

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

COMMONWEALTH PORTS AUTHORITY,

Plaintiff,

v.

LEO A. DALY COMPANY,

Defendant.

Case No. 1:12-CV-00005

**OPINION AND ORDER DENYING
MOTION FOR SUMMARY JUDGMENT**

This matter regards defendant Leo A. Daly Company's ("Daly") allegedly deficient performance on a contract with plaintiff Commonwealth Ports Authority ("Ports Authority"). This performance also implicates the Commonwealth of the Northern Mariana Islands ("Commonwealth") building code and Consumer Protection Act. Specifically before the Court now is Ports Authority's motion for partial summary judgment on claims alleging that Daly breached its contract, violated the Commonwealth building code, and violated the Consumer Protection Act. (ECF No. 53.) Having reviewed the briefs and considered the arguments of counsel, the Court DENIES the motion and also grants summary judgment in favor of Daly on the Consumer Protection Act claims.

I. BACKGROUND

Ports Authority contracted with Daly in 2003 "for the design and construction management of a project involving improvements of the West Tinian Airport facility" (ECF No. 1 at ¶ 8

(hereinafter “Complaint”).) Ports Authority now sues Daly for claims arising from its performance of this contract, alleging Daly breached contractual, professional, and statutory duties. (*See id.* at ¶ 1.) The complaint alleges six claims: breach of contract, professional malpractice, negligence, fraud, Consumer Protection Act violations, and building code violations. Only three of these claims—breach of contract, building code, and Consumer Protection Act—are relevant to this motion. (*See* ECF No. 53 at 1.)

II. JURISDICTION

The Court has subject matter jurisdiction over the claims in the complaint pursuant to 28 U.S.C. § 1332 (diversity jurisdiction).

III. STANDARD

On a Rule 56 motion for summary judgment, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In considering the motion, “[t]he court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d 547, 549–50 (9th Cir. 1994). Additionally, it must view the evidence “in the light most favorable to the opposing party.” *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 382 (1973) (internal quotation marks omitted).

The moving party bears the initial burden of identifying “particular parts of materials in the record” that “demonstrate the absence of a genuine issue of material fact.” Fed. R. Civ. P. 56(c)(1); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “When the moving party also bears the burden of persuasion at trial, . . . it must show that ‘the evidence is so powerful that no reasonable jury would be free to disbelieve it.’ ” *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008). If the moving

1 party meets this burden, the non-moving party must then do similarly, except to demonstrate that a
 2 genuine issue of material fact exists. Fed. R. Civ. P. 56(c)(1); *Anderson v. Liberty Lobby, Inc.*, 477
 3 U.S. 242, 250 (1986).

4 Finally, on a motion for partial summary judgment, a court has the discretion to deny the
 5 motion, “[e]ven if the court believes that a fact is not genuinely in dispute” *E.g.*, Fed. R. Civ. P.
 6 56, Committee Notes on Rules—2010 Amendment, Subdivision (g) (“[The court] may properly
 7 decide that the cost of determining whether some potential fact disputes may be eliminated by
 8 summary disposition is greater than the cost of resolving those disputes by other means, including
 9 trial.”); *see also Powell v. Radkins*, 506 F.2d 763, 765 (5th Cir. 1975).

10 IV. DISCUSSION

11 Ports Authority seeks summary judgment on three claims: breach of contract, violation of the
 12 Commonwealth building code, and violation of the Consumer Protection Act. (*See* ECF No. 53 at 1.)
 13 The Court analyzes each in turn.
 14

15 A. BREACH OF CONTRACT

16 Daly was contractually “responsible for professional quality, technical accuracy, and the
 17 condition of all services [it] furnished” under the contract between it and Ports Authority for the
 18 airport project. (ECF No. 53-4 at 14; *see also* Motion at 6.) These services included
 19 “architectural/engineering design and construction management” (ECF No. 53-4 at 1.)

20 Ports Authority seeks summary judgment on Daly’s liability for breaching its contractual
 21 duties of design and construction management. (ECF No. 53 at 2.) To show breach, Ports Authority
 22 argues that Daly’s design and construction violated both the Americans with Disabilities Act
 23 (hereinafter “ADA”) and the Commonwealth building code. Ports Authority is not claiming a
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1 separate cause of action under the former statute. (ECF No. 61 at 6 (hereinafter “Reply”); *see*
2 *generally* Complaint.)

3 4 **1. ADA Violations**

5 With the ADA violations, Ports Authority argues that these violations establish Daly’s breach
6 of its design and construction management duties. (*See* Motion at 7–8.) It attaches the declaration of
7 Richard Cody, an experienced designer in Saipan, detailing the airport terminal’s numerous ADA
8 violations. (*See* ECF No. 53-5.)

9 Ports Authority fails to satisfy its initial burden of proof with respect to both Daly’s design
10 and construction management duties. With the former duties, Cody’s declaration assesses only the
11 actual construction, not the design. (*See id.* at ¶ 3.) Even if Ports Authority did meet its initial
12 burden, Daly demonstrated through the declaration of Gary Koyama, a senior architect in Hawaii, a
13 genuine issue of material fact by presenting evidence that the alleged ADA violations do not appear
14 in Daly’s design. (Opposition at 3; ECF No. 58-5.)

15 With Daly’s construction management duties, Ports Authority concedes that at least some of
16 the ADA violations were outside Daly’s scope of work. (*Compare* Opposition at 4–5 *with* Reply at
17 5.) However, Ports Authority argues that other violations were within Daly’s scope. (Reply at 5, 7–
18 8.) And because Daly argues only that its designs do not violate the ADA, Ports Authority continues,
19 Daly effectively concedes that the resulting construction violates the ADA. (*Id.* at 7–8.)

20 Even if Daly concedes the construction does not comply with the ADA, this is not the same
21 as conceding that Daly breached its construction management duties. It is unclear what those duties
22 entailed. Ports Authority provides no evidence indicating the contract intended Daly, as construction
23 manager, be strictly liable for any ADA violations in the resulting construction. Nor does Ports
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1 Authority provide any evidence on Daly's construction management efforts. (ECF No. 76 at 4
 2 (hereinafter "Surreply").) Instead Ports Authority states, without citing any evidence, that Daly
 3 failed to make minimally adequate professional inspections. (Reply at 5.) This fails to satisfy Ports
 4 Authority's initial burden of proof.

5 **2. Building Code Violations**

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 7 Ports Authority argues that Daly breached its design and construction management duties by
 8 producing a design that did not comply with the Commonwealth building code and then by allowing
 9 that design to be constructed. (Motion at 9.) Supporting these allegations is the declaration of
 10 Terangue Gillham, a professional engineer, who finds "a minimum of 20 code violations in [Daly's
 11 design]" (ECF No. 54 at 3.)

12 For all violations but one, Ports Authority has not met its initial burden. Gillham does not
 13 conclude that Daly's design produced at least 20 violations of the Commonwealth building code.
 14 Rather, he concludes that Daly's design produced at least 20 violations of the following codes: the
 15 1997 Uniform Building Code, the Los Angeles City Department of Building and Safety checklist,
 16 the 1999 American Concrete Institute 318-99, Portland Cement Association "Notes on ACI 318-99
 17 with Design Applications," and "Seismic Design of Reinforced Concrete Special Moment Frames."
 18 (ECF No. 54 at ¶¶ 4-5; *see also* ECF No. 54-2 at 000003.) Ports Authority and Daly indicated that
 19 the Commonwealth building code implements the 1997 Uniform Building Code.¹ Yet it remains
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21 ¹ Both Ports Authority and Daly's briefs treat the 1997 Uniform Building Code as controlling. (*See, e.g.*, Motion at 6;
 22 Opposition at 10; Reply at 13.) Additionally, at this motion's hearing, Ports Authority's counsel indicated that there was
 23 no dispute that the 1997 Uniform Building Code is the law implemented by the Commonwealth building code. That code
 24 reads: "Except as otherwise provided by this code, all design, construction, enlargement, removal, and use of any
 building or structure within the Northern Mariana Islands . . . shall conform to the requirements of Parts II, III, IV, V, VI,
 VII, VIII, IX, X, XI and Appendix, or any subsequent amendments thereto, of the 1988 edition of the Uniform Building
 Code" 2 CMC § 7142.

1 unclear why these foreign codes and alleged violations of them—such as 20 violations of the Los
2 Angeles building code (ECF No. 54-2 at 0000010)—are relevant to the Commonwealth. It may be
3 that both the Los Angeles and Commonwealth building codes are based on the 1997 Uniform
4 Building Code, but the report neither definitively indicates this nor illuminates how the Los Angeles
5 and Commonwealth codes may differ. Thus, a genuine issue remains as to what exact
6 Commonwealth building code provisions were violated.

7 With one violation, Ports Authority has met its initial burden, but Daly satisfactorily satisfies
8 its own burden of proving the existence a genuine issue of material fact. Ports Authority provides
9 evidence that “[Daly]’s design plans, in fact, do not detail the frames as Special Moment Resisting
10 Frames, as required by the 1997 [Uniform Building Code] for seismic resistance using moment
11 resisting frames alone in Seismic Zones 3 and 4.” (*See* ECF No. 54 at ¶ 4; *see also id.* at ¶ 5.)

12 Daly provides contradictory evidence in the declaration of James Walfish, an independent
13 consultant who provided engineering and design services to Daly. (ECF No. 59 at ¶¶ 1–2.) Walfish’s
14 work for Daly included serving as “the structural engineer of record for the Tinian [airport] Project .
15 . . .” (*Id.* at ¶¶ 3, 5.) In this role, he “prepared certain preliminary calculations and structural plans,
16 including preparing the West Tinian Airport Terminal Improvements Structural Calculations”
17 (*Id.* at ¶ 3.) Walfish states that “[t]o the best of [his] knowledge, the design and detailing reflected in
18 the attached Structural Calculations met or exceeded all applicable code requirements and sound
19 engineering practice, including meeting or exceeding all seismic requirements.” (*Id.* at ¶¶ 6–7.)

20 Ports Authority contends that Walfish’s conclusions regarding the preliminary calculations
21 and plans apply equally to the final design. (Reply at 10.) It argues that the plans Walfish reviewed
22 “were final and were the same plans that were actually used in construction.” (*Id.*) For support, Ports
23 Authority offers the evidence of Gillham, who declares that he found Walfish’s design and the
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1 designs “marked AS-BUILT . . . to be identical in terms of content pertaining to the structural design
2 of the facility, and more particularly to the content that pertains to the seismic lateral load resisting
3 system.” (ECF No. 64 at ¶ 7.)

4 Ports Authority argues that this evidence means that Daly’s design did not comply with the
5 Commonwealth building code. (Reply at 10.) But what it actually does is demonstrate a genuine
6 issue of material fact. Walfish concludes that the designs he examined complied with the code, and
7 Gillham concludes that these documents are the same as the final design. Accordingly, there is a
8 genuine issue of material fact as to whether the final design complies with the Commonwealth
9 building code’s seismic requirements, and summary judgment is improper.

10 **B. BUILDING CODE VIOLATIONS**

11 Ports Authority seeks summary judgment on its independent claims for building code
12 violations. (Motion at 8–10.) The Court denies summary judgment here for the same reasons as it
13 denied summary judgment on the breach of contract claims based on building code violations.
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15 **C. CONSUMER PROTECTION ACT**

16 Ports Authority seeks summary judgment on the claims that Daly violated the
17 Commonwealth Consumer Protection Act. (*See* ECF No. 53 at 1; *see also* Reply at 17.) Resolving
18 this issue requires interpreting Commonwealth law in an area where the Commonwealth Supreme
19 Court has not yet ruled. Here, this Court “must make a reasonable determination of the result the
20 highest state court would reach if it were deciding the case.” *Med. Lab. Mgmt. Consultants v. Am.*
21 *Broad. Cos.*, 306 F.3d 806, 812 (9th Cir. 2002) (internal quotation marks omitted).

22 A reasonable determination of how the Commonwealth Supreme Court would rule is that
23 Ports Authority lacks standing to sue for Consumer Protection Act violations. The Consumer
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1 Protection Act explicitly exempts Commonwealth agencies. 4 CMC § 5106 (“Nothing in this article
2 shall apply to: (a) Actions or transactions carried out by the Commonwealth government, any branch
3 thereof or any other governmental agency . . .”).

4 Even without this exemption, the Act still would not apply to Ports Authority. It protects only
5 “person[s] aggrieved as a result of a violation of this article” *Id.* § 5112(a). A “person” is
6 defined as “natural persons, corporations, firms, partnerships, joint stock companies, and
7 associations or other organizations of persons.” *Id.* § 5104(g). This definition is limited to actual
8 persons and any limited liability entities they form. Though government agencies contain persons,
9 they are not an organization of persons. That phrase implies persons acting in the interest of the
10 organization. But in government agencies, persons ultimately act not in the interest of the agency,
11 but in the interest of the people.

12 Confirming this conclusion is the statute’s legislative history, stating that consumers are both
13 the “general public” and “merchants themselves.” *Id.* § 5102(a)(4). Governmental agencies are
14 neither. Further, the Act expressly distinguishes the government from consumers. *See id.* § 5103(a)
15 (“declar[ing] that [the] government can best advance the interests of consumers by facilitating the
16 proper functioning of the free enterprise market economy”). This demarcation indicates the
17 government or its agencies is not a consumer to be protected by the Consumer Protection Act, but
18 instead an overseer charged with protecting consumers.

19 The Court notes the existence of a Commonwealth Superior Court decision concluding that
20 Commonwealth agencies can sue for Consumer Protection Act violations, *see Commonwealth of the*
21 *Northern Mariana Islands v. AIC Marianas, Inc.*, Civ. No. 10-0262A (N. Mar. I. Commw. Super.
22 Ct. Apr. 24, 2012), but does not find its reasoning persuasive. There, the court held that the statutory
23 definition of persons included Commonwealth agencies. *Id.* at 6. The court reasoned that a portion of
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1 person's definition, "other organizations of persons," was ambiguous, amenable to being interpreted
2 as "other class of consumers." *Id.* at 4. Finding the statute ambiguous, the court invoked policy and
3 concluded that interpreting persons to include Commonwealth agencies favors the Act's legislative
4 intent of protecting consumers. *See id.* at 5–6, 8 (reasoning that the "Commonwealth is the most
5 prominent consumer in this jurisdiction" and that excluding it from Consumer Protection Act claims
6 would have "an exceptionally grave, negative impact on the CNMI's market stability").

7 In justifying this policy-based conclusion, the superior court relied on a Commonwealth
8 Supreme Court decision construing a different statute's definition of "person" as including
9 Commonwealth agencies. *See id.* at 6. That statute regarded judicial review, appearing to strip courts
10 of judicial review of administrative decisions where the party seeking such review is an agency. *See*
11 *N. Marianas College v. Civil Serv. Comm'n*, 2006 MP 4, ¶¶ 15–16. The supreme court's holding that
12 persons in this context included agencies was motivated both by another statutory provision
13 indicating that agencies were entitled to judicial review of administrative decisions and a heavy
14 presumption in favor of judicial review. *See id.* at ¶¶ 13–14, 16–19. Neither reasoning applies here,
15 and this Court believes it a reasonable determination that the Commonwealth Supreme Court would
16 find the Consumer Protection Act's text controlling.

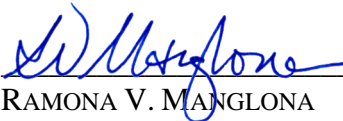
17 Because the Ports Authority lacks any legal claim under the Consumer Protection Act, the
18 Court denies summary judgment in its favor and instead grants it in favor of Daly. District courts
19 have the power to "grant[] summary judgment *sua sponte* when 1) no material dispute of fact
20 exists, and 2) the losing party has had an adequate opportunity to address the issues involved,
21 including adequate time to develop any facts necessary to oppose summary judgment." *Fuller v. City*
22 *of Oakland*, 47 F.3d 1522, 1533 (9th Cir. 1995). Here, Ports Authority has briefed this issue (*see*
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1 Reply at 13–15), and there are no facts capable of granting Ports Authority standing to sue under the
2 Act. Accordingly, the Court can and does grant summary judgment in favor of Daly on these claims.

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4 **V. CONCLUSION**

5 For the foregoing reasons, the Court denies Ports Authority's motion for partial summary
6 judgment in entirety and grants summary judgment in favor of Leo Daly on the Consumer Protection
7 Act claims.

8 SO ORDERED this 16th day of May, 2013.

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11 RAMONA V. MANGLONA
12 Chief Judge