

STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB- CV-07-18

PROJECT STAFFING, INC., et al,

Plaintiffs

v.

ORDER ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT AND ON
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT

MILLER INDUSTRIES

Defendant

This matter is before the Court on the motion of Defendant Miller Industries, Inc. ("Miller") for summary judgment on Plaintiffs' Complaint for breach of contract, and on the motion of Plaintiffs Project Staffing, Inc. ("Project Staffing") and Variable Employment, Inc. ("Variable") (also, collectively, "Plaintiffs") for partial summary judgment on select issues generated by their Complaint.

UNDISPUTED FACTS

Miller is a textile manufacturer that periodically hires workers from temporary employment agencies. Project Staffing is a temporary employment agency that has provided workers to Miller on numerous occasions. At times relevant to this suit, Project Staffing, Variable and two other companies ("Group")¹ acted in cooperation with each other to provide temporary workers to customers in such a way as to minimize their workers' compensation costs. This was accomplished, in part, by the constituent companies in the Group transferring workers and workers' compensation coverage among themselves to avoid any of the individual

¹ The two other companies, One Source Preferred, Inc. and Special Teams, Inc., were formerly plaintiffs in this case, but are no longer parties to this action. Those companies, together with Project Staffing and Variable, are part of the Group, which is known as Maine Staffing Group.

companies being classified as high risk and incurring an associated increase in workers' compensation insurance premiums.

In 2001, Miller contacted Project Staffing to supply a maintenance worker to clean one of Miller's facilities. Lawrence Thomas ("Thomas") was sent in response to this request. While working for Miller, Thomas suffered serious injuries operating a forklift.

It is undisputed that Miller had hired employees from Project Staffing for several years prior to Thomas's accident. On some occasions, Project Staffing would send Miller a letter-proposal for a temporary worker. (Def.'s S.M.F. ¶ 67.) There were never any oral discussions between Miller and Project Staffing regarding these letter proposals nor did Miller ever sign them. (Def.'s S.M.F. ¶¶ 70-71.) Additionally, on some occasions Project Staffing sent workers to Miller based only on oral requests with no letter-proposals generated. (Def.'s S.M.F. ¶ 72.)

Although plaintiffs have provided an example of a letter-proposal ("Proposal") as evidence of the terms of conditions of Thomas's employment, there is no dispute that the Proposal covers a different employee who performed a different job than Thomas. (Def.'s S.M.F. ¶¶ 74 & 78.) In fact, there is no evidence in the record as to whether Thomas was hired pursuant to an oral request or a letter-proposal.

At all relevant times, Thomas was an employee of Variable, not Project Staffing. (Def.'s S.M.F. ¶¶ 77-78.) Nevertheless, Project Staffing provided Thomas's services to Miller pursuant to the cooperative arrangement of the member companies of the Group. (Pl.'s S.M.F. ¶ 4.)

Although Project Staffing, Variable and the other two member companies of the Group retained their status as separate companies, in 2005 their workers' compensation insurance carrier, Employers' Mutual Insurance Company ("MEMIC"), decided to treat the members of the Group as combined for the purpose of establishing their experience ratings and, in turn, their risk group in order to determine their workers' compensation insurance premiums. MEMIC's

decision caused Project Staffing and Variable to be classified as high risk with a resulting increase in their premiums.

In the present suit, Plaintiffs allege that they had a contract with Miller, that Miller breached the contract by failing to provide a safe work environment for Thomas, that the breach led to Thomas's accident and injuries, and that Miller is liable for Plaintiffs' resulting increased workers' compensation premiums. Plaintiffs have moved for partial summary judgment on the issues of the existence of a contract between the parties and Miller's breach of that contract. Miller opposes Plaintiffs' motion and moves for summary judgment in its favor on Plaintiffs' Complaint.

DISCUSSION

A. CONTRACT BETWEEN MILLER AND VARIABLE

Miller asserts that it did not have a written agreement with Variable to provide Thomas's services, and that there could not have been any "meeting of the minds" to form such a contract because Miller only communicated with Project Staffing and did not know that Project Staffing and Variable had a cooperative arrangement.² However, Plaintiffs claim that there was an implied-in fact contract based on "the facts and circumstances surrounding the conduct between the parties," *Nightingale v. Leach*, 2004 ME 22, ¶ 4, 842 A.2d 1277, 1279, which included Plaintiffs' identical telephone numbers and a common receptionist who greeted callers with the names of both companies. These facts, Plaintiffs asserts, establish that Miller was on notice of the connection between Project Staffing and Variable. The court disagrees. It does not follow that this evidence, in and of itself, would put Miller or any caller on notice of the kind of

² To the extent that Miller argues that it had no contractual relationship with Project Staffing because there is no evidence of a written agreement memorializing their contractual duties, the court does not agree. The evidence is clear that Miller requested a temporary worker from Project Staffing and that Project Staffing agreed to provide that worker for a price. Thus, a contract was formed.

cooperative arrangement that existed between Variable and Project Staffing. However, the contract analysis does not end there.

Miller's apparent lack of knowledge of a relationship between Variable and Project Staffing aside, the motion record is sufficient to establish that Plaintiffs, including Variable, had an enforceable contract with Miller based on principles of agency law.

When an agent acting with actual authority makes a contract on behalf of an undisclosed principal,

- (1) unless excluded by the contract, the principal is a party to the contract;
- (2) the agent and the third party are parties to the contract; and
- (3) the principal, if a party to the contract, and the third party *have the same rights, liabilities, and defenses against each other as if the principal made the contract personally*

RESTATEMENT (THIRD) OF AGENCY § 6.03 (2006) (emphasis added); *See also* 3 Am. Jur. 2d *Agency* § 316 (1962) (stating “[w]hen an agent makes a contract for the principal, but, contracting as if he or she were the principal, conceals the fact that he or she is an agent, the principal may at any time appear as such and claim all the benefits of the contract from the other contracting party”) It appears that Variable was an undisclosed principle to the contract between Project Staffing and Miller, and has a right to pursue any claims against Miller that it could have asserted had it, and not Project Staffing, directly contracted with Miller. As a result, the fact that Miller thought it was contracting only with Project Staffing does not bar Variable's inclusion in Plaintiffs' breach of contract cause of action.

B. OSHA COMPLIANCE AS TERM OF CONTRACT

At the heart of Plaintiffs' case against Miller are allegations that the contract for Thomas's services required Miller to provide a work environment that met Occupational Safety and Health Administration (“OSHA”) safety standards, and that Miller breached this condition.

Although Plaintiffs have not produced written evidence of such a condition, they assert that there was a course of dealing between the parties on some occasions in which, prior to sending an employee to Miller, Project Staffing would provide Miller with a letter-proposal listing, among other details, the scope of the employee's work assignment, services to be provided by Project Staffing, and Miller's responsibilities. Plaintiffs have offered an exhibit, the Proposal, as a representative example of their typical letter-proposal. Among Miller's responsibilities in the Proposal is that "[a]ll OSHA and accepted safety practices and procedures must be followed to ensure a safe working environment." (Exhibit A to Pls.' S.M.F.)

Miller counters that the Proposal is irrelevant to the present analysis for several reasons: it is for a different employee performing a different job than Thomas; Miller never signed the Proposal; and Miller did not consider it to be a contract for the employee named in the Proposal. Although Miller's arguments are compelling as to the weight to be accorded Plaintiffs' evidence, it is not the court's role to make such determinations on a motion for summary judgment.

Miller and Project Staffing repeatedly contracted with each other for temporary employment services to the point that an informal phone call was all that was necessary for Miller to secure a worker. A continuing relationship of this sort between parties can create a course of dealing in which terms may exist that were not expressly formalized by the parties. *See* RESTATEMENT (SECOND) OF CONTRACTS § 223 cmt. b (1981) (stating "[c]ourse of dealing may become part of an agreement either by explicit provision or by tacit recognition")

Based on the foregoing, there is a genuine issue of material fact as to whether there was a sufficient course of dealing between the parties such that Miller tacitly recognized, or should have recognized, a contractual requirement to provide Thomas with a work environment that complied with OSHA standards.

C. STATUTORY BAR TO DAMAGES FOR PREMIUM INCREASE

Finally, Miller argues that Maine's Workers' Compensation law prohibits Plaintiffs from seeking damages for increased workers' compensation premiums. In support, Miller cites *Pro-Staffers, Inc.*, 651 N.W.2d 811 (Mich. Ct. App. 2002), a Michigan case involving a suit by a temporary employment agency against a client for workers' compensation premium increases resulting from an injury to the agency's employee while on the client's premises. The plaintiff-agency claimed that those damages resulted from the defendant-client's breach of contract and negligence.

Pro-Staffers held that under Michigan's workers' compensation scheme "an employer does not have a cause of action against a third party to recover damages for increased worker's compensation premiums . . . incurred as a result of an injury to its employee." *Id.* at 818. The court reasoned that the Michigan law "reflects the legislative determination that when an employer pays out benefits to an employee for an injury caused by the acts of a third party, the exclusive remedy is that found with [the statute]," *id.* at 816, and determined that "the subrogation provision of [Michigan's workers' compensation law] clearly shows that the Legislature has not provided such a statutory remedy for an employer," *id.* at 815.³

³ The text of the relevant Michigan statute reads in pertinent part as follows:

Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than . . . the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee . . . may also proceed to enforce the liability of the third party for damages in accordance with this section. If the injured employee or his or her dependents or personal representative does not commence the action within 1 year after the occurrence of the personal injury, then the employer or carrier . . . may enforce the liability of such other person in the name of that person.

Maine's Worker's Compensation Act is based upon the Michigan scheme, *see Temm v. S.D. Warren Co.*, 2005 ME 118, ¶ 10, 87 A.3d 39, 42, and the specific statutory provision at issue in this case is very similar in all relevant respects to the one interpreted in *Pro-Staffers, Inc.*, 39-A M.R.S.A. § 107.⁴ There is no Maine Law Court precedent on point and this court is not aware of any cases from other jurisdictions with similar statutes that reached a different conclusion.

This court finds *Pro-Staffers* persuasive and, as applied to this case, it renders Plaintiffs' claim for damages based on increased workers' compensation insurance premiums impermissible. There is much debate between the parties as to whether Plaintiffs' increased premiums were a foreseeable consequence of a breach of the purported contract provision requiring OSHA compliance. However, the accepted reasoning in *Pro-Staffers* moots that issue because it stands for the proposition that the legislature has determined that, no matter how foreseeable, such damages are not among the range of options for relief in a case like this.

Further, although Plaintiffs argue that the reasoning in *Pro-Staffers* is applicable only to tort actions, there is no support for this proposition. It is correct that the Michigan court

⁴ The Maine statute reads in part as follows:

When an injury or death for which compensation or medical benefits are payable under this Act is sustained under circumstances creating in some person other than the employer a legal liability to pay damages, the injured employee may, at the employee's option, either claim the compensation and benefits or obtain damages from or proceed at law against that other person to recover damages.

If the injured employee elects to claim compensation and benefits under this Act, any employer having paid the compensation or benefits or having become liable for compensation or benefits under any compensation payment scheme has a lien for the value of compensation paid on any damages subsequently recovered against the 3rd person liable for the injury. If the employee or the employee's beneficiary fails to pursue the remedy against the 3rd party within 30 days after written demand by the employer, the employer is subrogated to the rights of the injured employee and is entitled to enforce liability in its own name or in the name of the injured party, the accounting for the proceeds to be made on the basis provided.

discussed damages for workers' compensation premium increases in the context of a tort claim. *See e.g. id.* at 816 (stating "[Michigan's workers' compensation statute] essentially provides that where an employee who has received worker's compensation benefits recovers damages in a third-party tort action") However, the case involved a plaintiff's causes of action for breach of contract and negligence. *Id.* at 813. The Michigan court did not limit its discussion of permissible damages to some but not all of the plaintiff's claims and there is no reason to read such a limitation into its opinion. Perhaps more important than the wording in *Pro-Staffers* is the fact that neither the Michigan, nor the Maine statutes at issue here limits its applicability to tort claims or excludes contract actions. Therefore, even if *Pro-Staffers* is viewed as only applying to the plaintiff's negligence claim, its reasoning is equally applicable to a breach of contract cause of action.⁵

Finally, *Pro-Staffers* recognized that, notwithstanding the Michigan law's prohibition against damages based on increased premiums, parties were free to include an indemnification clause in their contracts rendering such damages recoverable by a plaintiff, *id.* at 817-18. However, Plaintiffs have not pled, and the record evidence does not support, the existence of such a clause in this case.

Accordingly, the court concludes that Plaintiffs are barred from seeking damages for increased workers' compensation premiums and that Miller is entitled to summary judgment on Plaintiffs' complaint.

⁵ Because the court views 39-A M.R.S.A. § 107 as excluding damages for increased workers' compensation premiums as a permissible measure of damages in a case such as this, the court need not reach the issue of whether such damages are ever sufficiently foreseeable to otherwise support a breach of contract claim. Even if the statute did not provide a complete defense to Plaintiffs' claims, however, the court agrees with the Michigan court's assessment that "when a defendant injures a plaintiff's employee, the nexus between that act and the plaintiff and its increased premiums . . . is simply too tenuous and removed to impose liability for such 'collateral consequences.'" *Pro-Staffers, Inc.*, 651 N.W.2d at 817 n.6 (quoting *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153, 157 (Conn. 1994)).

DECISION

Based on the foregoing and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference, and the entry is

Plaintiffs' Motion for Partial Summary Judgment is DENIED; and

Defendant's Motion for Summary Judgment is GRANTED. Judgment for Defendant on Plaintiffs' Complaint

Dated: May 30, 2008



Justice, Superior Court

JUDGMENT ENTERED:

June 2, 2008

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