UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MOUNTAIN WIRELESS, INCORPORATED,	)	
Plaintiff	)	
v.	)	
CUMULUS BROADCASTING, INC., et al.,	)	*Civil No. 01-04-P-H*
Defendants	)	
v.	)	
GEORGE SILVERMAN,	)	
Party-in-Interest	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Cumulus Broadcasting, Inc. and Cumulus Licensing Corp. (together, "Cumulus Defendants") move for summary judgment as to Counts I, II, III, IX and X of the amended complaint of Mountain Wireless, Incorporated ("Wireless"). Defendants Cumulus Broadcasting, Inc.'s and Cumulus Licensing Corp.'s Motion for Partial Summary Judgment ("Defendants' Motion") (Docket No. 21) at 1. Wireless concedes the Cumulus Defendants' entitlement to summary judgment as to Count X. Plaintiff, Mountain Wireless Incorporated's Objection to Defendant's [sic] Motion for Partial Summary Judgment, etc. ("Plaintiff's Opposition") (Docket No. 23) at 11; Report of Final Pretrial

Conference and Order (Docket No. 31) at 2. For the reasons that follow, I recommend that the Defendants' Motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "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 over it 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 Context

The contours of facts cognizable for purposes of summary judgment in this case are shaped in large part by both parties' substantial non-compliance with Local Rule 56. That rule requires or permits the filing of three separate documents in addition to the parties' motions and memoranda of law — *to wit*, supporting, opposing and reply statements of material facts, each of which must contain numbered paragraphs and within which (per subsection (e)) each asserted fact must be "followed by a citation to the specific page or paragraph of identified record material supporting the assertion." Loc. R. 56. Both the opposing and reply statements must admit, deny or qualify, by reference to specific paragraph, the facts set forth in the statements of material fact to which they respond. *Id*. Denials or qualifications must be supported by specific, supporting record citations. *Id*.

A party fails to honor this rule at its peril. *See* Loc. R. 56(e) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted. . . . The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment.").

The Cumulus Defendants:

1. Assert certain facts in their memorandum of law that are not found in their statement of material facts, *e.g*., "It is common practice in the radio industry for the buyer and seller, at the time of execution of a purchase agreement, to provide contractually for the buyer to acquire, immediately, virtually all of the airtime on the stations and to run its own radio programming[.]" *Compare* Defendants' Motion at 2 *with* Defendants Cumulus Broadcasting, Inc.'s and Cumulus Licensing Corp.'s Statement of Material Facts in Support of Motion for Partial Summary Judgment ("Defendants' SMF") (Docket No. 22).

2. Omit critical detail from their statement of material facts, *e.g*., referring to key documents without quoting the provisions in question. *See generally* Defendants' SMF. Details

omitted from a statement of material facts do not form a part of the summary-judgment record. *See, e.g., CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 888 F. Supp. 192, 201 n.7 (D. Me. 1995), *aff'd*, 97 F.3d 1504 (1st Cir. 1996) ("Under [Local Rule 56], it is not the court's duty to go beyond the parties' statements of material facts. . . . The parties are bound by their [Local Rule 56] Statements of Fact and the court's summary judgment decision will be based solely upon facts properly presented therein.").

For its part, Wireless wholly fails to counter the Cumulus Defendants' facts, or introduce its own, in accordance with the dictates of Local Rule 56. Wireless's single attempted denial amounts to legal argumentation and, in any event, omits pinpoint citations to the lengthy documents referenced. *See* Plaintiff, Mountain Wireless, Incorporated's Response to Defendants' Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 24) ¶ 3.[1] Wireless strews additional facts throughout the body of its opposing brief, failing to submit any in the required format. *See generally id.*; Plaintiff's Opposition. Such a practice contravenes not only the letter but also the spirit of the rule, key purposes of which are to focus the issues and to conserve the time of counsel and the court.

With all non-conforming assertions of fact disregarded, the record cognizable on summary judgment consists of the following:

Wireless owns radio stations WSKW-AM and WCTB-FM. Defendants' SMF ¶ 1; Plaintiff's Opposing SMF ¶ 1. On January 20, 1999 Wireless and the Cumulus Defendants entered into an Asset Purchase Agreement for WSKW and WCTB. *Id.* On January 20, 1999 Wireless and the Cumulus Defendants also entered into a Local Marketing Agreement for WSKW and WCTB. *Id.* ¶ 2. By letter dated September 1, 2000 Wireless sent the Cumulus Defendants a letter purporting to provide notice

[1] Inasmuch as Wireless fails in its attempted denial to set forth any cognizable facts, I also disregard the Cumulus Defendants' response to that denial. *See* Defendants Cumulus Broadcasting, Inc.'s and Cumulus Licensing Corp.'s Reply Statement of Material Facts in Support of Motion for Partial Summary Judgment (Docket No. 26); Loc. R. 56(d) (mandating that a reply statement "be limited to any
(*continued on next page*)

of an event of default under the Local Marketing Agreement and providing a thirty-day notice to cure. *Id*. ¶ 4. On September 26, 2000 the Cumulus Defendants sent Wireless a letter terminating the Asset Purchase Agreement on the stated ground that the Federal Communications Commission ("FCC") had not acted upon the application for approval of the transfer of the stations' licenses from Wireless to the Cumulus Defendants. Defendants' SMF ¶ 3.[2]

III. Discussion

A. Count I: Breach of Implied Covenant

In moving for summary judgment as to Count I the Cumulus Defendants betray some understandable confusion as to its precise contours. They construe it as encompassing two claims: (i) breach of contract (stemming from the Cumulus Defendants' failure to purchase the stations) and (ii) violation of the implied covenant of good faith and fair dealing (based on the manner in which the Cumulus Defendants operated the stations). Defendants' Motion at 3. The gravaman of Count I appears to be the claim of breach of implied covenant, with the unconsummated purchase mentioned by way of background. *See* Amended Complaint ("Complaint") (Docket No. 18) ¶¶ 1-16. Whatever doubt may exist is dispelled by Wireless's response to the Cumulus Defendants' motion, which as to Count I is confined to the issue of breach of an implied covenant. *See* Plaintiff's Opposition at 4-8.

As the Cumulus Defendants argue, *see* Defendants' Motion at 3-4, the Law Court has refrained from recognizing a general implied common-law duty of good faith and fair dealing in the context of various commercial contract disputes, *see, e.g., Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 456-57 (Me. 1993); *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 614 (Me. 1992). Wireless rejoins that the Local Marketing Agreement was in substance a lease, *see* Plaintiff's

additional facts submitted by the opposing party.").

[2] The cited materials do not make clear on their face that the stated ground for the termination was that the FCC had failed to act "within the one year time period provided in the Asset Purchase Agreement," as asserted in paragraph 3 of the Defendants' SMF. (*continued on next page*)

Opposition at 4-5; however, neither the contractual language nor the testimony upon which it relies for this point is properly before the court on summary judgment. In any event, as Wireless acknowledges, *id.* at 7, the Law Court declined to imply a duty of good faith and fair dealing in a commercial-lease context in which the question arose, *see KHK Assocs. v. Department of Human Servs.*, 632 A.2d 138, 140-41 (Me. 1993). Even assuming *arguendo* that facts establishing the existence of a lease were cognizable, federal court would not provide a hospitable forum in which to press for an extension of state law. *See, e.g., Andrade v. Jamestown Hous. Auth.,* 82 F.3d 1179, 1187 (1st Cir. 1996) (court sitting in diversity should not "torture state law into strange configurations or precipitously . . . blaze new and unprecedented jurisprudential trails") (citation and internal quotation marks omitted).

The Cumulus Defendants accordingly are entitled to summary judgment as to Count I.

B. Count II: Liquidated-Damages Claim

Wireless in Count II of its complaint requests liquidated damages on the basis of several asserted breaches of the Asset Purchase Agreement, including failure to consummate the purchase and failure to collect and remit accounts receivable. Complaint ¶¶ 17-22. The Cumulus Defendants seek summary judgment as to this count on grounds that (i) they properly terminated the transaction on the basis of failure to receive timely FCC approval and (ii) Wireless never declared the contract to be in default or provided the Cumulus Defendants with any opportunity to cure defects in performance. Defendants' Motion at 4.

The motion as to Count II succumbs to a failure of proof. The only relevant fact cognizable on summary judgment is that the Cumulus Defendants sent Wireless a letter terminating the transaction on the stated ground that the FCC had failed to approve it. There is no evidence that the FCC did in fact fail to approve the transaction or that, if it did, such a circumstance would entitle the Cumulus

Defendants pursuant to specific language of the Asset Purchase Agreement to terminate the transaction without liability. Nor is there any evidence that Wireless omitted to declare the contract in default or provide the Cumulus Defendants an opportunity to cure.

The Cumulus Defendants hence fall short of establishing entitlement to summary judgment as to Count II.

C. Count III: Negligent or Intentional Misrepresentation

Wireless alleges in Count III of its complaint that the Cumulus Defendants negligently or intentionally misrepresented "that they had the power and authority" to purchase the stations when in fact they never were authorized by the FCC to do so. Complaint ¶¶ 23-32. The Cumulus Defendants move for summary judgment on the basis that the relevant contract language did not constitute such a misrepresentation, *see* Defendants' Motion at 4-5; however, their failure to adduce cognizable evidence on this point dooms this portion of their motion.

D. Count IX: Breach of Local Marketing Agreement (Ad Cancellations)

In Count IX of its complaint Wireless alleges that the Cumulus Defendants breached the Local Marketing Agreement by canceling all advertising contracts for the stations. Complaint ¶¶ 69-71. The Cumulus Defendants move for summary judgment on the basis that applicable provisions of the contract did not require that advertising be maintained. Defendants' Motion at 5. Again, in the absence of cognizable evidence as to that point, the motion fails.

IV. Conclusion

For the foregoing reasons, I recommend that the Defendants' Motion be **GRANTED** as to Counts I and X 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 16th day of July, 2001.

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David M. Cohen
United States Magistrate Judge

TRLIST STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-4

MOUNTAIN WIRELESS v. CUMULUS BROADCASTING, et al Filed: 01/05/01
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt # in Cumberland Superior : is 00-cv-752

Cause: 28:1441 Notice of Removal-Breach of Contract

MOUNTAIN WIRELESS INC DANIEL J. BERNIER, ESQ.
plaintiff [COR LD NTC]
PHILLIPS & BERNIER LLC
179 MAIN STREET
SUITE 307
WATERVILLE, ME 04901
207-877-8969

v.

CUMULUS BROADCASTING INC JERROL A. CROUTER
defendant 772-1941
[COR LD NTC]
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P.O. BOX 9781
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GEORGE SILVERMAN
party in interest

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