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Contracts--Donee Beneficiary--Consideration from Promisee (Graybar Electric Co., Inc. v. Seaboard Surety Co., 157 Misc. 275 (App. T. 1st Dept. 1935))

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CONTRACTS — DONEE BENEFICIARY — CONSIDERATION FROM PROMISEE.—The defendant was surety and the Keresy Ryan Corporation principal, upon a bond running to Sears Roebuck & Company. The principal had undertaken to construct a building for Sears Roebuck. The latter exacted a bond which guaranteed the faithful performance of the building contract and the discharge of any debts or obligations owing from the Keresy Corporation to laborers and materialmen. In a suit to recover for materials, plaintiff's motion to strike out defendant's defenses of lack of privity and absence of consideration between the promisee, Sears Roebuck Corporation and the plaintiff beneficiary was granted. On appeal, *held,* privity of contract and consideration from a promisee to a beneficiary is not essential to recovery by the latter on a gratuitous promise where the clear intent of the contract is to benefit a third party. *Graybar Electric Co., Inc.* v. *Seaboard Surety Co.,* 157 Misc. 275, 283 N. Y. Supp. 522 (App. T. 1st Dept. 1935).

In New York the subject of the application of the doctrine of beneficiary contracts is expressed in *Seaver* v. *Ransom*[1] to extend to four classes: (1) where there is a legal obligation running from the promisee to the beneficiary;[2] (2) where the contract is made for the benefit of the near relative of a party to the contract;[3] (3) the public contract cases where the municipality seeks to protect its inhabitants by covenants for their benefit;[4] (4) where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration.[5] In the instant case[6] the court makes a strained effort to bring the facts within the fourth class enumerated. But the difficulty is that no direct promise to the beneficiary is present. The court, however, also relied on the doctrine of the donee beneficiary enunciated in the Restatement of the Law of Contracts wherein a gift promise[7] is made enforceable by the beneficiary when there is a clear inten-

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[1] Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 619 (1918).

[2] Lawrence v. Fox, 20 N. Y. 268 (1859) (debtor-creditor beneficiary); Vrooman v. Turner, 69 N. Y. 280 (1877).

[3] Todd v. Weber, 95 N. Y. 181 (1884); Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724 (1899); Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 619 (1918).

[4] Pond v. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211 (1906).

[5] F. N. Bank of Sing Sing v. Chalmers, 144 N. Y. 432, 39 N. E. 331 (1895); Hamilton v. Hamilton, 127 App. Div. 871, 112 N. Y. Supp. 10 (4th Dept. 1908).

[6] Graybar Electric Co. v. Seaboard Surety Co., 157 Misc. 275, 279, 283 N. Y. Supp. 522, 524 (1935).

[7] RESTATEMENT, CONTRACTS (1932) § 133. A gift promise is one where "it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary."

tion to benefit him.[8] The furthest that the Court of Appeals has gone in sustaining the donee beneficiary is the close relationship cases[9] where no consideration other than a moral obligation is required between the beneficiary and promisee. In a recent case, *McClare* v. *Mass. Bonding and Insurance Co.*[10] the principal opinion pronounced strong dicta to the effect that a donee beneficiary has enforceable rights in New York. A strong dissenting opinion did not disapprove this dicta, it simply maintained that the promisee had no legal capacity to contract with the promisor and that the beneficiary could therefore not recover.[11] *Seaver* v. *Ransom* does not limit beneficiary contracts to four classes. The progressive view on the subject is that any beneficiary clearly designated and intended to be benefited upon a contract has enforceable rights therein.[12] This seems to be the attitude of our highest court[13] and will probably be so declared when the situation is presented.

I. J. B.

CONTRACTS—PERFORMANCE TO SATISFACTION—OVERHEAD.—Defendant undertook to purchase stationery from plaintiff, the purchase price to be the cost of production plus a stipulated percentage of profit. The contract further provided that the overhead charges to be included in the cost of production, were to be satisfactory to the purchaser. As a matter of fact, the overhead charges were not satisfactory to the purchaser, and it refused to accept the stationery. The seller brings this action for breach of contract, claiming that the defendant should be satisfied with such an allowance of overhead

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[8] RESTATEMENT, CONTRACTS (1932) § 135, illustration 4 is precisely the situation here:

> "*D* contracts to build a house for *A*. *A* obtains a bond from *B*. *B* promises *A* that all *D's* creditors for labor and materials who may acquire a lien on the house shall be paid. *C* is such a creditor of *D's*. *C* is a donee beneficiary."

[9] Todd v. Weber, 96 N. Y. 181 (1884); Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724 (1899); Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 619 (1918); *cf.* Vogeler v. Alwyn Construction Corp., 247 N. Y. 131, 159 N. E. 886 (1928), discussed in Note (1928) 18 CORN. L. Q. 621.

[10] McClare v. Mass. Bonding & Ins. Co., 266 N. Y. 371, 195 N. E. 17 (1935).

[11] McClare v. Mass. Bonding & Ins. Co., 266 N. Y. 371, 380, 195 N. E. 17, 18 (1935). There must be an enforceable contract between the promisor and promisee before a beneficiary whose rights are derivative, can sue.

[12] 1 WILLISTON, CONTRACTS (1920) § 368; CARDOZO, NATURE OF THE JUDICIAL PROCESS (1922) 99; Corbin, *Third Parties as Beneficiaries of Contractor's Bonds* (1928) 38 YALE L. J. 1.

[13] Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 169 (1918); Ultramares v. Touche, 255 N. Y. 170, 180, 174 N. E. 441, 445 (1931); McClare v. Mass. Bonding and Ins. Co., 266 N. Y. 371, 379, 195 N. E. 17 (1935).