STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-2018-04

EMILE CLAVET,

Plaintiff,

v.

KEVIN DEAN, et al.,

Defendants.

COMBINED ORDER ON MOTIONS FOR RECONSIDERATION AND REVISION

On June 4, 2019, this Court entered its order on these parties' cross-motions for partial summary judgment (the "Prior Order"), granting each motion in small part but otherwise denying the motions based on multiple genuine, material factual disputes that the Court identified in the Prior Order. Each side has moved for reconsideration of the Prior Order. Both motions are fully briefed, and the Court exercises its discretion and decides the motions without holding oral argument. M.R. Civ. P. 7(b)(7).

BACKGROUND

The facts of this case as alleged are well-known by the Court and the parties. (*See* Prior Order 1-6.) In a nutshell, Mr. Clavet and Mr. Dean, former business associates who founded, ran, and sold many companies together over the years, owned two LLCs—Blue Water Marina, LLC ("Blue Water"), and Covered Marina, LLC ("Covered")—that in turn owned and operated a marina (the "Marina") in Texas. Mr. Dean solicited Mr. Clavet for his membership interests in the businesses. After sharing with him accurate information about the struggles the marina had experienced over the years, allegedly inaccurate information that the Marina's bank was requiring personal guaranties on the Marina's line of credit, Mr. Dean suggested that the purchase price the men had paid for the Marina years ago was an appropriate valuation of the business: $2.5 million.

Mr. Clavet agreed and sold Mr. Dean his interest in the two companies based on Mr. Dean's appraisal (half of $2.5 million value minus debt).

However, Mr. Dean did not tell Mr. Clavet was that he was simultaneously negotiating the sale of the Marina to a third party, TCRG Opportunity X, LLC ("TCRG"), at a much higher price—originally, over eight million dollars, although the price was subsequently negotiated down to the still higher value of $7.9 million. Mr. Dean has claimed that he did mention something about TCRG's initial outreach to Mr. Clavet, but that Mr. Clavet responded that it sounded like a "waste of time. Over the course of barely a week, Mr. Dean was able to finalize the sale of the Marina to TCRG — a mere two days after he bought out Mr. Clavet's interests in the two LLCs based on a much lower valuation. Mr. Dean even informed TCRG that he needed to postpone the closing to accommodate this "small transfer of interests."

As explained in the Prior Order, fraud can be proved by silence or omission only when the defendant had a duty to speak, either because of a special relationship between the defendant and plaintiff or because a statute imposes such a duty, or where the defendant takes active steps to conceal the omission. (Prior Order 8-9.) Mr. Clavet argued at summary judgment that the undisputed facts established a fiduciary relationship between Mr. Dean and himself, but struggled to identify the grounds for such a relationship. The essence of his argument was that the specific facts of this case imposed a common law "limited" fiduciary duty on Mr. Dean to disclose the negotiations for the sale of the Marina to Mr. Clavet in this one transaction. The Court could find no authority for the principle of "limited" fiduciary duties or relationships and Mr. Clavet did not identify any such authority. The Court thus analyzed the issue under traditional legal principles and concluded that under Maine law, there is no legal basis to impose fiduciary duties on Mr. Dean

vis-à-vis Mr. Clavet, but that under Texas law, there is a factual dispute on that issue. Principally, it is that conclusion that both parties ask the court to revisit on the instant motions.

An interesting happenstance partly motivates Mr. Clavet's motion. In arguing for the proposition that Mr. Dean owed Mr. Clavet fiduciary duties, Mr. Clavet's written memoranda never mentioned perhaps the most obvious source of that duty: Mr. Dean's status as manager of Blue Water. At the time of the summary judgment hearing, Maine's Supreme Judicial Court had not established whether a manager of a LLC owes "default" fiduciary duties to the LLC or its members, although this Court and at least one other Superior Court had construed section 1559(1)(3) of Maine's LLC Act as imposing such a duty unless specifically waived in the LLC operating agreement. *See Cianchette v. Cianchette*, No. CV-16-249, 2018 Me. Super. LEXIS 13, at *34-40 (January 17, 2018); *Gleichman v. Scarcelli*, No. BCD-CV-17-11, 2019 Me. Bus. & Consumer LEXIS 8, *27-28 (March 7, 2019). At the oral argument, the Court inquired of both parties about this theory of proving a fiduciary duty, and Mr. Clavet responded that section 1559 "doesn't have any particular relevance to this case."

As it turned out, the Law Court construed Maine's LLC Act consistent with the trial court as imposing default fiduciary duties on LLC managers—in an opinion published approimately two hours after this Court entered the Prior Order. In that order, this Court, "[g]iven the unsettled state of the law on th[e] issue," had declined to apply a statute that Mr. Clavet himself argued had no particular relevance. (Prior Order 14.) *See Cianchette v. Cianchette*, 2019 ME 87, ¶¶ 33-35, __ A.3d __ ("The Act expressly imposes fiduciary duties upon the manager of an LLC"). In other words, the state of the law was settled a few hours later that same day. As analyzed in more detail below, in light of *Cianchette*, Mr. Clavet now asks the Court to apply a statute he once claimed was irrelevant. *Cianchette* also explicitly adopted the formulation of fraudulent misrepresentation

from the Restatement (Second) of Torts. *See Cianchette*, 2019 ME 87, ¶¶ 23-27; *see also* Restatement (Second) of Torts §§ 525, 530. Mr. Clavet argues here that this change in law likewise requires revision of the Prior Order's conclusions on his fraud claim.

ANALYSIS

Under M.R. Civ. P. 7(b)(5), a motion for reconsideration "shall not be filed unless required to bring to the court's attention an error, omission, or new material that could not previously have been presented." "Rule 7(b)(5) is intended to deter disappointed litigants from seeking 'to reargue points that were or could have been presented to the court on the underlying motion.'" *Shaw v. Shaw*, 2003 ME 153, ¶ 8, 839 A.2d 714 (quoting M.R. Civ. P. 7(b)(5) advisory committee's notes to 2000 amend., 3A Harvey & Merritt, *Maine Civil Practice* 270 (3d, 2011 ed.)). "A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment." M.R. Civ. P. 59(e). A trial court's ruling on a motion for reconsideration is reviewable for an abuse of discretion. *Shaw*, 2003 ME 153, ¶ 12, 839 A.2d 714.

Mr. Dean claims that his motion, which seeks reconsideration of the Court's conclusion that there is a genuine factual issue as to whether Mr. Dean had an informal fiduciary relationship with Mr. Clavet under Texas law, fits into the "omission" category of Rule 7(b)(5). The Court disagrees. The "omission" from Mr. Dean's summary judgment motion (and opposition to Mr. Clavet's motion) was the twenty-three Texas cases Mr. Dean cites in this motion. In his original motion, Mr. Dean cites to eight state and federal Texas cases, six in a single string cite, with limited use of parentheticals and virtually no analysis. Nothing prevented Mr. Dean from citing these twenty-three cases when the original motions for summary judgment were litigated, and much of his motion is reargument of one of the most hotly contested legal issues at summary judgment with

the benefit of analogy to cases he omitted to cite the first time. *See Shaw*, 2003 ME 153, ¶ 8, 839 A.2d 714.

Finally, having nonetheless considered the Texas authority Mr. Dean belatedly brings to the Court's attention, the Court is not convinced that it entitles Mr. Dean to judgment as a matter of law on the issue of whether he owed Mr. Clavet an informal fiduciary duty under the facts of this case. None of the cases cited involved parties who had worked together nearly as long as Mr. Clavet and Mr. Dean did. Other factors such as the parties' lengthy period of shared office space and decades-long personal friendship further remove this case from the Texas cases' holdings. Essentially, Mr. Dean asks this Court to credit the factors that evidence independence between the men and disregard the factors that evidence an informal fiduciary relationship—quintessential weighing of evidence that is inappropriate for summary judgment. *Arrow Fastener Co. v. Wrabacon, Inc*., 2007 ME 34, ¶ 16, 917 A.2d 123 ("a fact-finder, rather than a court acting on a motion for summary judgment, is responsible for weighing the evidence . . . ."). The Court denies the Deans' motion for reconsideration.

Mr. Clavet's motion is brought pursuant to M.R Civ. P. 54(b), which provides in relevant part that orders and decisions of trial courts are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liability of all the parties." In essence, however, Mr. Clavet's motion is one for reconsideration. *See* M.R. Civ. P. 7(b)(5). Mr. Clavet argues that the Law Court's opinion in *Cianchette v. Cianchette* changes the state of Maine law in two important ways: (1) it removed any uncertainty as to whether managers of LLCs are fiduciaries with respect to the LLC and its other members pursuant to 31 M.R.S. § 1559(1),(3); and (2) it explicitly adopted one restatement provision that neighbors another restatement provision that he urges this Court to apply in this case. The Court addresses each proposed revision in turn.

Mr. Clavet's first proposed revision fits nicely into the M.R. Civ. P. 7(b)(5) standard. A "change of controlling law" is one of three "compelling reasons" explicitly recognized by the Law Court as proper grounds for reconsideration of a court order. *See Lord v. Murphy*, 561 A.2d 1013, 1016 (Me. 1989) (citing 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 790 (1981)). Mr. Dean argues that regardless of the change in law, Mr. Clavet has waived the argument that 31 M.R.S. § 1559(1),(3) imposes fiduciary duties since he argued that statute had "no particular relevance" at the summary judgment hearing, before the Law Court had authoritatively construed the statute.

The Court concludes that Mr. Clavet has not waived the argument under the circumstances of this case. First, Mr. Dean's argument and authority with respect to waiver is misplaced. The issue is not whether Mr. Clavet has waived a legal right, such as a right to enforce a deed restriction, *see Chalet Susse Int'l v. Mobil Oil Corp.*, 597 A.2d 1350, 1351 (Me. 1991), but rather whether he is estopped from pursuing a legal argument that he previously seemed to disavow. This sounds much more like judicial estoppel than waiver. *See Me. Educ. Ass'n v. Me. Cmty. Coll. Sys. Bd. of Trs.*, 2007 ME 70, ¶ 16, 923 A.2d 914 (citation omitted). Judicial estoppel is a doctrine which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase, regardless of whether the issue was actually litigated previously. *Id.* (citations and quotations omitted). The standard for application of judicial estoppel has not been satisfied because Mr. Clavet did not prevail at summary judgment. Moreover, the Court did not apply a different construction of section 1559 based on Mr. Clavet's representation at the oral argument, it simply did not factor the statute into its analysis based on Mr. Clavet's position that the statute did not "have any particular relevance." Given that both parties have been given an opportunity to reargue the statute's relevance in light of the Law Court's

authoritative construction in *Cianchette*, there is no prejudice to Mr. Dean for the Court to now consider the applicability of section 1559 to this matter. Indeed, at the oral argument, Mr. Dean conceded that once *Cianchette* was decided the parties and the Court would have to "deal with it" and "figure out . . . how the facts relate[ ] to what we have here." The instant motion, in light of the decision in *Cianchette*, presents the opportunity for the Court and the parties to "figure [it] out."

Discerning no bar to Mr. Clavet's re-visitation of the section 1559 argument, the Court concludes that Mr. Clavet's reconsideration motion is proper, and takes this opportunity to apply the Law Court's construction of 31 M.R.S. § 1559(1),(3) to this case. Pursuant to statute, as a manager, Mr. Dean was a fiduciary to Blue Water and its other member—Mr. Clavet—during all times relevant to this lawsuit.[1] Issues of breach and damages will be determined at trial.

Mr. Clavet's second point for reconsideration is also grounded in a change in controlling law reflected in *Cianchette*, but is decidedly less certain as it applies to this case. In *Cianchette*, the Law Court explicitly adopted the Restatement (Second) of Torts § 525 for its formulation of fraudulent misrepresentation. *Cianchette*, 2019 ME 87, ¶ 23, __ A.3d. __. It then cited Restatement section 530 for the proposition that "[a] representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention[,]" overruling *Shine v. Dodge*, 130 Me. 440, 443, 157 A. 318, 319 (1931) and abrogating the old rule that promises of future performance are not actionable in fraud. *Cianchette*, 2019 ME 87, ¶¶ 22-24, __ A.3d. __. Mr. Clavet asks this Court to take *Cianchette* one step further, and conclude that when the Law

[1] Mr. Dean's attempt to narrow *Cianchette*'s holding is unpersuasive. The Buy/Sell Agreement did not abrogate Mr. Dean's statutorily-imposed duties, and nothing in 31 M.R.S. § 1559 or *Cianchette* suggests that the manager's duty is limited to the business operations of the company. In fact, as Mr. Dean himself points out, the scope of section 1559 is "under this chapter," and the Act has an entire subchapter dedicated to transfers of interests in LLCs. *See, e.g.*, 31 M.R.S. §§ 1571-1574.

Court adopted the Restatement's formulation of intentional misrepresentation stated in Restatement section 525, it effectively adopted Restatement sections 525-530. The Restatement provision Mr. Clavet asks the Court to apply on reconsideration is section 529, which provides as follows: "A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation." Restatement (Second) of Torts § 529. Mr. Clavet argues here, as he did at the summary judgment hearing, that Mr. Dean's representations with respect to the operational difficulties and unprofitability of the Marina as a business, the bank's request for personal guaranties on the Marina's line of credit, and the $2.5 million valuation, while failing to state the additional or qualifying fact that he was closing in on a $7.9 million deal for the sale of the Marina, are fraudulent under this Restatement provision. However, Mr. Clavet is not merely rearguing the point: he points out that *Cianchette* is the clearest signal yet that our Law Court would adopt Restatement section 529, and urges this Court to apply the provision here.

Mr. Clavet's argument is not persuasive here, whatever its merits may be on appeal. Section 529 was not applicable to the fraud perpetrated by the defendants in *Cianchette*, and the Court's overruling of *Shine*, adoption of section 525, and application of section 530 for its persuasive authority were not unexpected developments. In fact, the change in law had been signaled for some years, as explained in the Law Court opinion itself. *See Cianchette*, ¶¶ 22-24. By 2019, *Shine*—which was decided in 1931—had become something of an outlier, even if it had never been expressly overruled. By comparison, the jurisprudence of fraud by omission has been well-developed in Maine, particularly in recent years, as laid out in the Prior Order. (Prior Order 8-9.) Restatement section 529 would represent a sharp departure from contemporary Maine precedent and greatly expand liability for fraud through omission. In the absence of authority to the contrary,

the Court declines to apply section 529 to this case, and instead applies the law as announced by the Law Court and described by this Court in its Prior Order. (Prior Order 8-9.)[2]

CONCLUSION

Based on the foregoing, the entry will be:

1. Mr. Clavet's motion for revision is granted in part and denied in part. Mr. Clavet's motion is GRANTED with respect to his claim for breach of fiduciary duty for Mr. Dean's management of Blue Water. The Prior Order is revised as follows: The second paragraph of page 13 of the Prior Order through the first full paragraph of page 14 of the Prior Order is vacated. As revised, that portion of the Prior Order is replaced with the following:

> "The [LLC] Act expressly imposes fiduciary duties upon the manager of an LLC[.]" *Cianchette v. Cianchette*, 2019 ME 87, ¶¶ 35, __ A.3d __ (citing 31 M.R.S. § 1559(1),(3)). The undisputed facts establish that Mr. Dean was a manger of Blue Water during the relevant period to this lawsuit. The Court therefore concludes that Mr. Dean owed fiduciary duties to the LLC and Mr. Clavet as its other member. Nonetheless, genuine factual disputes on issues of breach and damages preclude entry of summary judgment in Mr. Clavet's favor on this count.

Paragraph one of the Conclusion on page 25 of the Prior Order is also vacated and replaced with the following:

> 1. Defendants Kevin and Cecile Dean's motion for partial summary judgment is granted in part and denied in part. Defendants' motion is granted as to Count VII. Defendants' motion is otherwise denied.

Mr. Clavet's motion is otherwise DENIED.

2. Mr. Dean's motion for reconsideration is DENIED.

[2] Practically, however, the ruling with respect to 31 M.R.S § 1559(1),(3) makes Mr. Dean's omissions with respect to the sale of the Marina actionable in fraud in any event. *Glynn v. Atl. Seaboard Corp.*, 1999 ME 53, ¶ 12, 728 A.2d 117 ("Where a fiduciary relationship exists between the parties, 'omission by silence may constitute the supplying of false information.'") (citation and quotation omitted). Pursuant to statute, Mr. Dean as manager was a fiduciary to Mr. Clavet as the other member of Blue Water. Whether he was a fiduciary with respect to Covered remains a factual question under Texas law that will be resolved at trial. (Prior Order 16-18.)

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

August 2, 2019
DATE

____/s/_____
SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT