The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Dartmouth College

v.

North Branch Construction, Inc., et al

NO. 2009-CV-00152

ORDER

The Plaintiff, Dartmouth College ("Dartmouth"), has filed a number of motions *in limine* relating to the trial set for April 15, 2014. First, Dartmouth has filed a Motion *in Limine* to preclude Lavallee Brensinger Professional Association ("Lavallee") from arguing, offering evidence, or commenting on an "alleged exculpatory agreement between itself and Dartmouth College related to a change in roof surfacing materials" and precluding any defendant from attributing "the change in roof surfacing materials for the failure of the building envelope." (Doc. #63, 1, hereinafter "Roofing Materials Motion").[1] The Motion was filed when this case was scheduled for jury trial; the parties have now waived jury trial and the case will be tried to the Court. Although the Motion recites that it was filed to keep prejudicial testimony from being presented to the jury, Dartmouth now argues that the Motion should be decided in advance of trial, since a ruling will reduce the length and expense of trial. After reviewing the Motion, its supplements, exhibits, and the Objection, the Court agrees and accordingly, DENIES the Motion to the extent it seeks to exclude evidence of a supposed exculpatory agreement,

[1] The full motion is titled as "Plaintiff's Motion in Limine to Preclude: (1)LBPA from offering Evidence or Argument Concerning an Alleged Exculpatory Agreement Between Lavallee and Dartmouth College; and (2) Evidence or Argument Purporting to Blame the Change in Roof Surfacing Materials for the Failure of the Building Envelope."

and GRANTS the Motion to the extent it seeks to prevent Lavallee from introducing evidence that the change from a slate to a copper roof was a substantial factor in bringing about the harm.

Dartmouth has also filed a motion *in limine* to preclude Lavallee's damages expert, David Ponte, from testifying as to issues of law. (See Doc. #59, Dartmouth's Mot. *in Limine* Preclude Lavallee's "Damages" Expert, David Ponte, hereinafter "Ponte Mot.".) This Motion was filed while the case was scheduled for trial by jury, and there is far less concern about such evidence being admitted in a bench trial. The Motion is GRANTED to the limited extent set forth in section IV of this Order. Finally, Dartmouth has also filed a motion *in limine* to preclude Lavallee's energy loss expert, Lance Robson, from offering any opinion about the amount and cost of energy loss. (See Doc. #61, Pl.'s Mot. *in Limine* Preclude Lavallee's Energy Loss Expert, Lance Robson, from Offering Opinions about the Amount and Cost of Energy Loss, hereinafter "Robson Mot.".) That Motion is DENIED.

I

The following facts do not appear to be in dispute, based upon the motions, objections, and supporting documents. This case involves a renovation of a gymnasium at Dartmouth, which included a pool. The renovation, with a budget of $12 million, included a new fitness center, a new ceiling system above the pool, and new mechanical room housing dehumidification equipment. Lavallee was the architect of record. The project called for spray applied polyurethane foam insulation ("SPF") to be installed between the rafters over the pool area and its adjacent mechanical room with no allowance for ventilation between the SPF insulation and the roof. The general contractor, North Branch Construction ("NBC") hired Building Envelope Solutions

d.b.a. Foam-Tech ("Foam-Tech") to install the SPF. The Lavallee design called for the SPF to be covered by gypsum board mounted on the underside of the roof.

The project reached substantial completion in January 2006. However, in February 2007, large sections of the gypsum board ceiling panels in the new mechanical room detached from the rafters and fell on the mechanical room equipment and catwalks, exposing extensive cracking and separation of the SPF from the rafters. Dartmouth alleges that the failures of the SPF and the gypsum board panels, the moisture condensation staining, and structural deterioration in the pool area resulted from what it calls Lavallee's "negligent design" compounded by and in combination with "NBC's negligent construction." (Roofing Materials Mot., ¶ 14.) NBC and Foam-Tech have settled.

Dartmouth asserts that Lavallee plans to defend by pointing to an alleged exculpatory agreement between Dartmouth and Lavallee. (Roofing Materials Mot., ¶ 15.) Lavallee asserts that "the issue at hand does not concern an exculpatory agreement, but instead concern[s] a design developed by Dartmouth's in-house and licensed architect who then took responsibility for his design." (Doc. #110, Obj. Roofing Materials Mot. 1–2). The alleged agreement arises out of Dartmouth's decision, prior to the commencement of construction, to recover the roof of the gymnasium in question with copper to replace the pre-existing slate roof, which had reached the end of its useful life. Both parties agree that once Lavallee learned of Dartmouth's decision to replace the roof, discussions were had between the parties. Dartmouth retained an outside consultant who opined that the interior ceiling design by Lavallee was compatible with the proposed roofing project. (Roofing Materials Mot., ¶ 18);(Obj. Roofing Materials Mot., 3). The parties agree that they discussed the change, and that in an e-mail, one of

the Lavallee's architects working on the project, Chris Drobat ("Drobat"), communicated with a Dartmouth architect named John Scherding ("Scherding") on this subject. Lavallee relies particularly on one e-mail that Scherding sent to Drobat stating that "the roof work is not part of this project and the responsibility for the decisions about the roofing are being borne by Dartmouth College". (Roofing Materials Mot., ¶ 20.)

II

Dartmouth first argues that even if substitution of copper for slate on the roof caused or substantially contributed to cause the harm, RSA 338-A:1 prohibits Lavallee from asserting that it is not liable for its defective design. The Court disagrees. RSA 338-A:1, titled "Indemnification Agreements Prohibited," provides:

> Any agreement or provision whereby an architect, engineer, surveyor or his agents or employees is sought to be held harmless or indemnified for damages and claims arising out of circumstances giving rise to legal liability by reason of negligence on the part of any said persons shall be against public policy, void and wholly unenforceable.

In the first place, Lavallee does not allege that it should not be held liable for its design; rather, it argues that Dartmouth's architects modified the design it had prepared, and any liability for that modification should be properly borne by Dartmouth. (Doc. #110, Roofing Materials Mo. 1-2). The Court agrees. Moreover, even assuming the statute is applicable, it does not aid Dartmouth in the circumstances of this case.

By its terms, RSA 338-A:1 would appear to not be applicable to this case as the statute expressly involves "legal liability by reason of negligence." See RSA 338-A:1. Here, Dartmouth has a contract with Lavallee; although it characterizes its rights as based upon the law of torts, in fact its rights and obligations with respect to Lavallee obligations are defined by the contract with Lavallee. See Gould v. Concord Hosp., 126

N.H. 405, 407 (1985) (whether an action is a tort action or a contract action is not determined by the form of the action, but by its substance).

In the context of an express architectural contract, "[i]t is the general rule that the employment of an architect is a matter of contract, and consequently, he is responsible for all the duties enumerated within the contract of employment." Moundsview Independent School Dist. No. 621 v. Buetow & Associates, Inc., 253 N.W.2d 836, 839 (Minn. 1977) (citing Kostohryz v. McGuire, 212 N.W.2d 850 (Minn. 1973), and 5 Am.Jur.2d, Architects, § 5.); see also Getzschman v. Miller Chemical Co., Inc., 443 N.W.2d 260 (Neb. 1989) ("[A]n architect's duties are determined by the contract for the architect's employment"). Moreover, "[a]n architect, as a professional, is required to perform his services with reasonable care and competence and will be liable in damages for any failure to do so." Moundsview Independent School Dist. No. 621, 253 N.W.2d at 839 (citations omitted). Here, Lavallee's contract with Dartmouth forms the basis of the duties owed between the parties. The statutory prohibition of any exculpatory agreements plainly relates to agreements by which an architect, builder or surveyor can require a party with which it contracts to indemnify it for its own negligence, and is not intended to prohibit parties from negotiating the extent of their rights and liabilities. Dartmouth's reliance on RSA 338-A:1 is misplaced.[2]

Although the statute has never been construed by the New Hampshire Supreme Court, the conclusion that this statute is inapplicable to this contract case is buttressed by New Hampshire common law. The New Hampshire Supreme Court has long held that while exculpatory contracts, relieving a person from the consequences of his

[2] Other States have enacted similar legislation prohibiting indemnification agreements for an architect's own negligence. See N.J.S.A 2A:40A-1 (1983) (prohibiting indemnity or hold harmless agreements "arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promissee".); see also VA Code Ann § 11-4.4 (1995); A.R.S. § 34-226 (2013).

common-law duty to exercise ordinary care, are prohibited: "[w]here parties to a contract are free to make their own bargain, and no special relationship exists between them, a clause fully exculpating one party for property damage due to its negligence in the performance of a contract is valid and will be enforced." Tanguay v. Marston, 127 N.H. 572, 577 (1986) (citations and parenthetical omitted).

For example, in Chadwick v. CSI, Ltd. et. al, 137 N.H. 515, 523 (1993), the Court upheld waiver of subrogation provisions in a contract, reasoning that the provisions existed in the contract as part of a larger comprehensive approach to indemnifying the parties involved in the construction project, allocating the risks involved, and spreading the costs of different types of insurance. The Court noted that these provisions were not "designed to unilaterally relieve one party from the effects of its future negligence" but rather "work to ensure that injuries or damage incurred during the construction project are covered by the appropriate place and limits of insurance, and that the cost of that coverage are appropriately allocated among the parties." Id. at 523. The Court distinguished exculpatory contracts that contravene public policy because of a special relationship between the parties or a disparity in bargaining power. Id. (citing Barnes v. New Hampshire Karting Ass'n Inc., 128 N.H. 102, 104–05 (1986)).

Here, there is no claim that there was a disparity in bargaining power between Dartmouth and Lavallee. Indeed, the supposed exculpatory agreement was negotiated by Dartmouth's in-house architect with an architect Dartmouth had hired. Their principals' relationship was defined by an agreement they freely entered into. An agreement that Dartmouth's in-house architect would be responsible for a modification it sought to make in the project design by Lavallee does not violate public policy and is enforceable.

III

Dartmouth also argues that "putting aside the existence and legal significance of any exculpatory agreement" between Lavallee and Dartmouth, "the more fundamental question is whether there is any competent evidence that the change in roof surfacing materials (from slate to copper) caused the failure of the envelope [sic] because of the cracking and separation of SPF from the rafters." (Roofing Materials Mot., ¶ 42.)

Dartmouth has marshaled compelling expert testimony that the substitution of slate for copper on the roof of the gymnasium did not contribute to the building envelope failure. It points out that its expert, Simpson, Gumpertz and Heger ("SGH"), has conducted extensive field testing and observations and determined that the roofing system change from slate to copper does not significantly affect the total ceiling roofing performance and that the installation failure "has nothing to do with the change from slate to a copper roof coverage." (Roofing Materials Mot., ¶ 43.); (Dartmouth's Mot. *in Limine* to Preclude Defendant Foam-Tech's Expert, CCA, from Opining that the Change in Roof Surfacing Materials Contributed to the Failure of the Building Envelope, ¶¶ 15–16, hereinafter "Jalboot Motion".)[3] Lavallee's expert, Daniel Jalboot ("Jalboot"), concludes that the sole cause of the failure of the ceiling system was improper installation of the SPF. (Jalboot Mot. ¶ 16.)

Foam-Tech provided a report from its expert CCA that concludes that the use of copper roofing material contributed to the envelope failure. (Jalboot Mot. ¶¶ 26–28.) Dartmouth complains CCA has provided an opinion that cannot be tested, subjected to peer review or evaluated in terms of error rate and most importantly has not set forth a

[3] Dartmouth has provided copies of the expert reports it references.

methodology by which it reaches its conclusion[4]. However, Foam-Tech has settled and Lavallee has not provided notice that it will call CCA as an expert. Under these circumstances, the Court need not consider whether or not CCA's testimony would be admissible.

Lavallee argues that its "initial design considered that the project had a slate roof and moisture had been able to escape through the existing roof system as evidenced by the roof decking [sic] showing no signs of decomposition." (Obj. Roofing Materials Mot., 6.) But nowhere in its Objection does it specifically state that it has expert testimony that the change from slate to copper caused the envelope to fail. Rather, its position seems to be that "Dartmouth has retained experts who have opined that a significant cause of the issues at the Project relate to a lack of venting system in the Roofing Project." (Obj. Roofing Materials Mot., 7.) This dispute turns on the fundamental issue of whether the parties agreed in the communications between Dartmouth and Drobat that Dartmouth was taking responsibility for design of the entire system, or issues, if any, caused by replacement of the slate roof with copper and therefore had the responsibility to design a venting system. That factual issue is plainly part of the trial, and cannot be decided on the papers.[5] But Dartmouth need not go to the expense of

[4] RSA 516:29-a and New Hampshire Rules of Evidence 702 prohibit expert testimony unless the court finds that the testimony is based upon sufficient facts or data, is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case. RSA 516:29-a and Rule 702 essentially provide that expert testimony must rise to a threshold level of reliability to be admissible. Baker Valley Lumber, Inc. v. Ingersoll-Rand Co., 148 N.H. 609, 613 (2002). Under the statute, the trial court acts as a gatekeeper, "ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." Baxter v. Temple, 157 N.H. 280, 284 (2008) (citation and quotation omitted); *see generally* Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993). Plainly, if this case were a jury case and if Foam-Tech sought to call CCA, a hearing pursuant to Baker Valley would be required. Since this is a nonjury case, the Court would simply consider the qualifications of Foam-Tech's expert during the trial.

[5] The Court notes, however, that while Scherding e-mailed Drobat that Dartmouth was taking responsibility for the use of copper rather than slate in the roof, subsequent e-mails suggests that Lavallee

producing expert testimony that replacement of the roof with copper rather than slate did not cause or substantially contribute to the envelope failure, since Lavallee has produced no credible expert testimony that the change in roofing materials from slate to copper caused or contributed to cause the envelope failure.

IV

Lavallee intends to present David A. Ponte, P.E. of Helmes & Company to testify as to the amount of damage Dartmouth suffered. (Doc. #111 Lavaelle's Obj. Pl.'s Mot. Preclude David Ponte, hereinafter "Ponte Objection.") Dartmouth seeks to exclude the testimony of Ponte to the extent that Ponte seeks to testify as to conclusions of law. (Ponte Mot., 1.) Throughout his expert report, Ponte purports to testify to what damages are recoverable by the Plaintiff.

In a contract action, the injured party generally has a right to damages based on his "expectation interest," which is measured by: "(a) the loss in the value to him of the other party's performance caused by its failure or deficiency; plus (b) any other loss, including incidental or consequential loss, caused by the breach; less (c) any cost or other loss that he has avoided by not having to perform." RESTATEMENT (SECOND) OF CONTRACTS, § 347 (1979); see also Estate of Young by Bank of New England, N.A. v. Huysmans, 127 N.H. 461, 468 (1985). Under the second prong, the Plaintiff may only seek "consequential damages that could have been reasonably anticipated by the parties as likely to be caused by the [D]efendant's breach. . . ." Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust, 130 N.H. 673, 677 (1988) (quotation and citation omitted). Furthermore, as a general rule, a party cannot recover damages for loss he could have

understood that its responsibility for the functioning of the roof system remained. (Roofing Materials Mot., ¶ 29.) (citing e-mail from Drobat to Scherding, June 16, 2005); (id. ¶ 30) (citing e-mail from Drobat to Scherding, June 20, 2005).

avoided by reasonable efforts. See Grenier v. Barclay Square Commercial Condo. Owners' Ass'n, 150 N.H. 111, 119 (2003) (recognizing that a party seeking damages "must take all reasonable steps to lessen his or her resultant loss"). As the Restatement notes,

> [I]t is sometimes said that it is the 'duty' of the aggrieved party to mitigate damages but this is misleading, because he incurs no liability for his failure to act. The amount of loss that could reasonably have been avoided by stopping performance, making substitute arrangements or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages.

RESTATEMENT (SECOND) CONTRACTS, § 350, Comment b. The Defendant bears the burden of proving that the Plaintiff failed to mitigate its damages, Grenier, 150 N.H. at 119, and "the law does not require . . . the [Plaintiff] [to have made] a perfect decision, but only a reasonable one." See Joseph M. Perillo, CORBIN ON CONTRACTS, §57.11 (2005) ("[t]he doctrine of avoidable consequences merely requires reasonable efforts to mitigate damages").

A witness, expert or otherwise, may not testify to conclusions of law. Saltzman v. Saltzman, 124 N.H. 515, 524 (1984). The New Hampshire Supreme Court, although only addressing the issue of a police officer testifying on the issues of fault and causation, pertinently held:

> [A]witness may not testify to an opinion or conclusion which contains matters of law. On mixed questions of law and fact the jury, after being properly instructed by the court as to the law, can draw the required conclusion from the facts as well as can the expert, so that the opinion of the witness, be he expert or layman, is superfluous in the sense that it will be of no assistance to the jury.

Id. at 524–25 (citation and quotation omitted). Where the evidence available to the jury is the same evidence the expert uses to render an opinion about a conclusion based in law, the expert's testimony will not assist the jurors in their search for the truth and the

opinion must be excluded. See Johnston by Johnston v. Lynch, 133 N.H. 79, 88 (1990).

While there is no jury in this case, direct and cross examination on the legal opinions of an expert would constitute a waste of time. Accordingly, Ponte's testimony regarding pure issues of law are prohibited. Such opinions include the following statements:

> Inasmuch as DC is entitled to be made whole, DC is not entitled to be placed in a better position than it otherwise would have been but for the problems with the ceiling system. It is H&C's opinion, that notwithstanding whichever remediation DC chooses to undertake, it is only entitled to an amount up to but not exceeding the amount it paid for the ceiling system installed in the pool and mechanical room areas during the 2006 renovation project as well as any demolition costs of the 2006 system in those area not necessitated by its chosen remediation method.
>
> H&C acknowledges that DC would also be entitled to an adjustment for inflation on that amount but notes that because of DC's failure to . . . mitigate its damages in a timely fashion, it would be limited only to 2010 and the entire amount would then be subject to a deduction for depreciation of the ceiling system over the length of time it is in service.
>
> . . .
>
> When an owner such as Dartmouth College procures engineering and construction services for a renovation project such as it did for the Alumni Gymnasium in 2006, it can reasonably expect the systems installed to perform adequately. However, when they don't, they are entitled to have that system repaired if possible or reimbursed for the cost of that system if not. What an owner is not entitled to is the cost of an upgraded system.
>
> . . .
>
> Therefore, as discussed above, it is H&C's opinion, that Dartmouth College is entitled to actual appropriate remediation costs incurred, including design, permit and other applicable fees, up to those corresponding amounts paid by DC during the 2006 Alumni Gymnasium renovation project, subject to adjustments for inflation and depreciation.

(Ponte Mot., Ex. 4, 4–5.) Furthermore, such statements as, "claim preparation and legal support fees are not remediation costs and should not be included in the accounting of alleged damages" and "D.C.'s claim for 'Loss of Use' is considered consequential

damages and maybe excluded by contract language," are also precluded from trial. (Ponte Mot., Ex. 4, 3.)

Dartmouth also contends that Ponte's opinions are inadmissible under RSA 516:29-a because they are "rife with vague, naked and unverifiable conclusions which are unreliable, both as to methodology and the application of any methodology to the facts of this case." (Ponte Mot., ¶ 21.) In particular, Dartmouth contends Ponte's opinion does not meet the threshold of reliability because he has not revealed what method, such as an examination of market conditions or the costs of materials, he used nor has he "ever been to the site, or gone inside the gym, natatorium or mechanical room." (Ponte Mot. ¶ 20.) Lavallee objects and contends Ponte's opinions are based "upon review of construction industry manuals, and receipt and review of the Plaintiff's expert disclosures, reports, and cost estimates, including the calculations and data provided by SGH in its expert disclosure" and Ponte "provided a critique of the methodology and techniques used by SGH and other Plaintiff experts to calculate such damages." (Ponte Obj. ¶ 6.) Lavallee asserts that Dartmouth's motion goes to the weight of the evidence and not its admissibility.

New Hampshire Rule of Evidence 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Court cannot bar Ponte's testimony regarding Dartmouth's expenditures on this record. It appears that the focus of Ponte's testimony is

whether the installation of a "debris net" by Dartmouth was proper.[6] This opinion is not a conclusion of law. While Ponte may not have visited the site as Dartmouth alleges, Rule 703 does not require Ponte to base his opinion on such knowledge. However, it is unclear what methodology Ponte used in reaching his conclusion. While, Ponte's qualifications are not in dispute and his reliance on SGH's report to form his opinion as to the debris net is proper, the Court cannot assess what methodology was used in reaching his conclusion at this stage. Accordingly, Dartmouth's motion is DEFERRED to the extent Ponte testifies as to his conclusions regarding the "debris net" and the costs incurred by Dartmouth, and GRANTED to the extent Ponte testifies as to conclusions of law as detailed above.

V

Finally, Dartmouth seeks to prohibit Lavallee's energy loss expert, Lance Robson ("Robson") from offering any opinion regarding the amount and cost of energy loss because Robson failed to conduct any testing or remodeling to support his conclusion. (Robson Mot.) Specifically, Dartmouth argues that Robson's opinion lacks energy loss modeling and concedes that he did not perform any form of energy loss modeling as it would be prohibitively expensive. Robson states, in particular, that:

> As discussed, we can additionally also provide energy analysis. However, the effort to do so, including field verification of existing conditions and on-site testing, as well as the assumption of consensus based values

[6] As to the issue of a debris net, Ponte states:

> The reports prepared by SGH indicate that although the ceiling over the pool itself eventually presented with similar deficiencies as the ceiling in the mechanical room, there was no indication that the ceiling in the pool area was in imminent danger of failure which would require installation of a debris net.

(Ponte Mot. Ex. 4, 3.)

> acceptable to all parties, cannot be reasonably expected to be performed without resulting in expenses equal to many years of the predicted energy loss values.

(Robson Mot. Ex. 2, 5.) Lavallee objects and contends Robson's opinions "are based upon review of data provided by SGH in its expert disclosures and reports, and . . . Robson provides a critique of the methodology techniques used by SGH to calculate the damages related to energy loss, especially where SGH did not base its energy loss calculations upon constructed conditions." (Doc. #112, Obj. Pl.'s Mot. Preclude Evidence of Lavallee's Energy Loss Expert, Lance Robson, Relative to Opinions on Energy Loss, ¶ 6, hereinafter Obj. Robson Mot.).

After reviewing Robson's report (Robson Mot., Ex. 2.), the Court is persuaded that Robson's testimony rests upon "good grounds," and thus, "should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded . . . ." State v. Langill, 157 N.H. 77, 88 (2008) (internal quotations and citations omitted). Based upon analysis of the Motion and the Objection, the Court finds that Dartmouth's objections go to weight, not admissibility of the testimony, and that Robson may testify.

SO ORDERED

3/24/14
DATE

s/ Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/