

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MAINE RUBBER INTERNATIONAL,)

Plaintiff)

v.)

Docket No. 02-226-P-H

ENVIRONMENTAL MANAGEMENT)

GROUP, INC., et al.,)

Defendants)

**MEMORANDUM DECISION ON MOTION TO STRIKE AND RECOMMENDED
DECISION ON DEFENDANT ENVIRONMENTAL
MANAGEMENT GROUP'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Environmental Management Group, Inc. (“EMG”) moves for partial summary judgment on Counts I and III of the amended complaint.¹ The plaintiff moves to strike portions of that defendant’s reply to its opposition to that motion and that defendant’s response to the statement of material facts submitted by the plaintiff in opposition to the motion for partial summary judgment. I grant the motion to strike and recommend that the court deny the motion for partial summary judgment.

I. The Motion to Strike

The plaintiff filed on July 8, 2003 a motion to strike section I of the Defendant’s Reply to Plaintiff’s Objection to Defendant’s Motion for Partial Summary Judgment (“Reply”) (Docket No. 21) and paragraph 8 of the Defendant’s Reply Statement of Material Facts (“Defendant’s Responsive

¹ After EMG filed the instant motion, I granted the plaintiff’s motion for leave to amend the complaint. Memorandum of Decision on Motion for Leave to Amend (Docket No. 19). The amendment adds two individual defendants and changes the wording of a single paragraph in the initial complaint. It has no effect on the substance of the two counts that are the subject of this motion insofar as those
(continued on next page)

SMF”) (Docket No. 22), other than the word “admitted.” Plaintiff’s Motion to Strike (Docket No. 23) at 1. EMG has not responded to the motion to strike. The plaintiff essentially contends that EMG’s argument in section I of its reply memorandum and the information presented, apparently as a qualification, after the word “admitted” in paragraph 8 of its response to the plaintiff’s statement of material facts, impermissibly raise for the first time a new issue. While a moving party must be allowed to address arguments raised by an opposing party in its response to a motion for summary judgment, particularly where those arguments could not reasonably have been anticipated by the moving party, I agree with the plaintiff in this case that the portions of EMG’s response to which the motion to strike is directed represent an untimely attempt to add new, potentially dispositive factual material to the summary judgment record. EMG has made no attempt to show that this evidence could not have been included in its initial statement of material facts; indeed, it has not responded to the motion to strike at all. Section I of EMG’s reply memorandum is based on this factual material. Accordingly, the motion to strike is granted.

II. Motion for Partial Summary Judgment

A. Summary Judgment Standard

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.’” *Navarro v. Pfizer Corp.*, 261

counts raise claims against EMG.

F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

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 nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The parties' respective statements of material facts, submitted pursuant to this court's Local Rule 56, include the following undisputed material facts.

The plaintiff entered into a purchase and sale contract dated October 2, 1998 to buy real estate located at 17-66 Milliken Street, Portland, Maine. Plaintiff's Statement of Additional Material Facts ("Plaintiff's SMF") (included in Plaintiff's Opposing Statement of Material Facts, etc. ("Plaintiff's Responsive SMF")) (Docket No. 15) beginning at page 3) ¶ 4; Defendant's Responsive SMF ¶ 4. The contract was contingent upon the performance of an environmental inspection ("Phase I Assessment") within 60 days. *Id.* ¶ 6. The plaintiff entered into a contract with EMG pursuant to which EMG would

perform a Phase I Environmental Site Assessment of property located at 17-66 Milliken Street, Portland, Maine. Statement of Material Facts Not in Dispute (“Defendant’s SMF”) (Docket No. 8) ¶ 1; Plaintiff’s Responsive SMF ¶ 1. There was no pre-existing relationship between the parties to this contract. *Id.* ¶ 2. EMG submitted a written report of its findings to the plaintiff. *Id.* ¶ 3.

C. Discussion

EMG contends that Counts I and III of the amended complaint, insofar as they are asserted against EMG, are barred by the economic loss rule. Partial Motion [sic] for Summary Judgment, etc. (“Motion”) (Docket No. 7) at 2-9. Count I of the amended complaint alleges negligence; Count III alleges negligent misrepresentation. First Amended Complaint, etc. (“Amended Complaint”) (Docket No. 20) ¶¶ 16-20, 24-29. Count II alleges breach of contract solely against EMG. *Id.* ¶¶ 21-23.

In *East River S. S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), the Supreme Court held that no cause of action exists in tort in admiralty when a defective product purchased in a commercial transaction malfunctions, causing injury only to itself and causing purely economic loss, *id.* at 859, 868-71, 876. Noting that if the development of products liability law were allowed “to progress too far, contract law would drown in a sea of tort,” *id.* at 866, the Court stated that “[c]ontract law . . . is well suited to commercial controversies of [this] sort . . . because the parties may set the terms of their own agreements,” *id.* at 872-73. When the commercial situation does not involve “large disparities in bargaining power,” courts should not “intrude into the parties’ allocation of the risk.” *Id.* at 873. The Court revisited this issue in *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875 (1997), in which it stated that “[g]iven the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better,” *id.* at 880.

This “economic loss doctrine” was adopted by the Maine Law Court in a non-admiralty setting in *Oceanside at Pine Point Condo. Owners Ass’n v. Peachtree Doors, Inc.*, 659 A.2d 267, 270 (Me.

1995). While the Law Court has not expressly extended the doctrine to contracts for services, as distinct from those involving the sale of products, and this court has declined to predict whether it would do so, *Fireman's Fund Ins. Co. v. Childs*, 52 F.Supp.2d 139, 145 (D. Me. 1999), this court has also suggested that it is more likely than not that the Law Court would do so, adopting the majority view among courts that have addressed the issue, *id.* I see no reason to conclude otherwise. At least two Maine Superior Court justices who have addressed the question have extended the doctrine to service contracts. *Bayreuther v. Gardner*, 2000 WL 33675355 (Me. Super. June 21, 2000), at *2; *L.L. Bean, Inc. v. United States Mineral Prods. Co.*, 1999 Me.Super. LEXIS 323, Maine Superior Court (Cumberland County) Docket No. CV-98-632, Decision and Order (Dec. 3, 1999), at *7. In the one decision of the Maine Superior Court cited by the parties that purports to hold otherwise, *Pendleton Yacht Yard, Inc. v. Smith*, 2003 Me.Super. LEXIS 49, Maine Superior Court (Waldo County) Docket No. CV-01-47, Decision and Order on Motion for Summary Judgment (Mar. 24, 2003), at *12, the court actually held that a violation of a duty existing solely by virtue of a negotiated agreement would not ordinarily give rise to a remedy in tort, but that where “the conduct of one party would constitute a tort in the absence of the contract, then that cause of action is not extinguished simply because some aspects of the relationship . . . happen also to be governed by a[n] independent agreement,” *id.* at *14. This distinction was adopted by this court in *Dermalogix Partners, Inc. v. Corwood Labs., Inc.*, 2000 U.S.Dist. LEXIS 8009 (D. Me. Mar. 14, 2000), at *16-18 (liability in tort may coexist with liability in contract only where duty existing independent of contract has been violated).

Here, the plaintiff contends that (i) the contract does not provide standards for the performance of the professional services that were to be provided under the agreement and that “[t]he contract and EMG’s report make clear that EMG’s services were performed in accordance with extracontractual

standards;” (ii) the contract does not provide any limitations or restrictions on available remedies; and (iii) EMG’s “environmental professionals” must be held to the standards of their profession, independent of any contract, in the performance of their work. Plaintiff’s Objection to Defendant’s Motion for Partial Summary Judgment (“Objection”) (Docket No. 14) at 6-9. EMG responds that exceptions to the economic loss rule for professional services apply only where there is a fiduciary or other special relationship between the contracting parties, which is absent here; that the claim for negligent misrepresentation is barred by the economic loss rule in any event; and that the plaintiff has made no showing that EMG employees performed services beyond the scope of the contract, making the *Pendleton Yacht* distinction inapplicable. Defendant’s Reply to Plaintiff’s Objection to Defendant’s Motion for Partial Summary Judgment (“Reply”) (Docket No. 21) at 2-4, 5-7.

EMG’s first contention is undermined by the fact that the professional involved in *Pendleton Yacht* was a marine surveyor, 2003 Me. Super. LEXIS 49 at *1, not a lawyer or physician or a professional customarily considered to have a fiduciary or other special relationship with his or her clients. The case law from other jurisdictions is divided on this issue, but much of the case law does not support this narrow view, *e.g.*, *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 12, 17 (2d Cir. 2000) (engineering firm); *Steiner Corp. v. Johnson & Higgins of California*, 196 F.R.D. 653, 657-58 (D. Utah 2000) (actuary); *Moransais v. Heathman*, 744 So.2d 973, 983 (Fla. 1999) (engineers inspecting house), and I decline to adopt it.

EMG fares no better with its third argument. The plaintiff’s first and second contentions concerning the content of the contract are clearly correct; no standards of professional performance are set forth and remedies for breach are not mentioned. The plaintiff’s third contention is a legal argument. In that regard, the plaintiff’s statement of material facts offers evidence, albeit much of it disputed or qualified by EMG, that would allow a factfinder to conclude that EMG held its

professional employees out as performing to a certain professional standard. *E.g.*, Plaintiff's SMF ¶¶ 10, 15-17, 23, 26-35, 39-40.² Some courts have held that the existence of professional standards independent of the parties' contract is sufficient to allow a claim of professional negligence to proceed. *E.g.*, *17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 693 N.Y.S.2d 554, 559-60 (App. Div. 1999); *Congregation of the Passion v. Touche Ross & Co.*, 636 N.E.2d 503, 515 (Ill. 1994); *Business Men's Assurance Co. of Am. v. Graham*, 891 S.W.2d 438, 453 (Mo. App. 1994).

In this case, the document which the parties agree constitutes the contract at issue is silent concerning any standards that will be applicable to EMG's work other than the statement that "[t]he assessment will be conducted according to the Fleet Financial Group – Level I ESA requirements," Letter from Barbara Wojcik to Stuart Brown dated October 12, 1998, part of Exhibit A to Amended Complaint, at 2; those "requirements" are not part of the summary judgment record. The plaintiff does provide evidence that EMG represented that its report conformed to "customary practice" and "acceptable industry standards." Plaintiff's SMF ¶¶ 15-17. This evidence demonstrates the existence of professional standards that may well impose a duty that exists independent of the parties' contract. The language of this court's opinion in *Dermalogix* requires nothing more in order to avoid application of the economic loss doctrine.³ EMG is not entitled to summary judgment on Count I.

EMG's second argument addresses Count III of the amended complaint, which alleges negligent misrepresentation. Courts have differed on the question whether the economic loss rule bars claims for negligent misrepresentation. *Compare, e.g., Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 620 (3d Cir. 1995) (Pennsylvania law; economic loss doctrine bars recovery for

² The plaintiff offers no evidence that would allow a reasonable factfinder to conclude that EMG employees provided professional services to the plaintiff that were beyond the scope of the contract at issue, but it is not necessary for this court to decide under the circumstances of this case whether the Maine Law Court would adopt the Superior Court's description of the legal standard in this manner in *Pendleton Yacht* in order to resolve the pending motion.

³ The parties have not addressed the issue of the sufficiency of the evidence of professional negligence in this case, and I therefore do (continued on next page)

tort of negligent misrepresentation); *Apollo Group, Inc. v. Avnet, Inc.*, 58 F.3d 477, 480 (9th Cir. 1995) (Arizona law; same); *Bailey Farms, Inc. v. Nor-Am Chem. Co.*, 27 F.3d 188, 191 (6th Cir. 1994) (Michigan law; same); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 995 F. Supp. 983, 995 (D. Minn. 1998) (Minnesota law; same); *with Nota Constr. Corp. v. Keyes Assocs., Inc.*, 694 N.E.2d 401, 405 (Mass. App. 1998) (exception to economic loss doctrine permits recovery for loss resulting from negligent misrepresentation). However, the Arizona and Minnesota decisions which apply the economic loss doctrine to such claims do not discuss the exception, discussed above, for a tort claim arising from a duty existing apart from the parties' contract, which appears to exist in Maine law. The description of Michigan law in *Bailey Farms*, 27 F.3d at 191, is also distinguishable. That distinction is dispositive here. Negligent misrepresentation would constitute a tort in the absence of the contract between the parties. EMG is not entitled to summary judgment on Count III.

III. Conclusion

For the foregoing reasons, the plaintiff's motion to strike is **GRANTED** and I recommend that EMG's motion for partial summary judgment on Counts I and III of the amended complaint be **DENIED**.

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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral

not address it.

argument before the district judge 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 6th day of August 2003.

David M. Cohen
United States Magistrate Judge

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