

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

TOWN OF WOLFEBORO)	
)	
Plaintiff,)	Civil No. 1:12-cv-00130-JD
v.)	
)	
WRIGHT-PIERCE,)	
)	
Defendant.)	

**WOLFEBORO’S OBJECTION TO WP’S MOTION IN LIMINE TO PRECLUDE
UNTIMELY EVIDENCE OF BETTERMENT DAMAGES**

Plaintiff, the Town of Wolfeboro (“Wolfeboro”) hereby objects to WP’s Motion in Limine to Preclude Evidence of Betterment Damages. The premise of WP’s Motion is that Wolfeboro should be precluded from seeking the award of certain damages that WP claims represent a “windfall” or “double recovery” to Wolfeboro. WP’s Motion is based on incorrect factual and legal assertions, and underscores WP’s apparent failure to have reviewed Wolfeboro’s Supplemental Answers to Interrogatories (“Supplemental Answers”) which itemize, detail and support all of the damages at issue.

FACTUAL BACKGROUND

A. Wolfeboro’s Initial Production of Documents and Responses to Interrogatories.

On March 1, 2013, the undersigned counsel sent WP’s counsel a disk containing all 20 boxes of Wolfeboro’s project files.¹ See Exhibit 1, 3/1/13 letter from Attorney Pasakarnis to Attorney Corkum. On April 9, 2013, Wolfeboro produced its electronic documents to WP. See Exhibit 2, 4/9/14 Letter to Attorney Corkum. On or about February 12, 2014, Wolfeboro served its answers to WP’s interrogatories. See Exhibit 3, 2/12/14 email to Attorney Corkum attaching

¹ The documents were scanned into electronic form and the electronic images of the documents were Bates labeled. The original, hard copy, documents did not receive a Bates label sticker.

Answers. Wolfeboro fully answered WP's interrogatories, including Interrogatories No. 12 and 21 addressing Wolfeboro's damages. Id.

On December 13, 2013, Wolfeboro supplemented its answers to Interrogatories 12 and 21. See Exhibit 4, 12/13/2013 Email to K. Malone and Supplemental Answers ("Supplemental Answers"). Attached to the Supplemental Answers is a spreadsheet itemizing and detailing Wolfeboro's damages. Exhibit 5, Damages Spreadsheet.² The spreadsheet includes relevant citations to purchase orders and other documents evidencing the amounts paid by Wolfeboro for various work or services performed for the Project. Wolfeboro's Supplemental Answers reduced the damages claimed by Wolfeboro by roughly \$1,500,000.

LEGAL STANDARD

A. WP's General Request to Reduce Damages

The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence. See Stephen v. Hanley, 2009 U.S. Dist. LEXIS 43334 (E.D.N.Y. 2009) (citations omitted). Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on all potential grounds. Id. (citing Baxter Diagnostics, Inc. v. Novatek Med., Inc., 1998 U.S. Dist. LEXIS 15093 (S.D.N.Y. 1998)). Motions in limine that exclude broad categories of evidence are disfavored, and such issues are better dealt with during trial as the admissibility of evidence arises. See Saenz v. Reeves, 2013 U.S. Dist. LEXIS 8262, *3 (E.D.N.Y. 2013) (citing Sperberg v. Goodyear Tire & Rubber, Co., 519 F.2d 708, 712 (6th Cir. 1975)).

² Although the Damages Spreadsheet was attached to the Supplemental Answers, Wolfeboro has also filed it as a separate exhibit for ease of reference.

B. Betterment

The “betterment” doctrine relied upon by WP is merely a restatement of the general principle that a plaintiff is typically entitled to damages that “put the injured party in as good a position, so far as money damages can put him, as he would have occupied had the defendant fully performed.” See Peter Salvucci & Sons, Inc. v. State, 110 N.H. 136, 154 (1970) (citations omitted). New Hampshire does not require that damages be calculated with mathematical certainty, and the method used to compute damages need not be more than an approximation. See Phillips v. Verax Corp., 138 N.H. 240, 247 (1994) (citing Peter Salvucci & Sons, Inc., 110 N.H. at 154.)

ANALYSIS

WP provides no sound factual or legal basis for precluding Wolfeboro from introducing evidence of damages at trial or reducing Wolfeboro’s damages prior to trial. WP’s rationale for seeking to reduce Wolfeboro’s damages is based on factual misrepresentations, misrepresentations of the applicable law, unsubstantiated and erroneous analysis. WP’s Motion should be denied.

Each of the categories of damages addressed in WP’s Motion are addressed in turn.

A. Investigation/Evaluation of Disposal Alternatives

WP’s allegation that Wolfeboro seeks to recover \$1,283,893 for all engineering costs paid to WP concerning site investigation and evaluation of disposal alternatives is incorrect. See WP Motion at 5. Wolfeboro’s Supplemental Answers state that Wolfeboro seeks \$688,915 for the services provided to Wolfeboro pursuant to the delineated Purchase Orders (“PO”):

- 1934 (Wastewater Management Plan);
- 1953 (Hydrogeological Investigation);
- 1971 (Contract 1 – Existing Site Map/Evaluation);
- 1972 (Evaluation of Alternatives);

- 1973 (Contract 3 – Evaluation of Rapid Infiltration Alternatives); and
- 4187 (Contract 3 – Amendment #1).

Exhibit 4, Supplemental Answers, Damages Spreadsheet.

Contrary to WP's claims, these costs relate entirely to the design and construction of the Project, a Project that Wolfeboro asserts is a total loss. WP further asserts that certain of the services performed by WP pursuant to the above contracts provided "value" to Wolfeboro as they involved WP researching various disposal options for the Town. The evidence at trial, however, will show that WP had no intention to recommend, and did not fully evaluate other alternatives because it had a predetermined goal of designing and constructing an RIB System in Wolfeboro with the highest loading capacity in the country.

This fact is borne out by WP's November 2, 2005 presentation to the Board of Selectmen before Wolfeboro even engaged WP to provide engineering services. Exhibit 6, Meeting Minutes and WP's Handout. In that presentation, WP pitched its experience in siting and designing RIB Systems and represented to Wolfeboro that there were "sweet spots" in the geology that would be the source of a long-term solution. Id. at 5-7 (during that presentation, William Brown of WP represented that "if you could find something with sand soils, which would be a year round solution to take a huge burden of (sic) the current spray fields"). WP's Handout during the meeting with the Selectmen highlighted its experience in Moderate Rate Infiltration and Rapid Infiltration Basins and stated that one of its options would be to "identify land that will allow year round discharge of a portion of flow via rapid infiltration." Id. at 12-29.

Further to WP's ultimate goal of siting and designing an RIB System, WP later informed the Town that the Site was a "goldmine" and in an email, informed Wolfeboro that "your site comes as close to being perfect given Wolfeboro's geologic setting. This site is a real gem and a rare find." Exhibit 7, 6/18/08 email from G. Smith. These statements were categorically untrue -

- Wolfeboro's experts have opined that the Site is unsuitable for the construction of an RIB System and that WP failed to perform the required due diligence and investigation that would have confirmed this fact. Accordingly, Wolfeboro received absolutely no end use value from WP's services.

WP also states that the Town has received a benefit from use of the RIB System over the last five years, and thus theorizes that Wolfeboro has operated (and received value for) 40% of the Site's 20 year life expectancy.³ WP's theory of betterment is inapplicable. As explained in Matthew Bender's, *Construction Law*:

A reduction in damages, based upon the theory of betterment, is premised on the belief that an injured party should not be compensated in excess of its loss. This concept often comes into play in construction damage awards. Damages for repair or replacement of a defectively designed or constructed item must take into account the fact that the owner had the benefit of the use of that item for a portion of its anticipated useful life.

Construction Law, Matthew Bender, Ch. 3-11.

WP's Motion relies on an example of a roof with a 20 year useful life which breaks and begins leaking after 10 years. The corresponding reduction to the owner's damages is 50% due to the owner's beneficial use of the roof for half the life span before it broke. This scenario is easily distinguishable from the instant case. Here, the RIB System began to show signs of failure almost immediately after startup, unlike the roof which did not break until the 10th year of full use. Unlike the roof, which actually provided the intended beneficial use for half its lifespan, the RIB System failed almost immediately and has not provided Wolfeboro with full beneficial use during the period of operation. Due to WP's negligence, Wolfeboro has been forced to reduce the flow substantially (down to less than 25% of the permitted and intended capacity) and has

³ Wolfeboro disputes WP's counsel's assessment of the useful lifespan. Upon information and belief, WP represented that the anticipated lifespan of the RIB System was 40 years.

had to utilize spray fields to dispose of wastewater that cannot be discharged into the RIB System. Even at the greatly reduced flow, NHDES has advised Wolfeboro that this Site is in violation of its permit.⁴ Based on the above facts, the beneficial use argument must fail. Wolfeboro has not been able to use the RIB System as designed, permitted, or intended virtually since startup.

B. Land Purchase and Easement Costs

Wolfeboro also seeks \$1,218,391 for the cost of the RIB Site. WP's Motion blindly opines that the Site "would have a similar value to the initial purchase price, or perhaps slightly more as the land has undergone certain improvements such as the construction of a road." This statement is demonstratively incorrect.

Wolfeboro is a land rich town and purchased this particular Site for one reason only: WP's recommendation that the Site was a "gold mine" for the construction of an RIB System. Wolfeboro paid a premium for that property for the sole purpose of constructing the RIB System. The Site was appraised for \$720,000 based largely on the assumption that sand and gravel deposits could be mined. With WP's full knowledge and active encouragement, Wolfeboro paid \$1,050,000 for the Site.⁵

Wolfeboro's experts now opine that the Site is a total loss and cannot (nor should it ever have been) used as a location for a RIB System. The Site is now contaminated with treated wastewater effluent and cannot be sold for development or mineral purposes, therefore it has no value on the open market.

⁴ And in the words of Rene Pelletier of the NHDES: "the Site is cooked."

⁵ As described in the Supplemental Answers, the remaining \$168,391 in damages relates to easements, legal fees, and other costs associated with purchasing the land. Exhibit 4 and 5.

As a matter of public record, the appraised value of the Site is now \$42,900, which Mr. Ford, and/or the appropriate witness on behalf of Wolfeboro, will testify to at trial. He will further testify that the Site is actually a liability to Wolfeboro, and Wolfeboro will incur costs simply as a result of owning the land long after the RIB System is abandoned, as Wolfeboro will be required by the NHDES to continuously monitor and test the Site.

Retention of the ownership of the Site is in no way “betterment” because Wolfeboro actually takes a loss from the continued ownership of the Site.

Courts have acknowledged that in circumstances where the property at issue is “special purpose property” there is a need for greater flexibility in the presentation of evidence relating to damages where it is felt that there is no market value and where ordinary methods of ascertaining value will produce a miscarriage of justice. See Tampa Bay Water v. HDR Engineering, Inc., 2011 U.S. Dist. LEXIS 80735, *30 n. 12 (M.D. Fla. 2011) (acknowledging that award for damages to special use property may exceed property value since such property is generally not bought and sold on the open market). Here, the circumstances warrant great flexibility in the assessment of damages for purchasing the property, a task the trier of fact will be capable of deciding based on the above evidence presented at trial.

C. Design/Permitting Costs and Construction Costs

WP’s allegation that the cost to design, permit, and construct the RIB System is “betterment” is simply untrue. If the jury determines that the Site is a total loss as a result of WP’s negligent services, the proper measure of damages is recovery of those amounts that would place Wolfeboro in the same position but for WP’s wrongful and culpable conduct. Peter Salvucci & Sons, Inc., 110 N.H. at 154. This includes the amount of money spent to design, permit, and construct the RIB System. For the exact same reasons as discussed in Section A,

WP's calculation as to percentage of use that "bettered" the Site is untenable. Wolfeboro has not been able to use the RIB System as designed, permitted, and intended since damage was first observed in April 2009, roughly 5 weeks after the RIB System first went into operation.

D. Expenses for Remediation

WP neither cites law nor attempts to explain why Wolfeboro would be barred from recovery of \$386,428 in remediation expenses. These direct costs were incurred as a result of WP's wrongful and culpable conduct. The concept of betterment does not even apply. See Lavery v. Manchester, 58 N.H. 444, 445 (1878); see also, N.H. Dep't of Env'tl. Servs. v. Mottolo, 155 N.H. 57 (2007) (allowing recovery of remediation costs).

WP's allegation that "supporting documentation as to damages was not received during discovery" is demonstratively incorrect for the reasons described in Wolfeboro's Objection to WP's Motion in Limine to Preclude Untimely Produced Documents, which is hereby incorporated by reference. In sum, Wolfeboro produced the purchase orders noting the amounts it paid to WP in its Initial Productions. See, e.g., PO 4238 (WOLF-DOC-008884 through 008895) and PO 9022 (WOLF-DOC-008947 through 008949). Wolfeboro also notes that the largest itemized damage in this category is costs Wolfeboro paid to WP for engineering services related to remediation efforts. Id. There is no basis to exclude these documents or these amounts.

E. Operational Costs

WP argues that Wolfeboro is not entitled to operational costs because the Town would have "incurred operational costs regardless" of the sufficiency of WP's services. This position misstates Wolfeboro's claim, which is for additional operation costs necessitated by WP's negligence. As Wolfeboro articulated in the Supplemental Answers:

The Town is entitled to recover the additional operational costs that it paid to Woodward & Curran between 2009 and present to operate the RIB system, as well as the operating costs it paid to Woodward & Curran to operate the spray fields between 2011 and 2013. Wright Pierce informed the Town that it would not have to use the spray field after the RIB system was in operation. Wright Pierce further informed the Town that it would cost only \$59,000 per year to operate the RIB system. As a result of Wright Pierce's negligence, breaches of contract, and fraudulent misrepresentations the Town has been forced to continue to operate the spray fields at a cost of \$109,000 per year (2011 through 2013) and has had to pay Woodward & Curran \$125,000 per year (not \$59,000 per year) to operate the RIB's. The Town is therefore entitled to recover \$297,000 in damages for RIB operation [\$562,500 paid to Woodard & Curran over the past 4.5 years minus the anticipated amount of \$265,500] and \$327,000 paid to Woodard and Curran between 2011 and 2013 [\$109,000 time 3 years] to operate the spray fields. The Town also paid Woodard and Curran to automate the pumping system for the spray fields at a cost of \$75,000.

Exhibit 4, Supplemental Answers, P. 11.

Wolfeboro only seeks the additional operating costs over and above what WP assured Wolfeboro the yearly site operation costs would be if the system worked as intended. Id.

WP's allegation that "supporting documentation as to damages was not received during discovery" is incorrect for the reasons described in Wolfeboro's Objection to WP's Motion in Limine to Preclude Untimely Produced Documents. Specific to operating costs, WP's own report, the December 2006 "Wastewater Effluent Disposal Alternatives Draft Report" and the final version from March 2007 identify the \$59,000 operating and maintenance cost used in Wolfeboro's calculation of damages. In addition, WP received PO 11362 detailing the actual operating and maintenance costs of the RIB in the Initial Productions in the Spring of 2013. See WOLF-DOC-001601 through 001623.

Finally, WP's argument as to a discount due to the "beneficial use" is not tenable, as Wolfeboro has already accounted for, and discounted, the amount it was expected to pay for operational costs if the RIB System worked as intended. Wolfeboro seeks only the additional

operational costs incurred to operate the failed RIB System and to operate spray fields to dispose of treated wastewater effluent that the RIB System could not handle.

F. Financing Costs

Lastly, WP seeks to bar Wolfeboro from recovering its borrowing costs. WP claims Wolfeboro seeks to recover \$3,273,564 in principal and interest. Wolfeboro actually seeks to recover \$2,036,370.31 in financing costs only, not principal.

It is black letter law that WP is entitled to recover its financing costs for the Project if the trier of fact determines that WP was negligent and that the Site is a total loss. See RMA Lumber, Inc. v. Pioneer Machinery, LLC, 2008 U.S. Dist. LEXIS 86293, *27 (W.D. Va. 2008) (financing costs recoverable if incurred as a result of defendant's failure to disclose material defects in equipment); Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., 1992 U.S. Dist. LEXIS 7721, *113 (N.D.N.Y. 1992) (financing costs recoverable if there is a legally sufficient causal link between the plaintiff's direct damage and the loan in question); see also Chestnut Hill Development Corp. v. Otis Elevator Co., 739 F. Supp. 692, 702 (D. Mass. 1990) (interest-carrying charges incurred as a result of construction delays recoverable as direct damages); Roanoke Hosp. Ass'n v. Doyle and Russell, Inc., 215 Va. 796, 802 (1975) (extended financing costs due to contractor's extended delay on construction project recoverable as direct damages).

WP cites a New Hampshire Superior Court case, Pinefield Consulting, Inc. v. Port City Air, Inc., 2011 N.H. Super LEXIS 52 (N.H. Super Ct. 2011), for the proposition that financing costs are not recoverable. This is inaccurate. Pinefield holds that a party is entitled to recover its financing costs so long as they are foreseeable. Pinefield, 2011 N.H. Super LEXIS at *22-23. Pinefield denied recovery of financing costs only because there was "no evidence that how Plaintiff chose to allocate its capital was ever disclosed to Defendant so as to create a specific

obligation to pay finance costs in the event of damage...” Id. Other courts have agreed with this principle. See Great Lakes Aircraft Co. v. Claremont, 135 N.H. 270, 295 (1992) (recovery of consequential damages allowed where injury follows the breach and breaching party had reason to foresee the injury); Carl Beasley Ford, Inc. v. Burroughs Corp., 361 F. Supp. 325, 334 (E.D. Pa. 1973) (denying motion for judgment n.o.v. and motion for new trial, and allowing buyer to recover interest on financing for purchase of defective computer system, where the nature and price of the system was such that seller had reason to know buyer would borrow money to purchase it); Bobb Forest Prods. v. Morbark Indus., 783 N.E.2d 560, 578-79 (Ohio App. 2002) (affirming denial of motion for new trial on damages, and allowing sawmill buyer to recover, as consequential damages, costs of financing it incurred in purchasing a sawmill, where, based on the retail price of the sawmill, which was \$157,000, it was reasonable to infer manufacturer would know at the time of the purchase that buyer would be financing the purchase of the sawmill).

1. WP’s Misrepresentations of Fact.

First, WP misrepresents that Wolfeboro is “double dipping” by seeking recovery of principal and interest. This is incorrect. The Supplemental Answers clearly state that Wolfeboro is only seeking recovery of financing costs, not principal:

The Town will incur interest on four separate loans, as detailed in the attached spreadsheet. The total interest on these loans is \$2,483,556.61 (on a total amount borrowed of \$7,489,177.34). The Town has proportioned the interest attributable to Wright Pierce by multiplying the ratio of interest to total loan amounts (0.3316) time the damages caused by Wright Pierce in Items 1 through 5 above (total of \$6,140,684.82). The result is \$2,036,370.31.

Exhibit 4, Supplemental Answers, 12. The actual calculations are shown on the Damages Spreadsheet. See Exhibit 5.

This Supplemental Answer above also resolves WP's next argument: that "The Town has utterly failed to provide any methodology or supporting documentation as to its financial damages claim, and so Wright-Pierce is left without any means of determining the allocation of actionable financial damages." Motion at 11. Not only is the methodology described in the Supplemental Answer, the calculation is performed on the attached spreadsheet, and the interest documents are attached to the Supplemental Answers.

2. Foreseeability of Financing and WP's Assistance in the Process.

WP's allegation that Wolfeboro "sought financing in a manner which did not involve Wright-Pierce" is likewise demonstratively incorrect. WP was intimately involved in every aspect of the financing for this Project and was aware that financing would be in place well before performing the bulk of their engineering services. See Exhibit 8, Addendum to Project Specifications prepared by WP (noting "the project will be funded by NH State Revolving Fund (SRF), NH State Aid Grant (SAG) and the Town of Wolfeboro"). The evidence that WP was fully aware of the funding mechanisms for the Project is voluminous. To illustrate this point, Wolfeboro has attached hereto a brief compendium of WP emails concerning its involvement with obtaining the SRF and SAG financing. A sampling of quotations from that compendium follows:

- "We [WP] will need to submit an SRF application for the present disposal project and future WWTF and PS projects so that the Environmental Review can begin and allow us to bid the Disposal project in May/June." Peter Atherton, 3/12/07;
- "We need to prioritize the SRF application so we are in a position to bid the Disposal project as early as late May 2007." Peter Atherton, 3/21/07;
- "I have attached a couple of files on the SRF Application. I have spoken with Sharon Nail and Brad Foster at the DES about the SRF Application process." M. Smith, 3/21/07;

- “Currently, the wetlands permit and the SRF application (and public review) are close contenders for critical path.” M. Hamkins, 3/30/07;
- Attached are the letter addressing the request for an adjustment to the AO and an excel spreadsheet outlining the cash flow for the SRF applications.” M. Hamkins, 4/4/07

See Exhibit 9, Email Compendium.

In addition to the above emails, WP compiled and prepared each application that Wolfeboro then signed and submitted to NHDES for disbursements from the SRF. See, e.g., Exhibit 10. In total, WP’s electronic production of documents contains over 967 documents relating to SRF and SAG loans, applications, and grants. WP’s claim that it was unaware of how the Project would be financed (and that “the Town chose the means in which it sought financing in a manner which did not involve Wright-Pierce”) is plainly false.

WP also suggests that it should not be responsible for financing damages because it had no idea what the financing terms were: “the length of financing, the rate of financing and any penalties for early pay off are strictly between the Town and its lender.” Motion at 11. Again, this is blatantly false, see Exhibit 11, 1/18/07 Email from P. Atherton (explaining the Net Present Value calculations based on the length and interest rate of the SRF loan). In sum, Wolfeboro’s financing costs were foreseeable and are recoverable damages under applicable law. See, e.g., Great Lakes Aircraft Co., 135 N.H. at 295.

CERTIFICATION PURSUANT TO LR 7.1(a)(2)

Pursuant to LR 7.1(a)(2), no memorandum of law is necessary, as all supporting authorities are cited herein.

REQUEST FOR RELIEF

WHEREFORE Wolfeboro respectfully requests that the Court deny WP's Motion in Limine to Preclude Evidence of Betterment Damages.

Respectfully submitted,

The Town of Wolfeboro,

By its attorneys,

Date: March 27, 2014

/s/ Seth M. Pasakarnis

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CERTIFICATE OF SERVICE

I, Seth M. Pasakarnis, Esq., hereby certify that on this date a true and accurate copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Seth M. Pasakarnis

Seth M. Pasakarnis