

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

POTOMAC CAPITAL INVESTMENT CORPORATION,)	
)	
Plaintiff)	
)	
v.)	Civil No. 92-218-P-DMC
)	
FACILITIES SYSTEMS ENGINEERING CORPORATION, et al.,)	
)	
Defendants)	

MEMORANDUM DECISION ON PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT ¹

This action arises from defendant Facilities System Engineering Corporation's ("FSEC") performance of a subcontract with American Energy, a division of plaintiff Potomac Capital Investment Corporation ("Potomac"), to construct a waste-to-energy facility for the Mid-Maine Waste Action Corporation ("MMWAC"). Potomac has sued FSEC for breach of contract, breach of implied warranty and negligence. See First Amended Complaint (Docket No. 3) 19-31. FSEC has counterclaimed for breach of contract, bad faith breach, mechanic's lien, negligence, fraud and negligent misrepresentation. See Amended Counterclaim (Docket No. 34) 6-47. FSEC also seeks a declaratory judgment as to its remaining contract obligations. *Id.* 50.

Before the court now is Potomac's second motion for partial summary judgment. Potomac moves for summary judgment on a number of the counterclaims asserted by FSEC. Summary

¹ Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

judgment has previously been granted for Potomac on Count VI (fraud) of FSEC's amended counterclaim. *See* Order (Docket No. 60) at 1-2. In addition, Count IV (mechanic's lien) of FSEC's amended counterclaim was dismissed on a joint motion of the parties. *See* Joint Motion for Voluntary Dismissal (Docket No. 36).

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a . . . counterclaim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

I. COUNT III

Count III of FSEC's counterclaim asserts that American Energy breached the implied covenant of good faith and fair dealing contained in every Maine contract. The plaintiff has moved for summary judgment on Count III on the grounds that Maine law does not recognize an implied

duty of good faith and fair dealing in contracts such as the one at issue here. In response, FSEC asserts three reasons why the plaintiff's motion for summary judgment on this count must fail.

First, FSEC asserts that the subcontract explicitly requires, and the project demanded, a duty of good faith. In support of this proposition, FSEC cites specific provisions of the subcontract that commit the parties to act or negotiate "in good faith." *See* Ex. 160A 7.10, 7.12. Additionally, FSEC states that the "complexity and challenges" of the project demanded a duty of good faith if the project was to be completed on time. In Count III, however, FSEC asserts a claim based on an implied covenant of good faith and fair dealing that, FSEC says, every contract contains under Maine law. This is an implied-in-law covenant. By pointing to the express provisions of the subcontract and the spirit of the whole undertaking, FSEC is arguing the existence of an implied-in-fact duty of good faith, that is, a duty derived from the written contract and the parties' understanding. Such a claim is based on the contract, and thus is not cognizable under Count III of the defendant's counterclaim, as pleaded.

Second, citing a recent Law Court opinion, FSEC asserts that Maine has recently recognized an implied covenant of good faith and fair dealing in all contracts. *See Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993). Contrary to the defendant's strained reading of the case, however, I find that *Marquis* does not establish a general implied duty of good faith for every Maine contract. *Marquis* is expressly limited to the insurance contract context, *id.* at 647-48, 652, a specific area of Maine law that had already recognized an implied duty of good faith between an insurer and its insured. *See Linscott v. State Farm Mut. Auto. Ins. Co.*, 368 A.2d 1161, 1163-64 (Me. 1977). In addition to casualty insurance contracts, Maine law also implies a duty of good faith and fair dealing in contracts governed by the Uniform Commercial Code ("U.C.C."). 11 M.R.S.A.

1-203, 2-103(b). Beyond the insurance context and the U.C.C., however, the Law Court has thus far refused to recognize the existence of a general implied duty of good faith and fair dealing in all contracts. *See First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250-51 (Me. 1992); *Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609, 614 n.7 (Me. 1992).

Given the Maine Law Court's stance on this issue, this court has just recently stated that it will not recognize the existence of a general implied duty of good faith and fair dealing under Maine substantive law outside the context of the U.C.C. or casualty insurance contracts:

Accordingly, this Court will no longer recognize, in the absence of a clear holding to the contrary by the Maine Law Court, in its future application of Maine substantive law, existence of any implied duty to perform contractual obligations in good faith and with fair dealing outside of the context of the express terms of the Maine U.C.C. and contractual obligations on a contract of casualty insurance when put in issue between the insured and the insurer.

People's Heritage Sav. Bank v. Recoll Management, Inc., 814 F. Supp 159, 169-70 (D. Me. 1993); see also *Renaissance Yacht Co. v. Stenbeck*, 818 F. Supp. 407, 412 (D. Me. 1993). Although handed down before *Marquis*, the *Marquis* case does not in any way detract from this court's pronouncement in *People's Heritage*. *Marquis's* holding is specifically limited to the insurance context. At the time of the *People's Heritage* decision, this court specifically recognized the existence of an implied duty of good faith under Maine law between an insurer and its insured, as reaffirmed in *Marquis*. 814 F. Supp. at 169 n.17. Thus, the *Marquis* case has in no respect changed the status of Maine law since *People's Heritage*. Accordingly, I find that Maine substantive law recognizes no claim for the breach of an implied warranty of good faith and fair dealing in non-U.C.C. and non-casualty insurance contracts.

Finally, to avoid the sting of *People's Heritage*, FSEC argues that its subcontract implicates Article Two of the U.C.C. Article Two of the U.C.C. applies only to transactions involving the sale of goods. 11 M.R.S.A. 2-102. "When as here the transaction involves provision of both goods and services, the question for application of the U.C.C. becomes whether as a factual matter the transaction predominantly relates to goods." *Lucien Bourque, Inc. v. Cronkite*, 557 A.2d 193, 195 (Me. 1989). For purposes of determining applicability of the U.C.C., the nature of the "transaction" is described by the subcontract. See *Inhabitants of City of Saco v. General Elec. Co.*, 779 F. Supp.

186, 197 (D. Me. 1991). Thus, "[a]lthough the question of the applicability of the U.C.C. is usually one of fact, if the contract, the operative fact[,] is unambiguous, the Court may decide the issue as a matter of law." *Id.*

The subcontract at issue in this case unambiguously shows that the rendition of services predominated over the sale of materials. The purpose of the subcontract was to engage FSEC to "perform fast-track design and construction *services* on a turnkey project basis" and "to produce a Facility that will meet predetermined schedule and performance standards." Exh. 160A p. 1 (emphasis added). FSEC agreed to perform "work" consisting of "the design, construction, start-up and acceptance testing of the Facility" *Id.* 2.02(f) ("General Construction Tasks"); *Id.* at 14 ("Work"). The contract is for a fixed fee of \$16,647,000, with no allocation of costs for services or materials. *Id.* 2.04 ("Facility Construction Price"); *Id.* p. 7 ("Facility Construction Price"); *Id.* attach. L ("Facility Construction Price"). Indeed, the listings of equipment to be provided by FSEC for constructing the facility contain no individual prices. *Id.* 2.02(b)(2); *Id.* attach. A at 35-56 ("Equipment Specification Sheets"). Moreover, the subcontract indicates that FSEC's responsibility to supply materials is merely in furtherance of FSEC's primary obligation to perform design and construction services. *Id.* 2.02(a) ("FSEC shall supply all materials, labor and professional resources to perform its obligations hereunder . . .").

In short, the FSEC subcontract is a typical engineering/construction contract involving predominantly the rendition of services. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262, 275 (D. Me. 1977). Although the subcontract did require FSEC to supply substantial industrial equipment, "the nature of the goods provided is such that their value is difficult to conceptualize in the absence of the services that went along with them." *Cronkite*, 557 A.2d at 196. Absent FSEC's design and construction services in creating a waste-to-energy facility, the industrial equipment provided by FSEC under the subcontract would be of little value to American Energy. *Id.* The furnishing of materials is thus incidental to the performance of FSEC's design and construction services to produce a waste-to-energy facility. *See General Elec. Co.*, 779 F. Supp. at

197. Finally, I note that this court has addressed this identical question on two other occasions, concluding that the contracts were not governed by the U.C.C. because they involved predominantly the rendition of services. *Id.* (contract for waste-to-energy facility); *Dravo*, 436 F. Supp. at 275 (contract for boiler recovery system). Consequently, I conclude that the FSEC subcontract is not governed by Article Two of the U.C.C., and that the plaintiff's motion for summary judgment on Count III of FSEC's counterclaim must therefore be **GRANTED**.

II. COUNT VII

Count VII of FSEC's counterclaim asserts a claim of negligent misrepresentation. Potomac has moved for summary judgment on Count VII on the grounds that FSEC has failed to produce any evidence showing that American Energy either supplied false information to, or concealed truthful information from, FSEC. In response, citing the affidavits of Brophy and Slattery, FSEC asserts that the record contains substantial evidence of numerous negligent misrepresentations on the part of American Energy.

After having reviewed the affidavits of Brophy and Slattery, I am satisfied that there is a genuine issue of material fact as to whether American Energy supplied false information to FSEC. The affidavits of Brophy and Slattery provide sufficient evidence at the summary judgment stage to generate a factual issue surrounding American Energy's possible misrepresentations to FSEC and FSEC's detrimental reliance on those misrepresentations, as required to state a claim of negligent misrepresentation under Maine law. *See Chapman v. Rideout*, 568 A.2d 829, 830 (Me. 1990). In addition, at oral argument the plaintiff acknowledged the existence of a disputed factual issue relating to this claim. Accordingly, the plaintiff's motion for summary judgment on Count VII of the counterclaim must be **DENIED**.

III. CLAIMS FOR INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES

Potomac has moved for summary judgment on FSEC's claims for incidental, consequential or indirect damages. Potomac asserts that the subcontract expressly prohibits claims for incidental, consequential or indirect damages for delay or breach of the contract. FSEC responds that the subcontract provisions are ineffectual under the circumstances of this case.

Article 7.13 of the subcontract reads as follows:

Except as provided in Sections 2.07, 2.11, 2.12, 5.02, 5.03 and 6.04 in no event, whether because of a breach of any provision contained in this Agreement or any other cause, whether based upon contract, tort (including negligence or strict liability), warranty, delay or otherwise, arising out of the performance or nonperformance by either party of its obligations under this Agreement, shall either party by [sic] liable for or obligated in any manner to pay incidental, special, punitive, consequential or indirect damages of any nature. This Section 7.13 shall survive the termination of this Agreement.

Exh. 160A 7.13.

In a contract between two corporations acting at arms length, the unambiguous language of the contract must be given its plain meaning. *Portland Valve, Inc. v. Rockwood Systems Corp.*, 460 A.2d 1383, 1388 (Me. 1983); *Aroostook Valley R.R. Co. v. Bangor & Aroostook R.R. Co.*, 455 A.2d 431, 433 (Me. 1983). Moreover, the interpretation of unambiguous language is a question of law for the court and must be made without resort to extrinsic evidence. *Pelletier v. Jordan Assoc.*, 523 A.2d 1385, 1386 (Me. 1987).

The Maine Law Court has recognized the general enforceability of contract clauses excluding consequential damages. *Id.* at 1386-87. And as this court has previously recognized, albeit in a case involving the application of Pennsylvania law, where two corporations of equal bargaining strength have contracted to exclude consequential damages, the parties' consensual allocation of business risk should be given effect. *See Dravo*, 436 F. Supp. at 269-71, 278.

Article 7.13 of the subcontract unambiguously excludes recovery of incidental, consequential and indirect damages except in limited, specified situations. Moreover, Article 7.13 specifically states that neither party is liable for such damages resulting from delay or breach of the

contract. Article 7.13 also unambiguously states that it survives the termination of the contract; it makes no distinction between wrongful or justifiable termination, as argued by FSEC. Based on the clear language of Article 7.13, I must therefore conclude that FSEC, as well as American Energy, is precluded from recovering any damages for incidental, consequential or indirect damages outside of the limited exceptions enumerated in Article 7.13. Because its damages claims are not based on any of the Article 7.13 exceptions, FSEC cannot recover any incidental, consequential or indirect damages resulting from American Energy's alleged delays or wrongful termination of the subcontract. Accordingly, the plaintiff's motion for summary judgment on FSEC's counterclaims for incidental, consequential or indirect damages is **GRANTED**.²

² Of course, I intimate no view at this juncture on what claimed damages would be incidental, consequential or indirect.

IV. CLAIMS FOR DELAY DAMAGES

Potomac has moved for summary judgment on FSEC's claim to recover costs attributable to project delays that occurred prior to September 20, 1990. Potomac asserts that a waiver agreement executed by FSEC bars any claim for adjustment to the Facility Construction Price arising from delays occurring prior to September 20, 1990.³ FSEC responds that the waiver agreement is ineffectual under the circumstances of this case.

On February 1, 1991 FSEC and American Energy executed a written waiver agreement excusing American Energy's default for delays occurring before September 20, 1990 and waiving FSEC's right to claim adjustment of the Facility Construction Price resulting from such delay. Ex. 863. Apparently, a dispute had arisen among MMWAC, American Energy and FSEC concerning delays and costs resulting from the removal of hazardous materials from the construction site. The waiver was executed in accordance with Article 7.06 of the FSEC subcontract. The waiver provides in relevant part as follows:

FSEC hereby waives any rights it may have had under the FSEC Subcontract to claim adjustment to the Facility Construction Price, as defined in Section 2.04 of the FSEC Subcontract, resulting from a delay due to any acts or failures to act by American Energy under the FSEC Subcontract resulting from MMWAC's acts or failures to act under the Basic Agreement, at any time prior to September 20, 1990.

Ex. 863. In exchange for the waiver, FSEC received payment from American Energy for disputed amounts due under the subcontract. This money was apparently made available from MMWAC to cover the costs of the clean-up of the site.

Like the exclusion of consequential damages clause, I find that the language of this waiver agreement is clear and unambiguous. In exchange for the resolution of the disputed matter and payment to FSEC, FSEC agreed to waive any claim under the contract for an increase in the

³ The subcontract adopts a specific procedure for handling increased costs resulting from project delays. Ex. 160A 2.05.

construction price resulting from delays occurring prior to September 20, 1990. FSEC contends that American Energy also promised to execute a 63-day extension to the subcontract completion date in exchange for FSEC's waiver. This obligation is not contained in the written waiver, however, and thus cannot form a basis for refusing to enforce the clear language of the agreement. FSEC cannot introduce extrinsic evidence to alter the unambiguous language of the waiver agreement; the plain language of the agreement controls. *See Pelletier*, 523 A.2d at 1386. Accordingly, I conclude that FSEC is precluded from claiming an increase in the Facility Construction Price under the subcontract for delays occurring before September 20, 1990. The plaintiff's motion for summary judgment on FSEC's contractual claim for such delay damages is therefore **GRANTED**.⁴

V. EXEMPLARY DAMAGES

Potomac has moved for summary judgment on FSEC's claims for exemplary damages. Potomac argues that Article 7.13 of the subcontract expressly excludes an award of punitive damages for any action in contract or tort. Potomac also asserts that exemplary damages cannot be awarded under Maine law on the basis of the claims advanced by FSEC. In response, FSEC claims that the evidence demonstrates bad faith on the part of American Energy sufficient to support an award of punitive damages.

As an initial matter, I find that the contractual exclusion of punitive damages is unenforceable as a matter of Maine public policy. Though the Maine Law Court has never addressed this question, given the policies underlying punitive damages in Maine law I conclude that the Law Court, if faced with this question, would hold such an exclusion unenforceable. Under Maine law, punitive damages are imposed only against a party that has acted with malice. *Tuttle v.*

⁴ This ruling on FSEC's inability to recover the delay damages under the subcontract does not limit FSEC's opportunity to prove its claim of negligent misrepresentation with respect to the wavier agreement.

Raymond, 494 A.2d 1353, 1361 (Me. 1985). "Malice exists when [a] defendant's tortious conduct is motivated by ill will toward the plaintiff and may be implied by outrageous conduct." *DiPietro v. Boynton*, 628 A.2d 1019, 1024 (Me. 1993). The primary purpose of punitive damages is to "express society's disapproval of intolerable conduct and to deter such conduct where no other remedy would suffice." *Caron v. Caron*, 577 A.2d 1178, 1180 (Me. 1990) (citations omitted).

By contractually exempting itself from punitive damages, American Energy has effectively limited its accountability for its own malicious or outrageous conduct. This it could not do. *See Paris Util. Dist. v. A.C. Lawrence Leather Co.*, 665 F. Supp. 944 (D. Me. 1987), *aff'd*, 861 F.2d 1 (1st Cir. 1988); Restatement (Second) of Contracts § 195(1) (1981). Punitive damages are not a form of loss compensation properly allocable as a business risk. *See Tuttle*, 494 A.2d at 1355-56, 1358-59; Restatement (Second) of Torts § 908(1) (1979). Rather, the law imposes punitive damages as a form of punishment and deterrence for certain culpable conduct. *Tuttle*, 494 A.2d at 1355-56; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, at 9 (5th ed. 1984). As such, the exclusion of punitive damages is beyond the ambit of private agreements; parties cannot contractually insulate themselves from society's sanctions for intolerable conduct. *See* Restatement (Second) of Contracts § 195 com. a; *see also Public Serv. Enter. Group v. Philadelphia Elec. Co.*, 722 F. Supp. 184, 205 (D.N.J. 1989) (safety regulations). Otherwise, a party able to negotiate an exclusion for punitive damages would be free to engage in whatever egregious conduct it desires, yet avoid the law's sanctions for intentional and malicious harm. *See* Restatement (Second) of Contracts § 195 com. a. Such a scenario is inconsistent with the availability of punitive damages in certain exceptional circumstances under Maine law. *Cf. Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) ("[W]aiver of a right . . . charged or colored with the public interest will not be allowed where it would thwart . . . the policy which it was designed to effectuate."); *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 794 (N.Y. 1976) ("Punitive damages [involve] a public policy of such magnitude as to call for judicial intrusion to prevent its contravention."). Moreover, the fact that American Energy and FSEC are corporations

of equal bargaining strength acting at arm's length is immaterial to this inquiry. Corporations, just as individuals, are bound to society's standards of conduct. And like individuals, corporations cannot absolve themselves from the law's penalties for malicious conduct. *See* Restatement (Second) of Contracts § 336, cmt. a. Accordingly, I conclude that the exemption of punitive damages in the FSEC subcontract is contrary to Maine public policy and therefore unenforceable.

Nonetheless, regardless of the enforceability of the exemption, I conclude that punitive damages are unavailable as a matter of law for the counterclaims asserted by FSEC. First, "[n]o matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract." *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). Thus, FSEC's request for punitive damages must be grounded in tort. *Id.* at 776-77. In its counterclaim, FSEC asserted three separate tort claims: negligence (Count V), fraud (Count VI) and negligent misrepresentation (Count VII). The fraud claim has been eliminated on summary judgment. *See* Order (Docket No. 60). Consequently, the only remaining tort claims are based on negligence.

Maine law is clear -- neither simple negligence, gross negligence nor reckless disregard of the circumstances will support an award of punitive damages. *Tuttle*, 494 A.2d at 1360-61. Indeed, intentional conduct by itself is not even enough; "punitive damages are available based upon tortious conduct only if the defendant acted with malice." *Id.* at 1361. As a matter of pleading, therefore, a request for punitive damages must be linked to some tort claim to which punitive damages could attach, that is, a tort claim alleging either actual or implied malice. *See Reid v. Key Bank of S. Me., Inc.*, 821 F.2d 9, 16 (1st Cir. 1987). FSEC, however, has not asserted a surviving tort claim alleging conduct sufficiently culpable to justify an award of punitive damages. *See Tuttle*, 494 A.2d at 1354 n.2. Although FSEC asserts repeated deliberate "bad faith" actions on the part of American Energy -- conduct from which the court could arguably infer malice --, they have not linked this allegation to any tort claim to which punitive damages could attach. *See Reid*, 821 F.2d at 16. The only tort claims presently asserted by FSEC allege nothing more than negligence on the part of American Energy, that is, a failure to use reasonable care. *See Amended*

Counterclaim 29, 45. By definition, however, one cannot act with malice, actual or implied, if one is merely negligent. *See Prosser and Keeton on the Law of Torts* 2, at 10. Deliberate conduct is the cornerstone of either actual or implied malice; mere negligence involves nothing more than carelessness. *See Black's Law Dictionary* 862-63, 930-31 (5th ed. 1979). A request for punitive damages based solely on a claim of negligence is therefore inherently inconsistent with the required showing of deliberate conduct evidencing malice. Absent any claim asserting deliberate, tortious conduct from which malice could be inferred, punitive damages are thus unavailable to FSEC as a matter of law. Other than the dismissed fraud count, however, FSEC has not pleaded any intentional tort to which punitive damages could attach. Accordingly, the plaintiff's motion for summary judgment on FSEC's request for exemplary damages must be **GRANTED**.

VI. ATTORNEY FEES

Potomac has moved for summary judgment on FSEC's claim for attorney fees. FSEC has asserted no statutory or contractual provision for the award of attorneys fees under the circumstances of this case. *Elliott v. Maine Unemployment Ins. Comm'n*, 486 A.2d 106, 111 (Me. 1984). In the absence of any specific provision, the American Rule applies, and the parties bear their own attorney costs. *Bank of Maine, N.A. v. Weisberger*, 477 A.2d 741, 745 (Me. 1984). The plaintiff's motion for summary judgment on FSEC's claims for attorneys fees is therefore **GRANTED**.

VIII. CONCLUSION

For the foregoing reasons, plaintiff Potomac's second motion for partial summary judgment on Count VII of FSEC's counterclaim is **DENIED**; in all other respects the motion is **GRANTED**.
Dated at Portland, Maine this 28th day of December, 1993.

David M. Cohen

United States Magistrate Judge