

2017 IL App (1st) 153670-U  
No. 1-15-3670  
Order Filed August 4, 2017

FIFTH DIVISION

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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METRO JET CAB ASSOCIATION INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 00522
	)	
PASSDROID LLC,	)	Honorable
	)	Patrick Sherlock,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

*HELD:* Plaintiff-appellee Metro Jet met its burden of showing that it was entitled to bring a claim for breach of contract based upon its standing as an intended third-party beneficiary of the agreement between its affiliate Ambaco Limited (Ambaco) and defendant-appellant Passdroid. The circuit court's finding that Passdroid breached the agreement was not against the manifest weight of the evidence. And the circuit court did not abuse its discretion by denying Passdroid's motion *in limine* seeking to exclude certain exhibits relating to Metro Jet's calculation of damages.

¶ 1 In this appeal, defendant Passdroid LLC (Passdroid) challenges a circuit court judgment entered in favor of plaintiff Metro Jet Cab Association Inc. (Metro Jet) on its claim for breach of contract. Passdroid argues there was no contract in existence between it and Metro Jet at the time of the alleged breach and therefore there was no contract upon which a breach of contract claim could be based. Metro Jet counters that it was entitled to bring a claim for breach of contract based on its standing as a third-party beneficiary of the contract between its affiliate Ambaco Limited (Ambaco) and Passdroid. For the reasons that follow, we agree with Metro Jet and affirm the judgment of the circuit court.

¶ 2 BACKGROUND

¶ 3 The following background facts are taken from the record, the bystander's report, and the parties' briefs. Metro Jet is an association of taxicabs authorized to operate in Chicago, Illinois. Eddie Nwosu is the president and shareholder of both Metro Jet and one of its affiliates Ambaco. Passdroid is an Illinois limited liability company that provides certain equipment and services to taxicab companies. Patrice Berthome is the president of Passdroid and its affiliate Dialie LLC (Dialie). Passdroid is a joint venture between Dialie and another Illinois limited liability company, Taxi Financing LLC.

¶ 4 In February 2012, Metro Jet and Dialie entered into a written contract ("Dialie Agreement") wherein Dialie agreed to provide twelve Metro Jet taxicabs with services and equipment necessary to comply with the City of Chicago's ordinance requiring taxicabs to be equipped with certain credit-card processing technology. Under the agreement, Dialie and Passdroid processed taxicab credit-card transactions and then transferred the funds, less a fee, to Metro Jet for distribution to its associated taxicabs.

¶ 5 In May and June 2012, Nwosu and Berthome engaged in discussions concerning adding additional services to their agreement such as time-sheets, GPS tracking, and taxi fleet management software. However, rather than amend the Dialie Agreement to include these additional services, Berthome sought to terminate the agreement and replace it with a new agreement obligating Dialie's affiliate, Passdroid, to provide the additional services. Berthome informed Nwosu that Dialie could not provide certain of the additional services, but that Passdroid could provided the services.

¶ 6 There was conflicting testimony as to whether there was mutual assent to terminate the Dialie Agreement. Nevertheless, after the Dialie Agreement was terminated, the parties contemplated an agreement between Metro Jet and Passdroid. However, Passdroid required that its customers have assets to assure a source of recovery in case of a contract breach, and determined that Metro Jet did not have such assets. Nwosu advised Berthome that another company he owned, Ambaco, possessed assets consisting of taxicab medallions, and it was agreed that Ambaco would be a party to the new contract, instead of Metro Jet.

¶ 7 On July 31, 2012, Passdroid and Ambaco entered into a written contract ("Passdroid Agreement") wherein Passdroid agreed to provide Metro Jet taxicabs with the additional services, as well as continuing the prior services. Under the Passdroid Agreement, Passdroid continued to process taxicab credit-card transactions and transfer the funds, less a fee, to Metro Jet for distribution to its associated taxicabs.

¶ 8 Approximately a year later, on June 12, 2013, Passdroid unilaterally terminated the Passdroid Agreement pursuant to a notice of default stemming from a disagreement over the repair and maintenance of certain equipment. Metro Jet claimed that despite Passdroid's termination of the agreement, Passdroid continued collecting credit card payments from Metro

Jet taxicabs, but never turned these proceeds over to Metro Jet. Metro Jet alleged that between June and November of 2013, Passdroid improperly retained \$58,178.28 rightly belonging to taxi drivers associated with Metro Jet.

¶ 9 Passdroid countered that it withheld the proceeds after Ambaco failed to return loaned equipment. Passdroid claimed that it applied the withheld proceeds to cover the costs of the unreturned equipment. Nwosu claimed that he attempted to return the equipment to Dialie in January 2014, but that his attempts were unsuccessful because it appeared that the Dialie's office had been permanently closed.

¶ 10 Metro Jet filed this action against both Passdroid and Dialie, seeking return of the withheld proceeds as well as various consequential damages. In its amended complaint, Metro Jet asserted claims for breach of contract, unjust enrichment, fraud and accounting. The circuit court subsequently dismissed all of the claims against Dialie with prejudice.

¶ 11 Trial on the remaining claims against Passdroid was scheduled to begin on November 30, 2015. On the morning of trial, Passdroid filed a motion *in limine* requesting the circuit court to exclude certain exhibits relating to Metro Jet's calculation of damages. Passdroid argued that the exhibits should be excluded because they were produced only six days before trial. The circuit court did not rule on the merits of the motion, but rather denied it as untimely filed, and proceeded to trial.

¶ 12 At trial, Metro Jet introduced the exhibits to support Nwosu's trial testimony regarding the amount of monies he alleged was wrongfully withheld by Passdroid. Passdroid did not object to the introduction of this evidence and it presented no counter evidence.

¶ 13 At the close of evidence, the circuit court made the following findings: "Passdroid withheld \$58,172.28 from credit card proceeds processed in Metro Jet Cabs;" "Passdroid was not

entitled to un-retained equipment fees under the Passdroid Agreement because Nwosu made a good-faith attempt to return the equipment but was unable to do so;" "Passdroid received from Dialie \$11,000 of Metro Jet's funds;" "despite the Notice of Default, Passdroid continued to provide services in Metro Jet Cabs between June, 2013 and November, 2013, and therefore Passdroid was entitled to a Monthly Service Fee of \$250 per month per cab, for the total of \$18,000;" and "Metro Jet failed to pay an invoice to Passdroid in the sum of \$900 for a video monitor repaired at Passdroid's request."

¶ 14 The circuit court entered judgment in favor of Metro Jet and against Passdroid on the breach of contract claim, and in favor of Passdroid and against Metro Jet on the claims of fraud, unjust enrichment, and accounting. This appeal followed.

¶ 15 On appeal, Passdroid contends the circuit court erred in finding that it was liable to Metro Jet for breach of contract. Passdroid further argues the circuit court abused its discretion by denying its motion *in limine* to exclude certain exhibits relating to Metro Jet's calculation of damages. For the reasons set forth below, we affirm.

¶ 16 ANALYSIS

¶ 17 Passdroid first contends there was no contract in existence between it and Metro Jet at the time of the alleged breach of contract and therefore the circuit court erred in granting judgment in favor of Metro Jet on its claim for breach of contract. Metro Jet counters that it had standing to bring a claim for breach of contract based upon its status as a third-party beneficiary of the agreement between Passdroid and Ambaco – the Passdroid Agreement.

¶ 18 As such, this appeal does not, as Passdroid suggests, center on the existence of a contract between it and Metro Jet. The central issue is whether Metro Jet was an intended third-party beneficiary of the Passdroid Agreement, thereby entitling Metro Jet to bring a claim for breach of

that agreement. The "question of whether a party is a third-party beneficiary under a given contract is a mixed question of law and fact; that is, the analysis of whether a party is a third-party beneficiary depends in part on the provisions of the contract at issue." *Thomas v. New York City*, 814 F. Supp. 1139, 1152 (E.D.N.Y.1993).

¶ 19 A third-party beneficiary is a party whom the contracting parties intend to benefit from the contract. "Illinois law recognizes two types of third-party beneficiaries: intended and incidental." *Salvi v. Village of Lake Zurich*, 2016 IL App (2d) 150249, ¶ 53. "Only an intended third-party beneficiary may enforce rights under a contract." *Id.* If the benefit to the third party is not intended to be a direct benefit, but rather merely an incidental benefit, then the third party is not entitled to recover under a third party beneficiary theory. See *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 14.

¶ 20 Whether a party qualifies as a third-party beneficiary depends upon the intent of the contracting parties as evidenced by the contract language. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (2009). Only when the parties intend to enter into a contract for the direct benefit of a third party can that third party enforce rights arising under the contract. *Fantino v. Lenders Title & Guaranty Co.*, 303 Ill. App. 3d 204, 207 (1999). "The well-established rule in Illinois is that if a contract is entered into for the direct benefit of a third person, the third person may sue for a breach of contract in his or her own name, even though the third person is a stranger to the contract and the consideration." *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997).

¶ 21 "In order to determine whether the contracting parties intended to benefit a nonparty to the agreement, courts must look at the terms of the contract and the circumstances surrounding the parties at the time of its execution." *Advanced Concepts Chicago, Inc. v. CDW Corp.*, 405 Ill.

App. 3d 289, 293 (2010). Traditional third party beneficiary principles do not require that the intended beneficiary be specifically named in the contract. See *Altevogt v. Brinkoetter*, 85 Ill. 2d 44, 55-56 (1981); *Advanced Concepts Chicago, Inc.*, 405 Ill. App. 3d at 296.

¶ 22 In the instant case, Metro Jet maintains that even though Nwosu signed the Passdroid Agreement on behalf of Ambaco, the contract language in the agreement as well as the circumstances surrounding the parties at the time the agreement was executed, support a finding that Metro Jet was an intended beneficiary of the agreement. We agree.

¶ 23 A review of the contract language in the Passdroid Agreement clearly shows that the contracting parties entered into the agreement intending to directly benefit Metro Jet because the agreement continued and upgraded services that Metro Jet had been receiving under the Dialie Agreement. For example, the references to "Customer" in the Passdroid Agreement refer to Metro Jet, not to its affiliate, Ambaco. The following language in paragraph 1.1 of the Passdroid Agreement clearly indicates that the term "Customer" refers to Metro Jet:

"The Customer has been receiving card processing services from Dialie LLC. Now, the Customer desires to upgrade the services to add fleet management and GPS tracking components. The parties acknowledge and agree that the Customer and Dialie have reached an understanding where the Customer agreement with Dialie will terminate.

The Customer and Passdroid agree to enter into a relationship in which Passdroid will provide the Customer (a) access to and ability to use one or more of the features and functionalities of a taxi fleet software program developed by Passdroid, and related services selected by the Customer in the SERVICES box on the face of this Agreement ("Services");"

¶ 24 Metro Jet was the only entity that had previously received card processing services from Dialie, and it is undisputed that Ambaco had no direct relationship with Dialie. Although the signature pages of the Passdroid Agreement define "Customer" as Ambaco, it is apparent from the language of the agreement that at the time the agreement was entered into, the contracting parties intended to confer a direct benefit upon Metro Jet.

¶ 25 In addition, the factual circumstances surrounding the creation of the Passdroid Agreement also supports a finding that the contracting parties intended Metro Jet to directly benefit from the agreement. For example, the equipment referenced in the Passdroid Agreement is the very same equipment that Metro Jet received under the Dialie Agreement, and Passdroid deposited the "Customer's" funds into the same bank account under both agreements.

¶ 26 Thus, both the language of the Passdroid Agreement and the circumstances surrounding its creation and execution support a finding that Metro Jet is an intended third-party beneficiary of the agreement. Therefore, we find that Metro Jet has met its burden of showing that the contracting parties intended Metro Jet to be an intended third-party beneficiary under the Passdroid Agreement.

¶ 27 Passdroid next contends that even if Metro Jet was an intended third-party beneficiary of the Passdroid Agreement, the circuit court still erred in granting judgment in favor of Metro Jet on its claim for breach of contract, because Metro Jet failed to plead and prove that Passdroid breached the agreement. The circuit court determined that Passdroid breached the Passdroid Agreement when it withheld credit-card proceeds which were processed in Metro Jet taxicabs. Passdroid claims that after it terminated the Passdroid Agreement pursuant to its notice of default, it withheld the proceeds to cover the costs of the loaned equipment Ambaco had failed to return.



¶ 28 As mentioned, Passdroid unilaterally terminated the Passdroid Agreement pursuant to a notice of default stemming from a disagreement over the repair and maintenance of certain equipment. Passdroid relied upon section 16.1(e) of the agreement as grounds to terminate the agreement. Under section 16.1(e), Passdroid was permitted to terminate the agreement upon the event of a default, which is defined in this subsection as the failure by the customer to comply with any other provisions or perform any of its other obligations under the agreement, if such failure remained unremedied for a period of fourteen days, or if such failure could not be remedied.

¶ 29 Passdroid claims that after it terminated the Passdroid Agreement pursuant to the notice of default, its conduct in withholding the proceeds to cover the costs of certain unreturned equipment was justified under sections 5.1 and 8.1 of the Passdroid Agreement and thus did not constitute a breach of the agreement. Passdroid points to the following language in sections 5.1 and 8.1 of the Passdroid Agreement:

5.1: "The Customer shall return all items of the Equipment to Passdroid in good repair and working condition, as determined by Passdroid, as soon as this Agreement expires or is terminated for any reason, and a Restocking Fee in the amount of \$42 shall apply. If one or more items of the Equipment is not returned within fifteen (15) days after this Agreement expires or is terminated, or if one or more items of the Equipment is returned not in good repair and working condition, the Customer shall be charged an additional fee, \*\*\*."

8.1: "The parties agree that Passdroid shall have a right to withhold from the Proceeds and apply withheld amounts towards the payment of Amounts Due on the daily basis."

¶ 30 The interpretation of a contract is a question of law, subject to *de novo* review. *K's Merchandise Mart, Inc. v. Northgate Ltd. Partnership*, 359 Ill. App. 3d 1137, 1142 (2005). The primary objective when construing a contract is to determine and give effect to the intention of the parties at the time they entered into the contract. *Fleet Business Credit, LLC v. Enterasys Network, Inc.*, 352 Ill. App. 3d 456, 469 (2004). If the words in the contract are clear and unambiguous, we must give them their plain, ordinary and popular meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). "When interpreting a contract, we must consider the entire document to give effect to the parties' intent, as determined by the plain and ordinary meaning of the language of the contract." *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007).

¶ 31 "Whether a breach of contract has occurred generally is not a legal question subject to *de novo* review, but rather a question of fact which will not be disturbed unless the finding is against the manifest weight of the evidence." *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009). "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best*, 223 Ill. 2d at 350.

¶ 32 In applying these contract principles in the context of this case, we find that even if section 16.1(e) of the Passdroid Agreement allowed Passdroid to unilaterally terminate the agreement, none of the other sections of the agreement Passdroid refers us to permitted it to continue collecting credit card payments from Metro Jet taxicabs after the termination, and then withhold the proceeds of those payments as a remedy for the alleged default. This is the conduct that the circuit court found amounted to a breach of the agreement. We do not believe the circuit court erred in this regard. And as a result, we conclude that the circuit court's finding that

Passdroid breached the Passdroid Agreement was not against the manifest weight of the evidence.

¶ 33 Finally, we reject Passdroid's argument that the circuit court abused its discretion by denying Passdroid's motion *in limine* seeking to exclude certain exhibits relating to Metro Jet's calculation of damages. The circuit court denied the motion as untimely.

¶ 34 "A motion *in limine* is addressed to the trial court's inherent power to admit or exclude evidence." *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001). "The purpose of a motion *in limine* is to permit a party to obtain an order before trial excluding inadmissible evidence and prohibiting interrogation concerning such evidence without the necessity of having the questions asked and objections thereto made in the presence of the jury." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 851 (2010). "[A] denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial." *Brown v. Baker*, 284 Ill. App. 3d 401, 406 (1996). "When a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review." *Id.* "Absent the requisite objection, the right to raise the issue on appeal is waived." *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 502 (1994).

¶ 35 In this case, since Passdroid failed to object at the time the evidence at issue was introduced, its arguments regarding the circuit court's motion *in limine* ruling are waived on appeal. See, e.g., *Ford v. Herman*, 316 Ill. App. 3d 726, 736 (2000) (If the movant fails to object to the later introduction of evidence that was the subject of the motion *in limine*, the issue is waived on appeal).

¶ 36 Accordingly, for the reasons set forth above, we affirm the judgments of the circuit court of Cook County.

No. 1-15-3670

¶ 37 Affirmed.