

DATE FILED: April 17, 2023 11:21 AM
FILING ID: DF5D1814D4F59
CASE NUMBER: 2022CV31409

**DISTRICT COURT, JEFFERSON COUNTY,
STATE OF COLORADO**

100 Jefferson County Parkway,
Golden, Colorado 80419

Plaintiff:

SOLTERRA LLC, a Colorado limited liability company

v.

Defendants:

FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado; FOSSIL RIDGE METROPOLITAN DISTRICT NO. 2, a quasi-municipal corporation and political subdivision of the State of Colorado; and FOSSIL RIDGE METROPOLITAN DISTRICT NO. 3, a quasi-municipal corporation and political subdivision of the State of Colorado.

Attorneys for Plaintiff

Daniel K. Calisher, #28196
Lawrence G. Katz, #32724
FOSTER GRAHAM MILSTEIN & CALISHER, LLP
360 South Garfield Street, Sixth Floor
Denver, Colorado 80209
Telephone: 303-333-9810
Email: calisher@fostergraham.com
Email: lkatz@fostergraham.com

Neil L. Arney, #27860
KUTAK ROCK LLP
1801 California Street, Suite 3000
Denver, Colorado 80202
Telephone: 303-297-2400
Email: neil.arney@kutakrock.com

▲ COURT USE ONLY ▲

Case No. 2022 CV 31409

Division: 1

**PLAINTIFF'S RESPONSE TO DEFENDANTS FOSSIL RIDGE METROPOLITAN
DISTRICTS NO. 2 & 3's MOTION TO DISMISS**

Plaintiff Solterra LLC (“Solterra”), through undersigned counsel, responds to defendants Fossil Ridge Metropolitan District Nos. 2 & 3s’ Motion to Dismiss (“Motion”), as follows:

INTRODUCTION

Solterra adopts and incorporates herein the Introduction and Background, including defined terms, set forth in its response to defendant FRMD No. 1’s partial motion to dismiss filed contemporaneously herewith. For clarity, Solterra refers to FRMD District No. 1 as the “Service District,” and refers to FRMD Nos. 2 & 3 collectively as the “Financing Districts.” Solterra further adopts the arguments set forth in that response as necessary and/or referenced herein.

ARGUMENT

I. The Court Should Deny the Financing Districts’ Motion as to Solterra’s Claims for Unjust Enrichment (Claim 5) and Promissory Estoppel (Claim 6)

A. Unjust Enrichment

The Financing Districts argue “the Service District’s alleged breach cannot support an unjust enrichment claim against the non-contracting Financing Districts.” (Mot., pp. 6-7). This fundamentally misunderstands Solterra’s unjust enrichment claim. Solterra does not “assert that the Financing Districts were unjustly enriched because *the Service District* allegedly breached its contractual obligation to reimburse [Solterra] and to timely accept public infrastructure,” as the Financing Districts erroneously assert. (*Id.*, p. 6) (emphasis added).

Solterra expressly alleges it “funded the Public Infrastructure in reliance on *the irrevocable and unconditional commitments made by [the Financing Districts]* to finance the repayment of amounts Solterra advanced for Public Infrastructure” and the Financing Districts “have received tremendous benefit from the Public Infrastructure[.]” (FAC ¶¶ 152-53) (emphasis added). As such, Solterra alleges the Financing Districts “have been and will continue to be unjustly enriched if they

are permitted to use and enjoy the Public Infrastructure funded and maintained by Solterra without paying for the Public Infrastructure and the excess amounts paid by Solterra to maintain the Public Infrastructure.” (*Id.* ¶ 155). The Financing Districts’ argument ignores this and fails to present any argument challenging the sufficiency of Solterra’s actual allegations under C.R.C.P. 12(b)(5).

B. Promissory Estoppel

The Financing Districts argue Solterra’s promissory estoppel claim really seeks to enforce the Master IGA as a third-party beneficiary. (Mot., pp. 7-8). From that premise, the Financing Districts argue the Master IGA precludes third-party beneficiaries and thus effectively precludes Solterra’s promissory estoppel claim. (*Id.*) Thus, the Financing Districts fully conflate promissory estoppel and contract claims predicated on third-party beneficiary status. This is misplaced.

A third-party beneficiary claim sounds in breach of contract, seeks to enforce the contractual terms, and turns on the contracting parties’ intent to create contractual rights in the third party. *S K Peightal Eng’rs, LTD v. Mid Valley Real Estate Sol. V, LLC*, 342 P.3d 868, 872 (Colo. 2015) (“A third-party beneficiary is a “person not a party to an express contract [who nevertheless] may bring an action on the contract if the parties to the agreement intended to benefit the [third party and if] ... the benefit claimed is a direct and not merely an incidental benefit of the contract”). For a breach of contract claim predicated on third-party beneficiary status, “[t]he key question is the intent of the parties to the actual contract to confer a benefit on a third party.” *East Meadows Co., LLC v. Greeley Irr. Co.*, 66 P.3d 214, 217 (Colo. App. 2003) (quoting *Concrete Contractors, Inc. v. E.B. Roberts Constr. Co.*, 664 P.2d 722, 725 (Colo.App.1982), *aff’d*, 704 P.2d 859 (Colo. 1985)).

“[B]reach of contract is separate and distinct from . . . promissory estoppel.” *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C.*, 176 P.3d 737, 740 (Colo. 2007). Promissory estoppel sounds in both equity and contract and provides a remedy predicated not on intent, but on a promisor’s reasonable expectations and a promisee’s reliance. *Board of Cnty. Com'rs of Summit Cnty. v. DeLozier*, 917 P.2d 714, 716 (Colo. 1996). The core elements of a promissory estoppel claim are “the promisor should reasonably have expected that the promise would induce action or forbearance by the promisee”, “the promisee in fact reasonably relied on the promise to the promisee’s detriment”, and “the promise must be enforced to prevent injustice.” *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008). “Justifiable reliance on the representations of another is the gist of this action.” *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983); Restatement (Second) of Contracts § 90 (1981) (“If a promise is made to one party for the benefit of another, it is often foreseeable that the beneficiary will rely on the promise”). As such, “[p]romissory estoppel applies when there is no enforceable contract.” *Marquardt*, 200 P.3d at 1129. “Thus, if a plaintiff fails to prove a breach of contract claim, he or she may nevertheless be able to recover on a promissory estoppel claim.” *Id.*

Here, Solterra properly asserts a claim for promissory estoppel against the Financing Districts, alleging all elements of that claim and extensive supporting facts. Solterra’s claim for promissory estoppel, therefore, provides plausible grounds for relief against the Financing Districts, and the Motion should be denied as to that claim.

The Financing Districts also argue, without any legal support, that the Master IGA contains anti-third-party beneficiary provisions and that those provisions somehow preclude Solterra’s claim for promissory estoppel. (Mot., pp. 8-9). This is baseless. As explained above, a claim for promissory estoppel is distinct from a claim for breach of contract, and Solterra has not asserted a

claim under the Master IGA. Thus, the contractual provisions contained in the Master IGA attempting to limit third-party beneficiaries are irrelevant to and cannot preclude Solterra's claim for promissory estoppel.

Moreover, the third-party beneficiary provisions in the Master IGA, when properly construed likely would allow Solterra to assert a claim for breach of the Master IGA as a third-party beneficiary.¹ "A third-party beneficiary may enforce a contract only if the parties to that contract intended to confer a benefit on the third party when contracting; it is not enough that some benefit incidental to the performance of the contract may accrue to the third party." *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo. App. 1996). "Such an intent to benefit a third party must be apparent from the construction of the contract in light of all surrounding circumstances, and the intent of the parties is the key inquiry when determining whether a nonsignatory is a third-party beneficiary entitled to enforce the agreement." *Id.*

Here, the Financing Districts rely on two provisions in the Master IGA generally suggesting a lack of third-party benefits or rights, but expressly qualified by carve-out exceptions:

- It is further expressly declared by the Districts that non third person or entity shall be construed as a third party beneficiary of this Agreement, *unless otherwise expressly stated herein*. (Master IGA, Art. I § 1.3(j)) (emphasis added)
- *Except as expressly provided in Section 1.3 hereof*, nothing expressed or implied in the Agreement is intended or shall be construed to confer upon, or to give to, any Person other than the Districts, any right, remedy, or claim under or by reason of this Agreement or any covenants, terms, conditions, or provisions thereof, and all of the covenants, terms, conditions, and provisions in this Agreement by and on behalf of the Districts shall be for the sole and exclusive benefit of the Districts. (*Id.*, Art. X § 10.14) (emphasis added).

¹ Solterra has not at this time asserted a claim for breach of the Master IGA but reserves the right to do so.

Section 1.3 of the Master IGA indeed establishes the very exception relevant here. As established in Solterra’s response to the Service District’s partial motion to dismiss, the Master IGA expressly states “reference must also be made to the Service Plan for purposes of construing both this Agreement and the Districts’ intent” and the Master IGA “shall, in all circumstances, be interpreted in accordance with the Service Plan and the intentions expressed therein regarding the role of each District.” (Master IGA, Art. I, §§ 1.3, 1.3(e)). The Service Plan authorized the Master IGA to “impose an obligation for the Financing Districts to pay revenues to the Service District sufficient to fund the financing . . . of the public improvements that serve the Districts” and directs that “[a]t the time at which sufficient assessed valuation is developed within the Financing Districts, the Financing Districts will issue General Obligation Debt and/or Revenue Debt sufficient to repay the Developer under the [Reimbursement Agreement][.]” (Service Plan, ¶¶ 19-21, 24-7). The Master IGA thus states, “the Financing Districts will pay all costs related to construction . . . of said facilities by the Service District” and “will issue ‘General Obligation Debt’ or revenue ‘Bonds’ in the manner contemplated by the Service Plan in order to pay its obligations[.]” (Master IGA, Art. I. § 1.3). Thus, there appears to be a clear intent of the parties to the Master IGA to benefit Solterra, making Solterra an exception to the third-party beneficiary provisions in Sections 1.3 and 10.14.

Based on the foregoing, the Financing Districts’ reliance on *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass’n*, 771 F.3d 1230 (10th Cir. 2014) is misplaced. *Gorsuch* suggests only that anti-third-party beneficiary provisions can offer proof regarding the parties’ intent to confer benefits and rights on third parties. *Id.* at 1238 (“Courts construing Colorado law have determined an NTPB provision offers strong proof of the parties’ intent to preclude recognition of third-party beneficiaries”).

Unlike here, however, the provision in *Gorsuch* was unequivocal and unqualified: “no other person or entity shall be a third party beneficiary of, or have any direct or indirect cause of action or claim in connection with, this Agreement or any other of the Loan Documents to which it is not a party.” *Id.* at 1234. Therefore, nothing in *Gorsuch* supports the Financing Districts’ argument in the instant case.

CONCLUSION

WHEREFORE, Solterra respectfully requests that this Court deny defendants Fossil Ridge Metropolitan District Nos. 2 & 3 motion to dismiss in its entirety.

DATED this 17th day of April, 2023.

FOSTER GRAHAM MILSTEIN
& CALISHER LLP

/s/ Daniel K. Calisher

Daniel K. Calisher, #28196
Attorneys for Plaintiff

