Docket: **CA 15-02592-BLS1**
Date: **January 28, 2019**
Parties: **THE MIDDLESEX CORPORATION, INC. vs. FAY, SPOFFORD & THORNDIKE, INC.**
Judge: **/s/Mitchell H. Kaplan Justice of the Superior Court**

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

BACKGROUND

This plaintiff, The Middlesex Corporation, Inc., (Middlesex) was the general contractor on a project for the design/construction and rehabilitation of the Kens Burns Bridge Route 9 over Lake Quinsigamond (the Project). The defendant Fay, Spofford & Thorndike, Inc. (FST) is an engineering firm. FST entered into a Teaming Agreement with Middlesex pursuant to which FST prepared designs and drawings for the Project to be submitted by Middlesex to the Massachusetts Department of Transportation (the DOT) as part of its response to the Request for Proposal (RFP) for a contractor to perform the project. Middlesex also used the designs and drawings to estimate the costs that it would incur in performing the work, in particular the quantity of steel required, and therefore the contract amount that it would include in its response to the RFP. In this action, Middlesex alleges that FST performed its work negligently, i.e., not with the necessary skill and care of a professional engineer performing this type of work, with the result that Middlesex underestimated the cost of the steel necessary to complete the work by approximately $4 million. Middlesex also alleges that TMC was aware that the drawings that it

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submitted to Middlesex were improperly prepared and therefore it knew that Middlesex would underestimate the steel costs in its response to the RFP, but nonetheless represented that the drawings were "conservatively" prepared and further costs savings might be achieved with respect to the steel required to complete the Project.

CLAIMS

Based upon those allegations, Middlesex has asserted claims against FST sounding in contract, breach of the implied covenant of good faith and fair dealing, negligence, misrepresentation, fraud, and a violation of Chapter 93A.

THE PENDING MOTION

FST has moved for summary judgment dismissing all claims other than the negligence claim. For the reasons that follow, the motion is DENIED except with respect to the claim for breach of the implied covenant.

DISCUSSION

As will be explained, the summary judgment motion does not require an in depth consideration of the evidence developed in the summary judgment record concerning the nature and quality of FST's design for the steel supporting the bridge and the roadway.

The Contract Claims

At the hearing on this motion, Middlesex made very clear, if it was not already clear in its papers, that its case is premised upon its contention that the drawings that FST sent to it on January 20, 2012 were not prepared in accordance with good engineering practice and depicted a design that was later changed to be more robust, but caused Middlesex to underestimate the quantity of steel that would be required for construction, and this underestimate resulted in a

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reduction of its profit on the Project of nearly $4 million. In fact, Middlesex asserts that the design documents that FST delivered to it on February 9, 2012, the day before the response to the RFP had to be submitted to the DOT, were different from the January 20th design documents and required additional steel, but FST did not advise Middlesex of these changes and Middlesex was unaware of them until weeks after the response to the RFP had been submitted.

Prior to February 9th, the DOT sent bidders an addendum number 5 to the bridge design which may have resulted in an increase in the steel required, and after the Project was awarded to Middlesex, DOT may have required additional design modifications. However, Middlesex has expressly stated that its claims are based on alleged shortcomings in the January 20th design documents. According to Middlesex, the $4 million underestimation arose because of a failure of proper engineering in the application of the information then available to all bidders and not subsequent changes required by later developments in the Project. Whether all or any of the $4 million increase in the cost of steel for the Project was the result of a failure in the January 20th design documents or later design changes initiated or required by the DOT, is a question of fact that cannot be resolved at summary judgment. Further, FST does not argue that it can.

Rather, as to the breach of contract claims, FST maintains that they must be dismissed because the gist of this claim is for professional negligence not breach of contract. In support of this position, FST cites Massachusetts Housing Opportunities Corp. v. Whitman & Bingham Associates, P.C., 83 Mass. App. Ct. 325, 330 (2013) (Whitman) and similar cases in which the court had to determine whether the three year statute of limitations for tort actions applied to a professional malpractice claim or the six year period applicable to contract claims. Compare G.L. c. 260, §§ 2 and 2B. That is not the issue here. There is no argument that these claims were not timely filed under either statute. In this case, two sophisticated parties entered into a carefully

crafted contract which they called the "Teaming Agreement." While the standard to be applied in determining whether FST's design work breached the Teaming Agreement is the same as whether it was professionally negligent—whether the work was performed in accordance with the standard of care applicable to engineers engaged to design the structural support of a complex bridge system—that does not preclude Middlesex from pursuing claims under both contract and tort theories. Mass.R.Civ.P. 8(a) specifically permits a demand for alternative types of relief, provided, of course, that a plaintiff can recover only once for the same injury.

Breach of the Covenant of Good Faith and Fair Dealing

Under Massachusetts law the implied covenant arises out of a contract between parties, but does not create rights or duties beyond those the parties agreed to when they entered into the contract. See Ayash v. Dana-Farber Cancer Inst., 443 Mass. 367, 385, 822 N.E.2d 667, cert. denied sub nom. Globe Newspaper Co. v. Ayash, 546 U.S. 927, 126 S.Ct. 397, 163 L.Ed.2d 275 (2005). Rather, the covenant ensures that the parties act in good faith so that neither does "anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Druker v. Roland Wm. Jutras Assocs., Inc., 370 Mass. 383, 385 (1976). Here, Middlesex does not sue on any implied obligation, but rather on an express contractual provision, i.e, that FST perform its engineering work consistent with the standard of care. Accordingly, the implied covenant is not apposite.

Negligent Misrepresentation and Fraud

There is evidence in the summary judgment record that the principal FST engineer assigned to this Project represented to Middlesex during a February

3, 2012 conference call that

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the steel design was "conservative," in the sense that it might be possible to achieve further savings in steel costs with additional development of the design if Middlesex was awarded the Project. However, at the time that this statement was made the FST engineer was aware that the design was actually inadequate and more, not less, steel would be required to construct the Project. FST certainly disputes that evidence, but at the summary judgment stage of this litigation all inferences must be drawn in favor of Middlesex. FST argues that the engineer's statement, if credited by the finder of fact, would still only amount to an opinion and therefore cannot support claims of negligent misrepresentation or fraud. The court disagrees.

"Fraud or deceit 'may be perpetrated by an implied as well as by an express representation.' Robichaud v. Owens-Illinois Glass Co., 313 Mass. 583, 585 (1943). A statement that, in form, is one of opinion, in some circumstances may reasonably be interpreted by the recipient to imply that the maker of the statement knows facts that justify the opinion. Restatement (Second) of Torts Section 539 (1977)." Lucille P. Briggs vs. Carol Cars, Inc., 407 Mass. 391, 396 (1990). In context, a jury could find that the use of the word 'conservative' implied that based on the engineer's work to date the design was more than adequate to support the anticipated load, and if the engineer knew that his work did not support that conclusion this constituted a false statement of fact. Such a statement will support claims of fraud or negligent misrepresentation provided the other elements of those claims are proven.

The Chapter 93A Claim

The Chapter 93A claim is fact dependent and cannot be decided on the summary judgment record. Moreover, the claim will not be submitted to the jury and will not require the presentation of any evidence not relevant to the breach of contract, negligence, and

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misrepresentation claims. A ruling on this part of the summary judgment record will not shorten or simplify the trial. The court does note that if the court finds that the work was done in furtherance of a joint undertaking to submit a response to the RFP, as the contract title "Teaming Agreement" suggests, it may well be that the parties were not in a commercial relationship within the meaning of Chapter 93A, § 11 during their joint efforts to prepare the bid response. Interaction among parties involved in the same venture are 'private' and therefore outside the scope of G. L. c. 93A , which is meant to recognize trade or commerce between separate entities where the public or other business persons or entities may be affected." Lattuca v. Robsham, 442 Mass. 205, 209 (2004), quoting Szalla v. Locke, 421 Mass. 448, 451-453 (1995); see also Steele v. Kelley, 46 Mass. App. Ct. 712, 726 (1999); Newton v. Moffie, 13 Mass. App. Ct. 462, 467-469 (1982).

ORDER

For the foregoing reasons FST's motion for partial summary judgment is DENIED, except with respect to the claim asserting breach of the covenant of good faith and fair dealing, which is dismissed.

/s/Mitchell H. Kaplan Justice of the Superior Court

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