STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2017-44

PNM CONSTRUCTION, INC.,	)	
	)	
Plaintiff,	)	ORDER ON DEFENDANT FARM
	)	CREDIT EAST, ACA'S MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	
LMJ ENTERPRISES, LLC, et al.,	)	
	)	
Defendants.	)	

Pending before the Court is Defendant/Counterclaim-Plaintiff Farm Credit East, ACA's ("Farm Credit") motion for summary judgment in its favor on Count I of its Counterclaim and Count II and Count V of Plaintiff PNM Construction, Inc.'s ("PNM") Second Amended Complaint (the "Complaint"). Pursuant to its discretionary authority the Court elected to decide the motion without holding oral argument. M.R. Civ. P. 7(b)(7).

FACTS

Farm Credit is a corporation organized under the Farm Credit Act[1] of 1971 with a place of business in Auburn, Maine. (Def's Supp'g S.M.F. ¶ 1.) LMJ Enterprises, LLC, ("LMJ") is a limited liability company that owned a mill building (the "Mill") in Lincoln, Maine. (*See* Def's Supp'g S.M.F. ¶¶ 4, 5.) PNM is a Maine corporation with a place of business in Presque Isle, Maine. (Def's Supp'g S.M.F. ¶ 2.) Steve McHatten is the president and sole owner of PNM. (Def's Supp'g S.M.F. ¶ 3.)

As security for loans Farm Credit made to LMJ, Farm Credit took a security interest in all of LMJ's real and personal property. (Def's Supp'g S.M.F. ¶ 4.) As such Farm Credit was listed

[1] The Court assumes that Farm Credit's reference to the "Farm Credit Action of 1971" was a typographical error.

as loss payee on LMJ's insurance policies issued by Pennsylvania Lumbermens Mutual Insurance Company (the "Policy"). (Def's Supp'g S.M.F. ¶ 4.)

On January 29, 2016, a fire damaged the Mill. (Def's Supp'g S.M.F. ¶ 5.) LMJ filed an insurance claim on the Policy for the damage, using PNM's estimates and invoices as the basis for the calculations. (Pl's Opp'g S.M.F. ¶¶ 1-2.)[2] PNM provided labor and furnished materials to repair the Mill and completed that work in April 2016. (Def's Supp'g S.M.F. ¶ 6.) Farm Credit was aware that PNM performed this work on the Mill. (Pl's Opp'g S.M.F. ¶ 7.)

On May 20, 2016, Mr. McHatten went to Farm Credit's business office in Presque Isle, Maine and signed a lien waiver and certificate (the "Waiver") on behalf of PNM relating to the construction work it did at the Mill. (Def's Supp'g S.M.F. ¶ 7; Def's Ex. A1.)[3] Farm Credit's Vice President, Peter Hallowell, was present when Mr. McHatten signed the Waiver. (Def's Supp'g S.M.F. ¶ 7.) Farm Credit delivered a check for $100,000 to PNM when Mr. McHatten executed the Waiver. (Def's Supp'g S.M.F. ¶ 9.) This was from the proceeds of a progress payment that Pennsylvania Lumbermens Mutual Insurance Company paid to LMJ to compensate for repair work performed on the Mill. (Pl's Opp'g S.M.F. ¶¶ 3, 5.)[4] As of May 20, 2016, Farm Credit was aware that PNM had issued invoices in excess of $100,000. (Pl's Opp'g S.M.F. ¶ 8.) There is a factual

[2] Farm Credit purports to deny or qualify these facts, but does not "support each denial or qualification by a record citation" as required by M.R. Civ. P. 56(h)(3)-(4). Farm Credit's objections to PNM's opposing statement of material facts are overruled.

[3] Farm Credit has submitted two exhibits labeled A in support of its motion for summary judgment; the first is a copy of the Waiver attached to Farm Credit's statement of material facts and the second is an excerpt from the deposition of Mr. McHatten attached to Farm Credit's reply statement of material facts. The Court refers to these exhibits as A1 and A2, respectively. PNM's objection to evidence cited as the deposition of Mr. McHatten in Farm Credit's statement of material facts is overruled because Farm Credit attached Def's Ex. A2 to its reply and PNM admitted to all the facts in the statement of material facts that cite Mr. McHatten's deposition.

[4] Farm Credit purports to deny or qualify these facts, but the record citation does not controvert the facts stated and merely confirms that "[c]ontemporaneous with the execution of the Waiver, Farm Credit delivered a check for $100,000" to PNM. (Hallowell Aff. ¶ 8.) M.R. Civ. P. 56(h)(4). Furthermore, in its memorandum in support of its motion, Farm Credit concedes that the "payment of $100,000 [was] for [PNM's] work at the mill." (Def's Mot. Summ. J. 1.)

dispute as to whether Farm Credit obtained the benefit of PNM's repair work on the Mill. (Pl's Opp'g S.M.F. ¶¶ 9-10.)

PNM has sued Farm Credit and others under an unjust enrichment theory for the work it performed on the Mill and for which it has not been paid. (Pl's Compl. ¶¶ 41-47.) Farm Credit has counterclaimed against PNM for breach of contract arising out of PNM's violation of the Waiver. (Def's Countercl. ¶¶ 15-19.)

STANDARD OF REVIEW

Summary judgment is granted to a moving party where "there is no genuine issue as to any material fact" and the moving party "is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). "A material fact is one that can affect the outcome of the case, and there is a genuine issue when there is sufficient evidence for a fact-finder to choose between competing versions of the fact." *Lougee Conservancy v. CityMortgage, Inc.*, 2012 ME 103, ¶ 11, 48 A.3d 774 (quotation omitted). A genuine issue exists where the jury would be required to "choose between competing versions of the truth." *MP Assocs. v. Liberty*, 2001 ME 22, ¶ 12, 771 A.2d 1040. "Summary judgment is no longer an extreme remedy." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18.

DISCUSSION

I. Farm Credit's Counterclaim

Farm Credit's primary argument in support of its motion for summary judgment on its Counterclaim is that on May 20, 2016, in exchange for the payment of $100,000 for its work on the Mill, PNM agreed "to indemnify, defend, and hold . . . Farm Credit harmless from any and all claims . . . whatsoever based upon work done and/or materials furnished in connection with this construction by [PNM] . . . through the date" of May 20, 2016. (Def's Mot. Summ. J. 1.) By filing the instant lawsuit, PNM has sued Farm Credit for work it completed before May 20, 2016.

In order to obtain relief for breach of contract, a plaintiff must establish that there is an agreement, the defendant is in material breach, and the plaintiff has been damaged. *Tobin v. Barter*, 2014 ME 51, ¶¶ 9-10, 89 A.3d 1088. "A contract exists where the parties 'mutually assent to be bound by all its material terms . . . [and] the contract is sufficiently definite.'" *McClare v. Rocha*, 2014 ME 4, ¶ 16, 86 A.3d 22 (quoting *Sullivan v. Porter*, 2004 ME 134, ¶ 13, 861 A.2d 625). An unambiguous contract must be construed consistent with its plain meaning. *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989.

PNM does not dispute that Farm Credit intended to enter into a binding contract with PNM upon the execution of the Waiver and delivery of the $100,000 check, or that PNM agreed to the indemnity provision of the Waiver. (*See* Pl's Response to Def's Supp'g S.M.F. ¶¶ 11-12.) PNM likewise does not dispute that it commenced the instant litigation seeking an award of damages against Farm Credit for its work on the Mill completed prior to May 20, 2016. (*See* Pl's Response to Def's Supp'g S.M.F. ¶ 14.) However, PNM does not concede that Farm Credit has been or will be harmed by PNM's breach of the indemnity provision of the Waiver in any amount. (*See* Pl's Response to Def's Supp'g S.M.F. ¶ 18.)

PNM's principal argument in opposition to Farm Credit's motion for summary judgment on its Counterclaim is that the indemnity provision of the Waiver is unenforceable if Farm Credit is determined to have unjustly enriched itself at PNM's expense. (Pl's Opp'n to Def's Mot. Summ. J. 6.) PNM makes this argument by analogizing to *Emery Waterhouse Co. v. Lea*, 467 A.2d 986 (Me. 1983) and *Gatley v. United Parcel Serv., Inc.*, 662 F. Supp. 200 (D. Me. 1987).

In *Emery Waterhouse*, the plaintiff tenant sued the defendant landlord and others for damages resulting from their collective negligence. 467 A.2d at 989. The defendant landlord counterclaimed against the plaintiff on the basis of its right to indemnity under the lease contract.

Id. Under the indemnity provision in that case, the plaintiff was obligated to indemnify the defendant landlord from any and all damages to its property arising from or out of any occurrence in, upon, or at the leased premises. *Id.*, 467 A.2d at 992. The defendant landlord argued that such a broad and comprehensive provision afforded it with complete indemnity, including indemnity for damages caused by its own negligence. *Id.*

The Law Court disagreed with the defendant, holding that while indemnity clauses to save a party harmless from damages due to negligence are lawful and not against public policy, such clauses must explicitly provide for such indemnification:

> But when purportedly requiring indemnification of a party for damage or injury caused by that party's own negligence, such contractual provisions . . . are construed strictly against extending the indemnification to include recovery by the indemnitee for his own negligence . . . . It is only where the contract in its face by its very terms clearly and unequivocally reflects a mutual intention on the part of the parties to provide indemnity for loss caused by negligence of the party to be indemnified that liability for such damages will be fastened on the indemnitor[.]

Id., 467 A.2d at 993 (citations omitted). In *Gatley*, the U.S. District for the District of Maine reasoned that "[t]he rule in *Emery-Waterhouse*, that a contract will not be interpreted to provide for indemnity for a party's own negligence unless the contract clearly and unequivocally so provides, would appear to apply *a fortiori* to contracts assertedly providing for indemnity for a party's own intentional torts." 662 F. Supp. at 203. The *Gately* court therefore granted summary judgment to the purported indemnitor on that issue. *Id.*

As Farm Credit points out, the rule from *Emery-Waterhouse*, even as expanded by *Gatley*, does not directly apply in this case: unlike in those two cases, where the plaintiffs sought damages in tort, PNM seeks recovery from Farm Credit exclusively under the equitable doctrine of unjust enrichment. In order for PNM to prevail on a claim for unjust enrichment, it must prove that (1) it

conferred a benefit on the other party, (2) the other party had "appreciation or knowledge of the benefit," and (3) that the "acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value." *Howard & Bowie, P.A. v. Collins,* 2000 ME 148, ¶ 13, 759 A.2d 707 (citing *June Roberts Agency v. Venture Properties,* 676 A.2d 46, 49 (Me. 1996)). Crucially, the defendant's misconduct, or lack thereof, is not an essential element to recovery under an unjust enrichment theory. *A.F.A.B., Inc. v. Town of Old Orchard Beach*, 610 A.2d 747, 750 (Me. 1992). *See also* Horton & McGehee, *Maine Civil Remedies* §7-5(b) at 179 (4 ed. 2004).

Furthermore, to the extent that the defendant's misconduct (or lack thereof) is nonetheless relevant to the issue of whether the enrichment was unjust, *see id.*, PNM has not introduced any evidence of wrongful behavior on the part of Farm Credit in its opposing statement of material facts.[5] In argument in its opposition to Farm Credit's motion for summary judgment, PNM conflates two distinct concepts: (1) the requirement that a defendant's acceptance or retention of a benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value, and (2) the relevant—but not necessary—determination of whether the defendant's behavior was wrongful. (Pl's Opp'n to Def's Mot. Summ. J. 5-6.) To the extent that PNM would argue that this is a distinction without a difference, our Law Court disagrees. It explicitly recognizes that defendant wrongdoing is relevant to, but not a required element of, the determination of whether a defendant's retention of a benefit is inequitable for purposes of

[5] Even if this Court were inclined to entertain PNM's argument that the rule from *Emery-Waterhouse* should be expanded to invalidate indemnity provisions that purport to insulate the indemnitee from wrongful (as opposed to tortious) behavior, PNM has not presented any facts on which to base a finding that Farm Credit has acted wrongfully. At best, Pl's Opp'g S.M.F. ¶¶ 7-8, 10 could support the inference that Farm Credit's refusal to consent to payment of further insurance proceeds to PNM was wrongful. *See Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178. However, to the extent this raises a genuine factual dispute, the issue is not material. *See Lougee Conservancy*, 2012 ME 103, ¶ 11, 48 A.3d 774. PNM does not connect the inference of this wrongful act to the final element of recovery under unjust enrichment: the inequity of the defendant's retention of the benefit; in this case, the value the work added to the Mill when it was sold at auction.

applying the doctrine of unjust enrichment. *A.F.A.B., Inc.*, 610 A.2d at 750; *accord* Horton & McGehee, *Maine Civil Remedies* §7-5(b) at 179 (4 ed. 2004).

In effect, PNM asks this Court to broaden the rule from *Emery-Waterhouse*; the rule is stated very narrowly in that case, referring exclusively to indemnity provisions which purport to require indemnification for loss caused by the *negligence* of the indemnitee. *See Emery-Waterhouse*, 467 A.2d at 993. There is no authority extending the requirement of "clear[ ] and unequivocal[ ] . . . mutual intention . . . to provide indemnity for loss caused by" an inequitable result, or even "wrongful"—as opposed to "tortious"—conduct. *See id. Cf. Gatley*, 662 F. Supp. at 203. The Court declines to extend the *Emery-Waterhouse* rule in the absence of such authority, but also for practical reasons. Our Law Court's narrow statement of the rule in *Emery-Waterhouse* reflects the general principle of freedom to contract. *See State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶ 9, 995 A.2d 651 ("parties have 'considerable latitude' in their freedom to contract") (citation omitted). It is undisputed that PNM intended to be bound by the Waiver. Under current Maine law, had Farm Credit and PNM wished to insulate Farm Credit from claims arising from Farm Credit's own negligent or otherwise tortious acts, the Waiver would have been required to state that mutual intentional clearly and unequivocally. The broad language used by the Waiver is not otherwise unenforceable. To conclude otherwise would beg the question of what PNM thought it agreed to when it read that language and agreed to be bound by it by signing the Waiver.

In sum, the facts presented in this case distinguish it from *Emery-Waterhouse* and *Gatley* because there is no evidence in the record that Farm Credit acted negligently or otherwise tortiously. The Court thus concludes that the indemnification provision of the Waiver is enforceable against PNM with regards to its claim against Farm Credit for unjust enrichment.

The parties seem to agree that this conclusion disposes of Farm Credit's instant motion for summary judgment on its Counterclaim. Because the undisputed facts establish that the parties intended to enter into a binding contract upon the execution of the Waiver and delivery of the $100,000 check and that PNM agreed to the indemnity provision of the Waiver; that PNM has breached that agreement by failing to indemnify, defend, and hold Farm Credit harmless from any and all claims based upon work done and materials furnished in connection with its work on the Mill before May 20, 2016 by seeking recovery from Farm Credit under an unjust enrichment theory in this lawsuit; and that Farm Credit has suffered damages from that breach at least equal to its costs in litigating this suit; the Court concludes that Farm Credit prevails on its Counterclaim against PNM and summary judgment shall be entered in Farm Credit's favor on its Counterclaim.

II. PNM's Complaint

Farm Credit's primary argument in support of its motion for summary judgment on Counts II and V of PNM's Complaint is that PNM's claims are barred by the doctrines of setoff or recoupment. "A defendant who has a claim or right against the plaintiff may assert it in the form of a set-off of recoupment, through . . . an affirmative defense." Horton & McGehee, *Maine Civil Remedies* §4-3(d)(1) at 69 (4 ed. 2004) (citing *Inniss v. Methot Buick-Opel, Inc.*, 506 A.2d 212, 217-18 (Me. 1986)). A set-off is a demand that the defendant has against the plaintiff arising out of a transaction extrinsic to the plaintiff's cause of action. *Innis*, 506 A.2d at 217. A recoupment is a reduction of part of the plaintiff's damages because of a right in the defendant arising out of the same transaction. *Id.* Farm Credit does not specify which doctrine applies in this case, however, it is reasonably clear that what Farm Credit seeks is recoupment given that its contractual right to indemnification arose out of the payment of $100,000 to PNM. *See Developers v. Lacroix*, BCD-WB-CV-08-24, 2011 Me. Bus. & Consumer LEXIS 7, *16 n. 10 (Bus. & Consumer Ct. January

21, 2011, *Humphrey, C.J.*), *see also* 20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* § 38 (2018). PNM does not address this argument directly, relying exclusively on its argument that the indemnification provision of the Waiver is unenforceable.

Here, Farm Credit pled recoupment as an affirmative defense in its answer to PNM's Complaint, thereby avoiding the principal issue in *Innis*, 506 A.2d at 217-18, *see also Cheung v. Wu*, 2007 ME 22, ¶¶ 17-21, 919 A.2d 619. Farm Credit does not cite to any authority in which a court has applied the doctrine of set-off or recoupment to bar a plaintiff's claim under the theory that any recovery under that claim would be recouped by the defendant pursuant to an indemnification agreement. Independent legal research shows that the general rule is that a defendant is entitled to recoup to the extent of the damages resulting from a breach of contract. 20 Am. Jur. 2d *Counterclaim, Recoupment, and Setoff* § 42 (2018) (citing *Smith v. Smith*, 558 A.2d 798 (Md. App. 1989)). In the absence of argument to the contrary, the Court sees no reason to treat the indemnification provision of the Waiver differently than any other contractual provision. The Court therefore concludes that because this Court has concluded that PNM has breached the Waiver, and any recovery that PNM obtains in unjust enrichment against Farm Credit would be coextensive with Farm Credit's damages for that breach, that Farm Credit is entitled to judgment as a matter of law on Count II of PNM's Complaint. Summary judgment will therefore be entered for Farm Credit on that count. This ruling obviates the necessity of the imposition of a constructive trust on the proceeds of the check issued by Pennsylvania Lumbermens Mutual Insurance Company (Count V).

CONCLUSION

Based on the foregoing, the entry will be:

Defendant Farm Credit East, ACA's motion for summary judgment is GRANTED. Summary judgment is entered in favor of Defendant Farm Credit East on Count I of its Counterclaim and on Count II and Count V of Plaintiff PNM Construction, Inc.'s Complaint.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: October 15, 2018

/s

Richard Mulhern,
Judge, Business and Consumer Court