

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0848, Coachman Estates of Barrington, LLC v. REI Service Corporation & a., the court on September 29, 2011, issued the following order:

The plaintiff, Coachman Estates of Barrington, LLC (Coachman), appeals an order of the trial court granting the motion to dismiss filed by defendant REI Service Corporation (REI). Coachman argues that the trial court erred in finding that it failed to plead sufficient facts to establish that it was a third party beneficiary to a contract between REI and People's United Bank (bank). Although the bank was also named as a defendant, Coachman represents on appeal that it "has resolved matters with bank." We affirm.

In reviewing a motion to dismiss, our standard of review is whether the allegations in the plaintiff's pleadings are reasonably susceptible of a construction that would permit recovery. J & M Lumber & Constr. Co. v. Smyjunas, 161 N.H. 714, 724 (2011). We assume the plaintiff's pleadings to be true and construe all reasonable inferences in the light most favorable to it. Id. We need not assume the truth of the statements in the plaintiff's pleadings that are conclusions of law. Id. Dismissal is warranted if the writ's allegations do not constitute a basis for legal relief. Id.

In its writ Coachman alleged: (1) Coachman entered into a loan agreement with the bank for a site loan, a construction loan and a line of credit for the development of a project in Barrington ("project"); (2) the loan agreement between Coachman and the bank provided that the bank would retain a Construction Inspector, who would review the plans, specifications and progress of the Coachman project; and (3) the bank retained REI as Construction Inspector. Coachman further alleged that although it was not a party to the contract between REI and the bank, "both parties knew that the Plaintiff was to be a beneficiary of the work to be performed by the Defendant REI."

In April 2007, a severe rainstorm in Barrington damaged a large portion of a road under construction within the project. Coachman then filed suit against the bank and REI. The question before us on appeal is whether the trial court erred in dismissing the claims against REI which sought recovery under a third party beneficiary claim and an exception to the privity rule.

To plead a claim as a third party beneficiary to a contract, the plaintiff must allege facts sufficient to establish that: (1) the contract calls for a performance by the promisor which will satisfy some obligation owed by the promisee to the third party plaintiff; or (2) the contract is so expressed as to give

the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract. See Tamposi Associates v. Star Mkt. Co., 119 N.H. 630, 633 (1979). Coachman argues on appeal that the contract between REI and the bank was so expressed as to give REI reason to know a benefit to a third party was contemplated by the promisee as one of the motivating causes of its making the contract.

Coachman's argument is premised upon its allegation that the bank incurred a duty under the loan agreement "to exercise reasonable care in its inspections of Plaintiff's premises because it voluntarily undertook to perform such inspections on behalf of or for the benefit of the Plaintiff." If, however, the bank did not owe such a duty to the plaintiff under the loan agreement with respect to the inspections, it would have had no reason to intend that its contract with REI benefit the plaintiff; thus, it would not be the case that a benefit to the plaintiff was contemplated by the bank as one of the motivating causes of its making the contract with REI.

The interpretation of a contract is a question of law. Lassonde v. Stanton, 157 N.H. 582, 594 (2008). Having reviewed the loan agreement, we agree with the trial court that the role of the construction inspector was to ensure that the bank's security interest was adequately protected, not to provide technical assistance to the plaintiff in determining the quality of work. See Seymour v. N.H. Savings Bank, 131 N.H. 753, 759 (1989). We further agree with the trial court that the plaintiff has not alleged facts that would support a ruling that the bank voluntarily assumed the duty to assure that the construction would be completed in a workmanlike manner. The agreement between the bank and Coachman imposed no obligation upon the bank to conduct inspections for Coachman's benefit, and the writ does not plead any special circumstances that might have led to any such understanding between the bank and Coachman. Accordingly, we affirm the trial court's dismissal of the third-party beneficiary claim against REI.

Affirmed.

DALIANIS, C.J., and CONBOY and LYNN, JJ., concurred.

**Eileen Fox,
Clerk**