

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

FIREMAN’S FUND)
INSURANCE COMPANY,)
Plaintiff)
)
v.)
)
CHILDS BERTMAN)
TSECKARES CASENDINO, INC., et al.,)
)
Defendants)

Civil No. 98-228-P-C

**RECOMMENDED DECISION ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Fireman’s Fund Insurance Company (“Fireman’s”) filed this action on June 22, 1998 as subrogee of Berkeley Hotels Management, Inc. (“Berkeley”) after paying Berkeley more than \$200,000 for damages sustained to the Portland Jetport Hotel (“Hotel”) in October 1996 flooding. Complaint (Docket No. 1) at 1, ¶¶ 8-9, 11. According to Fireman’s, in or about 1988 or 1989 defendants Maine Masonry Company, Inc. (“Maine Masonry”) and Childs Bertman Tseckares Casendino, Inc. (“CBT”), as well as non-party Allied Construction Co., Inc. (“Allied”), defectively designed, engineered and built the Hotel, resulting in the 1996 flood damage.¹ *Id.* ¶¶ 2-3, 7, 9. Fireman’s sought to hold all of the named defendants liable on grounds of negligence, breach of

¹A separate suit filed by Fireman’s against Allied was dismissed. *See* Order of Dismissal (Docket No. 15) (April 30, 1998), *Fireman’s Fund Ins. Co. v. Allied Constr. Co., Inc.*, Docket No. 97-393-P-H.

contract and breach of warranty. *Id.* ¶¶ 12-21. Maine Masonry filed a motion to dismiss as to all claims against it, which this court granted on December 17, 1998. Defendant Maine Masonry Company’s Motion to Dismiss (Docket No. 6); Order Granting Defendant Maine Masonry Company’s Motion to Dismiss (Docket No. 21). CBT now moves for summary judgment as to all claims against it. Defendant CBT’s Motion and Incorporated Memorandum of Law in Support of a Summary Judgment (“CBT’s Motion”) (Docket No. 16). I recommend that its motion be granted.²

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “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). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). 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 whether this burden is met, the court must view the record in the light most favorable to the nonmovant, giving that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

²The grant of summary judgment in favor of CBT would be dispositive of claims against the remaining defendant, Doe Corporation, which is described as “a corporation, partnership or other business organization which, at all times material hereto, acquired the assets, assumed the liabilities and/or succeeded to the interests of defendant, Childs Bertman Tseckares Casendino, Inc.” Complaint ¶ 4.

II. Factual Context

The summary judgment record reveals the following undisputed facts material to the grounds upon which I base this recommended decision.

In 1987 Dunfey Properties entered into a contract with CBT for the provision of architectural design and other services with respect to the Hotel. Standard Form of Agreement Between Owner and Architect (“Hotel Design Contract”), attached as Exh. B to Defendant CBT’s Statement of Material Facts as to Which There Is No Dispute (“CBT’s SMF”) (Docket No. 17), at 1, 3-4, 12.

The Hotel Design Contract provided that, “[u]nless otherwise specified, this Agreement shall be governed by the law of the principal place of business of the Architect.” *Id.* § 11.1. CBT’s principal place of business is in Boston, Massachusetts. Complaint ¶ 3; Answer of Defendant Childs Bertman Tseckares Casendino, Inc., etc. (Docket No. 2) ¶ 3.

Berkeley purchased the Hotel from Dunfey Properties in or about 1992. Defendant CBT’s Request for Admissions Propounded [sic] Upon Plaintiff Fireman’s Fund Insurance Company (“Request for Admissions”), attached as Exh. A to CBT’s SMF, ¶ 6; Plaintiff’s Responses to Defendant CBT’s Request for Admissions, attached as Exh. A to CBT’s SMF, ¶ 6; Plaintiff’s Response to First Set of Interrogatories, etc. (“Interrog.”), attached as Exh D. to CBT’s SMF, ¶ 1.

The Hotel was first occupied in December 1989 or January 1990. Interrog. ¶ 19. The owner took occupancy, and the design, construction and engineering of the Hotel building were substantially completed, no later than the end of calendar year 1990. Request for Admissions ¶¶ 15-16; Letter from Steven L. Smith to Rebecca H. Farnum and Wendell G. Large dated November 30, 1998, attached as Exh. A to CBT’s SMF, at 2.

Drawings prepared for the Hotel project contained a printed title/author block identifying the

drawings as the product of CBT, as well as an official seal of Maurice F. Childs, Jr. identifying him as a Registered Architect in the State of Maine. Drawing attached as Exh. A to Plaintiff Fireman's Fund Insurance Company's Concise Statement of Material Facts (Docket No. 23).

III. Discussion

Following the filing of CBT's motion for summary judgment, Fireman's abandoned its claims for breach of contract and breach of warranty, pressing its negligence claim alone. Plaintiff Fireman's Fund Insurance Company's Answer and Incorporated Memorandum of Law, etc. ("Fireman's Opposition") (Docket No. 23) at 2; Stipulation of Dismissal (Docket No. 26). CBT attacks the negligence claim on grounds that (i) per the Hotel Design Contract the law of Massachusetts controls, barring the claim under the applicable Massachusetts statute of limitations, (ii) alternatively, if Maine law applies, the claim is time-barred pursuant to 14 M.R.S.A. § 752, the general six-year statute of limitations, and (iii) alternatively, if the claim is not untimely, it is barred by application of the so-called "economic loss doctrine." *See generally* Defendant CBT's Reply Memorandum of Law ("CBT's Reply") (Docket No. 24). While I am not persuaded by CBT's first ground, I am by its second, and hence do not reach its third.

CBT asserts, first, that the choice-of-law provision to which Dunfey (with whom Berkeley was in privity) and CBT agreed should be respected. *Id.* at 2. The fact that the claim sounds in negligence, CBT argues, should not preclude application of the original parties' choice-of-law provision to a cause of action rooted in a contractual agreement. *Id.* In so arguing, CBT overlooks the fact that the parties' choice-of-law provision pertains only to the governance of their "Agreement." The provision simply does not address the question of which state's statute of

limitations applies.³ *See, e.g., Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (provision stating that mortgage would be “governed by and construed in accordance with” Massachusetts law too narrowly drawn to apply to claim for fraudulent misrepresentation); *Northeast Data Sys., Inc. v. McDonnell Douglas Computer Sys. Co.*, 986 F.2d 607, 610 (1st Cir. 1993) (observing that true tort claims, versus disguised contract claims, would be outside scope of contractual choice-of-law agreements governing construction of contract); *Caton v. Leach Corp.*, 896 F.2d 939, 942-43 (5th Cir. 1990) (clause providing that agreement would be “construed under the laws of the State of California” did not address law applicable to tort, restitution claims).

In the absence of any controlling contractual choice-of-law provision, as both parties acknowledge, the law of Maine (the place of injury) governs Fireman’s negligence claim. *See* Fireman’s Opposition at 2 (citing Maine law); CBT’s Reply at 3-4 (falling back on Maine law if Massachusetts law inapplicable); *Adams v. Buffalo Forge Co.*, 443 A.2d 932, 934 (Me. 1982) (adopting Restatement (Second) of Conflict of Laws approach in which place of injury significant in tort context).

CBT presses for the application, under Maine law, of the six-year general statute of limitations, 14 M.R.S.A. § 752, which provides in its entirety:

All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state or of a justice of the peace in this State, and except as otherwise specially provided.

As a general rule, a cause of action accrues “upon the date of the wrongful act producing the injury

³Indeed, the Hotel Design Contract contains a separate statute-of-limitations provision designed to interplay with “any applicable statute of limitations.” Hotel Design Contract § 11.3. CBT does not contend that this provision applies here. CBT’s Reply at 1-4.

complained of.” *Bangor Water Dist. v. Malcolm Pirnie Eng’rs*, 534 A.2d 1326, 1328 (Me. 1988) (citation omitted). Fireman’s raises no claim that any “discovery rule” exception applies.⁴ *See* Fireman’s Opposition at 9-13. Inasmuch as, in this case, there is no dispute that the Hotel project was substantially completed by the end of calendar year 1990, Fireman’s cause of action for negligence is time-barred pursuant to section 752.

Fireman’s attempts to avoid application of the six-year general statute of limitations by arguing that 14 M.R.S.A. § 752-A applies, instead, in this case. Section 752-A provides in its entirety:

All civil actions for malpractice or professional negligence against architects or engineers duly licensed or registered under Title 32 shall be commenced within 4 years after such malpractice or negligence is discovered, but in no event shall any such action be commenced more than 10 years after the substantial completion of the construction contract or the substantial completion of the services provided, if a construction contract is not involved. The limitation periods provided by this section shall not apply if the parties have entered into a valid contract which by its terms provides for limitations periods other than those set forth in this section.

As CBT observes, however, this statute on its face applies only to “architects or engineers duly licensed or registered under Title 32.” CBT’s Reply at 3. Corporations and partnerships cannot be licensed as architects under Title 32 of the Maine Revised Statutes. 32 M.R.S.A. § 220(1)(C). Section 752-A is on this point unambiguous, obviating the need for further inquiry into its meaning. *See, e.g., Grossman v. Richards*, No. Cum-98-308, slip op. at 6 (Me. Jan. 13, 1999) (“if the meaning of the statute is clear on its face, then we need not look beyond the words themselves”) (quoting

⁴In *Johnston v. Dow & Coulombe, Inc.*, 686 A.2d 1064 (Me. 1996), the Law Court made clear the extent of the discovery rule in Maine. “We have limited the application of the discovery rule to three discrete areas: legal malpractice, foreign object and negligent diagnosis medical malpractice, and asbestosis.” *Id.* at 1066 (footnotes omitted).

Cook v. Lisbon Sch. Comm., 682 A.2d 672, 676 (Me. 1996); *Gordon v. Halperin*, 447 A.2d 62, 63 (Me. 1982) (applying “unambiguous” exception in tax statute of limitations).

Fireman’s decries CBT’s “arbitrary, hypertechnical distinction between corporations and individuals,” asserting that this court in *JSA Inc. v. Pinewood Manor, Inc.*, 755 F. Supp. 458, 463 n.1 (D. Me. 1991), resolved the question of the applicability of section 752-A to corporations. Fireman’s Opposition at 10-11. Inasmuch as appears, however, the parties assumed the applicability of section 752-A to the architectural firm JSA, and the court did not confront the question whether that section applied to individuals only.⁵

Fireman’s next argues that CBT’s interpretation of section 752-A would result in an illogical and unequal application of standards of liability for engineering and architectural corporations versus individuals comprising them. Fireman’s Opposition at 11-13. The logic of this distinction, however, was a matter for the legislature to decide. Had the legislature chosen to encompass corporations and other business associations within the purview of section 752-A, it readily could have added language expressly including them.⁶

Fireman’s finally, in its statement of material facts, points to the status of Maurice F. Childs,

⁵The same apparently was true in *Pirnie*, in which the Law Court noted the applicability of section 752-A to Malcom Pirnie Engineers. *Pirnie*, 534 A.2d at 1328 n.5. The *Pirnie* opinion, in addition, does not clarify the entity status of Malcom Pirnie Engineers.

⁶Applying a different limitations period to a business organization than to an individual professional is not inherently illogical given the financial and emotional consequences of exposure of one’s personal assets to liability and consequent potential to deter individuals from engaging in professional practice. The Maine legislature has chosen to so differentiate in other contexts. *See, e.g.*, 14 M.R.S.A. § 753-A (applying special limitations period in actions against “a licensed attorney”). Although it happens that, in the instant case, the exposure period for an individual would have been longer than that for CBT, this would not necessarily be so. *See* 14 M.R.S.A. § 752-A (action must be brought within four years of discovery of malpractice or negligence).

Jr. of CBT, who worked on the Hotel project, as an architect registered in the State of Maine. Inasmuch as Fireman's suit names CBT rather than Childs individually, Childs' status is irrelevant.

CBT accordingly is entitled to summary judgment on grounds that Fireman's remaining negligence claim is time-barred by 14 M.R.S.A. § 752.

IV. Conclusion

For the foregoing reasons, I recommend that CBT's motion for summary judgment be **GRANTED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of February, 1999.

*David M. Cohen
United States Magistrate Judge*