

STATE OF MAINE  
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET  
Location: West Bath  
Docket No. BCD-WB-CV-07-08

TD Banknorth, N.A.,

Plaintiff

v.

Benjamin Hawkins and  
Timothy Morse,

Defendants

**DECISION AND ORDER**  
(Supplemental Motion for Summary Judgment)

This matter is before the Court on Plaintiff TD Bank, N.A.'s Supplemental Motion for Summary Judgment. Through its motion, Plaintiff asks the Court to enter judgment in its favor on the remaining counts of the Defendants' Counterclaims. In particular, Plaintiff maintains that given the result in two companion cases, Plaintiff is entitled to judgment as a matter of law on Defendant Hawkins' defamation claim (Count VII) and Defendant Morse's fraud/misrepresentation claim (Count VIII).

Discussion

In this action, through their counterclaims, Defendants have asserted fraud/misrepresentation and defamation claims against Plaintiff, which claims are based upon alleged statements of two of Plaintiff's employees, Dana Wedge and Lawrence Wold. While this matter was pending, Defendant Hawkins commenced a separate action for defamation against Mr. Wedge, a corporate officer employed by Plaintiff;<sup>1</sup> Defendant Morse asserted a fraud/misrepresentation action against Mr. Wold, another corporate officer employed by Plaintiff.<sup>2</sup>

In January 2009, the Court granted the defendants' motions for summary judgment in both of the companion matters. Following the entry of summary judgment in the companion matters, Plaintiff requested, and was granted, permission to file this supplemental motion for summary judgment. In its motion, Plaintiff maintains that because Defendants' remaining counterclaims consist of Defendant

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<sup>1</sup> The action was captioned, *Hawkins & Morse v. Wedge*, BCD-CV-08-15.

<sup>2</sup> The action was captioned, *Hawkins & Morse v. Wold*, BCD-CV-08-16.

Hawkins' defamation claim and Defendant Morse's fraud/misrepresentation claim, given the judgments entered in the companion matters, the Defendants' remaining counterclaims are barred by the principle of *res judicata*.

In *Machias Savings Bank v. Ramsdell*, 1997 ME 20, ¶ 9, 689 A.2d 595, 599, the Law Court described the doctrine of *res judicata* as a "court-made collection of rules designed to ensure that the same matter will not be litigated more than once ... The doctrine has developed two separate components, issue preclusion and claim preclusion. *Id.* According to the Court in *Ramsdell*:

[i]ssue preclusion, also referred to as collateral estoppel, prevents the relitigation of factual issues already decided if 'the identical issue was determined by a prior judgment, and ... the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding.' Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action.

*Id.*

Although both issue preclusion and claim preclusion might be applicable in this matter, collateral estoppel (i.e., issue preclusion) is the more pertinent principle. In fact, the record establishes that the issues presented in the companion actions are the same as those alleged in the Defendants' counterclaims. That is, in the remaining counterclaims, as they did in the companion actions, Defendant Hawkins asserts a defamation claim based upon statements made by Mr. Wedge, and Defendant Morse seeks to recover damages based upon the fraud/misrepresentation of Mr. Wold. Because the issues in this case are identical to the issues presented in the companion matters, the question is whether Defendants had a fair opportunity and incentive to litigate the issues in the companion matters.

In their opposition to Plaintiff's motion, Defendants contend that they were deprived of a fair opportunity to litigate the matters in part due to alleged discovery violations by Plaintiff and the individual defendants in the companion actions, and the Court's failure to address the violations effectively. Simply stated, Defendants' arguments fail. First, to the extent that the Court was concerned about the conduct of depositions or any other discovery initiatives in this matter or the companion matters, the Court addressed the issues directly with the parties, and has been available to the parties in

the event that additional discovery disputes arose. Moreover, Defendants' assertion that "[t]he Court's response in the Wedge and Wold cases was to consider discovery violations as evidentiary matters to be resolved at trial"<sup>3</sup> mischaracterizes the Court's management of the numerous discovery disputes in these matters. If the Court had concluded that a party committed a discovery violation, the Court would have granted immediate relief, and would not have deferred the issue to trial. Contrary to Defendants' arguments, the Court did not conclude that Plaintiff committed the many discovery violations alleged by Defendants. In response to some of Defendants' assertions, the Court observed that Defendants could raise at trial some of the issues about which Defendants complained (e.g., Plaintiff's inability to produce certain information because it did not exist) if Defendants believed that the evidence is relevant to the trial issues. The Court did not, as Defendants contend, defer to trial the consequence of a proven discovery violation.

Defendants also argue that they did not have incentive to litigate the case because "[t]he incentive was frustrated by the improper tactics of Wedge and Wold which the Court has allowed to take place on the basis that the problems could be resolved at trial that could be reached."<sup>4</sup> As explained above, Defendants' assertion that Plaintiff and its agents engaged in inappropriate conduct that was condoned by the Court is unsupported by the record, and mischaracterizes the proceedings to date. Nevertheless, even if Plaintiff, Mr. Wedge, or Mr. Wold committed one or more discovery violations, and even if the Court erred in its resolution of any of the discovery disputes, Defendant's argument that they lacked incentive to litigate the companion cases must fail. Whether a party had incentive to litigate a matter for purposes of collateral estoppel depends on whether the party had an interest in the matter such that the party would be or should be motivated to participate in the matter. The issue is not, as Defendants' argument suggests, whether a party was discouraged by court rulings or an opponent's management of the case. Given that *Defendants* asserted the claims in the companion actions after they asserted the claims in this action, the Defendants clearly had the requisite incentive to litigate the claims.<sup>5</sup>

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<sup>3</sup> Joint Objection by Defendants Hawkins and Morse to Plaintiff's Supplemental Motion for Summary Judgment, p. 12.

<sup>4</sup> Joint Objection by Defendants Hawkins and Morse to Plaintiff's Supplemental Motion for Summary Judgment, p. 13.

<sup>5</sup> As part of this argument, Defendants also contend that because they did not respond to the motions for summary judgment in the companion actions, the judgments entered in those cases are analogous to default judgments and, therefore, should have no preclusive effect. Without commenting upon Defendants' basic premise (i.e., that collateral estoppel is not applicable when the prior action is resolved by way of default), the Court finds Defendants' argument to be unpersuasive. The Court did not enter default judgments in the companion actions, nor did the Court automatically enter the judgments upon the defendants' failure to respond to the motions for summary judgment. Indeed, the Court must review the record to

Defendants further maintain that Plaintiff has waived its ability to argue that Defendants' counterclaims are barred by collateral estoppel. Citing *Diversified Foods, Inc., v. The First National Bank of Boston*, 985 F.2d 27 (1<sup>st</sup> Cir. 1993), Defendants contend that because Plaintiff did not contest, "at the earliest opportunity," Defendants' assertion of the same claims in separate actions, Plaintiff acquiesced to the separate actions and cannot now insist upon the application of the doctrine of collateral estoppel. Once again, the record does not support Defendants' contention. In the responsive pleading to Defendants' complaints in the companion cases, the *first* opportunity for Plaintiff and its agents to address the issue, *res judicata* and collateral estoppel were asserted as affirmative defenses. In addition, Plaintiff's agents identified the issue in their application to transfer the companion cases to the Business and Consumer Docket. Finally, after final judgment was entered in the companion cases, Plaintiff promptly filed this motion. In short, contrary to Defendants' argument, Plaintiff and its agents have consistently raised issue preclusion as a potential defense, and did not acquiesce in Defendants' presentation of the issues in two separate actions.

Finally, Defendants argue that the equities militate against application of the doctrine of collateral estoppel. In support of their equitable argument, Defendants cite the time and energy that the parties and the Court have devoted to this action and the companion actions. In essence, Defendants urge the Court not to decide their counterclaims on a summary basis in deference to the parties' pretrial efforts in the case. Defendants do not cite, nor is the Court aware of any authority that allows the Court, when considering a motion for summary judgment, to ignore the record evidence, or the applicable law out of deference to the resources that were committed to the case. Parties frequently file motions for summary judgment only after extensive discovery, which is necessary to develop a record from which the parties and the court can assess whether summary judgment is appropriate.<sup>6</sup>

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determine whether summary judgment is appropriate. M.R. Civ. P. 56(e); *See, De La Vega v. The San Juan Star, Inc.*, 377 F.3d 111, 115-16 (2004). Consistent with this requirement, in each of the companion cases, the Court reviewed the record and concluded that "[t]he record establishes that there is no factual or legal basis upon which Plaintiffs could recover against Defendant."

<sup>6</sup> Defendants also allege that they "could not" respond to the motions for summary judgment in the companion actions. (Joint Objection by Defendants Hawkins and Morse to Plaintiff's Supplemental Motion for Summary Judgment, p. 16). Defendants have failed to present a legally recognizable explanation for their alleged inability to respond to the motions.

Conclusion

Based on the foregoing analysis, the Court concludes that the issues presented by Defendants' remaining counterclaims are the same issues that were presented and decided in the cases of *Hawkins & Morse v. Wedge*, BCD-CV-08-15, and *Hawkins & Morse v. Wold*, BCD-CV-08-16. The record establishes that Defendants had a fair opportunity and incentive to litigate the issues in the companion actions. The Defendants are, therefore, precluded by the doctrine of collateral estoppel from litigating the issues again in this action. Accordingly, the Court grants Plaintiff's Supplemental Motion for Summary Judgment.

The entry is:

Plaintiff's Supplemental Motion for Summary Judgment is granted.  
Judgment entered in favor of Plaintiff on Defendants' remaining counterclaims.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 5/27/09

  
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Justice, Maine Business & Consumer Docket

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