JOEL P. WILLIAMS,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 04-00,960
	:	
H. DAVID HAIGHT and	:	
BARBARA A. HAIGHT,	:	
and JAMES SANDER,	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: December 1, 2004

OPINION and ORDER

Before the Court for determination are the Preliminary Objections of Defendant Barbara A. Haight (hereafter "Haight") filed August 17, 2004. The Court will grant the Preliminary Objections.

The Complaint filed June 14, 2004 alleges the following facts. Plaintiff Joel P. Williams (hereafter "Williams") owned and resided at a residential unit located at 1935 West Fourth Street in Williamsport, Pennsylvania. Defendant James Sander (hereafter "Sander") resided in a residential unit located at 1933 West Fourth Street in Williamsport, Pennsylvania. The residential units located at 1935 and 1933 West Fourth Street comprise two halves of a double house.

Defendants H. David and Barbara Haight had acquired ownership of the 1933 residence by a deed dated January 27, 1992.[1] On January 7, 2000, David Haight, Barbara Haight, and Sander executed an Article of Agreement (hereafter "the Agreement"). The Agreement was a sales contract whereby Haights agreed to sell the 1933 residence to Sander

[1] Defendant H. David Haight is now deceased.

for the sum of $42,000. Payment was to be made periodically, with the first payment of $500 being due on February 1, 2000 and each successive payment being due on the first of each moth until the principle was paid on February 1, 2007. Pursuant to the Agreement, Sander was required to reside at the 1933 residence during the term of the Agreement. Sander was residing there at the time of the incident that gave rise to this litigation.

On February 11, 2003, a fire started in the 1933 residence. The cause of that fire is believed to have been the placement of a briefcase or other combustible item(s) in close proximity to the heating system in the basement. The state of the 1933 residence, with its large amount of refuse and debris, resulted in excessive amounts of smoke, soot, fumes and airborne particles being produced by the fire. As a result of the fire and its byproducts, the 1935 residence sustained damage in the amount of $70,413.84.

Williams has asserted two causes of action against Haight. Williams has averred a negligence and breach of contract claim against Haight. The negligence claim is brought under a regular negligence theory and a negligence *per se* theory. The breach of contract claim is brought on a third party beneficiary theory.

In the Preliminary Objections, Haight raises a demurrer to both causes of action lodged against her. As to the negligence claim, Haight contends that pursuant to the Agreement she is a vendor in an installment land contract. As a vendor, Haight asserts that she can only be liable for an injury caused by a dangerous condition on the property if the vendee does not know of the dangerous condition or have reason to know of the dangerous condition or risk involved and the vendor has reason to believe that the vendee will not discover the

dangerous condition or realize the risk. Haight argues that she cannot be held liable under this standard because she did not create the dangerous condition and it did not exist at the time she and Sander entered into the Agreement.

As to the breach of contract claim, Haight contends that Williams was not a third party beneficiary of the Agreement. Haight asserts that nowhere in the Agreement is Williams a named beneficiary thereof. Furthermore, Haight argues that Williams was not intended to benefit from the promises made in the Agreement. Haight contends that the Agreement was a contract for the purchase of property, which contained promises designed to protect the interests of Haight in that property.

In response, Williams argues that Haight's demurrer to the negligence cause of action must be denied because Haight's argument requires the Court to make a determination of Haight's status. Williams argues that the allegation in the Complaint asserts that Sander resided at the 1933 residence as either a tenant or per the Agreement. Williams argues that since the Court must accept the factual allegations as true, the Court cannot make a determination one way or the other as to Haight's status and then determine her liability under that status.

As to the breach of contract claim, Williams asserts that he is a third-party beneficiary of the Agreement. Williams contends that a number of the Agreement's provisions address the need to avoid causing injury to third parties and to compensate third parties for injuries caused by conditions on the property. From this, Williams argues that Haight and Sander clearly intended to benefit third parties who may be injured by a condition on the property. Williams argues that no one fits into the likely class of third parties more then one who shares a common wall with the property.

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "… is confined to the content of the complaint." ***In re Adoption of S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." ***Ibid***. The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997). "'If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.'" ***Ibid***. (quoting ***The County of Allegheny v. The Commonwealth of Pennsylvania***, 490 A.2d 402, 408 (Pa. 1985)).

The first issue before the Court is whether Williams can assert a negligence claim against Haight. Haight asserts that she cannot be held liable to Williams in negligence. Haight asserts that she is a vendor per the Agreement between her and Sander. Haight argues that if she is a vendor, then she cannot be held liable to Williams on the facts alleged. However, the Court cannot make such a definitive conclusion as to Haight's status at this point in the proceedings. In addition to a vendor, the factual allegations in the Complaint would also permit a conclusion that Haight held the status of a landlord out of possession and/or owner of the property. This being the preliminary objection stage, the Court must accept these allegations as true and conclude for the purposes of the preliminary objections that Haight is a vendor, landlord out of possession and/or owner of the property. Since the Preliminary

Objections do not address Haight's liability as a landlord out of possession or owner of the property, the Court will not make a determination in this regard. The Court will limit its inquiry as to whether Williams has alleged sufficient facts that would establish Haight's liability as a vendor.

If Haight is a vendor in an installment land contract, then, under the facts alleged, she cannot be held liable for the injury suffered by Williams. The seller of land in an installment contract has no greater responsibility for an injury caused by a condition on the property then an ordinary vendor. ***Welz v. Wong***, 605 A.2d 368, 373 (Pa. Super. 1992). In ***Welz***, the Superior Court cited to the Restatement of Torts (Second) §353 when stating that, "… a vendor will be found liable as to a dangerous condition only if the vendor does not know of, or have reason to know of, the condition or the risk involved and if the vendor has reason to believe that the vendee will not discover the condition or realize the risk." 605 A.2d at 370. Section 353 pertains to a vendor's liability for injuries to persons *on* the land. In ***Welz***, the plaintiff was injured when she fell down a flight of wooden stairs on the property that was subject to the articles of agreement. 605 A.2d at 369. Therefore, it was appropriate for the Superior Court to apply §353.

However, in the case *sub judice*, the injury did not occur to an individual while on the property subject to the installment contract. As such, the standard that should be applied must relate to a vendor's liability to an individual outside of the property when injured by a condition on the property. Such a standard is found at Restatement of Torts (Second) §372 and §373. Section 372 provides that:

> A vendor of land is not subject to liability to others outside of the land for physical harm caused by a natural or artificial condition

> thereon which comes into existence after the vendee has taken possession.

Restatement of Torts (Second) §372. Section 373 provides that:

> (1) A vendor of land who created or negligently permitted to remain on the land a structure or other artificial condition which involves an unreasonable risk of harm to others outside of the land, because of the place, construction, location, disrepair or otherwise is subject to liability to such persons for physical harm caused by the condition after his vendee has taken possession of the land.
>
> (2) If the vendor has created the condition, or has actively concealed it from the vendee, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise, the liability continues only until the vendee has had reasonable opportunity to discover the condition and take precautions.

Restatement of Torts (Second) §373. The Court has not located any Pennsylvania case that has adopted or cited to §372 or §373. Nevertheless, applying §372 and §373 to this case would be in accord with Pennsylvania law.

In general, liability for an injury caused by a condition existing on the land is placed upon the possessor of the land. ***Blackman v. Fed. Realty Inv. Trust***, 664 A.2d 139, 142 (Pa. Super. 1985). This is because the possessor is in the best position to identify a dangerous condition and to remedy it. It would be in keeping with this general rule to apply §372 and §373. In both instances, liability is placed upon the person in the best position to identify and remedy the dangerous condition.

Under either section, Haight, as a vendor, is not liable for the injury suffered by Williams. The Complaint alleges that the 1933 residence was occupied by an excessive number of people, who caused the basement to be used as a bedroom and accounted for the volume of personal property, garbage, refuse, and debris in the residence. It was this combined

use of the basement and some form of combustible material being placed in close proximity to the heating system that resulted in the fire. While the Complaint does not place a clear time stamp as to when this condition arose, it makes no difference as to the outcome concerning liability of a vendor under these facts.

If the condition arose after Sander took possession of the 1933 residence, then under §372 Haight cannot be found liable. If the condition existed prior to Sander taking possession of the 1933 residence, then Haight cannot be liable under §373. Haight's liability for any such condition ends once Sander had a reasonable opportunity to identify and remedy the dangerous condition. The fire occurred on February 11, 2003. The Agreement provided that Sander was to reside in the 1933 residence during the term of the Agreement and that he was to have possession of the property upon execution of the Agreement. The Agreement was executed on January 7, 2000. Sander would have had three years to identify the dangerous condition and remedy it. This is certainly a reasonable amount of time considering the alleged dangerous condition is rather obvious. Therefore, as a vendor, Haight cannot be held liable for the injury suffered by Williams.

The second issue before the Court is whether Williams has alleged facts that could establish that he is a third party beneficiary of the Agreement. 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). A party becomes a third party beneficiary of a contract if the two parties to the contract express an intention to benefit the third party in the contract itself. ***Scarpitti v. Weborg***, 609 A.2d 147, 150 (Pa. 1992). If the contract expresses no such intention, then the party must satisfy a two

part test to be recognized as a third party beneficiary of the contract. The party must show that:

> 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.

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." ***Scarpitti***, 609 A.2d at 150; ***Clifton v. Suburban Cable TV Co., Inc.***, 642 A.2d 512, 514 (Pa. Super. 1994). The second part of the test "… defines the two types of claimants who may be intended third party beneficiaries." ***Scarpitti***, 609 A.2d at 150; ***Clifton***, 642 A.2d at 514. 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. Therefore, a party who fails to satisfy the ***Scarpitti*** test is an incidental beneficiary without the right to enforce the contract. ***Weaverton Transp. Leasing, Inc. v. Moran***, 834 A.2d 1168, 1173 (Pa. Super. 2003), *app. denied*, 849 A.2d 242 (Pa. 2004).

The Court concludes that Williams is an incidental beneficiary of the agreement and not a third-party beneficiary. First, Williams is not named as a third party beneficiary in the Agreement. Second, Williams fails to meet the ***Scarpitti*** test. With respect to the ***Scarpitti*** test, the facts of this case are analogous to those in ***Dressel Associates, Inc. v. Welsch Real Estate Appraisers, Inc.***, 632 A.2d 906 (Pa. Super. 1993), *app. denied*, 653 A.2d 1231 (Pa. 1994). In ***Dressel***, the plaintiff filed a suit against a real estate appraiser. The plaintiff had

contracted with another party to buy that party's interest in an office building. ***Id***. at 907. The price was to be determined by an independent appraisal, which was performed by the defendant appraiser. ***Ibid***. In the suit, the plaintiff alleged that the appraisal was negligently done and caused damage to the plaintiff. A paragraph in the sales contract provided that the appraiser's opinion regarding the fair market value was conclusive and binding upon the parties and that neither party could challenge that determination absent proof of fraud or collusion between the appraiser and one of the parties. ***Ibid***. It was on this basis that the trial court determined that the appraiser was a third party beneficiary of this contract provision and immune from liability for negligently performing the appraisal. ***Ibid***.

The Superior Court reversed the determination of the trial court because the appraiser was not a third party beneficiary of the contract provision. The parties to the sales contract did not intend for the appraiser to be a third party beneficiary of the contract. The intent of the parties by including that provision was "… to ascertain a fair price, simplify their negotiations and fix their corresponding obligations to each other." ***Dressel***, 632 A.2d at 909. The agreement was intended only to fix the rights and obligations between the two parties. ***Ibid***.

Like in ***Dressel***, the provisions of the Agreement were intended to fix the rights and obligations of Haight and Sander in relation to the sale of the 1933 residence. The Agreement contained provisions as would relate to insurance and upkeep of the property. Pursuant to the Agreement, Haight was to purchase casualty and liability insurance for the property and be reimbursed by Sander. Haight also warranted that the 1933 residence was in compliance with all zoning laws, building and housing codes, environmental and all other laws pertaining to the property at the time of the execution of the Agreement. Sander agreed to

maintain the property and make the necessary repairs in conformity with all applicable codes. The Agreement also contained a provision that Sander would indemnify Haight for any loss, damage, claim, or liability arising from property loss, personal injury or death occurring on or about the 1933 residence to Sander, tenants, or any third party.

The circumstances are not so compelling as to require recognition of Williams as a third party beneficiary of the Agreement in order to effectuate the intent of Haight and Sander. The Agreement is an installment land contract between Haight and Sanders designed to facilitate the transfer of the 1933 residence. The insurance, compliance with codes, and indemnification provisions were intended as ways to protect Haight's interest in the property while the transfer of ownership was being completed. As such, Haight did not intend to give Williams the benefit of these promises. The promises contained in the Agreement were for the sole benefit of Haight. Any benefit Williams would have received from compliance with these promises would have been incidental. Therefore, Williams is not a third party beneficiary of the Agreement

Accordingly, the Preliminary Objections are granted.

O R D E R

Therefore, it is hereby ORDERED that the Preliminary Objections of Defendant Barbara A. Haight filed August 17, 2004 are GRANTED.

The demurrer to the negligence claim, Count I of the Complaint, is GRANTED. Haight, as a vendor, is not liable for the injuries caused by the conditions on the property. Any negligence claim based on Haight's status as a vendor is DISMISSED.

The demurrer to the breach of contract claim, Count II of the Complaint, is GRANTED. Plaintiff Joel P. Williams is not a third-party beneficiary of the contract. Count II of the Complaint is DISMISSED.

BY THE COURT:

William S. Kieser, Judge

cc: Joseph R. Musto, Esquire
Christopher D. Jones, Esquire
Griffin, Dawsey, DePaola and Jones, P.C.
101 Main Street; Towanda, PA 18848
James Sander
437 East Church Street, Apt. D; Williamsport, PA 17701
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)