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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1873CV01157

ANDREW STEINKE

vs.

SOUTHCOAST GREENLIGHT ENERGY, INC., & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Andrew Steinke ("Steinke" or "the plaintiff") initiated this litigation against Southcoast Greenlight Energy, Inc. ("Southcoast"), Gary T. Cyr ("Gary"), Jonathan L. Cyr ("Jonathan"), and Peter T. Cyr ("Peter") (collectively, "the defendants") for various claims arising from solar equipment the defendants installed on the plaintiff's property. On the remaining counts,[2] the defendants move for summary judgment arguing, among other things, that the record fails to establish damages. After hearing and review, and for the reasons that follow, the defendants' Motion for Summary Judgment is **ALLOWED** in part and **DENIED** in part.[3]

BACKGROUND

The undisputed facts, and the disputed facts construed in the plaintiff's favor, where appropriate, are as follows, see *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 371 (1982), with some facts reserved for discussion below.

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[1] Gary T. Cyr, Jonathan L. Cyr, and Peter T. Cyr

[2] On June 17, 2019, the court (Yessayan, J.) dismissed several claims against some of the defendants. The remaining claims are: Count I, breach of contract against Southcoast; Count II, breach of the implied covenant of good faith and fair dealing against Southcoast; Count III, breach of warranty against Southcoast; Count IV, unjust enrichment against all defendants; Count V, fraud against Southcoast and Gary; Count VI, negligent misrepresentation against Southcoast and Gary; Count VII, Chapter 93A violations against Southcoast and Gary; and Count VIII, negligence against all defendants.

[3] At the hearing, the court allowed the defendants' motion for summary judgment on Count IV for unjust enrichment against all defendants because Steinke conceded in his motion that this claim should be dismissed.

Steinke resides at 23 Acoaxet Road in Westport, Massachusetts. Southcoast is a Massachusetts corporation specializing in photovoltaic systems for homes, businesses, and communities throughout southeastern New England. Gary serves as Southcoast's president, Jonathan serves as treasurer, and Peter serves as vice president.

On September 4, 2015, Steinke, doing business as Harbor Solar LLC, and Southcoast entered into a contract for Southcoast to construct and install a 20.46 kilowatt grid tied net metering solar photovoltaic array on an aluminum frame Schletter Park Sol carport mounting system ("the Carport") at Steinke's home for a price of $108,417.[4] In Section 3 of the contract, Southcoast agreed to provide a five-year workmanship warranty. The contract further indicated that the installation would comply with applicable state and local regulations and inspections.

On November 19, 2015, the Town of Westport ("the Town") issued a building permit to Southcoast for the construction and installation of the Carport. The building permit allowed construction of a sixty-foot engineered carport with a roof-mounted solar array. As part of the building application, Southcoast submitted a construction control document authored by Massachusetts licensed engineer Ronald Schneider, which indicated he would prepare all structural design drawings for the Carport.

M-V Electrical ("M-V") is an electrical contracting business that performs residential, commercial, and industrial electrical work. Gary introduced Steinke to Paul Magalhaes ("Magalhaes"), a licensed electrician for M-V. After Magalhaes initially inspected the Carport, M-V obtained two electrical permits from the Town: one for laying a 20.52 kilowatt DC solar array and a charging station, and the other to upgrade Steinke's amp service from 100 to 200-amp single phase 12240. On January 27, 2016, Dane Winship ("Winship"), the Town's

[4] The parties signed the contract on December 8, 2015.

electrical inspector, approved the permits. M-V did not perform the work on the amp service upgrade permit because Steinke's amp system already permitted 200 amps.

After the initial meeting between Gary and Magalhaes, construction of the Carport and electrical work commenced. M-V also installed an internet connection for Steinke to connect the solar array to the Internet so he could view the status of the solar setup.

On April 22, 2016, Winship inspected the trench and conduit line. On April 28, Winship returned to the property to inspect the solar panels to the Carport and their electrical installation. On May 5, 2016, again he returned to the property for an electrical inspection. Each component passed inspection. Winship certified the completion of the electrical work by M-V and signed a Certificate of Compliance for all of the work performed on the Carport.

On October 26, 2016, Southcoast sent Steinke a letter offering to install a Solaredge approved revenue grade meter, and to adjust the base claw washers, replace any damaged base claw washers and torque them down after adjustment, and have a structural engineer review the Carport. Steinke did not permit Southcoast to perform such work.[5]

Southcoast retained engineer Steven Bogle ("Bogle") to inspect and certify the Carport's structural integrity. Bogle met with the Town's building inspector, Ralph Souza ("Souza"), and inspected the Carport. On January 23, 2017, Bogle signed and certified the Carport's structural integrity. Ralph Souza signed off on the Carport's completion and closed the building permit on January 24, 2017.

[5] Steinke disputes this fact in his response to the defendants' statement of material facts; however, Steinke's deposition testimony indicates that he did not let Southcoast enter his property to rectify any of the alleged issues with the Carport. See Ex. B at 70.4-70.19, 75.12-76.23.

DISCUSSION

Summary judgment should only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56(c); *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 716 (1991). The moving party bears the initial burden of showing that no genuine issue of material fact exists. See *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party satisfies its initial burden either by providing affirmative evidence negating an essential element of the non-moving party's claim or showing that the non-moving party has no reasonable expectation of proving an essential element at trial. See *Flesner* v. *Technical Comms. Corp.*, 410 Mass. 805, 809 (1991).

If the moving party successfully shows that no genuine issue of material fact exists, the non-moving party then "must set forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e). See *Kourouvacilis,* 410 Mass. at 714. "Conclusory statements, general denials, and factual allegations not based on personal knowledge are insufficient to avoid summary judgment" (modifier omitted). *Madsen* v. *Erwin,* 395 Mass. 715, 721 (1985).

I. Breach of Contract against Southcoast

Southcoast argues that it is entitled to summary judgment on Steinke's breach of contract claim against it because Steinke failed to show evidence of any breach of the contract or damages. As to breach, based on the evidence in the record, several genuine issues of material fact remain. However, the court agrees with Southcoast that the record fails to show damages.

To prevail in a breach of contract action, a plaintiff must show an agreement between the parties supported by valid consideration; the plaintiff was ready, willing, and able to perform; the defendant breached the contract; and the plaintiff suffered damages. *Bulwer* v. *Mount Auburn Hosp.*, 473 Mass. 672, 690 (2016). In a breach of contract action, while the plaintiff does not

need to prove damages with "mathematical certainty, 'damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty.'" *Pierce* v. *Clark*, 66 Mass. App. Ct. 912, 914 (2006), quoting *Kitner* v. *CTW Transport, Inc.*, 53 Mass. App. Ct. 741, 748 (2002).

As to breach, Steinke alleged in his Complaint that Southcoast breached its obligations under the contract by failing to (1) install the Carport to the applicable state and federal electrical laws, codes, and practices; (2) use a Massachusetts licensed electrician to conduct the electrical work; (3) install the Carport to the manufacturer's specifications; and (4) install the Carport in accordance with preexisting plans for the property.

As to the proper installation of the Carport and its compliance with the requisite electrical laws, codes, and practices, Southcoast presents, among other things, deposition testimony from Winship and Souza, Bogle's report, and the supporting documentation approving the Carport's installation by Winship, Bogle, and Souza. See Exs. D, E, G, I. In response, Steinke provides an inspection report, completed on July 27, 2017, from Chris Houtz ("Houtz") of the Cadmus Group, a company that conducts photovoltaic inspections. See Ex. M. In Houtz's report, he identifies various violations of the electrical codes and laws, as well as instances where Southcoast did not properly secure the Carport. *Id.* As to the electrical work, SouthCoast provides the deposition testimony of Magalhaes and Jonathan Ste. Marie, a journeyman and licensed electrician at M-V, who indicated that M-V performed all the electrical work on the Carport. See Ex. F, H. Steinke counters this testimony with his own observations, stating that he never observed Magalhaes or anyone from M-V conduct electrical work, but instead observed Southcoast employees, who are not certified electricians, perform the work. See Ex. B at 80.17-

18.20; Ex. C at 6-7, 12-13. Given the conflicting evidence, genuine issues of material fact remain as to whether Southcoast breached the contract.[6]

Despite the genuine issues of material fact concerning breach, the undisputed record shows that Steinke suffered no damages. See *Kourouvacilis*, 410 Mass. at 711 ("A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial.").[7] During Steinke's deposition, counsel specifically asked what financial damage Steinke sustained. See Ex. B at 122.22-122.23. In response, Steinke stated "[t]hat would be hard to do," and failed to indicate how the purported breaches caused him financial damage. See Ex. B at 123.2-123.6.[8] Such testimony amounts to speculation, which fails to show damages. See *Pierce*, 66 Mass. App. Ct. at 914 (affirming judgment on breach of contract action where, despite breach, damages purely speculative).

Thus, the record's absence of evidence of damages entitles Southcoast to summary judgment on Count I.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing against Southcoast

Similarly, Steinke's breach of the implied covenant of good faith and fair dealing claim against Southcoast requires him to show loss or injury. See *A.L. Prime Energy Consultant, Inc.*

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[6] The court agrees with Southcoast that it did not breach the contract for failing to install the Carport in accordance with Steinke's preexisting plans for the property because the contract did not require Southcoast to take such plans into consideration.

[7] In Steinke's response to the defendants' interrogatories, he indicated an assessment of financial damages had not been completed. Ex. C at 2-3. On May 3, 2021, this court endorsed and allowed the defendants' motion to compel further answers to interrogatories and document requests. In their motion, they sought information and documentation concerning Steinke's damages. Defense counsel indicated at the hearing on the motion for summary judgment that they received nothing in response to the motion to compel. Additionally, when the court questioned plaintiff's counsel at the motion hearing concerning damages, he failed to provide an amount of damages and stated damages could be determined at trial.

[8] In fact, during his deposition, Steinke stated he's received tax credits from National Grid as a result of the Carport's installation. See Ex. B at 196.4-196.24.

v. *Massachusetts Bay Transp. Auth.*, 479 Mass. 419, 434 (2018). As the record fails to show damages for this breach, summary judgment must also be allowed on this claim.

III. Breach of Warranty against Southcoast

The basis of Steinke's breach of warranty claim arises from Section 3 of the contract, which indicated that Southcoast agreed to provide a five-year workmanship warranty on the installation of the Carport. Southcoast argues it is entitled to summary judgment on this claim because (1) Steinke has no expert to substantiate his claims of a defect; (2) plaintiff prevented Southcoast from making repairs to the Carport; and (3) Steinke had the Carport substantially modified without notice to Southcoast.

When "a design professional expressly warrants a certain result, 'the plaintiff may maintain an action for breach of express warranty.'" *Anthony's Pier Four, Inc.* v. *Crandall Dry Dock Engineers, Inc.*, 396 Mass. 818, 822 (1986), quoting *Klein* v. *Catalano*, 386 Mass. 701, 720 (1982). A plaintiff must present expert evidence concerning the presence of a product defect, and the opinions of non-experts cannot substitute for the lack of an expert. *Enrich* v. *Windmere Corp.*, 416 Mass. 83, 87 (1993).

Even considering Exhibit M, Houtz's report, as an expert opinion, and that Steinke's hiring of a third party to modify the Carport did not void the warranty, the undisputed record demonstrates that Southcoast attempted to cure any alleged defect in the Carport, in accordance with Section 3, but Steinke refused to grant Southcoast permission to proceed. In a letter dated October 26, 2016, Southcoast offered to install a Solaredge approved revenue grade meter, among other things, and to cure any alleged issue with the Carport. Steinke, during his deposition testimony, indicated that he did not permit Southcoast to conduct this work. See Ex. B at 70.4-70.19, 75.12-76.23. Accordingly, there is no genuine issue as to any material fact that

Southcoast attempted to honor the warranty in accordance with the contract, but Steinke refused to grant Southcoast permission to do so. Therefore, summary judgment must be awarded to Southcoast on this claim.

IV. Chapter 93A

Southcoast and Gary argued that their motion must be allowed on Count VII for violation of G. L. c. 93A, § 9, and § 11 because Steinke failed to show damages.[9]

The court agrees with the defendants' that they are entitled to judgment as a matter of law on the § 11 claim for failing to show damages. Failing to show a loss of money or property proves fatal to a count under G. L. c. 93A, § 11. *Tedeschi-Freij* v. *Percy Law Group, P.C.*, 99 Mass. App. Ct. 772, 779 (2021). Here, as with the contractual claims, Steinke only speculates as to the amount of damages he sustained and fails to quantify any damages amount. See *Cesso* v. *Todd*, 92 Mass. App. Ct. 131, 139 (2017) ("On summary judgment, any inference that could be drawn in favor of the nonmoving party 'must be based on probabilities rather than possibilities and cannot be the result of mere speculation and conjecture'" [quoting *McEvoy Travel Bureau, Inc.* v. *Norton Co.*, 408 Mass. 704, 706 n.3 (1990)]). Since the defendants have demonstrated Steinke has no reasonable expectation of proving damages, summary judgment must be allowed.

However, the § 9 claim does not require an actual damage amount because a plaintiff can receive nominal damages of twenty-five dollars. See *Tedeschi-Freij*, 99 Mass. App. Ct. at 779-780 (denying summary judgment under c. 93, § 9 because, despite plaintiff's failure to show damages, plaintiff could still receive nominal damages). Similar to *Tedeschi-Freij*, the parties

[9] In their motion papers, the defendants argue that Steinke's claim under either G. L. c. 93A, § 9, or § 11 fails because he did not establish claims for fraud or misrepresentation, or any outrageous or egregious conduct by either defendant in installing the Carport. However, like the breach element in the breach of contract claim, whether the defendants made false representations, and whether their conduct can be categorized as outrageous or egregious, would require the court to weigh evidence and assess witness' credibility, which the court cannot do on a motion for summary judgment. See *Bulwer*, 473 Mass. at 689 ("at the summary judgment stage[,] a court does not resolve issues of material fact, assess credibility, or weigh evidence" [quotations omitted]).

here did not brief the issue whether Steinke's claim falls exclusively under § 11 or § 9. See *id.* at 780. Therefore, so much of the defendants' motion for summary judgment on Count VII concerning c. 93A, § 9 must be denied.

V. Remaining Counts

Like the c. 93A, § 11 claim and the contractual claims, Steinke's claims for fraud, negligent misrepresentation, and negligence all require damages as an essential element. See, e.g., *Cumis Ins. Soc'y, Inc.* v. *BJ's Wholesale Club, Inc.*, 455 Mass. 458, 471-472 (2009) ("pecuniary loss" required in negligent misrepresentation action); *Poly* v. *Moylan*, 423 Mass. 141, 149 (1996) (damages "essential to recovery" in fraud action); *Bernal* v. *Weitz*, 54 Mass. App. Ct. 394, 396 (2002) (actual damages or loss essential element of negligence). As with the other claims, since the undisputed record fails to quantify, and only speculates as to damages, the defendants have met their burden of demonstrating that Steinke cannot prove an essential element on each of these claims. Accordingly, the defendants are entitled to summary judgment on them.

ORDER

For the aforementioned reasons, it is hereby **ORDERED** that the defendants' Motion for Summary Judgment be **ALLOWED** in part and **DENIED** in part. The motion is **DENIED** as to the portion of Count VII for a violation of Chapter 93A, § 9 against Southcoast and Gary. In all other respects, the defendants' motion is **ALLOWED**.

Susan E. Sullivan
Justice of the Superior Court

July 21, 2022