VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 21-CV-00530

AIR Development LLC v. Erwin Electric et al

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff AIR Development, LLC ("AIR") sues Defendants Erwin Electric and Anthony Erwin ("Mr. Erwin") in contract and negligence for defective design and installation of an electrical distribution system at the Apple Island Resort in South Hero. Mr. Erwin moves for summary judgment, arguing that AIR has no evidence to support its contract claims, while its negligence claims are barred by the economic loss doctrine. The court denies the motion in part and grants it in part.

BACKGROUND

Viewed through the lens required by Rule 56 and related caselaw, the parties' papers establish that AIR hired Mr. Erwin to pull wire and install and connect service panels and pedestals for the electrical system to serve the expansion of AIR's Apple Island Resort. Mr. Erwin neither agreed nor undertook to provide design services. Rather, he was hired to pull wire through conduit that would be placed by AIR's excavation contractor. Mr. Erwin did not specify the conduit; that specification was made by AIR's Facilities Director, Don Bushey, who had hired Mr. Erwin and was AIR's onsite representative for this project.[1] After a brief discussion at a pre-construction meeting, Mr. Bushey made the decision to use 2" conduit, as had been used in the electrical system serving the existing portions of the resort. Mr. Erwin was at the meeting, and did not object to Mr. Bushey's decision. He did, however, make the determination of which gauge wire to use; he selected the same gauge he had used, evidently without problems, in the earlier installation.

When he was well into the installation, Mr. Erwin realized that the total length of wire was too long to sustain the necessary voltage. He brought this to Mr. Bushey's attention. After some conversation about options, Mr. Bushey told Mr. Erwin to continue with the installation as planned.

[1] In its Response to Mr. Erwin's Statement of Undisputed Material Facts, AIR purports to dispute Mr. Erwin's characterization of Mr. Bushey's role. Mr. Erwin's characterization is properly supported by competent evidence. AIR's "dispute," however, is not. Thus, per V.R.C.P. 56(e), the court deems Mr. Erwin's characterization undisputed.

When AIR placed the new system into service, it experienced voltage drop problems. It hired an electrical engineer, who determined that the wire Mr. Erwin had installed was undersized for the length of the run, causing voltage drop. The engineer thus determined that the system, as installed, failed to meet code requirements. AIR incurred significant costs, which it seeks to recover here, to bring the system into compliance.

ANALYSIS

On these facts, Mr. Erwin argues that he undertook no responsibility for the design of the electrical system. Thus, he concludes, he cannot be liable in contract. While Mr. Erwin's premise is correct, his conclusion is not.

It is hornbook law that

> "[A]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expediency and faithfulness the thing agreed to be done. A failure to observe any of these conditions is . . . a breach of contract." Thus, "[a] cause of action for breach of contract may be based on an implied promise to exercise due care in performing the services required by the contract." Whether a contract for services is breached depends upon whether the service provider exercises or fails to exercise that degree of skill and knowledge normally possessed by those members of the trade in which the service provider is engaged who are in good standing in the same or similar communities.

23 Williston on Contracts, § 62:25 (4th ed.) (citations omitted); s*ee S. Burlington Sch. Dist. v. Calcagni–Frazier–Zajchowski Architects, Inc.,* 138 Vt. 33, 44 (1980) ("In the obligation assumed by a party to a contract is found his duty, and his failure to comply with the duty constitutes a breach. In addition, accompanying every contract is an implied duty to perform with care, skill, reasonable expedience and faithfulness.") (internal quotation marks and citation omitted). The facts before the court do not exclude the possibility that a jury would reasonably conclude that Mr. Erwin, as a licensed Master Electrician, undertook to provide services consistent with the standard of care applicable to that trade. It is an open question whether Mr. Erwin met that standard when, in the first instance, he chose the gauge wire he did without knowing the length of the run. Equally, it is an open question whether he met the standard when, having discovered the potential problem, he proceeded only on Mr. Bushey's say-so.

In short, while Mr. Erwin undertook no responsibility for system design or even for conduit specification, that does not absolve him of responsibility for the choices that he alone made, in installing the system. As the Court observed in *Alexander v. Gerald E. Morrisey, Inc.*, under the shield doctrine first recognized in *Fairman v. Ford*, 70 Vt. 11 (1898), "a contractor who faithfully follows plans or specifications supplied by the owner is not liable for loss or damage to the owner which

results solely from defective or insufficient plans or specifications." 136 Vt. 20, 26 (1979). Conversely, however, "the contractor [may be] precluded from relying on Vermont's shield doctrine by the limitation embodied in the requirement that plaintiff's damage arise solely from the defective plans or specifications." *Id.* Here, AIR's claimed damage does not arise solely from the system design or conduit specification; it appears to be attributable, at least in part, to Erwin's choice of wire gauge. The claim for breach of contract thus remains.

The determination that Mr. Erwin undertook no overall design responsibility yields the opposite result with respect to the claim for negligence. It is undisputed that the losses claimed here were purely economic; AIR seeks to recover only for the cost of repairing or upgrading the electrical system to conform to code requirements. This brings the negligence claim squarely within the operation of the "economic loss rule." Vermont has adopted the rule, which prohibits recovery in tort for purely economic losses. *Springfield Hydroelectric Co. v. Copp*, 172 Vt. 311, 314 (2001). Economic losses are generally defined as "damages other than physical harm to persons or property." *Id.* at 315 (quoting *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000)). "[I]njury to the product or property that is the subject of a contract is generally considered disappointed economic expectation for which relief lies in contract rather than tort law." *Walsh v. Cluba*, 2015 VT 2, ¶ 28, 198 Vt. 453. The rule is intended to separate contract and tort claims. It rests on the recognition that "negligence actions are best suited for 'resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damages that the parties have, or could have, addressed in their agreement.' " *Springfield Hydroelectric*, 172 Vt. at 314 (quoting *Spring Motors Distribs. v. Ford Motor Co.*, 489 A.2d 6601, 672 (N.J. 1985)); *see also Gus' Catering, Inc. v. Menusoft Sys.*, 171 Vt. 556, 558 (2000) (mem.) ("[N]egligence law does not generally recognize a duty to exercise reasonable care to avoid intangible economic loss to another unless one's conduct has inflicted some accompanying physical harm, which does not include economic loss."). Economic losses may include, but are not limited to, lost profits, claims of inadequate value received, and repair or replacement costs. *See Heath v. Palmer*, 2006 VT 125, ¶ 15 (affirming that plaintiffs' remedy for construction defect repairs rests in contract not tort law); *Gus' Catering, Inc.*, 171 Vt. at 558–59 (defining economic loss to include "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits") (internal quotation omitted).

Vermont has also recognized a narrow exception to the economic loss rule for cases in which the parties have a special relationship independent of their underlying contractual relationship. *EBWS, LLC v. Britly Corp.*, 2007 VT 37, ¶ 31, 181 Vt. 513. As the *Springfield Hydroelectric* Court stated:

> Even where courts have permitted recovery for economic loss, they have required a special relationship between the alleged tortfeasor and the individual who sustains purely economic damages sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor.

172 Vt. at 316. Whether a "special relationship" exists depends on the "type of relationship created between the parties." *EBWS*, 2007 VT 37, ¶ 31. In the past, the Court has found it significant whether defendants held "themselves out as providers of any licensed professional services" or "maintained complex and highly specialized responsibilities." *Id.* ¶ 30. The Court has cautioned, though, that while a professional license in a particular field "may be indicative of this [special] relationship, it is not determinative." *Id.* ¶ 31. The Court has also indicated that such relationships usually take the form of "a professional relationship such as doctor-patient or attorney-client . . . such that it 'automatically triggers an independent duty of care that supports a tort action.' " *Walsh*, 2015 VT 2, ¶ 30 (quoting *Town of Alma*, 10 P.3d at 1263). This exception is narrow, and it does not appear that the Court has ever actually found an application. *See Hunt Constr. Grp. v. Brennan Beer Gorman/Architects, P.C.*, 607 F.3d 10, 14 (2d Cir. 2010) ("Although *EBWS* held that a professional services exception exists . . . we know of no case in which the Vermont Supreme Court has actually found the exception to apply.").

This does not appear to be the case in which the Court would apply the special relationship exception. The threshold issue in this analysis not whether one party had a professional license but what the parties contracted for. In both *Long Trail House* and *EBWS*, the general contractors alleged to have provided professional services were found not to fall under the exception described above because they presented and operated as contractors, not engineers. *See Long Trail House Condo. Ass'n v. Engelberth Const., Inc.*, 2012 VT 80, ¶ 21–22, 192 Vt. 322 (rejecting plaintiff's claim for recovery on negligence claim where defendant presented and operated as contractor, not provider of specialized professional services) (citing *EBWS*, 2007 VT 37, ¶ 32). Here, likewise, while Mr. Erwin's license and experience might have qualified him to provide design services, he was not contracted for this purpose. The undisputed evidence confirms that Mr. Erwin contracted with AIR to provide services as an electrical contractor on a time and materials basis, not on a specialized design-build basis. The court therefore need not determine whether the latter engagement may have given rise to a "special

relationship" exception; the former clearly does not. Accordingly, the economic loss rule bars AIR's negligence claim.

ORDER

The court grants the motion in part and denies it in part. AIR's negligence claim (Count II) is dismissed with prejudice. The breach of contract claim (Count I) survives. The clerk will schedule a status conference.

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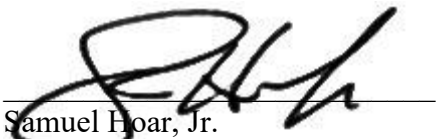

Samuel Hoar, Jr.
Superior Court Judge