

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

RICHARD F. STOKES  
JUDGE

1 THE CIRCLE, SUITE 2  
SUSSEX COUNTY COURTHOUSE  
GEORGETOWN, DE 19947

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Re: ***State of Delaware Department of Transportation v. Figg Bridge  
Engineers, Inc. and Mactec Engineering and Consulting, Inc.***  
Cr.A. No S11C-01-031 RFS

*Upon Defendant Mactec's Motion for Reconsideration and Reargument.  
Denied.*

Submitted: November 28, 2011  
Decided: December 7, 2011

Dear Counsel:

Defendant Mactec has moved for reargument on my denial of summary judgment to Mactec regarding DelDOT's status as a creditor beneficiary to the Subcontract between Figg and Mactec. The State opposes.

Mactec asserts first that the Court's decision would destroy the typical construction contract setting, which does not confer intended beneficiary status on an owner absent an

indemnity clause. There is nothing to prevent a departure from the typical construction contract pattern.<sup>1</sup> Further, the ramification of Mactec's position is that credit beneficiary status depends solely on whether a subcontract indemnifies the owner. This is not accurate. Intended beneficiary status rests on the parties' intent as expressed in the contract.<sup>2</sup> Indemnification is a factor, which, if present, warrants third party status, but its absence does not *per se* eliminate that status.

The Contract does not create a typical construction contract setting in that it authorizes specific subcontractors for each aspect of the work and repeatedly states that a subcontractor is bound by the terms and provisions of the Contract to the same extent that the general contractor is bound. Mactec's Subcontract reiterates these atypical terms and similar ones, as explained in my original decision.<sup>3</sup> Mactec sidesteps the clear intent of the Subcontract as discussed in my decision.

Mactec also argues that I relied on "confusing *dicta*" from *Institutform of North America, Inc. v. Chandler*:

It is universally recognized that where it is the intention of the promisee to secure performance of the promised act for the benefit of another, either a gift or **in satisfaction or partial satisfaction of an obligation to that person**, and the promisee makes a valid contract to do so, then such third person has an enforceable right under the contract to require the promisor to

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<sup>1</sup>*Pierce Assoc., Inc. v. Nemours Foundation*, 865 F.2d 530, 536 (3<sup>rd</sup> Cir. 1989), *cert. denied*, 492 U.S. 907 (1989).

<sup>2</sup>*Oliver B. Cannon and Son, Inc. v. Dorr-Oliver, Inc.*, 336 A.2d 211, 215 (Del. 1975).

<sup>3</sup>For a description of a typical construction contract setting, *see Institutform of North America, Inc. v. Chandler*, 534 A.2d 257, 268-69 (Del.Ch. 1987).

perform or respond in damages.<sup>4</sup>

First, this language is not confusing, but clear. Further, it is not *dictum*, which “is by definition no part of the doctrine of the decision.”<sup>5</sup> In *Chandler*, the quoted passage is part of the doctrine of the case.

More recently, it was also part of the doctrine of *Global Energy Finance LLC v. Peabody Energy Corp.*,<sup>6</sup> *Street Search Partners, L.P. v. Ricon Internat’l, LLC*,<sup>7</sup> and *Stuchen v. Duty Free Internat’l, Inc.*<sup>8</sup> Each of these cases quotes the above-referenced passage and applies it as bedrock law. It was part of the doctrine of the decision which is the subject of the reargument motion.

Mactec argues that none of the cases cited in *Chandler* use the language “in satisfaction or partial of an obligation to that person.” That issue was not presented in those cases, but the *Chandler* court recognized that the cited cases reflected the general principles of intended beneficiary law.

By arguing that DelDOT is not an intended beneficiary of the Subcontract, Mactec implies that DelDOT is an incidental beneficiary. If the third party “happens to benefit from the promise either coincidentally or indirectly,” the third party is not an intended

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<sup>4</sup>*Id.* at 268 (emphasis added).

<sup>5</sup>Black’s Law Dictionary 519 (9<sup>th</sup> ed.).

<sup>6</sup>2010 WL 4056164 (Del.Super.).

<sup>7</sup>2005 WL 1953094 (Del.Super.).

<sup>8</sup>1996 WL 33167249 (Del. Super.).

beneficiary and has no enforceable rights under the contract.<sup>9</sup> DeIDOT's benefit under the Subcontract is neither coincidental nor indirect. In fact, the benefit is intentional and direct. DeIDOT's status as an intended beneficiary is established in the Subcontract.

Mactec has not shown that this ruling was error by challenging the *Chandler* language.

The second issue on reargument is that under § 302 of the Restatement (Second) of Contracts, a third party creditor beneficiary must owe money or liquid assets in some form. Mactec misstates the law.

The Reporter's Note to § 302 states that the definition of "intended beneficiary" presented in § 302(1) is new and that it includes both donee and creditor beneficiaries. The Note states that § 302(1) covers situations in which neither a debt nor a gift analysis applies. Illustrations 10 and 14, which are based on case law not supposition, describe situations where an intended beneficiary wants something other than money. Although many intended beneficiaries seek money or some equivalent, this is not a required factor in the analysis under the Restatement.

I find no requirement, either explicit or implied, that an intended beneficiary must seek money or its equivalent in order to have enforceable rights under the contract.

Mactec's motion for reargument is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

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<sup>9</sup>*Chandler*, 534 A.2d at 269.

Richard F. Stokes

cc: Prothonotary