The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Penta Corporation

v.

Town of Newport

v.

AECOM Technical Services, Inc.

NO. 212-2015-CV-00011

ORDER

The Plaintiff, Penta Corporation ("Penta"), filed an action against the Defendant, the Town of Newport ("Town"), for breach of contract arising from the Town's alleged refusal to pay Penta, the general contractor of an allegedly defective wastewater treatment plant upgrade. In response, the Town brought a counterclaim against Penta and a third-party complaint against AECOM Technical Services, Inc. ("AECOM"), the engineer that had designed the plant. Penta filed a cross-claim against AECOM, and AECOM brought a counterclaim against the Town and a cross-claim against Penta. Penta moves to dismiss Counts I and III of AECOM's cross-claim, to which AECOM objects. Penta also moves to dismiss Counts II and III of the Town's amended counterclaim, to which the Town objects. For the reasons stated in this Order, Penta's Motion to Dismiss AECOM's cross-claim is GRANTED with respect to Count I, but DENIED with respect to Count III, and Penta's Motion to Dismiss the Town's counterclaim is DENIED with respect to Count II, but GRANTED as to Count III.

I

When ruling on a Motion to Dismiss, the Court must determine whether the plaintiff's allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel v. JGI Eastern, Inc., 154 N.H. 791, 793 (2007) (quoting Berry v. Watchtower Bible & Tract Soc'y of N.Y., Inc., 152 N.H. 407, 410 (2005)). In doing so, the Court must "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (quoting Berry, 152 N.H. at 410). However, the Court need not "assume the truth of statements . . . that are merely conclusions of law" not supported by predicate facts. Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611–12 (2010). The Court tests these facts against the applicable law and will deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." Starr v. Governor, 148 N.H. 72, 73 (2002).

II

The following facts are derived from the allegations contained in the Town's amended counterclaim and AECOM's cross-claim. The Town operates a Wastewater Treatment Facility ("WWTF"), which discharges treated wastewater into the Sugar River. (Town's Am. Countercl. ¶ 6; AECOM's Cross-Cl. ¶ 6.) In April 2007, the EPA issued a National Pollutant Discharge Elimination System (NPDES) permit authorizing the Town to discharge treated wastewater from the WWTF. The NPDES permit contained certain effluent limitations, and other conditions, including a specific limitation as to the rate of phosphorous discharge. (Town's Am. Countercl. ¶¶ 7–9.)

On March 6, 2009, the EPA issued an Administrative Order ("AO"), which found that the Town had violated the terms of the NPDES permit by discharging phosphorous

in excess of the established limits. The AO also found that the Town had violated the acute and chronic whole effluent toxicity limits of the permit. (Town's Am. Countercl. ¶ 10.) As a result, the AO mandated that the Town submit a report by December 31, 2009, identifying all upgrades and modifications to the WWTF necessary to comply with the effluent limitations in the NPDES permit by October 31, 2012. (Town's Am. Countercl. ¶¶ 11–12.)

The Town selected AECOM as an engineer to complete the preliminary evaluation and design services necessary to determine a method for meeting the AO requirements. (Town's Am. Countercl. ¶ 13; AECOM's Cross-Cl. ¶ 7.) On August 21, 2009, the Town and AECOM entered into an Engineering Report Phase Contract for Professional Services (the "Study Contract") to "examine the need, alternatives and cost of constructing Treatment Works including an evaluation of the alternatives and a recommendation for the upgrade of the WWTF necessary for the purpose of complying with the phosphorous limits contained in [the Town's] NPDES permit." (Town's Am. Countercl. ¶¶ 13–15.) The Study Contract included an indemnity provision, which provided that AECOM would indemnify the Town for damages caused by AECOM's negligence. (Town's Am. Countercl. ¶ 17.) The Study Contract further provided that the applicable standard of care for AECOM's services would be "the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services." (Town's Am. Countercl. ¶ 18.)

Pursuant to the Study Contract, AECOM pilot tested two technologies for phosphorous removal, coagulation followed by direct filtration and ballasted sedimentation process. AECOM's January 2010 report concluded that both technologies were equivalent, but AECOM ultimately recommended the coagulation followed by

direct filtration method, which utilized a disc filter system. The Town followed AECOM's recommendation and selected the disc filter system as part of the phosphorous upgrade (the "Project"). (Town's Am. Countercl. ¶¶ 19–20; AECOM's Cross-cl. ¶ 8.)

On or around May 9, 2011, the Town and AECOM entered into a Preliminary Engineering Design Phase Contract ("Preliminary Design Contract"), under which AECOM was to perform all preliminary work necessary to produce specifications, including the final design criteria, and associated contract documents for the Project. (Town's Am. Countercl. ¶¶ 21–22.) The Preliminary Design Contract specified an identical standard of care and similar indemnity provision as those delineated in the Study Contract. (Town's Am. Countercl. ¶¶ 18, 23–24.)

As delineated by the Preliminary Design Contract, AECOM prepared a preliminary design for phosphorous removal (the "Preliminary Design"). Consistent with the prior testing of phosphorous removal methods, the Preliminary Design called for a new treatment facility utilizing the coagulation followed by direct filtration method of phosphorous removal. The Preliminary Design specifically called for the use of an electric filter system that would utilize cloth media disc filters to achieve direct filtration. The design meant to automatically trigger a backwash cycle to remove solids from the cloth media filters and direct them to a spent backwash wet well. Effluent pumps were designed to maintain a constant level in the wet well. (Town's Am. Countercl. ¶¶ 25–27.)

On or around September 9, 2011, the Town and AECOM entered into a Final Engineering Design Phase Contract ("Final Design Contract"), in which AECOM agreed to prepare final drawings and specifications with all criteria necessary to meeting the Town's NPDES permit effluent limits. (Town's Am. Countercl. ¶ 28; AECOM's Cross-

Cl. ¶ 9.) The Final Design Contract included standard of care and indemnity provisions identical to those in the Preliminary Design Contract. (Town's Am. Countercl. ¶ 30.)

In January 2012, AECOM sought bidders for the contract to construct the Project. It issued specifications for bids and conditions to which the winning contractor must agree (the "Construction Contract"). Several provisions of the Construction Contract required the contractor to use its skill and expertise to design certain elements of the Project. In particular, it required the contractor to design and provide the Project's disc filters that could operate continuously at various flow rates with constant filtration and to provide the Town a certificate of design from a registered professional engineer and a certificate of compliance from the selected disc manufacturer. (Town's Am. Countercl. ¶¶ 31–35; AECOM's Cross-cl. ¶¶ 12–14, 19–20.) The Construction Contract prohibited the contractor from taking advantage "of any apparent error or omission in the plans or specifications," and required the contractor to notify AECOM of any such errors. (Town's Am. Countercl. ¶¶ 38–39; AECOM's Cross-cl. ¶¶ 21–22.) The Construction Contract also required the contractor to indemnify the Town and AECOM from certain claims, including loss of use. (AECOM's Cross-cl. ¶¶ 15–18.)

On or around March 2, 2012, the Town and AECOM entered into an Engineering Construction Phase Contract for Professional Services (the "Engineering Construction Contract"), which provided for construction administration for the Project. (Town's Am. Countercl. ¶ 43; AECOM's Cross-Cl. ¶ 23.) AECOM agreed to provide the services of a part-time resident engineer and supervise the selected contractor to ensure compliance and identify and reject deficiencies. The Engineering Construction Contract contained standard of care and indemnity provisions identical to those in the Preliminary and Final Design Contracts. (Town's Am. Countercl. ¶¶ 44–46.)

The Town awarded the construction contract to Penta in March 2012. Penta then executed a purchase order for the design and supply of the disc filters by WesTech Engineering Inc. ("WesTech"). Because the WesTech filter differed from the disc filters called for by the design specifications in the Construction Contract, AECOM required Penta to make certain modifications to accommodate the WesTech filter. (Town's Am. Countercl. ¶¶ 47, 50–52; AECOM's Cross-cl. ¶¶ 24–28.) As construction of the Project went on, it became clear Penta would be unable to achieve the substantial completion date set for October 31, 2012, as required by the Construction Contract and the AO, and with permission from the Town and the EPA, the AO compliance deadline and the Construction Constract final completion date were both extended to December 31, 2012. (Town's Am. Countercl. ¶¶ 53–55; AECOM's Cross-cl. ¶¶ 30–33.)

In mid-December 2012, WesTech, Penta's subcontractor, intended to test the filter system, but discovered several deficiencies that required it to install temporary equipment in order to complete testing. Sometime before early January 2013, WesTech and its subcontractor, Blueleaf Water, proceeded with performance testing of the Project and found that the Project was unable to consistently meet the permit requirements. WesTech reported that the WWTF's operation had "serious problems" and that "it [was] unlikely that the filters [could] operate at design flow" because the disc filters could not backwash, thus creating a "no flow" condition that jeopardized the system's operation. (Town's Am. Countercl. ¶¶ 58–61; AECOM's Cross-cl. ¶¶ 35–38.)

On or around January 29, 2013, AECOM notified Penta that substantial completion had not been achieved due to the Project's failure to satisfy permit requirements concerning phosphorous removal. Since then, the Project's filter system has encountered repeated operational failures is still unable to comply with the NPDES

permit phosphorous limitations. (Town's Am. Countercl. ¶¶ 53–57, 62–63; AECOM's Cross-cl. ¶¶ 30–34.) NHDES provided the Town a report summarizing its evaluation of the WWTF's continuing problems in January 2014. The report attributed the problems to AECOM's miscalculations. (Town's Am. Countercl. ¶¶ 64–35.) AECOM asserts that Penta's performance under the Construction Contract was deficient for several reasons, including failure to comply with certain specifications in the Construction Contract, such as using non-complying steel and failing to repair cracks in the concrete. After filter installation and during startup operations, Penta also allegedly damaged certain components of the filter system by, among other things, placing plywood on the filter system and power washing the filters. (AECOM's Cross-cl. ¶¶ 29, 41.)

The Town has paid more than two million dollars to AECOM and Penta combined, but the WWTF continues to fail to consistently satisfy the permit's phosphorous limits, and the filter system cannot operate continuously. As a result, the Town shut down the filter system in April 2015, thus rendering the Project a total loss. The Town attributes its continued violation of the AO to AECOM and Penta's failure to design and construct a filter system that could reduce the phosphorous levels in the treated effluent to meet the permit requirements. (Town's Am. Countercl. ¶¶ 66–67.)

Penta filed this action to recover payments it alleges the Town owes under the Construction Contract. The Town filed a counterclaim in response, in which it asserts three counts: (I) Breach of Contract; (II) Professional Negligence; and (III) Negligence for Failure to Supervise. The Town also filed a third-party complaint against AECOM. In turn, AECOM and Penta filed cross-claims against each other. AECOM's cross-claim asserts four counts: (I) Contractual Indemnity; (II) Contribution; (III) Common Law Indemnity; and (IV) Violation of RSA chapter 358-A.

Penta has filed a Motion to Dismiss Counts I and III of AECOM's Cross-claim and Penta a Motion to Dismiss Counts II and III of the Town's Amended Counterclaim. Penta had previously moved to dismiss Count IV of AECOM's cross-claim, and the Town had moved to dismiss Counts III and IV of AECOM's Counterclaim, but AECOM filed voluntary nonsuits without prejudice as to each of those counts. Penta had also previously moved to dismiss Count II of the Town's Counterclaim, but the Town later amended the Counterclaim rendering Penta's initial Motion to Dismiss moot.

III

A

Count I of AECOM's Cross-claim alleges contractual indemnity based upon the Construction Contract's provision requiring Penta to indemnify AECOM for damages caused by Penta's negligence. Penta does not dispute the existence of an express indemnity agreement, but merely contends that Count I is insufficient because the Town's third-party complaint against AECOM alleges damages as a result of AECOM's work, rather than as a result of Penta's work. AECOM objects stating that its cross-claim specifically alleges that any damages based on the Town's claims against it were not caused by any negligence by AECOM, but by that of Penta or its subcontractors, which is sufficient to survive a motion to dismiss.

AECOM has alleged facts sufficient to form a basis for relief with respect to Count I of its cross-claim. AECOM's cross-claim specifically alleges that the Town's claims against AECOM were filed "as a result of the negligence of Penta and/or its subcontractors." (AECOM's Cross-cl. ¶ 47.) Viewed in the light most favorable to AECOM, the non-moving party, with all reasonable inferences therefrom, this allegation specifically attributes damages to the negligence of Penta or its subcontractors, the type

of liability to which the Construction Contract's indemnity provision applies. If AECOM establishes that the damages alleged against it by Newport were attributable in whole or in part to Penta or its subcontractors' negligence, then AECOM has established a basis for contractual indemnity against Penta. Accordingly, Penta's motion to dismiss Count I of AECOM's cross-claim is DENIED.

B

Count III of AECOM's cross-claim alleges that Penta made misrepresentations to AECOM, which resulted in the Town suing AECOM. On this basis, AECOM alleges it is entitled to implied, common law indemnity. AECOM's Cross-claim raises difficult issue. AECOM alleges that it was injured because it "relied on the representation that Penta would follow the contract documents to its detriment". Cross-claim, ¶ 54. Penta argues that implied indemnity cannot arise until AECOM actually suffers a judgment in favor of the Town, and if this result occurs, AECOM's own negligence will be proved, which disables any claim for implied indemnity.

This argument exalts form over substance. While technically the right to indemnity arises when a judgment is rendered in favor of another, it has long been the practice to try indemnity claims, when properly pled, along with an underlying action. See generally Sears Roebuck and Co. v. Phillip, 112 N.H. 282, 284 (1972); Superior Court Rule 10. The real difficulty for AECOM is the lack of a substantive right to implied indemnity under Counterclaim III.

The right to indemnity may arise in three different circumstances: "(1) 'where the indemnitee's liability is derivative or imputed by law'; (2) where an implied duty to indemnify exists; or (3) where there is an express duty to indemnify." Gray v. Leisure

Life Indus., 165 N.H. 324, 327 (2013) (quoting Hamilton v. Volkswagen of Am., 125 N.H. 561, 563 (1984)).

The facts alleged in AECOM's cross-claim do not support a claim for implied indemnity.

This case does not involve a third party—one who was not a party to the contract giving rise to the indemnity claims—harmed by an indemnitor's breach of an indemnitee's non-delegable duty. Gray v. Leisure Life Industries, 169 N.H. 328. The misrepresentation claim against Penta-that it represented that it would perform work in a non-negligent manner but did not do so is nothing more thana rephrasing of the breach of contract claim. There is no allegation that Penta had an obligation to perform a nondelegable duty. The third party alleged to be damaged by Penta's alleged negligence, the Town, also had a contractual relationship with Penta under the Construction Contract. Given the fact that implied indemnity agreements are rarely found, it is difficult to construe the Construction Contract as requiring implied indemnification. While AECOM may be entitled to contribution under RSA 507:7-F based on these allegations, the well pleaded facts are insufficient to support AECOM's cross-claim for implied indemnity, and Penta's motion to dismiss Count III of AECOM's cross-claim is GRANTED.

IV

The Court next turns to Penta's motion to dismiss Counts II and III of the Town's amended counterclaim. With respect to Count II, which alleges a claim "professional negligence," Penta contends the claim is barred by the economic loss doctrine because the alleged duty is not separate and distinct from the duty imposed by the contract. Similarly, Count III of the Town's amended counterclaim alleges negligence based on

Penta's alleged failure to supervise its subcontractors to ensure all work was performed in accordance with the applicable professional standards of care. Penta contends Count III must be dismissed because no such duty arises outside of the parties' contract. The Town objects arguing that Penta's work on the Project involved professional design responsibilities, which implicates an additional professional duty outside of the contract, and that Penta had an independent duty to supervise its independent subcontractors. The Court finds that the Town has pleaded sufficient facts to form a basis for relief for Count II, but not for Count III.

A

In New Hampshire, 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." Plourde Sand & Gravel v. JGI Eastern, Inc., 154 N.H. 791, 794 (2007) (quoting Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233, 241 (Wis. 2004)). The New Hampshire Supreme Court has observed:

> 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.

Id. (quoting Tietsworth, 677 N.W.2d at 242).

However, a narrow exception to the economic loss rule applies where the defending party owed an "independent duty of care outside the terms of the contract." Wyle v. Lees, 162 N.H. 406, 410 (2011). This exception applies where the defending party assumes extra-contractual duties, such as where a promisor owes a duty to an

intended third-party beneficiary when the contract "give[s] 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," and therefore the promisor can "reasonably foresee the effect his negligence will have on the third party." Plourde Sand & Gravel, 154 N.H. at 796–97 (quoting Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903 (1982)).

New Hampshire courts have recognized that independent, extra-contractual duties of care exist in actions claiming professional negligence. See Schaefer v. Indymac Mrtg.Servs., 731 F.3d 98, 104 n.5 (1st Cir. 2013) (recognizing an exception applying to "malpractice-like claims based on the breach of extra-contractual duties arising from the qualifications of licensed professionals"). This principle is commonly referred to as the professional negligence exception to the economic loss doctrine. Sherman v. John Brown Ins. Agency, 38 F. Supp. 3d 658, 663 (W.D. Pa. 2014). For example, courts have traditionally held that legal malpractice cases may implicate both tort and breach of contract claims where the tort claim is based on breach of a professional standard of care. Wong v. Ekberg, 148 N.H. 369, 375 (2002). Similarly, architects and contractors have extra-contractual duties to design and construct in accordance with their respective professional standards of care. See Bruzga v. PMR Architects, P.C., 141 N.H. 756, 759 (1997) (recognizing that "architects and contractors have a duty to design and construct safe structures"); Blanchard Pointe Condo. Owners Ass'n v. Bowers Landing of Merrimack Dev. Grp., Merrimack County Superior Ct., No. 217-2010-CV-5003 (Jan. 13, 2011) (Order, McNamara, J.) (imposing an actionable duty of care on an architect because architects as professionals owe extra-contractual duties to those whom the architect may reasonably foresee suffering damages as a result of the architect's negligent design).

Count II of the Town's counterclaim sufficiently pleads the professional negligence exception to the economic loss doctrine on the theory that there is an actionable duty against Penta to the extent it took on the professional responsibility of design. The Town's Amended Counterclaim alleges that pursuant to the Construction Contract, Penta undertook responsibilities as a design professional. Specifically, Penta agreed to design and provide materials for the construction of the disc filters that would meet the performance specifications delineated by AECOM. This professional obligation is underscored by the Town's allegation that the Construction Contract required Penta to provide a certificate of design executed by a registered professional engineer. The Town further alleges that Penta's defective design of the disc filters did not satisfy the professional standard of care and caused damages to the Town, not limited to the total loss of the Project's value due to the Town's inability to operate the Project. Based on those alleged facts alone, the Court can conclude that Penta's contractual obligation to provide professional design services implicates an extra-contractual, actionable duty of care, which qualifies as a professional negligence exception to the economic loss doctrine. Therefore, the Town has pleaded facts sufficient to constitute a basis for relief, and Penta's motion to dismiss is DENIED as to Count II of the Town's counterclaim.

B

A party may be liable for the negligence of its independent contractor when that party was negligent in selecting, instructing, or supervising the independent contractor. Lawyers Title Ins. Corp. v. Groff, 148 N.H. 333, 336 (2002). It follows that a party may not be liable for negligent supervision unless the independent contractor was somehow negligent. A successful negligence claim "must demonstrate that the defendant had a

duty to the plaintiff, that [the defendant] breached that duty, and that the breach proximately caused injury to the plaintiff." England v. Brianas, 166 N.H. 369, 371 (2014)

The Court finds that Count III of the Town's counterclaim does not provide a basis for legal relief for two independent reasons. First, the Town's amended counterclaim does not plead facts demonstrating that any of Penta's subcontractors were negligent, which is a prerequisite for Penta's liability for negligent supervision of its subcontractors. Second, even if the Town's amended counterclaim pleaded sufficient facts, the economic loss doctrine would bar recovery because Penta's duty to supervise its subcontractors is not independent of its contractual duties.

Nowhere in its amended counterclaim does the Town identify any negligence by Penta's subcontractors or attribute any damages to those subcontractors' failures to design or construct. Under the Construction Contract, Penta was permitted to select a provider of disc filters, and Penta selected WesTech. The Town characterizes WesTech as Penta's subcontractor and supplier of disc filters. The Town alleges that "Penta executed a purchase order for the design and supply of the disc filters by WesTech." (Town's Am. Countercl. ¶ 50.) The Town further alleges facts related to WesTech and Blueleaf Water's involvement in testing the filter system. Specifically, WesTech discovered deficiencies with the system when it arrived to start the filter system. As a result, in order to continue performance testing, WesTech replaced certain equipment with temporary equipment while acquiring replacements. WesTech and Blueleaf proceeded with performance testing and found the Project was deficient. None of these facts attribute the system's deficiencies to Penta's subcontractors' actions. Indeed, the subcontractors are alleged to have themselves found that the system was deficient, and

the Town expressly attributes the cause of the design failures to "AECOM and Penta's failure to design and construct" the Project. (Town's Am. Countercl. ¶¶ 67–68.)

Moreover, the Construction Contract expressly states that Penta agrees to indemnify the Town for damages "caused in whole or in part by any negligent or willful act or omission of the . . . Subcontractor, [or] anyone directly or indirectly employed by any of them." Therefore, liability for any subcontractor's negligence is already a contractual obligation, and it strains logic to conclude that liability for any subcontractor's negligence due to failure to supervise amounts to an independent duty outside the terms of the contract. Even if the Court found that these facts sufficiently alleged professional negligence by any subcontractor to the extent the subcontractor took on the professional responsibility of design, which could feasibly be considered an exception to the economic loss doctrine similar to Count II, that professional duty is that of the subcontractor, not Penta. Therefore, the Town has not pleaded facts sufficient to constitute a basis for legal relief, and Penta's motion to dismiss is GRANTED with respect to Count III of the Town's counterclaim.

In sum, Penta's motion to dismiss AECOM's cross-claim is GRANTED with respect to Count I, but denied with respect to Count III, and Penta's motion to dismiss the Town's counterclaim is DENIED with respect to Count II, but GRANTED as to Count III.

SO ORDERED.

11/20/15
_____
DATE

Richard B. McNamara
_____
Richard B. McNamara,
Presiding Justice