UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOSEPH SUTTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-190-P-DMC***
	)	
FIVE ISLANDS BOATWORKS, INC., et al.,	***)***	
	)	
	)	
Defendants	***)***	

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT[1]

The defendants, Five Islands Boatworks, Inc., and William F. Plummer, IV, move for summary judgment on Count II of the plaintiff's amended complaint and for summary judgment on certain aspects of Counts I, III and IV. I grant the motion in part and deny it in part.

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 over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such

[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

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 to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71,73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.), *cert. denied*, 132 L.Ed.2d 255 (1995); Fed. R. Civ. P. 56(e); Local Rule 19(b)(2).

This case arises out of an oral contract between Sutton and Plummer, owner of Five Islands, concerning the construction of a vessel. Sutton provided Five Islands with a hull and superstructure and specifications concerning the finished vessel; he agreed to pay Five Islands $20,000 for labor and to reimburse Five Islands for all materials at the price paid by Five Islands. Transcript of Deposition of Joseph H. Sutton ("Sutton Dep."), Exh. A to Plaintiff's Memorandum in Opposition to Motion for Partial Summary Judgment ("Plaintiff's Mem.") (Docket No. 15) at 48-52; Transcript of Deposition of William F. Plummer, IV ("Plummer Dep."), Exh. B to Plaintiff's Mem., at 47-49. The vessel was delivered in July 1990. Plummer Dep. at 95-96. A few weeks after delivery, Sutton reported to Plummer that a plug had failed while he was out alone in the vessel, resulting in flooding of the engine room so that the engine was 60 to 80% submerged. Sutton Dep. at 70, 72. Plummer inspected the engine room and started the engine, finding no damage. Affidavit of William F.

Plummer, IV ("Plummer Aff.") (Docket No. 13) ¶ 7. At some point in late 1990 Sutton had the vessel hauled out of the water and onto his summer property. Sutton Dep. at 75. It remained on his property for five years, during which time Plummer would winterize the vessel and make it ready for use at the appropriate times of year. Plummer Aff. ¶¶ 8,9; Sutton Dep. at 75-76, 79-81, 83-84. Sutton hired a marine surveyor who provided Plummer with a punch list of items to be corrected on the vessel in 1990 and again in 1995. Transcript of Deposition of Robert D. Cartwright, Exh. D to Plaintiff's Mem., at 10, 18, 36, 39; Plummer Aff. ¶¶ 4, 10; Sutton Dep. at 61. In 1995 the vessel was taken to Plummer's boatyard, where he began repairs. Plummer Dep. at 124-29. The vessel was then removed from Plummer's yard by Sutton's agent. *Id*. at 128; Sutton Dep. at 96-97. This action was filed on June 18, 1996.

COUNT II

Count II of the amended complaint alleges that the defendants breached a duty of care to the plaintiff to "use reasonable care in constructing, equipping, furnishing and otherwise preparing the Vessel for navigation and use." Amended Complaint (Docket No. 2) at ¶ 14. This count sounds in tort. The defendants contend that they are entitled to summary judgment on this count because the amended complaint alleges no personal injury and a tort theory of recovery is unavailable in Maine law when only economic loss is alleged, relying on *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc.*, 659 A.2d 267 (Me. 1995).

In *Oceanside* the Law Court joined the majority of courts in holding that tort recovery is not permitted for a defective product's damage to itself. *Id*. at 270.

A situation where the injury suffered is merely the "failure of the product

> to function properly," [*East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 868 (1986)], is distinguishable from 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." [J. M.] Zitter, [Annotation, *Strict Products Liability: Recovery for Damage to Product Alone*], 72 A.L.R. 4th [12], 16 [1989].

659 A.2d at 270. "When a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." *East River*, 476 U.S. at 871. "Damage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'" *Id.* at 872, quoting J. White & R. Summers, *Uniform Commercial Code* 406 (2d ed. 1980); *see also Oceanside*, 659 A.2d at 270.

Sutton responds that the instant case differs from *Oceanside* in that his contract with Plummer was for the purchase of components of the vessel, not for a single finished product, and that therefore he does not seek recovery for a defective product's damage to itself. Plaintiff's Mem. at 10-11. The necessary corollary to this argument is that the defective components caused damage to the vessel that Sutton received. However, Sutton's own testimony at deposition was that he told Plummer that he "wanted a finished product" with respect to the vessel, Sutton Dep. at 49, and courts that have addressed this issue have uniformly held, under similar circumstances, that the product is the finished vessel rather than the components of the vessel. *E.g., Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925, 929 (5th Cir. 1987); *see Oceanside*, 659 A.2d at 271. The damages sought by Sutton in Count II are economic damages. Amended Complaint, ¶ 15. Under the "economic loss" doctrine adopted by the Law Court in *Oceanside*, Sutton's claims must be brought in warranty, not tort.

COUNTS I AND III

Count I of the amended complaint alleges breach of contract; Count III alleges breach of warranties. The defendants seek summary judgment on these counts as to four specific instances of alleged damage: (i) damages to the bulkhead and walls around the cabin and superstructure due to leaking windows; (ii) damages to the roof structure caused by leaking around the seals of the through-hulls; (iii) damages caused by washrails canting inward and directing water into the vessel; and (iv) damages to the engine or its parts due to defects in installation. The defendants contend that they are entitled to summary judgment on these claims because the claims are barred by a four-year statute of limitations applicable under the Uniform Commerical Code. Sutton responds that the claims in Count I are not subject to the Uniform Commercial Code and that the defendants are equitably estopped to invoke the statute of limitations against the claims asserted in Count III.

Under the Uniform Commercial Code ("UCC"), as adopted in Maine, "[a]n action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued." 11 M.R.S.A. § 2-725(1). "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ." *Id*. § 2-725(2). The UCC applies to sales of goods. 11 M.R.S.A. § 2-102. Sutton contends that the contract at issue was predominantly for services, specifically construction and assembly, rather than for the sale of goods, and that the UCC therefore does not apply to his Count I claims.

Neither Sutton nor the defendants have provided the court with any citations to evidence in the summary judgment record upon which a determination of the predominant nature of the oral

contract at issue can be made. "When as here the transaction involves provision of both goods and services, the question for application of the U.C.C. becomes whether as a factual matter the transaction predominantly relates to goods." *Lucien Bourque, Inc. v. Cronkite*, 557 A.2d 193, 195 (Me. 1989). The defendants correctly note that at least one court has held that the UCC applies to contracts for the construction of a vessel. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187, 191 (S.D.N.Y. 1966). The First Circuit has held that a contract for storage of a yacht may be governed by the UCC. *Fireman's Fund Am. Ins. Co. v. Boston Harbor Marina, Inc.*, 406 F.2d 917, 919 (1st Cir. 1969). This court has applied the UCC to a claim of breach of warranties against the manufacturer of a component of a vessel. *Sullivan v. Young Bros. & Co.*, 893 F. Supp. 1148, 1159 (D. Me. 1995), *mod. on other grounds* 91 F.3d 242 (1st Cir. 1996).

However, none of these cases is sufficiently close on its facts to the case at hand to allow the entry of summary judgment at this point. If the UCC does not apply, this action was brought within the six year statute of limitations, 14 M.R.S.A. § 752, because the tender of delivery was made in July 1990. In order to decide this question on summary judgment, the contract at issue must show "unambiguously that services predominate over the sale of materials," or that the opposite is unambiguously the case. *Inhabitants of the City of Saco v. General Electric Co.*, 779 F. Supp. 186, 197 (D. Me. 1991). There is little about the oral contract at issue in this case that is unambiguous at this point. The defendants are not entitled to summary judgment on any aspect of Count I.

As to the claims for breach of warranty raised in Count III of the amended complaint, the analysis differs. Sutton admits that the UCC applies to these claims. Plaintiff's Mem. at 11-12. In order to avoid the application of section 2-725 to these claims, Sutton contends that the defendants are equitably estopped to raise the statute of limitations bar. Sutton maintains that the defendants

"repeatedly assured Plaintiff, over a period of approximately five years, that they would remedy the various defects and deficiencies in the vessel," Plaintiff's Mem. at 13, and that he reasonably relied upon these assurances "until 1995, when it became obvious that Defendants were failing to perform," *id.*

Under Maine law, estoppel may be applied to bar a defendant from successfully raising an otherwise valid statute of limitations defense. *Hanusek v. Southern Maine Medical Center*, 584 A.2d 634, 636 (Me. 1990). "[T]he party seeking to assert the equitable estoppel bears the burden of establishing the facts necessary to support the successful application of the doctrine." *Townsend v. Appel*, 446 A.2d 1132, 1134 (Me. 1982). There must be evidence in the record supporting at least a reasonable inference that the plaintiff contemplated the pursuit of his claim through the legal process during the prescriptive period. *Id.* Sutton offers no such evidence in this record and the defendants are therefore entitled to summary judgment on Count III to the extent that that count addresses the four specific alleged sources of Sutton's damages listed above. *See Dugan v. Martel*, 588 A.2d 744, 747 (Me. 1991) (absence of evidence in summary judgment record that defendant actually induced plaintiff to delay bringing suit).

COUNT IV

Count IV of the amended complaint raises a claim under Maine's Unfair Trade Practices Act ("UTPA"), 5 M.R.S.A. § 205-A *et seq*. The defendants assert, without citation of authority, that this claim is barred by Sutton's failure to notify them of any breach of warranty; by the commercial nature of Sutton's intended use of the vessel; by his removal of the vessel from Plummer's boatyard, thus preventing the defendants from repairing any defects; and by application of the statute of

limitations. Sutton contends that he did provide the necessary notice and that this action was filed within the UTPA's six-year statute of limitations. He does not respond to the defendants' other arguments.

The UTPA requires that a written demand for relief be delivered to a prospective defendant at least 30 days prior to the filing of an action for damages. 5 M.R.S.A. § 213(1-A). Sutton offers only the punchlists developed by his marine surveyor as evidence of his compliance with this requirement. Even if these documents did not meet the statutory requirement, an issue which I need not now decide, the notice requirements of section 213(1-A) are not jurisdictional and do not operate in this case to preclude Sutton from maintaining a UTPA claim against the defendants. *Oceanside,* 659 A.2d at 273.

The UTPA is limited to plaintiffs who purchase goods or services "primarily for personal, family or household purposes." 5 M.R.S.A. § 213(1). The defendants point to Sutton's deposition testimony that the vessel "was made for lobstering. It was made for fishing." Sutton Dep. at 94. That statement alone is not determinative on this issue. In any event, this statement was not cited in the defendants' Rule 19 statement of material facts, depriving the plaintiff of the opportunity to respond directly. The parties are bound by their Rule 19 statements. *Pew v. Scopino,* 161 F.R.D. 1, 1 (D. Me. 1995). I will not base a summary judgment decision on a fact presented outside the framework provided by the Local Rules.

The defendants cite no authority in support of their argument that Sutton's UTPA claims are barred by his removal of the vessel from Plummer's boatyard, thereby making it impossible for the defendants to complete repairs, and my own research has disclosed none. There is no requirement in the statutory language of the UTPA that a prospective defendant be given an opportunity to

remedy the damages caused by his unfair trade practice. In the absence of authority supporting the defendants' position, I will not give further consideration to this argument in connection with the summary judgment motion.

On the final point raised by the defendants, the mere fact that a four-year statute of limitations applies to Sutton's breach of warranty claims does not mean that the same statute of limitations applies to his claims under the UTPA, even if the underlying facts are the same.

> The elements of an unfair trade practice are substantively different than the elements for a simple breach of warranty under the UCC. To be a violation of 5 M.R.S.A. § 207 it is not enough that the act or practice be a violation of a particular statute, it must also be unfair or deceptive. Here, the trial court found various commercial or trade practices of [the defendant] to be unfair and deceptive in violation of the UTPA. Accordingly, the trial court properly held that the six-year statute of limitations established by 14 M.R.S.A. § 752 (1980) applies.

State v. Bob Chambers Ford, Inc., 522 A.2d 362, 364 (Me. 1987) (citations omitted). *See also Campbell v. Machias Sav. Bank*, 865 F. Supp. 26, 34 (D. Me. 1994) (claims under Maine's UTPA are subject to general six-year statute of limitations for civil actions). Sutton's UTPA claims in Count IV of the amended complaint are not time-barred.

CONCLUSION

For the foregoing reasons, the defendants' motion for summary judgment is **GRANTED** as to Count II of the amended complaint and as to those portions of Count III of the amended complaint as are based on claims for damages to the bulkhead and walls around the superstructure and cabin of the vessel due to leaking windows; for damages to the roof structure caused by leaking of water around the seals of the through-hulls; for repair of the alleged defect of the washrails and damage

caused by such defect; and for damages to the engine or its component parts due to alleged defects in the installation of the engine and its component parts; and is otherwise **DENIED**.

Dated this 31st day of December, 1996.

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David M. Cohen
United States Magistrate Judge