IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JACCO & ASSOCIATES, INC., *et al.*	)	**CASE NO. CV 09 705385**
	)	
Plaintiffs	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JOURNAL ENTRY**
	)	
T.H. MARTIN, INC.	)	
	)	
Defendant	)	

***John P. O'Donnell, J.*:**

Plaintiffs Jacco & Associates, Inc., and Aaon, Inc., filed this breach of contract lawsuit against defendant T.H. Martin, Inc., on September 29, 2009. The defendant filed its answer denying liability and demanding a jury trial on December 30. Aaon was later dismissed and a jury trial waived. The case was tried to the court on July 12, 2010, and this entry follows.

STATEMENT OF FACTS

Jacco & Associates, Inc., is an engineering firm and manufacturers' representative in the air handling equipment industry. Jacco designs air handling – heating and air conditioning systems – for commercial construction projects. Jacco earns its money by educating architects and engineers about the various features and other benefits of its manufacturers' products in the hope of persuading the architect or other professional first to incorporate its manufacturers' systems into the overall design of a new building and then to buy the system through Jacco.

T.H. Martin, Inc., is a mechanical contractor in the business of installing the mechanical systems, including heating, ventilation and air conditioning, of a new building.

In September, 2008, T.H. Martin sought to become the mechanical sub-contractor on a project to build a branch of the Cleveland Public Library. To prepare its own bid for the job, T.H. Martin solicited bids for separate portions of the job from other sub-contractors. One portion of the sub-bid covered the purchase and installation of a rooftop air conditioning unit. The sub-bids were required to comport with the library's specifications for the unit.[1] Among those specifications is that the rooftop unit must be manufactured by Aaon, McQuay, York, Trane, or Carrier. Another requirement called for 24-inch curbs. A curb is essentially a platform on which the rooftop air conditioning unit rests. Curbs may be anywhere from 14 to 60 inches high.

On September 3, 2008, Jacco submitted a $112,500.00 bid to T.H. Martin for the rooftop unit and curb.[2] It called for an Aaon Model RN rooftop handling unit. Martin incorporated Jacco's sub-bid into its bid and was awarded the work as the mechanical contractor on the project. Martin, in turn, accepted Jacco's bid and, at Jacco's request, on November 3, 2008, submitted two form purchase orders: one in the amount of $10,000.00 to Jacco and one for $102,500.00 to Aaon. Each purchase order includes the notation "hold equipment release for submittal approval."

Jacco had offered its submittal data for approval, in writing, on October 27, 2008. That submittal included a drawing showing that Jacco proposed a 48-inch high curb. The "submittal approval" described on the purchase orders means final approval by the contractor, engineer, and architect.

On December 30, 2008, the engineer, Ralph Tyler Companies, stamped the submittal "approved as corrected" with seven separate handwritten notations. The fifth of those notations

[1] Trial Exhibit 2.
[2] Trial Exhibit 3.

was "curb height shall be per drawing H 2-3," *i.e.*, 24 inches, not 48. Despite the corrections, the engineer's stamp includes the comment that "fabrication/ installation may be undertaken."

On January 20, 2009, the architect stamped the submittal "approved as noted" with the handwritten notation "Contractor to coordinate top of screen wall per drawings. Top of mechanical unit should not be visible." This note refers to the architect's intention that the rooftop unit not be exposed above a concealing wall extending above the roof line. The Aaon Model RN was 94½ inches high, and that height, combined with a 48-inch curb, would have been higher than the 10-foot screen wall.

Gerard Cohen of Jacco testified that the plaintiff was fully aware of the specification for, and ready to provide, a 24-inch curb. He said that the inclusion in the submittal of drawings for a 48-inch curb was merely an oversight.

Around the time of the architect's "approval as noted" in late January, Jacco heard rumors that the owner was no longer willing to use an Aaon unit. Evidence about whether that rumor was true and, if so, the reasons for it, was not introduced at trial. Eventually, on August 17, 2009, Martin corresponded to Jacco to cancel the two purchase orders. The letter notes that a "directive from the owner" was made to use an "alternate roof top unit." The alternate unit was manufactured by Valent, a company not included in the library's original specifications as an acceptable air handling unit manufacturer.

LAW AND ANALYSIS

Jacco's complaint is for breach of contract. Although the proposed transaction here involved Jacco's performance of some engineering services, the essence of the transaction was a sale of goods, namely the rooftop unit and curb. Ohio Revised Code section 1302.04(A) requires that a contract for the sale of goods in excess of $500 be in writing "sufficient to indicate that a

contract for sale has been made between the parties and signed by the party against whom enforcement is sought."

The elements of a contract are offer and acceptance, supported with valid consideration.[3] The essential elements of a cause of action for breach of contract are the existence of a contract, performance by the plaintiff, breach by the defendant, and resulting damage to the plaintiff.[4] There is no question that contracts were formed. Martin's November 3 purchase orders, combined with Jacco's September 3 quotation and October 27 submittal data, constitute writings sufficient to conclude that Martin agreed to buy an Aaon Model RN and supporting curb for the total of $112,500.00. The plaintiff established the first element of a breach of contract claim.

However, Martin argues that there are two contracts here: one between Martin and Aaon for the purchase of the rooftop unit and a second between Martin and Jacco for the curb. In support, Martin cites as evidence the fact that the purchase order in the amount of $102,500.00 was submitted to Aaon, not Jacco. Jacco's role as a manufacturer's representative is further evidence that it is not a party to the sale of the rooftop unit. A manufacturer's representative has been defined as "an independent contractor who solicits orders for a manufacturer's product from potential customers and is paid a commission on resulting sales."[5] In this case, Martin placed its order with Aaon based on Jacco's solicitation, but Jacco's payment was to come from its separate contract with Aaon. Finally, Cohen agreed in his testimony with the assertion that the contract for the rooftop unit was between Martin and Aaon. The court finds that there were two contracts and that Jaaco is not a party to the contract for the purchase of the rooftop unit. Only a party to a contract or an intended third-party beneficiary to a contract may bring an action

[3] *Gruenspan v. Seitz* (1997), 124 Ohio App. 3d 197, 211.
[4] *Café Miami v. Domestic Uniform Rental*, 2006-Ohio-6596, Cuyahoga App. No. 87789, ¶11.
[5] *John Maye Co., Inc. v. Nordson Corp.* (1992), 959 F. 2d 1402, 1408.

for the contract's breach.[6] Since Jacco is not a party to the contract, it may only assert a breach against Martin if it is an intended third-party beneficiary.

In Ohio, the determination of whether a non-party to a contract is an intended beneficiary with enforceable rights is made by applying the "intent to benefit" test described by the Ohio Supreme Court in *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d, 36. The *Hill* court explained the intent to benefit test as follows:

> Under this analysis, if the promisee intends that a third party should benefit from the contract, then that third party is an 'intended beneficiary' who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an 'incidental beneficiary,' who has no enforceable rights under the contract.
>
> The mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract is insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.[7]

The test requires evidence that the promisee – Aaon in this case – intended to directly benefit the third party.[8]

Cohen testified that Jacco and Aaon have a "handshake agreement" under which Aaon would pay Jacco a substantial commission on orders placed and executed. Documentary evidence supporting that agreement was admitted at trial as Exhibit 17, Jacco's job information sheet showing the calculation of Jacco's anticipated commission.

Nevertheless, the court finds that the plaintiff was not an intended beneficiary of a contract between Martin and Aaon. Jacco's position here is analogous to that of a commission-based salesman employed as an agent of the seller. Jacco cannot seriously argue that a salesman obtains rights enforceable against a customer when he arranges a contract between his employer

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[6] *Cincinnati Ins. Co. v. Cleveland*, 2009-Ohio-4043, Cuyahoga App. No. 92305, ¶28.
[7] *Hill*, supra, at 40.
[8] *Shaker Courts Condominium Unit Owners Assn., Inc. v. Industrial Energy Systems, Inc.* (Feb. 24, 2000), Cuyahoga App. No. 75378, unreported.

and that customer, just as the customer cannot hold the salesman personally liable under such a contract. To put it in the words of the intent benefit test, the promisor's (Martin's) performance (payment to Aaon) satisfies only its duty to Aaon and not a duty owed (commission payment) by the promisee (Aaon) to the beneficiary (Jacco).

The plaintiff having failed to demonstrate a contractual duty owed by the defendant to Jacco for the contract to buy the rooftop unit, the court finds in the defendant's favor on this claim, leaving for decision Jacco's claim for Martin's breach of contract for the sale of the curb.

The contract to buy the curb between Jacco and Martin is enforceable. The second element of Jacco's action on this contract is whether it performed under the contract. Cohen testified to how Jacco generates income. He noted that much of his company's efforts are devoted to establishing relationships with architects and engineers and educating those professionals about the salutary features of the products made by the manufacturers it represents. This work is undertaken in the hope that the architect or engineer will incorporate a Jacco manufacturer's product into a building's design, thereby providing Jacco with an opportunity to bid, on the manufacturer's behalf, for the sale of the product for installation into the building. Cohen testified that all of Jacco's expenses are "upfront" and incurred through the preparation of the bid documents, *i.e.*, before a bid is ever accepted. Or, as Jacco's counsel put it at trial, if a bid is accepted all that Jacco has to do is "push a button" and instruct the fabricator to make the curb.

Throughout the preparation of the bid documents, there are many chances for Jacco's client to lose a sale: the client's product may not be incorporated into the building's design; Jacco's bid for the manufacturer may not conform with the design's detailed specifications; or Jacco's manufacturer's price may be beaten by a competitor. Because Jacco incurs all of its cost

before it ever gets a contract, and because the ratio of bids accepted to bids prepared is low, Jacco's commissions are structured so that the payments it does receive cover its costs in working on contracts it doesn't receive. Since Jacco's work has been done, once its bid is accepted the contract is complete. If the customer then cancels in favor of another vendor, the customer has breached the contract even if the plaintiff has not "pushed the button" to actually manufacture the goods. Therefore, the court concludes that Jacco did perform its obligations under the contract. The court further finds that Martin's cancellation was a breach of the contract, leaving only the element of damages.

The evidence here is that the contract amount of $10,000.00 included a cost to Jacco of $3,504.00, leaving the plaintiff with a lost profit of $6,496.00.

The defendant's argument that the plaintiff has failed to show a lost profit to a reasonable certainty is unavailing. Based on the way Jacco operates and calculates its commissions, as outlined above, the court finds credible Cohen's testimony that "gross profit," "net profit," and "job profit" are synonymous and that the plaintiff has therefore proved its damages on the curb contract by a preponderance of the evidence.

CONCLUSION

Because Jacco was not in privity of contract for the sale to Martin of the Aaon rooftop air conditioning unit for $102,500.00, nor was Jacco an intended beneficiary of that contract, the court finds in favor of the defendant on that claim. Because the plaintiff has proved Martin's breach of the contract to buy a rooftop curb for an air conditioning unit by a preponderance of the evidence, the court finds in favor of the plaintiff on that claim and hereby enters judgment in favor of plaintiff Jacco & Associates, Inc., and against defendant T.H. Martin, Inc., in the total

amount of $6,496.00, interest at the statutory rate beginning on the date of this entry, and court costs.

IT IS SO ORDERED:

_____ Date: _____
JUDGE JOHN P. O'DONNELL

SERVICE

A copy of this Journal Entry was sent by e-mail, this _____ day of July, 2010, to the following:

Mark I. Wachter, Esq.
Wachter Kurant, LLC
mwachter@lawkkwt.com
Attorney for Plaintiff

Mark S. Fusco, Esq.
Walter & Haverfield LLP
mfusco@walterhav.com
Attorney for Defendant

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JUDGE JOHN P. O'DONNELL