

STATE OF MAINE  
ANDROSCOGGIN, ss

SUPERIOR COURT  
Civil Action  
Docket No. CV-08-257

DOWNEAST ENERGY CORP.,

Plaintiff

v.

DECISION AND JUDGMENT

LINNELL, CHOATE & WEBBER, LLP, *et als.*,

Defendants

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I. BEFORE THE COURT ANDROSCOGGIN  
SUPERIOR COURT

This matter comes before the Court on defendants', Linnell, Choate, & Webber, 83 Realty, Curtis Webber, Rebecca Webber, Jon Oxman, Richard O'Brien, and John Conway (collectively "defendants" or "LCW"),<sup>1</sup> motion for summary judgment; and Downeast Energy Corporation's (Downeast) cross-motion for partial summary judgment.

## II. FACTUAL BACKGROUND

The central facts in this case are not in dispute.

LCW is a law firm that has been a customer of Downeast, a heating oil supply company beginning in 1998. Since that time, except for 2001, the parties have entered into written agreements for Downeast to supply LCW's heating oil.

The contested issues surround the document presented to LCW by Downeast on or about June 25, 2008. The writing states, in pertinent part:

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<sup>1</sup> Defendant 83 Realty is a Maine general partnership. Curtis Webber, Rebecca Webber, Jon Oxman, Richard O'Brien, and John Conway are all general partners of 83 Realty.

On behalf of Downeast Energy, thank you for this opportunity to submit the following supply agreement . . . .

Based on your annual consumption of 4,055 gallons, Downeast Energy is pleased to offer:

A. A firm fixed price of \$4.359 per gallon. \*This price is for a commitment of 4,055 gallons and will expire when all gallons are delivered or on May 31, 2009, whichever comes first. In the event that all gallons are delivered before May 31, 2009 pricing will revert to the Downeast Energy Oil Rack Price as described in Option B.

OR

B. The Downeast Energy Oil Rack Price, at time of delivery, plus \$.35 per gallon. This price includes all freight charges to our "bulk" plant, handling costs at our "bulk" plant and all costs associated with delivery to your location(s).

OR

C. Cap Option. The actual price at the time of delivery will be the Daily Posted Price, but will never exceed the price quoted in Option A. I wish to purchase a non-refundable guaranteed cap protection and agree to pay \$.30 per gallon to be prepaid with the signed copy of this agreement.

#### PROPOSAL CONTINGENCIES

\* \* \*

5. Pricing is based upon volume and any significant decline in anticipated consumption or increase in Downeast Energy's operational costs may require adjustment of over-all pricing structure. Refusal by the customer to accept delivery of fuel as described in the agreement may result in a \$.75 per gallon charge to offset Downeast Energy's procurement costs.

6. All pricing options require "automatic" delivery unless Downeast Energy determines that "will call" delivery is more efficient.

7. The fixed price option will terminate either when all committed gallons are delivered or on May 31, 2009, whichever comes first . . .

8. In the absence of receiving a signed executed supply agreement within 24 hours of the date of this letter, Downeast Energy reserves the right to rescind this offer without notification.

#### CONFIRMATION OF AGREEMENT

Please check off which option(s) you prefer (A) or (B) or (C) and sign and date where applicable. Please forward the original to our officer. If you have any questions please call me.

(Pl.'s M. Opp. To Summ. J., Ex. A). At the end of the agreement Option A is checked off, followed by Conway's signature, dated July 1, 2008.

Downeast, in reliance on the disputed writing, supplied LCW with 1,119 gallons of oil in the beginning of the 2008-2009 heating season. On November 6, 2008, LCW, through partner Conway, sent Downeast a letter intended as a cancellation of the agreement.<sup>2</sup> (D.S.M.F. ¶ 12)

Downeast, however, contends that the writing is a contract, and that the defendants breached said contract by accepting delivery at the proposed price for Option A and then unilaterally canceling their heating oil delivery for the remaining months of the 2008-2009 winter season. (P.S.M.F. ¶ 1.) The defendants contend that it was not a contract, but rather a pricing proposal letter. (D.S.M.F. ¶ 2.) They further state that the writing did not require the purchase of 4,055 gallons of oil, but simply limited the gallons that Downeast was willing to sell at its set price. (D.S.M.F. ¶¶ 4-5.) The Defendants alternatively allege that if the court construes the writing to be a contract that the damages are laid out in the liquidated damages clause as \$.75 per gallon. (D.S.M.F. ¶ 17). Downeast counters that there is no enforceable liquidated damages clause within the contract. (P.A.S.M.F. ¶ 17).

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<sup>2</sup> The letter states:

We have never received a confirmation of the agreement from Downeast Energy in regards to this mater and there we are revoking this agreement effective immediately . . . . [T]here are a couple of different provisions which support this action. Fist of all, you indicate that increase in Downeast Energy's operational costs may require adjustment of overall pricing structure. I can only assume that the operational costs . . . have decreased significantly and that this would warrant an adjustment to the overall pricing structure. However, given that I cannot get anyone to respond to my requests by telephone, I am therefore canceling the agreement. I also note that the document indicates that in the absence of a signed, executed Supply Agreement within 24 hours of the date of the letter, that Downeast Energy reserves the right to rescind the offer without notification. I also note that I have never received any signed approval of this agreement and therefore am exercising out rights to rescind this agreement. "

### III. PROCEDURAL HISTORY

The controlling pleadings are as follows: Downeast filed a first amended complaint,<sup>3</sup> alleging that the defendants breached their heating oil purchase contract. The defendants filed a motion for summary judgment, supporting memorandum of law, and a statement of material facts. Downeast then filed an opposition to the defendants' motion for summary judgment and a cross-motion for partial summary judgment accompanied by an opposing and additional statement of material facts. LCW then filed a reply and an opposition to Downeast's motions, as well as a response to the additional statement of material facts.

### IV. DISCUSSION

#### A. Standard of Review.

"Summary judgment is appropriate when review of the parties' statements of material facts and the referenced record evidence, considered in the light most favorable to the non-moving party, indicates that no genuine issue of material fact is in dispute." *Blue Star Corp. v. CKF Props. LLC*, 2009 ME 101, ¶ 23, \_\_A.2d \_\_ (citing *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821, 825; *Stanley v. Hancock County Comm'rs*, 2004 ME 157, ¶ 13, 864 A.2d 169, 174); see also M. R. Civ. P. 56. A party wishing to avoid summary judgment must present a prima facie case for the claim or defense that is asserted. *Reliance National Indemnity v. Knowles Industrial Services*, 2005 ME 29, ¶ 9, 868 A.2d 220, 224-25. A genuine issue is raised "when sufficient evidence requires a fact-finder to choose between competing versions of the truth at trial." *Parrish v. Wright*, 2003 ME 90,

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<sup>3</sup> The plaintiff's motion to amend the complaint and add additional parties was granted by this court on June 9, 2009.

¶ 8, 828 A.2d 778, 781. A material fact is a fact that has “the potential to affect the outcome of the suit.” *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573, 575. “If material facts are disputed, the dispute must be resolved through fact-finding.” *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18, 21-22.

## **B. Existence of a Contract**

LCW has moved for summary judgment, arguing they are not liable to Downeast because there was never a valid contract between the parties, or alternatively, that if there is a contract between the parties Downeast’s damages are limited to \$.75 per gallon for the oil not purchased. Downeast filed a cross-motion, arguing that it is entitled to summary judgment because there was a contract between the parties that was breached by LCW.

The trier of fact determines if a contract exists and if that contract has been breached. *See Smile, Inc. v. Moosehead Sanitary Dist.*, 649 A.2d 1103, 1105 (Me. 1994); *Vanvoorhees, et al. v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). “The party seeking to enforce the alleged contract ha[s] the burden to establish its existence.” *Smile*, 649 A.2d at 1105.

To establish a legally binding agreement the parties must have mutually assented to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties.

*Roy v. Danis*, 553 A.2d 663, 664 (Me. 1989) (citing *Sevigny v. Home Builders Assoc. of Maine, Inc.*, 429 A.2d 197, 202 (Me. 1981); *Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978); *Pendleton v. Sard*, 297 A.2d 889, 892 (Me. 1972)).

The court concludes that there exists no issue of material fact regarding the existence of a contract between the parties. The Supply Agreement is clearly

more than a proposal and became a binding contract on Conway's acceptance. It states that the parties agree that by selecting Option A, LCW agreed to Downeast's "firm fixed price of \$4.359 per gallon" as "a commitment [for] 4,055 gallons [that] expire[s] when all gallons are delivered or on May 31, 2009, whichever comes first." The fact that the written agreement is based on the previous year's heating use and is signed by both a Downeast representative and Conway, demonstrates the parties intentions to make an agreement for LCW's 2008-2009 oil needs. Downeast has met its burden of demonstrating that a contract existed between the parties; as such, the defendants' motion for summary judgment that there is no contract between the parties must be denied, and the plaintiff's cross-motion for partial summary judgment that there is a contract between the parties will be granted.

### **C. Breach of Contract**

The parties dispute the terms of the contract. For a contract to be legally binding a court must be able to discern its exact meaning and the legal liability of the parties. *Bates v. Anderson*, 614 A.2d 551 (Me. 1991). The terms of the contract must be clear so that the trier of fact can determine whether there was a breach. *See VanVoorhees v. Dodge*, 679 A.2d 1077, 1080 (Me. 1996). "Similarly, the question of whether there has been a breach of contract is a question of fact." *Id.* Further, it is well established that

the paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in the light of all the circumstances under which it was made. . . . Such intention must be gathered from the written instrument, construed in respect to the subject matter, the motive and purpose of making the agreement and the object to be accomplished.

*Top of the Track Assocs. v. Lewiston Raceways*, 654 A.2d 1293, 1295-96 (Me. 1995) (citing *Baybutt Constr. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 919 (Me. 1983)).

The court finds that there are no issues of material fact regarding the breach of contract, and as such plaintiff's partial motion for summary judgment is granted. LCW's commitment to purchase heating oil is far from ambiguous. See *Fitzgerald v. Gamester*, 658 A.2d 1065 (Me. 1965) (noting that contract language is ambiguous when it is reasonably susceptible to different interpretations). The contract clearly states the amount of oil to be purchased pursuant to the contract (4,055 gallons), the price for the oil (\$4.359 per gallon), the price for oil used in excess of the 4,055 gallons (reversion to Option B), as well as a time limit for delivery (May 31, 2009). The consideration consisted of a set fixed price for the agreement to purchase 4,055 gallons of heating oil. In assessing the totality of the circumstances and the purpose of the contract, there is no question that the defendants breached the contract by unilaterally canceling the agreement prior to May 31, 2009.<sup>4</sup>

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<sup>4</sup> The parties spent a significant amount of time in their briefs discussing whether or not the contract at issue was a requirements contract. Under the Maine Uniform Commercial Code:

- 1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith . . . .
- 2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

11 M.R.S.A § 2-306. The defendants argue that since the contract lacks a "requirement" and exclusivity term, then it cannot be a requirements contract. In supporting their argument they point to *Roger Edwards, LLC v. Fiddes & Son Ltd.*, 245 F. Supp. 2d 251, 260 (D. Me. 2003). However, in *Roger Edwards* the court found that no evidence on the record could be interpreted to establish a requirements contract. Although the court finds that this contract is for 4,055 gallons of oil in consideration for a fixed-price of \$4.359 per gallon, the contract could be interpreted, as suggested in *Roger Edwards*, as a requirements contract based on the quantity of the negotiated oil, the course of dealings between the parties, and the usage of trade in the heating oil industry. *Id.*; see also 11 M.R.S.A. § 1-205.

The court also finds 10 M.R.S.A. § 1110 (2006) (Supp. 2009), which sets the requirements for price protection and prepaid contracts for heating oil, helpful in discerning the terms of the contract between the parties. The statute states, in pertinent part, that:

A contract for the retail sale of home heating oil, . . . must be in writing and the terms and conditions of the price plan must be disclosed . . . . A solicitation for the retail sale of home heating oil . . . that offers a guaranteed price plan that could become a contract upon a response from a consumer, including a prepaid contract and any other similar term, must be in writing and the terms and conditions of that offer must be disclosed in plain language.

. . . .  
A home heating oil . . . dealer may not enter into a prepaid contract . . . to a consumer unless that dealer has obtained and maintains . . . contracts or other similar commitments that allow the dealer to purchase, at a fixed price, heating oil . . . in an amount not less than 75% of the maximum number of gallons that the dealer is committed to deliver pursuant to all prepaid contracts entered into by the dealer . . . .

*Id.* (emphasis added). The court recognizes that this is not a home heating oil contract; however, it would be disingenuous to provide consumers with the protections provided by the statute, yet none to dealers who, in a commercial relationship, fulfill their responsibilities by securing the statutorily required percentage of the requested oil. (P.S.A.M.F. ¶ 40.)<sup>5</sup>

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<sup>5</sup> The court also notes that the fixed oil prices are not something of a nature that a consumer, let alone a law practice, can claim to be unfamiliar with. For example,

Some customers are wondering if they can get out of their higher-priced [oil] contracts and into terms that reflect the reality of today's market. Unfortunately, the answer is no. In 2006, the state of Maine passed a law designed to protect consumers who have contracts with their dealers. The law requires oil dealers to protect the consumer by covering their fixed-price contracts with an adequate supply of oil. In other words, when you lock in a price with your dealer, they in turn lock in oil deliveries with their suppliers. This ensures the oil is there to keep you and your family warm when you need it, regardless of what is happening in the market or on Wall Street. Over the past decade, this has saved Maine consumers significant amounts of money, as prices tended to rise during the heating season . . . . The Maine Attorney General's Office has been very explicit in [regarding these contracts], stating to the media that customers who break heating oil contracts may be subject to legal action.

#### D. Liquidated Damages

Courts determine whether a liquidated damages clause is enforceable on an individual basis, analyzing whether the clause meets the two-fold requirements that “(a) the damages caused by the breach are very difficult to estimate accurately and (b) the amount so fixed is a reasonable forecast of the amount necessary to justly compensate one party for the loss occasioned by the breach of the other party.” *Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135, 1137 (Me. 1978) (citing *Interstate Industrial Uniform Rental Service, Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 921 (Me. 1976)). “[T]he party seeking enforcement of a liquidated damages clause in a contract has the burden of proving its validity in accordance with the two requirements.” *Pacheco v. Scoblionko*, 532 A.2d 1036, 1039 (Me. 1987). Courts examine the intentions of the parties, the reasonableness of the clause, and the uncertainty of actual damages when determining whether to enforce a liquidated damages clause. See *Interstate Industrial Uniform Rental Service, Inc. v. Couri Pontiac, Inc.*, 355 A.2d 913, 921 (Me. 1976).

The plaintiff denies that the clause at issue is a liquidated damages clause, rather that it is “inserted to give customers an idea of the possible measure of damages which might result in the event of a breach.” (P.S.A.M.F. ¶ 30.) However, regardless of whether the plaintiff intended this clause to be for liquidated damages, it does not meet the two-part test, and as such is

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Jamie Py, Heating oil contracts: *Mainers Paying the Price for Wall Street Hype*, PORTLAND PRESS HERALD, Dec. 4, 2008 available at <http://pressherald.maintoday.com/story.php?id=225467&ac=PHedi#at>; see also Dave Gram, *Heating Oil Contracts Signed at Peak Now Haunt*, BOSTON.COM, available at [http://www.boston.com/business/articles/2008/10/22/heating\\_oil\\_contracts\\_signed\\_at\\_peak\\_now\\_haunt\\_1224703401/](http://www.boston.com/business/articles/2008/10/22/heating_oil_contracts_signed_at_peak_now_haunt_1224703401/) (stating that “Maine Assistant Attorney General Linda Conti said . . . [t]here’s nothing the state can do if an oil customer has decided to lock into a price and signed a contract, and the price drops”).

unenforceable. The damages caused by the breach are not difficult to ascertain, nor do the proposed damages adequately compensate Downeast for LCW's breach. In *Interstate Industrial Uniform Rental Service* the Law Court stated that "[a]n excessive sum suggests that the parties did not make a good-faith effort to pre-estimate the actual loss . . . . Obviously, if the sum is not reasonable [it] is not the product of a good-faith attempt to anticipate actual loss." 355 A.2d at 921-922 (citing *Bignall v. Gould*, 119 U.S. 495, 7 S. Ct. 294, 30 L. Ed. 491 (1886)). Along that same reasoning, this court infers that a sum that is excessively small also reflects a failure on the part of the parties to make a good faith effort to pre-estimate the actual loss. As such, the clause is unenforceable and the defendants' motion for summary judgment must be denied; and plaintiff's corresponding cross-motion will be granted.

## V. DECISION AND JUDGMENT

A. The clerk will make the following entries on the defendants' motion for summary judgment:

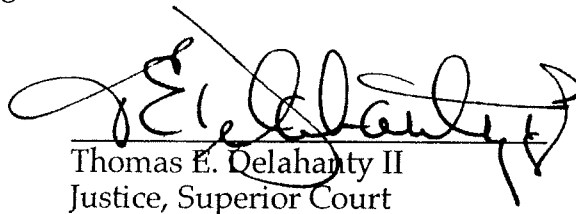
1. Motion denied that the agreement does not constitute a contract; and,
2. Motion denied that the agreement contains an enforceable liquidated damages provision.

B. The clerk will make the following entries on the plaintiff's cross-motion for summary judgment:

Motion granted that the agreement constitutes a contract and that the defendants have breached the agreement.

SO ORDERED.

Dated: December 1, 2009

  
Thomas E. Delahanty II  
Justice, Superior Court