

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

H Only the Westlaw citation is currently available.

United States District Court, D. Kansas.
SITHON MARITIME COMPANY, Plaintiff,
v.
Holiday MANSION, a Division of Mohawk, Inc.,
and Mercury Marine, a Division of Brunswick
Corporation, Defendants.
No. CIV. A. 96-2262-KHV.

Feb. 16, 1999.

MEMORANDUM AND ORDER

VRATIL, District J.

*1 This matter is before the court on *Defendant Mercury Marine's Motion For Partial Summary Judgment On Count X Of Plaintiff's Amended Complaint* (Doc. # 238) filed September 1, 1998. For the reasons set forth below, defendant's motion will be sustained in part and overruled in part.

Summary Judgment Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d 1535, 1538-39 (10th Cir.1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hicks v. City of Watonga, 942 F.2d 737, 743 (10th Cir.1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to

demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l. Inc. v. First Affiliated Securities, Inc., 912 F.2d 1238, 1241 (10th Cir.1990); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir.1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. Applied Genetics, 912 F.2d at 1241.

"[W]e must view the record in the light most favorable to the parties opposing the motion for summary judgment." Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir.1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (10th Cir.1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

Factual Background

The following facts are uncontroverted, deemed admitted, or where controverted, viewed in the light most favorable to plaintiff.

Navistar designed and built a model 7.3L IDI (indirect injection) diesel engine. Marine Corporation of America ("MCA") purchased the engine from Navistar and modified it for use in a marine environment. MCA then sold the engines to Mercury Marine for resale. Mercury sold 7.3L diesel engines with Mercruiser propulsion systems (stern drives and inboards) from approximately 1993 to 1996. Mercury conducted quality control tests for the engines and propulsion systems at its plant in Stillwater, Oklahoma.

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

*2 Mercury's quality control program included visually inspecting all of the 7.3L engines for obvious flaws and defects (*e.g.*, scratches and dents, missing or broken parts, improper engine fluid levels). Mercury also performed objective engine dynamometer tests on each engine. Mercury initially rejected some of the engines through this procedure. Typically, an MCA technician or engineer or a Mercury technician or engineer would fix any problems at Mercury's plant. The engines would then go through the quality control process again.

Sithon Maritime Company ("Sithon") was organized in December 1994 to obtain exclusive government permits to operate high speed passenger ferry boats between points on the Chalkidiki peninsula in Northern Greece. In late 1994, **Sithon**, through Kostas Vagianos, its president, agreed to purchase from **Holiday Mansion** four 50-passenger ferry boats with Mercury propulsion systems and 7.3L diesel engines. **Sithon** received the boats in April 1995, and commenced passenger service on May 19, 1995. Within days, the propulsion systems of all four boats experienced various mechanical problems such as overheating. The boats could reach speeds of only 16 knots when empty and 12 to 13 knots when full. Sithon had anticipated that the boats would travel at 24 knots cruising speed and 28 knots maximum speed.

In June 1995, Mercury implemented several changes on the boats. Mercury changed the gear drive ratio and replaced the Bravo III stern drives with Bravo II stern drives. Despite these changes, the propulsion systems continued to malfunction. In early August 1995, Mercury replaced two of the 7.3L diesel engines in one of Sithon's boats, the "Omiros." A Mercury representative observed the installation of these two engines and conducted various tests on the boat. Patrick LeClerre, an engineer with Marine Power Europe (Mercury's European affiliate), witnessed sea trials of the Omiros with the replacement engines. On August 8 or 9, 1995, LeClerre told Vagianos that (1) the boat stayed at speeds of 12 to 13 miles per hour both with the boat empty and with 45 persons on board; (2) he doubted that Mercury had ever guaranteed speeds of 24 to 28 miles per hour with the 7.3L engines; and (3) "these engines are not suitable because they are for

recreational vessels and another type should be installed, either Caterpillar or Man or MTU (Mercedes)." Immediately after making this statement, LeClerre assured Vagianos that "Mercury could and would repair the engines so that they would perform reliably" and that Mercury could fix the propulsion systems so that they could "reach the appropriate rpms and not overheat or otherwise fail." *Decl. of Kostas Vagianos* (Doc. # 250) filed Oct. 14, 1998, ¶¶ 16-18; *see Vagianos Depo.*, Exh. D to *Aff. of George J. Tsimis, Esq.* (Doc. # 248) filed Sept. 29, 1998) at 532-33 (LeClerre stated "I'm here, Mr. Vagianos, to repair the engines and I will do it.").

In August 1995, Sithon hired its own naval architect, John Nicolas Gervassis, to make an independent assessment of the Omiros with the replacement engines. In a report dated August 27, 1995, he stated that the mean ship speed with the replacement propulsion system, with 27 persons on board, and with both engines running at 3400 rpm, was 13.44 knots.

*3 In September 1995, Mercury sent **Sithon** six additional 7.3L engines for installation. Four of the six engines were installed. **Sithon's** boats continued to experience many of the same mechanical problems and **Sithon** was forced to terminate its operation.

All eight of the replacement engines successfully passed Mercury's quality control inspection and dynamometer test before they were shipped to **Sithon**. Those which initially failed were repaired and/or brought up to specification and then were successfully re-inspected and re-tested before they were shipped to **Sithon**.

Analysis

In Count X, **Sithon** alleges that Mercury concealed material information regarding its propulsion systems and misrepresented to **Sithon** that Mercury would fix the propulsion systems on **Sithon's** boats. **Sithon's** only allegation of reliance, however, is that it allowed Mercury to repair, replace, and refit its boats during the high tourist season, the summer of 1995. *See Am. Compl.* (Doc. # 195) filed Jan. 7, 1998, ¶ 161. **Sithon** now argues that based on Mercury's representations, it chose Mercury propulsion systems over competing products in late 1994 and early 1995. *See Pl. Sithon*

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

Maritime Co.'s Opp. Mem. Of Law To Def.-Mercury Marine's Mot. For Partial Summ. J. (Doc. # 246) filed Sept. 29, 1998 at 3-4, 22, 30, 48, 63-65, 67. Given **Sithon's** limited allegation of reliance in Count X, this claim is not cognizable. **Sithon** cannot expand this allegation at this late date. **Sithon's** reliance in Count X is limited to its agreement to allow Mercury to repair the boats in the summer of 1995.

I. Fraud Through Silence.

Sithon alleges that Mercury committed fraud through silence by (1) concealing the fact that the original and replacement engines were rejected and not new, (2) concealing the fact that the boats equipped with Mercury propulsion systems could not be operated as passenger ferries, and (3) concealing the history of problems and defects with the 7.3L diesel engine. To establish fraud through silence, Sithon must prove by clear and convincing evidence that:

- (1) defendant had knowledge of material facts which plaintiff did not have and which plaintiff could not have discovered by the exercise of reasonable diligence;
- (2) defendant was under an obligation to communicate the material facts to the plaintiff;
- (3) defendant intentionally failed to communicate to plaintiff the material facts;
- (4) plaintiff justifiably relied on defendant to communicate the material facts to plaintiff; and
- (5) plaintiff sustained damages as a result of defendant's failure to communicate the material facts to the plaintiff.

OMI Holdings, Inc. v. Howell, 260 Kan. 305, 344-45, 918 P.2d 1274, 1299 (1996) (quoting *Lesser v. Neosho County Community College*, 741 F.Supp. 854, 863 (D.Kan.1990)). Fraud through silence is actionable where a party is under a legal or equitable obligation to communicate and thus cannot remain "innocently silent ." *Monarch Normandy Square Partners v. Normandy Square Assocs. Ltd.*

Partnership, 817 F.Supp. 899, 906 (D.Kan.1993). A duty to disclose arises from a fiduciary relationship which may be created by contract or other special circumstances. *Flight Concepts Ltd. Partnership v. Boeing Co.*, 38 F.3d 1152, 1158 (10th Cir.1994); see *DuShane v. Union Nat'l Bank*, 223 Kan. 755, 760, 576 P.2d 674, 679 (1978). Kansas courts have noted that a party not in privity with the defrauding party may pursue an action for fraud by silence in limited circumstances. See *State ex rel. Stephan v. GAF Corp.*, 242 Kan. 152, 156-57, 747 P.2d 1326, 1330 (1987) (roofing manufacturer with knowledge of recurring defects and problems with product has duty of disclosure to ultimate purchaser); *Citizens State Bank v. Gilmore*, 226 Kan. 662, 668, 603 P.2d 605, 610 (1979) (seller of diseased cow has duty of disclosure to buyer's bank because bank is within class of persons that seller expects to act in reliance on representation that cow is healthy); *Griffith v. Byers Constr. Co.*, 212 Kan. 65, 510 P.2d 198 (1973) (residential developer, who dealt directly with builders, has duty to disclose saline condition in soil to ultimate homeowners). A fact is material if a reasonable person would attach importance to it in determining his or her choice of action in a transaction. See *Horsch v. Terminix Int'l Co.*, 19 Kan.App.2d 134, 138, 865 P.2d 1044, 1048 (1993).

A. Concealment Of Fact That Engines Were Rejected And Not New

*4 Sithon alleges that Mercury concealed the fact that the eight original engines and eight replacement engines were "defective, unrepaired, rejected, old, obsolete, used, pre-production, test, rebuilt, converted, previously sold, and/or incorrectly designed or configured." See Am. Compl. ¶ 157. As explained above, Sithon has not alleged any reliance on Mercury's omissions regarding the original engines. Accordingly, Sithon's claim is limited to the replacement engines.

Mercury first argues that it had no duty to disclose to Sithon the history of each replacement propulsion system installed on Sithon's boats. The Court agrees. A duty to disclose arises only where one "knows that the other is about to enter into the transaction under a mistake as to such facts, and that the other, because of the relationship between them, the customs in the trade, or other objective circumstances, would

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

reasonably expect a disclosure of such facts.” [Griffith, 212 Kan. at 71, 510 P.2d at 203](#) (quoting [Restatement \(Second\) of Torts § 551\(2\)\(3\) \(Tent. Draft No. 12, 1966\)](#)). Sithon has presented evidence that some of the replacement engines initially failed Mercury's quality control tests and that Mercury or MCA adjusted or repaired the engines before shipping them to Sithon. Notably, Sithon has failed to show that any of the eight replacement engines ultimately failed Mercury's quality control tests before they were shipped. Sithon's liability expert, Mr. Winer, notes that two engines shipped to Sithon were previously “invoiced” for \$0.00 to “Scott R.” in August 1993 and returned to Bryan Cowans, a Mercury employee, for \$0.00 in August 1995. *See Aff. of Joseph Winer* (Doc. # 247) filed Sept. 29, 1998, ¶ 16, Exh. 3. Winer concedes, however, that he does not know whether Mercury invoiced the engines internally and he has no proof that any of the replacement engines were used before Mercury shipped them to Sithon. *See* Oct. 16, 1998 Winer Depo., Exh. A-I to *Def. Mercury Marine's Reply In Supp. Of Its Mot. For Partial Summ. J. On Count X Of Pl.'s Am. Compl.* (Doc. # 255) filed Oct. 29, 1998 at 131-32; Sept. 29, 1998 Winer Depo. (Exh. A-1 to Doc. # 255) at 334.

Sithon has not cited, and the Court cannot find, any pertinent authority for imposing a duty to disclose in these circumstances.^{FN1} *See* [Restatement \(Second\) of Torts § 551](#), comment on clause (2)(e) (1977) (duty arises only where non-disclosure is “so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling”). In contrast to the manufacturer in *GAF Corp.*, Mercury corrected the known problems with its propulsion systems so that each system passed its quality control tests. [242 Kan. at 157-58, 747 P.2d at 1330-31](#). If the Court imposed a duty to disclose here, manufacturers could be discouraged from keeping detailed records on quality control procedures and the history of individual products. Consumers do not reasonably expect disclosure of the quality control history of each product they purchase. Similarly, Sithon had no reasonable expectation of disclosure regarding the replacement engines provided to it at no additional cost.

^{FN1} Winer opines that Mercury had such a duty, but he provides no basis for his conclusion. *See* Winer Aff. ¶ 17. Moreover,

he concedes that Mercury could properly sell the engines as new (apparently with no duty of disclosure) if it corrected any manufacturing flaws discovered during its quality control procedures. *See* Oct. 16, 1998 Winer Depo. at 24-30.

*5 Sithon claims that federal and state statutes required Mercury to disclose defective or rejected products. First, Sithon relies on [46 U.S.C. § 4307](#), which provides:

(a) A person may not-

(1) manufacture, construct, assemble, sell or offer for sale, introduce or deliver for introduction into interstate commerce, or import into the United States, *a recreational vessel*, associated equipment, or component of the vessel or equipment unless-

(A) (i) it conforms with this chapter or a regulation prescribed under this chapter; and

(ii) it does not contain a *defect which has been identified, in any communication to such person by the Secretary or the manufacturer of that vessel, equipment or component, as creating a substantial risk of personal injury to the public*

(emphasis added). Sithon concedes that this statute applies only to “recreational vessels” and not to commercial ferry boats. Moreover, Sithon has not shown that Mercury's propulsion systems contained a defect identified either by the Secretary of Transportation or the manufacturer as creating a substantial risk of personal injury to the public. Finally, the statute is not applicable because Sithon's boats were not on waters of the United States. *See* [46 U.S.C. § 4301](#) (statute applies to vessels and equipment on “waters subject to the jurisdiction of the United States and, for a vessel owned in the United States, on the high seas”).

Sithon's reliance on the Kansas Consumer Protection Act (“KCPA”) also is misplaced. *See* [K.S.A. § 50-626](#) (prohibition of deceptive acts and practices). First, neither **Sithon** nor **Holiday Mansion** is a “consumer” as defined in the KCPA. *See* [K.S.A. § 50-624\(b\)](#) (consumer means “individual or sole proprietor”). Next, Mercury's repair of the

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

propulsion systems was not a “consumer transaction” because it did not involve services within the State of Kansas. See [K.S.A. § 50-624\(c\)](#) (consumer transaction means “a sale, lease, assignment or other disposition for value of property or services within this state”).

Next, Mercury argues that Sithon has not shown that it sustained damages because of Mercury's failure to reveal the history of the replacement engines. Winer, Sithon's liability expert, concedes that (1) he has not determined the cause of the failure of the propulsion systems and (2) he cannot relate any specific quality control issue which Mercury noted to any actual problems in the propulsion systems. See Oct. 16, 1998 Winer Depo. at 22-24, 80. Sithon has failed to present any other evidence that its damages resulted from Mercury's non-disclosure of the history of each replacement engine. Absent a link between the information withheld and Sithon's damages, Sithon cannot establish causation.

For these reasons, the Court grants Mercury's motion for summary judgment on this claim.

B. *Concealment Of Fact That Boats Could Not Be Operated As Passenger Ferries*

Sithon alleges that Mercury concealed the fact that its replacement propulsion systems would not enable Sithon's boats to operate as passenger ferries without mechanical problems. See Am. Compl. ¶ 156. Mercury again argues that it had no duty to disclose this information. In contrast to quality control history, however, consumers reasonably expect that a manufacturer will disclose whether its product will work in a known proposed application. See [GAF Corp., 242 Kan. at 156, 747 P.2d at 1330](#) (“a manufacturer who knows that its product is being improperly used or installed cannot continue to disseminate with impunity information encouraging the improper installation or use of its material”). No later than August 1995, Mercury knew that Sithon was using the propulsion systems in high speed 50-passenger ferries. Indeed, Mercury supervised the installation of the replacement engines in the Omiros and conducted tests to determine if the replacement engines would enable Sithon boats to operate as passenger ferries without mechanical problems. In these circumstances, Mercury had a duty of

disclosure.

*6 Mercury contends that it did not conceal information on the propulsion systems and that Sithon has not shown any reliance on the alleged omission. Mercury points to LeClerre's statement to Vagianos in August 1995 that “these engines are not suitable because they are for recreational vessels and another type should be installed, either Caterpillar or Man or MTU (Mercedes).” Reasonably construing the evidence in favor of plaintiff, LeClerre's statement related to the boats reaching a cruising speed of 24 knots and a maximum speed of 28 knots. LeClerre's two prior statements related to boat speed, not whether the boats could operate as passenger ferries without mechanical problems. Moreover, immediately after making the referenced statement, LeClerre assured Vagianos that “Mercury could and would repair the engines so that they would perform reliably” and that Mercury could fix the propulsion systems so that they could “reach the appropriate rpms and not overheat or otherwise fail.” Vagianos Decl. ¶¶ 16-18; see *id.* ¶ 30 (Sithon accepted replacement engines based on “Mercury's assurances that the replacement engines would perform properly and not overheat or experience mechanical failures in Sithon's operation”). Finally, LeClerre's statements that Mercury would fix the propulsion systems are consistent with the statement of Jim Puddy, a Mercury employee, in an internal memorandum that “I expect we will be able to get these boats performing to an acceptable level.” Aug. 17, 1995 Memo from Jim Puddy, Exh. BB to *Aff. of George J. Tsimis, Esq.* (Doc. # 248) filed Sept. 29, 1998 at 1. Although Mercury has presented evidence which challenges the reasonableness of Sithon's reliance and whether any information was concealed, such evidence is not so one-sided to compel summary judgment in favor of Mercury on Count X. ^{FN2}

^{FN2}. Of course, LeClerre's statements may significantly impact Sithon's fraud claim based on anticipated speed of the boats. See Am. Compl., count VII.

Mercury also argues that Sithon could not reasonably rely on Mercury because Sithon hired its own naval architect in August 1995. Sithon's naval architect primarily reported on the speed of the boats with the replacement engines. See Exh. A-8 to *Def. Mercury*

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

Marine's Mem. In Supp. Of Its Mot. For Partial Summ. J. On Count X Of Pl.'s Am. Compl. (Doc. # 239) at 1 (purpose was to conduct speed trials on two boats). The architect's observations were consistent with those of LeClerre in early August. In Count X, Sithon does not claim that Mercury failed to reveal information regarding projected boat speed. Rather, Sithon claims that Mercury concealed the fact that the boats could not be used as passenger ferries without mechanical problems (even at speeds as low as 12 or 13 knots). Although there may be an important relationship between boat speed and function as passenger ferries, Mercury has not established as a matter of law that Sithon did not reasonably rely on Mercury to reveal whether the replacement propulsion systems would enable the boats to operate as passenger ferries without mechanical problems.

*7 Finally, Mercury claims that Sithon could have discovered that Mercury's propulsion systems would not enable Sithon's boats to operate as passenger ferries without mechanical problems. Mercury again relies on Sithon's hiring of a naval architect in August 1995. As explained above, the naval architect primarily reported on boat speed. He expressed no opinion whether the replacement propulsion systems would allow the boats to operate as passenger ferries without mechanical problems. Mercury has not shown that such information was reasonably ascertainable by Sithon or its consultants.

Based on these reasons, Mercury's motion for summary judgment on this claim is overruled.

C. Concealment Of Engine Line's History Of Problems And Defects

Sithon alleges that Mercury concealed the fact that the 7.3L diesel engine had a history of mechanical design problems and/or defects and that Mercury received hundreds of warranty claims on the engine. *See* Am. Compl. ¶ 158. Again, Sithon's only alleged act of reliance is that it allowed Mercury to repair and replace the propulsion systems. Sithon has not presented any evidence, however, that it would not have allowed Mercury to conduct the repairs if it had known the troubled history of the 7.3L engine.

Sithon also has failed to show causation. Sithon has

not presented any evidence that the failure of its boats was due to any known problems or defects in the 7.3L engine. As discussed above, Winer concedes that he has not investigated the cause of the failure of the propulsion systems and Sithon has not presented any other evidence on this point.

For these reasons, the Court will grant Mercury's motion for summary judgment on this claim.

II. Fraudulent Misrepresentation

Sithon alleges that throughout 1995, Mercury fraudulently represented to Sithon that it would repair the engine overheating and other problems, so that its propulsion systems would perform reliably, when Mercury knew or should have known that such representations were false.^{FN3} *See* Am. Compl. ¶¶ 155, 160. Sithon's claim is that Mercury fraudulently misrepresented a future event, *i.e.* that Mercury would fix the propulsion systems.^{FN4} To prevail on a claim for fraudulent promise of a future event, a plaintiff must prove by clear and convincing evidence that:

^{FN3}. Sithon also argues that Mercury expressly misrepresented that the replacement engines were new. The Court will not consider this claim because it is not included in Sithon's Amended Complaint.

^{FN4}. Neither party has discussed the elements of a claim for fraudulent misrepresentation of a future event. Given that several of the elements of fraud and fraudulent misrepresentation of a future event are similar, the Court has analyzed Sithon's claim based on the parties' present briefing.

1. defendant had no intention of performing its promise to plaintiff at the time the promise was made;
2. defendant did not perform its promise as it represented it would;
3. defendant made the promise with the intent to deceive and for the purpose of inducing plaintiff to

Not Reported in F.Supp.2d, 1999 WL 156167 (D.Kan.)
(Cite as: 1999 WL 156167 (D.Kan.))

act upon the promise;

4. plaintiff reasonably relied and acted upon the promise; and

5. plaintiff sustained damages caused by its reliance on defendant's promise.

Kreekside Partners v. Nord Bitumi U.S., Inc., No. 95-2580-EEO, 1997 WL 618761, at *5 (D.Kan. Sept. 16, 1997). Where a claim of fraud is predicated on a promise or statement concerning future events, plaintiff must prove more than mere nonperformance to show fraudulent intent. See *Whitten v. Farmland Indus., Inc.*, 759 F.Supp. 1522, 1542 (D.Kan.1991) (citing *Modern Air Conditioning, Inc. v. Cinderella Homes, Inc.*, 226 Kan. 70, 78, 596 P.2d 816, 824 (1979)). “The gravamen of such a claim is the existence of other circumstances of substantial character which support an inference of wrongful intent at the time of making the representation.” *Whitten*, 759 F.Supp. at 1542 (citing *Young v. Hecht*, 3 Kan.App.2d 510, 515, 597 P.2d 682, 688 (1979)); see *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 469, 819 P.2d 1192, 1200 (1991), cert. denied, 504 U.S. 912 (1992).

*8 Mercury argues that it did not promise Sithon that it would repair the boats so that they could operate as passenger ferries without mechanical problems. Sithon has presented sufficient evidence to create a disputed factual issue on this point. See Vagianos Decl. ¶¶ 16-18 (LeClerre assured Vagianos that “Mercury could and would repair the engines so that they would perform reliably” and that Mercury could fix the propulsion systems so that they could “reach the appropriate rpms and not overheat or otherwise fail”); Vagianos Depo. at 532-33 (LeClerre stated “I’m here, Mr. Vagianos, to repair the engines and I will do it.”).

Mercury also contends that Sithon failed to show its reliance on the alleged promise. Sithon has presented sufficient evidence to establish that it reasonably relied on Mercury's representation when it allowed Mercury to repair the propulsion systems in August 1995. See *supra* Part I.B. In particular, Vagianos stated that Sithon accepted replacement engines in August 1995 based on Mercury's assurances that the replacement engines would perform properly and not

experience mechanical problems in Sithon's operation. See Vagianos Decl. ¶ 30.

Neither party has addressed in its briefing the specific elements of a claim for fraudulent promise of a future event. Although it appears that Sithon will have a difficult time establishing the first and third elements of such a claim, given Mercury's efforts to fix the propulsion systems, the Court cannot rule on this claim as a matter of law based on the record evidence. Accordingly, Mercury's motion for summary judgment on this claim is denied.

IT IS THEREFORE ORDERED that *Defendant Mercury Marine's Motion for Partial Summary Judgment on Count X of Plaintiff's Amended Complaint* (Doc. # 238) filed September 1, 1998 be and hereby is SUSTAINED in part and OVERRULED in part as discussed herein.

D.Kan.,1999.

Sithon Maritime Co. v. Holiday Mansion
 Not Reported in F.Supp.2d, 1999 WL 156167
 (D.Kan.)

END OF DOCUMENT

