeki, Daishipan, and Daisue have agreed to establish a company…which company shall be established by each party or through its subsidiaries or local subsidiaries in Saipan, with main objectives of conducting the business provided by 2.3 and other related business activities
>
> 2.3 The business of the new company shall be as follows: (1) Construction of tourist and recreational facilities, their related facilities in Saipan and sale of/agent for/intermediary for/management of real estates in Saipan

In order for the parties to achieve their objectives, they would need to purchase leaseholds from NIS, rent office space and employ a project manager. Thus, the rights of performance held by NIS are not only appropriate, but necessary to effectuate the intention of the parties.

¶ 17 Finally, viewing the evidence in a light most favorable to NIS, it appears that Niizeki Japan intended to give NIS the benefit of the promised performances. The trial court appears to have assumed that NIS could only benefit from the sale of the property if it were to make a profit. In its Order Granting Summary Judgment, the trial court found that "… the JVA says nothing about the contemplated price for those leasehold properties, and for all intents and purposes, the parties to the JVA could have intended that NIS sell the properties for no benefit at all, for the good of the joint venture." *Aplus Co., Ltd., v. Niizeki Intern'l Saipan Co*, Civ. No. 99-0532, (N.M.I. Super. Ct. May, 26, 2004) (Order

Granting Plaintiff's Motion for Summary Judgment and Dismissing Defendant's Counterclaims), p. 11. Section 302 (1) (b) of the Restatement, however, provides that a party is an intended beneficiary if, among other things, "the promise intends to give the beneficiary the *benefit of the promised performance*." We interpret this to mean that the benefit is the promise of performance promise itself. One does not need to profit from the performance in order to benefit from performance of the promised obligation. *See, e.g. Scarpitti v. Weborg*, 609 A.2d 147 (Pa. 1992) (benefit to third party beneficiary homeowners was establishing a vehicle for enforcement of deed restrictions).

¶18 Now that we have addressed the meaning of benefit, we turn to whether, in this case, Niizeki Japan intended to give NIS the benefit of a promised performance. The test by which the line is ordinarily said to be drawn between *intended* and *incidental* beneficiaries is the test of "intent to benefit" the beneficiary. *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). More recently, a Colorado appellate court opined:

> The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself, or be shown by necessary implication. It is a question of fact to be determined by the terms of the contract taken as a whole, construed in the light of the circumstances under which it was made and the apparent purposes the parties were trying to accomplish.

East Meadows Co. v. Greeley Irrigation Co., 66 P.2d 214, 217 (Colo. App. 2003). "In the typical case, where the promisor has undertaken to render performance directly to the beneficiary, the intent to benefit the third party will be clearly manifested." 13 RICHARD A. LORD, WILLISTON ON CONTRACTS § 37:8 (4th ed. 2000) (footnotes omitted). Here, the

JVA provided that the new company, funded substantially by Aplus, would purchase the lands described in the JVA from NIS. Article 10.1(1) specifically provides:

> To attain the joint business project, Niizeki shall sell the rights in the lands (leasehold) in Saipan described in the attached property list and held by Niizeki Saipan (hereinafter "concerned property") and the new company shall purchase concerned property. In addition, if deemed necessary for the joint projects, Niizeki shall sell the lands owned by Niizeki Saipan to the new company in accordance with the terms and conditions agreed to by the parties hereto, and the new company shall purchase the same.

Under the terms of the agreement, the promised performance of purchasing the properties described in the JVA was made directly to NIS. This presents strong evidence in support of a finding that NIS was an intended beneficiary.

¶ 19 There are other provisions of the JVA to support such a finding. For example, Article 2.4 provides that, "The head office of the new company shall be located at the office of [NIS] until an office for the new company is to be provided elsewhere." The promised performance of renting office space was to be rendered directly to NIS. Furthermore, Article 10.5 provides that "Niizeki shall have [NIS] accept business duties as the so-called project manager for this joint project…and have it execute management duties for the concerned building." This provision explicitly promises the position of project manager directly to NIS. Based on this evidence, it appears that Niizeki Japan intended to benefit NIS when it entered into the JVA.

V.

¶ 20 After viewing the evidence in a light most favorable to NIS, we find that a material question of fact remains over whether NIS was an intended beneficiary. Therefore, the trial court erred in granting of summary judgment. Accordingly, the Order

Granting Summary Judgment and Order Denying Motion to Vacate Order and Reconsider are REVERSED and this case is REMANDED.

¶ 21 So Ordered this 22nd day of June 2006

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN
Chief Justice

/s/ F. Philip Carbullido
F. PHILIP CARBULLIDO
Justice *Pro Tempore*

/s/ Frances M. Tydingco-Gatewood
FRANCES M. TYDINGCO-GATEWOOD
Justice *Pro Tempore*