STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

Location: Portland
Docket No.: BCD-CV-13-15

ARUNDEL VALLEY, LLC et al.,

Plaintiffs,

v.

BRANCH RIVER PLASTICS, INC., et al.,

Defendants.

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants Branch River Plastics, Inc., ["Branch River"] and Robert Mayo [collectively "Defendants"] move for summary judgment with respect to all counts asserted against them by Plaintiffs Arundel Valley, LLC ["Arundel"] and Kate's Butter, Inc. ["Kate's"]. The Complaint alleges that Branch River is liable—and Mr. Mayo is personally liable—to Plaintiffs for damages arising out of roof panels supplied by Branch River to Arundel's butter making facility [the "Facility"] during construction.

II. MATERIAL FACTS

The following facts are undisputed, except where noted:

Arundel owns a butter-making facility in Arundel, Maine. (Supp. S.M.F. ¶ 1; Opp. S.M.F. ¶ 1.) Kate's leases the premises from Arundel and runs a butter manufacturing operation.[1] Both companies are owned and operated by Dan and Karen Patry. (Supp. S.M.F. ¶ 3; Opp. S.M.F. ¶ 3.) Dan Patry has authority to make decisions on behalf of Arundel with

[1] Kate's was started by the Patrys in the basement of their Old Orchard Beach home. The Patrys sought to expand their home business into the technologically advanced Facility. (Pls.' Opp. Mot. 1-2.)

respect to the design and construction of the Facility. (Supp. S.M.F. ¶ 4; Opp. S.M.F. ¶ 4.) In preparation for the construction process, the Patrys hired a team of professionals—including architect Kevin Browne ("Browne"), general contractor Peachey Builders, and other design professionals. (Defs.' Addt'l S.M.F. ¶ 3; Opp. Defs.' Addt'l S.M.F. ¶ 3.) Mr. Patry intended to construct an energy efficient facility by utilizing Structural Insulated Panels ("SIPs").[2] (Supp. S.M.F. ¶ 11; Opp. S.M.F. ¶ 11.); (Defs.' Addt'l S.M.F. ¶ 4.)

Branch River, manufactures "expanded polystyrene building and packing products," including SIPs (Supp. S.M.F. ¶¶ 6-7; Opp. S.M.F. ¶¶ 6-7.) In September 2011, Arundel entered into a contract with Peachey Builders to construct the foundation and exterior shell of the Facility. (Supp. S.M.F. ¶ 9; Opp. S.M.F. ¶ 9.) Under the terms of the contract, the roof and the walls of the Facility were to be constructed with SIPs. (Supp. S.M.F. ¶ 10.) Mr. Patry made clear his intention to utilize SIPs in the construction and gave Peachey Builders the responsibility of procuring appropriate materials.[3] (Supp. S.M.F. ¶ 13; Opp. S.M.F. ¶ 13.) Peachey Builders contacted House & Sun, a distributor of solar and green building materials located in Brooksville, Maine, to obtain an estimate on the SIPs required for the construction of the Facility. (Supp. S.M.F. ¶ 14.) Peachey Builders gave House & Sun preliminary drawings prepared by architect Browne. (Supp. S.M.F. ¶ 16.) Thereafter, House & Sun hired Branch River to prepare drawings depicting a configuration of roof and wall SIPs.[4]

[2] SIPs consist of two pieces of oriented strand board with a core of "expanded polystyrene foam in between." (Defs. Addt'l S.M.F. ¶ 6.) SIPs prevent a "hot roof" and help to prevent ice damming, accumulation of condensation, and shortening of the lifespan of shingles. (Pls.' Compl. ¶ 35.)

[3] The contract allowed Arundel to "sign off" on the products procured. (Opp. S.M.F. ¶ 13.)

[4] Arundel denies that any drawings were ever prepared. (Opp. S.M.F. ¶ 17.)

At the time, Branch River's website is alleged to have indicated that it was licensed to manufacture R-Control Products from AFM Corporation.[5] (Pls.' Opp. Mot. 3.) Further, according to Arundel, Kevin Arcand, an employee of Branch River, indicated to House & Sun that the SIPs provided would be licensed R-Control products. (Pls.' Opp. Mot. 2.) Branch River, however, points out that the initial drawings prepared for the project indicated that the roof would be comprised of vented SIPs and was labeled "Air-Flo" SIPs, not R-Control Air-Flo SIPs. Architect Browne reviewed and approved said drawings for general conformance with the design concept of the project. (Supp. S.M.F. ¶ 18; Opp. S.M.F. ¶ 18.)

On January 17, 2012, Branch River submitted a proposal or estimate[6] to House & Sun for the sale of the SIPs to be used in the project. (Supp. S.M.F. ¶ 19; Opp. S.M.F. ¶ 19.) Branch River's proposal or estimate did not indicate that Branch River's SIPs would be R-Control. On January 23, 2012, Kel House, of House & Sun, accepted Branch River's proposal or estimate. (Supp. S.M.F. ¶ 20; Opp. S.M.F. ¶ 20.) Under the Terms & Conditions, Branch River indicated the materials were subject to a "Standard Panel Warranty."[7] (Supp. S.M.F. ¶ 21; Opp. S.M.F. ¶ 21.) Thereafter, the Panels were delivered directly to the Facility jobsite.[8] Branch River provided instruction to the crew that installed the panels and Branch River's

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[5] R-Control is a registered trademark of AFM Corporation. AFM makes its products available to licensed facilities. Said licensed facilities must adhere to consistent standards to ensure high quality products. (Pls.' Compl. ¶ 34.) R-Control SIPs are manufactured under carefully controlled conditions and are recognized as *per se* code compliant. They are designed to block wind and moisture for high-energy efficiency. Branch River has a license to manufacture R-Control products. (Defs.' Addt'l S.M.F. ¶¶ 10-13.)

[6] The parties disagree as to whether there this was a proposal or an estimate.

[7] The Plaintiffs never received a copy of the Standard Panel Warranty until after dispute arose between the parties. (Defs.' Addt'l S.M.F. ¶ 31; Opp. Defs.' Addt'l S.M.F ¶ 31.)

[8] Branch River contends that it never received notice of any problems with the delivered SIPs upon delivery or installation. (Supp. S.M.F. ¶ 24.) Arundel contends that Branch River was aware that "SIP Tape" had not been delivered with the panels. (Opp. S.M.F. ¶ 25.)

sales manager visited the jobsite to guide Peachey Builders in the installation of the panels. (Defs.' Addt'l S.M.F. ¶ 36; Opp. Defs.' Addt'l S.M.F. ¶ 36.)

The contract between Arundel and Peachey Builders did not require R-Control SIP panels, but specified that the SIPs used in constructing the roof and the walls of the Facility should have "built-in airflow channels." (Supp. S.M.F ¶ 26; Opp. S.M.F ¶ 27.) Branch River provided vented "Air-Flo" SIPs for the roof. (Supp. S.M.F ¶ 27.) However, these panels were not licensed "R-Control" SIPs as Arundel had supposedly expected and as Branch River allegedly represented.[9] (Opp. S.M.F. ¶ 27.) After the installation of the SIPs provided by Branch River, Dan Patry designated his son, Chris Patry, a civil engineer, to assist in the project. (Supp. S.M.F ¶ 29; Opp. S.M.F ¶ 29.)

Upon speaking with a representative of R-Control, Chris Patry learned that the installed SIPs were not R-Control Air-Flo SIPs.[10] (Opp. S.M.F. ¶ 34.) Thereafter he contacted Branch River to request proof that the installed SIPs met the structural load capacity required by the town's Building Code. (Supp. S.M.F. ¶ 34) That contact appears to have been the first direct contact between Arundel and Branch River—Dan Patry and Chris Patry admitted not having known that Branch River was the manufacturer of the SIPs provided to the project until after the SIPS had been purchased and installed. (S.M.F. ¶¶ 28-30)

Branch River contends that while R-Control SIPs were not provided to the Plaintiff, the Plaintiff was provided with "Air-Flo SIPs." Branch River avers that there is no crucial

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[9] Arundel contends that the SIPs received were non-R-Control and therefore were not *per se* code compliant. Arundel contends that Branch River is not a manufacturer of R-Control products as they represented because they do not have a quality control manager. Such manager is alleged to be required in order for Branch River to maintain its R-Control license. (Pls.' Opp. Mot. 3.)

[10] On May 30, 2012, Chris Patry contacted Kel House to inquire about the factory warranty on what he thought to be R-control SIPs. (Supp. S.M.F. ¶ 31; Opp. S.M.F ¶ 31.) Chris Patry was concerned that the absence of SIP tape may void the warranty. House then contacted Bob Mayo, the President of Branch River, to as whether the warranty on the panels would still be honored. (Supp. S.M.F. ¶ 31) Branch River agreed to maintain the warranty notwithstanding the absence of SIP tape. (Supp. S.M.F. ¶ 32; Opp. S.M.F ¶ 32.)

difference between the two and they are manufactured by using exactly the same process. Branch River further insists that the only difference between the two is that Air-Flo SIPs have vents cut into one side of the polystyrene core. (Opp. Defs.' Addt'l S.M.F. ¶ 17.)

However, James Nagle, the Code Enforcement Officer for the Town of Arundel issued a verbal stop-work order to Peachey Builders and Arundel. (Supp. Addt'l S.M.F. ¶ 7; Opp. Defs.' S.M.F. ¶ 27.) The parties dispute the circumstances under which Mr. Nagle issued the stop-work order. However, the undisputed facts indicate that he directed that work stop until the load capacity of the installed SIPs could be determined. (Opp. Defs.' Addt'l S.M.F. ¶ 27.)

Robert Mayo, the president of Branch River, arranged to have sample Branch River SIPs tested for load bearing capacity, to demonstrate that the panels were in compliance with the Building Code. (Supp. S.M.F. ¶¶ 35, 36.) However, Arundel contests the validity of the test, as the panels tested were not the panels actually installed. (Opp. Defs.' Addt'l S.M.F. ¶ 35.) Chris Patry contacted Kevin Chamberlain, a registered professional engineer, who determined that there was a number of installation and manufacturing deficiencies in the Branch River SIPs as installed which could diminish the useful life of the roof. (Supp. S.M.F. ¶ 40; Opp. S.M.F ¶ 40.) As a result of this finding, Dan Patry had the roof removed from the Facility and replaced with a roof constructed of SIPs manufactured by Foard Panel. (Supp. S.M.F. ¶ 47; Opp. S.M.F. ¶ 47.)

III. STANDARD OF REVIEW

To survive a motion for summary judgment on a claim, "the [party asserting the claim] must establish a prima facie case for each element of [its] cause of action." *Bonin v. Crepeau*, 2005 ME 59, ¶ 8, 873 A.2d 346. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). A "material fact" is one that can affect the outcome of the case, and a

genuine issue exists when there is sufficient evidence for a fact finder to choose between competing versions of the fact. *See Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774. Although parties may differ as to the legal conclusions to be drawn from the record, summary judgment is proper where the facts are not in dispute. *See S.D. Warren Co. v. Town of Standish*, 1998 ME 66, ¶ 9, 708 A.2d 1019. The court views the evidence in the light most favorable to the non-moving party. *Webb v. Haas*, 1999 ME 74, ¶ 18, 728 A.2d 1261.

IV. DEFENDANTS' MOTION

The Motion for Summary Judgment of Defendants Branch River and Robert Mayo seeks summary judgment on all of the seven counts of the Plaintiffs' Complaint that pertain to Branch River and Mr. Mayo. The moving Defendants contend that the claims contained in Counts V through VIII (negligence, tortious interference, negligent misrepresentation, and intentional misrepresentation) of the Plaintiffs' Complaint are barred by the economic loss doctrine. They contend that Count X (unjust enrichment) is barred by the availability of legal remedies, and that Counts XI and XII (breach of warranties of merchantability and fitness for particular purpose) are barred because the Plaintiffs failed to meet conditions necessary to trigger Branch River's liability on its warranty for the panels.

Defendants further contend that notwithstanding the economic loss doctrine, the Plaintiffs' tort claims fail because Plaintiffs' have not made a *prima facie* showing that either Defendant is liable for any of the tort claims asserted. (Defs.' Supp. Mot. 1, 7) (citing *Davis v. R.C. Sons Pavin, Inc.* 26 A.3d 787, 790 (Me. 2011)). Specifically, the Defendants contend that relief is provided for tortious interference of contract "wherever a person, by means of fraud or intimidation, procures, either the breach of a contract or the discharge of a plaintiff, from an employment, which but for such wrongful interference would have continued." *MacKerron v.* Madura, 445 A.2d 680, 683 (Me. 1982) (citing *Perkins v. Pendleton*, 90 Me. 166, 176, 38 A.96, 99

(1897). The Defendants argue there is no factual basis for claiming that plaintiffs were forced to breach a contract as a result of fraud or intimidation by Branch River. (Defs.' Supp. Mot. 8.) Defendants also contend that Plaintiffs fail to meet the elements of both negligent and intentional misrepresentation as well as an equitable claim for unjust enrichment. Defendants aver that there is no basis for the Plaintiffs' claim against Robert Mayo personally as Plaintiffs cannot identify facts sufficient to state a plausible basis for imposing personal liability on Robert Mayo for damages associated with deficiencies in products manufactured and sold by the corporation. The court analyzes these arguments below.

Defendants also challenge the Plaintiffs' removal of Branch River's SIPs as being unnecessary and unjustified. They point out that the DeStefano & Chamberlain report recommended that the roof be repaired due to serious installation errors, not because of any product defect. (Defs.' Supp. Mot. 11.) The Defendants contend that the Plaintiffs lack evidence to prove that their decision to remove the roof was reasonable or necessary because of a product defect. (Defs.' Supp. Mot. 12.)

The Defendants next argue that Kate's is an improper party to this action, because Kate's is not the owner of the subject Facility and did not enter into a contractual relationship with the Defendants.

Branch River further argues that its warranty obligations are controlled by its 20-year factory warranty ["Warranty"]. Branch River contends that it sold the SIPs to House & Sun pursuant to a purchase order which provided that the standard Warranty applied. (Defs.' Supp. Mot. 9.) Said Warranty expressly warrants that the SIPs "will be free from defects in materials and workmanship on the date of final delivery to the Owner or Owner's representative." *Id.* However, Branch River asserts that said its liability on its Warranty was subject to conditions

that the Plaintiffs failed to fulfill.[11] Branch River argues that the Plaintiffs failed to have sampling and testing conducted in accordance with specified ASTM Test methods. Further, the Warranty was conditioned upon installation of the SIPs in strict accordance with SIP specifications and guidelines in effect at the time of installation.[12]

The Defendants contend they are entitled to summary judgment on the warranty claims asserted in Counts XI and XII of the Plaintiffs' Complaint "because the express condition pursuant to which Mayo agreed to maintain the Warranty was not fulfilled and because no approved testing was conducted by or at the behest of plaintiffs to demonstrate that the panels did not meet warranty value." (Defs.' Supp. Mot. 10.) Thus, if the Plaintiffs are permitted to proceed with their warranty claims, Branch River argues that its liability should be limited only to the original purchase price of the SIPs.

V. DISCUSSION

Economic Loss Doctrine

The Maine Law Court unequivocally adopted the economic loss doctrine in the matter *Oceanside at Pine Point Condominium Owners Assn. v. Peachtree Doors*, 659 A.2d 267 (Me. 1995). In *Peachtree*, the Law Court defined economic loss as "damages for inadequate value, costs of repair and replacement of defective product, or consequent loss of profits --without claim of personal injury or damage to other property." *Id.* at 270 n.4 (quoting *Moorman Mfg. Co. v. Nat'l Tank Co.*, 435 N.E.2d 443, 449 (Ill. 1982)). Thus, absent evidence of personal injury or property damage, "[c]ourts generally . . . do not permit tort recovery for a defective product's

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[11] The warranty language indicated that if the SIPS failed to meet Warranty value after sampling and testing, Branch River would deliver replacement SIPs or a refund of the original purchase. However, the values of the refund shall not exceed the original purchase price of the SIPs. (Defs.' Supp. Mot. 10.)

[12] In this case, while the Plaintiffs failed to utilize SIP tape in the installation of the roof, Mayo agreed that an alternative sealing procedure could be utilized to maintain the warranty. (Defs.' Supp. Mot. 10.)

damage to itself." *Id.* at 273; *see also In re Hannaford Bros. Co. Customer Data Security Breach Litig.*, 613 F. Supp. 2d 108, 127 (D. Me. 2009).

The Law Court in *Peachtree* further determined "[d]amage to a product itself . . . means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'" *Peachtree*, 659 A.2d at 270. The doctrine requires courts to "distinguish between a situation where the injury suffered is merely the 'failure of the product to function properly . . . [and] those situations, traditionally within the purview of tort, where the plaintiff has been exposed, through a hazardous product, to an unreasonable risk of injury to his person or property.'" *Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp. 2d 139, 142 (D. Me. 1999) (applying Maine law) (*citing East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868 (1986)).

The applicability of the economic loss doctrine is examined in the context of the particular tort claims asserted by the Plaintiffs.

Plaintiffs' Negligence Claim

In Count V of Plaintiffs' Complaint, Plaintiffs allege the Defendants were negligent in supplying the appropriate R-Control Air-Flo SIPs. The Plaintiffs contend that Defendant Branch River held itself out as capable of producing R-Control Air-Flo SIPS and subsequently breached any duty owed by failing to provide the appropriate SIPs.[13] (Pls.' Compl. ¶¶ 126-27.) Branch River contends that Plaintiffs' negligence claim is barred by the economic loss doctrine

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[13] "Negligent act" has been defined by the Maine Law Court as:

> [A] violation of the duty to use reasonable care toward another. . . . To sustain a cause of action in negligence, the plaintiff must prove (1) that the defendant owed plaintiff a duty of care, (2) that the defendant breached that duty, and (3) that the breach was an actual and legal cause of the injury suffered by the plaintiff.

Aliberti, LaRochelle & Hodson Eng'g Corp. v. F.D.I.C., 844 F. Supp. 832, 844 (D. Me. 1994) (citing *Wing v. Morse*, 300 A.2dd 491, 495-96 (Me. 1973); *Parker v. Harriman*, 516 A.2d 549, 550 (Me. 1986)).

because it is based solely on the assertion that Branch River failed to provide the goods allegedly requested and because Arundel faces only wholly economic damages.

A decade ago, the Federal District Court for the District of Maine applied the economic loss doctrine to preclude recovery in tort where parties to commercial contracts sought to recover in both tort and contract. *See Me. Rubber Int'l v. Envtl. Mgmt. Grp., Inc.*, 298 F. Supp. 2d 133, 138 (D. Me. 2004). However, Plaintiffs raise an argument that makes the application of the economic loss doctrine less clear. Plaintiffs contend that no contractual relationship exists between the parties. Rather it was Peachey Builders, Arundel's general contractor, who negotiated with Branch River to obtain the SIPs. To date, the law in Maine is unsettled as to whether the economic loss doctrine will bar a claim in tort when the damage is wholly economic, and when there is no contractual relationship between the parties. *Fireman's Fund*, 52 F. Supp. 2d at 143-44; *Banknorth, N.A. v. BJ's Wholesale Club, Inc.*, 394 F. Supp. 2d 283 (D. Me. 2005).

A few courts in the United States hold "that since the principle behind the economic loss doctrine is to prevent tort law's unreasonable interference with principles of contract law, the economic loss doctrine does not apply where there is no contractual relationship, and thus no privity between the parties." *Plourde Sand & Gravel v. JGI E., Inc.*, 917 A.2d 1250, 1254 (2007) (citing *Trinity Lutheran v. Dorschner Excavating*, 710 N.W.2d 680, 683 (Wis. 2006); *Indemnity Ins. Co. v. Am. Aviation*, 891 So.2d 532, 534 (Fla. 2004)). However, a majority of jurisdictions that have decided the issue hold that "[p]rivity of contract is not an element of the economic loss doctrine," based on the rationale is that "commercial disputes ought to be resolved according to the principles of commercial law rather than according to tort principles . . . . A disputant should not be permitted to opt out of commercial law by refusing to avail himself of

the opportunities which that law gives him." *Miller v. U.S. Steel Corp.*, 902 F.2d 573, 575 (7th Cir. 1990).[14]

The Plaintiffs argue that this court should follow the contractual relationship analysis and decline to apply the economic loss rule because the Plaintiffs are not in privity with the Defendant and therefore cannot recover its economic loss in an action for breach of contract.[15] However, this argument ignores the fact that there was no privity of contract between the plaintiff condominium association and the defendant window manufacturer in *Peachtree*, and the Law Court nonetheless applied the economic loss doctrine to bar the association's tort claims.

Injecting negligence liability into what is fundamentally a breach of warranty case not involving any damage to person or property would be inappropriate, because it would displace predictable contractual and warranty liability defined in the course of the transaction in favor of tort liability determined after the fact. The world of contract depends on large part on predictability of rights and obligations. Clearly, when a product causes personal injury or property damage, the harm can legitimately be viewed as a breach of a societal duty sounding in tort, as well as a breach of contractual and warranty duty, and tort remedies come into play, but when the product simply fails to perform as expected or guaranteed, there is no reason to depart from contractual and warranty remedies. This is essentially the basis for the *Peachtree* decision, and the court is constrained to follow it.

For these reasons, Defendants will be granted summary judgment on Plaintiffs' negligence claim in Count V.

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[14] *See also East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 875 (1986); *Rardin v. T & D Machine Handling, Inc.*, 890 F.2d 24, 28; *Anderson Electric, Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 249 (1986).

[15] The rationale behind the Plaintiffs' argument is that the Defendant likely knew or should have known the effect of its negligence on the Plaintiff.

Plaintiffs' Negligent Misrepresentation Claim

In Maine a party will be held liable for negligent misrepresentation "if in the course of his business he supplies false information for the guidance of others in their business transactions, and the other party justifiably relies upon it to his pecuniary detriment." *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992) (citing *Chapman v. Rideout*, 568 A.2d 829, 830 (Me.1990)); *see also Restatement (Second) of Torts* § 552.

In this case, the Plaintiffs identify the following bases for their misrepresentation claim: Branch River was aware that the SIPs provided were to be used in the construction of Kate's butter-making Facility. Branch River represented directly to Peachey Builders and other agents of Arundel that the SIPs provided would be R-Control Air-Flo SIPs. (Pls.' Opp. Mot. 10.) Branch River knew or should have known that the SIPs provided were not in fact R-Control Air-Flow SIPs. Because the SIPs were not as allegedly promised, Arundel had to remove the SIPs at great expense.[16] (Pls.' Opp. Mot. 11.)

There is a divide among jurisdictions concerning whether the economic loss doctrine permits recovery for wholly economic losses resulting from negligent misrepresentation on the part of the contracting parties or their agents. *See Gannett v. Pettegrow*, Civ.03-CV-228-B-W, 2005 WL 217036 (D. Me. Jan. 28, 2005) *report and recommendation adopted sub. nom. Gannet v. Pettegrow*, Civ.03-CV-228-B-W, 2005 WL 763276, at *7 (D. Me. Feb. 17, 2005). However, in *Peachtree*, the Law Court applied the economic loss doctrine to negligent misrepresentation claims in products liability cases not involving personal injury or damage to property other than the product itself. *Oceanside at Pine Point Condo. Owners Ass'n v. Peachtree Doors, Inc.*, 659

[16] Arundel contends that that Branch River represented itself as a seller of R-Control products and understood Arundel's project as requiring R-Control panels. Arundel asserts that Branch River knew or should have known that what they supplied to the project was not in fact R-Control materials.

A.2d 267, 273 (Me. 1995) (affirming the trial court's grant of summary judgment on a negligent misrepresentation claim); *see also Maine Rubber*, 298 F. Supp. 2d at 136.

Some exceptions to the rule have been identified in certain limited circumstances in Maine trial court decisions. For example, in *Pendleton Yacht Yard, Inc. v. Smith,* the Superior Court declined to apply the economic loss doctrine to a negligent misrepresentation claim where conduct by the defendant arose outside the scope of the contract. In *Pendleton,* the plaintiff had a contract with Marine Design & Survey, Inc. for an audio-gauging inspection to be completed on a landing craft the plaintiff considered purchasing. 2003 WL 21714927, at *1 (Me. Super. Mar. 24, 2003). The defendant, who was an accredited and certified marine surveyor, performed the requested services under the contract.[17] *Id.* However, it was alleged that the defendant made further observations and rendered opinions as to the condition and value of the boat that induced the plaintiff into purchasing the vessel. The court noted that any conduct by the defendant outside of the scope of the contract "would give rise to an action in tort notwithstanding the economic loss doctrine." *Id.* at 5.

In a Maine Business & Consumer Court case, the court also recognized an exception to the economic loss doctrine. *Camden Nat. Bank v. D & F Properties*, LLC, BCD-WB-RE-10-16 (Bus & Consumer Ct. Oct. 3, 2011, *Nivison J.).* In *Camden,* the Bank funded the defendants/counterclaim plaintiffs' purchase of commercial real estate in Monmouth, Maine where the defendants operated a convenience store and gas station known as the Pit Stop. The defendants relied on the professional expertise of a loan representative on behalf of the Bank. The representative promised that that the defendants would be timely funded by the Bank. In reliance on the representative's statements, the defendants began spending operating capital on

[17] The court noted, "[T]he circumstances surrounding the contract may give rise to an independent duty to exercise due care or similar duty in tort, in which case a breach may be actionable under both tort and contract theory." *Pendleton,* 2003 WL 21714927, at *3.

renovations for the Pit Stop. *Id.* at 3. Ultimately, as a result of delay in funding, the defendants defaulted on their loans and had to close the business. The Bank seized the defendants' accounts and instituted foreclosure proceedings. Given this set of facts, the court refused to apply the economic loss doctrine, noting "the doctrine does not apply appl[y] to claims of misrepresentation." *Id.* at 4.

While both of the above mentioned cases hint that there might be an exception to the economic loss doctrine as it applies to claims of misrepresentation, this view has yet to be adopted by the Law Court. As noted above, among the claims that the Law Court held in *Peachey* to be barred by the economic loss doctrine was a claim for negligent misrepresentation.

Further, neither *Pendleton* nor *Camden* involved a product as opposed to a service, and can be distinguished from the facts in *Peachtree* and in this case on that ground alone. As in *Peachtree* and *Maine Rubber*, "the critical issue here . . . is value and quality of what was purchased," and there is no reason not to limit the Plaintiffs to their remedies provided under the product warranties that apply. Thus, the Plaintiffs' negligent misrepresentation claim is barred by the economic loss doctrine. Defendants are entitled to summary judgment on the negligent misrepresentation claim in Count VII of the Complaint.

Plaintiffs' Intentional Misrepresentation Claim

The applicability of the economic loss doctrine to a claim of intentional misrepresentation is an open question under Maine law. *See American Aerial Servs. v. Terex USA, LLC.*, No. 2:12-cv-00361-*GZS* (D. Me. May 7, 2013). In Maine, fraudulent misrepresentation and intentional misrepresentation have been treated as the same tort. *Camden Nat. Bank v. D & F Properties, LLC.*, BCD-WB-RE-10-16 (Bus. & Consumer Ct. Oct. 3, 2011, *Nivison, J.*) (equating intentional misrepresentation and fraud). To prevail on a claim of fraudulent/intentional misrepresentation, the plaintiff must show:

> (1) that [the Defendant] made a false representation (2) of a material fact[18] (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing plaintiff to act in reliance upon it, and (5) plaintiff[s] justifiably relied upon the representation as true and acted upon it to [their] damage.

Mariello v. Giguere, 667 A.2d 588, 590 (Me. 1995) (citing *Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992)).[19] In the case at hand, Arundel contends the Defendants misrepresented that the SIPs provided were R-Control SIPs and that said SIPs were *per se* code compliant. Branch River allegedly knew that the SIPs provided were not R-Control as represented and as a result of Plaintiffs' reliance on the misrepresentations the Plaintiffs sustained pecuniary losses.

While the economic loss doctrine typically bars tort claims for wholly economic losses, Maine courts have held that the economic loss rule is inapplicable to fraud claims because in such claims "Plaintiff's injury is sustained at the time he makes the purchase in reliance on Defendant's purposeful misrepresentation." *Everest v. Leviton Mfg. Co.*, 2006 Me. Super. Lexis 12, at *5-*6 (Jan 13, 2006). Further, sister states have also recognized that the economic loss doctrine does not apply in instances where the tort is intentional. *First Choice Armor & Equip., Inc. v. Toyobo Am., Inc.*, 717 F. Supp. 2d 156, 163 (D. Mass. 2010) ("Although the economic loss doctrine bars recovery for pure economic loss in negligence and strict liability cases, it does not apply in instances where the tort is intentional.").

Arundel's fraud claim is based on alleged misrepresentations Branch River made to induce it to buy its products, independent of any breaches of warranty. In essence, the Plaintiffs allege that Branch River intentionally represented its SIPs to be R-Control SIPS when in fact they were not, and that Arundel purchased the SIPs in reliance on that

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[18] "To be material, the false or fraudulent representation must 'not only influence the buyer's judgment in making the purchase but also must relate to a fact which directly affects the value of the property sold.'" *Mariello*, 667 A.2d at 590 (citing *Bolduc v. Therrien*, 147 Me. 39, 43, 83 A.2d 126, 129 (1951)).

[19] Each of the above elements must be proved by clear and convincing evidence. *Butler v. Poulin*, 500 A.2d 257, 260 n. 5 (Me. 1985).

misrepresentation. Their contention regarding a misrepresentation is supported by statements on the Branch River website. They also contend that a Branch River employee told an employee of House & Sun that Branch River's SIPS would be R-Control. However, the remainder of the allegation—reliance on the alleged misrepresentation—lacks support in the record.

Nothing in any written contract or proposal in the record required Branch River to supply R-Control SIPS. There is no evidence that Branch River or Mr. Mayo represented to Plaintiffs before the purchase that Branch River would be supplying licensed R-Control SIPS to the Facility, or that Plaintiffs sought any assurances to that effect. There is also no evidence that either of the Plaintiffs dealt with Branch River or relied on the Branch River website. Moreover, even assuming, as the court does in taking disputed facts in a light most favorable to the Plaintiffs, that a Branch River employee told a subcontractor that Branch River SIPS would be R-Control SIPS, Branch River's failure to provide what was supposedly promised does not equate to a valid claim of fraud or intentional misrepresentation.

In fact, the Complaint undercuts Arundel's claim by alleging, on information and belief, that the parties that did deal directly with Branch River—Peachey, House and Browne—knew that the SIPS to be provided by Branch River to the Facility were not R-Control SIPS. *See* Complaint ¶¶ 168-71.

Finally, because there is no mention of R-Control being a requirement in any contract or proposal in what appears to have been an extensively documented project, the record evidence suggests that R-Control did not become a concern, much less a requirement, until well after the installation process was underway.

Thus, Plaintiffs have not made out a *prima facie* showing of fraud or intentional misrepresentation, much less proffered any clear and convincing evidence of such, on anyone's part, and Defendants are entitled to summary judgment on Count VIII of the Complaint.

Plaintiffs' Tortious Interference with Contract Claim

Maine law is silent on whether the economic loss doctrine will bar a claim for tortious interference with contract. However, a majority of states recognize that the economic loss doctrine normally does not bar recovery for tortious interference.[20] In Maine, to establish a claim for tortious interference with contractual relations, a plaintiff must prove the following: "(1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately cause damages."[21] *Currie v. indus. Sec., Inc.*, 2007 ME 12, ¶ 31, 915 A.2d 400 (*quoting Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d. 1104). Under Maine law, a tortious interference claim requires either a valid contract or prospective economic advantage. *Id.*

In this case, Plaintiffs had a valid contract with Peachey Builders for the planning and construction of the Facility. The design submittals presented to Arundel under the contract

[20] *See generally Bankers Risk Mgmt. Services, Inc. v. Av-Med Managed Care, Inc.*, 697 So. 2d 158, 161 (Fla. Dist. Ct. App. 2d Dist. 1997) ("The economic loss rule has not eliminated causes of action based upon torts independent of the contractual breach even though there exists a breach of contract action. Where a contract exists, a tort action will lie for either intentional or negligent acts considered to be independent from acts that breached the contract."); *Reengineering Consultants, Ltd. v. EMC Corp.*, 2009 WL 113058 (S.D. Ohio 2009) (the economic loss doctrine is limited to negligence, and therefore does not apply to intentional interference with contractual relations); *Kayser v. McClary*, 875 F. Supp. 2d 1167, 1176 (D. Idaho 2012) ("[F]irst, a claim for tortious interference with contract is intended to protect a party's economic interest in contractual relations. Accordingly, economic losses *must* be recoverable and it would not be sensible for the tort to be recognized under Idaho law on one hand, and then effectively eviscerated by application of the Economic Loss Doctrine on the other hand.").

[21] "Intimidation is not restricted to frightening a person for coercive purposes, but rather exists wherever a defendant has procured a breach of contract by making it clear to the party with which the plaintiff had contracted that the only manner in which that party could avail itself of a particular benefit of working with defendant would be to breach its contract with plaintiff."
Currie, 2007 ME 12, ¶ 31, 915 A.2d 400 (quoting *Pombriant v. Blue Cross/Blue Shield of Maine*, 562 A.2d 656, 659 (Me. 1989)) (citations omitted).

required that SIPs be used in the construction of the Facility. While Plaintiffs expected the SIPs to be R-Control SIPs, the contract did not specify that R-Control SIPs be used. Plaintiffs contend that in order to save money on the transaction, Branch River knowingly provided SIPs that were not R-Control.[22] However, the Plaintiffs have failed to present evidence that Branch River's failure to provide the expected SIPs interfered with the contract through fraud or intimidation. Because the Plaintiffs have not met the requisite elements necessary to sustain claim for tortious interference with contract, the court will grant summary judgment on this claim.

Plaintiffs' Unjust Enrichment Claim

"An unjust enrichment claim is brought to recover the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *U.S. Bank, Nat. Ass'n v. Thomes,* 2013 ME 60, ¶ 14, 69 A.3d 411 (citing *Estate of Miller,* 2008 ME 176, ¶ 29, 960 A.2d 1140) (quotation marks omitted); *see also Paffhausen v. Balano,* 1998 ME 47, 708 A.2d 269.

"To pursue unjust enrichment in equity, the plaintiff must lack an adequate remedy at law. A remedy at law is adequate if it '(1) is as complete, practical and as efficient to the ends of justice and its prompt administration as the remedy in equity, and (2) is obtainable as of right.'" *Wahlcometroflex, Inc. v. Baldwin,* 2010 ME 26, ¶ 22, 991 A.2d 44, 49. Here, only Arundel, and not Kate's, arguably conferred a benefit on Branch River, but Arundel has an adequate remedy for breach of warranty that, if proved, could compensate Arundel for some or all of what it paid for Branch River's SIPs. The unjust enrichment claim in Count X of the Complaint explicitly

[22] Plaintiffs argue that as a direct and proximate consequence of Branch River's interference with Arundel's contract with Peachey Builders, Plaintiffs have been unable to obtain the benefit of the contract.

relies on the same set of facts that the Plaintiffs' previously pleaded claims rely upon. Defendants are entitled to summary judgment on Count X of the Complaint.

Plaintiffs' Breach of Warranty Claims

With respect to Plaintiffs' warranty claims in Counts XI and XII of the Complaint, Branch River first argues that when Peachey Builders failed to properly install the SIPs, it offered to maintain the 20 Year Warranty,[23] so long as Peachey Builders undertook special and specific measures outlined by Branch River. These conditions were never met as the roof was ultimately removed. (Defs.' Mot. 10.) However, Branch River contends that if the Warranty is found by this court to apply, then Branch River's "maximum liability for warranty claims shall not exceed the original purchase price of the SIPs."[24]

In response to this cap on damages Arundel argues first that the Warranty document does not apply to Arundel's claim; second the provision in the Warranty does not apply because Arundel is seeking direct damages and not consequential damages; and third, the provision should not apply here as Arundel was allegedly supplied with a product different than what was originally contracted for by its alleged agent Peachey Builders. Arundel further contends that Branch River breached the implied warranty of merchantability and the duty of fitness for a particular purpose.

Arundel has made a *prima facie* showing that Branch River knew for what purpose the SIPS it supplied would be used, and that they were not suitable for that purpose, although Branch River clearly has some responses to Arundel's evidence that the fact finder could find persuasive. It is also not clear on this record that Arundel is limited to an express warranty

[23] Branch River contends that generally all SIPs, like the ones installed in the Facility, are subject to Limited 20 Year Warranty that the SIPs are "free from defects in materials and workmanship on the date of final delivery to the Owner or Owner's representative." (Defs.' Mot. 9.)

[24] This limits damages to $111,010, the ultimate cost of the Air-Flo SIPS installed at the Facility.

claim. Even Arundel were so limited, there are issues of fact regarding whether Arundel complied with the conditions set forth in the express warranty. The court also declines Branch River's invitation to rule that Arundel's warranty damages are limited to what is provided in its express warranty. Branch River has multiple defenses to Arundel's warranty claims, but the validity of the claims and defenses are for a fact finder to decide.

Defendant Branch River's Motion for Summary Judgment is denied as to Counts XI and XII of the Complaint.

Personal Liability of Robert Mayo

Although the foregoing rulings grant summary judgment as to all claims against Robert Mayo (the only remaining claims being those against Branch River only, in Counts XI and XII), Defendants have shown an independent ground for granting Mr. Mayo summary judgment. Defendants' Motion argues that the Plaintiffs cannot identify facts sufficient to state a plausible basis for imposing personal liability against Mayo for damages associated with the products manufactured and sold by Branch River. In Maine, there is strong public policy holding corporations as separate legal entities with limited liability. *Johnson v. Exclusive Properties Unlimited,* 1998 ME 244, ¶ 5, 720 A.2d 568. "As such, courts are generally reluctant to disregard the legal entity and will cautiously do so only when necessary to promote justice." *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 n.5 (1981). However, a court will pierce the corporate veil "when equity so demands, and may disregard the corporate entity 'when used to cover fraud or illegality, or to justify a wrong.'" *Id.* (quoting *Me. Aviation Corp. v. Johnson,* 160 Me. 1, 5, 196 A.2d 748, 750 (1964)).

The Law Court has set forth two common elements that Plaintiffs must establish to disregard the legal entity. First, "some manner of dominating, abusing, or misusing the corporate form. *Johnson,* 1998 ME 144, ¶ 6, 720 A.2d 568. Second, there must be an unjust or

inequitable result that would arise if the court recognized a separate corporate existence.[25] *Id.* In determining whether a shareholder has abused the privilege of a separate corporate entity the courts will examine a series of factors. For example:

> (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity[,] assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; [and] (12) use of the corporation in promoting fraud.

Id. ¶ 7.

However, piercing the corporate veil is not the only theory for holding corporate employees or agents individually liable to third parties. Corporate officers may be liable for their own tortious conduct and conduct amounting to an unfair trade practice. *See Advanced Const. Corp. v. Pilecki*, 2006 ME 84, ¶ 13, 901 A.2d 189; *see also Mariello v. Giguere*, 667 A.2d 588, 590-91 (Me. 1995). Here, Plaintiffs argue that Robert Mayo was personally responsible for the misleading representations on Branch River's website. However, as noted above, the Plaintiffs have not shown evidence that either they or their contractor, architect or roof supplier actually relied on the website. Perhaps the clearest proof of this is the fact that the contract that Arundel chose to enter into with Peachey, the general contractor, did not specify that the SIPS had to be R-Controlled.

Plaintiffs have not made a *prima facie* showing that Robert Mayo can be held personally liable on either of the two bases for imposing such liability. Plaintiffs have not demonstrated a basis on which a fact finder might hold Mr. Mayo personally liable, either on a veil-piercing basis or based on his own tortious acts. He will be granted summary judgment on all claims against him.

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[25] In establishing this test, the court seeks to balance the policy of encouraging business development with the policy of protecting patrons of the business. *Johnson*, 1998 ME 144, ¶ 6, 720 A.2d 568.

Plaintiff Kate's Butter as a Proper Plaintiff to this Action

Branch River contends that Kate's Butter is not a proper party to this suit. In support of this assertion Branch River contends Kate's is not the owner of the Arundel Facility. Rather, Kate's merely leases the Facility from Arundel. Further, Kate's has no contractual relationship with any of the Defendants. In response, Kate claims to have been damaged as a result of Branch River's failure to supply R-Control SIPS. Kate's claim presumably is one for delay damages—clearly a form of consequential damages.

The only remaining claims of those pleaded in the Complaint against Branch River are the claims for breach of warranty in Counts XI and XII. Although breach of warranty claims do not require privity of contract and may be enforceable by the ultimate consumer, the consumer still must be a purchaser of the product. The SIPs are goods, and the Uniform Commercial Code remedies for breach of implied warranty run to buyers. *See* 11 M.R.S. § 2-714, 2-715.

VI. CONCLUSION

The entry will be: Defendants' Motion for Summary Judgment is GRANTED as to Counts V, VI, VII, VIII and X of the Complaint, and to all counts asserting personal liability against Robert Mayo. Said Motion for Summary Judgment is DENIED as to Branch River with respect to Counts XI and XII.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: November 5, 2014

s/ A. M. Horton

A.M. Horton, Justice
Business & Consumer Court

Entered on the Docket: 11.6.14
Copies sent via Mail__Electronically ✓