OCEANA SENSOR, INC. d/b/a TOTAL WEB HOSTING SOLUTIONS, Plaintiff, v. FULTON COUNTY, GEORGIA, Defendant.

CIVIL ACTION FILE NO. 1:08-CV-2981-BBM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2009 U.S. Dist. LEXIS 120892

August 27, 2009, Decided
August 27, 2009, Filed

PRIOR HISTORY: Oceana Sensor, Inc. v. Fulton County, 2009 U.S. Dist. LEXIS 122271 (N.D. Ga., Apr. 8, 2009)

COUNSEL: [*1] For Total Web Hosting Solutions, Inc., Plaintiff, Counter Defendant: David J. Hungeling, LEAD ATTORNEY, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For Oceana Sensor, Inc., doing business as Total Web Hosting Solutions, Plaintiff: David J. Hungeling, LEAD ATTORNEY, John Andrew Robertson, Law Office of David J. Hungeling, P.C., Atlanta, GA.

For Fulton County, Georgia, Defendant: Carmen R. Alexander, Cheryl Ringer, Nwakaego Ijeoma Okparaeke, Robert L. Martin, Vincent D. Hyman, Office of the Fulton County Attorney, Atlanta, GA.

For Fulton County, Georgia, Counter Claimant: Nwakaego Ijeoma Okparaeke, Vincent D. Hyman, Office of the Fulton County Attorney, Atlanta, GA.

JUDGES: BEVERLY B. MARTIN, UNITED STATES DISTRICT JUDGE.

OPINION BY: BEVERLY B. MARTIN

OPINION

ORDER

This matter is before the court on the Motion for Summary Judgment [Doc. No. 48], filed by Defendant Fulton County, Georgia ("Fulton County" or "the County"), and the Motion for Leave to File Sur-Reply Brief in Further Opposition to Defendant's Motion for Summary Judgment [Doc. No. 77], filed by Plaintiff Oceana Sensor, Inc. d/b/a Total Web Hosting Solutions ("Oceana").

I. Factual and Procedural Background

On a summary judgment motion, justifiable factual [*2] inferences are construed in favor of the nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court previously included a comprehensive discussion of the facts in its Order on Fulton County's Motion to Dismiss [Doc. No. 39], and will not restate those facts here. (Order, Apr. 8, 2009 at 1-3.)

The relevant procedural history of the case is briefly summarized as follows. On September 23, 2008, Oceana filed this breach of contract action against Fulton County, alleging that the County had failed to pay for computer hardware and professional information technology

services provided by Oceana. On January 22, 2009, Oceana filed an Amended Complaint, and subsequently filed a Second Amended Complaint on April 15, 2009. In the Second Amended Complaint ("Complaint"), Oceana asserts claims for (1) breach of contract; (2) restitution; and (3) interest, attorneys n' fees, and costs of litigation. On May 14, 2009, Fulton County filed a Motion for Summary Judgment.

II. Legal Standard

Summary judgment is appropriate only when the pleadings and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter [*3] of law. Fed. R. Civ. P. 56(c). A dispute over a fact will preclude summary judgment if the dispute "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A court must deny summary judgment "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

Although in considering a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor," id. at 255, the nonmovant must do more than "simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Indeed, the nonmovant must present affirmative evidence beyond mere allegations to show that a genuine issue of material fact does exist. Anderson, 477 U.S. at 256-57. Furthermore, the court must evaluate the evidence "through the prism of the substantive evidentiary burden" at trial. Anderson, 477 U.S. at 254.

III. Analysis

The court first addresses Fulton County's argument that Oceana has failed to prove the enforceability of the contract at issue. Next, it analyzes the County's assertion that summary [*4] judgment should be granted on all claims by Oceana that are based upon renewal years contained in the contract. Finally, this Order will discuss Fulton County's argument that Oceana is not entitled to the amount of damages that the company seeks in its Complaint.

A. Enforceability of Contract

As an initial matter, both Oceana and Fulton County agree that the contract at issue consists of both: (1) Fulton County's Request for Invitation to Bid No. 07ITB58000YB-BR ("ITB") and (2) Oceana's Bid No. 07ITB58000YB-BR ("Bid") (collectively "the Contract"). (See Br. in Supp. of Def.'s Mot. for Summ. J. 1; Resp. in Opp'n to Def.'s Mot. for Summ. J. 21.) [1] Pursuant to Georgia law, "[a] written agreement can be formulated from separate signed documents." Bowman v. Walnut Mountain Prop. Owners Ass'n, 251 Ga. App. 91, 95, 553 S.E.2d 389, 393 (2001); see also Employers Commercial Union Ins. Co. v. Wrenn, 132 Ga. App. 287, 288, 208 S.E.2d 124, 125-26 (1974) ("In cases of contemporaneous agreements between the same parties with relation to the same subject matter, each writing may be used to ascertain the true intention of parties and may authorize a determination that when construed together they constitute [*5] as a whole but one contract."). The court will therefore conduct its inquiry by analyzing both the ITB and the Bid.

1 Oceana and Fulton County likewise agree that the Contract is governed by Georgia law. (See Br. in Supp. of Def.'s Mot. for Summ. J. 6; Resp. in Opp'n to Def.'s Mot. for Summ. J. 19.) The ITB states "[a]ll applicable laws and regulations of the State of Georgia and ordinances and regulations of Fulton County shall apply." (Compl. Ex. A P 12.)

Fulton County first argues that Oceana has failed to demonstrate a factual dispute as to the enforceability of the Contract. Specifically, the County asserts that O.C.G.A. § 36-10-1 requires all contracts entered into by the County to be entered on the minutes of the county governing authority. Fulton County says that as Oceana has not met its burden of "showing entry of the written Contract on the minutes of the Board of Commissioners of Fulton County," no issue of material fact exists as to the enforceability of the Contract, and summary judgment should be granted. (Br. in Supp. of Def.'s Mot. for Summ. J. 9.)

In Georgia, "[a] claim for breach of contract requires that a plaintiff show the breach of a contract and damages." Roland v. Ford Motor Co., 288 Ga. App. 625, 629, 655 S.E.2d 259, 263 (2007). [*6] First and foremost, "[u]nder O.C.G.A. § 13-3-1, the plaintiff in a breach of contract action has the burden of pleading and proving the existence of a valid contract." Eastview Healthcare, LLC v. Synertx, Inc., 296 Ga. App. 393, 398,

674 S.E.2d 641, 646 (2009). O.C.G.A. § 36-10-1 requires that "[a]ll contracts entered into by the county governing authority with other persons in behalf of the county shall be in writing and entered on its minutes." O.C.G.A. § 36-10-1. "To be enforceable, therefore, a contract with a county or subdivision of a county must comply with th[e]se requirements." Harden v. Clarke County Bd. of Educ., 279 Ga. App. 513, 513, 631 S.E.2d 741, 742 (2006) (citation and internal quotations omitted); see also Grech v. Clayton County, 335 F.3d 1326, 1342 n.31 (11th Cir. 2003) (recognizing statute's requirements); Ogletree v. Chester, 682 F.2d 1366, 1370 (11th Cir. 1982) ("Under Georgia law, any contract entered into with other persons in behalf of a county must be in writing and spread on the official minutes of the [County] Commission. Where that procedure is not followed, there is no enforceable agreement.") (internal citation omitted); Smith v. Murrath Enters., Inc., 243 Ga. App. 856, 856, 534 S.E.2d 125, 126 (2000) [*7] ("No party is entitled to the benefits of an alleged contract with a county unless there has been a full compliance with the requirements of the Code.").

In response to Fulton County's argument, Oceana asserts that the Fulton County Board of Commissioners ("the Board") did in fact enter the Contract into the minutes of one of its meetings. Specifically, Oceana provides evidence in the form of the Board's January 16, 2008 meeting minutes, which record the following:

> **08-0145 PURCHASING AND CONTRACT COMPLIANCE -- REQUEST APPROVAL OF LOWEST RESPONSIBLE BIDDERS. (APPROVE NUMBERS 1 & 2[)]**
>
> **A motion was made by Commissioner Lowe and seconded by Commissioner Boxill to approve numbers 1 and 2. The motion carried by a unanimous vote of 7-0-0. Chairman Eaves, Vice Chairman Edwards, and Commissioners Pitts, Riley, Lowe, Darnell, and Boxill voted yes**.
>
> . . . .
>
> **2. DEPARTMENT**: Information Technology
>
> **SERVICE/COMMODITY**: Web Hosting Services
>
> **BID #**: 07ITB56048YB-BR
>
> **TOTAL AMOUNT OF PURCHASE: $ 120,000**
>
> **PRIME CONTRACTOR**: Total Web Hosting Solutions (New Port Richey, FL)
>
> **CONTRACT TERM**: One (1) year from date of contract execution with two (2) one (1) year renewal options.
>
> **SCOPE OF SERVICES**: To provide complete managed [*8] dedicated web hosting to the County at large.
>
> **Mark Massey** -- 'Page 8. Purchasing and Contract Compliance. **08-0145**. Request approval of Lowest Responsible Bidders. Numbers one and two. General Services. . . .'
>
> **Commissioner Lowe** -- 'Move approval.'
>
> **Commissioner Boxill** -- 'Second.'
>
> **Chairman Eaves** -- 'Second. Let's vote please.'
>
> **Mark Massey** -- 'That passes, unanimously.'

(Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 29 at 92-93.) Likewise, Oceana provides the deposition of Ryan Fernandes ("Mr. Fernandes"), the Director of Information Technology for Fulton County. Mr.

Fernandes was handed a copy of the previously described meeting minutes, and acknowledged that "[p]er the minutes [of the meeting]," the Board voted unanimously to approve the award of the web hosting services contract to Oceana. (See id. Ex. 2 at 11:22-12:15.) The court thus finds that Oceana has provided evidence sufficient to demonstrate a genuine issue of material fact as to whether the Contract was entered into the Board's minutes as required by O.C.G. A. § 36-10-1. Therefore, it denies summary judgment to Fulton County on the breach of contract claims relating to the enforceability of the Contract. [2]

> 2 Because the court finds [*9] that Oceana has satisfied its summary judgment burden of demonstrating that the Contract was entered into the Board minutes, and thereby enforceable, this Order will not address Oceana's alternative arguments that: (1) Fulton County admitted the existence of the Contract in its Answer and Counterclaim; and (2) the County failed to raise a lack-of-contract defense in its Answer or Discovery Responses. (Resp. in Opp'n to Def.'s Mot. for Summ. J. 18.)

B. Length of the Contract

Fulton County next asserts that the Contract with Oceana was for a one-year term, and that for any periods of time past this initial year, the County had the option to renew the Contract. In support, the County points to the Contract, which purportedly provides for an initial one-year term as well as two "one (1) year renewable options." (Br. in Supp. of Def.'s Mot. for Summ. J. 11.) Fulton County says that because "[t]here is no evidence in the record of any . . . exercise of the renewal options . . . Oceana . . . has no contract rights related to th[e]se years." (Id. at 12-13.) It argues that "[i]n [*10] the absence of . . . a renewal, Oceana has, at most, rights under the initial one year term of the Contract, if any." (Id. at 12.) The County concludes that as such, "the Court should dismiss all claims by Oceana based upon the renewal years." [3] (Id. at 13.)

> 3 This argument is made in conjunction with the County's assertion that "Oceana is not entitled to damages representing three years n' payment of the contract price." (Br. in Supp. of Def.'s Mot. for Summ. J. 9.) The court addresses this argument as a separate issue in the next section.

In response, Oceana asserts that the Contract is ambiguous as to whether it was for a one-year term or a three-year term. [4] To support its argument, Oceana cites, *inter alia*, to the actual language of the Contract, as well as the testimony of Oceana's Director, who says that the company "saw it as a three-year contract." (Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 3 at 19:10-11.) Oceana states that "because the contract is ambiguous, a jury should determine the parties n' intent concerning the length of the contract." (Id. at 22.) Oceana thus concludes that summary judgment should be denied on its breach of contract claims to the extent that they [*11] are based on terms in excess of one year.

> 4 Implicit in its argument that the Contract was for a single three-year term is the assertion that the Contract did not contain renewal terms for up to two additional years.

Pursuant to Georgia law, "the construction of [a] contract is a question of law for the court." Duffett v. E & W Props., Inc., 208 Ga. App. 484, 486, 430 S.E.2d 858, 859 (1993); see also Adams v. State Farm Mut. Auto. Ins. Co., 298 Ga. App. 249, 679 S.E.2d 726, 2009 WL 987457, at *1 (Ga. Ct. App. 2009) (noting that "contract disputes are particularly well suited for adjudication by summary judgment because construction of contracts is ordinarily a matter of law for the court.") (citation and internal quotations omitted). "Where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties," as this provides "the only evidence of what the parties intended and understood by it." UniFund Fin. Corp. v. Donaghue, 288 Ga. App. 81, 82, 653 S.E.2d 513, 515 (2007) (citation and internal quotations omitted); see also Mitchell v. Cambridge Prop. Owners Ass'n, 276 Ga. App. 326, 328, 623 S.E.2d 511, 513 (2005) ("the goal [*12] of contract construction is to carry out the intent of the parties."); Duffett, 208 Ga. App. at 486, 430 S.E.2d at 859 ("if no ambiguity appears, the trial court enforces the contract according to its terms irrespective of all technical or arbitrary rules of construction."). "The existence or nonexistence of ambiguity in a contract is [itself] a question of law for the court." UniFund, 288 Ga. App. at 83, 653 S.E.2d at 515-16; see also Duffett, 208 Ga. App. at 486, 430 S.E.2d at 859 ("if ambiguity does appear, the existence or non-existence of an ambiguity is itself a question of law for the court.") (citation and internal quotations omitted). Importantly, "[p]arol evidence is not admissible to contradict or construe an unambiguous

contract." UniFund, 288 Ga. App. at 82-83, 653 S.E.2d at 515. And finally, "[a] jury question arises only when there appears to be an ambiguity in the contract which cannot be negated by the court's application of the statutory rules of construction." Duffett, 208 Ga. App. at 486, 430 S.E.2d at 859 (citation and internal quotations omitted).

After examining the language of the Contract, the court finds that it is unambiguous, and provides for a one-year term [*13] and the option for up to two single year renewals. The ITB states: "TERM OF CONTRACT: One (1) year from date of contract execution with two (2) one (1) year renewable options at the request of Fulton County[.]" (Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 11 P 8.) Importantly, "an option to renew . . . [is itself] a new contract" upon exercise of the option, and does not constitute a part of the original contract. Ehrlich v. Teague, 209 Ga. 164, 168-69, 71 S.E.2d 232, 235-36 (1952) ("The option contemplates that the lessors would renew the contract, by a new lease, for an additional year."); see also Martin v. Schindley, 264 Ga. 142, 143, 442 S.E.2d 239, 241 (1994) ("An option becomes a contract between the parties binding from the date of its execution when the option is exercised according to its terms."). Additionally, another portion of the ITB requests cost information specifically relating to a one-year term: Section 9, which contains pricing forms, requests that the bidder list the "[c]ost to provide all services for *1 year*." (Resp. in Opp'n to Def.'s Mot. for Summ. J. Ex. 11 at 55) (emphasis added). Oceana's Bid itself states that "[t]he Bid will be for *one year* with 2 (two) [*14] one (1) year renewals at the County's option." (Id. Ex. 12 at 7) (emphasis added). And in responding to the County's request for a total cost amount for "all services for 1 year," Oceana stated an amount of $ 120,000, which ultimately corresponds with Oceana's total bid amount. (Id. Ex. 12 at 14, 18.)

In arguing that the Contract is ambiguous, and a fact issue exists as to whether it was to last for one year or three years, Oceana first asserts that "there is nothing in the contract that explains how the County may exercise (or not) the so-called option [to renew]." (Id. at 22.) However, the absence of specific provisions as to how Fulton County may "request" that the Contract be renewed for a second and third year does not demonstrate an ambiguity as to the Contract's length. (Id. Ex. 11 P 8.) To the contrary, in acknowledging that the Contract was to be renewed, Oceana negates its own argument that the Contract was for a single three-year period.

Oceana also points to: (1) the ITB's "General Conditions" page, which states that "[t]he Vendor will be allowed a market cost increase of up to 5% each renewal year," (id. at 53), and (2) the "Pricing Forms" which provide that "[b]ased on [*15] growth and additional projects, the vendor and Fulton County will negotiate the renewal cost for the 2nd and 3rd year." (Id. at 55.) This language supplies further support for the finding that the Contract provided unambiguously for an initial one-year term, and two separate one-year renewal options. That the Contract made provisions for increased costs for potential second and third years does not support Oceana's assertion that the Contract was an agreement lasting for three-years. [5] It merely allowed for potential cost changes in years two and three -- *if* the County determine that it wanted to request a renewal of the Contract past the initial one-year term. The court thus finds that the Contract's own language clearly provides that it was to last for one year, and that Fulton County, if it so desired, could request to exercise the Contract's renewal option for up to two additional one-year terms. [6]

5 However, Oceana does argue that the renewal terms of the Contract evidence that "the parties contemplated that Plaintiff would retain the contract for three years." (Resp. in Opp'n to Def.'s Mot. for Summ. J. 21.) That the parties may have contemplated having an agreement that went [*16] on for three years does not change the unambiguous language of the Contract regarding its term.

6 The deposition testimony of Alexander Kalasinsky and Wayne Boula provided by Oceana is not properly considered in construing the terms of the Contract. See UniFund, 288 Ga. App. at 82-83, 653 S.E.2d at 515 ("[p]arol evidence is not admissible to contradict or construe an unambiguous contract."). Likewise, Oceana's argument that a jury should determine the parties n' intent concerning the length of the Contract is unpersuasive, as "[a] jury question arises only when there appears to be an ambiguity in the contract." Duffett, 208 Ga. App. at 486, 430 S.E.2d at 859 (citation and internal quotations omitted).

In addition, Oceana has not put forth any evidence demonstrating a factual dispute as to whether Fulton

County in fact renewed the Contract, such that Oceana would have claims for breach of contract based upon the renewal periods. "An option becomes a contract between the parties binding from the date of its execution when the option is exercised according to its terms." Martin, 264 Ga. at 143, 442 S.E.2d at 241; see also Redmond v. Sinclair Refining Co., 204 Ga. 699, 707, 51 S.E.2d 409, 414 (1949) [*17] (stating that an option to renew a lease is a "conditional contract," and that only "when the condition has been made absolute by a compliance with its terms, [does] the contract become [] mutual, and capable of enforcement by either party.") (citation and internal quotations omitted). While one party holds the option to renew, the other party "has no contract right to a renewal of the [contract] beyond the term originally stated." Hall v. Provident Life & Accident Ins. Co., 48 Ga. App. 359, 359, 172 S.E. 721, 721 (1934) (also stating that a failure of the party holding the option to renew "does not amount to a repudiation or violation of the contract."). Oceana does not argue that Fulton County exercised its option to renew the Contract past the initial one-year term, nor does it provide any evidence to support such an assertion. [7] The court therefore finds that Oceana has not established that any additional contracts existed between itself and the County based on the renewal options available in the Contract.

> 7 Oceana also argues that Fulton County "waived its right to th[e] contractual [renewal] benefit because (1) it told Total Web that the contract would last for at least three [*18] years, and (2) it improperly and prematurely terminated the contract." (Resp. in Opp'n to Def.'s Mot. for Summ. J. 24.)
>
> > All that was said between the contracting parties in relation to the terms and stipulations of the contract is presumed to have been merged in the written contract, which is the highest and best evidence of the contract between the parties, in the absence of any evidence as to fraud, accident, or mistake, at the time of its execution, delivery and acceptance by the contracting parties.
>
> Sullivan v. Cotton States Life Ins. Co., 43 Ga. 423, 1871 WL 2575, at *3 (Ga. 1871). Oceana has not alleged the presence of accident, fraud, or mistake. Furthermore, Oceana has not provided, nor is the court otherwise aware of, any legal or evidentiary support for its assertions.

The Contract is unambiguous in providing that its duration was a one-year period, and contained options to renew for up to two separate one-year terms at Fulton County's request. There being no factual dispute as to whether the County exercised its right to renew the Contract, the court finds that summary judgment is warranted on all breach of contract claims alleged by Oceana to the extent that they are based [*19] upon any of the renewal periods subsequent to the initial one-year term of the Contract.

Oceana also argues that because Fulton County did not provide an Answer to Oceana's Second Amended Complaint, the County "is, accordingly, in default and is not entitled to summary judgment." (Resp. in Opp'n to Def.'s Mot. for Summ. J. 25.) In support, Oceana cites to Rule 15(a)(3). Rule 15 states: "Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later." Fed. R. Civ. P.

This argument calls for a couple of responses. In addition to that portion of Rule 15 cited by Oceana, the rule also requires a party seeking to amend a pleading (after a responsive pleading has been filed) to obtain either the written consent of the opposing party, or the court's leave. See Fed. R. Civ. P. 15(a)(2). The docket of this proceeding reflects neither the written consent of Fulton County, nor leave of the court to amend a second time. Oceana states that Fulton County "requested" that Oceana amend its complaint, however the court is not privy to [*20] any written consent from Fulton County. In light of the fact that the record of this case does not demonstrate that the Second Amended Complaint was filed in compliance with Rule 15(a)(2), the court would be hard-pressed to enforce a default judgment against Fulton County as a result.

As is clear from the language of Rule 15 cited by Oceana, unless a deadline for responding to an amended pleading is specially set by the court, the responsive pleading would be due within 10 days. Again, however, the court was given no opportunity to specially set a deadline for Fulton County's responsive pleading, as Oceana gave no notice of its intent to amend its

Complaint for a second time.

Even assuming that Fulton County was required to file a responsive pleading within 10 days, as opposed to 30 days, [8] this Circuit does not favor defaults, but strongly favors resolution of disputes on the merits. Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc., 740 F.2d 1499, 1510 (11th Cir. 1984). The Federal Rules also provide for setting aside a default where (1) the default was not a result of culpable conduct by the defendant; (2) the plaintiff would not be prejudiced by the setting aside of a default; [*21] and (3) the defendant has a meritorious defense. Ritts v. Dealers Alliance Credit Corp., 989 F. Supp. 1475, 1480 (N.D. Ga. 1997) (Forrester, J.); see also Fed. R. Civ. P. 55. Oceana has made no showing on any of these points, and, as discussed above, Fulton County has a meritorious defense as to some of Oceana's claims. Perhaps for all of these reasons, Oceana has not asked this court to enter a default against Fulton County, and the court will not do so now. Also for these reasons, the court rejects Oceana's invitation to refuse Fulton County summary judgment on this basis.

8 Oceana filed the Second Amended Complaint on April 15, 2009, and Fulton County filed its Motion for Summary Judgment on May 14, 2009.

C. Damages Limitation

Finally, in making its argument that the Contract was for a one-year period, Fulton County takes issue with the amount of damages Oceana seeks for the alleged breach of contract. The County argues "Oceana is not entitled to damages representing three years n' payment of the contract price," and asserts that summary judgment should be granted on Oceana's claim that it "has been damaged in the amount of at least $ 360,000.00." (Br. in Supp. of Def.'s Mot. for Summ. [*22] J. 9.) Of course, the court has already granted summary judgment on Oceana's breach of contract claims based upon renewal periods occurring subsequent to the initial one-year term, and Oceana is thereby barred from recovering damages for what it has alleged to be years two and three of the contract.

Under Georgia law, "[d]amages are given as compensation for the injury sustained as a result of the breach of a contract." O.C.G.A. § 13-6-1. The measure of damages are "such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable result of its breach." O.C.G.A. § 13-6-2; see also State of Ga., Dep't of Transp. v. Douglas Asphalt Co., 297 Ga. App. 470, 472-73, 677 S.E.2d 699, 702 (2009); S. Bell Tel. & Tel. Co. v. Coastal Transmission Serv., Inc., 167 Ga. App. 611, 619, 307 S.E.2d 83, 91 (1983) ("damages recoverable for breach of contract are limited to those within the contemplation of the defendant at the time the contract was made.") (citation and internal quotations omitted). Importantly," [t]he question of damages [is] one for the jury." O.C.G.A. § 13-6-4 (noting that "a reviewing [*23] court should not interfere unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias."). Because any potential award of damages is within the province of the jury, this court will not grant summary judgment limiting the amount of damages that Oceana may seek to recover for the one-year term of the contract. Summary Judgment is therefore denied as to the limitation of damages for the one-year term of the contract. [9]

9 Oceana has filed a Motion for Leave to File Sur-Reply Brief in Further Opposition to Defendant's Motion for Summary Judgment, arguing that Fulton County improperly asserted in its Reply Brief a new argument that the Georgia Constitution prohibits a multi-year contract with Oceana. However, because the court has held that the Contract's language itself is determinative as to its duration, and did not consider the constitutional argument in coming to its decision, Oceana's Motion for Leave to File Sur-Reply Brief is denied as moot.

IV. Summary

For the foregoing reasons, Fulton County's Motion for Summary Judgment [Doc. No. 48], is GRANTED IN PART and DENIED IN PART. The Motion is GRANTED as to all breach of contract and [*24] damage claims alleged by Oceana based upon renewal periods occurring subsequent to the initial one-year term. The Motion is otherwise DENIED. Oceana's Motion for Leave to File Sur-Reply Brief in Further Opposition to Defendant's Motion for Summary Judgment [Doc. No. 77] is DENIED AS MOOT. The parties are hereby DIRECTED to file their Consolidated Pretrial Order within thirty (30) days of the date of this Order.

IT IS SO ORDERED, this 27th day of August, 2009.

/s/ Beverly B. Martin UNITED STATES DISTRICT JUDGE

BEVERLY B. MARTIN