RICHARD SIMON and SANDRA SIMON, h/w,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 03-01,015
	:	
	:	
FORKLIFTS, INC.,	:	
Defendant	:	PRELIMINARY OBJECTIONS

Date: November 6, 2003

OPINION and ORDER

Before the Court for determination are the Preliminary Objections of Defendant Forklifts, Inc. (Forklifts) filed July 18, 2003. In July 2002, Richard Simon was employed by Shop-Vac. At that time, there was a contract between Shop-Vac and Forklifts whereby Forklifts agreed to provide maintenance services for several of the forklifts at Shop-Vac's facility. On July 19, 2002, Richard Simon was injured when a forklift he had been operating at the Shop-Vac facility rolled down a loading ramp and struck him. On June 30, 2003, Plaintiffs Richard and Sandra Simon filed a Complaint seeking recovery for the injuries Richard Simon suffered from that accident. Plaintiffs allege that Richard Simon had stopped the forklift on the level top portion of the ramp and engaged the parking brake before walking down the ramp. Plaintiffs have asserted three theories of liability against Forklift in the Complaint: negligence, breach of warranty, and breach of contract.

Forklifts raises three preliminary objections to Plaintiffs' Complaint. The first is a demurrer to Count II, the breach of warranty claim. The first argument advanced by Forklifts as to why Plaintiffs cannot state a claim for breach of an express or implied warranty is that Plaintiffs were not third party beneficiaries of the contract between Forklifts and Shop-Vac.

Forklifts' second argument is that even if Plaintiffs were third party beneficiaries of the contract there were no warranties in the contract. Forklifts contends that the contract contains no language creating an express warranty. Forklifts further argues that there is no implied warranty because the implied warranties of the Uniform Commercial Code are only applicable if there is a transaction for the sale of goods. Forklifts acknowledges that implied warranties have been recognized in contracts not involving the sale of goods, but argues that those contracts did not involve a pure service contract like the one in this case.

Forklifts' second preliminary objection is a demurrer to Count III of the Complaint, the breach of contract claim. Forklifts argue that Plaintiffs cannot state a claim for breach of contract because the contract does not express an intention on the part of Forklifts and Shop-Vac to benefit Plaintiffs. Forklifts asserts that the contract is a service contract that sets forth what equipment is to be fixed and when, but it does not mention anything regarding safety of Shop-Vac employees. Forklifts argue that the intention of Forklifts and Shop-Vac was to have maintenance services done on the equipment, not the protection of Shop-Vac employees.

Forklifts' third preliminary objection is that Paragraph 10.j. of the Complaint is a vague, conclusory allegation that lacks factual support.

In response, Plaintiffs contend that they have stated claims for relief under the theories of breach of warranty and breach of contract. As would pertain to the breach of warranty claim, Plaintiffs acknowledge that for the implied warranties of the Uniform Commercial Code to apply there must be a sale of goods; however, Plaintiffs assert that they have not pleaded implied warranties under the UCC, but instead have pleaded the implied

warranty of workmanlike performance. Plaintiffs argue that such a warranty has been recognized in service contracts involving the preparation of architectural plans, construction, and the provisions of electrical services. Therefore, Plaintiffs argue that the lack of a sale of goods does not prevent the pleading of such an implied warranty

Regarding the demurrer to Count III, Plaintiffs assert that they are third party beneficiaries of the contract between Forklift and Shop-Vac. Plaintiffs argue that the circumstances are so compelling that Richard Simon's right to operate a forklift with a properly maintained and serviced emergency brake must be recognized to effectuate the intentions of Forklift and Shop-Vac. Plaintiffs contend that Shop-Vac entered into the maintenance contract to insure that its employees would be protected from improperly functioning forklifts. Plaintiffs assert that under the Maintenance Agreement the parking brake was expressly subject to periodic operational tests. Plaintiffs argue that the circumstances indicate that Shop-Vac intended to give its employees the benefit of forklifts with safe and operational parking brakes.

With regard to the third preliminary objection, Plaintiffs have agreed to withdraw Paragraph 10.j. of the Complaint. ***Simon v. Forklifts, Inc.***, No. 03-01,015 Plaintiffs' Memorandum of Law in Support of Response in Opposition to Defendant's Preliminary Objections, 2 n.1 (Lycoming Cty).

Thus, there are two issues before the Court. The first is whether an employee is a third party beneficiary of a maintenance service contract entered into by his employer when the contract is for maintenance of forklifts used by the employee. The second issue is whether Plaintiffs are barred from alleging a claim of breach of warranty when the contract is a maintenance service agreement and not a sale of goods.

The determination of whether an individual is a third-party beneficiary of a contract is a question of law that must be decided by a court. ***Hicks v. Metropolitan Edison, Co.***, 665 A.2d 529, 536 (Pa. Cmwlth. 1995). The Supreme Court set forth the test for determining whether a party is a third party beneficiary of a contract in ***Scarpitti v. Weborg***, 609 A.2d 147 (Pa. 1992).

> [A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself (citation omitted) *unless*, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Id. at 150 (emphasis in original). The first part of the test is a standing requirement that gives the court discretion to determine whether "recognition of third party beneficiary status would be appropriate." ***Ibid***. The second part of the test "defines the two types of claimants who may be intended third party beneficiaries." ***Ibid***. A claim may be asserted under the contract as a third party beneficiary if a party can satisfy both parts of the test. ***Ibid***. However, third party beneficiary status will not be conferred to the public at large, but only to a specific limited group intended to benefit from the contract. ***Hicks***, 665 A.2d at 536.

The Court cannot conclude as a matter of law that Richard Simon is not a third party beneficiary of the contract between Forklifts and Shop-Vac. It would be appropriate to recognize Simon's right to a properly functioning forklift. It also appears likely that Shop-Vac intended to give its employees the benefit of the promise of a properly functioning forklift.

This decision is reached by applying the analysis of ***Scarpitti***, *supra*. In ***Scarpitti***, the plaintiffs had purchased lots in a residential subdivision that were subject to

recorded deed restrictions. 609 A.2d at 149. The plaintiffs were required to submit their construction plans to an architect for approval. The architect denied the plaintiffs' plans because they included a three-car garage in violation of the recorded restrictions. ***Ibid***. The plaintiffs then constructed homes with either a two car or a two and a half car garage. Subsequent to the construction of the plaintiffs' homes, the architect approved plans that included a three-car garage. ***Ibid***.

The plaintiffs brought suit against the architect for breach of contract for his failure to properly review and approve the plans of other lot owners so that the restrictions were enforced. The plaintiffs argued that they were third party beneficiaries of the implied contract between the architect and the subdivision developer where the architect was retained for the purpose of approving construction plans and enforcing the recorded restrictions of the subdivision. ***Scarpitti***, 609 A.2d at 149. The Supreme Court agreed.

The Supreme Court held that "recognition of a right to uniform enforcement of the deed restrictions in [the plaintiffs] is appropriate to effectuate the intention of the parties." ***Scarpitti***, 609 A.2d at 151. The purpose of the architectural review was to make the lots more attractive to prospective purchasers by assuring that other homeowners would be required to abide by the restrictions. Therefore, "the homeowners … [had] the greatest interest in uniform enforcement of restrictions and it [was] the homeowners who were benefited [sic] by the establishment of a vehicle to enforce the restrictions." ***Ibid***.

The Supreme Court then went on to state that the subdivision developer intended to give the lot owners the benefit of the promised performance. The Court reached this conclusion because it was "patently clear" that the parties to the contract intended to benefit the

lot owners since they created a vehicle specifically for the enforcement of the restrictions and the benefit of the lot owners. ***Scarpitti***, 609 A.2d at 151. The lot owners were also part of a limited class that was intended to benefit from the contract between the architect and the developer. The Supreme Court also noted that it was unaware of any other purpose for hiring the architect to review the construction plans other than for the benefit of the lot owners. ***Ibid***.

The same analysis is appropriate in the case *sub judice*. Here, the agreement is between Forklifts (promisor) and Shop-Vac (promisee), whereby Forklifts has promised to provide maintenance service to a number of forklifts used by Shop-Vac at its facility. Specifically included as part of the maintenance service, Forklifts promised to test the parking brake as part of the operational tests it would perform. Recognition of Simons's right to a properly serviced forklift is appropriate. The purpose of the agreement between Forklifts and Shop-Vac is to ensure that the forklifts are functioning properly. A properly functioning forklift not only means that the motor runs properly, or that the lift goes up and down, but that the emergency brake works as well. Shop-Vac employees have a great interest in having a properly functioning forklift since they are the ones that use them and are in contact with them.

The circumstances in this case also indicate that Shop-Vac likely intended to give its employees the benefit of properly maintained and functioning forklifts so that they could perform their jobs injury free. It is obvious Shop-Vac would not want to lose the services of valuable employees due to injuries. Also, Shop-Vac has an interest in avoiding worker's compensation claims and government safety regulation violations. It can be inferred that Shop-Vac wanted to ensure that its forklifts operated properly so they contracted with Forklifts to do the maintenance. At the time this agreement was reached, both parties had to know that Shop-

Vac employees would be using the forklifts that were the subject of the service agreement. By creating the agreement, Shop-Vac and Forklifts created a vehicle to ensure that the forklifts were properly maintained and functioned properly. This carried out Shop-Vac's intention of benefiting its employees by providing them with forklifts that would be properly maintained and functioning.

Concluding that Simon was a third-party beneficiary of the service agreement does not open the door for anyone injured by one of the forklifts to claim they were third-party beneficiaries. A third-party beneficiary of the service agreement is limited to the circumscribed class known as Shop-Vac employees. The determination of being a third party beneficiary of the service agreement is based upon the circumstances surrounding this particular agreement. As such, the only appropriate third party beneficiary would be the one intended to benefit from the agreement – Shop-Vac employees.

Since the Court cannot say that Plaintiffs were not third party beneficiaries, the Court must now address whether Plaintiffs can assert a breach of warranty claim under the contract when the contract is a service agreement. The Court concludes that Plaintiffs are not barred from alleging a breach of warranty claim. Plaintiffs may plead a claim based on the implied warranty of workmanlike performance.

For the implied warranties of the Uniform Commercial Code (UCC) to apply there must be a transaction involving goods. ***Turney Media Fuel, Inc. v. Toll Brass, Inc.***, 725 A.2d 836, 840 (Pa. Super. 1999); ***Whitmer v. Bell Tel. Co.***, 522 A.2d 584, 587 (Pa. Super. 1987). However, the adoption of the UCC was not intended to disturb prior case law which "recognized that warranties need not be confined either to sales contracts or to the direct parties

to such a contract." 13 Pa.C.S.A. § 2313, Comment 2. The adoption of the UCC in Pennsylvania did not "intend to impede the parallel development of warranties implied in law in non-sales situations." ***Hoffman v. Misericordia Hosp. of Philadelphia***, 267 A.2d 867, 870 (Pa. 1970). As such, the fact that the underlying agreement does not involve a sale of goods does not mean that the law will not recognize an implied warranty.

The Court cannot say that there is no implied warranty of workman like performance here. Pennsylvania law has recognized the implied warranty of workmanlike performance in agreements where services were the subject of the underlying agreement. ***Bloomsburg Mills, Inc. v. Sordoni Constr. Co., Inc.***, 164 A.2d 201 (Pa. 1960) (Agreement to provide architectural services.); ***Elderkin v. Gaster***, 288 A.2d 771 (Pa. 1972) (Construction of a home.); ***Metropolitan Edison Co. v. United Engineers & Constr.***, Inc., 4 Pa. D. & C. 4th 473 (Philadelphia Cty. 1977) (Construction of a nuclear power plant.). In these situations, an implied warranty of workmanlike performance was found because the courts concluded that by contracting the individual implied that he possessed the requisite expertise in the particular field and would employ that expertise with a certain level of performance so that the work would be done properly. *See*, ***Bloomsberg Mills***, 164 A.2d at 203; ***Elderkin***, 288 A.2d at 776-77. This Court believes that the same reasons for applying the implied warranty of workmanlike performance in the previous situations permits the application of the implied warranty to Forklifts as a mechanic contracting to do repairs on a number of forklifts.

Forklifts held itself out as having the expertise of being able to service and maintain forklifts. Because of the implied expertise, it would be reasonable to conclude that Forklifts would use that expertise in doing the job and that the job would be done properly.

Shop-Vac entered into a contract with Forklifts on the basis of this knowledge and ability hoping to benefit from it by having Forklifts service the forklifts at its facility. Therefore, the Court cannot conclude that as a matter of law there is no implied warranty of workmanlike performance in the contract.

As would pertain to any other express or implied warranty, the Court will grant the preliminary objection. Plaintiffs assert in their brief that the implied warranty of workmanlike performance is the implied warranty that they pleaded in the Complaint. Therefore, the language relating to express warranties and implied warranties other then the implied warranty of workmanlike performance shall be stricken from the paragraphs in Count II. The claim in Count II is limited to the implied warranty of workmanlike performance.[1]

Regarding Forklifts' third preliminary objection, the Court will grant the preliminary objection to Paragraph 10.j. of the Complaint. Plaintiffs have agreed in their brief to withdraw the paragraph. Therefore, Paragraph 10.j. shall be stricken from the Complaint.

Forklifts' preliminary objections shall be denied in part and granted in part. The Court cannot conclude that as a matter of law Plaintiffs are not third-party beneficiaries of the service agreement between Forklifts and Shop-Vac. Plaintiffs may plead a claim for breach of the implied warranty of workmanlike performance. Paragraph 10.j. shall be stricken from the Complaint.

[1] The Court would note that the Complaint states "workmanlife manner" in Paragraph 18. The Court believes this to be a typographical error and interprets it as "workmanlike manner."

O R D E R

It is hereby ORDERED that the Preliminary Objections of Defendant Forklifts, Inc. (Forklifts) filed July 18, 2003 are denied in part and granted in part.

The demurrer to the breach of contract claim in Count III is denied.

The demurrer to the breach of warranty claim in Count II is partially granted. It is granted to claims made on the theory of an express warranty and to any implied warranty other then the implied warranty of workmanlike performance. The demurrer to the claim based on the implied warranty of workmanlike performance is denied.

Paragraph 10j is stricken from the Complaint.

Plaintiffs shall have twenty days to file an Amended Complaint.

BY THE COURT:

William S. Kieser, Judge

cc: J. B. Dilsheimer, Esquire
Kessler, Cohen & Roth; 1705 Two Penn Center; Philadelphia, PA 19102
Richard A. Gray, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)