STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
LOCATION: WEST BATH
DOCKET NO. BCD-WB- CV-08-24

BLACK BEAR DEVELOPERS, LLC, ET AL

Plaintiffs

v.

KEVIN LaCROIX, ET AL

Defendants

ORDERS ON:
(1) DEFENDANTS' LACROIX AND WOOSTER TO DISMISS CLAIMS AGAINST THEM
AND
(2) DEFENDANT CONSOLIDATED PLUMBING AND HEATING, LLC TO DISMISS COUNTS II–V OF PLAINTIFFS' COMPLAINT

Before the Court are the motions of (1) Defendant Consolidated Plumbing and Heating, LLC ("Consolidated") to the claims against them by Plaintiffs Black Bear Developers, LLC and Bauer & Gilman Construction, LLC (collectively "Plaintiffs") in Counts II through V of the First Amended Complaint ("Complaint"); and (2) the individual defendants Kevin Lacroix and Wallace Wooster ("Individual Defendants") to dismiss all of Plaintiffs' claims against them.[1] Both Motions are filed pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

Among other things the Complaint alleges the following: Consolidated is a Maine limited liability company and that the Individual Defendants are "doing business as" Consolidated. Pls.' Compl. at ¶ 2. Plaintiffs entered into contracts with the "Defendants to provide certain services relating to the design and construction of condominiums known as the Black Bear Condominiums at Sugarloaf ('the Project')." Pl.'s Comp. at ¶ 4. In particular, Plaintiffs allege that they "entered

[1] The Complaint also names an additional defendant, Builder Services Group, Inc. However, without objection, the claims against Builder Services Group were dismissed with prejudice on October 10, 2008.

into a contract with [the Individual Defendants] to install plumbing and heating and provide related services for the Project. *Id.* Plaintiffs "paid for the services rendered by Defendants pursuant to said contracts", *Id.* at ¶ 5, but Defendants failed to adequately perform the services for which they were hired. *Id.* at ¶ 14. *See also id.* at ¶¶ 7 & 22.

The Complaint alleges claims for Breach of Contract (Count I); Negligence (Count II); Unjust Enrichment (Count III); Fraud (Count IV); and Punitive Damages (Count V).

DISCUSSION

I. STANDARD OF REVIEW

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* A dismissal under M.R. Civ. P. 12(b)(6) will be granted only "when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Id.* (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law." *Bean v. Cummings*, 2008 ME 18, ¶7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

II. CONSOLIDATED'S MOTION TO DISMISS

In essence, Consolidated argues that Plaintiffs' claims are appropriately and necessarily limited to a claim for breach of contract.

A. Count II: Negligence

Count II of the Complaint alleges that the Defendants, including Consolidated, "had a duty to exercise reasonable care or competence in performing their services relating to the Project" and that they breached that duty by, without limitation, dead-ending the septic and sewer vent stacks, as outlined above. Pl.'s Compl. at ¶ 14. Consolidated argues that Plaintiffs' claim for negligence is barred by the economic loss doctrine because it is based solely on the assertion that Consolidated failed to perform its contractual obligations.

In opposition, Plaintiffs argue that, pursuant to M.R. Civ. P. 8,[2] they are entitled to plead breach of contract and negligence in the alternative. Plaintiffs further assert that, for the purposes of a 12(b)(6) analysis, it is sufficient to simply plead the necessary elements of each cause of action. Although the court recognizes the leniency of Maine's notice pleading rules and of the standard of review at this stage in the proceedings, Plaintiffs have failed to sufficiently state a claim for negligence upon which relief can be granted.

As Consolidated correctly points out, the Law Court has previously held that "tort recovery must be based on actions that are separable from the actual breach of contract." *Stull v. First Am. Title Ins. Co.*, 2000 ME 21, ¶ 14, 745 A.2d 975, 980. Although the court's conclusion in *Stull* was limited to claims by an insured against an insurer, the Law Court and other courts in Maine have applied the same principle in other, more analogous settings. For example, in *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors*, 659 A.2d 267 (Me. 1995), the Law Court applied the "economic loss" doctrine in the products liability setting and

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[2] M.R. Civ. P. 8(e)(2) provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements.

held that tort recovery is not permitted for a defective product's damage to itself. *Id.* at 271. Further, a number of trial courts in Maine have applied the economic loss doctrine to service contracts very similar to the contract at issue in this case. *See e.g. Me. Rubber Int'l v. Envtl. Mgmt. Group, Inc.*, 298 F. Supp. 2d 133 (D. Me. 2004) (applying the economic loss doctrine to a service contract); *Bayreuther v. Gardner*, 2000 Me. Super. LEXIS 140 (Mills, J.) (citations omitted); and *Twin Town Homes, Inc. v. Molley*, 2002 Me. Super. LEXIS 209 (Brennan, J.). *See also Fireman's Fund Ins. Co. v. Childs*, 52 F. Supp.2d 139 (D. Me. 1999) (discussing the economic loss doctrine in Maine and collecting cases from around the country applying the doctrine to service contracts). *But see Pendleton Yacht Yard, Inc. v. Thomas H. H. Smith*, 2003 Me. Super. LEXIS 49 (Marden, J.) (declining to apply the economic loss doctrine).

In applying the economic loss doctrine to service contracts, one court outside of Maine has helpfully explained:

> A provider of services and his client have an important interest in being able to establish the terms of their relationship prior to entering into a final agreement. The policy interest supporting the ability to comprehensively define a relationship in a service contract parallels the policy interest supporting the ability to comprehensively define a relationship in a contract for the sale of goods. It is appropriate, therefore, that [the economic loss doctrine] should apply to the service industry. Just as a seller's duties are defined by his contract with a buyer, the duties of a provider of services may be defined by the contract he enters into with his client. When this is the case, the economic loss doctrine applies to prevent the recovery of purely economic loss in tort.

Fireman's Fund Insur. Co. v. SEC Donohue, Inc., 679 N.E.2d 1197, 1200 (Ill. 1997).

Accordingly, under the majority view, "the breach of a contract is not actionable in tort in the absence of special additional allegations of wrongdoing which amount to a breach of a duty distinct from, or in addition to, the breach of a contract." *Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp.*, 725 F. Supp. 656, 662 (N.D.N.Y. 1989) (citations omitted). *See also*

Fireman's Fund Ins. Co. v. Childs, 52 F. Supp. 2d at 145 (application of the economic loss doctrine to service contracts constitutes the "majority view").

In this case, Plaintiffs' negligence claim fails to allege the existence either of a duty or of damages distinct from those arising out of the parties' contract. The court therefore concurs with those courts in Maine and around the country that have concluded that the economic loss rule bars recovery for alleged negligent performance of contractual obligations. Courts applying the economic loss doctrine "do not recognize a tort action for the breach of a simple contract be it for goods or services," and "employing language familiar to tort law when describing a contractual breach will not transform a contract claim into one sounding in tort ...." *Niagara Mohawk Power Corp,* 725 F. Supp. at 661.

B. Count III: Unjust Enrichment

According to Consolidated, Plaintiffs' claim for unjust enrichment is barred as a matter of law because the parties are alleged to have had a contractual relationship. Consolidated Mot. at 4 (citing *Lynch v. Ouellette*, 670 A.2d 948 (Me. 1996). In *Lynch*, the Law Court sustained summary judgment in favor of the defendants on an unjust enrichment claim and in so doing explained that "[u]njust enrichment describes recovery for the value of the benefit retained *when there is no contractual relationship*, but when, on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay." *Id.* at 950 (emphasis in the original) (citations omitted). "The existence of a contractual relationship between . . . [the parties] precludes . . . [Plaintiff] from recovery under an unjust enrichment theory." *Id.* (citing *Top of the Track Associates v. Lewiston Raceways, Inc.*, 654 A.2d 1293, 1296 (Me. 1995)). *See also In re Wage Payment Litig. v. Wal-Mart Stores, Inc.*, 2000 ME 162, ¶ 19, 759 A.2d 217, 224.

Based upon the foregoing, the court concludes that Plaintiffs are precluded, as matter of law, from recovery under an unjust enrichment theory.

C. Count IV: Fraud

Count IV of the Complaint alleges that Consolidated "made fraudulent misrepresentations" including "representing to Plaintiffs that the work had been done in compliance with the contract and with applicable building codes when they had actually dead-ended the septic and sewer vent stacks . . .." According to Consolidated, because Plaintiffs' fraud claim is based on the alleged "dead-ending" of the septic and sewer vent stacks, it is a reprise of the breach of contract claim and is therefore barred by the economic loss doctrine. Consolidated's Mot. at 4-5. Had Plaintiff indeed failed to assert any conduct distinct from the contract, the court would agree with Consolidated. However, in addition to the factual allegations regarding "dead-ending," Plaintiffs' complaint also alleges that Defendants "actively concealed from Plaintiffs the truth that their work violated applicable building codes and breached the contract." Pls.' Compl. at ¶ 23. As such, Plaintiffs have alleged conduct – i.e. fraudulent representations aimed at concealment – that can be construed as being separate and apart from Defendants' contractual obligations. *See Dermalogix Partners, Inc. v. Corwood Labs., Inc.*, 2000 U.S. Dist. LEXIS 8009 (D. Me. 2000) (noting that "whether the economic loss doctrine applies to . . . [a] fraudulent misrepresentation claim" is an open question) (citing *Arthur D. Little, Inc. v. Dooyang*, 928 F. Supp. 1189, 1205 (D. Mass. 1996)(applying Massachusetts law, the court states that "the economic loss rule does not apply to harm caused by intentional misrepresentations")).

Viewing Plaintiffs' complaint in the light most favorable to them, the court concludes that Plaintiffs have adequately alleged fraudulent conduct distinct from the contractual obligations at issue in this case and, therefore, have sufficiently stated a claim for fraud upon which relief may be granted. Whether that claim will ultimately be barred by the economic loss doctrine will depend on whether Plaintiffs are able to develop and prove a distinction between any allegedly fraudulent conduct and the contractual duties and obligations undertaken by the parties.

D. Count V: Punitive Damages

Consolidated asserts that Plaintiffs are not entitled to punitive damages on their breach of contract claim. Consolidated's Mot. at 5 (citing *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776 (Me. 1989)). In so moving, Consolidated assumes that all of Plaintiffs' tort claims will be dismissed. However, because Plaintiffs' fraud claim remains viable and because Plaintiffs have sufficiently pled the actual or implied malice required for the imposition of punitive damages, the court concludes that Plaintiffs have adequately stated a claim for punitive damages upon which relief may be granted.

III. THE INDIVIDUAL DEFENDANTS' MOTION TO DISMISS

According to the Individual Defendants, Plaintiffs may not maintain an action against them in their individual capacities absent allegations of individual misconduct aimed at piercing the corporate veil. They argue that the contract alleged in the Complaint was with Consolidated, a limited liability company, and, therefore, Plaintiffs may not maintain an action against the Individual Defendants absent allegations that they abused the corporate form. In opposition, Plaintiffs explain that they "are not seeking to pierce the limited liability company." Pls.' Opp. at 2. Instead, Plaintiffs argue that they "contracted with Mr. Lacroix and Mr. Wooster to perform the work complained of" and that they have adequately pled a claim for breach of contract. *Id.*

The Individual Defendants are correct that members or managers of limited liability companies are generally shielded from the LLC's debts, obligations and liabilities. 31 M.R.S. § 645(1). Therefore, if Plaintiffs were seeking to hold the Individual Defendants personally liable for the obligations of an LLC, they would have to allege conduct justifying a disregard of the corporate form and of the protections it affords its members. *Johnson v. Exclusive Props. Unlimited*, 1998 ME 244, ¶¶ 5-6, 720 A.2d 568, 571 (explaining that a plaintiff must show "(1) some manner of dominating, abusing, or misusing the corporate form; and (2) an unjust or

inequitable result that would arise if the court recognized the separate corporate existence" in order to pierce the corporate veil).

In this case, however, Plaintiffs have alleged that they "entered into a contract with Mr. Lacroix and Mr. Wooster to install plumbing and heating and provide related services for the Project." Pls.' Compl. at ¶ 4. Although Plaintiffs have also alleged that the Individual Defendants were "doing business" as Consolidated, it is unclear from the face of the Complaint who, precisely, the contracting parties are. Plaintiffs have not attached a written contract to the Complaint and so the court is unable to independently discern who, precisely, is a party to the contract or whether and to what extent the individual defendants are alleged to have contractual obligations independent of those borne by the corporate defendants.[3]

Because the court views the complaint in the light most favorable to Plaintiffs at this stage, and because Plaintiffs' Complaint alleges the existence of a contract with the Individual Defendants, the court cannot rule at this stage that Plaintiffs have failed to state a claim against the Individual Defendants upon which relief can be granted.

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

> Defendant Consolidated Plumbing and Heating, LLC's Motion to Dismiss is GRANTED as to Counts II and III.

[3] Although Defendants have attached to their Answer and Counterclaim copies of invoices allegedly issued to Plaintiffs and documenting the work that was done, Defendants have not acknowledged the authenticity of those invoices nor are the invoices alleged to represent the parties' contract. Accordingly, the court will not consider the invoices in the context of the instant motions to dismiss. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶¶ 9-11, 843 A.2d 43, 47-48 (explaining that "official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint," may be considered without transforming a motion to dismiss into a motion for summary judgment when the authenticity of such documents is not challenged).

Defendant Consolidated Plumbing and Heating, LLC's Motion to Dismiss is DENIED as to Counts IV and V.

Defendants Kevin Lacroix and Wallace Wooster's Motion to Dismiss Plaintiffs claims against them in their individual capacities is DENIED.

Dated: October 10, 2008

Justice, Superior Court