

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

VIDEOADS, INC.,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 97-261-P-C
)	
MEDIAONE OF NEW ENGLAND, INC.,)	
)	
<i>Defendant</i>)	

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

The defendant, MediaOne of New England, Inc., moves for summary judgment on all claims raised against it after removing this action from state court. The plaintiff, VideoAds, Inc., raises claims of breach of contract, negligence and promissory estoppel and seeks punitive damages. I recommend that the court grant the motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate 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 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 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 nonmoving party and “give the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following facts in the summary judgment record are undisputed and appropriately supported. On August 5, 1985 the plaintiff and Continental Cablevision, Inc. (“Continental”) executed a written contract pursuant to which the plaintiff agreed to provide automatic advertisement insertion sales equipment and services for Continental’s cable television system in Saco and Old Orchard Beach, Maine. Contract, Exh. A to Statement of Material Facts Not in Dispute in Support of MediaOne’s Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 10), at 1, 3-5. The defendant is the corporate successor to Continental. Complaint, included in Notice of Removal (Docket No. 1), ¶ 2; Answer (Docket No. 2), ¶ 2. The written contract had a term of six years and required that any amendment be in writing. Contract at 1, 12.

No other written contract between the parties has been executed. Affidavit of Steven Feingold (“Feingold Aff.”),¹ attached to Defendant’s SMF, ¶ 12. The plaintiff continued to provide advertisement insertion sales equipment and services for the defendant until July 28, 1997. Affidavit of Claudia Richards (“Richards Aff.”), Exh. B to Statement of Material Facts Not in Dispute in Support of VideoAds’ Opposition to MediaOne’s Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 12), ¶¶ 4-6, 10. The plaintiff presented proposed written contracts to the defendant in 1991 and 1994, neither of which was executed by the defendant. Feingold Aff. ¶ 14. In March 1997 Steven Feingold, vice president/advertising for the defendant, invited the plaintiff to submit a bid for provision of sales and advertisement insertion for the defendant’s Saco system. *Id.* ¶¶ 2, 18-19. The plaintiff submitted a bid on May 1, 1997 and on May 9, 1997 Feingold requested in writing that the plaintiff revise its proposal. *Id.* ¶¶ 23-24. The plaintiff submitted another proposal on May 16, 1997. *Id.* ¶ 25. On May 29, 1997 Feingold sent the plaintiff written notification of the defendant’s intent to discontinue using the plaintiff’s service effective July 28, 1997. *Id.* ¶ 27.

The complaint filed in state court is dated July 1, 1997 and the summons apparently served on the defendant is dated July 2, 1997. The action was removed to this court by the defendant on August 1, 1997. Docket No. 1.

III. Discussion

Count I of the complaint alleges breach of contract. Complaint ¶¶ 1-15. Count II alleges negligence in “the handling of” the contract between the parties. *Id.* ¶¶ 16-20. Count III asserts a claim

¹ All of the affidavits submitted by both parties in connection with this motion for summary judgment are made on information and belief, in violation of the requirement of Fed. R. Civ. P. 56(e) that such affidavits be made on personal knowledge. I rely only on that information shown by the context of the affidavits to be within the personal knowledge of the affiants.

of promissory estoppel. *Id.* ¶¶ 21-25. Count IV raises a claim for punitive damages and attorney fees. *Id.* ¶¶ 24 [sic]-27.

A. Breach of Contract and Promissory Estoppel

Asserting that there was no contract between the parties after the term of the written contract expired, the defendant moves for summary judgment on Count I of the complaint. Similarly, the defendant argues that the record “is devoid of any promise by MediaOne on which VideoAds could rely,” Defendant’s Memorandum of Law in Support of Its Motion for Summary Judgment (Docket No. 9) at [9],² and that it is therefore entitled to summary judgment on Count III of the complaint. Relying on reported cases based on New York state law, the plaintiff responds that the continuation of performance by the parties after the expiration of the written agreement raises an implication of mutual assent to a new contract containing the same provisions. On the issue of promissory estoppel, the plaintiff points to an alleged promise by employees of the defendant “to permit VideoAds to provide ad insertion services to [the defendant] on an annual calendar basis even if a valid and binding contract is not found to exist.” Plaintiff’s Memorandum of Law in Support of Its Objection to Defendant MediaOne of New England, Inc.’s Motion for Summary Judgment (“Plaintiff’s Memorandum”) (Docket No. 11) at 10.

In the only similar Maine case my own research has unearthed, the Law Court in *Utica Mut. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 468 A.2d 315 (Me. 1983), held that a plaintiff could established the existence of an implied contract based on a course of dealing after a written contract had expired. *Id.* at 317. In addition, Maine law recognizes the existence of oral contracts established by a course of

² The pages of the defendant’s memorandum are unnumbered. Local Rule 7(e) requires that all pages be numbered at the bottom.

dealing between the parties. *E.g., Sunset Enter. v. Webster & Goddard, Inc.*, 556 A.2d 213, 216 (Me. 1989). Here, the plaintiff offers evidence that the parties entered into an oral agreement to continue with the ad insertion services and payment to the defendant, with the only difference from the written agreement being a calendar year term rather than the July termination date included in the written agreement, and that the plaintiff did continue to provide services and payment to the defendant. *Richards Aff.* ¶¶ 3-4. This evidence, disputed by the defendant, is material and sufficient under Rule 56 to prevent the imposition of summary judgment on Count I. The defendant's assertion that the language of the written contract allowing only written amendment bars an oral agreement with a termination date different from that established by the written agreement is without legal foundation. Indeed, the defendant cites no authority in support of this argument. Whatever contractual arrangement the parties may have had after the expiration of the written agreement, the written agreement had expired, and it was no longer in effect. None of its explicit terms can be enforced against either party at this time.

Maine law recognizes the doctrine of promissory estoppel as set forth in the Restatement (Second) of Contracts § 90. *June Roberts Agency, Inc. v. Venture Properties, Inc.*, 676 A.2d 46, 49-50 (Me. 1996). One element of this cause of action, and the only element addressed by the motion for summary judgment, is the existence of a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee. *Id.* at 49. This promise need not be express but may be implied from a party's conduct. *Id.* at 50. Contrary to the defendant's argument, the plaintiff has presented evidence of a promise made by an employee of the defendant that the plaintiff could continue to provide ad insertion services on a year-to-year basis until a long-term written contract could be negotiated, as well as evidence that the defendant provided the plaintiff with necessary information, on a calendar year basis, to enable it to perform. *Richards Aff.* ¶¶ 3, 5. While the

defendant clearly disputes this evidence, such a dispute is the essence of an issue appropriate for resolution at trial. The defendant is not entitled to summary judgment on Count III.

B. Negligence

The plaintiff describes Count II in its memorandum of law as raising the question “whether [the defendant] used reasonable care in its bidding process for a new contract.” Plaintiff’s Memorandum at 10. The facts listed by the plaintiff as material to this claim, interpreted in the light most favorable to the plaintiff, would support an allegation that the plaintiff was treated unfairly or did not receive treatment equal to that extended to other bidders. Essential to a claim of negligence is the existence of a duty running from the defendant to the plaintiff which has been breached. *E.g., Parker v. Harriman*, 516 A.2d 549, 550 (Me. 1986). Without citation to authority, the plaintiff identifies the duty here as “a duty to employ a reasonable bidding process for the new contract and to use reasonable care in the implementation of this bidding process.” Plaintiff’s Memorandum at 9. My own research has disclosed no mention of such a duty imposed on private parties by Maine law. In the absence of such authority, the plaintiff has presented no reason for this court to find that such a duty exists. The defendant is entitled to summary judgment on Count II of the complaint.

C. Punitive Damages

Punitive damages are available under Maine law only for tortious conduct, *Tuttle v. Raymond*, 494 A.2d 1353, 1360 (Me. 1985), and only “if the plaintiff can establish by clear and convincing evidence that the defendant’s conduct was motivated by actual ill will or was so outrageous that malice is implied,” *Fine Line, Inc. v. Blake*, 677 A.2d 1061, 1065 (Me. 1996). If the court adopts my recommendation that summary judgment be entered for the defendant on Count II, summary judgment

is also in order on Count IV, because no claim sounding in tort will remain in this action.

Even if that were not the case, the plaintiff would not be entitled to present a claim for punitive damages at trial on the basis of the summary judgment record. The plaintiff offers the following evidence to support its claim: Feingold only requested a bid from the plaintiff after the plaintiff learned independently that another party would be “taking over” its ad insertion business with the defendant, Feingold refused to schedule a meeting with representatives of the plaintiff concerning its bid, and Feingold was aware that termination of the plaintiff’s services in July rather than at the end of the calendar year would render the plaintiff unable to fulfill its contractual obligations to its advertisers. Plaintiff’s Memorandum at 13-14. None of these facts rises to the level of actual ill will or conduct so outrageous that malice may be implied. *See Tuttle*, 494 A.2d at 1360-63.

The plaintiff requests this court to defer ruling on the motion for summary judgment on the punitive damages count until the plaintiff has had an opportunity to take the deposition of Feingold, the person who made the decision to terminate the plaintiff’s services. Plaintiff’s Memorandum at 14. However, the plaintiff has not complied with Fed. R. Civ. P. 56(f) in making this request, nor does it specify what additional evidence of malice it will seek to develop in this deposition. Under these circumstances, I conclude that the plaintiff will in any event be unable to present evidence of malice sufficient to support a claim for punitive damages. The defendant is entitled to summary judgment on Count IV.³

IV. Conclusion

³ The plaintiff does not address its claim for attorney fees in its opposition to the motion for summary judgment on Count IV. Therefore, that claim is waived. *Winters v. FDIC*, 812 F. Supp. 1, 6 (D. Me. 1993).

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to Counts II and IV of the complaint, 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 21st day of January, 1998.

*David M. Cohen
United States Magistrate Judge*