

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FORUM ADMINISTRATIVE SERVICES)
LIMITED LIABILITY COMPANY,)
et al.,)

Plaintiffs

v.

WESTWOOD VENTURES, LTD., et al.,)

Defendants

Docket No. 97-82-P-H

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

The plaintiffs, four affiliated corporations¹ with headquarters in Maine, Affidavit of David I. Goldstein (“Goldstein Aff.”) (Docket No. 23) ¶ 2, seek summary judgment on the counterclaim of defendant Westwood Ventures, Ltd. (“Westwood”), which alleges fraud, negligent misrepresentation, breach of contract and negligence in four counts and seeks punitive as well as compensatory damages. First Amended Answer and Counterclaim (“Counterclaim”) (Docket No. 19) at 6-23. The action arises out of an attempt to launch a new mutual fund in 1996. The amended complaint alleges breach of contract, unjust enrichment and fraudulent conveyance. Amended

¹ The plaintiffs are Forum Administrative Services Limited Liability Company, Forum Financial Services, Inc., Forum Financial Corp., and Forum Advisors, Inc. While some of the counts in the amended complaint present claims for one or fewer than all of the plaintiffs, the parties have treated all four as one entity for purposes of the motion for summary judgment, and the counterclaim refers only to the plaintiffs collectively. This recommended decision will use the term “Forum” to refer to all of the plaintiffs.

Complaint at 9-14. 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 that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). 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 undisputed facts are included by the parties in their respective statements of material fact and appropriately supported by the summary judgment record.² Gary Miller, an attorney in New York City, and his friend, Adam Zalta, decided to create a mutual fund consisting of equities in sports-related companies. Deposition of Gary Miller (“Miller Dep.”), included in Appendix (“Mem. App.”) to Defendant’s Memorandum, at 5-12, 47-48, 52. Miller had no experience in the mutual fund industry other than as an investor. Deposition of Mark Kaplan (“Kaplan Dep.”), included in Mem. App., at 88. Miller contacted Forum and spoke with Mark Kaplan about starting Sportsfund. Miller Dep. at 68-72.

Forum advises and services a “family” of mutual funds, all of which are part of Forum Funds, an open-end management investment company. Goldstein Aff. ¶ 3. At the time of the development of Sportsfund, the Forum funds included Maine and New Hampshire bond funds, two bond funds sold primarily to trust companies, and two equity funds sold primarily to clients of H. M. Payson & Co. of Portland, Maine. *Id.* ¶¶ 3-4. Forum had no experience in marketing a sector mutual fund. Kaplan Dep. at 42.

By letter dated March 8, 1996 Kaplan submitted a proposal to Miller setting forth the services

² Some of the statements included in Westwood’s Statement of Material Facts (“Def. SMF”), included in its Memorandum of Law in Opposition to Plaintiffs’ Motion for Summary Judgment (“Defendant’s Memorandum”) (Docket No. 27) at pp. 7-19, are not supported by citations to the summary judgment record and therefore will not be considered by the court. *E.g.*, ¶¶ 30 and parts of 14, 32, 33, & 34. Some of the statements are based on hearsay, *e.g.*, ¶¶ 15, 16, & 22, and the plaintiffs have objected to such statements. Plaintiffs’ Reply Memorandum in Support of Motion for Summary Judgment (Docket No. 30) at 2-3 & n. 2. Hearsay is inadmissible at trial, and, given the plaintiffs’ objection, cannot be considered in connection with a motion for summary judgment. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1980); *Benjamin v. Aroostook Medical Ctr.*, 937 F. Supp. 957, 964 (D. Me. 1996). The plaintiffs also appropriately object to Westwood’s citation of its own expert witness designation, Exh. 2 to the Deposition of Peter F. Muratore, part of the Mem. App., as evidence to support some of the assertions included in its SMF, *e.g.*, ¶¶ 5, 8, 14, 16E, & 16F. I rely on none of these statements, or the expert witness designation, in reaching my recommended decision.

that Forum would provide to Sportsfund. Exh. 5 to Kaplan Dep. (“Proposal”). Attached to the proposal was a “fund profitability analysis” prepared by Kaplan, Kaplan Dep. at 104, that showed, inter alia, “total advisory fees” in each of three scenarios, each with a different figure for “average net assets,” ranging from \$25,000,000 to \$100,000,000, Exh. 5 to Kaplan Dep. at [4]. The parties agree that this proposal was adopted by reference in a letter agreement dated April 1, 1996 and signed by Kaplan and Miller, who signed as president of Westwood. Exh. 8 to Kaplan Dep. (“Letter Agreement”). Westwood was the “named investment advisor” for Sportsfund under the Forum proposal. Exh. 5 to Kaplan Dep. at [2]. Before the letter agreement was signed, Kaplan informed Miller that Forum had a network of 75 broker/dealers who could sell Forum mutual funds. Miller Dep. at 75. These broker/dealers entered into selected dealer agreements with Forum that permitted them to offer and sell shares of the Forum funds. Goldstein Aff. ¶ 5. “All but a very few” of these agreements automatically included any new fund that might be added to the Forum family of funds. *Id.*

On June 14, 1996 the board of trustees of Forum Funds approved the addition of Sportsfund to the Forum Funds family of mutual funds. Forum Funds, Minutes of the Meeting of the Board of Trustees, June 14, 1996, Exh. A. to Goldstein Aff., at 17-22. Sportsfund was available for sale as of August 1, 1996. Goldstein Aff. ¶ 7. By the terms of the letter agreement, Westwood was responsible for marketing Sportsfund. Exh. 5 to Kaplan Aff. at [2]. Westwood made an offering of its preferred stock, hoping to raise \$2.5 million, of which \$1.8 million would be used to advertise and promote Sportsfund. Exh. 12 to Plaintiffs’ Motion for Summary Judgment on Defendant Westwood Ventures’ Counterclaims (“Motion”) (Docket No. 22) at 10. This “private placement” of stock was terminated, apparently without any income to Westwood. Exhs. 22 & 23 to Kaplan Dep. Westwood ultimately spent about \$90,000 on advertising and promotion of Sportsfund. Miller Dep. at 161.

By December 23, 1996 Sportsfund had attracted investments of less than \$500,000, a significant

portion of which came from Miller and Zalta, and their families and friends. Goldstein Aff. ¶ 8. On that day, the trustees of Forum Funds voted to close Sportsfund. Meeting of the Board of Trustees of Forum Funds, Exh. B to Goldstein Aff., at 3-4. On March 11, 1997 Forum filed this action, seeking to recover “over \$136,935.36” that it claims is owed by Westwood under the letter agreement and other agreements between Westwood and various individual Forum corporations, or on equitable theories of recovery. Complaint (Docket No. 1) at ¶¶ 1, 30- 50. The First Amended Complaint, filed on September 16, 1997, does not change the gravamen of the claims against Westwood. Westwood’s counterclaim seeks damages of “no less than \$5,000,000.” Counterclaim ¶¶ 58, 62, 67, & 76. Miller testified at deposition that Westwood’s claimed damages include approximately \$200,000 in out-of-pocket expenses; \$9.5 million in lost revenue, based on Kaplan’s “fund profitability analysis;” \$300,000 due to Westwood’s inability to act as an investment advisor for any other fund after the failure of Sportsfund; and \$200,000 due to the inability of the officers of Westwood to engage in investment advising in the future.³ Miller Dep. at 18-23.

III. Analysis

A. Breach of Contract

Forum first argues that Westwood lacks standing to raise a breach of contract claim because the letter agreement requires Forum only to provide services to Sportsfund. However, the letter agreement is signed by representatives of Forum and Westwood, refers to a further contract to be executed between Westwood and Forum, and, most significantly, states that Forum and Westwood “agree to use their best

³ At the final pretrial conference held in this action on February 6, 1998, counsel for Westwood stated that the damages it seeks consists of \$206,000 in out-of-pocket losses, \$100,000 lost investment capital, \$400,000 in lost good will, and lost profits of \$1,000,000 per year for up to five years. Report of Final Pretrial Conference and Order (Docket No. 33) at 2.

efforts to organize and start-up the Fund and take all required steps to commence the Fund's operations in accordance with the Proposal." Letter Agreement at 2. The latter is a contractual term between Forum and Westwood. Westwood thus has standing to raise a claim of breach of this term, at the very least.⁴ Given the fund profitability analysis by Kaplan showing income to Westwood at various levels of investment in the Fund, Forum cannot seriously contend that Westwood did not stand to benefit from Forum's dedication of its best efforts to organize and start-up Sportsfund. If Sportsfund was not well organized, or if its start-up was inhibited, Westwood could be harmed. By the terms of the letter agreement, for example, "if the Fund is not sufficiently successful enough [sic] to repay Forum within 24 months of its commencement of operations, [Westwood] will at that time pay Forum any outstanding balance of the \$75,000." Letter Agreement at 1.⁵

Forum argues in the alternative that there is no evidence in the record that it had any contractual duty to perform any specific actions beyond those which it did perform. However, Westwood has provided deposition testimony from an expert witness concerning the steps necessary to "manage the organization and start-up of the Fund," as Forum undertook to do in the Letter Agreement, using Forum's "best efforts" as a member of the mutual fund industry,⁶ and to "oversee[] the filing, launch,

⁴ My finding that Westwood has standing to assert breach of the Letter Agreement makes it unnecessary to address the parties' dispute concerning Westwood's possible status as a third-party beneficiary of the Forum Funds Distribution Services Agreement ("Distribution Agreement"), Exh. 18 to Motion, and that document's requirement that it be interpreted in accordance with New York law, *id.* at 8.

⁵ The \$75,000 was to be paid to Forum "to organize and start up the Fund," and was immediately payable, although Forum agreed not to collect it "until the Fund has adequate cash flow." Letter Agreement at 1.

⁶ For example, the expert stated that Miller should have been provided by Forum with back-up for his marketing efforts, including introductions to the people he needed to see at the broker/dealers with which Forum had sales agreements, Deposition of Peter F. Muratore ("Muratore (continued...)

and ongoing operation” of Sportsfund, in the words of Forum’s proposal that was incorporated into the Letter Agreement, Proposal at 1. While Forum contends that these actions were not necessary to fulfill its contractual obligations, that is the essence of a dispute that should be reserved for trial.

Forum asserts that Westwood has provided no admissible evidence that it failed to perform these actions. However, Mark Kaplan, the employee of Forum most involved with Sportsfund, testified at deposition that he was not aware of any steps taken by Forum before the effective date of Sportsfund to obtain approval of the fund by any of the broker/dealer firms with which Forum had sales agreements, that Miller was left to find out on his own who he should contact at these firms in order to obtain approval of the fund, and that no one from Forum contacted these firms prior to the effective date of Sportsfund to inquire about their willingness to trade the fund, Kaplan Dep. at 76, 114, 115, all actions that Westwood’s expert witness testified were Forum’s responsibilities under the letter agreement. In addition, Linda Romero Black of Forum testified at deposition that paperwork necessary for “back office” approval of Sportsfund at the broker/dealer firms was not done before the fund was launched and that some of these firms required specific information from Forum to be input into their systems in order to facilitate trading of Sportsfund, which information Forum did not begin to provide until September 13, 1996, some six weeks after the fund was launched. Deposition of Linda Romero Black (“Black Dep.”), included in Mem. App., at 25, 72-73, & Exh. 9. These actions are also inconsistent with Forum’s responsibilities as identified by Westwood’s expert witness. Interpreting this

⁶(...continued)

Dep.”), included in Mem. App., at 69-72, 72-79, 106-08; that the failure to provide Miller with such assistance was inappropriate given Forum’s responsibility for administration and operation of Sportsfund under the Letter Agreement, *id.* at 85-86; that Forum should have sought “back office approval” for Sportsfund, *id.* at 89-91; and that Forum should have assisted Miller by identifying the individuals at the broker/dealers with which it had sales agreements who could have approved Sportsfund for trading by those firms, a necessary step before individual brokers could sell shares in the fund, *id.* at 110-11.

evidence in the light most favorable to the party opposing the motion for summary judgment, I conclude that there are disputed issues of material fact that preclude summary judgment for Forum on Count III of the counterclaim.

B. Fraud

Under Maine law, common-law fraud requires:

(1) a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage.

Butler v. Poulin, 500 A.2d 257, 260 (Me. 1985).

Westwood presents only one assertion or representation by Forum as the basis for this claim: Kaplan's "express representation that Forum had or would have selected dealer agreements with dozens of brokers willing and able to sell Sportsfund when Sportsfund became effective." Counterclaim ¶ 26. Specifically, Miller testified that Kaplan told him that Forum had a "network" of "upward of 75 broker/dealers," and that Kaplan implied that any broker at any of these firms could sell the fund if it "c[a]me under" the Forum family of funds. Miller Dep. at 75-76. Westwood does not contend that the statement concerning the number of broker/dealers with which Forum had agreements was false. Rather, it argues that

the critical issue for purposes of Westwood's fraud and misrepresentations [sic] claim is (i) whether Forum's *undisputed* failure to ensure that Sportsfund was first approved by the mutual fund manager at the [broker/dealer] and was Networked and Fund/Serv eligible, meant that *as a practical matter* individual brokers would not trade the Fund for their clients, which placed Sportsfund at a critical competitive disadvantage vis-a-vis other "equity funds"; and (ii) whether Miller *reasonably understood* Kaplan's representations about Forum's "existing network" as meaning that when it became effective, Sportsfund could be sold by Forum's brokers in a *commercially effective* manner and on an equal footing with other mutual funds.

Defendant's Memorandum at 22-23 (emphasis in original). The first of these "critical issues" does not present a claim of fraud or misrepresentation, but rather sounds in negligence. The second stated issue suggests that Westwood bases its claim of fraud on Forum's alleged failure to disclose that its broker/dealers would not sell shares in Sportsfund as soon as it became available unless other steps were taken, including manager approval at each broker/dealer firm and electronic order capability.

The only admissible evidence in the summary judgment record to support Westwood's position is the memorandum of Linda Romero Black and her testimony concerning it. Black Dep. at 71-75 & Exh. 9. The memorandum and the testimony make clear that Black was not aware of the difficulties that a broker might encounter in selling Sportsfund before early September 1996 and that she then contacted the broker/dealers with which Forum had sales agreements to encourage those firms to take the necessary steps to add Sportsfund to their internal systems. Ms. Black testified that she believed it would be important for a wholesaler of mutual funds to know which broker/dealers had internally approved the fund for sale. Black Dep. at 34-35. Kaplan testified that Forum was aware that some of its broker/dealers has an internal approval process for new funds at the time Sportsfund was introduced. Kaplan Dep. at 112-13.

There is no evidence in the summary judgment record of a false representation made by Forum. Westwood essentially argues that Forum's nondisclosure concerning the need for further steps before Sportsfund could be sold in a commercially practical manner by the broker/dealers amounts to a false representation, because a reasonable person in Miller's position would have interpreted Kaplan's actual statement to assure the ability of brokers to sell the fund without problems or inconvenience immediately upon its availability. In Maine, silence may constitute the supplying of false information for purposes of fraud. *Horner v. Flynn*, 334 A.2d 194, 203 (Me. 1975), *overruled on other grounds*, *Taylor v. Commissioner of Mental Health & Mental Retardation*, 481 A.2d 139 (Me. 1984). While

fraud must be proved at trial by clear and convincing evidence, the court's task in ruling on a motion for summary judgment is merely to determine whether there is any evidence in the record from which the trier of fact would be able to draw the necessary factual conclusions to establish a claim of fraud. Interpreting the evidence in the summary judgment record in the light most favorable to Westwood, I cannot conclude as a matter of law that no reasonable trier of fact could find support for each of the elements of a claim that Forum knowingly withheld information from Westwood in order to induce Westwood to launch Sportsfund through Forum. Accordingly, Forum is not entitled to summary judgment on Count I of the counterclaim.

C. Negligent Misrepresentation

Maine law adopts the Restatement (Second) of Torts definition of negligent misrepresentation.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990). That definition provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1) (1977). There is no scienter requirement. *Chapman*, 568 A.2d at 830. An omission by silence may be sufficient to establish the element of supplying false information for purposes of negligent misrepresentation. *Binette v. Dyer Library Ass'n*, 688 A.2d 898, 903 (Me. 1996).

The only difference between the analysis of this claim and that presented above for the fraud claim is that actual knowledge on the part of the party conveying the false information is not necessary to establish negligent misrepresentation. The summary judgment evidence on this point is inconclusive,

a fact which itself suggests that summary judgment is not appropriate. Muratore’s testimony provides the basis for a conclusion that Forum should have obtained or communicated certain information about the steps necessary to facilitate sales of shares in Sportsfund that was not communicated to Westwood. *E.g.*, Muratore Dep. at 69-72, 77-78, 126-27. That is sufficient to avoid the entry of summary judgment on this claim.

D. Negligence

Both Forum and Westwood present minimal arguments regarding Count IV of the counterclaim, which alleges negligence. Forum bases its motion for summary judgment on the argument, discussed earlier, that Westwood lacks standing to raise such a claim because Forum owed a duty, if any, only to Sportsfund.⁷ However, the expert testimony of Muratore, construed favorably to Westwood, provides the basis for a claim that Forum had certain duties toward Westwood arising out of their relationship. Forum’s suggestion that the only duties that may give rise to a negligence claim by Westwood are those explicitly set forth in a written agreement is incorrect.

Tort obligations are imposed by law, to be distinguished from obligations arising from one party’s promise to another. Negligence involves a duty recognized by law requiring a party to conform to a certain standard of conduct for the protection of others and a failure of that party to conform to the

⁷ Forum argues that language in the Distribution Agreement limits its tort liability to instances of “willful misfeasance, bad faith or gross negligence.” Motion at 21. It is not necessary for purposes of the motion for summary judgment to decide whether the Distribution Agreement, to which Westwood is not a party, applies to Westwood’s claims because Westwood raises a minimally adequate claim of common-law negligence under Maine law, independent of the Distribution Agreement, as discussed *infra*. This also makes it unnecessary to consider the question whether Forum could, under the circumstances, disclaim any obligations imposed by tort law. *See generally* W. Keeton, *Prosser and Keaton on the Law of Torts* (“Prosser”) § 92 at 656 (5th ed. 1984).

standard, resulting in loss or damage to a party within the protection of the standard. Westwood's expert witness testified concerning the standard of conduct for a reasonable wholesaler of a new mutual fund, which was Forum's role regarding Sportsfund. *E.g.*, Muratore Dep. at 34, 85-86. *See also* Prosser § 32 at 185-93 (discussing standard applicable to defendant with skill or knowledge superior to that of plaintiff).

On the showing made by the parties, I cannot conclude that there is an absence of evidence to support Westwood's negligence claim. Forum is not entitled to summary judgment on Count IV of the counterclaim.

E. Damages

1. Compensatory Damages

Relying on both New York and Maine law, Forum argues that any claim by Westwood for lost profits is too speculative as a matter of law and that therefore it is entitled to summary judgment on any claim for damages other than Westwood's out-of-pocket expenses incurred in the Sportsfund venture. *See, e.g., Eckenrode v. Heritage Management Corp.*, 480 A.2d 759, 765 (Me. 1984) (prospective profits recoverable as damages only if they can be estimated with reasonable certainty); *Ashland Management, Inc. v. Janien*, 624 N.E.2d 1007, 1010 (N. Y. 1993) (damages for lost profits may only be recovered if within contemplation of parties at time they entered into contract and if capable of measurement with reasonable certainty).⁸ Forum bases its argument on Miller's lack of experience in the mutual fund business and the testimony of Westwood's expert witness that he is unable to give an opinion on the

⁸ I base my analysis of the motion for summary judgment on this issue on both Maine and New York law so that it will not be necessary to revisit this issue should the court subsequently determine that New York law governs one or more of the claims raised in the counterclaim.

question whether Sportsfund would have succeeded if Forum had acted as Westwood contends it should have acted. Without citation to the record, Forum asserts that liability for lost profits was not within the contemplation of the parties, presumably when they entered into their contractual relationship.

In response, Westwood relies primarily upon the Fund Profitability Analysis produced by Forum in March 1996. Proposal at [3]-[5]. Kaplan testified that this analysis was “[n]ot unreasonable, perhaps optimistic,” and that it was an optimistic, but not unreasonable goal, to “grow the fund” to \$50 million within the first six months. Kaplan Dep. at 104-05. Miller testified that Kaplan told him that the fund could obtain \$100 million in assets within six months of SEC approval and that \$500 million in total assets was a “reachable goal.” Miller Dep. at 157-58. Here, the amount of damages is not speculative in the sense that it is simply uncalculable. In its profitability analysis, Forum has laid out the essentials for a calculation of damages for any of several given levels of fund assets. The issue for resolution at trial is whether any of these levels was more likely than not to have been reached, and in what interval of time. Interpreted as required at the summary judgment stage of this proceeding, the evidence in the summary judgment record is sufficient to preclude the granting of summary judgment for Forum on the issue of the availability of damages for lost profits, both as to specificity and as to the likelihood that such damages were within the contemplation of the parties at the relevant time.

2. Punitive Damages

Westwood seeks punitive damages on all counts of its counterclaim. Forum seeks a summary judgment that Westwood may not recover punitive damages. Westwood does not respond to this portion of Forum’s motion. It has therefore waived any objection. Nonetheless, because this is a motion for summary judgment, the court will consider the merits of the motion on the basis of the materials filed by the moving party. *Redman v. FDIC*, 794 F. Supp. 20, 22 (D. Me. 1992).

Under Maine law, punitive damages are not available for breach of contract. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989). If New York law applies to any of the claims raised in the counterclaim, it makes punitive damages available for breach of contract only if the offending conduct was “aimed at the public generally.” *Rocanova v. Equitable Life Assurance Soc.*, 634 N.E.2d 940, 943 (N.Y. 1994). There is no evidence in the summary judgment record that any of Forum’s actions or inactions of which Westwood complains were aimed at the public. Westwood is not entitled to punitive damages on its breach of contract claim.

Punitive damages are available in Maine for tortious conduct upon a showing of actual malice or conduct so outrageous that malice toward the plaintiff can be implied. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985). Under New York law, punitive damages are available in tort cases “so long as the very high threshold of moral culpability is satisfied.” *Giblin v. Murphy*, 532 N.E.2d 1282, 1284 (N.Y. 1988) (upholding award on findings of willful, wanton and reckless misconduct). Again, the summary judgment record contains no evidence capable of meeting either the New York or the Maine standard. Forum is entitled to summary judgment on Westwood’s claim for punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiffs’ motion for summary judgment on the counterclaim of defendant Westwood Ventures, Inc., be **GRANTED** as to any claim for punitive damages raised in the counterclaim 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 18th day of February, 1998.

*David M. Cohen
United States Magistrate Judge*