

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

J.S. MCCARTHY CO., INC., d/b/a)	
J.S. MCCARTHY PRINTERS,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 04-107-B-W
)	
BRAUSSE DIECUTTING &)	
CONVERTING EQUIPMENT, INC.,)	
)	
Defendant.)	

**RECOMMENDED DECISION ON DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT
AND
MEMORANDUM OF DECISION ON DEFENDANT'S
MOTION, IN THE ALTERNATIVE, TO EXCLUDE**

The J.S. McCarthy Company is pursuing Maine law contract and tort claims against Brausse Diecutting & Converting Equipment, Inc. ("Brausse"), that arise from representations allegedly made by Brausse to J.S. McCarthy concerning the nature, quality and characteristics of a foil stamping machine J.S. McCarthy contracted to purchase from Brausse and from Brausse's alleged provision of a non-conforming, defective and substantially inferior machine. The first amended complaint recites claims for breach of contract, breach of express warranty, fraud, negligent misrepresentation, unfair trade practices, and "revocation of acceptance," and also includes a plea for punitive damages styled as a substantive cause of action. (First Am. Compl., Docket No. 30.) Now pending is Brausse's "Motion for Partial Summary Judgment or in the Alternative to Exclude." (Docket No. 23.) Brausse's motion for partial summary

judgment is limited to J.S. McCarthy's claim for consequential damages. Because there is a genuine issue of material fact whether J.S. McCarthy suffered the damages at issue and because there is a legal basis for recovery of these damages, I recommend that the court deny the motion for partial summary judgment. Because J.S. McCarthy's tardy disclosure of the spreadsheet evidence supporting the damages claim was harmless on these facts, I also deny the motion to exclude.

Background

The following statement of facts is drawn from the parties' Local Rule 56 statements of material fact in accordance with this District's summary judgment practice. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the procedure). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, all evidentiary disputes appropriately generated by the parties' statements have been resolved, for purposes of summary judgment only, in favor of the non-movant. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998).

On April 30, 2003, J.S. McCarthy and Brausse entered into a sales agreement in which J.S. McCarthy agreed to buy and Brausse agreed to sell a product identified as a Brausse Automatic Foil Stamping Machine, Model SBL 1050 SEF. (Statement of Material Facts, Docket No. 24, ¶ 1.) The Agreement contains the following clause:

The Sellers warrant that the Commodity will be free from defects in materials and workmanship The remedy for breach of warranty shall be limited to replacement of defective parts (mechanical and electrical), repairing and labor related [sic]. Consequential damages for breach of warranty where the claimed loss is commercial are excluded.

(Id., ¶ 2.) The contract was a culmination of negotiations that had commenced in March of that year. (Opposing Statement of Material Facts, Docket No. 33, ¶ 1 Additional.)¹ There is a genuine issue of material fact whether the machine that was delivered by Brausse and installed on J.S. McCarthy's Augusta, Maine, premises, although stamped SBL 1050 SEF, is actually the SBL 1050 SEF model machine that Brausse agreed to sell and J.S. McCarthy agreed to buy. (Id., ¶ 3.) In any event, J.S. McCarthy experienced significant problems with the machine. According to certain of J.S. McCarthy's witnesses who participated in contract negotiations and product demos, the machine J.S. McCarthy received did not perform as promised or expected, but instead suffered from excessive downtime and slow and inferior performance. (Id., ¶ 4.) As a result of these problems, jobs performed on the machine required more time and materials than were planned when the jobs were bid. (Id.) Because of downtime and slow performance, some printing jobs had to be performed on other machines to ensure that J.S. McCarthy met its deadlines. J.S. McCarthy refused to allow the problems it experienced from the machine Brausse delivered to affect its relationships with its clients. According to Conrad Ayotte, J.S. McCarthy's chief financial officer and minority owner, J.S. McCarthy "went to great lengths to meet deadlines in spite of the problems it experienced with the Brausse Machine." (Id., ¶¶ 5, 9.) This assertion of fact is corroborated by the deposition testimony of William White, J.S. McCarthy's Chief Operating Officer and Rule 30(b)(6) designee, who testified: "We did whatever we had to do, including breaking jobs down, running them on the smaller machines, working all the overtime you can imagine to get the jobs done for our customers." (White Depo. at 33-34, Docket No.

¹ Hereinafter, all citations to Docket No. 33 will refer exclusively to J.S. McCarthy's statement of additional material facts. Citation of Docket No. 24 should be understood to reference both Brausse's statement of material fact and J.S. McCarthy's responses to the same.

33, Elec. Attach. 2.) J.S. McCarthy did not lose any customers or income as a result of any alleged problems with the Brausse 1050 Machine, but experienced increased costs of production that cut into its profits. (Docket No. 24, ¶ 12(i).) Eventually, J.S. McCarthy purchased a new machine from a different vendor. According to J.S. McCarthy's witnesses, the replacement SBL 1050 SEF performed in the manner that Brausse had represented its machine would perform. (Docket No. 33, ¶ 6.)

In order to calculate the consequential damages caused by the non-performing machine,² J.S. McCarthy appointed Ayotte to determine the amount of damages attributed to lost profits and cost overruns. (Id., ¶ 9.) J.S. McCarthy uses a computer system, referred to as the Hagen system, to track all of its printing jobs. This system captures all of the time and materials for every printing jobs completed by J.S. McCarthy. (Id., ¶ 10.) J.S. McCarthy inputs into the Hagen system the planned time and materials for all printing jobs it performs. Because the Hagen system captures the actual time and materials for all printing jobs, and categorizes that data by specific machine, it is possible to use this system to determine whether a specific printing job required more time or more materials than anticipated and the amount of additional time or materials required for the printing job. (Id., ¶¶ 11-12.) Using the data he obtained from the Hagen system, Ayotte calculated the amount by which the time and volume of materials it took to complete printing projects using the Brausse machine exceeded the amount of time and volume of materials J.S. McCarthy had estimated for the project. (Id., ¶ 7.) As for the reliability of J.S. McCarthy's estimates, Ayotte indicates that J.S. McCarthy bid on

² J.S. McCarthy's statements identify the Brausse machine as a "counterfeit" SBL 1050 SEF and the machine that Brausse represented it would sell and the replacement machine J.S. McCarthy later purchased as "genuine" SBL 1050 SEF machines. I have chosen to designate the machine that is the subject of this litigation as the "non-performing" machine because J.S. McCarthy did not bother to articulate in its statement of additional material facts the factual basis for its claim that the machine is "counterfeit."

printing jobs based upon the performance that Brausse promised and asserts that these estimates have been justified based on the experience J.S. McCarthy has since had with its replacement machine. (Id., ¶¶ 14, 17; see also id., ¶¶ 13, 15.) According to Ayotte, the data from the Hagen system enabled him to calculate additional costs of \$174,761.80, for the period December 1, 2003, through July 31, 2004, during which J.S. McCarthy used the Brausse machine. (Id., ¶¶ 8, 16.)

The spreadsheet on which Ayotte calculated or compiled J.S. McCarthy's damages is attached to his affidavit as Exhibit A and is the subject of Brausse's motion to exclude. In support of the motion to exclude Brausse offered numerous statements of fact concerning the discovery process, which reflect the following:

The Scheduling Order set September 28, 2004, as the deadline for making initial disclosures required by Fed. R. Civ. P. 26(a)(1). (Docket No. 24, ¶ 4.) In its initial disclosure pursuant to Rule 26, J.S. McCarthy provided the following computation of its claim for compensatory damages: “[Plaintiff] seeks damages in the amount of \$175,000.00 for lost income and expenses it has incurred as a result of the failure of the machine.” (Id., ¶ 5.) This computation of damages was produced on September 28, 2004. (Id., ¶ 6.) J.S. McCarthy's Rule 26 disclosure also included 171 pages of documents and 28 pictures which were produced shortly after the September 28 deadline, but none of these documents support any calculation of lost income and expenses resulting from the alleged failure of the machine. (Id., ¶ 7.) On October 29, 2004, Brausse served on J.S. McCarthy four deposition notices with accompanying requests for production of documents. (Id., ¶ 8.) Brausse's document requests, in part, asked for the following: “Any and all documents relating in any way to the operation, maintenance,

and repair of the Brausse Machine”; “Any and all documents relating to any claims raised in the remaining counts of Plaintiff’s Complaint including any and all documents which support any claim for damages”; and “Any and all documents relating in any way to the production of the Brausse Machine.” (Id., ¶ 9.) J.S. McCarthy offered the following response to each document request noted above: “J.S. McCarthy produced all documents in its possession responsive to this request in its initial production of documents on October 4, 2004. If J.S. McCarthy subsequently discovers documents responsive to this request, it will produce them.” (Id., ¶ 10.)

As of December 2004, when Brausse conducted the depositions of J.S. McCarthy's chief operating officer (Bill White), owner (Rick Tardiff), and the production supervisor responsible for operation of the Brausse 1050 Machine (Bill DiBenedetti), J.S. McCarthy had still not produced Ayotte's damages spreadsheet. Although Brausse had not yet obtained a copy of the document, the above-referenced depositions revealed to Brausse that J.S. McCarthy had performed a calculation of consequential damages using the information available in the Hagen system. (Id., ¶ 12.) The Hagen system does not record the nature of any problems experienced by the Brausse machine. (Id., ¶ 12(f).) That information was provided by the deponents. (Docket No. 33, ¶¶ 4, 5, 9, citing White Depo. at 33-34.) J.S. McCarthy's claim for \$175,000 in damages is predicated on Conrad Ayotte's analysis of the information compiled from the Hagan system. (Docket No. 24, ¶ 19.) On January 3, 2005, J.S. McCarthy finally produced Ayotte's spreadsheet. (Id., ¶ 13.) In the email message from plaintiff's counsel to defense counsel to which the spreadsheet was attached, plaintiff's counsel stated: “Attached is the analysis Conrad Ayotte used to develop that McCarthy lost \$175,000 as a result of the problems with the

. . . machine Brausse delivered to McCarthy. Conrad Ayotte did all the work on calculation of damages.” (Id., ¶ 20.)

Discussion

A movant is entitled to summary judgment only "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 judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d at 7. If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

A. *There is a genuine issue of material fact as to the existence of consequential commercial damages and Brausse fails to raise or brief any legal basis for precluding such an award on J.S. McCarthy's independent tort claims.*

According to Brausse, "[p]artial summary judgment is warranted because plaintiff has offered no facts to substantiate its \$175,000 damage claim, and also because the \$175,000 damage claim is prohibited by the terms of the contract between the parties." (Docket No. 23 at 1.) This aspect of Brausse's motion should be denied. As for the

factual contest, the summary judgment papers establish that there are genuine issues of material fact concerning both the existence of consequential damages and their dollar value. All of the J.S. McCarthy deponents appear to have testified concerning the Brausse machine's poor operation and downtime, which in itself supports an inference of injury in light of the nature of J.S. McCarthy's business. Moreover, J.S. McCarthy's expectations or projections about the machine's performance appear to be based on the knowledge and experience its witnesses collectively gained from observation of both the demo machines and the replacement machine. Finally, even if Ayotte's spreadsheet were excluded from evidence, Ayotte's testimony is sufficient in itself to support a non-speculative award of consequential damages. As for the legal challenge, J.S. McCarthy's complaint presents tort causes of action that could theoretically support an award of consequential damages independent of the warranty claims. Brausse has not cited any precedent that would support a finding that, as a matter of law, a contractual waiver of consequential commercial damages on a warranty theory, in itself, precludes a recovery for consequential damages on another theory. The only authority Brausse cites in this portion of its memorandum concerns the standards applicable to the interpretation of contract language.

B. J.S. McCarthy's late production of Ayotte's spreadsheet was harmless.

The Scheduling Order set September 28, 2004, as the deadline for making the initial disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure. Pursuant to that Rule, a party must make certain initial disclosures to other parties near the commencement of litigation, including disclosure of "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in

the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Fed. R. Civ. P.

26(a)(1)(B). Pursuant to Rule 26(e), a party is under a duty to supplement its discovery disclosures "at appropriate intervals . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Finally, Rule 37(c)(1) calls for the imposition of an exclusionary sanction against parties who, "without substantial justification" fail to comply with the discovery rules, unless they are able to show that their failure to comply is harmless.

J.S. McCarthy acknowledges that it failed to produce Ayotte's spreadsheet in accordance with the relevant deadlines set by this court and the discovery rules, due to "oversight," but maintains that its failure was harmless because the manner of Ayotte's analysis and the fact that he compiled data from the Hagen system were disclosed during a deposition conducted in December 16, 2004, roughly a month and a half before the period for discovery closed. (Docket No. 32 at 5-6.) Despite this information, Brausse declined to depose Ayotte. From J.S. McCarthy's perspective, it "should not be punished because Brausse chose to file a motion to exclude . . . rather than using the ample time left in discovery to investigate this issue." (Id. at 6.)

Although oversight is not a "substantial justification," I conclude that the December 16, 2004, disclosure and the January 3, 2005, production of the Ayotte spreadsheet was harmless because a sufficient opportunity remained for Brausse to conduct whatever discovery it desired concerning Ayotte's actual computation of consequential commercial loss. Ayotte's spreadsheet simply provides additional

supporting documentation for the \$ 175,000 damage claim that was part and parcel of this case from the time of the initial disclosure. It does not provide some new damage figure or any new theory of damages other than the theory disclosed and developed by the deposition testimony throughout the discovery period. This case is distinguishable from a situation in which the supplemental information substantially changes the complexion of the case or is produced after the close of discovery. See, e.g., Peterson v. Scotia Prince Cruises, Ltd., 222 F.R.D. 216, 217 (D. Me. 2004) (excluding expert designated after twice-extended expert designation deadline had passed and under circumstances where court concluded that permitting the late designation would delay the trial of the case); Roger Edwards, LLC v. Fiddes & Son, Ltd., 216 F.R.D. 18, 20 (D. Me. 2003) (excluding witnesses first disclosed in the plaintiff's pre-trial memorandum, after the close of discovery); Currier v. United Techs. Corp., 2003 U.S. Dist. LEXIS 21127, *14, 2003 WL 22799669, *4-*5 (D. Me. Nov. 21, 2003) (excluding complex financial documents produced on the eve of trial); Davies v. Datapoint Corp., 1995 U.S. Dist. LEXIS 21739, *14-*16 (D. Me. Oct. 31, 1995) (excluding expert opinion first disclosed after the deadline for filing dispositive motions). Of course, Brausse is not supposed to be burdened with ferreting out this kind of documentary information; if McCarthy intended to buttress its damages calculation with this kind of supporting spreadsheet, it should have provided the spreadsheet with its initial disclosures. Nor is the burden on Brausse to show that it was substantially prejudiced; McCarthy must show that the tardy production without substantial justification was harmless. See Roger Edwards, LLC, 216 F.R.D. at 20. Since Brausse did receive the information well in advance of the discovery deadline and since it has not been shown to be the sort of information that changed the amount of

damages sought or the theory of damages, it seems to me that in this case McCarthy's "oversight" was harmless. Had Brausse so chosen, it had plenty of discovery time left to do the one additional deposition this document might have required. Instead of completing its discovery, Brausse chose to file a motion for partial summary judgment before the end of discovery.³ The notion of litigating a case piecemeal as discovery progresses generates an unnecessary and duplicative motion practice. Parties are well advised to use the discovery period to complete discovery, and if it turns out that an "oversight" in initial disclosure compliance will unnecessarily prolong discovery or add unwarranted expense, the party whose oversight created the problem will be hard-pressed to argue it was harmless. In this case, neither circumstance presents itself and there is no reason to impose the Rule 37 sanction of exclusion. The spreadsheet, produced well before the close of discovery, reflected the same numbers and theory of consequential damages the plaintiff maintained under its theory of damages in its initial disclosures and at its 30(b)(6) depositions.

Conclusion

For the foregoing reasons, I **DENY** the motion to exclude and **RECOMMEND** that the court **DENY** the motion for partial summary judgment (Docket No. 23).⁴

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

³ In accordance with the dispositive motion deadline in the scheduling order, Brausse has now filed a motion for complete summary judgment on the entire case, raising additional issues. That motion has not yet been completely briefed.

⁴ Pursuant to 28 U.S.C. § 636(b)(1)(A), my ruling on the motion to exclude constitutes an order, rather than a recommendation. Any appeal from that order is governed by Rule 72(a) of the Federal Rules of Civil Procedure, rather than by 28 U.S.C. § 636(b)(1)(B), which separately governs any objection to my recommendation on the motion for partial summary judgment.

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

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated March 8, 2005

J S MCCARTHY CO, INC v. BRAUSSE
DIECUTTING AND CONVERTING
EQUIPMENT, INC

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Cause: 28:1332 Diversity-Other Contract

Date Filed: 06/23/2004

Jury Demand: Plaintiff

Nature of Suit: 190 Contract: Other

Jurisdiction: Diversity

Plaintiff

J S MCCARTHY CO, INC
doing business as
J S MCCARTHY PRINTERS

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V.

Defendant

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