IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

ONE INDEPENDENCE PLACE OWNERS' ASSOCIATION and TWO INDEPENDENCE PLACE OWNERS' ASSOCIATION, Plaintiffs,	:	February Term 2015
	:	No. 1153
v.	:	
FRUB PENN LLC, RUBENSTEIN PARTNERS And MVP REIT, individually and t/a MCP PHILADELPHIA WASHINGTON SQUARE, LLC, Defendants.	:	COMMERCE PROGRAM
	:	Control Number 15052464

ORDER

AND NOW, this 10th day of September, 2015, upon consideration of Defendant FRUB Penn LLC's Preliminary Objections, Plaintiffs' response in opposition and Defendant's reply, it hereby is **ORDERED** that the Preliminary Objections are **Sustained in part** and counts I, II and III are dismissed. The remaining preliminary objection to count IV is **Overruled**.

BY THE COURT,

PATRICIA A. McINERNEY, J.

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FRUB PENN LLC, RUBENSTEIN PARTNERS And MVP REIT, individually and t/a MCP PHILADELPHIA WASHINGTON SQUARE, LLC, Defendants.	:	COMMERCE PROGRAM
	:	Control Number 15052434

OPINION

The instant dispute alleges claims for breach of contract and quiet title and requests the appointment of receiver. Plaintiffs are the owners' associations of two condominium towers called Independence Place, One Independence Place Owners' Association (Tower One) and Two Independence Place Owners' Association (Tower Two) ("Plaintiffs"). Tower One and Tower Two sit on an underground garage which is the subject of the instant dispute. Moving defendant FRUB Penn LLC ("FRUB") is the current owner and tenant of the garage. Presently before the court are defendant FRUB's preliminary objections. [1]

The 1971 Lease

In early 1970's Denny Development, a developer and owner, proposed to construct two multi-story apartment condominium buildings called Tower One and Tower Two and a subsurface garage at 241 and 233 South 6th Street. On July 15, 1971, Denny Development, landlord, entered into a Construction and Lease Agreement ("Garage Lease") with W.S.E.

[1] The other defendants are Rubenstein Partners and MVP Reit, individually and t/a MVP Philadelphia Washington Square,LLC. Defendant Rubenstein Partners have also filed preliminary objections which will be disposed of in a separate order. Plaintiffs have discontinued the action against defendant MVP Reit, individually and t/a MVP Philadelphia Washington Square,LLC.

Garage Corp., tenant, for a term of ninety-nine (99) years. The Construction and Lease Agreement provided in pertinent part as follows:

> 12. Maintenance, Repair and Restoration of Garage Premises.
>
> A. Tenant shall throughout the term of this lease, at its sole cost and expense, take good care of the Garage Improvements and equipment, and the ramps, areas, sidewalks, curbs and parking areas within the limits of the Garage Premises and keep same in good order and condition, and promptly, at Tenant's own cost and expense, make all repairs necessary to maintain such good order and condition, whether such repairs be interior or exterior, structural or non-structural, ordinary or extraordinary, foreseen or unforeseen. When used in this Article, the term "repairs" shall include, without limitation, replacements and renewals when necessary to maintain such improvements, and equipment in good order and condition. Tenant shall keep and maintain all portions of the Garage Premises and the ramps and ways adjoining the same clean and orderly condition, free from accumulation of dirt, rubbish, snow or ice.

The lease also provided as follows:

> Tenant agrees to permit Landlord....to enter the Garage Premises at all reasonable times for the purpose of inspecting the same and making all necessary repairs thereto and performing all work therein that may be necessary by reason of Tenant's failure to make such repairs or perform any such work required of Tenant hereunder...[T]he cost of each of such repairs or the performance of such work shall be payable by the Tenant to Landlord....

Modification Agreement and Declaration of Easements and Restrictions

On February 8, 1973, Denny Development Corporation and W.S.E. Garage Corp. entered into a Modification Agreement by which the 1971 Garage Lease was amended. One of the paragraphs amended included Paragraph 13 in which W.S.E. Garage Corp. promised to "provide not less than 264 spaces for owners or tenants to the high-rise apartments to be constructed above the garage."

On the same date, Denny Development and Washington Square East, as declarants made a Declaration of Easements and Restrictions. The Declaration of Easements and Restrictions references the July 16, 1971 lease between Denny Development and W.S.E. Garage Corp. and

the subsequent Modification Agreement dated February 8, 1973. The Declaration of Easements along with the 1971 Lease Agreement and the 1973 Modification Agreement were recorded in Deed Book. As it pertained to the garage facility and reserved parking spaces, the Declaration of Easements provided as follows:

> 5. Subject to the terms and conditions of the Garage Lease and the provisions of paragraph 7 hereof:
>
> (a) The Reserved Parking Spaces retained by the Declarant under the Garage Lease are granted, fifty percent (50%) to the owners of Parcel One and fifty percent (50%) to the owners of Parcel Two.
> (b) Upon expiration or termination of the Garage Lease, the reversionary interest of Declarant [Denny Development and Washington Square East] and the right to operate, repair and maintain the Garage Improvements and to establish reasonable rules, regulations, fees and charges with respect to the use of those Improvements shall vest in the owners of Parcels One and Two [Towers One and Two] to the exclusion of the owners of Parcel Three [the club facility].

Public Offering Statement

On August 15, 1980, the initial Public Offering Statement for the creation and sale of the condominium units in Tower One, pursuant to the Pa. Uniform Condominium Act, 68 Pa. C. S. A. § 3402, was created by an entity called Independence Place Associates, the successor developer to Denny Development. The 1980 Public Offering Statement references both the 1971 Garage Lease with the 99 year lease term and the Declaration of Easements granting Independence Place ownership in the garage in fee at the expiration of the termination of the 99 year lease. The Public Offering Statement provides as follows:

> (1) The Condominium has the right to the continued use and enjoyment of the support and utility service elements incorporated in the Garage Facilities. Such right is conferred by a certain Declaration of Easements and Restrictions dated February 8, 1973 made by Denny Development Corporation and recorded on February 15, 1973 in the Philadelphia Department of Records in Deed Book D.C.C. 303, Page 326 (the "Overall Tract Declaration");
>
> (2) The Condominium's Unit owners and the owners of the North Development Parcel have a priority right to the use of two hundred sixty-four (264) parking

> spaces in the Garage Facilities. Such right is conferred by the Overall Tract Declaration and is expressly reserved for the benefit of the forgoing parties under the terms of a certain lease agreement dated July 15, 1971 with W.S.E. Garage Corp. (as amended by Modification Agreement dated February 8, 1973), providing for the demise of the Garage Facilities (the "Garage Facilities Lease"). ****
>
> 3.3 The Garage Facilities are not owned by the Condominium but are subject to the terms of the Overall Tract Declaration and to zoning limitations, both of which require that 264 parking spaces be allocated, on a priority basis, to the owners and occupants of the Condominium Units and of the improvements planned for development on the North Development Parcel. These priority rights to the available parking space in the Garage Facilities have been expressly reserved under the outstanding Garage Facilities Lease described in paragraph 1.2(2)....

The Public Offering Statement was amended on December 4, 1981, July 19, 1983 and December 1, 1983. These subsequent amendments did not discuss the Garage Lease. On December 2, 1981, the Declaration of Condominium for Tower One was created by Independence Place Associates, the successor developer and declarant of Denny Development. The Declaration was recorded shortly thereafter pursuant to the Pennsylvania Uniform Condominium Act, creating plaintiff Tower One. The Declaration references the 1971 Garage Lease with its 99-year lease term, as well as the Overall Tract Declaration. The Declaration of Tower One provides in relevant part:

> 1.01(1) Declarant has caused to be constructed below, on and above the surface of the Land...a certain structure which has twenty-five (25) stories...and two (2) below grade levels of garage improvements that also extend through adjoining subsurface areas...With respect to said structure:
>
> (a) There has been created, by a certain Declaration of Easements and Restrictions dated February 8, 1973 made by Denny Development Corporation...(the "Overall Tract Declaration"), certain restriction and covenants that in recognition of the contemplated separate ownership of the tower and garage portions of the structure, establish a logical and efficient working relationship between such portions and the owners thereof....
>
> 14.05 The garage improvements described in Section 1.01(1) of this Declaration do not constitute a part of the Condominium, with the exception of those

> subsurface elements, systems and spaces shown on the Condominium Plans as providing support for or services to the Building. Notwithstanding the foregoing, the Overall Tract Declaration, as well as certain zoning limitations, require [] that a total two hundred sixty-four (264) parking spaces in the garage be allocated, on a priority basis, to the owners of the Condominium Units and [to Tower Two].[2]

Based on the disclosures in the Public Offering Statement and the Declaration, plaintiffs allege that any purchaser of a unit in Tower One would receive legally binding assurances from the declarant and the developer that the Garage Lease had a term of 99 years and that the unit owners of Tower One and Two would have a vested fee ownership interest in the garage at the expiration or termination of the Garage Lease beginning in 2070.

Sale Agreement

Plaintiffs allege that defendants were secretly attempting to assign the Garage Lease and sell their ownership in fee to defendant MVP REIT. In the draft sale agreement, plaintiffs allege that they discovered the existence of an amendment to the Garage Lease dated November 3, 1981 which extended the lease term from 2070 to 2169.[3] This amendment allegedly was never disclosed to the unit owners in any of the pertinent documents, including the Public Offering Statement and Declaration of Condominium. Plaintiffs further allege that defendants are attempting to sell an ownership interest in the garage that is titled in the plaintiffs and that is in conflict with the ownership interests disclosed to the owners of Tower One in the chain of title that benefits the plaintiffs, the owners of Tower One and Tower Two.

Flooding Issues

Over the past few years, Independence Place has advised defendants that it has faced alleged increasingly dire problems with water as a result of the garage's alleged inadequate and

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[2] The Public Offering Statement and Declaration for Tower Two is not referred to in the complaint nor attached to the complaint as an exhibit.

[3] The 1981 Amended Lease is not attached to the complaint as an exhibit.

failing ceiling drainage systems. The flooding has occurred with increasing frequency both in the plaza and in commercial units on the ground floors of the towers. The garage is underground and sits below Towers One and Two and the plaza lies above it. All precipitation that falls on any of the areas above the garage allegedly makes its way downward toward the ceiling of the garage. According to plaintiffs, the membrane has outlived its useful life and is no longer waterproof. Plaintiffs allege that it is the responsibility of the landlord and tenant of the garage lease to make the necessary repairs. Plaintiffs further alleges that the landlord and tenant have failed to make the necessary repairs.

In February 2015, plaintiffs filed a writ of summons against defendant FRUB and other defendants and indexed a *lis pendens*. Thereafter, plaintiffs filed a complaint alleging the following: count I- breach of the garage lease for failing to make the repairs to the garage roof required under the lease and for damages for those repairs, count II- quiet title seeking the court to determine that plaintiffs are now owners of the garage since the lease is terminated due to defendants' breach of the garage lease, and count III- appointment of a receiver with respect to enforcing the repair obligations under the lease. Additionally, plaintiffs allege in count IV a claim for quiet title seeking a determination that the purported extension of the garage lease in the 1981 Garage Lease Amendment which was never disclosed to plaintiffs is unenforceable. For the reasons discussed below, FRUB's preliminary objections are sustained in part and overruled in part.

DISCUSSION

I. Plaintiffs lack standing sue on counts I, II and III.

The core concept of standing is that a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his

challenge. A litigant is aggrieved when he can show a substantial, direct, and immediate interest in the outcome of the litigation. A litigant possesses a substantial interest if there is a discernable adverse effect to an interest other than that of the general citizenry. It is direct if there is harm to that interest. It is immediate if it is not a remote consequence of a judgment.[4] Here, plaintiffs lack standing to sue on counts I, II and III.

Counts I, II and III of the complaint purport to originate from the Garage Lease. Plaintiffs allege that defendants have breached the Garage Lease by failing to make necessary repairs to the garage. As a result of said breach, plaintiffs ask this court to terminate the Garage Lease and make plaintiffs the owners of the garage and appoint a receiver to oversee the repair obligations. Plaintiffs allege they have standing to allege said claims because they are the "current vested beneficial owners" of the garage, who will own the garage at the expiration or termination of the garage lease in 2070. Plaintiffs further allege they have standing to allege said claims because they are third party beneficiaries of the garage contract.

Plaintiffs' designation as "current vested beneficial owners" does not confer upon them standing to enforce or terminate the Garage Lease. According to the Declaration of Easements, plaintiffs do hold a reversionary interest in the garage. However, this reversionary interest does not give plaintiffs current possession of the property and therefore plaintiffs may not impinge upon the current owners' possessory right to use the property as it deems appropriate. FRUB, as the current owner and possessor, may use the garage as it deems appropriate subject only to the duty that it not commit waste on the property which would be detrimental to plaintiffs' future interest.[5] As a future interest holder, plaintiffs' sole remedy is limited to injunctive relief to

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[4] *In re Milton Hershey School,* 590 Pa. 35, 911 A.2d 1258, 1261–62 (2006).

[5] See, *Restatement of Property§ 49.*

prevent waste.[6] Presently, there are no allegations within the complaint that FRUB is committing waste.

Plaintiffs are not third party beneficiaries of the Garage Lease. For plaintiffs to have standing to enforce a contract as a third party beneficiary, both contracting parties must have expressed an intention that plaintiffs be a beneficiary and that intention must have affirmatively appeared in the contract itself. [7] Applying the forgoing to the Garage Lease, it is clear that there are no contractual provision expressly stating that plaintiffs are third party beneficiaries of the Garage Lease. As such, plaintiffs are not express third party beneficiaries under the Garage Lease. This however does not end the inquiry. Even when the contract does not expressly state that the third party is intended to be a beneficiary, as in the instant case, the party may still be a third party beneficiary if both parties to the contract so intended, and that such intent was within the parties' contemplation at the time the contract was formed. Pennsylvania has adopted § 302 of the Restatement (Second) of Contracts to determine when a party is an intended third-party beneficiary of a contract, creating a two-part test: "(1) the recognition of the beneficiary's right must be appropriate to effectuate the intention of the parties, and (2) the performance must satisfy 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."[8]

Applying the forgoing to the facts at hand, it is clear that although plaintiffs are entitled to priority parking with the allotment of 264 spaces in the garage, said entitlement to priority

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[6] Id. at ¶¶ 193-194.

[7] *Pa. Energy Vision, LLC et.al. v. South Avis Realty Inc.*, ---A.3d. ---, 2015 Pa. Super. 154 (2015).

[8] *Guy v. Liederbach,* 501 Pa. 47, 459 A.2d 744, 751 (Pa.1983).

parking does not make plaintiffs' third party beneficiaries of the garage lease.[9] The Garage Lease was not intended to benefit plaintiffs. Plaintiffs were not the sole users of the garage; nor were plaintiffs contemplated by the contracting parties at the time the garage lease was drafted as third party beneficiaries under the garage lease. Rather, the terms of the Garage Lease unequivocally provide that the landlord and tenant entered into the lease to construct, operate and maintain the garage for their respective benefit.[10] Intended third party beneficiary status cannot be established based on the right to priority parking.[11] Naturally, performance of the contract will benefit plaintiffs. But unless the third person is an intended beneficiary no duty to him is created.[12] Awareness that a third party will benefit from a contract provision is not an intention to specifically confer a third party right.[13] At best, plaintiffs are incidental beneficiaries, who acquired no rights against the contracting parties in the Garage Lease.[14] Since, plaintiffs are not third party beneficiaries to the garage lease and since plaintiffs' reversionary interest in the garage does not confer standing upon plaintiffs to enforce or terminate the garage lease, FRUB's preliminary objections to counts I, II and III are sustained and said counts are dismissed.[15]

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[9]Absent from the complaint are any allegations that plaintiffs use of the parking spaces is being impaired.

[10]Construction and Lease Agreement dated July 15, 1971 Background Facts, ¶¶ A, B, C. and Modification Agreement dated February 8, 1973 whereas clauses.

[11] *See, Scarpitti v. Weborg,* 530 Pa. 366, 609 A.2d 147, 150 (1992).

[12] *Gerace v. Holmes Prot. of Phila.,* 357 Pa. Super. 467, 473, 516 A.2d 354, 358 (1986).

[13] *Pa. Liquor Control Bd. v. Rapistan, Inc.,* 472 Pa. 36, 46, 371 A.2d 178, 183 (1976).

[14]See, *Restatement (Second) of Contracts* § 315 (1981).

[15] Counts I, II and III are all related to the alleged claim for breach of the garage lease. Since the court found there is no standing to bring the claim for breach of the garage lease and to seek termination of the garage lease, count III fails as well since it seeks the appointment of a receiver to monitor repairs to the garage.

CONCLUSION

For the forgoing reasons, defendant FRUB's Preliminary Objections are **Sustained in part** and counts I, II and III are dismissed. The remaining preliminary objection to count IV is **Overruled**.[16]

BY THE COURT,

PATRICIA A. McINERNEY, J.

[16] In count IV, plaintiffs allege a claim for quiet title related to a 1981 amendment to the Garage Lease which extended the term of the lease from 2070 to 2169 allegedly without plaintiffs knowledge. Unlike counts I, II, and III, the court finds that plaintiffs do have standing to bring the quiet title claims since plaintiffs' rights are being directly harmed by said amendment.