

provisions of this section, it shall thereupon order such distribution of the principal and undistributed income as it deems proper and as nearly as possible in conformity with the conveyor's intention.

(c) Other powers. --Nothing in this section shall limit any power of the court to terminate or reform a trust under existing law.

Obviously this act is not applicable to the case at bar, for §6102 concerns the termination of trusts. The Estate of Mary M. Rupert consists simply of real property subject to a life estate, which was divided through a will. No trust is involved in this case.

In order to create a trust, three requirements are necessary; a trustee, a res and one or more beneficiaries. The res, or property must be owned by the trustee, who is required to care for it as specified in the trust agreement for the benefit of the beneficiaries. The settlor/testatrix must also intend to create a trust. *Sherwin v. Oil City Natl. Bank*, 229 F.2d 835 (3d Cir. 1956). None of the elements are present here, nor has either party shown this to be present in the above case.

Since this Court possesses no jurisdiction, the petition will be denied.

ORDER OF COURT

NOW, this 24th day of September, 1990, the petition of Edgar B. Rupert, Jr. for appointment of a trustee and for the sale of real estate and fixtures formerly assets of the Estate of Mary M. Rupert, deceased, is denied.

Exceptions are granted the petitioner.

J AND D KITCHEN DISTRIBUTORS, INC. V. MALOSKEY AND WIFE, C.D., Franklin County Branch, No. A.D. 1991-114

Unpaid Subcontractor - Unjust Enrichment - Third Party Beneficiary

1. Only an intended beneficiary and not an incidental beneficiary is entitled to recover on a contract as a third party beneficiary.
2. Where a general contractor and the owners of property execute a waiver of liens agreement which specifically states that the defendants are not liable for a subcontractor claim, the subcontractor is not an intended beneficiary.
3. Recovery is permitted under a theory of unjust enrichment where a benefit was secured for which no compensation was given.
4. A subcontractor may not claim unjust enrichment when the property owner has paid the general contractor.

Donald L. Kornfield, Esq., Attorney for Plaintiff

George E. Wenger, Jr., Esq., Attorney for Defendants

WALKER, J., August 5, 1991:

OPINION AND ORDER

FINDINGS OF FACT

In May of 1990, Thomas and Marybeth Maloskey, defendants, contracted with Larry Thatcher, a general contractor, to build a single family home. The defenants signed a waiver of liens agreement with the general contractor on May 21, 1990. In September and October of 1990, J and D Kitchen Distributors, plaintiff, was employed by the general contractor to supply various cabinets, appliances and counter tops for the kitchen and two bathrooms. The general contractor installed these materials.

The defendants have paid the general contractor the money due to him under the contract and have taken possession of the residence. However, the general contractor never paid the plaintiff for the kitchen and bathroom materials that he supplied for the defendants' residence.

On February 25, 1991, the plaintiff filed a complaint against the defendants demanding reimbursement for the materials supplied to complete the defendants' residence. In response, the defendants

filed a preliminary objection asking for a demurrer.

The following issues are before the court:

1. whether the defendants would be liable for the unpaid materials as third party beneficiaries to the alleged contract between the general contractor and the plaintiff; and
2. if not liable as third party beneficiaries, whether the defendants would be liable for the unpaid materials under the theory of unjust enrichment.

DISCUSSION

I. Third Party Beneficiary

According to the law of contracts, a third party beneficiary is classified as either intended or incidental. Restatement of Contracts 2d §302 (1979) (adopted by Pennsylvania in *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744 (1983)). Only an intended beneficiary has standing to recover on a contract as a third party beneficiary. *Guy v. Liederbach*, 501 Pa. 47, 58, 459 A.2d 744 (1983). An incidental beneficiary possesses no rights under the contract. *Meyer Plumbing & Heating Supply Company v. West End Federal Savings and Loan Association*, 345 Pa. Super. 559, 565, 498 A.2d 966 (1985) (citing Restatement of Contracts 2d §315 (1979)). The test used to determine whether a party is an intended beneficiary is:

1. the beneficiary's right is recognized as effectuating the intention of the parties and
2. the circumstances indicate that the contractee intends to give the beneficiary the benefit gained by the contract. *Guy v. Liederbach*, *supra* at 60.

Liability exists only if the contract contains language expressing the parties' intention to benefit the third party. *Manor Junior College v. Kaller's, Inc.*, 352 Pa. Super. 310, 507 A.2d 1245 (1986).

In the case at bar, the court assumes that a contract existed between the general contractor and the plaintiffs, J and D Kitchen Distributors. However, the general contractor and the defendants,

Thomas and Marybeth Maloskey, entered into a waiver of liens agreement, which expressly states that the defendants are not liable for any claim filed against the general contractor by a "sub-contractor, materialmen or laborers for work done or materials furnished under said contract." The existence of this waiver of liens agreement indicates the defendants' obvious intent by the defendants to protect themselves from any claims filed against the general contractor. See *Meyers Plumbing & Heating Supply Company v. West End Federal Savings and Loan Association*, *Supra* at 565.

The court finds that the defendants would not qualify as intended beneficiaries to the contract between the general contractor and the plaintiff. Therefore, the plaintiff has no cause of action against the defendants for the unpaid materials under contract law.

II. Unjust Enrichment

Under the theory of unjust enrichment, recovery is permitted where a benefit was secured for which no compensation was given. *State Farm Mutual Automotive Insurance Company v. Jim Bowe & Sons, Inc.*, 372 Pa. Super. 186, 190, 539 A.2d 391 (1988); *Meyers Plumbing & Heating Supply Company v. West End Federal Savings and Loan Ass'n*, 345 Pa. Super. 559, 566, 498 A.2d 966 (1985). A direct relationship between the parties is not necessary. *Gee v. Eberle*, 279 Pa. Super. 101, 119, 420 A.2d 1050 (1980). However, the plaintiff must establish:

1. that a benefit was received by the defendant; and
2. that the enrichment to the defendant is unjust.

D.A. Hill Company v. Clevertrust Realty Investors, 524 Pa. 425, 432, 573 A.2d 1005 (1990). The court does not look to see if the parties intended the defendants' benefit. *Gee v. Eberle*, *supra* at 117. Rather, the court focuses on the extent to which the enrichment was unjust. *Gee v. Eberle*, *supra*.

The case at bar involves the relationships between property owners, the defendants, a general contractor and a subcontractor, the plaintiff. As a general rule, a subcontractor may not claim unjust enrichment when the property owner has paid the general contractor. In *Gee v. Eberle*, *supra* at 123, and *D.A. Hill Company v.*

Clevetrust Realty Investors, supra at 433, the courts held that a lender/property owner satisfied his obligations to the subcontractor by making advances to the general contractor for the work performed by the subcontractors. Furthermore, the court held in *Meyers Plumbing & Heating Supply Company v. West End Federal Savings and Loan Ass'n supra* at 565 that property owners are not liable for the cost of materials supplied by a subcontractor for the renovation of their property.

In the current dispute, the defendants, Thomas and Marybeth Maloskey, paid compensation for all the benefits received as a result of their newly constructed residence. The defendants paid the general contractor the amount due under the contract. The amount paid included the costs of the services rendered for construction and installation as well as the cost of the building materials. Therefore, the defendants paid the general contractor for the materials received from the plaintiff. If the court were to require the defendants to pay the plaintiff, J and D Kitchen Distributors, for the kitchen and bathroom materials, the defendants would pay twice for the same items.

Moreover, in the interest of fairness, the defendants should not be held liable for the general contractor's failure to pay the plaintiff for these materials. The business agreement between the plaintiff and the general contractor involved a certain amount of risk to be born by the plaintiff. To have the court restructure this agreement and place all the risk on the defendants would be unfair. *D.A. Hill Company v. Clevetrust Realty, supra* at 434. The plaintiff should bear the responsibility for its own business decisions and seek recourse from the general contractor, not the defendants.

CONCLUSION

The plaintiff, J and D Kitchen Distributors, Inc., has not set forth any cause of action against the defendants, Thomas and Marybeth Maloskey, in its complaint. First, under contract law, the defendants were only incidental beneficiaries to the contract between the plaintiff and the general contractor, Larry Thatcher. Incidental beneficiaries will not be held liable under the third party beneficiary theory. Second, under the theory of unjust enrichment, the defendants did not receive an uncompensated benefit from the plaintiff.

ORDER OF COURT

August 5, 1991, the preliminary objection filed by defendants, Thomas and Marybeth Maloskey, in the form of a demurrer is granted and the case is dismissed.

PEIPER VS. PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, C.P. Franklin County Branch, Misc. Vol. AA, Page 143

Bus Drivers License - Revocation - Established Medical History - Federal Rehabilitation Act of 1973

1. A Pennsylvania Department of Transportation regulation disqualifying a school bus driver on the basis of medical history of heart disease is a reasonable exercise of the Department's rule-making powers.
2. Under the current regulation a school bus driver's license can be revoked based on her medical history and not her current condition.
3. The Federal Rehabilitation Act of 1973 creates an affirmative defense of handicap discrimination in license revocation cases.
4. Where appellant does not raise an affirmative defense to avoid the regulation of the Department of Transportation, medical history alone is a basis for license suspension.

Donald J. Smith, Esquire, Attorney for Appellant
Patrick J. Redding, Esquire, Attorney for Appellee

KAYE, J, July 30, 1991:

OPINION

Carol Ann Peiper (hereinafter "appellant") has appealed from the February 8, 1991 recall by the Department of Transportation of her license to operate a school bus. The Department's action was based on a physical examination report filed by appellant's family physician in January, 1991, which indicated that she had a medical