

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

ELMET TECHNOLOGIES, INC.,)
)
 Plaintiff)
)
 v.)
)
 ADVANCED TECHNOLOGIES)
 SYSTEMS, INC., et al.,)
)
 Defendants)

Docket No. 05-200-P-S

**RECOMMENDED DECISION ON MOTION OF DEFENDANT BIG SKY
ENGINEERING, INC. FOR SUMMARY JUDGMENT**

Defendant Big Sky Engineering, Inc. (“Big Sky”) moves for summary judgment on portions of the only counts of the complaint asserted against it in this action. I recommend that the court grant the motion.

I. Summary Judgment Standard

A. Federal Rule of Civil Procedure 56

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 judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “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 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. *Santoni*, 369 F.3d at 598. 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. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its

own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id.*; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted." (Citations and internal punctuation omitted)).

II. Factual Background

The statements of material facts filed by the parties pursuant to Local Rule 56 include the following undisputed material facts.

Elmet is the successor to Philips Electronics North America Corporation ("Philips") as to all rights and obligations under a contract with Advanced Technologies Systems, Inc. ("ATS") for the design, manufacture and installation of an automated filament packaging machine or system for Elmet's

manufacturing facility in Lewiston, Maine. Defendant Big Sky Engineering, Inc.'s Statement of Material Facts ("Big Sky SMF") (Docket No. 65) ¶ 1; Elmet's Opposing Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 68) ¶ 1. Because there was no machine specifically capable of packaging lighting filaments, Philips employees spent 2-3 months in 2001 developing the specifications for this machine. Elmet's Separate Statement of Material Facts ("Elmet SMF") (included in Plaintiff's Responsive SMF beginning at 6) ¶ 1; Defendant Big Sky Engineering, Inc.'s Reply to Elmet's Additional Statement of Material Facts ("Big Sky Responsive SMF") (Docket No. 74) ¶ 1. The purchase order was issued to ATS on December 27, 2001 and accepted by ATS on January 9, 2002. *Id.* ¶ 5.

ATS subcontracted the development and installation of certain subsystems to Big Sky. Big Sky SMF ¶ 2; Plaintiff's Responsive SMF ¶ 2. Big Sky in turn subcontracted the design and installation of a single subsystem to Inspired Automation, Inc. ("Inspired"). *Id.* ¶ 3. Big Sky was aware that the machine was being constructed by ATS for Philips. Elmet SMF ¶ 6; Big Sky Responsive SMF ¶ 6. The Big Sky equipment was specifically engineered for the automated packaging system being manufactured for Philips and had little value beyond that purpose aside from scrap metal. *Id.* ¶ 8.

Alexander Gemma purchased ATS in 1989 and was the contact person at ATS for the Elmet project. Big Sky SMF ¶ 4; Plaintiff's Responsive SMF ¶ 4. Mark Strasser has been the vice-president of Big Sky from 1996 to the present and Joel Cunningham has been its president and operations manager during the same period. *Id.* ¶¶ 5-6. Carl Miller has been the vice-president and chief financial officer of Elmet since February 9, 2004; Harry Richardson and David Punch were employees of Elmet at all relevant times. *Id.* ¶¶ 7-9.

Neither Philips nor Elmet was part of the negotiation of the subcontract between ATS and Big Sky, which does not refer to either Philips or Elmet. *Id.* ¶¶ 10-11.

Big Sky installed a software lockout feature that was imbedded into the PLC programming as a failsafe to ensure that it was paid for its work on projects such as the ATS subcontract. *Id.* ¶¶ 12-13. The program counts the number of days the machine is under power and if payment is not made by ATS within the agreed-upon payment schedule, the machine will stop functioning. *Id.* ¶ 14.

On January 8, 2003 Big Sky notified ATS that it was prepared to ship the “Philips machine” provided that Big Sky received an overdue progress payment and letter of intent with respect to the final three installment payments required under the terms of the purchase order. Elmet SMF ¶ 13; Big Sky Responsive SMF ¶ 13. During the same month the machine, including the Inspired component, was delivered to the facilities of ATS in Rhode Island for preliminary assembly and testing. *Id.* ¶ 14. During preliminary testing representatives of Elmet identified several deficiencies in machine performance. *Id.* After ATS gave Elmet assurances that these malfunctions could be corrected, Elmet agreed to have the machine delivered to its Lewiston facility for acceptance testing. *Id.* On February 27, 2003 ATS notified Big Sky that it objected to additional charges by Inspired because the Inspired system did not function as specified or required and asked Big Sky to resolve the issue with Inspired. *Id.* ¶ 15. On March 18, 2003 Big Sky notified ATS that it was over 30 days past due on its payment commitments to Big Sky and that Big Sky’s software had an imbedded code that would terminate the machine unless a code was entered in a timely fashion. *Id.* ¶ 17. Soon thereafter the machine was shut down by the lockout program. *Id.* ¶ 18. Subsequently, the software lockout function was disarmed when Big Sky provided ATS with the lockout code. *Id.* ¶ 20. Several weeks later, while Big Sky was assisting ATS with further troubleshooting, Big Sky reactivated the software lockout function with a new code, without the knowledge or consent of ATS or Philips. *Id.*

The problems with the machine centered around Inspired's weigher/counter mechanism. *Id.* ¶ 21. Initially, the Inspired equipment was completely under the control of Big Sky. *Id.* ¶ 23. As the project evolved, ATS worked directly with Inspired. *Id.* Big Sky was aware that frustration was building between Inspired and ATS. *Id.* ¶ 25. On February 10, 2004 Big Sky informed ATS that the machine would again go into automatic shutdown within a few days. *Id.* ¶ 28. Big Sky reinstated the automatic shutdown on May 10 or 11, 2004 and refused to restart the equipment until at least one-half of the past-due balance was paid. *Id.* ¶ 29. The machine was not turned back on until late July or early August 2004, after Elmet released one-half of the funds remaining unpaid under its purchase order with ATS in June 2004. *Id.* ¶ 30. The weigher/counter continued to malfunction. *Id.* ¶ 31. In October 2004, the machine shut down again. *Id.* ¶ 32. Elmet told Gemma that no additional payments would be made until the machine met contract specifications; Gemma notified Elmet that final payment of all monies owed would be necessary for ATS to provide the key codes for the system. *Id.* ¶¶ 32-33.

When testing was performed in March 2005 the machine experienced the same type of problem involving the Inspired-manufactured component. *Id.* ¶ 39. Miller and Richardson then met with Gemma to talk about making the machine work properly. *Id.* ¶ 40. Gemma abruptly walked out of the meeting. *Id.* At no point during the course of the testing of the machine did it test well enough to be running product on a regular basis. *Id.* ¶ 42. On September 23, 2005 Elmet terminated the contract with ATS. *Id.* ¶ 44.

III. Discussion

Big Sky seeks summary judgment on Counts IX and XIII of the complaint. Defendant Big Sky Engineering, Inc.'s Motion for Summary Judgment, etc. ("Motion") (Docket No. 64) at 1.¹ Count IX

¹ Big Sky appears to believe that these are the only counts asserted against it. Motion at 1. However, as the plaintiff (*continued on next page*)

asserts that the plaintiff is a third-party beneficiary of the subcontracts between ATS and Big Sky and Big Sky and Inspired and that it is entitled to recover for Big Sky's alleged breach of those contracts. Complaint ¶¶ 73-78. Count XIII alleges that Big Sky wrongfully interfered with its "rights to contractual performance by ATS . . . and Inspired." *Id.* ¶¶ 93-95.

A. Count IX

Big Sky contends that there is no evidence that the plaintiff was an intended third-party beneficiary under the subcontract between ATS and Big Sky. Motion at 6.² Maine has adopted section 302 of the Restatement (Second) of Contracts with respect to third-party beneficiary contract claims. *F. O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992). That portion of the Restatement provides:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
 - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
- (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

Restatement (Second) of Contracts § 302 (1981). Here, the plaintiff must "generate a genuine issue of material fact on the issue of [Big Sky's] intent that [it] receive an enforceable benefit under the contract."

Devine v. Roche Biomedical Labs., 659 A.2d 868, 870 (Me. 1995).

notes, Elmet Technologies, Inc.'s Opposition to Big Sky Engineering Inc.'s Motion for Summary Judgment ("Opposition") (Docket No. 67) at 1 n.1, Counts X-XII also state claims against Big Sky, Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1) ¶¶ 79-91. Those claims will not be affected by the resolution of this motion.

² Both Big Sky's motion and the plaintiff's opposition are silent with respect to the plaintiff's claim, also asserted in Count IX, to be the third-party beneficiary of the subcontract between Big Sky and Inspired. Inspired has been dismissed as a party, Docket No. 62, but that does not dispose of any claim that Big Sky breached its subcontract with Inspired thereby causing damage to the plaintiff, *see* Complaint ¶ 78, which accordingly remains active in this case.

It is not enough that [the plaintiff] benefitted or could have benefitted from the performance of the contract. The intent must be clear and definite, whether it is expressed in the contract itself or in the circumstances surrounding its execution.

Id. (citation omitted). Where, as here, there is no mention of the plaintiff in the contract at issue, Big Sky SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11, "there must be circumstances that indicate with clarity and definiteness that [Big Sky] intended to give [the plaintiff] an enforceable benefit under the contract." *Id.* "[T]he focus must be on the nature of the contract itself to determine if the contract necessarily implies an intent on the part of the promisee to give an enforceable benefit to a third party." *Id.* It is not the consequence of the contract that is important in this context.

The plaintiff contends that Big Sky "knew both the end use and the identity of the purchaser of its customized components," and that this is sufficient to allow a jury to conclude that Big Sky intended that its performance of its subcontract with ATS "was to specifically benefit Philips." Opposition at 6. To the contrary, a subcontractor will often know the ultimate destination of the parts or service it is contributing to a larger project. That knowledge alone cannot make the ultimate purchaser an intended beneficiary of the subcontract. *See Pierce Assocs., Inc. v. Nemours Found.*, 865 F.2d 530, 538 (3d Cir. 1988). Nor does the fact that the product or service that is the subject of the contract is unique necessarily bestow such status.

"[T]he law requires special clarity to support a finding that the contracting parties intended to confer a benefit on a third party." *InterGen N.V. v. Grina*, 344 F.3d 134, 146 (1st Cir. 2003) (citation and internal quotation marks omitted). Even more significant here, "[u]nless the performance required by the contract will *directly* benefit the would-be intended beneficiary, he is at best an incidental beneficiary." *Public Serv. Co. of N. H. v. Hudson Light & Power Dep't*, 938 F.2d 338, 342 (1st Cir. 1991) (Massachusetts law, construing section 302 of the Restatement; emphasis in original). *See also*

Moosehead Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 52-53 (1st Cir. 1979) (Maine law).

Here, the plaintiff has not proffered evidence that would allow a reasonable factfinder to conclude that Big Sky's performance under the subcontract with ATS would directly benefit the plaintiff, let alone allow such a conclusion to be reached with the necessary "special clarity."

Big Sky is entitled to summary judgment on that portion of Count IX that asserts a third-party beneficiary claim under the subcontract between ATS and Big Sky.

B. Count XIII

Count XIII alleges that Big Sky intentionally interfered with the plaintiff's "rights to contractual performance by" ATS and Inspired by threatening and acting to deny access to the machine through its use of its lockdown software. Complaint ¶¶ 93-95. Big Sky contends that the plaintiff cannot demonstrate that it interfered with any such contracts through fraud or intimidation, which is one of the elements of this tort.

Motion at 8-10.³ Under Maine law,

[i]nterference with an advantageous relationship requires the existence of a valid contract or prospective economic advantage, interference with the contract or advantage through fraud or intimidation, and damages proximately caused by the interference.

Barnes v. Zappia, 658 A.2d 1086, 1090 (Me. 1995).

The plaintiff asserts that "Big Sky tortiously interfered with the Philips Contract by inserting lockout software in components it provided for the Machine that repeatedly shut down the Machine to force contract payments from ATS that were not made because the Machine did not operate properly because of

³ Big Sky also asserts, in a single conclusory sentence: "As for proximate causation due to the interference, by Elmet's own admission, the Machine *never* worked in accordance with the contract specifications when it was under power and not locked out." Motion at 10 (emphasis in original). It is not clear from this undeveloped argument how Big Sky means to contend, if it does, that the plaintiff cannot offer or has not offered evidence of the third element of a tortious interference claim. An argument presented in such an undeveloped manner will not be considered by this court. *Crowe (continued on next page)*

malfunctions in Big Sky’s contract deliverables.” Opposition at 6. As a result, it contends, “ATS failed to meet contract specifications and deliver the . . . machine that Elmet had paid for.” *Id.* The plaintiff does not mention interference through fraud, discussing only intimidation. Opposition at 7-8. It sums up its argument on this count as follows:

[T]he essence of unlawful interference by Big Sky is (1) the insertion of a lockout software that prevented operation of the Machine for acceptance testing, malfunctions diagnosis, and repair, (2) the activation of Big Sky’s lockout software to force ATS to make payments to Big Sky, (3) where the components for which Big Sky demanded payment were the source of the malfunctions that prevented ATS from delivering a machine that performed in accordance with contract specifications, (4) while Big Sky refused to correct the malfunctioning equipment that was Big Sky’s responsibility under its contract with ATS, and (5) the shutdowns caused by Big Sky’s lockout software prevented ATS from performing its obligations under the Philips Contract and resulted in Elmet’s termination of that contract. In other words, Big Sky not only coerced payments from ATS for equipment that did not function while at the same time refusing to fix its equipment, but also forced ATS to breach its obligations under the Philips Contract.

Opposition at 10-11. Notably absent from this summation is any identification of any of Big Sky’s alleged conduct as intimidation. In fact, this presentation resembles a claim for breach of contract — one that would be brought by ATS against Big Sky on their subcontract — more than it does a claim for tortious interference with the contract between ATS and the plaintiff.

Without citation to authority, the plaintiff asserts that “it is sufficient [to prove intimidation] that the evidence would reasonably support a finding by a jury that the defendant used his positional advantage or leverage to either threaten⁴ or to actually interfere with the contract of another.” *Id.* at 7. To the contrary, that construction reads intimidation out of the cause of action. “Interference by intimidation involves

v. Bolduc, 215 F.Supp.2d 233, 238 (D. Me. 2002); *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990).

⁴ The plaintiff offers no evidence that would allow a reasonable factfinder to conclude that Big Sky threatened to interfere with the contract between ATS and Elmet.

unlawful coercion or extortion.” *Rutland v. Mullen*, 798 A.2d 1104, 1111 (Me. 2002). “[A] person who claims to have . . . a property right that the person believes exists cannot be said to have . . . unlawfully coerced or extorted another simply because that right is later proved invalid.” *Id.* Here, while the plaintiff alleges that Big Sky “coerced” payments from ATS by shutting down the machine, it offers no evidence that would allow a reasonable factfinder to conclude that Big Sky did not reasonably believe that it was entitled to payment from ATS at the time. The plaintiff’s statement of material facts does not refer to any specific terms of the subcontract between ATS and Big Sky that necessarily included full responsibility for Inspired’s component.⁵ In addition, the evidence proffered by the plaintiff cannot reasonably be read to allow a factfinder to conclude that the problem with the component provided by Inspired was within Big Sky’s control. At most, the plaintiff asserts that “[i]nitially, the Inspired Automation equipment was completely under the control of Big Sky.” Elmet SMF ¶ 23; Big Sky Responsive SMF ¶ 23. By inference, therefore, at a later time, when the machine was automatically shut down for a second time by Big Sky’s software, *id.* ¶¶ 23-24, 28-30, the Inspired equipment was not “completely under the control of Big Sky.” Accordingly, the plaintiff’s assertion that correction of the malfunctioning Inspired equipment was Big Sky’s responsibility under its contract with ATS, Opposition at 11, is not supported by the summary judgment record.

Finally, the case law cited by the plaintiff as examples of allegedly similar fact patterns, *id.* at 7, is distinguishable. In *Pombriant v. Blue Cross/Blue Shield of Maine*, 562 A.2d 656 (Me. 1989), the Maine Law Court held that

Blue Cross procured the breach of contract between Pombriant and Bennett by the intimidating means of making it clear to Bennett that the only manner in which

⁵ The plaintiff’s statement of material facts does state that “Big Sky’s quotation also noted that Big Sky would assume responsibility for cycle time, engineering design, and machine function,” Elmet SMF ¶ 7, Big Sky Responsive SMF ¶ 7, but the plaintiff does not explain how the performance of Inspired’s component fit within any of these three categories.

it could avail itself of Blue Cross's lower rates for the desired insurance would be by using the brokerage services of Johnson.

Id. at 659. Here, in the plaintiff's version of events, Big Sky did not condition its provision of any service or thing desired by ATS on ATS's breaching of its contract with the plaintiff. There was no intimidation as that term was used in *Pombriant*. In *MacKerron v. Madura*, 445 A.2d 680 (Me. 1982), the Law Court found intimidation in the defendant's threats that he would not seek to have a criminal complaint against the plaintiff's client dismissed if the plaintiff continued to represent that client, *id.* at 683. Again, the defendant in that case was seeking an action that would inevitably cause a breach of an existing contract. And in *Taylor v. Pratt*, 195 A. 205 (Me. 1937), the same was true. In that case, the plaintiff testified that the defendant, a physician, told her that he would tell her employer, a druggist, that he would direct all of his patients to another druggist unless the employer fired the plaintiff, and her employer so testified as well. 195 A. at 205-06. The Law Court upheld a finding of intimidation through the demand that the employer breach his employment agreement with the plaintiff. In the case at hand, from all that appears in the summary judgment record, ATS could have made the payment demanded by Big Sky without breaching its contract with the plaintiff. That distinction is critical; under such circumstances it cannot be said that Big Sky procured a breach of that contract.

On the showing made, Big Sky is entitled to summary judgment on Count XIII.

IV. Conclusion

For the foregoing reasons, I recommend that Big Sky's motion for summary judgment be **GRANTED** as to that portion of Count IX that alleges that the plaintiff is a third-party beneficiary of a contract between Big Sky and ATS and as to Count XIII, and otherwise **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, 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 3rd day of January, 2007.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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