

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

**MUNICIPAL REVIEW COMMITTEE,
CITY OF WATERVILLE, TOWN OF BAR HARBOR,
TOWN OF FAIRFIELD, TOWN OF MOUNT DESERT
and TOWN OF ORONO**

Plaintiffs

v.

Docket No. BCD-CV-15-22

USA ENERGY GROUP, LLC

Defendant

**PERC HOLDINGS, LLC and
PENOBSCOT ENERGY RECOVERY COMPANY, LP**

Parties-in-interest

ORDER ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant USA Energy Group, LLC (USAE) has filed a Motion for Partial Summary Judgment on the Amended Complaint filed against it by Plaintiff Municipal Review Committee, Inc. (MRC) and five municipalities that are members of the MRC. Plaintiffs oppose the Motion, and USAE has filed a reply memorandum. Oral argument was held July 11, 2016.

Plaintiffs' Amended Complaint contains nine counts:

Count I for declaratory judgment as to all Plaintiffs

Count II for breach of duty of loyalty as to the municipal Plaintiffs

Count III for breach of duty of care as to the municipal Plaintiffs

Count IV for breach of duty of good faith as to the municipal Plaintiffs

Count V for breach of the duty of fair dealing as to the municipal Plaintiffs

Count VI for breach of fiduciary duty as to the municipal Plaintiffs

Count VII for breach of contract as to all Plaintiffs

Count VIII for tortious interference as to all Plaintiffs

Count IX for injunctive relief as to the municipal Plaintiffs

The prayer for relief contained in the last paragraph of the Defendant's Motion for Partial Summary Judgment indicates that Defendant "requests this Court to enter summary judgment on all counts in Plaintiff[s'] Complaint," but as Plaintiffs point out, the Motion briefs only the Plaintiffs' claims in Counts II and IV through VIII, omitting Counts I, III and IX.

Background

The pertinent factual background was partly set forth in this court's June 3, 2015 Order on Defendant's Motion to Dismiss. Essentially, Party-in-interest Penobscot Energy Recovery Company, LP ("the LP") is a Maine limited partnership formed for the purpose of owning and operating a 25.3 megawatt refuse-derived fuel waste-to-energy facility in Orrington, Maine. The limited partnership agreement is memorialized currently in the Fifth Amended and Restated Agreement of Limited Partnership of Penobscot Energy Recovery Company, Limited Partnership ["the Agreement"]. Plaintiff MRC is a named party and signatory to the Agreement. *See* Agreement at 1, 43.

The general partner of the LP is Defendant USAE, a Minnesota limited liability company. Plaintiff MRC is a "regional association" created by a number of municipalities in Maine to serve as their agent for purposes of their ownership of the Orrington waste-to-energy facility. *See* 38 M.R.S. §1303-C(24) (definition of "regional association" as "a nonprofit corporation that consists exclusively of municipalities and is organized under Title 13, chapter 81 or Title 13-B, for the purpose, among other permissible purposes, of owning, constructing or operating a solid waste disposal facility"); *id.* § 1304-B(5-A) (defining purpose and powers of regional associations).

MRC does not itself own any interest in the LP. The Agreement defines USAE as owner of 100% of the “general partner interests” and 47.48068% of the “limited partner interests” of the LP; PERC Holdings as owner of 26.99792% of the limited partner interests, and a group of municipalities defined in the Agreement as “Equity Charter Municipalities” (ECMs) as owning the remaining 25.52140% of the limited partner interests. The Agreement indicates that MRC was formed by the ECMs “to assist them in their dealings with the Partnership [and to serve] for certain purposes as agent for all Equity Charter Municipalities.” Agreement ¶ 1.34, at 5. The ECMs include the five Plaintiff municipalities, which were joined after the action was filed to cure an issue as to MRC’s standing to assert the claims that were set forth in MRC’s complaint.

MRC and the municipal Plaintiffs charge that USAE has violated its obligations as general partner under the Agreement by using partnership resources to pay legal and lobbying expenses related to USAE’s efforts to promote legislation referred to in the Amended Complaint and the summary judgment record as LD 1483. Plaintiffs assert that LD 1483 was inconsistent with the “economic interests” of the LP, and that USAE promoted the legislation without the consent and over the objections of MRC and/or the ECMs. They argue that USAE has wrongly applied and sought to apply resources of the LP to defray the expense of promoting LD 1483.

The Plaintiffs’ six counts in Counts II through VII assert that the Agreement and applicable law imposed various duties upon USAE, and that USAE breached its contractual, legal and fiduciary obligations to the Plaintiffs by failing to obtain MRC’s permission to advocate for LD 1483 and by applying LP assets toward the cost of lobbying for L.D. 1483. In a tortious interference count, Plaintiffs also accuse USAE of interfering with MRC’s relationships with its member ECMs.

USAE has filed an amended counterclaim for declaratory relief and for money damages against MRC. Essentially, USAE's amended counterclaim asserts that LD 1483 would indeed have been consistent with the LP's interests and of economic benefit, and charges MRC with wrongfully opposing the legislation and interfering with USAE's activities.

Standard of Review

Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821. "A material fact is one that can affect the outcome of the case. A genuine issue of material fact exists when the [fact finder] must choose between competing versions of the truth." *Dyer*, 2008 ME 106, ¶ 14, 951 A.2d 821 (internal citation and quotation marks omitted). When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.*

Analysis

1. Counts II through VII: breach of duty of loyalty; breach of duty of care; breach of duty of good faith; breach of the duty of fair dealing; breach of fiduciary duty; breach of contract

Counts II through VII all assert breaches of duty arising out of the contract or out of the relationship between USAE and the Plaintiffs. In the court's view, the contract as well as the fact that USAE is the general partner of the LP does mean that USAE owed the Plaintiff municipalities and/or MRC the various contractual, fiduciary and legal duties alleged in Counts II and IV through VII. Count III of the Amended Complaint appears to be a negligence claim, inasmuch as it refers to USAE's duty of care to Plaintiffs, and it may be problematic in light of the economic loss doctrine, because Plaintiffs' claimed damages do not involve personal injury or physical damage to property. However, because this issue was not addressed in the

Defendant's Motion for Partial Summary Judgment, the viability of Count III will be addressed at a later time.

With regard to breach of the various contractual and legal duties alleged in Counts II through VII, the summary judgment record does establish the following genuine issues as to the following material facts:

- whether LD 1483 was indeed contrary to the interests of the LP, or at least was not relevant to the interests of the LP
- whether USAE violated any duty by lobbying for the passage of LD 1483?
- whether USAE violated any duty by using LP assets to fund its lobbying effort for LD 1483?
- whether USAE's lobbying effort for passage of LD 1483 caused Plaintiffs any harm or loss?

Because these facts are material and because Plaintiffs have shown that they are genuinely in dispute, USAE's Motion for Partial Summary Judgment will be denied as to Counts II through VII.

2. Count VIII: tortious interference as to all Plaintiffs

Count VIII of the Amended Complaint asserts that USAE committed the tort of tortious interference by going around MRC and attempting to induce the ECMs to support USAE's lobbying effort in favor of LD 1483. The independent cause of action known as tortious interference requires proof of interference with a contract or expectancy by means of fraud or intimidation or both. *See MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982) (citing *Perkins v. Pendleton*, 90 Me. 166, 176, 38 A.96, 99 (1897)).

The summary judgment record reveals two problems with the Plaintiffs' claim. First, they have not made a prima facie showing that USAE used fraud or intimidation in trying to convince the ECMs to support LD 1483. The second and equally important problem is that the Plaintiffs have not shown that they sustained any loss or damage as a result of the alleged interference—LD 1483 was never enacted into law. At oral argument, Plaintiffs' counsel argued that Plaintiffs' damages consist of the LP funds that USAE used to help fund USAE's lobbying effort in support of LD 1483. However, USAE's alleged misuse of LP funds did not result from USAE's alleged contact with the ECMs. Plaintiffs have therefore failed to make a prima facie showing that the alleged interference caused them any cognizable loss or damage.

Accordingly, USAE is entitled to summary judgment on Count VIII of the Amended Complaint.

Conclusion

IT IS ORDERED:

(1) Defendant USAE's Motion for Partial Summary Judgment is denied as to Count II Counts IV through VII of the Amended Complaint, and is granted as to Count VIII of the Amended Complaint.

(2) Defendant USAE is granted summary judgment on Count VIII. Counts I through VII and IX remain unresolved in the case.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated July 19, 2016

_____/s/_____
A. M. Horton
Justice