UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WORLD POWER, a division of Associated Electric Co., Inc.	)	
v.	)	CIVIL ACTION NO. 98-~~300~~ 30019-MAP
ENERGY SERVICES, INC.	)	

ORDER

June 30, 1999

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, with the qualification noted, this court hereby adopts the Report and Recommendation of the Magistrate Judge. The Motion for Summary Judgment is DENIED, except as to Count Five. As to Count Five, the motion is ALLOWED.

The clerk will set this matter for a status conference to determine further proceedings.

Michael A. Ponsor

MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WORLD POWER, a division of Associated Electric Co., Inc.	)	
v.	)	CIVIL ACTION NO. 98-~~300~~3019-MAP
ENERGY SERVICES, INC.	)	

MEMORANDUM REGARDING
REPORT AND RECOMMENDATION RE:
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(Docket No. 16)

June 30, 1999

PONSOR, D.J.

Plaintiff seeks damages for breach of an alleged oral agreement for brokerage services by the defendant. Defendant moved for summary judgment, contending in essence that the record (even viewed in the light most favorable to the plaintiff) lacks sufficient facts to justify a jury in concluding that any oral agreement ever existed between the parties. Moreover, defendant contended that even if such an agreement existed it would be barred by the Massachusetts Statute of Frauds.

The Motion for Summary Judgment was referred to Magistrate Judge Neiman who issued his Report and Recommendation on January 14, 1999 disagreeing with the defendant on both points, with one minor qualification. First, the Magistrate Judge determined that

sufficient facts could be distilled from the record to justify a jury in concluding that some sort of agreement existed, at least for a "reasonable" broker's fee. Second, he found as a matter of law that Connecticut, not Massachusetts, law should be applied to this case. Since, unlike Massachusetts, Connecticut does not prohibit oral agreements for brokerage services, the Magistrate Judge recommended that defendant's motion be denied.[1]

In all essential respects, this court fully agrees with the Report and Recommendation. Defendant's vigorous arguments ignore or downplay the requirements of Fed. R. Civ. P. 56. While strong evidence exists that may ultimately convince a factfinder that no oral agreement ever existed, consideration of plaintiff's submissions and particularly the Gaynor affidavit, viewed through the prism of the summary judgment standard, requires the court to conclude that plaintiff must at least have its day in court. Moreover, a de novo review reveals that Connecticut, not Massachusetts, law controls in this case. At the very least, the considerations favoring each jurisdiction are in equipoise. When

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[1] The Magistrate Judge did agree with defendant that no version of the record could support a claim for fraud and intentional misrepresentation as set forth in Count Five of the complaint. The plaintiff has not objected to this recommendation, so the court will be allowing summary judgment to this extent.

this occurs, the court is obliged to apply the Statute of Frauds that is "more liberal in recognizing and enforcing the existence of a contract . . . ." Computer Sys. of Am. v. Int'l. Bus. Mach. Corp., 795 F.2d 1086, 1092 (1st Cir. 1986).

In one respect, this court will not adopt the analysis of the Report and Recommendation. The Magistrate Judge discussed, in dicta, whether (assuming Massachusetts law applies) the Commonwealth's Statute of Frauds bars enforcement of a promissory estoppel claim. This court, in a different context, has opined that the Statute of Frauds in Massachusetts appears not to do so. See Commonwealth Aluminum Corp. v. Baldwin Corp., 980 F. Supp. 598, 611 (D. Mass. 1997). However, in Cox v. Thornton Assocs., Inc., 1998 W.L. 470, 508 (Mass. Super. 1998), a Massachusetts Superior Court judge held that Mass. Gen. Laws ch. 259, § 7 does apply to a claim of promissory estoppel. Since the law appears to be developing in a direction contrary to the Magistrate Judge's suggestion, this court expressly declines to adopt that portion of his analysis.

This conclusion, however, does not affect the court's ruling on the Motion for Summary Judgment, since Connecticut, and not Massachusetts, law controls.

In summary, upon de novo review, with the qualification

noted, this court hereby adopts the Report and Recommendation of the Magistrate Judge. The Motion for Summary Judgment is DENIED, except as to Count Five. As to Count Five, the motion is ALLOWED.

The clerk will set this matter for a status conference to determine further proceedings.

A separate order will issue.

Michael A. Ponsor

MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WORLD POWER, a division of ASSOCIATED ELECTRIC CO., INC., Plaintiff	)	
v.	)	Civil Action No. 98-30019-MAP
ENERGY SERVICES, INC., Defendant	)	DOCKETED

REPORT AND RECOMMENDATION WITH REGARD TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Docket No. 16)
January 14, 1999

NEIMAN, U.S.M.J.

World Power ("Plaintiff"), a division of Associated Electric Company, Inc., has brought an eight count complaint seeking to enforce an alleged oral agreement for brokerage services it claims to have provided Energy Services, Inc. ("Defendant"). The complaint consists of claims for breach of contract (Count I), breach of an implied contract (Count II), quantum meruit (Count III), money had and received (Count IV), fraud and intentional misrepresentation (Count V), promissory estoppel (Count VI), unfair trade practices (Count VII), and deceptive and negligent misrepresentation (Count VIII).

With respect to the contractual claims, Counts I, II, III, IV and VI, Defendant asserts that no agreement was ever reached between the parties. Even if an oral agreement does exist, Defendant continues, it is unenforceable under M.G.L. ch. 259 § 7, the Massachusetts statute of frauds, which requires that brokerage

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agreements be in writing. Defendant also moves for summary judgment on Plaintiff's tort and unfair trade practice claims, Counts V, VII and VIII, asserting that an essential predicate for those claims, misrepresentation, never occurred.

Defendant's motion for summary judgment has been referred to the court for a report and recommendation pursuant to Rule 3 of the Rules for United States Magistrates of the United States District Court for the District of Massachusetts. *See* 28 U.S.C. § 636(b)(1)(B). For the reasons which follow, the court will recommend that Defendant's motion be allowed in part, but otherwise denied.

I. SUMMARY JUDGMENT STANDARD

A court may grant summary judgment pursuant to Rule 56(c) if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has demonstrated that no genuine issue of material fact exists, the burden is on "a party opposing a properly supported motion for summary judgment ... [to] set forth specific facts showing that there is a genuine issue for trial." *Feliciano v. State of Rhode Island*, 160 F.3d 780, 784 (1st Cir. 1998) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 246 (1986)).

For a dispute to be "genuine," there must be sufficient evidence to permit a reasonable trier of fact to resolve the issue in favor of the non-moving party. *Aponte Matos v. Toleda Davila*, 135 F.3d 182, 186 (1st Cir. 1998). Not every genuine factual conflict, however, necessitates a trial. "'It is only when a disputed fact has the potential to change the outcome of the suit under the governing law if

found favorably to the nonmovant that the materiality hurdle is cleared.'" *Parrilla-Burgos v. Hernandez-Rivera*, 108 F.3d 445, 448 (1st Cir. 1997) (quoting *Martinez v. Colon*, 54 F.3d 980, 983-84 (1st Cir. 1995)).

II. FACTUAL BACKGROUND

Plaintiff, a broker of power generation equipment and services, is a New Hampshire registered company with facilities in both New Hampshire and Massachusetts. There is no dispute that its principal place of business is Massachusetts. Defendant, an installer of power generation equipment and a provider of installation services, is a Connecticut corporation with its principal place of business there.

Over the several years prior to the instant litigation, Plaintiff worked to locate potential customers for Defendant. There is a dispute, however, as to the nature of the agreement under which Plaintiff sought to perform its services on Defendant's behalf. Plaintiff maintains that it had an ongoing understanding with Defendant that Plaintiff would receive its "usual and customary fee" of ten percent, subject to adjustment, for the sale of Defendant's equipment to third parties identified by Plaintiff. (Gaynor Aff. (Docket No. 23) ¶ 5.) Defendant denies that it ever entered into such brokerage agreements directly with Plaintiff. Rather, Defendant maintains that, at best, Plaintiff sought to enter into separate buy-sell agreements with third parties and, if the deal was consummated, Plaintiff would receive the difference between the price agreed to by the third party and the price quote Plaintiff received directly from Defendant. (Def. Mem. (Docket No. 19) at 3 ¶ 8. *See, e.g.,* Def.

Add. Filing (Docket No. 26) Exh. 25(3)).[1]

Whatever the form of the prior business arrangement between them, there is no dispute that, despite Plaintiff's efforts to locate potential customers, none bore fruit, except possibly the matter with which the court is currently confronted. With respect to this matter, both parties appear content to label Plaintiff's role as that of broker. Indeed, as detailed below, Defendant seeks shelter in Massachusetts statutory law governing brokerage agreements.

In late 1995, Plaintiff learned of a potential customer in Ecuador for Defendant's equipment and so notified Defendant. (Gaynor Aff. ¶ 6.) Plaintiff offered that equipment, four power generation units, to the Ecuadorian customer at an asking price of $5.5 million. That figure reflected Defendant's quoted price to Plaintiff plus a ten percent commission. At this point, the parties' description of the facts diverge.

Plaintiff maintains that, as the Ecuador project grew increasingly complex, it would relinquish control of the project to Defendant but still expected to receive a commission of ten to twelve percent for its work. (Gaynor Aff. ¶¶ 10-11; Def. Add. Filing Exh. 35 at 61.) In some contrast, Defendant maintains that Plaintiff's vice-president, Robert Gaynor, told Defendant that Defendant itself could negotiate

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[1] The first and only time Defendant entered into a direct brokerage agreement with Plaintiff was in 1996, undisputedly subsequent to the instant controversy. (Def. Add. Filing Exh. 26 at 160-61. *See* Def. Supp. Mem. (Docket No. 29) Exh. D (attachment)).

the entire deal with the Ecuadorian customer. (Def. Mem. at 5 ¶¶ 34-35.) However the deal is characterized, it is undisputed that, when Plaintiff turned the matter over to Defendant, no order was pending and no commission arrangement had yet been formalized.

Still, Plaintiff maintains, each of its business proposals to Defendant, including the Ecuador project, included a ten percent commission. In fact, Defendant concedes that Plaintiff mentioned a ten to twelve percent commission with respect to the project, but asserts that Plaintiff simply made a proposal, not a demand. (Def. Add. Filing Exh. 36 at 59.) Thereafter, the parties exchanged letters and telephone calls regarding a commission, but no written brokerage agreement was executed.

In a March 21, 1997, letter to Plaintiff, Defendant claimed to have sold the equipment for less than the estimated $5.5 million. In that letter Defendant offered Plaintiff $20,000, not the $500,000 Plaintiff believed it was entitled to. Notwithstanding Defendant's claim that the Ecuador project lost money, Plaintiff believes that Defendant has been paid $19.5 million thus far for turbine equipment which Plaintiff claims to have brokered.

III. DISCUSSION

A. Contractual Claims

1.

The parties have targeted their first phase of discovery to the resolution of a conflict of law with respect to Plaintiff's contractual claims. (*See* Pretrial

Scheduling Order (Docket No. 13) ¶ 1.) Defendant maintains that Massachusetts law applies to the instant litigation and that the Massachusetts statute of frauds would bar all of Plaintiff's claims grounded in contract, namely, Counts I-IV and VI. Plaintiff, on the other hand, maintains that the law of the State of Connecticut governs. The Connecticut statute of frauds does not bar oral brokerage agreements.

Given the obvious conflict, and the fact that its present jurisdiction is based in diversity, the court would normally proceed directly to the choice of law rules of the state in which it sits, Massachusetts. *See Klaxon Co. v. Stentor Elec. Mfg Co.,* 313 U.S. 487 (1941); *Bi-Rite Enter. v. Bruce Miner Co., Inc.,* 757 F.2d 440, 442 (1st Cir. 1985). Defendant, however, also argues as a preliminary matter that no conflict exists between the substantive laws of Connecticut and Massachusetts as to the formation of contracts. In this respect, Defendant argues, Plaintiff cannot produce sufficient evidence that a contract even exists under either Connecticut or Massachusetts law because the parties simply did not agree on a material contractual term, the amount of the brokerage fee. Accordingly, Defendant asserts, the court need not engage in a choice of law analysis at all.

Although Defendant makes a viable argument, the court does not agree that a choice of law analysis can be avoided. The court is not convinced that the applicable laws of Massachusetts and Connecticut with respect to contract formation are as conflict free as Defendant asserts.

Under Massachusetts law, a contract will be formed if the parties agree on

"all material terms." *Goren v. Royal Inv. Inc.*, 516 N.E.2d 173, 175 (Mass. App. Ct. 1987); *Novel Iron Works, Inc. v. Wexler Constr. Co., Inc.*, 528 N.E.2d 142 (Mass. App. Ct. 1988). Similarly Connecticut law provides that an agreement, to be enforceable, "must be definite and certain as to its terms and requirements." *Dunham v. Dunham*, 528 A.2d 1123, 1129 (Conn. 1987) (quoting *Augeri v. C. F. Wooding Co.*, 378 A.2d 538, 540 (Conn. 1977)). *See also Suffield Dev. Assocs. Ltd. Part. v. Society for Savings*, 708 A.2d 361 (Conn. 1998); *Dacourt Group, Inc. v. Babcock Indus., Inc.*, 747 F. Supp. 157 (D. Conn. 1990). As Plaintiff points out, however, Connecticut law also provides that a "promise to pay a commission is not made unenforceable merely because [the agreement] ... did not include the amount of the commission." *Presidential Capital Corp. v. Reale*, 652 A.2d 489, 493 (Conn. 1994). "[A]n agreement will not be rejected if the missing terms can be ascertained, either from its express terms or by fair implication." *Id.* (citing *Augeri*, 378 A.2d at 540.) "[W]here the plaintiff and the defendant have agreed that the defendant will pay for the plaintiff's services but the agreement is silent as to the amount of compensation, the court may conclude that the defendant contemplated paying a reasonable fee." *Id.* at 493. Thus, Plaintiff asserts, the laws of the two states differ not only in their respective statutes of frauds, but also with respect to the necessary elements of an oral promise to pay a commission.[2]

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[2] In this regard, Connecticut law is not unlike the law of Massachusetts with regard to promissory estoppel. "The theory of promissory estoppel, as embodied in the Restatement of Contracts, § 90 (1932), permits recovery if (1) a promisor makes a promise which he should reasonably expect to induce action or

Despite Plaintiff's argument, Defendant's position is not without some force. Even when viewed in a light most favorable to Plaintiff, it appears from the facts that the parties may not have agreed on all material terms of their brokerage agreement. At most, Gaynor, on Plaintiff's behalf, avows that to the best of his recollection and belief it was historically "understood" that Plaintiff's usual and customary fee was ten percent. In this instance, according to Plaintiff, Gaynor "requested" a fee of ten to twelve percent and that Plaintiff relied on Defendant's "past and customary assurance that we would be protected and a fair commission paid if any of our deals were consummated." (Gaynor Aff. ¶¶ 5-12.)

While the facts do not support Plaintiff's claim that a ten percent commission was in fact agreed upon, there are still sufficient facts to support Plaintiff's belief that the reasonable value of its brokerage services would be paid. For example, Plaintiff cites correspondence from Defendant in February of 1996, from which it may be inferred that some agreement had in fact been reached. In that letter, Defendant told Plaintiff that

> with regard to what, if any agreements we have made

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forbearance on the part of a promisee, (2) the promise does induce such action or forbearance of a definite and substantial character, and (3) injustice can be avoided only by enforcement of the promise." *Loranger Constr. Corp. v E. F. Hauserman, Co.*, 374 N.E.2d 306, 308 (Mass. App. Ct. 1978). As Magistrate Judge Zachary Karol recently explained, "under Massachusetts law, a claim in promissory estoppel is essentially a claim for breach of contract, except that the plaintiff must prove reasonable reliance on a promise, offer, or commitment by defendant, rather than the existence of consideration." *Engler v. C.R. Bard, Inc.*, 1997 WL 136249 at *5 (D. Mass. 1997) (citing *Rhode Island Hosp. Trust Nat. Bank v. Varadian*, 647 N.E.2d 1174, 1179 (Mass. 1995)).

> with [Plaintiff] to date, [Defendant] has agreed that [Plaintiff] introduced the [Equador] project to us. In recognition of this introduction, we hope at some point in time to appropriately compensate [Plaintiff] should the project prove to have the economics as originally contemplated. As I stated in our telephone conversation, at this point, our investment situation is questionable at best.

(Pl. Mem. (Docket No. 22) Exh. 8 at 3 ¶ 3.) The next month, on March 21, 1997, Defendant again wrote Plaintiff and offered to pay $20,000 for Plaintiff's services. (Id. Exh. 10.)

As might be expected, Defendant asserts that this correspondence does not reflect a firm promise to pay Plaintiff a brokerage fee. The court believes, however, that an inference may be drawn that Defendant promised to pay Plaintiff at least the reasonable value of its services. Accordingly, the court believes that, although the question is close, Defendant is not entitled to judgment as a matter of law on its contractual formation claim.

2.

Still, Defendant argues, it is entitled to summary judgment, even if the parties entered into an oral brokerage agreement. Such oral brokerage agreements are barred by the Massachusetts statue of frauds. M.G.L. ch. 259, § 7 makes void "[a]ny agreement to pay compensation for service as a broker or finder or for service rendered in negotiating a loan or in negotiating the purchase, sale or exchange of a business, its good will, inventory, fixtures, or an interest therein." The Massachusetts Court of Appeals has indicated that the scope of Section 7 is

not limited to the purchase, sale or exchange of a business, but encompasses the "component elements thereof." *Bay Colony Marketing Co., Inc. v. Fruit Salad, Inc.*, 672 N.E.2d 987, 990 (Mass. App. Ct. 1996). Section 7, by its own terms, also applies "to a contract implied in fact or in law to pay reasonable compensation." M.G.L. ch. 259 § 7.

The language respecting contracts "implied in fact or in law" in M.G.L. ch. 259 § 7, Defendant argues, subsumes all of Plaintiff's contract-based claims, including its claim for promissory estoppel. In support, Defendant relies on *Cox v. Thornton Assocs., Inc.*, 1998 WL 470508 (Mass. Super. 1998), in which the court noted that "[c]laims of promissory estoppel and quantum merit are both claims under 'a contract implied in fact or in law,' within the meaning of c. 259, § 7." *See also Schwartz v. Inductotherm Indus., Inc.*, 1993 WL 818579 (Mass. Super. 1993) (M.G.L. ch. 259 § 7 bars a plaintiff broker's contractual and "quasi-contractual claims" including claims based on "equitable estoppel," "reliance on the promise," and "contract-implied in fact"); *Stavardis v. Dynamic Mach. Works, Inc.*, 1994 WL 879484 (Mass. Super. 1994) (M.G.L. ch. 259 § 7 bars broker's claim premised on express contract and quantum merit), *aff'd*, 662 N.E.2d 1064 (Mass. App. Ct. 1996). Respectfully, this court does not entirely agree, particularly with respect to Plaintiff's claim of promissory estoppel.

As Plaintiff argues, the statute of frauds is not an absolute bar to recovery "where the denial of relief, to one who has been misled to his harm, would cause an unjust and unconscientious injury and loss." *Simon v. Simon*, 625 N.E.2d 564,

569 (Mass. App. Ct. 1994) (internal citations and quotation marks omitted). *See also Pappas Indus. Parks, Inc. v. Psarros*, 511 N.E.2d 621, 622 (Mass. App. Ct. 1987) ("Occasionally there is risk of inequity if effect is not given to an unwritten agreement."). The Massachusetts Appeals Court has also recognized that promissory estoppel can be used to thwart a defense grounded in the statute of frauds. *Cellucci v. Sun Oil Co.*, 320 N.E.2d 919, 923 (Mass. App. Ct. 1974). *See also Frederick v. ConAgra*, 713 F. Supp. 41, 45 (D. Mass. 1989); *Hoffman v. Optima Sys., Inc.*, 683 F. Supp. 865, 869 (D. Mass. 1988). Whether there is sufficient evidence to support a claim of promissory estoppel is a question of fact which cannot ordinarily be decided on a motion for summary judgment. *See Simon*, 625 N.E.2d at 569; *Levin v. Rose*, 19 N.E.2d 297, 299 (Mass. 1939).

Granted, as Defendant argues, the cases relied upon by Plaintiff did not address M.G.L. ch. 259 § 7 which, unlike the provisions of the statute of frauds referred to in the cases cited, expressly applies to "contracts implied in fact or in law." Nonetheless, the court does not believe that this supplementary language necessarily encompasses claims of promissory estoppel. As Judge Karol noted in *Engler*, "[a]lthough . . . parties sometimes refer to promissory estoppel, express and implied contract (in fact and in law), and fraud as though they were interchangeable, each is a separate cause[] of action, with its own elements and measure of damages." *Engler*, 1997 WL 130249 at *4. Given its particular elements, a claim of promissory estoppel can readily be distinguished from a contract implied in fact or in law. Here, the court believes, Plaintiff has set forth

sufficient facts to demonstrate that it appropriately relied on what it reasonably perceived to be a promise on Defendant's part to pay Plaintiff a reasonable commission. *Compare Goeken v. Kay*, 751 F.2d 469, 474 (1st Cir. 1985) (estoppel exception to statute of frauds not applicable where proponent had not reasonably relied on oral promise).

3.

Even were the court to assume *arguendo* that M.G.L. ch. 259 § 7 would bar a promissory estoppel claim, the court would not suggest its application to the case at bar. Rather, the court, implementing a choice of law analysis, would choose to apply the Connecticut statute of frauds, Conn. Gen. Stat. § 52-550, which contains no analogous provision.

Both parties recognize that, when approaching a choice of law question, Massachusetts courts use a functional analysis to determine the applicable substantive law. This approach "responds to the interests of the parties, the states involved and the interstate system as a whole." *Bushkin Assocs. Inc. v. Raytheon Co.*, 473 N.E.2d 662, 668 (Mass. 1985). Pursuant to this functional approach, and drawing on Restatement (Second) Conflicts of Laws §§ 186-88, the first step is to "appl[y] the substantive law of the state which has the more significant relationship to the transaction in litigation." *Hendricks & Assocs. Inc. v. Daewoo Corp.*, 923 F.2d 209, 213 n.3 (1st Cir. 1991). *See also Bushkin*, 473 N.E.2d at 669.

Under § 188(2), the contacts to be considered are (1) the place of

contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. Where, however, an analysis of the contacts does not persuade the court that one state or the other has the most significant relationship to the transaction between the parties, the court must proceed to the second step of the choice of law analysis, namely, the "choice-influencing factors" listed in § 6(2) of the Restatement (Second). *Bushkin*, 473 N.E.2d at 670.

In the court's opinion, the § 188(2) factors do not shed much light on the instant matter. First, because both parties communicated by telephone and facsimile machine from their respective places of business, there is no one place of contract or negotiation. *Cf. id.* at 668 ("Although for summary judgment purposes we must accept [the plaintiff]'s assertion that the contract was made in Massachusetts, the governing principles of law should hardly turn on a parsing of the disputed content of a telephone call or, more importantly, on the fortuitous fact that an oral offer was accepted in one state rather than in the other."). Similarly, both the "performance" of the contract and the location of the subject matter of the contract, the commission, is uncertain. Finally, while each party handled its obligations under the alleged agreement from their respective states, the equipment itself was shipped to Ecuador. Much of this reflects the same factual dilemma presented in *Bushkin*.

Accordingly, as in *Bushkin,* it is appropriate for the court to apply the § 6

factors at this juncture. Those factors include:

(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

Id. at 669 (citing Restatement (Second) Conflict of Laws § 6(2)).

With respect to the first factor, Defendant concedes that it is unlikely that the application of either Massachusetts or Connecticut law would impede the interstate system. The court agrees. As to the second and third factors, however, Defendant asserts that Massachusetts, the forum state, has a significant interest in overseeing the work of brokers operating within its borders. Connecticut's only interest, Defendant maintains, is that it is Defendant's state of incorporation and principal place of business. In fact, at all relevant times, Defendant asserts, it "tolerated brokers prescribing their state's law as the applicable law for the interpretation of broker commission agreements." (Def. Mem. at 4 ¶ 23.)

Defendant's argument with respect to the second and third factors is not without force. As M.G.L. ch. 259 § 7 makes clear, it is Massachusetts' clearly stated policy that a commission contract must be in writing. Here, as the court has explained, there is no such written contract. Nevertheless, it is not so much the presence of a written contract which is at issue here, but the question of whether a

promise existed. Accordingly, the court looks primarily to the elements of promissory estoppel. The "promise" upon which Plaintiff allegedly relied was made by Defendant at its corporate headquarters in Connecticut.

Granted, Defendant asserts that no such a promise was ever made. As the court has explained, however, that dispute cannot be resolved at this stage of the litigation. Suffice it to say for purposes of the court's choice of law analysis, Connecticut has as great an interest in having promises made within its borders enforced as Massachusetts has in ensuring that brokerage contracts made within its borders be in writing.

That brings us to the fourth factor, the justified expectations of the parties, a factor which the *Bushkin* court emphasized. *Bushkin*, 473 N.E.2d at 670-71. *See also Bradley v. Dean Witter Realty Co.*, 967 F. Supp. 19, 25 (D. Mass. 1997). ("The intent of the parties is a significant factor."). *But see Dunfey v. Roger Williams Univ.*, 824 F. Supp. 18, 21 (D. Mass. 1993) ("Even assuming that [the plaintiff] had [ ] an expectation [that the contract would be enforced], it is only one factor to be considered."). Here, the court finds that it is Plaintiff's expectation which is paramount, particularly in light of its claimed justifiable reliance. As the court noted in *Bushkin*, "since [a broker] is not in the business of supplying free information, we may assume [the broker] expected any agreement for such information to be enforced." *Bushkin,* 473 N.E.2d at 671.[3]

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[3] Defendants appear to concede that factors five, six and seven have relatively little impact on the court's analysis.

At bottom, the court believes, after weighing the relevant factors, that the scales tip in favor of choosing Connecticut law. That would be appropriate even were the court to consider the scale to be in equipoise: "when the contacts of the two states in question are quite equal, and where the statute of frauds of one of the two states is more liberal in recognizing and enforcing the existence of a contract which the parties intended, the more liberal rule should be preferred." *Computer Sys. of Am. v. Int'l Bus. Mach., Corp.*, 795 F.2d 1086, 1092 (1st Cir. 1986) (discussing *Bushkin*, 473 N.E.2d at 662). Here, Connecticut law is clearly the more liberal rule. As described, the Connecticut statute of frauds will not necessarily invalidate an oral contract, if in fact a promise was made. In contrast, the Massachusetts statute of frauds M.G.L. ch. 259 § 7-- again assuming its applicability to Plaintiff's promissory estoppel claim as well as its other contractual claims -- would defeat an oral commission agreement. Connecticut having the more liberal rule, its law is preferred. Applying that law here, the court cannot say that Defendant is entitled to the summary judgment it seeks with respect to Counts I-IV and VI.

B. Misrepresentation claims

Defendant also moves for summary judgment on Plaintiff's claim of intentional misrepresentation, Count V. Interestingly enough, a choice of law question is at the threshold of this issue as well. While the elements regarding the claim of intentional misrepresentation are essentially the same in Massachusetts and Connecticut, there is a conflict between the laws of the two states regarding

the burden of proof. In Connecticut, a plaintiff must prove fraud by "clear, precise and unequivocal evidence." The Massachusetts standard is proof by a fair preponderance of the evidence.

The parties agree that a functional approach to the choice of law is appropriate and that Section 148 of the Restatement(Second) of Conflict of Laws governs the claim. Under Section 148, a court must consider (1) the place where a plaintiff acted in reliance upon a defendant's misrepresentation, (2) the place where the plaintiff received the misrepresentation, (3) the place where the defendant made the misrepresentations, (4) the domicile, residence, nationality, place of incorporation and place of business of the parties, (5) the place where a tangible thing which is the subject of the transaction was located at the time, (6) and the place where the plaintiff is to render performance under a contract which has been induced by false representations of the defendant.

Remaining true to form, Plaintiff argues for the application of Connecticut law which, against Plaintiff's interests, creates a higher evidentiary burden. Defendant argues that Massachusetts law applies.[4] In the court's opinion, however, the choice need not be made, for even were Massachusetts' less burdensome standard of proof applied, the court believes that summary judgment should be awarded Defendant on this count.

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[4] In the court's estimation, factors 1, 2 and 6 point to the application of Massachusetts law. Factors 3 and 5 point to Connecticut. Factors 4 and 6 are neutral.

In Massachusetts, in order to prove intentional misrepresentation, a plaintiff must demonstrate that (1) the defendant made a false representation of a material of fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act thereon, and (4) the plaintiff acted upon the representation to its damage. *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1471-72 (1st Cir. 1996). "Under Massachusetts law, a promissory statement cannot form the basis of a claim of misrepresentation unless at the time the statement was made, the promisor had no intention of carrying out the promise." *Gerli v. G.K. Hall & Co.*, 851 F.2d 452, 456 (1st Cir. 1988). When a fraud claim is based upon a promise to act in the future, "the present intent or state of mind of the defendant at the time the promises were made become the relevant issue." *Bradley*, 967 F. Supp. at 28. "The mere fact that the expected performance was not realized is insufficient to demonstrate that defendant falsely states its intention." *Id.* (internal quotation omitted). The same holds true when applying Connecticut law. *See generally Paiva v. Vanech Heights Constr. Co.*, 271 A.2d 69, 71 (Conn. 1970).

It is the element of known falsity which clearly distinguishes Count V from Plaintiff's promissory estoppel claim. It is that element which Plaintiff fails to meet here. In short, Plaintiff has not put forth any genuine or material fact from which a jury may fairly infer that Defendant did not intend to fulfill its alleged promise to compensate Plaintiff. To the contrary, looking at the facts in the most favorable light to Plaintiff, the record merely reflects Plaintiff's understanding that a commission rate would be settled upon through future negotiations. In fact,

Plaintiff points out that Defendant made an offer in this regard. However, in no way do the facts support a claim of fraudulent misrepresentation. Accordingly, the court will recommend that Defendant's motion for summary judgment be granted with respect to Count V.

Defendant also moves for summary judgment on Plaintiff's negligent misrepresentation count, Count VIII, but, in the court's opinion, has less success. Given that no conflict of law appears with respect to this claim, the court applies the laws of the forum state, Massachusetts. In order to recover for negligent misrepresentation, Plaintiff must prove that Defendant, in the course of the transaction at issue here, failed to exercise reasonable care in communicating information to Plaintiff upon which Plaintiff justifiably relied. *Nota Constr. Corp. v. Keyes Assocs., Inc.*, 694 N.E.2d 401 (Mass. App. Ct. 1998).

Defendant's argument that Plaintiff cannot prove a necessary element of this claim, reasonable reliance on the alleged misrepresentation, must fail. As Defendant concedes for purposes here, both parties understood that the commission was to be negotiated. (Def. Mem. at 22.) Plaintiff's reliance on that understanding cannot be said to be unjustified as a matter of law. In short, there are a number of factual issues regarding the agreement between the parties and the attendant circumstances. These issues, in the court's opinion, preclude the granting of summary judgment on Count VIII.

C. Unfair Trade Practice

Defendant asserts that Plaintiff's remaining claims in Count VII pursuant to

M.G.L. ch. 93A and the Connecticut Unfair Trade Practices Act cannot survive at this juncture because all of Plaintiff's other claims lack merit. Because the court believes that summary judgment is inappropriate on all other counts but Count V, the potential remains for Plaintiff to prove that Defendant committed various unfair trade practices. Accordingly, the court will recommend that summary judgment be denied on Count VII.

IV. CONCLUSION

For all the reasons stated, the court recommends that Defendant's motion for summary judgment be ALLOWED with respect to Count V, but otherwise DENIED.[5]

DATED: January 14, 1999

KENNETH P. NEIMAN
U.S. Magistrate Judge

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[5] The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these findings and recommendations must file a written objection with the Clerk of this Court **within ten (10) days** of the party's receipt of this Report and Recommendation. The written objection must specifically identify the portion of the proposed findings or recommendations to which objection is made and the basis for such objection. The parties are further advised that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court order entered pursuant to this Report and Recommendation. *See Keating v. Secretary of Health & Human Services*, 848 F.2d 271, 275 (1st Cir. 1988); *United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980). *See also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

WORLD POWER, a division of Associated Electric Co., Inc.	)	
v.	)	CIVIL ACTION NO. 98-~~300~~ 30019-MAP
ENERGY SERVICES, INC.	)	

ORDER

June 30, 1999

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, with the qualification noted, this court hereby adopts the Report and Recommendation of the Magistrate Judge. The Motion for Summary Judgment is DENIED, except as to Count Five. As to Count Five, the motion is ALLOWED.

The clerk will set this matter for a status conference to determine further proceedings.

Michael A. Ponsor

MICHAEL A. PONSOR
U. S. District Judge

[illegible] Summary Judgment.

(even viewed in the light most favorable to the plaintiff) lacks sufficient facts to justify a jury in concluding that any oral agreement ever existed between the parties. Moreover, defendant contended that even if such an agreement existed it would be barred by the Massachusetts Statute of Frauds.

The Motion for Summary Judgment was referred to Magistrate Judge Neiman who issued his Report and Recommendation on January 14, 1999 disagreeing with the [illegible]

this occurs, the court is obliged to apply the Statute of Frauds that is "more liberal in recognizing and enforcing the existence of a contract . . . ." Computer Sys. of Am. v. Int'l. Bus. Mach. Corp., 795 F.2d 1086, 1092 (1st Cir. 1986).

In one respect, this court will not adopt the analysis of the Report and Recommendation. The Magistrate Judge discussed, in dicta, whether (assuming Massachusetts law applies) the Commonwealth's Statute of Frauds bars enforcement of a promissory estoppel claim. This court, in a different context, has opined that the Statute of Frauds in Massachusetts appears not to do so. See Commonwealth Aluminum Corp. v. Baldwin Corp., 980 F. Supp. 598, 611 (D. Mass. 1997). However, in Cox v. Thornton Assocs., Inc., 1998 W.L. 470, 508 (Mass. Super. 1998), a Massachusetts Superior Court judge held that Mass. Gen. Laws ch. 259, § 7 does apply to a claim of promissory estoppel. Since the law appears to be developing in a direction contrary to the Magistrate Judge's suggestion, this court expressly declines to adopt that portion of his analysis.

This conclusion, however, does not affect the court's ruling on the Motion for Summary Judgment, since Connecticut, and not Massachusetts, law controls.

In summary, upon de novo review, with the qualification

noted, this court hereby adopts the Report and Recommendation of the Magistrate Judge. The Motion for Summary Judgment is DENIED, except as to Count Five. As to Count Five, the motion is ALLOWED.

The clerk will set this matter for a status conference to determine further proceedings.

A separate order will issue.

Michael A. Ponsor

MICHAEL A. PONSOR
U. S. District Judge