

AUG 26 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DELTA MECHANICAL, INC., an  
Arizona corporation,

Plaintiff - Appellant,

v.

GARDEN CITY GROUP, INC., a New  
York corporation; RHEEM  
MANUFACTURING COMPANY, a  
Delaware corporation; AMERICAN  
WATER HEATER COMPANY, a Nevada  
corporation; BRADFORD WHITE  
CORPORATION; A. O. SMITH  
CORPORATION, a Delaware corporation;  
STATE INDUSTRIES, INC., a Tennessee  
corporation; LOCHINVAR  
CORPORATION,

Defendants - Appellees.

No. 08-15429

D.C. No. 06-CV-01095-JWS

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Arizona  
John W. Sedwick, Chief District Judge, Presiding

Argued and Submitted June 1, 2009  
San Francisco, California

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\* This disposition is not appropriate for publication and is not precedent  
except as provided by 9th Cir. R. 36-3.

Before: TROTT, McKEOWN and IKUTA, Circuit Judges.

Delta Mechanical, Inc. (“Delta”) appeals the district court’s decision pursuant to Fed. R. Civ. P. 12(b)(6) that it is not a third-party beneficiary to a settlement agreement and thus is not entitled to bring a lawsuit for alleged breach, etc., of that agreement by the settling defendants. Delta also appeals the district court’s decision that it cannot sue the Garden City Group, Inc. (“Garden City”) as a contractual delegatee of the settling defendants.

We reverse in part, affirm in part, and remand for further proceedings.

## I

The district court was correct in denying the effects of collateral estoppel to Delta. The Missouri court’s conclusion that Delta was a third-party beneficiary to the settlement agreement was not a critical and necessary part of its judgment that Delta was not entitled to intervene in the action which produced the agreement.

## II

The district court erred in concluding pursuant to Rule 12(b)(6) that Delta was not a third-party beneficiary to the agreement. The evidentiary record on this issue demonstrates at this early stage of the case that whether Delta was or was not

a third-party beneficiary is a genuine issue of material fact that might survive summary judgment.

A party is a third-party beneficiary to a contract if the terms of the contract “clearly express intent to benefit that party or an identifiable class of which the party is a member.” *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. 2006). “In cases where the contract lacks an express declaration of that intent, there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves.” *Id.* “Furthermore, a mere incidental benefit to the third party is insufficient to bind that party.” *Id.*

It is not necessary that the contracting parties’ primary object is to benefit the third parties, “but only that the third parties be primary beneficiaries.” *Andes v. Albano*, 853 S.W.2d 936, 942 (Mo. 1993). “Third party beneficiary status depends not so much on a desire or purpose to confer a benefit on the third person, but rather on an intent that the promisor assume a direct obligation to him.” *Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. Ct. App. 1998); *see also Teter v. Morris*, 650 S.W.2d 277, 282 (Mo. Ct. App. 1983).

The district court held that Delta was not a third-party beneficiary because the settlement agreement “does not express any intent that the defendants assume a direct obligation to Delta or other ‘authorized service personnel.’” We conclude,

however, that the evidence currently in the record viewed in the light most favorable to Delta could support a determination in its favor on this issue. The factual content of the complaint and reasonable inferences therefrom are plausibly suggestive of a claim entitling Delta to relief. *See Moss v. U.S. Secret Serv.*, No. 07-36018, 2009 WL 2052985, at \*1-2 (9th Cir. July 16, 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

Section 8 of the agreement sets forth the “Settling Defendants’ Obligations” which outlines the benefits the settling defendants must provide to the class. Class members are entitled to a certificate for a water dip tube replacement upon submitting a timely Proof of Claim form. The class member then has six months to redeem the certificate by using the services of an authorized service personnel who will provide the repair benefits. The class member is required to provide the Proof Documentation and parts and pieces of the dip tube to the approved plumber before he or she is entitled to the Section 8.2 replacement.

The agreement establishes an obligation on the part of the settling defendants to pay for the replacement of the water dip tubes:

**8. Settling Defendants’ Obligations.** Settling Defendants shall provide the following benefits to the Class.

...

... The names of authorized service personnel who will be available to provide the service will be provided with the certificate.

Settling Defendants shall ensure that adequate and trained service personnel are available to provide service to Class Members in a timely manner.

...

8.2.4. If a Class Member is experiencing property damage resulting from a Subject Dip Tube, such Class Member shall, in addition to a dip tube replacement, be entitled to repair of property damage caused by, or related to the Subject Dip Tube.

...

8.2.6. Upon submission of a timely, completed Proof of Claim, such claimant will be provided the identities of approved plumbers who will provide repair benefits.

...

**16. Assignment of Class Members' Claims Against Perfection.**

Upon entry of the Final Order and Judgment, each Class Member . . . shall be deemed to and does hereby assign, unto the Settling Defendant that is responsible for providing to the Class Member any benefits described in Section 8, any and all claims . . . which the Class Member has or may have against [the dip tube manufacturer] . . . .”

.....

25.3. Under the Settlement, each Tank Manufacturer is obligated to provide benefits under Section 8 of the Agreement only for claims made against its water heaters.

*Id.* at pp. 14-15, 22, 25.

There can be no doubt that Delta qualifies as “authorized service personnel.”

Thus, a reasonable fact finder might determine that the settling defendants did intend to assume a direct obligation to Delta for the replacement costs.

Accordingly, it was error to dismiss this case pursuant to Rule 12(b)(6). Normally the next step would be to proceed to summary judgment. *Vignolo v. Miller*, 120 F.3d 1075, 1078 (9th Cir. 1997).

### III

Delta has not raised a claim that it was a third-party beneficiary of an agreement between Garden City and the settling defendants. Therefore, we affirm the district court's dismissal of Garden City as a defendant. A mere agent of a disclosed principal is not a party to a contract and is not liable for the principal's nonperformance.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. The parties shall bear their own costs.