

NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 05-1833**

**MICHAEL W. C. EMERSON
Plaintiff,**

vs.

**RELIABLE HEATING, INC. & others¹
Defendants.**

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**MEMORANDUM OF DECISION AND ORDER ON DEFENDANT GULF OF MAINE
RESEARCH CENTER, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

At all relevant times to this action, Warren F. Myers and William J. Myers, as trustees of Reliable Realty Trust (collectively "owners"), owned the property located at 144 Broadway Street, Revere, Massachusetts ("the property"). The owners had a mortgage with Broadway Bank of Chelsea ("the bank"). In 1998, the owners were in default on their mortgage to the bank and the bank was seeking to sell the property, in lieu of foreclosure. On March 9, 1998, Century 21 D'Amico ("Century 21"), the broker marketing the property, entered into a contract with Gulf of Maine Research Center, Inc. ("GMRC"), on behalf of the bank, to conduct a site investigation of the property. Paragraph 10 of the March 9, 1998 contract provided as follows:

Professional Liability. Client agrees that the liability of Gulf of Maine to all claimants, for any and all claims, losses, expenses or damages arising out of, or in any way related to the contracted project or this agreement resulting from any negligent act, error, omission, breach of contract or breach of warranty by Gulf of Maine shall be limited to an aggregate sum not to exceed the total fee for Gulf of Maine's services or \$50,000, whichever is less.

GMRC conducted a site investigation that included sampling soil in the location where fuel oil and gasoline tanks were formerly kept. On April 27, 1998, GMRC prepared the Phase I

¹ Warren F. Myers and William J. Myers as trustees of Reliable Realty Trust, and Gulf of Maine Research Center, Inc.

Environmental Assessment Report ("the report") for Century 21. The report stated that the soil contamination in the former pit did not exceed the reportable concentrations that would have mandated reporting a release to the Massachusetts Department of Environmental Protection ("DEP"). Century 21 paid \$3,197 to GMRC for conducting the inspection and preparing the report.

On June 3, 1998, in reliance on the report, the plaintiff, Michael W. C. Emerson ("Emerson"), purchased the property. In 2002, when Emerson attempted to sell the property, another environmental assessment company found that there were reportable concentrations of contamination on the property and that notification to the DEP was required, as well as supplemental investigation. As a result of this discovery, Emerson, as current owner of the property, was subjected to liability pursuant to G.L. c. 21E.

On May 10, 2005, Emerson filed a complaint in this Court alleging (1) violation of G.L. c. 21E, § 5 against Reliable Heating, Inc., the owner of the property from October 14, 1982 until December 18, 1984 and operator of the property from October 14, 1982 until June 3, 1998, (2) violation of G.L. c. 21E, § 5 against Reliable Realty Trust, owner of the property from December 18, 1984 until June 3, 1998, (3) contribution against Reliable Heating, Inc., (4) contribution against Reliable Realty Trust, (5) strict liability against Reliable Heating, (6) strict liability against Reliable Realty Trust, (7) negligent performance of services against GMRC, and (8) breach of contract against GMRC. Emerson claims that he has incurred response costs in connection with the remediation of the contamination, including but not limited to, \$65,000 to an environmental management services company and \$15,000 in paying his own employees.

On July 3, 2007, the defendant GMRC filed a Motion for Partial Summary Judgment as

to damages for both the the negligent performance of services claim and breach of contract claim. GMRC claims the contract between GMRC and Century 21 limits the amount of damages for..... which GMRC is liable to the amount GMRC received for its services – \$3,197 – and, therefore, this Court has no jurisdiction and should remand the case to District Court. On July 3, 2007, Emerson filed an Opposition to the Defendant GMRC’s Motion for Partial Summary Judgment. Emerson concedes that since he is not a party to the contract between Century 21 and GMRC, he is limited to recovering \$3,197 under his breach of contract theory (“Count VIII”) as an intended third-party beneficiary. Emerson maintains that he can recover the full amount of his damages under his alternate theory against GMRC – negligent performance of services (“Count VII”).

DISCUSSION

Summary judgment shall be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Comm’r of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party’s case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Commc’ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

The non-moving party cannot conjure up genuine issues of material fact or merely rely on the allegations or denials of her pleading. See Mass. R. Civ. P. 56(e). Conclusory statements,

general denials, and allegations not based on personal knowledge are insufficient to avoid summary judgment. *Madsen v. Erwin*, 395 Mass. 715, 721 (1985). Rather, the non-moving party bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine issue for trial. See *Wooster v. Abdow Corp.*, 46 Mass. App. Ct. 665, 673 (1999).

“[T]he Supreme Judicial Court has held that liability will be imposed in Massachusetts for the negligent furnishing of services to one not a party to the contract where the defendant knows that the party will rely on his services.” *Nota Constr. Corp. v. Keyes Assocs. Inc.*, 45 Mass. App. Ct. 15, 21 (1998), citing *Craig v. Everett M. Brooks Co.*, 351 Mass. 497, 501 (1967); *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 193 (1982). “To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage.” *Jupin v. Kask*, 447 Mass. 141, 146 (2006).

Because a genuine issue of material fact exists, summary judgment is not appropriate as a matter of law. A genuine issue of material fact exists as to whether GMRC was negligent in its performance of its services to Century 21 and, if they were, whether it was foreseeable that Emerson would rely on those services. This Court sees no reason why Emerson cannot proceed on his negligent performance of services theory and, alternatively, on his breach of contract claim. “[W]hen one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.” *Flattery v. Gregory*, 397 Mass. 143, 148 (1986). Emerson could potentially recover the full amount of his damages under his negligent performance of services claim and, if he did not recover on that theory, could recover


up to \$3,197 on his breach of contract claim. *Id.* (stating that the plaintiff could recover on both tort and contract theories).

GMRC has not cited to any authority, and this Court does not know of any, that stands for the proposition that parties to a contract can limit their liability for negligence to parties that are not in privity, who are foreseeable, and rely on the services performed by one of the parties to the contract. Limitations on liability provisions have no effect on the liability of persons who were not parties to the contract. *Standard Register Co. v. Bolton-Emerson, Inc.*, 38 Mass. App. Ct. 545, 550-551 (1995).

ORDER

For the foregoing reasons, it is hereby **ORDERED** the defendant GMRC's Motion for Partial Summary Judgment is **DENIED**.

DATED: September ¹², 2007


David A. McLaughlin
Justice of the Superior Court