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To be submitted by
Diana Lawless

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

FILIP SASKA, TOMÁŠ NADRCHAL and STEPHEN MICHELMAN,

Plaintiffs-Appellants,

-against-

THE METROPOLITAN MUSEUM OF ART,

Defendant-Respondent.

THEODORE GRUNEWALD and PATRICIA NICHOLSON,

Plaintiffs-Appellants,

-against-

THE METROPOLITAN MUSEUM OF ART,

Defendants-Respondents.

BRIEF AMICUS CURIAE FOR THE CITY OF NEW YORK

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INTEREST OF THE CITY OF NEW YORK

The City of New York respectfully appears as *amicus curiae* in support of defendant-respondent Metropolitan Museum of Art. This appeal involves two consolidated actions challenging the Museum's "pay what you wish" admissions policy: one is a putative class action brought by residents of the Czech Republic and New York who have visited the Museum in the past, and the other is an action brought by two regular visitors and art preservationists. Both sets of plaintiffs now appeal from a decision and order of Supreme Court, New York County (Shirley Werner Kornreich, J.), to the extent that the ruling dismissed their claims asserting that the Museum has violated its lease with the City and dismissed their claims asserting that the Museum has violated an uncodified nineteenth-century state statute, Chapter 476 of the Laws of 1893.

The City has a strong interest in this appeal, because both sets of claims at issue here present serious risks of interference with and disruption of the City's governmental decision-making. Plaintiffs' contention that they have standing to sue as third-party beneficiaries under the City's lease with the Museum, if accepted by this Court, would interfere with the City's administration of its lease with the Museum, one of the most significant cultural institutions in the world, and would threaten to impair the City's ability to effectively administer innumerable

contracts, leases, and licenses it has executed in the interests of the public. Contractual arrangements, and long-term leases in particular, frequently present ongoing relationships in which parties may make judgments not to press every potential legal argument available under the contract to its fullest extent. If dissenting members of the public were permitted to sue under a city contract every time they disagreed with, for example, the City's interpretation of a contract or a decision by the City to forebear from seeking judicial recourse in the event of an arguable breach, the City's ability to administer its contracts, and, perhaps even to induce counterparties to enter into such contracts, would be significantly compromised.

For these reasons, as well as others described below, the City urges the Court to hold that the plaintiffs' claims brought under the City's lease are barred at the threshold because the plaintiffs lack standing to sue under that lease. Supreme Court took the different approach of assuming for the sake of argument that plaintiffs had standing to sue as third-party beneficiaries, and then dismissing the claims on the ground that plaintiffs sought remedies that went beyond those that would be available to the City under its lease. The City urges the Court to dismiss instead on the threshold ground of lack of standing, and therefore not to reach questions about the remedies that would be available to the City under the lease if

it had brought the suit, or to reach other questions presented by the parties about the nature or scope of the City's rights under the lease. While the court below and the parties have delved into matters such as the history of the City's enforcement of the lease provisions, the City respectfully suggests that exploration of such issues should await a case that is brought by a plaintiff with standing to sue under the lease—namely, either the City itself or the Museum.

Plaintiffs' efforts to sue under a century-plus-old public appropriations statute raise concerns about disruption of governmental operations similar to those raised by the claims brought under the City's lease. As shown below, Supreme Court correctly dismissed the purported claims brought under the appropriations statute on the ground that the statute does not create a private right of action, and this Court should affirm that ruling.

ARGUMENT

In these appeals, the plaintiffs are attempting to distort the doctrines of third-party beneficiary standing and private rights of action to manufacture a judicial remedy for their objections to the Museum's admissions policy.[1] Both claims at

[1] In both cases, plaintiffs have also brought claims alleging that the Museum engaged in deceptive acts and misrepresentations regarding admissions costs. Supreme Court severed these claims in its order and they are still pending. The claims alleging deceptive acts and misrepresentation, therefore, are not at issue in this appeal, and the City expresses no position as to them.

issue in this appeal should be dismissed at the threshold, and any questions about the nature of the City's rights under its lease with the Museum and the history of its enforcement of that lease should be reserved for a case brought by a proper party plaintiff.

POINT I

PLAINTIFFS' CLAIMS BROUGHT UNDER THE CITY'S LEASE SHOULD BE DISMISSED AT THE THRESHOLD FOR LACK OF STANDING

Plaintiffs argue that they have standing to sue under the City's lease with the Museum because they are intended third-party beneficiaries of the lease with the right to sue under the contract. Their arguments misconstrue the law of third-party beneficiaries, and, if adopted by this Court, would threaten to disrupt the City's administration of its lease with the Museum, and indeed could threaten to impair the City's administration of innumerable contracts executed by the City in the interest of the public.

To have standing to sue under a contract as a third-party beneficiary, a plaintiff must demonstrate that (1) a valid and binding contracts exists between other parties; (2) the contract was intended for the plaintiff's benefit; and (3) the benefit to the plaintiff is "sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit

is lost." *Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 336 (1988).

A plaintiff will qualify as an "intended beneficiary" of a contract only if (a) its "right to performance is 'appropriate to effectuate the intention of the parties' to the contract," and (b) "either the performance will satisfy a money debt obligation of the promisee to the beneficiary or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" *Edge Mgmt. Consulting, Inc. v. Blank,* 25 A.D.3d 364, 368 (1st Dept.), *appeal dismissed*, 7 N.Y.3d 864 (2006) (quoting Restatement (Second) of Contracts § 302 (1981)). In contrast, a plaintiff will be considered an "incidental beneficiary," and thus unable to sue under the contract, where it "may derive a benefit from the performance of a contract," but is "neither the promisee nor the one to whom performance is to be rendered." *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 98 (1st Dept. 2001). "[T]he parties' intent to benefit the third party must be apparent from the face of the contract." *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108 (1st Dept. 2001).

The New York Court of Appeals has made clear that the third-party beneficiary doctrine applies to public contracts as well as private contracts. *Burns*

Jackson, 59 N.Y.2d at 336. But the Court of Appeals has not lightly reached the conclusion that sprawling groups of members of the public are intended beneficiaries authorized to sue under a government contract. In *Burns Jackson*, for example, the Court of Appeals rejected the attempt by law firms which were harmed by a transit strike to sue as third-party beneficiary to enforce a contractual prohibition on strikes in the collective bargaining agreement between the transit workers' unions and certain public authorities. 59 N.Y.2d at 337. The Court held that the plaintiffs were merely "incidental beneficiaries" of the collective bargaining agreement. *Id.*

If , as the Court of Appeals held in *Burns Jackson*, businesses whose employees are dependent on the transit system are not third-party beneficiaries of a collective bargaining agreement disallowing strikes that would shut down that system, then plaintiffs here cannot be viewed as being the third-party beneficiaries of a lease between the City and the Museum setting forth numerous terms, only one of which is a provision addressing admission of the public. Moreover, in *Burns Jackson*, the Court stressed that any conclusion that the parties to the agreement intended to assume a broad and ill-defined obligation to all members of the public was dubious, given how burdensome such an obligation would be. *Id.* The same reasoning dooms the contention of the plaintiffs here — a class composed of

potentially millions of members of the public who have attended the Museum — that the City and the Museum intended to assume contractual obligations to so numerous a category of possible future plaintiffs.

Other New York precedents confirm that plaintiffs here lack standing to sue under the City's lease with the Museum. In *H.R. Moch Co., Inc. v. Rensselaer Water Co.*, the Court of Appeals held that a citizen whose property was destroyed in a fire did not have standing to sue a water company under its contract with a city to supply water to water hydrants, because the benefit that the contract accorded to members of the public was merely incidental. 247 N.Y. 160, 165 (1928) . The Court reasoned: "An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden that the obligation would impose." *Id.*

In another case, the United States District Court for the Southern District of New York, applying New York law, found that the plaintiffs, who were users of parkland and area residents, did not have standing to sue as third-party beneficiaries of an agreement between a county and a municipality to transfer parkland to the municipality. *Federated Conservationists of Westchester Cnty. v. City of Yonkers*, 117 F. Supp. 3d 371, 383-84 (S.D.N.Y. 2000), *aff'd*, 26 F. App'x 84 (2d Cir. 2002). The Court aptly observed that such facts were "simply not

enough to raise even the remote possibility" that the plaintiffs were intended to be third-party beneficiaries and they could not demonstrate that the contract benefited them in particular rather than the public generally. *Id.* at 383.

Under the above precedents, the plaintiffs here are not third-party beneficiaries of the lease between the City and the Museum because the lease was not intended by the parties for their benefit; any benefit they may receive is incidental to the lease's purpose; and there is no indication that the parties to the lease intended for persons like the plaintiffs to be compensated in the event that they were denied the benefit of the contract.

There are sound reasons for exercising caution before finding members of the public to be third-party beneficiaries of government contracts. A rule broadly permitting members of the public who disagree with the government's decisions in administering a contract to sue would greatly interfere with the City's ability to effectively manage its contractual relationships in the public interest. Here, for example, if plaintiffs were held to have standing to sue under the City's lease with the Museum, it would open the door to claims by millions of people who have visited the Museum. Such litigation could greatly interfere with the City's handling of its lease relationship with the Museum. And, if plaintiffs were held to have standing here, it could threaten the City's ability to administer numerous other

contracts as well, and might discourage counterparties from dealing with the City due to the prospect of unmanageable or expensive litigation.

Plaintiffs' own arguments in this appeal highlight the practical problems that would arise under their overly broad view of third-party beneficiary standing. On October 21, 2013, the parties entered into an amendment of the lease which deleted Article Fourthly, the provision at issue here, and replaced it with a provision that permits the Museum to set the terms of its admission with the written consent of the Commissioner of the City's Department of Cultural Affairs (R432-34).[2] In their brief, plaintiffs argue that, as a result of their purported third-party beneficiary status, the City and the Museum were unable to modify their lease during the pendency of plaintiffs' lawsuit. Saska Appellant's Br. at 45-46. On this basis, plaintiffs contend that the amendment is legally ineffective in light of their claimed third-party beneficiary status.

Plaintiffs are thus suggesting that any of millions of members of the public, simply by filing a lawsuit asserting the view that the lease with the Museum has been breached, could effectively disable the City from modifying the lease in certain respects during the pendency of the suit. If plaintiffs were correct, it could cast doubt upon the City's ability to modify many of its contracts, since there

[2] Numbers in parentheses preceded by "R" refer to pages of the Record on Appeal.

might be a private suit filed by someone pending somewhere that seeks to sue under the contract.

Fortunately, plaintiffs' expansive vision of third-party beneficiary standing is not the law in New York. And there is no reason that it should be the law: the City exercises sound judgment in the interest of the public when it administers and enforces contracts such as the lease with the Met. And as Supreme Court correctly recognized (R29), where the City's judgment in administering a contract is arguably flawed, or where interested persons simply disagree with the City's decisions, the proper remedy is for those persons to express their views and vote their preferences in the political process, not for those persons to bring suit under the City's contract.

Plaintiffs seem to argue that they should be held to have standing under the particular lease at issue here because the leased property is parkland subject to the public trust doctrine. But while the property's status as parkland under the public trust doctrine meant that the State Legislature's approval was required before the property could be leased, the public trust doctrine does not say anything about whether members of the general public have third-party standing to sue under the lease itself.

Moreover, plaintiffs are simply wrong in their assertion that the only possible consideration that the City received for the lease with the Museum was the provision stating that the Museum must keep its exhibition halls "open and accessible to the public, free of charge" on certain days and during certain times (R150-51). The lease was clearly designed to provide a space for the Museum and to govern its tenancy, so that the City would benefit from the presence of an important cultural institution.

And even if plaintiffs were correct that the provision regarding public admission was the only consideration that the City received in the lease, it would not follow that the parties intended members of the general public to have the right to sue under the lease in court if its benefits were somehow denied to them. As Supreme Court astutely observed, "nothing in the Lease suggests that the City intended for members of the public who disagree with the City's policies regarding the Museum to be allowed to circumvent the City's wishes by suing the Museum directly" (R28-29). But Supreme Court failed to follow through on the logical consequences of this observation and thus to rule that plaintiffs lack third-party standing under the lease. This Court should not repeat that mistake: the Court should hold that plaintiffs' claims under the lease fail at the threshold for lack of standing, and decline to reach the parties' contentions about the remedies available

under the lease, or the import of the City's historical enforcement of the lease. Those issues should be left for another case brought by a party with standing to sue under the lease.

POINT II

SUPREME COURT CORRECTLY HELD THAT NO PRIVATE RIGHT OF ACTION EXISTS UNDER THE 1893 APPROPRIATIONS STATUTE

Plaintiffs' claims seeking to sue to enforce an 1893 public appropriations statute as to the Museum likewise fail at the threshold, as Supreme Court correctly recognized. "It goes without saying that not every violation of a statutory provision is actionable by a person aggrieved by the breach. Before such an action may be brought, an express or implied private right of action must be conferred on an aggrieved party." *Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 A.D.3d 86 (1st Dept. 2004). The 1893 appropriations statute does not confer any private right of action on plaintiffs.

A plaintiff may sue to enforce a statute "'only if a legislative intent to create such a right of action is "fairly implied" in the statutory provisions and their legislative history.'" *Id.* (quoting *Brian Hoxie's Painting Co. v. Cato-Meridian Cent. School Dist.*, 76 N.Y.2d 207, 211 (1990)). The Court of Appeals has established a three-prong test to determine whether a statute confers a private right

of action: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Sheehy v. Big Flats Cmty. Day, Inc.*, 73 N.Y.2d 629, 633 (1989).

Plaintiffs seek to assert a private right of action under the 1893 act, which was never codified in the New York Consolidated Laws, and which, before the instant case, has never been cited in a reported judicial decision in its 121-year history. As the Museum details in its brief and as is demonstrated in the record, the 1893 act cannot bear the weight that plaintiffs seek to place on it: that particular enactment amended a similar annual appropriations act from the previous year, and has been followed by numerous subsequent appropriations acts and authorizations throughout the years.

As Supreme Court held, plaintiffs cannot establish that a private right of action under the statute would promote the legislative purpose or be consistent with the legislative scheme. The court correctly concluded that the 1893 act was an appropriations act that merely provided a means of public funding to promote the Museum's operations, rather than creating a private right of action to enforce the Museum's admissions policy in its 1893 form.

In addition, Supreme Court correctly concluded that holding a private right of action to exist under the 1893 statute would be inconsistent with the legislative scheme. The appropriations act was designed to provide funding to the Museum rather than to expose the Museum or the City to liability based on an individual's displeasure with the admissions policy. As the court noted, the statute "makes the funding a matter of government discretion, not part of a consumer protection, regulatory scheme" (R.23).

The court also homed in on the practical and systemic dangers of allowing private rights of action under appropriations statutes, recognizing that, under the plaintiffs' arguments, "[e]very single time a single, dissenting citizen takes offense at the way the government exercises its power of the purse, the government would be forced, at great expense (which, of course, is paid with the public's tax dollars), to defend this predictable deluge of litigation, regardless of its merit" (R24). The City shares the lower court's concerns about the implications of plaintiffs' overbroad position, and respectfully urges this Court to hold, as Supreme Court did, that plaintiffs have no private right of action under the 1893 act.[3]

[3] The City also agrees with the Museum's alternative position that the 1893 act is irrelevant because, since the amendment of the General City Law in 1943, the City has had the authority to make its own funding decisions without the Legislature's approval. *See* Respondent's Br. 21-22.

CONCLUSION

This Court should affirm the decision and order of Supreme Court dismissing plaintiffs' claims under the City's lease with the Museum and their claims under the 1893 appropriations statute.

Dated: New York, New York
September 4, 2014

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