STATE OF MAINE
Cumberland, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-14-44

EMERA MAINE

Plaintiff

v.

CPM CONSTRUCTORS

Defendant

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Emera Maine ("Emera") moves for summary judgment on the Counterclaim of Defendant CPM Constructors'("CPM") for breach of contract (Count I); negligence (Count II); misrepresentation (Count III); and equitable indemnification (Count IV).

As agreed by the parties, the court decides the motion without oral argument. *See* M.R. Civ. P. 7(b)(7). For the reasons discussed below, the court grants Emera's Motion as to all counts of CPM's Counterclaim.

I. Background

At some time prior to January 31, 2005, CPM was awarded a contract to perform roadwork on Route 1A, in Dedham Maine. Emera's Supp. S.M.F., ¶1. At all times relevant to this dispute, Bangor Hydro-Electric Company ("BHE"), now operating as Emera, owned land running alongside portions of Route 1A in Dedham Maine by virtue of a "Quit-Claim Deed With Covenant" from George Pressley, Jr. recorded at the Hancock County Registry of Deeds in Book 2778, Page 153 (the "Quit-Claim Deed"). CPM's Opp. S.M.F., ¶¶2-3; Exhibit D to Emera's Supp. S.M.F., Quit-Claim Deed.

On or about January 31, 2005, CPM and BHE entered into a written contract authorizing CPM to take certain actions on BHE's property, including harvesting trees and disposing of fill, rock, aggregate, and other earthen material (the "Roadwork Contract"). Exhibit A to CPM's Opp. S.M.F., Roadwork Contract; CPM's Opp. S.M.F., ¶¶2, 6. The Roadwork Contract recited that BHE "is the owner of certain land in said Dedham by virtue of a deed from George Pressley, Jr. recorded at the Hancock County Registry of Deeds in Book 2778, Page 153[.]" Exhibit A. to CPM's Opp. S.M.F., Roadwork Contract. The Roadwork Contract further provided that:

> CPM shall indemnify and hold harmless BHE, its successors and assigns, against any and all claims, suits, damages or causes of action (including attorney's fees) which may arise as a result of the activities contemplated herein.

Id. The Quit-Claim Deed, referenced in the Roadwork Contract, provides that it is:

> SUBJECT To the protective covenants pertaining to the herein conveyed premises contained in the Declaration of Protective Covenants executed by Grantor and Katherine R. Pressley, of even date, to be recorded in the Hancock County Registry of Deeds just prior to this deed

Exhibit D to Emera's Supp. S.M.F., Quit-Claim Deed.

The Declaration of Protective Covenants referenced in the Quit-Claim Deed, places a number of restrictions upon the deeded land. Exhibit E to Emera's Supp. S.M.F., Exhibit C therein, Declaration of Protective Covenants.

Pursuant to the Roadwork Contract, CPM cut and cleared trees from a portion of BHE's land and disposed of fill, rock, aggregate, and other earthen material on BHE's land. Emera's Supp. S.M.F., ¶¶5-6.

By means of a complaint dated December 15, 2009, filed in the Hancock County Superior Court, Tonya and Christian Andersen, the owners of the property benefited by the Declaration of Protective Covenants, brought suit against BHE and CPM for breach of covenant, nuisance, and infliction of emotional distress (the "Andersen Suit"). Exhibit E to

Emera's Supp. S.M.F., Andersens' Complaint, Counts I through V. The Andersen Suit arose out of CPM's activity on BHE's land under the Roadwork Contract. *Id.* at ¶¶11, 15-43. BHE and CPM asserted cross-claims against each other in the Andersen Suit, but did not pursue the claims due to an agreement to postpone all such claims until resolution of the Andersen Suit. CPM's A.S.M.F., ¶6.

In a post-trial order on the taxation of costs in the Andersen Suit, the Superior Court noted that CPM and BHE "presented what amounted to a joint defense." Exhibit G to Emera's Supp. S.M.F., Hancock County Superior Court Post-Trial Order on Costs, 1. The Andersens eventually obtained judgment against BHE for breach of covenant. CPM's A.S.M.F., ¶4. CPM was not found liable on any of the Andersens' claims. *Id.*

The Superior Court's post-trial order on costs awarded the Andersens as prevailing parties costs against Emera, and awarded CPM as prevailing party costs against the Andersens. .Exhibit G to Emera's Supp. S.M.F.,*supra* at 1. The court explained the latter award by noting that "Plaintiffs did not prevail over CPM. Although the question of CPM's liability for violating the restrictive covenant was not actually determined, it was not necessary to decide that issue because, regardless of the outcome, the plaintiffs were not going to be awarded injunctive relief against CPM, as the court's decision on the issue clearly indicated". *Id.* The court also declined the Andersens' suggestion that Emera, rather than they, be ordered to pay CPM's costs, "because CPM did not have a claim against [Emera] upon which it prevailed." *Id.* at 2.

In March 2014, Emera brought this action against CPM, seeking indemnification, pursuant to the Roadwork Contract, for the judgment entered against Emera in the Andersen Suit. CPM filed its Counterclaim against Emera on May 1, 2014 seeking damages for the attorneys' fees and costs of litigation incurred in its defense of the Andersen Suit.

II. Analysis

The damages CPM seeks to recover in its Counterclaim consist only of the attorney fees and unreimbursed costs CPM incurred in defending the Andersen Suit. CPM's Opp. to Motion, 2 ("CPM counterclaimed, seeking damages for the attorneys' fees and costs of litigation incurred from defending itself from the Andersens' claims"). Emera asserts and CPM agrees that "the sole issue presented for resolution on Emera's Motion for Summary Judgment is whether CPM may recover its attorneys' fees and costs from the Andersen Suit as damages in this action." CPM Opp. to Motion at 3. *See* Emera's Motion, 4-6.

All of the claims advanced in the counts of CPM's Counterclaim require proof of actual damages.[1] Therefore, if, as a matter of law, CPM cannot recover its attorney fees and costs incurred in the Andersen Suit, it cannot recover damages on any of the counts in its Counterclaim, and Emera would be entitled to summary judgment.

Emera's Motion asserts that: (1) principles of *res judicata* bar CPM from recovering its costs; and (2) the American Rule prohibits CPM from recovering its costs and attorneys' fees incurred in the Andersen Suit. CPM responds by arguing that *res judicata* does not bar its claims, and that its claims fall within the "collateral litigation" exception to the American Rule.

A. Standard of Review.

To survive a motion for summary judgment on a claim, "the [party asserting the claim] must establish a prima facie case for each element of [its] cause of action." *Bonin v. Crepeau*, 2005 ME 59, ¶8, 873 A.2d 346. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c). A "material fact" is one that can affect the outcome of the case, and a genuine issue exists when there is sufficient evidence for a fact finder to choose between

[1] *See In re Hannaford Bros. Co. Customer Data Security Breach Litigation*, 2010 ME 93, ¶8, 4 A. 3d 492

competing versions of the fact. *Lougee Conservancy v. CitiMortgage, Inc.*, 2012 ME 103, ¶11, 48 A.3d 774. Although parties may differ as to the legal conclusions to draw from the record, summary judgment is proper where the facts are not in dispute. *S.D Warren Co. v. Town of Standish*, 1998 ME 66, ¶9, 708 A.2d 1019 (Me. 1998). The court views the evidence in the light most favorable to the non-moving party. *Webb v. Haas*, 1999 ME 74, ¶18, 728 A.2d 1261.

B. Principles of Res Judicata Do Not Bar CPM's Claim for Costs From the Andersen Suit

Emera argues CPM is precluded under principles of *res judicata* from recovering the costs it incurred in the Andersen Suit because these costs were already denied to CPM. *Res judicata* and its companion doctrine of collateral estoppel are jurisprudential doctrines "designed to ensure that the same matter will not be litigated more than once." *Macomber v. Macquinn-Tweedie*, 2003 ME 121, ¶22, 834 A.2d 131 (quoting *Machias Sav. Bank v. Ramsdell*, 1997 ME 20, ¶11, 689 A.2d 595.) *See also* Emera's Motion, 11-12.

CPM responds that (1) Emera waived its right to assert a *res judicata* defense; (2) Emera is estopped from asserting *res judicata*; and (3) in any event, the Andersen court did not address whether CPM could recover its costs from Emera. CPM's Opp. to Motion, 9.[2]

"Waiver is the voluntary and knowing relinquishment of a right and may be shown by a course of conduct signifying a purpose not to stand on a right, and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon." *Dep't of Health and Human Servs. v. Pelletier*, 2009 ME 11, ¶16, 964 A.2d 630. "Equitable estoppel precludes a party from asserting rights which might perhaps have otherwise existed against another person who has in good faith relied upon such conduct, and has been led thereby to change his position

[2] CPM also asserted that Emera had waived the *res judicata* defense because it was not raised in its answer to CPM's Counterclaim. This argument is now moot because Emera, with CPM's permission, filed an Amended Answer to CPM's Counterclaim raising *res judicata* as a defense.

for the worse, and who on his part acquires some corresponding right." *Blue Star Corp. v. CKF Props., LLC*, 2009 ME 101, ¶27, 980 A.2d 1270.

Here, it is undisputed that BHE and CPM agreed to postpone resolution of all claims they might have against each other relating to the Andersen Suit. CPM's A.S.M.F., ¶6. The parties agree that, in reliance on that agreement, CPM did not pursue its cross-claim against BHE in the Andersen Suit. CPM's Opp. to Motion, 9-11; Emera's Reply, 5-6.

The order on costs in the Andersen Suit focused on the Andersens' request for costs against BHE, and CPM's request for costs against the Andersens. *See* Exhibit G to Emera's Supp. S.M.F., Hancock County Superior Court Post-Trial Order on Costs. In the course of denying the Andersens' suggestion that BHE rather than they should pay CPM's costs, the court noted that, because CPM was not a prevailing party in the case as to BHE, the court could not order BHE to pay CPM's costs. *Id.* CPM did not prevail against BHE because CPM agreed to defer its cross-claim, not because CPM's cross-claim was adjudicated in favor of BHE. Accordingly, neither CPM's cross-claim itself nor any entitlement to damages or costs associated with the cross-claim was adjudicated in the Andersen Suit, and CPM's Counterclaim is not barred by res judicata or collateral estoppel.

C. CPM's Claims for Attorney Fees and Costs Are Not Within the Collateral Litigation Exception to the American Rule

The American Rule provides that, "absent a statutory provision or contractual agreement, litigants bear their own attorney fees and litigation costs." *Colquhoun v. Webber*, 684 A.2d 405, 413 (Me. 1996). CPM does not assert any statute or contract as the basis for its claim for the attorney fees and costs incurred in the Andersen Suit.

CPM instead argues that its claims fall within another exception to the American Rule—the "collateral litigation" exception, sometimes called the "tort of another" exception.

The Restatement (Second) of Torts expresses the American Rule and the collateral litigation exception to it, as follows

> (1) The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation
>
> (2) One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.

Restatement (Second) of Torts § 914 (1979).

The status of the collateral litigation exception in Maine is uncertain. In *Soley v. Karll*, the Law Court noted that "Maine has not recognized the collateral litigation exception to the American rule . . .". 2004 ME 89, ¶11 n.3, 853 A.2d 775, 758 n.3. However, in an earlier decision, the Law Court espoused what appears to be the collateral litigation exception, without labeling it as such: "Where the wrongful act of a defendant has involved the plaintiff in litigation with others, or placed him in such relation to others as makes it necessary for him to incur expense to protect his interest, such costs and expenses, including attorneys' fees, must be treated as the legal consequence of a wrongful action and may be recovered as damages." *Gagnon v. Turgeon*, 271 A.2d 634, 635 (Me. 1970). This Order treats the collateral litigation exception as having been recognized in Maine in substance, if not in name.

The court in *Gagnon* also noted an important limitation on the collateral litigation exception to the American Rule: the exception "does not apply to attorneys' fees incurred in litigation between the plaintiff and the defendant or persons in privy to the contract agreement or events through which the litigation arises." *Id.* at 635-36 (citing *Armstrong Construction Co. v. Thomson*, 64 Wash.2d 191, 390 P.2d 976).

The cited *Armstrong Construction* opinion explains the rationale for both the exception and the limitation on the exception as follows:

> In those actions, where the acts or omissions of a party to an agreement or event have exposed one to litigation by third persons-that is, to suit by persons not connected with the initial transaction or event-the allowance of attorney's fees may be a proper element of consequential damages. . . . The fulcrum upon which the rule balances, then, is whether the action, for which attorney's fees are claimed as consequential damages, is brought or defended by third persons-that is, persons not privy to the contract, agreement or events through which the litigation arises.

Armstrong Constr. Co. v. Thomson, supra at 195-196, 390 P.2d at 979, *quoting Wells v. Aetna Ins. Co.*, 60 Wash.2d 880, 376 P.2d 644 (1962).[3]

Applied to this case, the "fulcrum upon which the rule balances" tilts against CPM. This case—"the action, for which attorney's fees are claimed as consequential damages"—is not "brought or defended by third persons-that is, persons not privy to the contract, agreement or events through which the litigation arises." CPM and Emera (then BHE) were both privy to the events in the underlying Andersen Suit, and are in privity through the Roadwork Contract.

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[3] In *Armstrong*, the builder of a home brought a lien action against the home owner, and the owner. The owners joined the architects to the suit as third-party defendants, demanding judgment against the architects for any amounts the builder might recover against the owners, and the owners' attorneys' fees for defending against the builder's suit. *Id.* at 977-78. The court determined that "[i]n the instant case, both the builder and the architect were privy to the construction contract; therefore, neither could be classified as third persons and the trial court properly excluded the owner's [sic] claim for attorney's fees reasonably incurred in defending the builder's lien foreclosure." *Id.* at 979-80.

Another Washington case illustrates the same principle, in the context of privity by virtue of events rather than privity of contract. In *Manning v. Loidhamer*, the State of Washington was named as a defendant in a motor vehicle accident case, and the State asserted cross-claims against the other defendants for indemnification. 3 Wash.App. 766, 538 P.2d 136, *rev. den.*, 86 Wash. 1001 (1975). The State was found not liable to the plaintiff and it requested an award of its attorneys fees incurred in defending the case, against the defendants who were found liable to the plaintiff. 3 Wash.App. at 768, 538 P.2d at 138. The court rejected the State's attorney fee claim on the basis of the rule in *Armstrong:*

> As in Armstrong, the State was privy to the events 'through which the litigation' arose. Armstrong involved a contract but the principle also applies to tort actions.

3 Wash.App. at 773, 538 P.2d at 141.

The reason why parties who are linked—"privy"—by virtue of a contract or events at issue in the underlying litigation cannot later take advantage of the collateral litigation exception is that they can implead each other in the underlying litigation by virtue of that connection, and such claims can and should be brought in the underlying litigation:

> The [collateral litigation exception] rule enabling recovery of attorneys' fees is designed to prevent the injustice of a situation where a blameless party must prosecute or defend an action in which the true party at fault cannot be brought into the litigation and made to indemnify the blameless party. The rule was created to aid the party who must litigate two actions to vindicate his rights: the first because of the wrongful conduct of a third party and the second for indemnity from the wrongdoer. By allowing attorneys' fees from the first action to be recovered in the second, the blameless party is made whole, put where he would have been but for the wrongful acts. *Where, as here, the party at fault could be joined in the first action, the inequitable situation does not exist. The blameless party has immediate recourse, and application of the rule is unnecessary.*

G & D Co. v. Durand Milling Co., Inc., 67 Mich.App. 253, 258, 240 N.W.2d 765, 767-68 (1976) (emphasis added).

The *G & D Co. v. Durand Milling Co., Inc.* opinion also points out that to interpret the collateral litigation exception to allow for recovery of attorney fees and costs on claims that could have been asserted in the underlying litigation would be bad jurisprudential policy: "With such precedent, [a party] would be foolish to implead an indemnitor. The longer the alleged wrongdoer remains out of the case, the more attorneys' fees could be charged against him. If the other party to the action did not bring in the third party wrongdoer or if the third party could not intervene, needless and repetitious litigation would be encouraged."

The circumstances of this case illustrate why the collateral litigation exception "does not apply to attorneys' fees incurred in litigation between the plaintiff and the defendant or persons in privy to the contract agreement or events through which the litigation arises." *Gagnon v. Turgeon, supra,* 271 A.2d at 635-36. The reason is that, without that limitation, the collateral exception litigation would swallow the American Rule, by permitting attorney fees

subject to the American rule to be claimed as damages in separate litigation. That is precisely what CPM's counterclaim seeks to accomplish.

Had CPM pursued its cross-claim in the Andersen Suit, CPM's recovery on its cross-claim against BHE would have been limited to indemnification for any damages awarded to the Andersens against CPM, and would not have included attorney fees. As noted at the outset, CPM's claims do not rest on any contractual fee-shifting provision, so the American Rule would have applied to CPM's cross-claim had it been pursued in the Andersen Suit. But since CPM was not found liable to the Andersens, there was no liability for Emera to indemnify.

CPM cannot avoid the American Rule on attorney fees by deferring its claim to this case. The rule that the collateral litigation exception does not apply to claims by parties "privy" to the contract or events in the underlying litigation is designed to prevent exactly such circumlocution of the American Rule.

Likewise, by deferring its claim to this case, CPM cannot seek as damages in this case costs that it would not have been awarded in the Andersen Suit even if it had pressed its cross-claim against BHE. No damages were awarded against CPM, so the jury would not have had to reach CPM's cross-claim, and CPM would not have recovered costs against BHE as a prevailing party. In other words, CPM's cross-claim may have been deferred by agreement, but it disappeared as a result of the verdict in its favor on the Andersens' claims against it.

Although CPM's counterclaim is labeled as asserting contract, negligence and equitable claims, all of CPM's theories of liability seek relief in the nature of indemnification for attorney fees and costs as to which CPM is not entitled to be indemnified.

Under CPM's view of the law, any co-defendant who was found not liable in a case could bring a later action to recover attorney fees against the co-defendant who was found liable to the plaintiff in the underlying case, on the theory that the at-fault defendant caused the

non-negligent defendant to be sued and to incur legal fees and costs. That actually was the argument made to and rejected by the Michigan court in the *Manning v. Loidhamer* case discussed in note 3, *supra*. In denying the State's attorney fee claim against co-defendants, the court noted that

> the State was privy to the events 'through which the litigation' arose. . . The State emphasizes that the jury absolved it of negligence. This fact is not the determining consideration in allowing attorney's fees as damage by one defendant against another. If it were, every defendant found not negligent could recover attorney's fees against another defendant who was found negligent. We have been cited to no case which goes that far.

13 Wash. App. 766. 773-74, 538 P.2d 136, 141 (1975).

III. Conclusion

Plaintiff Emera Maine is entitled to summary judgment on all four counts of CPM's Counterclaim, because CPM's damages consist only of its attorney fees and costs incurred in the Andersen Suit and because it cannot recover such damages as a matter of law. Whether or not the collateral litigation exception exists in Maine law, it does not apply here. The entry will be: Plaintiff Emera Maine's Motion for Summary Judgment is granted. Judgment shall be entered for Plaintiff Emera Maine on the Counterclaim of Defendant CPM Constructors.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated August 11, 2014

A.M. Horton
Justice, Business & Consumer Court

Entered on the Docket: 8-11-14
Copies sent via Mail __ Electronically ✓