STATE OF MICHIGAN

COURT OF APPEALS

HARRY KNOTT

Plaintiff-Appellant,

v

RON SLOAN,

Defendant.

and

HOWARD LEE VANDERLAAN

Defendant-Third-Party Plaintiff,

v

CITY OF SCOTTVILLE,

Third-Party Defendant-Appellee.

UNPUBLISHED
August 27, 1996

No. 181662
LC No. 94-001062

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

This case involves a slip and fall by plaintiff while entering the business of defendant Sloan. The fall occurred on a parking lot owned by defendant VanderLaan. In the circuit court, plaintiff sought leave to amend his complaint to add the City of Scottville, which leased the parking lot from VanderLaan. The trial court denied plaintiff's motion, finding that amendment would be futile. The trial court then granted defendant VanderLaan's motion for summary disposition, and plaintiff voluntarily dismissed defendant Sloan. Plaintiff now appeals the trial court's denial of his motion to amend his complaint and add Scottville as a defendant. We reverse.

On March 18, 1993, plaintiff was walking on a parking lot toward the business of defendant Sloan when he slipped on an accumulation of ice, causing him to injure his right ankle. Plaintiff filed his negligence complaints against defendants on March 9, 1994. Subsequently, VanderLaan, the owner of the building which housed Sloan's business, filed a third-party complaint against the City of Scottville. The third-party complaint was based on a contract between VanderLaan and Scottville in which the city agreed to lease the parking lot from VanderLaan and further agreed to maintain the lot and hold VanderLaan harmless for all injuries that occurred in that parking lot for the duration of the lease. In addition to the third-party complaint, VanderLaan also filed a cross-claim against Sloan seeking indemnification.

Scottville filed a motion for summary disposition which was originally denied by the circuit court because it found that, in leasing the parking lot, the city was engaging in a proprietary function, and had thus waived the defense of governmental immunity. Scottville filed a motion for reconsideration, pointing out that it paid VanderLaan no rent, it charged the public no fee for parking, it paid the taxes due on the parking lot, and it did not earn a monetary profit from the lease of the lot. The trial court took this motion under advisement.

On October 31, 1994, plaintiff moved to file a first amended complaint to include Scottville as a defendant on counts of negligence and breach of contract. In the proposed breach of contract claim, plaintiff alleged that he was an intended third-party beneficiary of the lease contract between Scottville and VanderLaan. Scottville opposed the motion, arguing that Scottville was entitled to governmental immunity and that plaintiff was not an intended beneficiary of the lease. The trial court found that governmental immunity applied to Scottville and that plaintiff, as a customer of Sloan's business, was not an intended beneficiary of the lease contract. Thus, plaintiff's motion for leave to file his first amended complaint was denied on the basis of futility.

Pursuant to MCL 600.1405; MSA 27A.1405, a third party that is an intended beneficiary of a contract can enforce the contract. The statute provides in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person. [MCL 600.1405; MSA 27A.1405]

The lease contract between VanderLaan and Scottville provided, inter alia:

> The Lessee shall maintain, periodically sweep and clean, remove the snow and generally use the demised premises as it does the adjacent parking lot and to the benefit of the Lessor's business patrons and also those business patrons of other Scottville businesses similarly situated.

The lease also provided:

> The Lessee hereby agrees to assume all risks, incident to the use of the premises and to hold the Lessors, their officers, agents, and assigns, harmless from and indemnified against any loss, damage or expense resulting from injury to person or persons, or damage to or loss of property occurring upon or in any way related to the use of the said demised premises by the general public.

The first issue we must decide, therefore, is whether the parties intended plaintiff to be a third-party beneficiary of the contract under MCL 600.1405; MSA 27A.1405. The trial court found that "Lessor's [VanderLaan's] business patrons and also those business patrons of other Scottville businesses" included only the merchants which conducted their operations on VanderLaan's property, such as Sloan, but did not include patrons of those businesses such as plaintiff. We disagree with the trial court's analysis.

The test to determine whether a third party is a third-party beneficiary is whether the promisor undertakes to do something directly to or for the party so that the party can be considered someone for whose benefit the promise was made. *Alden State Bank v Old Kent Bank-Grand Traverse*, 180 Mich App 40, 44; 446 NW2d 559 (1989). A court must objectively determine from the form and meaning of the contract itself whether a party is a third-party beneficiary as defined in MCL 600.1405; MSA 27A.1405. *Kammer Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189; 504 NW2d 635 (1993).

In the instant case, the lease between VanderLaan and Scottville obligates the city to "remove the snow and generally use the demised premises as it does the adjacent parking lot and to the benefit of the Lessor's [VanderLaan's] business patrons and also those business patrons of other Scottville businesses similarly situated." Contractual language is to be given its ordinary and plain meaning. Resort to a dictionary is permitted to determine a word's plain and ordinary meaning. *Michigan Millers Ins v Bronson*, 445 Mich 558, 568; 519 NW2d 864 (1994). A "patron" is defined as:

> a person who is a customer, client, or paying guest, esp. a regular one of a store, hotel or the like. [*Random House Webster's College Dictionary* (1995).]

Plaintiff claims that he went to the premises to do business with Sloan. Under the definition, he thus qualifies as a business "patron" in the ordinary sense of the word. Accordingly, plaintiff is included within the class of beneficiaries specifically mentioned in the contract. Pursuant to MCL 600.1405; MSA 27A.1405, plaintiff thus qualifies as a third-party beneficiary of the lease contract who may seek to enforce that promise. *Kammer*, *supra*. The trial court's finding to the contrary was erroneous.

Because we have established that plaintiff could enforce the contract as a third-party beneficiary, the next question before us is whether plaintiff sufficiently pleaded a breach of contract claim in his proposed amended complaint, such that amendment would not be futile. We find that plaintiff's proposed amended complaint properly set forth a claim for a breach of contract.

To plead a breach of contract as a third-party beneficiary, a plaintiff must allege: (1) that a valid contract existed; (2) that a contractual term was violated by defendant; (3) that the plaintiff was the third-party beneficiary; and (4) defendant's nonperformance resulted in damage to plaintiff. 2 Callaghan's Michigan Pleading & Practice, § 22.35, pp 94-95. Plaintiff's proposed amended complaint properly set forth each of the required allegations. Thus, allowing plaintiff to amend his complaint would not be futile because the proposed amended complaint states a breach of contract claim on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

Although plaintiff's claim appears to sound in tort, the Michigan Supreme Court has recognized that the same underlying facts may give rise to a tort claim and a breach of contract claim. *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 647-648; 363 NW2d 641 (1984). Michigan law allows for recovery of damages which result from a breach of a contract if such damages were in the contemplation of the parties at the time the contract was formed. *Lawrence v Darrah & Associates*, 445 Mich 1, 11; 516 NW2d 43 (1994). "[T]o be recoverable, the injury must not only be foreseeable but somehow must be a consequence of the breach." *McNeal v Tuori*, 107 Mich App 141, 150; 309 NW2d 588 (1981). In this case, plaintiff's proposed amended complaint alleged that he was damaged as a result of a foreseeable injury which was a consequence of Scottville's breach of its promise to maintain the parking lot. The proposed amended complaint further alleged that the contract intended to benefit persons such as plaintiff. Thus, a proper breach of contract claim was set forth in plaintiff's proposed amended complaint.

We note that, under a claim of a contract breach, plaintiff can only recover his actual damages such as medical bills. This differs from a tort claim in that plaintiff will not be able to claim non-economic damages such as pain and suffering, emotional distress and anxiety. *LaMonte v ACIA*, 214 Mich App 577, 582-583; 543 NW2d 42 (1995). However, the issue of damages or the merit of plaintiff's claim is not before this Court. We merely hold that plaintiff's proposed amended complaint sufficiently stated a claim for a breach of contract, such that amendment would not be futile.

Plaintiff's proposed amended complaint included a claim of negligence against Scottville. However, in this Court, plaintiff has not raised any issues concerning the tort claim, and thus has abandoned that count on appeal. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993). Similarly, plaintiff has abandoned the issue of whether Scottville can waive governmental immunity by contractually agreeing to perform VanderLaan's duties to invitees, which would give rise to a tort claim. *Id*. Finally, plaintiff appears to argue that the trial court erred in failing to make a specific ruling as to whether justice required allowing amendment of the complaint. However, as plaintiff noted, such a ruling is unnecessary when a court denied the amendment due to futility. *Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). Because the trial court denied plaintiff's motion due to futility, it was not required to determine whether justice required the amendment.

Reversed and remanded. Upon remand, the circuit court shall allow plaintiff to amend his complaint to include a count against defendant Scottville for breach of contract. Plaintiff shall not be permitted to amend his complaint regarding a claim of negligence.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski