[Cite as *Lone Star Steakhouse & Saloon, Inc. v. Quaranta*, 2003-Ohio-3287.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

LONE STAR STEAKHOUSE AND SALOON, INC.,	)	
PLAINTIFF,	)	
VS.	)	
	)	CASE NO. 02-CA-156
RONALD QUARANTA, ET AL.,	)	
	)	OPINION
DEFENDANTS-APPELLANTS,	)	
AND	)	
FIRST AMERICAN TITLE INSURANCE COMPANY,	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court Case No. 99CV997
JUDGMENT:	Affirmed
APPEARANCES:	
For Defendants-Appellants:	Attorney Matthew C. Giannini 1040 S. Commons Place, Suite 200 Youngstown, OH 44514
For Defendant-Appellee:	Attorney Bradley P. Toman McFadden & Associates Co., L.P.A. 1370 Ontario Street, Suite 1700 Cleveland, Ohio 44113
JUDGES:	
Hon. Gene Donofrio	

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: June 18, 2003

DONOFRIO, J.

{¶1} Defendants-appellants, Ronald and Joanne Quaranta ("Quarantas"), appeal a decision of the Mahoning County Common Pleas Court granting summary judgment for defendant-appellee, First American Title Insurance Company ("First American"), on the Quarantas' claim for indemnification and/or contribution against First American.

{¶2} Earl Weaver ("Weaver") owned a parcel of property in Boardman Township, Mahoning County, Ohio.[1] In 1985, he divided the parcel of land into two parcels and sold each parcel. He conveyed Lot 1 to the Quarantas and Lot 2 to T&W Properties ("T&W"). T&W is a partnership composed of Weaver, Jack Weaver, and Thomas Rochford.

{¶3} Prior to conveying Lot 1 to the Quarantas, Weaver operated a restaurant on that lot known as "Some Where Else." The Quarantas purchased Lot 1 to open a restaurant. Mr. Quaranta wanted to ensure that Weaver would not open a restaurant on Lot 2 so he made it a condition of the sale for a restriction to be put into each deed.

{¶4} The restriction was placed in the deed from Weaver to T&W. The restriction stated that for fifteen years from the date of recording the deed that T&W, their heirs, successors, and assigns could not open a sit-down restaurant or tavern on Lot 2 in competition with the restaurant on Lot 1. The restriction further stated that the restriction was for the benefit of Ronald L. Quaranta, his heirs and assigns and that if Lot 2 was sold these restrictions would be incorporated into the deed. The aforementioned restriction was to lapse on June 23, 2000.

{¶5} The deed from Weaver to the Quarantas contains the following provision:

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[1] A portion of the facts and procedural history recited herein are borrowed verbatim from this court's decision in *Lone Star Steakhouse of Ohio, Inc. v. Quaranta* (Mar. 18, 2002), 7th Dist. No. 01 CA 60.

{¶6} "Further granting unto the Grantees, their heirs and assigns, the rights in common with the Grantor in and to the restrictions contained in a prior deed from the Grantor herein to T&W Properties, a partnership, conveying Lot Number 2 in said Bud Weaver Plat No. 1, as found recorded in Volume 82, page 324, Mahoning County Records of Deeds made among other purposes for the benefit of Lot Number One (1) herein conveyed, together with, but not limited to, the right to enforce said restrictions as fully and completely as the Grantor herein."

{¶7} After the conveyance, the Quarantas opened a restaurant on Lot 1 known as "Isle of Capri." In 1994, the Quarantas sold the restaurant to Lone Star. In March of 1994, after the purchase agreement was executed but prior to the closing date, the Quarantas released the restrictive covenant from Lot 2. Their purported reason for doing so was that Weaver and Mr. Quaranta had discussed opening up a tavern on Lot 2 after the sale of Lot 1.

{¶8} First American is the underwriter for Midland Title Security, Inc./Inter-County, Inc. ("Midland"). Lone Star hired Midland to act as escrow agent for the sale of Lot 1, to provide a commitment, and to issue an owner's policy of title insurance. First American/Midland issued a commitment for title insurance to Lone Star dated February 14, 1994. The commitment listed exceptions to coverage. One of the listed exceptions was the restriction found in the deed from Weaver to T&W. On the date of closing, May 6, 1994, First American/Midland issued an Owner's Policy of Title Insurance. This policy also listed exceptions to coverage. The restriction found in the deed from Weaver to T&W was again listed as an exception to coverage. However, the commitment showed that the covenant was still in full force.

{¶9} On August 2, 1994, "The Office" (a tavern/restaurant) opened for business on Lot 2. Lone Star proceeded to open on August 10, 1994, without notice

that the covenant was released. Lone Star did not inquire into the opening of The Office until October 2, 1998. On December 3, 1998, Lone Star allegedly first discovered that the covenant in question was released.

{¶10} On April 26, 1999, Lone Star brought suit against the Quarantas and First American seeking declaratory judgment. On June 3, 1999, the Quarantas filed a cross-claim against First American seeking indemnification and/or contribution. All parties filed motions for summary judgment on Lone Star's claim. The trial court granted the Quarantas' and First American's motion for summary judgment. On appeal, this court reversed summary judgment for the Quarantas finding that they had no authority to release the covenant. *Lone Star Steakhouse of Ohio, Inc. v. Quaranta* (Mar. 18, 2002), 7th Dist. No. 01 CA 60. The court affirmed summary judgment for First American finding that the negligence claim was barred by the statute of limitations. Id.

{¶11} After remand, First American and the Quarantas filed cross-motions for summary judgment on the Quarantas' remaining claim for indemnification and/or contribution. On August 28, 2002, the trial court granted First American's motion for summary judgment and denied the Quarantas'. This appeal followed.

{¶12} The Quarantas raise two assignments of error. Since both raise a common point of law dispositive of this appeal, they will be addressed together. The Quarantas' first assignment of error states:

{¶13} "Appellants, Quarantas, Are Third Party Beneficiaries to the Appellee, First American's, Title Insurance Policy And, as Such, Are Legally Entitled to Indemnification Pursuant to its Terms and Conditions."

{¶14} The Quarantas' second assignment of error states:

{¶15} "The Plaintiff's inability to enforce its claim in *negligence* against Appellee, FIRST AMERICAN, as barred by the two year statute of limitations does not defeat the title company's separate *contractual* liability to the seller(s), QUARANTAS, who are intended third party beneficiaries to the title insurance contract for which consideration. (sic.)"

{¶16} The Quarantas argue that they are intended third-party beneficiaries under First American's title insurance policy with (Lone Star). Therefore, the Quarantas argue, they are entitled to indemnification and/or contribution.

{¶17} "Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio." *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220. "Intended" and "incidental third-party beneficiaries" have been defined as follows:

{¶18} "(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:

{¶19} "(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

{¶20} "(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

{¶21} "(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary." Restatement of the Law 2d, Contracts (1981) 438-440, Section 302.

{¶22} Comment e to Section 302 states:

{¶23} "Performance of a contract will often benefit a third person. But unless the third person is an intended beneficiary as here defined, no duty to him is created. * * *"

{¶24} In *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 521 N.E.2d 780, the Supreme Court adopted the Sixth Circuit Court of Appeals' "intent to benefit" test in determining whether a third party is an intended or incidental beneficiary, observing:

{¶25} "'* * * 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.

{¶26} "'* * * [T]he 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.'" Id. at 40, 521 N.E.2d 780, quoting *Norfolk & W. Co. v. United States* (C.A.6, 1980), 641 F.2d 1201, 1208.

{¶27} In this case, the Quarantas clearly were not parties to the insurance contract. First American was the insurer and Lone Star was the insured. The policy neither mentions the Quarantas or any rights of the Quarantas. The Quarantas presented no evidence that they were intended third-party beneficiaries. The purpose of the insurance contract between First American and Lone Star was to protect Lone Star's interest in acquiring good title. Therefore, the Quarantas cannot claim that they are third-party beneficiaries under the insurance contract. See *Mitchell v. Harlamert* (June 15, 1994), 2d Dist. Nos. 14279, 14296. To the extent they received any benefit

under the policy it was only incidental to the policy, making them incidental third-party beneficiaries and not intended third-party beneficiaries.

{¶28} Accordingly, both of the Quarantas' assignments of error are without merit.

{¶29} The judgment of the trial court is hereby affirmed.

Judgment affirmed.

Vukovich and DeGenaro, JJ., concur.