STATE OF MAINE **BUSINESS AND CONSUMER COURT**

Cumberland, ss.

JAY McLAUGHLIN

Plaintiff

v. **Docket No. BCD-CV-15-14**

EMERA MAINE, formerly known as Bangor Hydro Electric Co.

and

HAWKEYE, LLC

Defendants

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The Motion for Summary Judgment filed by Defendant Hawkeye, LLC ["Hawkeye"] and the Motion for Partial Summary Judgment filed by Emera Maine ["Emera"], both dated November 20, 2015, are before the court for decision, together with Plaintiff Jay McLaughlin's oppositions and the various reply memoranda and other materials filed in connection with both motions. Pursuant to M.R. Civ. P. 7(b)(7), the court elects to decide the motions without oral argument.

I. Background

Plaintiff, Jay McLaughlin, owns a parcel of land located in Greenbush, Maine, recorded in the Penobscot County Registry of Deeds in Book 6574, Page 296 (the "Property"). (Emera Supp. S.M.F. ¶ 2). McLaughlin purchased the Property in 1998. *Id.* at ¶ 4. The Property consists of approximately 3,200 acres of forest land as well as a dominant easement over an access road. (*Id.* ¶ 3, Pl. Opp. S.M.F. ¶¶ 2, 3). Emera Maine ("Emera") is an electric utility that was formerly known (and is occasionally referred to herein) as Bangor Hydro Electric

Company ("BHE"). At all relevant times, BHE, now Emera, has owned and operated a transmission line from Veazie to Chester, Maine. (Emera Supp. S.M.F. ¶ 6). A portion of this transmission line runs through the Property. *Id.* [1] At some point during or before 2009, BHE made plans to perform a reconstruction and recommissioning project known as the Line 64 Rebuild Project (the "Project"), along the transmission line from Veazie to Chester, Maine. (Emera Supp. S.M.F. ¶ 8). BHE developed a detailed Request for Proposals ("the RFP") that contained numerous specifications for the performance of the site work associated with the Project. BHE contracted with Hawkeye, LLC ("Hawkeye") to work on the Project. (Hawkeye Supp. S.M.F. ¶ 13). specifications

During the summer of 2010, Emera negotiated licensing agreements with landowners across whose property access was needed for the Project. (Emera Supp. S.M.F. ¶ 11). The License Agreement as it relates to the Property was signed by McLaughlin on July 29, 2010. *Id.* at ¶ 12. The memorandum of license is recorded in the Penobscot County Registry of Deeds, Book 12256, Page 57. According to the License Agreement, Emera had McLaughlin's permission to enter the property from November 2010 through October 2012 and at the end of that term, Emera would leave the Property in the same condition as they found it, subject to normal wear and tear. (Emera Supp. S.M.F. ¶¶ 14, 15).

One point of contention is whether the License Agreement alone defines Emera's, and/or Emera's agents', permissible usage of the Property. (Emera Supp. S.M.F. ¶ 13). Emera contends that it does, and Hawkeye agrees, although Hawkeye denies it is bound by an

[1] Plaintiff objects to, denies, or qualifies every Statement of Material fact presented by Defendant at length, with the exception of ¶ 4. Pursuant to the rule 56 of the Maine Rules of Civil Procedure, a nonmoving party is to submit a "separate, short, and concise statement" admitting, denying, or qualifying the moving party's statements of fact. While viewing the facts in the light most favorable to the non-moving party, the court will address only material objections, denials, and qualifications presented.

agreement to which it is not a party. [2] McLaughlin contends that "[t]he license agreement was only part of the deal," and contends that various terms and conditions of the Bangor Hydro Electric standards in place at the time the license was executed, the restrictions in the RFP and statements made by Hawkeye employees, also form part of the parties' agreement. (Pl. Opp. S.M.F. ¶ 13).

During the term of the License Agreement, Hawkeye primarily used the Property to access the Transmission Line for a period of two to three weeks. (Hawkeye Supp. S.M.F. ¶ 25). Hawkeye operated bulldozers, track vehicles and other heavy equipment during those two to three weeks. Id. at ¶ 26.

After completing work, Hawkeye hired Sunset Development of Greenville, Maine to repair the damage that Hawkeye caused to the Property. *Id.* at ¶ 39. McLaughlin disputes either that Hawkeye hired Sunset Development to make repairs or that repairs were made, it is not clear to the Court which. (Pl. Opp. to Hawkeye S.M.F. ¶¶ 39, 40). Hawkeye hired Prentiss & Carlisle to evaluate tree damage. (Hawkeye Supp. S.M.F. ¶ 41). Prentiss & Carlisle determined that 54 stems with commercial value were damaged, amounting to damages totaling $1,433.18. *Id.* at ¶ 42. Hawkeye tendered a check in that amount to McLaughlin and McLaughlin rejected it. *Id.* at ¶ 43. McLaughlin objects to the method by which Prentiss & Carlisle determined damage. (Pl. Opp. to Hawkeye S.M.F. ¶¶ 41-43).

McLaughlin complains that extensive damage was caused to the Property, in ways and in areas of the Property not agreed to by McLaughlin, and that the damage caused was not remediated. *See* Complaint. Defendants contend that McLaughlin gave Emera and its agents

[2] The License Agreement states in part: "Landowner hereby grants a license to Bangor Hydro, its employees, agents and contractors, to perform the following activities in the location on the Property generally depicted in Exhibit "A" (the "**Strip**") . . . the right to enter upon the Strip with workers and equipment and all necessary tools for the purpose of accessing the Transmission Line; and the right to improve and maintain roads over the Strip to facilitate access to the Transmission Line . . . Bangor Hydro shall repair, or cause to be repaired, any damage to the Property caused by Bangor Hydro beyond normal wear and tear"

permission to use three points of access to reach the Transmission Line Right of Way. (Emera Supp. S.M.F. ¶ 10; Hawkeye Supp. S.M.F. ¶ 4). McLaughlin contends that permission was only granted over Taylor Road, AR-21 and Madden Meadows Road North, ARG-02. (Pl. Opp. to Emera S.M.F. ¶ 10; Pl. Opp. to Hawkeye S.M.F. ¶ 4). The parties dispute whether McLaughlin gave Emera permission to use the Skidder Trail (a.k.a. Taylor 1, a.k.a. the Spur Road) as an access road. (Pl. Add. S.M.F. ¶ 28; Emera Resp. to Add. S.M.F. ¶ 28; Hawkeye Supp. S.M.F. ¶ 4). McLaughlin contends that no permission was given and that Emera and/or Hawkeye turned the Skidder Trail into a road, causing significant damage to the surrounding woods and brook. (Pl. Add. S.M.F. ¶¶). McLaughlin further complains that severe structural damage was caused to Taylor Road, AR-21, the approach to the Property, and the security gate to the Property. (Pl. Add. S.M.F. ¶ 85). Hawkeye asserts that the Property has been repaired to its prior state, less normal wear and tear, and that the Property suffered no diminution of value as a result of work performed by Hawkeye. (Hawkeye Supp. S.M.F. ¶¶ 49-52).

McLaughlin filed this action for breach of contract, negligence, injury to land, trespass, and promissory estoppel on October 7, 2013.

II. Discussion

a. Standard of Review

"Summary judgment is properly granted if the record reflects that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law." *Angell v. Hallee*, 2014 ME 72, ¶ 16, 92 A.3d 1154 (quotation omitted). "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive." *Id.* (quotation omitted). However, a genuine issue of material fact does not exist when one version is only supported by evidence that is "merely

colorable, or is not significantly probative[.]" *Bouchard v. American Orthodontics*, 661 A.2d 1143, 1144-45 (Me. 1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). Similarly, summary judgment is warranted against a party when their version of the truth is based on conjecture or speculation. *See Stanton v. University of Maine System*, 2001 ME 96, ¶ 6, 773 A.2d 1045. While speculation is not permitted, the nonmoving party is accorded "the full benefit of all favorable inferences that may be drawn from the facts presented." *Curtis v. Porter*, 2001 ME 158, ¶ 9, 784 A.2d 18 (quotation omitted).

Motions for summary judgment must be supported by citations to record evidence of a quality that would be admissible at trial. *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 6, 770 A.2d at 656 (citing M.R. Civ. P. 56(e).) Affidavits in support of motions for summary judgment must "be made on personal knowledge" and must "show affirmatively that the affiant is competent to testify to the matters stated therein." *Platz Associates v. Finley*, 2009 ME 55, ¶ 16, 973 A.2d 743 (quoting M.R. Civ. P. 56(e)).

b. Count I – Breach of Contract

The first count of McLaughlin's complaint is for breach of contract. Defendant Hawkeye seeks summary judgment on this count. Defendant Hawkeye argues that as a matter of law Hawkeye is entitled to judgment in its favor because Hawkeye was not a party to the License Agreement and therefore cannot be bound to it. *See Barr v. Dyke*, 2012 ME 108, ¶ 13, 49 A.3d 1280.

"To establish a legally binding agreement the parties must have mutually assented to be bound by all its material terms; the assent must be manifested in the contract, either expressly or impliedly; and the contract must be sufficiently definite to enable the court to determine its exact meaning and fix exactly the legal liabilities of the parties." *Searles v. Trustees of St. Joseph's College*, 1997 ME 128, ¶13, 695 A.2d 1206. McLaughlin and Bangor Hydro Electric, now

known as Emera Maine mutually assented to the License Agreement. Hawkeye did not agree to be bound by the License Agreement. Because Hawkeye was not bound by the License Agreement, Hawkeye could not have breached the License Agreement. Therefore, the Court grants Hawkeye's Motion for Summary Judgment as to Count I.[3]

c. Count II – Negligence –

The second count of McLaughlin's complaint is a count for negligence. McLaughlin asserts a special relationship and duty on behalf of Defendants to McLaughlin that was breached when Defendants damaged the security gate; destroyed the roads on the Property, two culverts, and ditches; and caused excessive siltation damaging the roadway, forest area, and woodlands. McLaughlin alleges that these breaches caused damages of repair and replacement costs, loss of forest products, governmental agency costs and attorney's fees and costs.

Both Defendants move for summary judgment on Count II. Defendant Hawkeye argues that, as a matter of law, Hawkeye did not owe a duty to McLaughlin. While McLaughlin's assertions that the License Agreement and promises created some sort of tort duty is insufficient, the Defendants owed McLaughlin a general duty of care not to cause personal injury or damage to property.

Emera moves for summary judgment on Count II arguing that McLaughlin's claim is barred by the doctrine of economic loss. The economic loss doctrine stands for the proposition that: "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." Restatement (Third) of Torts—Liability For Economic Harm, Tentative Draft No. 1, § 3, Preclusion of Tort Liability Arising from Contract (Economic Loss Rule). However, the economic loss doctrine is meant to apply where the damages incurred are purely economic, not where there has been injury to person or property.

[3] The Court notes Defendant Emera's remaining Cross-Claim for indemnification against Defendant Hawkeye.

In re Hannaford Bros. Co. Customer Data Sec. Breach Litig., 613 F. Supp. 2d 108, 127 (D. Me. 2009). In the current case, the essential claim is for damage to tangible property, so Plaintiff is not barred from bringing tort claims by the economic loss doctrine.

Additionally, Defendant Hawkeye seeks summary judgment on the basis that McLaughlin is unable to prove his damages. The record certainly raises the question whether the damage to McLaughlin's property was anywhere near as extensive as he claims, but summary judgment is not appropriate on this factual question.

d. Count III – Injury to Land

Plaintiff alleges a count of injury to land, claiming that, without permission, Hawkeye and/or Emera removed and severely damaged trees on the Property and are therefore subject to statutory damages. According to 14 M.R.S. § 7552, a party is prohibited from cutting down, destroying, damaging, or carrying away any forest product without the permission of the owner. The statute sets forth damages of the greater of the value of the forest products or the diminution of value. 14 M.R.S. § 7552(3)(A). Both Defendants move for summary judgment on this count.

Defendant Hawkeye claims that it had permission to enter the property and perform work. Because any damage occurred as a result of permissible entry onto the property, Hawkeye argues that it is entitled to judgment as a matter of law.

Defendant Emera moves for summary judgment on this count on the grounds that public utilities and their contractors are not liable for damages for trees lost when providing safe and reliable service to customers necessitates the loss. 14 M.R.S. § 7552 (3)(B-1) (2015). Additionally, Defendant Emera moves for summary judgment on Count III arguing that the parties enacted the License Agreement, which governs damages in the event that trees were cut down or injured as a result of work performed by Emera. Emera argues that because the rights

were contracted for, no further liability can be attributed to them by statute, pursuant to the economic loss doctrine.

There remain a number of questions of material fact, making Count III inappropriate for summary judgment. There is a factual question as to the specific areas of Property the license applies to and whether Defendants did in fact have permission to perform the work they performed. There is a question as to whether the damage to forest products was necessary in order for Emera to provide safe and reliable service. Additionally, Defendant Emera's argument that the economic loss doctrine bars tort recovery fails as the dispute concerns damage to tangible property rather than pure economic loss. Therefore, the Court denies Defendants' motions for summary judgment as to Count III.

e. Count IV and Count VI – Trespass

Plaintiff brings two counts of trespass, one count of trespass pursuant to statute 14 M.R.S. § 7551-B and one count of trespass for the building of the Spur Road over the Skidder Trail. Defendants each move for summary judgment on both counts.

In order to prove a cause of action of trespass, a plaintiff must show that the defendant intentionally entered the plaintiff's land without permission and damaged the property. 14 M.R.S. § 7551-B(1) (2015). Defendant Hawkeye and Defendant Emera move for summary judgment on Counts IV and VI on the basis that their presence on the property was permissive due to the License Agreement. According to Defendants, because the entry onto the Property and the use of the roads on the Property was permissive, Plaintiff cannot make out a prima facie case of trespass.

Some of the same genuine issues of material fact mentioned above mean that Defendants are not entitled to summary judgment. Plaintiff challenges the Defendants' statement that the License Agreement was meant to apply to the entire property and to Defendants'

categorization of the Skidder Trail as a road on the Property at the time of the License Agreement. Both the intent of the License Agreement and the categorization of the Skidder Trail as a road present genuine issues of material fact. The Court denies Defendants' motions for summary judgment with respect to Counts IV and VI.

f. Count V – Promissory Estoppel

The fifth count of Plaintiff's complaint asserts promissory estoppel. McLaughlin asserts that Mr. Quigley, an employee of Hawkeye, promised not to use the road during mud season and promised to repair any damage caused to the Property. McLaughlin further asserts that Mr. LaBelle, an agent of Hawkeye, promised Hawkeye would protect the Taylor Road, that there were rules Hawkeye had to follow, and that Hawkeye would leave the property in better condition than it was at the start of the project. McLaughlin alleges that he agreed not to report Hawkeye to the DEP if Hawkeye properly remediated. McLaughlin argues that he detrimentally relied on the promises by not reporting the damage to DEP, which could have exposed Emera to additional costs, and as a result the Property remains unrepaired.

Defendant Hawkeye and Defendant Emera both move for summary judgment on Count V. Defendant Hawkeye argues that McLaughlin has not offered proof of the alleged promises and that there is no evidence to suggest that McLaughlin relied on those promises to his detriment. Defendant Hawkeye attests that the statements by Quigley were merely assurances that Hawkeye was already obligated to undertake repair of the Property under the License Agreement.

Defendant Emera maintains that promissory estoppel is available only to enforce promises that would otherwise be unenforceable. In this case, where a contract explicitly governs the relationship between the parties, McLaughlin must look to the contract for remedy rather than a quasi-contract claim that applies only where no contract exists. Defendant Emera

also echoes Hawkeye's analysis, asserting that the "promise" from Quigley was a restatement of existing contractual obligations under the Licensing Agreement. Thus, no new stand-alone promise was offered to secure the Plaintiff's silence with regard to a DEP complaint, and promissory estoppel cannot be applied to the case.

In the alternative, Defendant Emera contends that the Plaintiff's agreement, if found to be enforceable, to refrain from reporting the damage to the DEP did not confer any benefit or detriment to the Plaintiff, and conversely, reporting the matter to the DEP for investigation would similarly have provided no benefit or detriment. Therefore, even were the promissory estoppel claims not duplicative of the contract claims in Count I, Defendant Emera asserts that the claim fails for lack of detrimental reliance by the Plaintiff.

The operative principle of promissory estoppel is this: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." *Tarbuck v. Jaeckel*, 2000 ME 105, ¶ 16, 752 A.2d 176 (internal quotation omitted); Restatement (Second) of Contracts § 90(1) (1981); *see also*, *Daigle Commercial Grp., Inc. v. St. Laurent*, 1999 ME 107, ¶ 14, 734 A.2d 667. Where "'there is an express contract governing the relationship out of which the promise emerged . . . there is no gap in the remedial system for promissory estoppel to fill . . . [and] to allow it to be invoked becomes . . . gratuitous duplication.'" *Bradley v. Kryvicky*, 574 F. Supp. 2d 210 (D. Me. 2008) (citing *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 869 (7th Cir. 1999)).

In this case, the relationship between the Plaintiff and Defendant Emera is governed by the License Agreement. (Pl. Ex. A: Transmission Line Access Agreement.) The License Agreement is an enforceable contract that establishes the Defendants' obligations and rights

regarding the use of the Property, with the possible addition of . *Id.* Accordingly, there is no contractual gap in the relationship between McLaughlin and Emera for promissory estoppel to fill.

As to Hawkeye, two additional points militate against the application of promissory estoppel. The statements allegedly made by Hawkeye employees appear to postdate the License Agreement, which (perhaps along with the BHE standards) defines the scope of Emera's and its agents' rights of access and use of the Property. McLaughlin therefore cannot have relied on the statements in consenting to Hawkeye's activities on the Property. Moreover, what the DEP would have done in response to the report McLaughlin claims to have been induced not to make is almost completely a matter of speculation, so McLaughlin would be unable to prove any particular "detriment" suffered as a result of not making the report.

Promissory estoppel does not fit any reasonable view of the facts. Therefore, Defendants' motions for summary judgment as to Count V are granted.[4]

II. Conclusion

a) The Court grants Defendant Hawkeye's Motion for Summary Judgment with respect to Count I.

b) The Court denies Defendant Hawkeye's and Defendant Emera's motions for summary judgment with regards to Counts II, III, IV, and VI.

c) The Court grants Defendants' motions for summary judgment with respect to Count V.

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

Dated February 25, 2016 _____/s_____
A. M. Horton, Justice
Business & Consumer Court

[4] This ruling has no bearing on the admissibility in evidence of the oral promises McLaughlin claims were made. Indeed, they may well be admissible in support of his other theories of liability.