

In the United States Court of Federal Claims

Case No. 99-754 C

Filed for Publication: July 22, 2005

NORMA C. SULLIVAN and
DONALD E. SULLIVAN,

Plaintiffs,

v.

THE UNITED STATES,
Defendant.

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Rule 56 Summary
Judgment; Third Party
Beneficiary; Breach of
Contract.

Charles E. Berg, Brockton, Massachusetts, for Plaintiff.

J. Reid Prouty, Trial Attorney, with whom were *Mark A. Melnick*, Assistant Director, *David M. Cohen*, Director, and *Peter D. Keisler*, Assistant Attorney General, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington D.C., for Defendant.

OPINION and ORDER

SMITH, Senior Judge

This matter is before the Court on cross-motions for summary judgment. After oral argument by the parties and careful consideration by the Court, Plaintiffs' motion for summary judgment is hereby GRANTED.

Jurisdiction and Standard of Review

This Court has subject matter jurisdiction to hear non-tort suits for money damages arising out of express or implied contracts with the United States. 28 U.S.C. § 1491 (2001). Accordingly, this Court renders judgment on any claim against the national government founded "upon any express or implied contract with the United States." *Id.* The Plaintiffs in the present case allege that they are third party beneficiaries to an express contract between the United States Postal Service (Postal Service) and TNT Transportation (TNT) and that both TNT and the Postal Service breached that contract, to the Plaintiffs'

detriment. Because the complaint is a claim against the United States founded upon an express contract to which the Government is a party and seeks money damages for an alleged breach and for the reasons set out in the earlier decision in this case, this Court entertains the parties' cross-motions for summary judgment. *Sullivan v. United States*, 54 Fed. Cl. 214 (2002).

Pursuant to Rule 56 of the Court of Federal Claims an award of summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC. 56(c). Because of a summary judgment motion's dispositive nature, the Court is to construe all evidence presented by the non-movant and draw all inferences in his favor. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986). This case is ripe for summary judgment disposition because the underlying facts giving rise to the Sullivans' contract claim are not disputed by either party, as evidenced by the parties' Joint Stipulation of Facts as to Liability. See *Curtis v. United States*, 168 F. Supp. 213, 216 (1958).

Undisputed Facts¹

On July 15, 1995, responding to an emergency need for mail delivery services around suburban Boston, the USPS, entered into written contract HCR 023EU with TNT. That contract was on a standard form. The form included a subsection detailing the minimum liability insurance that TNT was required to carry. The minimum insurance requirement was the same as the Department of Transportation minimum requirement, which was \$750,000.00. While the Postal Service contracting officer requested written verification that TNT had acquired the DOT minimum coverage in compliance with the contract term, and TNT's president promised to fax a copy of the contract's requisite insurance policy, TNT did not acquire the insurance. Just one month after the contract was signed, on August 17, 1995, one of TNT's mail delivery truck hit the Sullivans' automobile from behind, resulting in bodily injury to Norma Sullivan. The truck itself was insured at the then-applicable Massachusetts state minimum of \$20,000.00 per person, but did not carry the coverage required in the contract.

Standing

Contract law is typically a matter of state common law, however in the field of federal government contracts this Court applies a federal common law. *United States v. Allegheny County, PA*, 322 U.S. 174, 183 (1944). Because of the unique posture of a sovereign as defendant, federal contract law is narrowly construed and "as a general proposition, the 'government consents to be sued only by those with whom it has privity of contract'." *First Hartford v. United States*, 194 F.3d 1279, 1289 (1999), citing *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984). As with many

¹ The undisputed facts of this case were stipulated by the parties. *Stipulation of the Parties (Liability Only)*.

general rules, however, the law carves out exceptions to this demand of privity. “Before a stranger can avail himself of the exceptional privilege of suing for a breach of contract to which he is not a party, he must, at least, show that it was intended for his direct benefit.” *German Alliance Insurance v. Home Water Supply Company*, 226 U.S. 220, 230 (1912). A proper third party beneficiary does not need to be mentioned in the contract, but need only fall within a class of people clearly intended to be benefitted by the contract provision. *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). In order to prove third party beneficiary status, the Plaintiff here must demonstrate that contract HCR 023EU not only reflects the intention to benefit their class, but that the contract reflects an intention to benefit highway travelers directly. *Glass v. United States*, 258 F.3d 1349, 1354, *amended on reh’g* 273 F.3d 1072 (Fed. Cir. 2001). It is hard to imagine who would be a more direct beneficiary than the party injured by the policy holder’s negligence. “In other words, if circumstances indicate that the promisee intends to give a third party the benefit of that promised performance, they are an intended beneficiary.” *Airplane Sales International Corporation v. United States*, 54 Fed. Cl. 418, 421 (2002), citing *Restatement of Contracts* § 304(1)(b) (1981). In order for non-signatory Plaintiffs, such as the Sullivans, to satisfy the jurisdictional requirement of third party beneficiary status, they must prove that the USPS and TNT had the general population who might be injured in their contemplation when they agreed to the contract provision of liability insurance coverage in the amount of \$750,000.00.

Third Party Beneficiary Status

Plaintiffs contend that they come before the Court as third party beneficiaries because both parties had highway motorists in mind. *Plaintiff’s Cross-Motion for Summary Judgment* at p. 4. In contrast, Defendant’s argument is two-fold. First, Defendant contends that the “insurance provision was intended to be incident to support the actual purpose of the contract, delivery of the mail”, *Defendant’s Motion for Summary Judgment* 5, and second, that there is “regulatory evidence that the purpose of the contract provision for insurance is to protect the Postal Service, not the general public or the Sullivans.” *Id.*

Clearly, when parties contract for insurance, they intend to get some benefit for themselves. When people contract for life insurance it is usually to get the benefit of knowing a loved one is economically protected. When liability insurance is purchased it is for the purpose of compensating people who might otherwise sue you. The contracting parties to a liability insurance contract or policy benefit themselves by conferring on a third party beneficiary (the future accident victim) compensation for the injury the promisee has caused. Thus, a contract to procure liability insurance logically intends that the injured third party will also benefit from their contract. The government’s semantic argument does not challenge this simple logic. *See Flattery v. Gregory*, 397 Mass. 143 (1986). While *Flattery* is not controlling law in this Court, the case does provide this Court with analytical guidance. In *Flattery*, the court held that the insurance requirement in a contract inherently implies an intention on the part of the parties to benefit third party injured highway travelers. In its ruling, the court implied an intent to benefit a third party based upon the anticipated payment of judgments to third party injured highway travelers. *Flattery* at 148-149. In this case, it seems clear, that the insurance requirement in the contract between TNT and the Postal Service anticipates similar possible payments for injuries to third parties. For this very reason, the Postal Service

required TNT to carry at the very minimum \$750,000.00 in liability insurance. By its very nature liability insurance provides both a protection against litigation by the injured, and a cushion, at the very least, to liability that would otherwise be borne solely by the insured. The government as the insured's contracting partner has a dual interest in both avoiding secondary liability and litigation and in its contractors acting properly. Hence, the Court finds that future injured highway travelers were contemplated third party beneficiaries as part of the negotiated contract.

This Court has found third party beneficiary status in factually diverse contract cases. *E.g. North Star Steel Co. v. United States*, 58 Fed. Cl. 720 (2004) (a manufacturer survived its lack of privity through its third party beneficiary status); *Airplane Sales International Corporation v. United States*, 54 Fed. Cl. 418 (2002) (a private company which contracted to buy used airplane hulks from the Naval Museum Foundation was found to be an intended third party beneficiary of a contract between the Navy and its Foundation); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596, 602 (1985) (finding tribe members and their children were intended third party beneficiaries to government contracts for high school upkeep given the pertinent statutes and regulations and the underlying policy behind the contracts sufficient to survive the Government's motion to dismiss). The USPS Procurement Manual governs contracts between the Postal Service and its contractors.² With regard to insurance requirements, the Manual provided "contractors may be required to carry insurance only when necessary to protect the interest of the Postal Service." *See Appendix* at p. 3.³ The Court, however, does not sit in a vacuum, and thus it is the Court's duty to also analyze all the natural and logical consequences of the stated purpose. 39 C.F.R. § 601.100; *Modern Systems Technology Corp. v. United States*, 24 Cl. Ct. 360, 362 (1991). While it is true that the Manual mandates liability insurance to protect the interests of the Government, the natural and logical consequence of such a measure is to shield the United States Government from claims by accident victims precisely like the Sullivans. Common sense instructs that insurance protects its purchaser from financial exposure, and in so doing, the policy also necessarily benefits the accident victim making a claim.

Breach of Contract

It is an undisputed fact that both the Postal Service and TNT agreed to section 18, part D of contract HCR 0123EU, setting out the DOT legal minimum liability coverage, as a term of the contract. Nor does either party dispute that TNT, which promised to obtain that coverage by entering the contract, and then further by a telephone conversation with the Postal Service contracting officer, broke that promise. *See Joint Stipulation of the Parties (Liability Only)*. Instead, Defendant argues that because third party beneficiaries suing the government must stand in the shoes of the party who has privity with the

² The Manual has been incorporated by reference into the Code of Federal Regulations. It therefore has, and did have in 1995 when the USPS/TNT contract was negotiated, the force and effect of law. 39 C.F.R. § 601.100 (1991).

³ Chapter 7, section 2 of the 1995 Manual, section 7.2.1(a).

Government, and that TNT's own breach of the contract would not allow it to maintain a suit against the Government, the Sullivans cannot maintain a cause of action in this Court. Instead, Defendant argues that Plaintiffs' remedy lie exclusively against TNT, not the Postal Service. *Defendant's Motion for Summary Judgment* p. 7 and *Defendant's Reply* at 3. The government's position that the Sullivans' remedies lie exclusively against TNT is only partly correct. TNT was negligent and this resulted in injury to the Sullivans. However, the very purpose of the insurance was to protect innocent highway drivers from uncompensated losses from judgment proof or under-insured contractors doing the government's business. By not enforcing the insurance policy requirement the government denied the Sullivans a benefit of the contract, to which they were entitled. That is the reason the Sullivans not only have a cause of action against TNT, but a valid claim against the government. It is this contractual injury which this Court is required to remedy.

Conclusion

The Court finds that the Sullivans have standing as third party beneficiaries of the insurance provisions of a federal contract, and because the Government failed to enforce the explicit terms of that contract granting a benefit to people in the Sullivans position, the Court hereby **DENIES** the Defendant's motion for summary judgment, and **GRANTS** the Plaintiffs' motion for summary judgment.

The Court hereby **DIRECTS** the parties to confer regarding the next steps to be taken in this litigation. The Parties are further **ORDERED** to contact the Judge's law clerk to set a time and date for a telephonic status conference to discuss the issue of damages.

IT IS SO ORDERED.

LOREN A. SMITH
Senior Judge