

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNCLE HENRY'S INC.,)
)
 Plaintiff)
)
 v.) **Civil No. 01-180-B-H**
)
 PLAUT CONSULTING INC.,)
)
 Defendant¹)

**MEMORANDUM DECISION ON PLAINTIFF'S
MOTIONS FOR RECONSIDERATION AND
FOR SUPPLEMENTATION OF RECORD**

Uncle Henry's Inc. ("Uncle Henry's") entreats me to reconsider on a number of fronts my October 21, 2002 recommended decision on Plaut's motion for summary judgment and, in so doing, to take into consideration assertedly newly discovered evidence. *See* Plaintiff Uncle Henry's, Inc.'s Motion for Reconsideration of Magistrate Judge's Recommendations ("Motion To Reconsider") (Docket No. 78); Plaintiff Uncle Henry's, Inc.'s Amended Motion for Leave To File Plaintiff's Supplemental Appendix and Plaintiff's Supplemental Statement of Material Facts (Docket No. 79) ("Motion To Supplement"). For the reasons that follow, I deny the Motion To Supplement as it pertains to the Motion To Reconsider and grant in part and deny in part the Motion To Reconsider.²

¹ As I have previously noted, although the complaint names two defendants, Plaut Consulting Inc. ("Plaut") and EdgeWing, a division of Plaut, technically there is only one defendant inasmuch as EdgeWing was an internal, unincorporated subdivision of Plaut. *See* Memorandum Decision on Parties' Motions To Strike and Recommended Decision on Defendant's Motion for Summary Judgment ("Recommended Decision") (Docket No. 71) at 1 n.1.

² The Motion To Supplement is addressed both to me for use in connection with the Motion To Reconsider and to Judge Hornby for use in connection with Uncle Henry's pending objections to my Recommended Decision. *See* Motion To Supplement at 1. I rule on it only as it pertains to the Motion To Reconsider, expecting that Judge Hornby will rule on it as he sees fit in connection with the *(continued on next page)*

I. Motion To Supplement

In connection with its Motion To Supplement, Uncle Henry's proffers a sixty-one-paragraph supplemental statement of material facts supported by an approximately two-inch-thick stack of additional record materials. *See* Plaintiff's Supplemental Statement of Material Facts ("Supplemental SMF") & Plaintiff's Supplemental Appendix, filed with Motion To Supplement. This represents a monumental, but ultimately wasted, effort.

Uncle Henry's posits that:

1. It has been severely prejudiced by dilatory discovery tactics by Plaut, including delays in delivery of a "zip disk" until August 30, 2002 (the day Uncle Henry's objection to summary judgment was due) and in delivery of a CD until September 9, 2002. Motion To Supplement at 3, 7.

2. As a result of the "sheer enormity of the information contained on these electronic media, the processing of that information took a substantial amount of time." *Id.* at 8.

3. In the course of that processing, it discovered that numerous documents (such as e-mails) had never been produced in hard-copy form, as a result of which it was seeing them for the first time. *Id.* at 7.

4. Even as to documents earlier produced in hard copy, Uncle Henry's suffered prejudice inasmuch as they were delivered piecemeal over a lengthy period of time extending past the discovery deadline. *Id.* at 8.

These complaints come too late. As the Motion To Supplement itself makes clear, the discovery disputes in question are of long standing. As of August 30, 2002 Uncle Henry's knew that it had only just received certain electronic materials; indeed, it called that fact to the court's attention in a motion filed on September 3, 2002 in which it successfully sought to extend its summary-judgment deadline by

objections to the Recommended Decision.

one day. *See* Motion To Enlarge Time for Filing (“Motion To Enlarge”) (Docket No. 46) at 1, 4 & endorsement thereto. Plaut posits that Uncle Henry’s could have filed a motion pursuant to Fed. R. Civ. P. 56(f) for a continuance to adduce further evidence but failed to do so, thereby waiving its right to seek to supplement the record now. Defendant’s Objection to Plaintiff’s Amended Motion for Leave To Supplement Summary Judgment Evidence and Statement of Material Facts (Docket No. 80) at 2-5.

Uncle Henry’s protests that, as of its September 3 deadline, it could not have filed a Rule 56(f) motion inasmuch as it could not then have known that its assumption that Plaut had already produced hard copies of all e-mails stored on the zip drive was wrong. Plaintiff’s Response to Defendants’ Objection to Plaintiff’s Amended Motion for Leave To Supplement Summary Judgment Evidence and Statement of Material Facts (Docket No. 87) at 1-2. Nonetheless, a Rule 56(f) motion need not necessarily be filed by the deadline for opposing summary judgment, *see Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass’n*, 142 F.3d 26, 44 (1st Cir. 1998), and Uncle Henry’s continued to file motions related to summary judgment as late as September 27, 2002, *see, e.g.*, Plaintiff’s Motion for Leave To File Response to Defendants’ Summary Judgment Reply Memorandum of Law (Docket No. 65). In the exercise of due diligence, it should have discovered by then that a problem existed and availed itself of a Rule 56(f) remedy.³ As the First Circuit has held, “failure to resort to such first aid [relief via Rule 56(f)] will ordinarily bar belated aid.” *Meehan v. Town of Plymouth*, 167 F.3d 85, 92 n.7 (1st Cir. 1999) (citation and internal quotation marks omitted).

In any event, even assuming *arguendo* that Uncle Henry’s should not be held to have forfeited its opportunity to supplement the record by virtue of failure to avail itself of Rule 56(f), its motion

³ I note that, in a draft letter attached to Uncle Henry’s motion for a one-day enlargement of the summary-judgment deadline, it quoted from correspondence in which it described the electronic media as “[k]ey to us.” Draft Letter dated August 30, 2002 from Edward P. Watt to Honorable David M. Cohen, attached to Motion To Enlarge, at 2.

founders for lack of good cause. Its proffer is tardy, entailing a delay of two months after receipt of the electronic media and two weeks after issuance of the Recommended Decision. In addition, despite its emphasis on the prejudice caused by Plaut's discovery delays, it seeks in the main to adduce evidence concerning events about which it knew or should have known at the time they transpired. *See generally* Supplemental Aff.; *see also* Motion To Supplement at 6-7. Such evidence could and should have been presented with Uncle Henry's original opposition to summary judgment.

The Motion To Supplement accordingly is denied as it relates to the Motion To Reconsider.

II. Motion To Reconsider

A. Factual Findings

I turn next to Uncle Henry's Motion To Reconsider as it pertains to my factual findings and evidentiary rulings, which I grant in part and deny in part as follows:

Points 1a & b: Denied. I am unpersuaded that the mass of material set forth in paragraphs 60-64 of Plaintiff's Genuine Issues of Material Fact ("Plaintiff's Additional SMF") (Docket No. 50) was "necessary" or that its presentation otherwise conformed with the dictates of Local Rule 56.⁴ In any event, a non-movant cannot rely on interrogatory answers not made on personal knowledge to defeat summary judgment. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990).⁵ Neither the court nor opposing counsel reasonably could have been expected to wade through these voluminous statements of fact to ascertain which portions were made on personal knowledge. That was Uncle Henry's job.

⁴ Uncle Henry's concedes that paragraph 65 appropriately was stricken. *See* Motion To Reconsider at 2.

⁵ The fact that interrogatories are on file with the court (in the sense contemplated by Fed. R. Civ. P. 56(c)) does not surmount the personal-knowledge hurdle. *Garside*, 895 F.2d at 49. In like vein, the fact that a movant has cited discrete sections of such interrogatories does not trigger an open season for a non-movant to rely on any other portion, regardless whether made on personal knowledge.

Points 1c & d: Denied. The word “final” properly was deleted from paragraph 8(a) of the Plaintiff’s Additional SMF inasmuch as that characterization neither was admitted by Plaut nor supported by the record citation given. *See* Defendant’s Response to Plaintiff’s Genuine Issues of Material Fact (“Defendant’s Reply SMF/Additional”) (Docket No. 60) ¶ 8(a); e-mail dated October 17, 2000, Tab 15 to Plaintiff’s Revised Appendix of Documents in Support of Statement of Genuine Issues of Material Fact, filed with Plaintiff’s Additional SMF.

Point 1e: Denied. The context of this statement makes reasonably clear that it pertains to Justin Sutton’s knowledge as of October 30, 2000 – after his execution of the October 17, 2000 version of the contract that Uncle Henry’s asserts is the final, binding version. *See* Recommended Decision at 14-15. In any event, and although not pointed out by Plaut, *see* Defendant’s Opposition to Plaintiff’s Motion for Reconsideration of Magistrate Judge’s Recommendations (“Reconsideration Opposition”) (Docket No. 81) at 3, this is a freshly minted objection to a reply statement of facts with respect to which no leave to file a surreply was sought. “A motion for reconsideration does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.” *Butcher Co. v. Bouthot*, Civil No. 00-139-P-H, 2001 WL 263313, at *1 (D. Me. Mar. 16, 2001) (citation and internal quotation marks omitted).

Point 1f: Denied. Even assuming *arguendo* that the October 17, 2000 contract was valid and binding, the parties agree that it contained a provision (section 11.2) providing in essence: “no supplement, modification, amendment or waiver of this Master Agreement or any SOW [statement of work] shall be binding unless executed in writing by the party against whom enforcement of such supplement, modification, amendment or waiver is sought.” Motion To Reconsider at 4; Defendants’ [sic] Summary Judgment Reply Memorandum of Law (Docket No. 58) at 2 n.2; *see also*

Reconsideration Opposition at 3-4.⁶ There is no dispute that Justin Sutton signed a subsequent version of the agreement (the December 7, 2000 version). *See* Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 36) ¶ 39; Plaintiff’s Response to Defendants’ Statement of Undisputed Material Facts (“Plaintiff’s Opposing SMF”) (Docket No. 49) ¶ 39. Moreover, Uncle Henry’s has admitted that “Justin Sutton understood that the Master Agreement and Website Development Statement of Work that he signed on December 7, 2000 set forth the agreement between the parties as identified within the document.” *Id.* ¶ 41.⁷ Thus, to the extent the October 17, 2000 version of the agreement ever was in effect, it was superseded by the December 7, 2000 version.

Point 1g: Withdrawn. *See* Plaintiff’s Reply to Defendants’ Response to Plaintiff’s Motion for Reconsideration of Magistrate Judge’s Recommendation (“Reconsideration Reply”) (Docket No. 88) at 2.

Point 1h: Denied. My findings are consistent with the responses supplied in Uncle Henry’s opposing statement of material facts. *See* Defendant’s SMF ¶ 30; Plaintiff’s Opposing SMF ¶ 30.

Point 1i: Withdrawn. *See* Reconsideration Reply at 2-3.

Point 1j: Denied. *See* discussion pertaining to Point 1f, above.

Point 1k: Granted in part, denied in part. I am persuaded that paragraph 48 of the Plaintiff’s Additional SMF should be restored. As to the first sentence, Plaut admitted “that the termination letter purported to provide notice of termination and to make demand for the delivery of the items identified within such letter.” Defendant’s Reply SMF/Additional ¶ 48. As to the second sentence, the material

⁶ Although I do not find the substance of section 11.2 in either party’s statement of material facts, and (per Local Rule 56) facts cited solely in briefs normally are not cognizable on summary judgment, both parties acknowledge that this section exists and quote from it.
⁷ To the extent this statement may be considered ambiguous, I note that Plaut coupled it with the following: “By signing the [December 7, 2000 version], Justin Sutton confirmed Uncle Henry’s agreement to the terms set forth therein.” Defendant’s SMF ¶ 40. This statement was both supported by the record citation given, *see* Deposition of Justin Sutton, Tab 12 to Appendix of Documents in Support of Statement of Undisputed Material Facts (“Defendant’s First Appendix”), filed with Defendant’s SMF, at 174, and not effectively controverted by Uncle Henry’s, which relied on legal argument to “deny” it, *see* Plaintiff’s Opposing SMF ¶ 40.

cited adequately evidences Justin Sutton's personal knowledge that demands for return of material were made and refused. *See* Plaintiff's Third Supplemental Responses to Defendants' First Set of Interrogatories, Tab 15 to Defendant's First Appendix, ¶ 8(d) at 73, *incorporated by reference in* ¶¶ 7(b)(11) at 57 & 7(d)(11) at 62. As to paragraph 49, denied on the ground that, even assuming *arguendo* the existence of personal knowledge, the statement is neither admitted nor supported by the citations given. As to paragraph 50, denied on the basis of lack of personal knowledge. As to paragraph 51, denied on the ground that my ruling comported with Local Rule 56.⁸

Point 1l. Denied. Even assuming *arguendo* that I erred in excluding this statement (paragraph 54 of the Plaintiff's Additional SMF), nothing turns on it. The cognizable record contained a substantially similar statement (that Uncle Henry's had moved its existing website to Waltham for hosting). *See* Recommended Decision at 23.

B. Legal Conclusions

I grant in part and deny in part Uncle Henry's Motion To Reconsider as it pertains to my legal conclusions, as follows:

Point 2a: Denied. Uncle Henry's Chapter 93A claim concerned twenty-three alleged misrepresentations as to which the cognizable evidence raised no dispute that (i) all were received and relied upon in Augusta, Maine (although some were received in Massachusetts as well), and (ii) Uncle Henry's damages were incurred primarily in Maine. *See id.* My focus properly was on whether these twenty-three alleged acts – not the parties' relationship in general – occurred “primarily and substantially in Massachusetts.” *See* Mass. Gen. Laws ch. 93A § 11. As to these acts, I continue to find *Roche v. Royal Bank of Canada*, 109 F.3d 820 (1st Cir. 1997), and *M & I Heat Transfer*

⁸A non-movant's statement of additional facts is cognizable only to the extent (i) admitted by the movant or (ii) supported by the record (*continued on next page*)

Prods., Ltd. v. Gorchev, 141 F.3d 21 (1st Cir. 1998), compelling (albeit not controlling) authority construing relevant Massachusetts law. Here, as in *Roche* and *M & I Heat*, the messages in issue primarily were received, relied upon and caused losses elsewhere than in Massachusetts.⁹

As to the assertion that I employed the “wrong methodology,” Motion To Reconsider at 9-10, for purposes of the question presented it was unnecessary for me to address the merits of the alleged misrepresentations; their merit was assumed *arguendo*.¹⁰ Uncle Henry’s final point – that Plaut is not entitled to summary judgment because its motion does not weigh and measure the facts under the various tests, *see id.* at 10 – is both patently without merit and was not raised when it could and should have been, in response to the original motion for summary judgment, *see* Plaintiff’s Response to Defendants’ Motion for Summary Judgment (“Plaintiff’s SJ Opposition”) (Docket No. 39) at 17-21.

Point 2b: Denied. Although Uncle Henry’s objects in generalized fashion that I impermissibly resolved material factual disputes, *see* Motion To Reconsider at 10-11, Reconsideration Reply at 5, it fails to provide concrete examples of any such transgressions. Beyond this, Uncle Henry’s relies primarily on a challenge to my finding as to the locus of its acts in reliance on the alleged misrepresentations. *See* Motion To Reconsider at 10-12. For the reasons discussed above in connection with Point 2a, its list of alleged “acts of reliance in Massachusetts” fails to persuade me that I erred.

Points 2c & d: Denied. The argument that Allegations Nos. 2 and 3 fall within the so-called *Kearney* exception is an afterthought. It could have been raised in opposition to Plaut’s motion for summary judgment but was not. *Compare* Motion To Reconsider at 12-13 *with* Plaintiff’s SJ

citation given. Loc. R. 56(c) & (e). If neither, it cannot create issues of disputed fact.

⁹ Uncle Henry’s attempt to underscore its “acts of reliance in Massachusetts,” Motion To Reconsider at 9, is problematic on several fronts, including that certain acts (Nos. 1-3, 5 and 10) reflect activity originating in Maine while others (Nos. 4 and 6-9) reflect activity on the part of third parties, not Uncle Henry’s.

¹⁰ Nor does *Roche* stand for the proposition that a court must first determine whether alleged Chapter 93A violations are actionable (*continued on next page*)

Opposition at 14. Moreover, Uncle Henry's utterly fails to flesh out its point regarding Allegation No. 2.

Point 2e: Granted in part, denied in part. Restoration of paragraph 48 of the Plaintiff's Additional SMF raises a triable issue whether Plaut refused Uncle Henry's requests for return of equipment during the period between July 18, 2001 (when Uncle Henry's terminated the contract) and August 23, 2001 (when Plaut attempted to deliver non-production equipment to Uncle Henry's). *See* Recommended Decision at 21-22. However, Uncle Henry's fails to generate a triable issue whether Plaut permanently converted the equipment (*e.g.*, by virtue of Plaut's alleged attempt to extort a release of liability from Uncle Henry's or alleged tampering or threats to tamper with the equipment).

Point 2f: Denied. As to Uncle Henry's argument predicated on the existence of a Chapter 93A claim, *see* Motion To Reconsider at 14-15, denied in accordance with my ruling on Point 2a, above. As to its second sub-point, *see id.* at 15-16, it remains unclear to me whether, in describing Allegation No. 1 as "a summary of misrepresentations after the Master Agreement was signed," Plaintiff's SJ Opposition at 12, Uncle Henry's referred only to the October 17, 2000 version of the agreement or to any version. If to any version, the admission stands. If only to the October 17, 2000 version, then there is a separate problem: that Uncle Henry's, having chosen to define the timing of the alleged misrepresentations with respect only to its preferred version of the agreement, forfeited the chance to develop a cogent argument of fraud in the inducement with respect to the December 2000 version.¹¹ As to Uncle Henry's third sub-point, Motion To Reconsider at 16-19, I am unpersuaded that

before addressing whether they occurred primarily and substantially in Massachusetts.

¹¹ I note that in the context of discussing fraud in the inducement in its summary-judgment opposition, Uncle Henry's did argue that "the integration clause in the Master Agreement – presuming one of the three versions of the Master Agreement is even a contract between the parties – does not protect Defendants from their prior misrepresentations." Plaintiff's SJ Opposition at 8-9. However, it then went on to quote from the integration clause contained in the October 2000 version of the parties' agreement. *Id.* at 9. In any event, it never expressly argued that there was fraud in the inducement with respect to the December 2000 version of the contract. *See id.* at 3-4, 5-10.

I erred in ruling, based on the cognizable evidence before me, that the December 7, 2000 version constituted the final and binding version of the parties' agreement as a matter of law. As discussed above in the context of Point 1f, even assuming *arguendo* that the October 17, 2000 version itself constituted a valid, binding contract, it was modified and superseded upon Justin Sutton's execution of the December 7, 2000 version.

III. Conclusion

For the foregoing reasons, Uncle Henry's Motion to Supplement is **DENIED** as it relates to its Motion To Reconsider, and its Motion To Reconsider is **GRANTED** in part with respect to Points 1k and 2e and otherwise **DENIED**.¹²

In view of this disposition, Section IV of the Recommended Decision is modified in relevant part as follows:

For the foregoing reasons, I **GRANT** in part and **DENY** in part the plaintiff's motions to strike, **GRANT** the defendant's motion to strike, and recommend that the defendant's summary judgment motion be (i) **GRANTED** with respect to Counts I and VI of Uncle Henry's amended complaint and Plaut's eighth affirmative defense, (ii) **GRANTED** with respect to Counts III and IV as to all claims except for that pertaining to statement No. 1, (iii) **GRANTED** with respect to Count V except as it pertains to the period from July 18, 2001 through August 23, 2001, and (iv) otherwise **DENIED**.

If this recommended decision is adopted, the following will remain for trial (in addition to Plaut's counterclaims, as to which no dispositive motion was filed): (i) Count II of the amended complaint, (ii) to the extent they bear on statement No. 1 only, Counts III and IV of the amended complaint and (iii) to the extent it pertains to the period from July 18, 2001 through August 23, 2001, Count V of the amended complaint.

So ordered.

¹² The instant motions typify the contentious manner in which this case has been litigated, in which both sides have at times doggedly pressed even picayune and weak points, needlessly compounding the work of the court and opposing counsel. Counsel are urged to exercise sounder judgment and greater restraint.

Dated this 17th day of December, 2002.

David M. Cohen
United States Magistrate Judge

TRLIST PORTLD
STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-180

UNCLE HENRYS INC v. PLAUT CONSULTING CO, et al Filed: 09/04/01
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Both
Demand: \$0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Contract Dispute

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