STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-11-03

415 CONGRESS STREET PROPERTIES, LP, and HARPERS DEVELOPMENT, LLC,	)
Plaintiffs,	)
v.	)
URS CORPORATION and T.F. PROPERTIES, INC.,	)
Defendants	)

ORDER ON DEFENDANT URS CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant URS Corporation (URS Corp.) has filed a Motion for Summary Judgment, or, in the Alternative, Motion *in Limine* for an Order Enforcing the $250,000 Contractual Damages Cap. Plaintiffs oppose the motion. The court elects to decide the motion without oral argument, *see* M.R. Civ. P. 7(b)(7); Case Management Conference Scheduling Order No. 1 ¶10. For the reasons stated within, the court grants the motion for summary judgment.

BACKGROUND

The following facts are undisputed, except where noted.

This case arises from a Property Condition Assessment (PCA) performed by URS Corp. for Plaintiff Harpers Development, LLC (Harpers) on a multi-story office building located at 415 Congress Street in Portland, Maine (the "Building"). (Supp. S.M.F. ¶1; Opp. S.M.F. ¶1.) Harpers is an experienced real estate developer in Maine, engaging in sophisticated

development deals throughout the state, and in the past has purchased buildings of the same age as the Building. (Supp. S.M.F. ¶2; Opp. S.M.F. ¶2.)

URS Corp. and Harpers entered into an agreement effective February 5, 2004, entitled "Agreement for Professional Services," (the "Agreement") which referenced one or more "Work Orders" to which the Agreement's terms and conditions would apply. (Supp. S.M.F. ¶¶6, 8; Opp. S.M.F. ¶¶6, 8; *see* A.S.M.F. ¶8.) The Agreement contains a "Risk Allocation" provision:

> **ARTICLE V – Risk Allocation.** The liability of URS, its employees, agents and subcontractors (referred to collectively in this Article as "URS"), for Client's claims of loss, injury, death, damage, or expense, including, without limitation, Client's claims of contribution and indemnification, express or implied, with respect to third party claims relating to services rendered or obligations imposed under this Agreement, including all Work Orders, shall not exceed in the aggregate:
>
> (1) The total sum of $250,000 for claims arising out of professional negligence, including errors, omissions, or other professional acts, and including unintentional breach of contract . . .
>
> (2) The total sum of $1,000,000 for claims arising out of negligence, breach of contract, or other causes for which URS has any legal liability, other than as limited by (1) above.

(Supp. S.M.F. ¶7; Opp. S.M.F. ¶7.)

On October 4, 2004, Harpers and URS Corp. executed a work order for the PCA on the Building, which stated that "[t]he terms and conditions of the [Agreement] shall apply to this Work Order, except as expressly modified herein." (Supp. S.M.F. ¶¶9-11; Opp. S.M.F. ¶¶9-11; Mattson Depo. Exh. 9.) URS Corp. assigned its employee, Tony DiNicola, to perform the PCA. Mr. DiNicola is a registered architect, but he was not practicing architecture in connection with the PCA. (Supp. S.M.F. ¶12; Opp. S.M.F. ¶12; A.S.M.F. ¶11; Reply S.M.F. ¶11.) The parties disagree about whether URS Corp. was directed to conduct the PCA

pursuant to ASTM standards[1], and what entity may have directed URS Corp. to do so, but there is no dispute that Mr. DiNicola utilized ASTM standards in conducting the PCA. (Supp. S.M.F. ¶15; Opp. S.M.F. ¶5; Mattson Depo. Exh. 15 at 2-2.) The results of the PCA were presented to Harpers in October 2004 in a 73-page PCA report (the "Report"). (Supp. S.M.F. ¶13; Opp. S.M.F. ¶13.) URS Corp. billed Harpers a total of $2,086.44 for the PCA and Report. (Supp. S.M.F. ¶14.)[2]

In November 2004, Harpers assigned all of its "right, title and interest in and to any and all architectural plans, engineering work, [and] inspection reports" acquired by Harpers "in connection with the acquisition or development of" the building to Plaintiff 415 Congress Street Properties, L.P., a Maine limited partnership formed on September 21, 2004 for the purpose of owning and operating the Building, "together with any and all rights and claims relating thereto." (Supp. S.M.F. ¶3, 4; Opp. S.M.F. ¶3, 4.)[3]

The PCA's assessment of the condition of the façade of the Building and URS Corp.'s alleged omissions regarding the condition of the Building form the basis of 415 Congress's claims against URS Corp. (Supp. S.M.F. ¶19; Opp. S.M.F. ¶19.) 415 Congress alleges that URS Corp. owed it "a duty to perform [the PCA] with the degree of skill, care, and diligence ordinarily exercises by a building inspector" and that URS Corp. "breached its duty to perform its services with the degree of skill, care, and diligence ordinarily exercised by a building inspector." (Supp. S.M.F. ¶20; Opp. S.M.F. ¶20.) 415 Congress has retained an expert witness to testify on the standard of care. (Supp. S.M.F. ¶21; Opp. S.M.F. ¶21.)

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[1] ASTM standards are developed by ASTM International (formerly the American Society for Testing and Materials) for use in a variety of technical and engineering applications.

[2] Contrary to 415 Congress's denial of the statement of material fact (Opp. S.M.F. ¶14), the cited exhibit supports the statement that Harpers was the entity billed for the PCA. (*See* Mattson Depo. Exh. 22.)

[3] Although this supporting statement of material fact is not supported by a record citation, the fact of the assignment was before the court in URS Corp. and URS Group, Inc.'s previous motion for summary judgment, supported by a copy of the assignment in the court's record. The court includes it because it is not disputed by 415 Congress, who only qualifies the statement to note that "[t]he document speaks for itself."

DISCUSSION

I. Standard of Review

Pursuant to M.R. Civ. P. 56(c), a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact set forth in those statements and that [the] party is entitled to a judgment as a matter of law." *See also Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶11, 989 A.2d 733. A party wishing to avoid summary judgment must present a prima facie case for each element of the claim or defense that is asserted against it. *See Reliance Nat'l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶9, 868 A.2d 220. "If material facts are disputed, the dispute must be resolved through fact-finding." *Arrow Fastener Co. v. Wrabacon, Inc.*, 2007 ME 34, ¶18, 917 A.2d 123 (quotation marks omitted). A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *See Inkel v. Livingston*, 2005 ME 42, ¶4, 869 A.2d 745.

II. Analysis

A. *Ripeness*

As a threshold matter, 415 Congress argues that the court should not address the damage cap issue at this juncture in the case. First, 415 Congress argues that a limitation on damages should only be addressed after liability has been established, thus challenging the ripeness of URS Corp.'s motion. "Ripeness concerns the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Wagner v. Sec'y of State*, 663 A.2d 564, 567 (Me. 1995). The doctrine "[p]revent[s] judicial entanglement in abstract disputes" and "avoid[s] premature adjudication." *Johnson v. City of Augusta*, 2006 ME 92, ¶7, 902 A.2d 855.

415 Congress misconstrues the doctrine of ripeness to apply to individual claims in a complaint, broken down by elements of the cause of action. A case is ripe or not upon the filing of a complaint or other petition for judicial review based on whether "there exists a genuine controversy between the parties that presents a concrete, certain, and immediate legal problem." *Id.*; *accord Marquis v. Town of Kennebunk*, 2011 ME 128, ¶18, 36 A.3d 861. Whether the contractual damage cap applies is squarely before the court, representing a "genuine controversy and a concrete, certain, and immediate legal problem" between the parties. The doctrine of ripeness does not apply to prevent the Court's consideration of the motion.

415 Congress also argues that an "interlocutory ruling as to the scope of [its] damages" is unavailable by summary judgment. The court disagrees. M.R. Civ. P. 56(b) allows a defending party, such as URS Corp., to move for "summary judgment in the party's favor as to all or any part" of the claims against it. Damages or harm is an essential element for any negligence action, *see Davis v. R C & Sons Paving, Inc.*, 2011 ME 88, ¶10, 26 A.3d 787, and URS Corp. may move for partial summary judgment as to part of that claim.

B. *Contractual Interpretation*

Because the damages cap on its face applies to claims for "unintentional breach of contract," and because there is no allegation of an intentional breach of contract on the part of URS Corp, (Supp. S.M.F. ¶23; Opp. S.M.F. ¶23), the cap plainly applies to Count I of the complaint. The primary dispute between the parties is as to Count II, and specifically it focuses on whether the claim in Count II is for "professional negligence" within the meaning of the damages cap provision.[4]

[4] Before 415 Congress's opposing statement was due, URS Corp. filed a supplemental supporting statement of material facts that added 7 facts for the court's consideration. 415 Congress generally objects to the supplemental statement as untimely. Because the court does not find the supplemental statements to be controlling to the outcome of the motion, the court does not address them or rely upon them.

URS Corp. asserts that the Agreement unambiguously limits its liability for claims arising out of the PCA because the PCA was a professional service and the contract limits "claims arising out of professional negligence, including errors, omissions, or other professional acts" to $250,000. (Supp. S.M.F. ¶7; Opp. S.M.F. ¶7.)

URS Corp. argues that professional services should be defined broadly, "so as to embrace all activities for which the specialized training of the particular profession is required." *Centennial Ins. Co. v. Patterson*, 564 F.3d 46, 53 (1st Cir. 2009). 415 Congress, on the other hand, argues that the meaning of "professional negligence" in the Agreement is ambiguous because it is not defined within the agreement and the term generally refers to negligence of doctors, lawyers, and other licensed professionals. 415 Congress asserts that inspecting buildings, while requiring a degree of experience, is not professional work in the same way that a doctor's or lawyer's practice is "professional," and thus negligent conduct of a building inspection is not professional negligence.

Interpretation of a contract and whether a contract term is ambiguous are both questions of law. *See Villas by the Sea Owners Ass'n v. Garrity*, 2000 ME 48, ¶9, 748 A.2d 457. "A contract should be construed viewing it as a whole. An interpretation that would render any particular provision in the contract meaningless should be avoided." *McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 52 (Me. 1996). Likewise, any alleged ambiguity must be viewed in the context of the entire contract to determine if another provision resolves the ambiguity. *See id.* Further, "[i]t is a well established principle that a contract is to be interpreted to give effect to the intention of the parties as reflected in the written instrument, construed in respect to the subject matter, motive and purpose of making the agreement, and the object to be accomplished." *Estate of Barrows*, 2006 ME 143, ¶13, 913 A.2d 608 (quotation marks omitted).

"If a contractual provision is unambiguous, it will be given its plain, ordinary, and generally accepted meaning." *Villas by the Sea Owners Ass'n*, 2000 ME 48, ¶9, 748 A.2d 457. A contractual provision "is ambiguous if it is reasonably susceptible to more than one interpretation." *Madore v. Kennebec Heights Country Club*, 2007 ME 92, ¶7, 926 A.2d 1180; *accord Coastal Ventures v. Alsham Plaza, LLC*, 2010 ME 63, ¶¶26-27, 1 A.3d 416.

The language in question is as follows:

> **ARTICLE V – Risk Allocation**. The liability of URS, its employees, agents and subcontractors (referred to collectively in this Article as "URS"), for Client's claims of loss, injury, death, damage, or expense, including, without limitation, Client's claims of contribution and indemnification, express or implied, with respect to third party claims relating to services rendered or obligations imposed under this Agreement, including all Work Orders, shall not exceed in the aggregate:
>
> (1) The total sum of $250,000 *for claims arising out of professional negligence, including errors, omissions, or other professional acts,* and including unintentional breach of contract . . .
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> (2) The total sum of $1,000,000 *for claims arising out of negligence,* breach of contract, or other causes for which URS has any legal liability, other than as limited by (1) above.

(Supp. S.M.F. ¶7; Opp. S.M.F. ¶7 (emphasis added).)

At the outset, it should be noted that the parties in this case used the same word in characterizing their contract as an "Agreement for *Professional* Services" (emphasis added) and in capping damages for "*professional* negligence" (emphasis added). There is absolutely no indication that the parties intended the word "professional" to mean one thing in the first context and something else in the other. Therefore, whatever the word "professional" might mean in other situations, the parties here agreed that it applied to any services rendered under the Agreement, as the PCA admittedly was. That undisputed fact alone arguably makes it unnecessary to parse the meaning of "professional," and compels the conclusion that any claim

relating to the services performed under the Agreement for Professional Services is subject to the "professional negligence" cap.

However. even if the focus instead is on whether "professional negligence" is an ambiguous term, the court concludes it is not ambiguous. The term "professional negligence" has a particular meaning under Maine law. *See Madore*, 2007 ME 92, ¶7, 926 A.2d 1180. "Professional negligence" is simply a variation of negligence, differing only by the standard of care, or duty owed by the defendant to the plaintiff. The standard of care in a typical negligence case is what an ordinary careful person would do or not do in the same situation, considering all the facts of the case. *See Fitts v. Central Me. Power Co.*, 562 A.2d 690, 693 n.2 (Me. 1989). The standard of care in a professional negligence case is the "failure to use such skill, judgment, prudence, and preparation as is reasonable for *an ordinarily competent [professional]* performing similar services under like conditions." Alexander, *Maine Jury Instruction Manual* § 7-78 at 7-82.1 (4th ed. 2011) (emphasis added).

Although 415 Congress cites to a number of decisions indicating that professional negligence is only applicable to doctors, lawyers, accountants, and other highly trained, licensed professionals, those cases are extra-territorial. The Law Court has clearly stated that "the standards for demonstrating the elements of professional negligence do not differ from profession to profession. The plaintiff in a professional negligence action must establish the appropriate standard of care, demonstrate that the defendant deviated from that standard, and prove that the deviation caused the plaintiff's damages." *Graves v. S.E. Downey Land Surveyor, P.A.*, 2005 ME 116, ¶10, 885 A.2d 779 (quotation marks and citation omitted). The cases cited by 415 Congress reflect a much narrower view of professional negligence than is applicable in Maine, and the Court does not find them persuasive.

Because "professional negligence" is not ambiguous, it should be given its "plain, ordinary, and generally accepted meaning." *Villas by the Sea Owners Ass'n*, 2000 ME 48, ¶9, 748 A.2d 457. Consistent with the Law Court's precedent, "professional negligence" is the failure to use such skill, judgment, prudence, and preparation in the course of rendering a service requiring skill, training and judgment as is reasonable for an ordinarily competent professional performing similar services under like conditions that results in injury or other loss to the plaintiff.

In addition, the Agreement itself distinguishes between "professional negligence" and "negligence," thus indicating that the parties understood and considered there to be two types of negligent conduct under the contract whose risk they were allocating and set the damage cap limits accordingly.[5] The pleadings themselves show that 415 Congress is not alleging that URS Corp. breached the standard of care of what an ordinary careful person would have done under the circumstances; 415 Congress alleges that URS Corp. owed it "a duty to perform [the PCA] with the degree of skill, care, and diligence ordinarily exercised *by a building inspector*." (Supp. S.M.F. ¶20; Opp. S.M.F. ¶20 (emphasis added).) The fact that 415 Congress has hired an expert to elucidate the standard of care only reinforces this point. (Supp. S.M.F. ¶21; Opp. S.M.F. ¶21.)

A final and equally persuasive point is that, as noted at the outset, even if the term "professional" were ambiguous in some contexts, the fact that the parties labeled their contract

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[5] 415 Congress suggests that under URS Corp.'s interpretation of the contract, all services performed would be professional services, essentially writing the ordinary negligence cap out of the contract. The court disagrees with this characterization. Had Mr. DiNicola driven his car into the building upon arrival, or left a ladder in a precarious position that caused someone injury, or loosened a piece of the façade that later fell and injured a passer-by—all those examples would fall under the ordinary negligence damages cap.

In fact, 415 Congress's position that none of URS Corp.'s work constituted "professional services" would truly do the opposite—write the professional negligence cap out of the contract.

as an "Agreement for Professional Services" virtually compels the inference that the cap on damages for "professional negligence" applies to claims arising out of such services.

CONCLUSION

The $250,000 damages cap applies to "claims arising out of professional negligence, including errors, omissions, or other professional acts, and including unintentional breach of contract . . . " Because Count I is a claim for breach of contract in which there is no allegation that the breach was intentional, and because Count II is a professional negligence claim arising out of services that the parties themselves labeled as "professional services," the cap applies to both counts.

Defendant URS Corp.'s Motion for Summary Judgment, or, in the Alternative, Motion *in Limine* for an Order Enforcing the $250,000 Contractual Damages Cap is GRANTED. The Plaintiff 415 Congress's recovery against URS Corp. under Counts I and II of the complaint shall be and is limited to $250,000 in damages, exclusive of interest and costs.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this Order by incorporation in the docket.

Dated July 30, 2012

A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 8/1/12
Copies sent via Mail __ Electronically ✓