

STATE OF MAINE  
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET  
DOCKET NO. BCD-CV-18-26

SARAH K. SHED, PERSONAL )  
REPRESENTATIVE OF THE ESTATE )  
OF JOEL D. DAVIS )

Plaintiff )

v. )

WILLIAM E. LOVELY and A.B.J. )  
GENERAL CONTRACTOR, INC., )

Defendants )

ORDER DENYING PLAINTIFF’S  
MOTION FOR SUMMARY  
JUDGMENT

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WILLIAM E. LOVELY and A.B.J. )  
GENERAL CONTRACTOR, INC., )

Counter-Plaintiffs, )

v. )

JOEL E. DAVIS, )

Counter-Defendant )

INTRODUCTION

Plaintiff Joel D. Davis<sup>1</sup> (“Davis” or “Plaintiff”) filed an Amended Complaint against William Lovely (“Lovely”) and A.B.J. General Contractor, Inc. (“A.B.J.”) claiming breach of contract, breach of duties as a member of a limited liability company, breach of covenant of good faith and fair dealing, unjust enrichment, interference with advantageous business opportunity, intentional misrepresentation, negligent misrepresentation, fraud and seeking declaratory

<sup>1</sup> Sarah K. Shed, Personal Representative of the Estate of Joel D. Davis, has since been substituted as the Plaintiff in this matter.

judgment. Lovely and A.B.J. deny the allegations and filed a Counterclaim alleging breach of good faith and fiduciary duties, breach of contract, fraud, contribution, unjust enrichment, declaratory judgment unit pledge agreement, and declaratory judgment security interest in Lovely property. Davis subsequently filed a Motion for Summary Judgment<sup>2</sup> against Lovely<sup>3</sup> on Count I (Breach of Contract), Count II (Breach of Duty as Member of a Limited Liability Company), Count IV (Unjust Enrichment), Count VII(first) (Intentional Misrepresentation) and Count VII(third) (Fraud) of Davis' Complaint.<sup>4</sup> For the reasons discussed below, the Court denies Davis' Motion for Summary Judgment.

### UNTIMELINESS

Before embarking on a substantive review of Plaintiff's Motion, the Court addresses the untimeliness issue. The Motion is untimely, and filed in violation of the Scheduling Order deadlines and rules of the Business and Consumer Docket ("BCD"). By Order dated July 9, 2020, the Court denied Plaintiff's request for an extension of time to file a Motion for Summary Judgment. Accordingly, Plaintiff's Motion for Summary Judgment is denied as untimely and in violation of the Scheduling Order. Even if the Motion were timely, however, as discussed below, it would still be denied.

### STANDARD OF REVIEW

In deciding a motion for summary judgment under M.R. Civ. P. 56, the Court must determine whether: (1) a "separate, short, and concise statement of material facts" establishes that

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<sup>2</sup> Although captioned a Motion for Summary Judgment, Plaintiff's Motion is actually a Motion for Partial Summary judgment, since the Motion seeks summary judgment on only some of his counts. Despite only seeking partial summary judgment, Plaintiff's Motion and accompanying materials are of unusual length and volume. Plaintiff's Motion to Allow a Longer [Reply] Memo is being denied this same date.

<sup>3</sup> The Motion for Summary Judgment addresses Counts that appear to only be pled against Lovely. A.B.J. is unrepresented and has not been participating in the litigation.

<sup>4</sup> Plaintiff's numbering of counts in the Complaint is erroneous and confusing. For instance, there is no Count V, but the Complaint contains three counts all designated Count VII.

“there is no genuine issue of material fact to be tried,” (M.R. Civ. P. 56(h)(1)), and (2) each statement of material fact is supported by reference to the record and facts that would be “admissible in evidence.” (M.R. Civ. P. 56(e)). Facts that are supported by record citations and are not “properly converted” are deemed admitted. M.R. Civ. P. 56(h)(4). *See Cash, LLC v. Kulas*, 2011 ME 70, ¶ 9, 21 A.3d 1015 (“A moving party’s factual assertions may not be deemed admitted because of an improper response unless those factual assertions are properly supported.”) Therefore, “[a]s the moving party with the ultimate burden of proof, [the plaintiff] bears the initial responsibility of demonstrating the absence of a genuine issue of material fact through a properly supported statement of material facts.” *Id.* The plaintiff may support its assertions by providing supportive affidavits “made on personal knowledge, [setting] forth such facts as would be admissible in evidence, and [showing] affirmatively that the affiant is competent to testify to the matters stated therein.” M.R. Civ. P. 56(e). The Law Court has noted that the rules “require that each statement of material fact must directly refer the court to ‘the specific portions of the record from which each fact is drawn.’” *HSBC Bank USA, N.A. v. Gabay*, 2011 ME 101, ¶ 9, 28 A.3d 1158 (quoting *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 9, 770 A.2d 653); *see also* M.R. Civ. P. 56(h)(3) (“The reply statement shall admit, deny or qualify such additional facts by reference to the numbered paragraphs of the opposing party’s statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by paragraph (4) of this rule.”).

## FACTS

William E. Lovely (“Lovely”) is President of A.B.J. General Contractor, Inc. (“ABJ”). (Supp.’g S.M.F. ¶ 1.) In 2011, Lovely became a co-owner of Northeast Meats, LLC. (*Id.* ¶ 4.) In early 2015, Davis and Lovely met and agreed to start a new meat processing company, Central

Maine Meats, LLC (“CMM”) (*Id.* ¶ 14.) Thereafter, the relationship between and among Davis, Lovely, and CMM became extremely complicated and convoluted. The Court is unable to make any further findings of undisputed material facts, for two reasons. First, Plaintiff’s statements of material facts suffer from multiple failures to comply with the requirements of M.R. Civ. P 56(h).<sup>5</sup> Second, the material facts are disputed by Lovely.

#### ANALYSIS

Plaintiff seeks summary judgment on five of the nine counts in his Complaint. The Court will address in turn each of the Counts for which Davis seeks summary judgment.

##### Count I: Breach of Contract

“A breach of contract claim accrues when the defendant breaches a contract,” such as when the “contract fails to provide the bargained-for benefit.” *York Cty. v. PropertyInfo Corp.*, 2019 ME 12, ¶ 18, 200 A.3d 803 (quotation marks omitted). To establish that there is a legally binding contract, Plaintiff must prove there was a meeting of the minds or mutual assent “to be bound by all the material terms of the contract.” *Tobin v. Barter*, 2014 ME 51, ¶ 9, 89 A.3d 1088 (internal quotation and alteration omitted). To obtain relief for a breach, Plaintiff must show that there was a breach of a material term by Defendant, and this breach caused damages. *Id.* ¶ 10. In this case, Davis has failed to establish as a matter of undisputed fact what was promised in the alleged contract, and hence whether there was a meeting of the minds. Accordingly, Plaintiff’s request for summary judgment on Count I is denied.

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<sup>5</sup> The problems are too numerous to catalog, and so the Court only briefly summarizes some of the issues. In many instances, Plaintiff fails to comply with the requirement for separate, short, concise statements of material fact. The affidavits submitted by Plaintiff repeatedly fail to properly lay the foundation for admissible evidence. Plaintiff frequently relies on records that are hearsay, uncertified, contain unidentified persons’ handwriting, or are incomplete. Plaintiff frequently fails to cite to the specific location of supporting material in the summary judgment record. In the face of this, the Court declines to sift through the large volume of material submitted by Plaintiff to find the relevant, admissible support in the summary judgment record. See *Allen v. St. Louis Public Service Co.*, 285 S.W.2d 663, 668 (Mo. 1956) (“It was certainly not the duty of the trial court to sift the wheat from the chaff.”).

### Count II: Breach of Duty as Member of a Limited Liability Company

Under Maine law, a member may be personally liable for monetary damages if the member “is found to not have acted honestly or in the reasonable belief that the action was in or not opposed to the best interests of the limited liability company or its members.” 31 M.R.S. § 1559(2) (2019). In this case, Plaintiff has failed to establish as a matter of undisputed fact that Lovely acted dishonestly or without a reasonable belief that his actions were in the best interest of CMM. Accordingly, Plaintiff’s request for summary judgment on Count II is denied.

### Count IV: Unjust Enrichment

For Plaintiff to prevail on its claim for unjust enrichment, he must show that “(1) it conferred a benefit on the other party; (2) the other party had appreciation or knowledge of the benefit; and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.” *Knop v. Green Tree Servicing, LLC*, 2017 ME 95, ¶ 12, 161 A.3d 696 (quoting *Maine Eye Care Assocs., P.A. v. Gorman*, 2008 ME 36, ¶ 17, 942 A.2d 707). In this case, Davis has failed to establish as a matter of undisputed fact that Lovely gained any unfair benefit through work performed by ABJ. Accordingly, Plaintiff’s request for summary judgment on Count IV is denied.

### Count VII(first) & Count VII(third)<sup>6</sup>: Intentional Misrepresentation and Fraud

Count VII(first) and VII(third) are closely related and have similar elements, and thus will be discussed together. Intentional misrepresentation is a form of fraud that occurs when a person:

- (1) makes a false representation;
- (2) of a material fact;
- (3) with knowledge of its falsity or in reckless disregard of whether it is true or false;

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<sup>6</sup> In the Complaint, there are three counts denominated Count VII. Plaintiff seeks summary judgment on the first and third of the three claims titled Count VII.

- (4) for the purpose of inducing another to act or to refrain from acting in reliance on it; and
- (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

*Drilling & Blasting Rock Specialists, Inc. v. Rheaume*, 2016 ME 131, ¶ 17, 147 A.3d 824 (footnote omitted) (quoting *Sherbert v. Remmel*, 2006 ME 116, ¶ 4 n.3, 908 A.2d 622). The elements of a fraud claim are essentially the same. See *Barr v. Dyke*, 2012 ME 108, ¶ 16, 49 A.3d 1280; *Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 15, 956 A.2d 110; *Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 9, 832 A.2d 771; *Brawn v. Oral Surgery Assocs.*, 2003 ME 11, ¶ 21, 819 A.2d 1014. For a party to establish fraudulent omission, the party must show:

- (1) A failure to disclose;
- (2) A material fact;
- (3) Where a legal or equitable duty to disclose exists;
- (4) With the intention of inducing another to act or to refrain from acting in reliance on the non-disclosure; and
- (5) Which is in fact relied upon to the aggrieved party's detriment.

*N.E. Ins. v. Young*, 2011 ME 89, ¶ 19, 26 A.3d 794; see also *Dairyland Ins. Co. v. Sullivan*, No. 2:16-cv-00050-JDL, 2017 U.S. Dist. LEXIS 30116, at \*4 (D. Me. Mar. 3, 2017) (listing the elements for fraudulent misrepresentation); *Randall v. Conley*, 2010 ME 68, ¶ 12, 2 A.3d 328. A fraud claim must be proven by clear and convincing evidence. *Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640.

In this case, Plaintiff alleges Lovely engaged in fraud and intentional misrepresentation in a great number of ways, both through affirmative acts and through material omissions. However, Davis has not established the elements of his misrepresentation and fraud claims as a matter of clear and convincing evidence. Further, Davis has failed to establish as a matter of undisputed fact that Lovely knowingly misrepresented various matters, such as how he would use the proceeds of bank loans, or intentionally omitted material facts. Accordingly, Plaintiff's request for summary

judgment on Count VII(first) and Count VII(third) is denied.

CONCLUSION

For all of the foregoing reasons, including but not limited to untimeliness, Plaintiff's Motion for Summary Judgment is denied.

Pursuant to M.R. Civ. P. 79(a), the Clerk is instructed to incorporate this Order by reference on the docket for this case.

So Ordered.

Dated: August 11, 2020

\_\_\_\_\_/s\_\_\_\_\_  
Michael A. Duddy  
Judge, Business and Consumer Court