The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Mentis Sciences, Inc.

v.

Pittsburgh Networks, LLC

No. 2017-CV-00132

ORDER

Plaintiff, Mentis Sciences, Inc. ("Mentis"), has brought an action against Defendant, Pittsburgh Networks, LLC ("Pittsburgh"), seeking damages arising out of a contract (the "Agreement") between the parties in which Pittsburgh agreed to provide services including network maintenance, workstation aid and/or service support, and network infrastructure management. Mentis alleges that Pittsburgh failed to comply with the Agreement and, as a result, Mentis suffered damages including loss of data critical to its business. This loss has resulted in Mentis being forced to incur the cost of re-creating the data and caused it to lose profits because it was unable to bid on other work. Mentis makes two claims. In Count I, it seeks damages for breach of contract. In Count II, it seeks damages as a result of Pittsburgh's negligence in performing the agreement.

Pittsburgh moves to dismiss, alleging that the damages sought in Count I, the contract claim, is barred by a Limitation of Liability Clause which prohibits recovery for consequential and incidental damages such as lost profits, and that the negligence claim, Count II, is barred by controlling New Hampshire law. For the reasons stated in this Order, the Motion is DENIED with respect to Count I, the Contract Claim. However, Mentis' claim for incidental and consequential damages resulting from loss of data,

including lost profits, is DISMISSED. The Motion to Dismiss is GRANTED with respect to Count II, the negligence claim.

I

In ruling on a Motion to Dismiss, the Court must determine whether a plaintiff's allegations are "reasonably susceptible of a construction that would permit recovery." Bohan v. Ritzo, 141 N.H. 210, 212 (1996) (quotation omitted). This determination requires the Court to test the facts contained in the complaint against applicable law. Tessier v. Rockefeller, 162 N.H. 324, 330 (2011). In rendering such a determination, the Court "assume[s] the truth of all well-pleaded facts alleged by the plaintiff and construe[s] all inferences in the light most favorable to the plaintiff." Bohan, 141 N.H. at 213 (quotation omitted). "The plaintiff must, however, plead sufficient facts to form a basis for the cause of action asserted." Mt. Springs Water Co. v. Mt. Lakes Vill. Dist., 126 N.H. 199, 201 (1985). A Court "need not accept statements in the complaint which are merely conclusions of law." Id. Plaintiff has appended a copy of the contract between the parties and the Court may therefore consider the terms of the contract in ruling on the Motion to Dismiss. Beane v. Beane & Co., 160 N.H. 708, 711 (2010).

According to the Complaint, on or about May 22, 2014, Mentis and Pittsburgh entered into an Agreement pursuant to which Pittsburgh agreed to provide Mentis with IT services. (Compl. ¶ 5.) Pittsburgh agreed to provide "Network Maintenance, Workstation and/or Server support and Network Infrastructure management, as well as other services agreed to by the Customer [Mentis] and the Service Provider [Pittsburgh] as detailed in additional quotes or change orders." (Compl., Ex. A "Agreement," p. 2.) The contract price was $15,864.00 annually. (Compl., Ex. A "Agreement," attach.) On or

about August 18, 2014 Pittsburgh notified Mentis that one of Mentis' servers had failed and needed to be replaced. (Compl. ¶ 6.) Between August 18 and August 25, 2014, Pittsburgh worked to repair Mentis' IT system. (See Compl. ¶¶ 7–8.) On August 25, 2014, Pittsburgh advised Mentis that piece of equipment called a RAID controller had malfunctioned which caused corruption of data. (Compl. ¶ 8.) The data that was corrupted and rendered useless due to the malfunctioning controller was supposed to have been backed up by Pittsburgh. (Compl. ¶ 8.) However, when Pittsburgh attempted to recover the data it discovered it had failed to properly back up the data, and the data was permanently lost. (Compl. ¶ 8.)

"The data that was lost represents valuable intellectual property compiled over many years and is of daily critical use in Mentis' business." (Compl. ¶ 9.) "This is especially true for unique data obtained from United States Department of Defense testing." (Compl. ¶ 9.) Mentis alleges that as a result of this loss of data it "has incurred substantial damages, including but not limited to the cost of re-creating the data and the additional time and expense now required on existing and future work." (Compl. ¶ 10.) Mentis claims that some of the data which was lost "can only be obtained through . . . testing which is massively expensive to conduct." (Compl. ¶ 10.) Mentis alleges that as a result of the loss of data it is "unable to bid or participate in various projects worth potentially millions of dollars." (Compl. ¶ 10.) According to the Complaint "the actual damages incurred by Mentis as a result of Pittsburgh's actions are estimated to be in the millions of dollars." (Compl. ¶ 14.)

Pittsburgh moves to dismiss both counts of the Complaint. Pittsburgh alleges that the damages sought in Count I, the breach of contract count, are consequential damages

which are barred by the terms of the Agreement. It also alleges that Count II, the negligence count, does not state a cause of action. The Court deals with the issues *seriatim*.

II

The purpose of a damages award in a breach of contract action is to put the non-breaching party in the same position it would have been in if the contract had been fully performed. Robert E. Tardiff, Inc. v. Twin Oaks Realty Trust, 130 N.H. 673, 677 (1988). Recoverable damages may be direct or indirect damages. Direct damages constitute "the loss in the value of the other party's performance caused by its failure or deficiency." Restatement (2d) Contracts § 347(a). In addition to the loss in value to of the other person's performance, an injured party may recover "any other loss, including incidental or consequential loss, caused by the breach." Restatement (2d) Contracts § 347(b). Such indirect or consequential damages are those "that could have been reasonably anticipated by the parties as likely to be caused by the defendant's breach." George v. Al Hoyt & Sons, Inc, 162 N.H. 123, 134 (2011).

The Agreement between the parties contains a "Limitation of Liability Clause" which Pittsburgh alleges bars Mentis' claim for consequential lost profit damages. The Clause provides:

> The Service Provider [Pittsburgh] shall not be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the work performed or equipment supplied by the Service Provider [Pittsburgh] under the terms of this Agreement.

(Compl., Ex. A "Agreement," p. 7.)

Limitation of Liability clauses are generally enforceable between business entities

dealing at arm's length in New Hampshire. See, e.g., Hydraform Prods. Corp. v. American Steel & Aluminum Corp., 127 N.H. 187, 194 (1985). Mentis does not allege overreaching by Pittsburgh. Pittsburgh asserts that Count I, alleging breach of contract, must be dismissed because the language of the Agreement plainly excludes incidental or consequential damages resulting from loss of data including lost profits.

Mentis objects and makes two arguments. First, Mentis relies upon the decision of the 10th Circuit in Penncro Assocs. v. Sprint Spectrum, L.P., 499 F.3d 1151 (10th Cir. 2007)[1] which held that a Limitation of Liability Clause, virtually identical to the Limitation of Liability clause in the Agreement here, did not bar the plaintiff's claim for lost profit damages. Second, it argues that if the Limitation of Liability Clause were considered to bar its claim for lost profits, then it would be unenforceable because Mentis would be left with no "minimum adequate remedy for breach of the contract where the breach was total and fundamental." (Pl.'s Mem. in Support of Obj. to Mot. to Dismiss, p. 15, citing Colonial Life Ins. Co. of Am., v. Electronic Data Systems Corporation, 817 F. Supp. 235, 242-43 (D.N.H. 1993).)

Pittsburgh argues that Penncro is either distinguishable or inconsistent with New Hampshire law, and that under New Hampshire law it is well settled that all lost profits are consequential damages and are therefore barred by the Limitation of Liability clause. (Def.'s Reply to Pl.'s Obj. to Mot. to Dismiss, p. 2.) It does not dispute that the Limitation of Liability clause allows Mentis to recover its direct damages but argues Mentis has not pled any such direct damages. (Def.'s Reply to Pl.'s Obj. to Mot. to Dismiss, p. 5.)

[1] Decided by Judge Gorsuch while on the United States Court of Appeals for the 10th Circuit.

A

Both parties treat Penncro as setting forth a novel approach to contract damages. The Court disagrees. Penncro is essentially based upon the Restatement (2d) Contracts and is consistent with New Hampshire law.[2]

An understanding of Penncro's facts is critical to understanding the decision. Penncro was a bill collector, which was hired by the defendant, Sprint, to collect overdue bills from Sprint's cell customers. Under the contract between the parties, customers with overdue Sprint accounts trying to make outgoing calls were automatically routed to call centers staffed by Penncro. Penncro employees introduced themselves as Sprint agents, informed callers that their accounts were past due and attempted to collect money. Penncro agreed maintain its staffing levels to provide Sprint with 80,625 productive hours per month. Sprint agreed to pay for those hours at the rate of $22 an hour. Penncro, 499 F.3d at 1153. Penncro sued Sprint for termination of the contract and recovered damages for lost profits. The contract between the parties contained a Limitation of Liability clause which was similar to the limitation of liability clause in this case, and which barred the award of consequential damages defined as "including, but . . . not limited to lost profits, lost revenues and lost business opportunity." Id. at 1155. Sprint argued this language prohibited Penncro from recovering any lost profits. The Court rejected Sprint's argument and, applying Kansas law, held that that "direct damages refer to those which the party loss from the contract itself—in other words the benefit of the bargain—while consequential damages referred to economic harm beyond the immediate scope of the document." Id. at 1156, citing Restatement (2d) Contracts §

[2] The New Hampshire Supreme Court routinely cites Restatement(2d) Contracts as authority. See, e.g.

347.[3] The Court explained:

> Lost profits, under appropriate circumstances, can be recoverable as a component of either (and both) direct and consequential damages. Thus, for example, if a services contract is breached and the plaintiff anticipated a profit under the contract, those profits would be recoverable as a component of direct, benefit of the bargain damages. If that same breach had the knock-on effect of causing the plaintiff to close its doors, precluding it from performing other work for which it had contracted and from which it expected to make a profit, those lost profits might be recovered as "consequential" to the breach.

Penncro, 499 F.3d at 1156, *quoted with approval by* Atl. City Associates, LLC v. Carter & Burgess Consultants, Inc., 453 F.Appx. 174, 179–80 (3rd Cir. 2011) and Atlantech Inc. v. American Panel Corporation, 740 F.3d 287, 293–294 (1st Cir. 2014).

Penncro's expectation interest was the profit it intended to make as a provider of services to Sprint. The court's unremarkable conclusion was that Penncro was entitled to its expectation interest, the lost profits it did not make as a result of the breach by Sprint. See Jay Jala, LLC v. DDG Construction, Inc., 2016 WL 6442074, *6 (E.D. Pa. Nov. 1, 2016). As the First Circuit explained in Atlantech, Inc., (decided under Georgia law), there are 2 types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less his saved expenses) and (2) lost profits which are indirect or consequential damages such as what the user of the a defective machine would lose if the machine were not working and he was unable to perform work for other clients. Items of loss other than loss in value of the other party's performance are

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Brooks v. Trustees of Dartmouth College, 161 N.H. 685, 698 (2011).

[3] The Restatement provides in relevant part that the injured party has a right to damages based on his expectation interest 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 laws, 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 (2d) Contracts § 347.

characterized as incidental or consequential damages. Restatement (2d) Contracts § 347, *comment c*.

The Limitation of Liability Clause in this case can only be construed to exclude incidental or consequential damages, such as lost profits, resulting from the data breach. It cannot be construed to exclude damages for lost profits directly caused by Pittsburgh's breach. However, Mentis has not and could not plead such a claim, because it did not expect to profit from the contract; it expected to receive a service. Since Mentis waived all claim to consequential or incidental damages including lost profits and loss of data, its expectation interest is limited to what it expected to receive, the fair market value of Pittsburgh's services, which is probably close to, if not actually, the contract price. Restatement (2d) Contracts, § 347, *comment a*.

B

While recognizing that this case does not involve the sale of goods, and therefore Article 2 of the Uniform Commercial Code ("UCC"), RSA 382-A:2-101 *et seq*. is inapplicable, Mentis cites a number of cases for the proposition that if the limitation of liability clause were interpreted to exclude its claim for lost profits from the data of breach, the contract would be unenforceable, because it would not be afforded a minimum adequate remedy. See generally RSA 382-A:2-719. However, the fact that under a correct interpretation of the contract Mentis is entitled to direct damages necessarily renders its claim that the Limitation of Liability Clause is unenforceable because it does not afford a "minimum adequate remedy" for breach nugatory. Compare Colonial Life, 817 F.Supp. 242–243. Under the UCC, limitations of remedies to repair or replacement between commercial parties are permissible. See generally, Xerox Corp. v.

Hawkes, 124 N.H. 610, 617–18 (1984); BAE Sys. Info. & Elecs. Sys. Integration, Inc. v. SpaceKey Components, Inc., 941 F. Supp.2d 197, 202 (D.N.H. 2013).

Mentis also argues that the UCC restates the common law of contracts and that if the Limitation of Liability Clause is construed to exclude incidental and consequential damages including lost profits, it would be unconscionable under Restatement (2d) Contracts § 346. (Pl.'s Memo. in Opp. to Def.'s Mot. to Dismiss, p. 14.) Mentis cites no authority for this proposition. Gross disparity of the values exchanged is an important factor in determining unconscionability of an agreement. Restatement (2d) Contracts § 208. The Court cannot find a waiver of consequential damages unconscionable where the party receiving less than $16,000 under a contract obtained a waiver of liability for potentially millions of dollars in consequential damages. Compare American Home Improvement Co. v. McIver, 105 N.H. 435, 438–39 (1965) (contract unenforceable under UCC 2-302 where defendants received "little or nothing of value under the transaction the entered into" and were paying $1609 for goods and services valued at approximately $800).[4]

III

Mentis has also brought a count alleging Negligence against Pittsburgh. In Count II, its negligence count, it incorporates the allegations in its contract count and alleges that "Pittsburgh had a duty to exercise a reasonable and appropriate standard of care in performing the above described work." (Compl. ¶ 17.) It further asserts that "Pittsburgh was negligent in failing to exercise reasonable standard of care in performing its work by, among other things, failing to confirm that Mentis's data was being backed up, as it

[4] It appears the drafters of the Restatement believe that the decision in McIver illustrates the common law

represented to Mentis was being done." (Compl. ¶ 18.)

"In New Hampshire, the general rule is that 'persons must refrain from causing personal injury and property damage to third parties, but no corresponding tort duty exists with respect to economic loss.'" Plourde Sand & Gravel Co., Inc. v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007) (quoting Ellis v. Robert C. Morris, Inc., 128 N.H. 358, 364 (1986) *overruled on other grounds by* Lempke v. Dagenais, 130 N.H. 782, 792 (1988)). In Plourde, the Court stated:

> The [economic loss] doctrine is a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.
>
> The economic loss doctrine is based on an understanding that contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena. If a contracting party is permitted to sue in tort when a transaction does not work out as expected, that party is in effect rewriting the agreement to obtain a benefit that was not part of the bargain.

Plourde, 154 N.H. at 794 (quoting Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233, 241—42 (Wis. 2004). Thus, while a plaintiff may recover damages for economic loss under a contract, generally a cause of action in negligence for purely economic loss will not lie. Plourde, 154 N.H. at 794.

Mentis argues that it may maintain its negligence action notwithstanding the economic loss doctrine, because negligent misrepresentation is an exception to the doctrine. (Pl.'s Memo. in Opp. to Def.'s Mot. to Dismiss, p. 17.) It is true that a narrow exception to the economic loss rule applies when there is a "special relationship" between the party to be charged and the plaintiff. But the New Hampshire Supreme

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standard for unconscionability. Restatement (2d) Contracts § 208, illustration 2.

Court has likened the duty owed in such a relationship to that owed by a promisor to an intended third-party beneficiary: "[a] third-party beneficiary relationship exists if the contract is so expressed as to give the promisor reason to know that a benefit to a third party is contemplated by the promisee as one of the motivating causes of his making the contract." Plourde, 154 N.H. at 796, *quoting* Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903 (1982). Mentis has alleged no such special relationship, and based upon the Agreement it could not do so. It follows that its claim for negligence must be DISMISSED.

III

In sum, under the Limitation of Liability Clause of the Agreement, Mentis has waived its claim for lost profits from loss of data, which are incidental or consequential damages in the circumstances of this case, and its claim for such damages must be DISMISSED. However, Pittsburgh's Motion to Dismiss Count I of the Complaint, alleging breach of contract, must be DENIED, as damages are not an element of a breach of contract claim. Restatement (2d) Contracts § 346(2). Pittsburgh's Motion to Dismiss Count II of the Complaint, which alleges negligence, must be GRANTED.

SO ORDERED

6/8/17 ____________________ DATE

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