

STATE OF MAINE
CUMBERLAND, ss.

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

EMILE CLAVET,

Plaintiff,

v.

KEVIN DEAN, et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)

**ORDER ON DEFENDANT'S
MOTION FOR ADJUDICATION**

This matter comes before the Court on Defendant Kevin Dean's motion for adjudication that Camden National Bank ("CNB") should not be adjudged trustee with respect to accounts in which CNB is a lender to defendant Kevin Dean ("Adjudication Motion"). Plaintiff Emile Clavet opposes the motion. The Court heard oral argument on the motion on July 2, 2018; Mr. Dean was represented by George Marcus, Esq. and Mr. Clavet was represented by Clifford Ruprecht, Esq.

BACKGROUND

On May 23, 2018, this Court entered its combined order on pending motions (the "Prior Order") which more fully lays out the facts giving rise to this lawsuit. In addition to denying Defendant Cecile Dean and the Parties-in-Interest Blue Water Marina, LLC and Covered Marina, LLC's motions to dismiss, the Court ordered attachment and attachment on trustee process on the assets of Defendant Kevin Dean as follows:

Plaintiff Emile Clavet's motion for attachment and attachment on trustee process is GRANTED. The Court ORDERS attachment on all attachable assets of Kevin Dean up to the amount of \$2,972,500. The Court further ORDERS attachment on trustee process against all parties in possession of property payable to Kevin Dean to the amount of their attachable credits not to exceed \$2,972,500.
(Prior Order 15-16.)

Pursuant to the Prior Order, Mr. Clavet served a summons to trustee on CNB on June 1, 2018. (Def's Adj. Mot., Ex. A.) In response to that summons, CNB filed its trustee disclosure which disclosed the existence of a home equity line of credit ("HELOC") with account number 20241962 naming Mr. Dean as "Primary" account owner and his wife Cecile Dean as "Comaker." (*Id.*; *See* Def's Adj. Mot., Ex. C.) The HELOC is secured by residential property owned solely by Mrs. Dean. Upon service of the summons to trustee, CNB "froze" the HELOC, meaning that it suspended the rights of the Deans to obtain loans pursuant to the account.

DISCUSSION

Mr. Dean's position is that with respect to the HELOC, CNB should be adjudged not to be a trustee and should be discharged. (Def's Adj. Mot. ¶ 7.) Mr. Dean argues that although his right to receive loans under the HELOC is a contract right and thus a form of property interest, it is not the kind of property that can be subject to trustee process because the contractual right to obtain a home equity loan from CNB under the HELOC is not "due absolutely and not on any contingency." *See* 14 M.R.S. § 2602(4). In support of this proposition, Mr. Dean points to the HELOC Loan Agreement (Def's Adj. Mot., Ex. C), which lists a number of conditions on CNB's obligation to extend money pursuant to the HELOC and lists various contingencies to which Mr. Dean's ability to draw on the HELOC is subject.

Mr. Clavet responds that the HELOC is more akin to a checking account than a loan agreement because the account is "funded with real estate" rather than money, as CNB took title to the residence in the form of a mortgage to secure all "withdrawals" made against the fund balance. (Pl's Opp. to Def's Adj. Mot. 2.) Mr. Clavet further argues that the conditions and contingencies cited by Mr. Dean "are simply the ordinary rights of [CNB] to close the account if the account holders do something to impair the assets held on deposit by [CNB], if various

government actions impair the account relationship, and the like.” (Pl’s Opp. Motion 4.) The main thrust of Mr. Clavet’s argument is that the Summons to Trustee is the only obstacle stopping Mr. Dean from simply writing a check for the full available balance of the account—nearly a million dollars (*see* Def’s Adj. Mot., Ex. B)—notwithstanding the conditions and contingencies listed in the loan agreement.

An “order discharging the trustee is subject to an immediate appeal as an exception to the ‘final judgment’ rule, because ‘great and irreparable loss’ may otherwise result.” *Loyal Erectors, Inc. v. Hamilton & Son, Inc.*, 312 A.2d 748, 751-52 (Me. 1973) (citing *Foisy v. Bishop*, 232 A.2d 797 (Me. 1967)). “The burden is upon the plaintiff to show that the trustee should be charged.” *Loyal Erectors, Inc.*, 312 A.2d at 756.

“In connection with the commencement of any personal action, [subject to exceptions not applicable here], trustee process may be used in the Superior Court” 14 M.R.S. § 2601. However, as to certain classes of property, “[n]o person shall be adjudged trustee[.]” 14 M.R.S. § 2602. The parties direct the Court’s attention to one such exception for “[d]ebts due defendant:”

No person shall be adjudged trustee. . . [b]y reason of any money or other thing due from him to the principle defendant unless, at the time of the service of the summons upon him, it is due absolutely and not on any contingency[.]

14 M.R.S. § 2602(4). The parties argue about whether the funds available under the HELOC (nearly a million dollars) are “due absolutely” or on “any contingency.” However, the Court does not see the relevance of this provision. The money available under the HELOC is not a “debt due” Mr. Dean. It is a “line of *credit*,” *i.e.* a promise to extend credit that is then a debt due CNB in the

¹ Orders for attachment and trustee process are reviewable on appeal for an abuse of discretion or clear error. *Libby O'Brien Kingsley & Champion, LLC v. Blanchard*, 2015 ME 101, ¶ 5, 121 A.3d 109. However, the question of whether the HELOC is an attachable interest subject to trustee process pursuant to M.R. Civ. P. 4B and 14 M.R.S. §§ 2601-2714 is a question of law subject to *de novo* review. *City of Bangor v. Penobscot Cty.*, 2005 ME 35, ¶ 9, 868 A.2d 177.

event that Mr. Clavet draws on the account as he is entitled to under the HELOC Loan Agreement. “[S]ubject to certain exceptions, a party is not chargeable in trustee process with respect to credits, unless *the party* is liable in an action to the principal defendant.” Horton & McGehee, *Maine Civil Remedies* §23-3 at 434 (4th ed. 2004) (citing *Loyal Erectors, Inc.*, 312 A.2d 748) (emphasis added). Section 2602(4) would only apply if a debtor of Mr. Dean had a “debt due absolutely and not on any contingency” payable to him. CNB is not Mr. Dean’s debtor; it is his creditor. That any loan extended to Mr. Dean on the line of credit is secured by real estate does not transmute it into a “debt due” Mr. Dean.⁷ The Court’s research on this issue did not uncover any cases in which a HELOC has been attached or a bank extending a HELOC has been adjudged trustee (or “garnishee” as it may be called in other jurisdictions) with respect to a HELOC.

In sum, Mr. Clavet has failed to meet his burden to show that CNB should be adjudged trustee with respect to the HELOC. The Court concludes that the HELOC—or, more specifically, CNB’s contractual obligation to extend credit to Mr. Dean pursuant to the HELOC Loan Agreement—is not an asset which can be trustee pursuant to M.R. Civ. P. 4B and 14 M.R.S. §§ 2601-2714. This conclusion flows from the established principle that “a party is not chargeable in trustee process with respect to credits[.]” Horton & McGehee, *Maine Civil Remedies* §23-3 at 434 (4th ed. 2004). The Court sees no reason to abrogate the rule on the grounds that the HELOC entitles Mr. Dean to credit up to a certain limit or because the resulting debt is secured by real estate.

⁷ The Court distinguishes the “asset” as to which Mr. Clavet urges CNB to be adjudged trustee—the HELOC—from Mr. Dean’s equitable right of redemption of the mortgage securing the HELOC. The latter may be trustee. Horton & McGehee, *Maine Civil Remedies* §23-3 at 433 (4th ed. 2004); 14 M.R.S. § 2712. By this Order the Court concludes that the former may not.

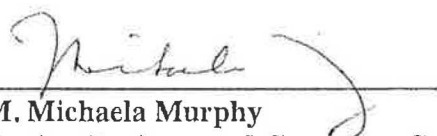
CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Camden National Bank shall be and hereby is discharged as trustee with respect to Defendant Kevin Dean's HELOC Loan Account, and shall have no duty to Plaintiff Emile Clavet with respect to Mr. Dean's HELOC account and is hereby adjudicated not to be a trustee with respect to that account.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: 8/17/18



M. Michaela Murphy
Justice, Business and Consumer Court

Entered on the Docket: 8/20/18
Copies sent via Mail ☐ Electronically ☒

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2018-04 ✓

EMILE CLAVET,)
)
Plaintiff/ Counterclaim-Defendant,)
)
v.)
)
KEVIN DEAN, et al.,)
)
Defendants/ Counterclaim-Plaintiff.)

COMBINED ORDER
ON PENDING MOTIONS

Pending before the Court are Plaintiff Emile Clavet's amended motion for attachment, attachment on trustee process, and preliminary relief; Defendant Cecile Dean's motion to dismiss; Parties-in-Interest Blue Water Marina, LLC and Covered Marina, LLC's motion to dismiss; and Counterclaim-Plaintiff Kevin Dean's motion for attachment, attachment on trustee process, and preliminary relief. All motions are opposed. Oral argument on all pending motions was heard on March 28, 2018. Cliff Ruprecht, Esq. appeared for Mr. Clavet and Bernard Kubetz, Esq. appeared for Defendants.

FACTUAL OVERVIEW AND PROCEDURAL HISTORY

This case, as originally brought by Mr. Clavet in his Complaint filed in Cumberland County Superior Court on November 17, 2017, sought recovery from Mr. Dean based on his sale of Parties-in-Interest Blue Water Marina, LLC, and Covered Marina, LLC (the "Marina Properties"), two companies that Mr. Clavet and Mr. Dean had co-owned equally, after Mr. Dean bought out

¹ Both Mr. Clavet and Mr. Dean's motions are captioned as seeking "preliminary relief" or "preliminary injunctive relief." Mr. Dean subsequently withdrew his claim for permanent or preliminary injunctive relief in his reply memorandum to his motion. (Def's Reply Mot, Attachment 3.) Mr. Clavet's motion does not make clear what preliminary relief he seeks in his motion and did not mention this aspect of his motion at oral argument. The Court thus treats Mr. Clavet's motion as a motion for attachment and attachment on trustee process.

Mr. Clavet's interest and subsequently sold the Marina Properties at a substantially higher price to a third party. (Pl's Compl. ¶¶ 4, 6-7, 14, 26, 29.) Mr. Clavet alleges that Mr. Dean subsequently transferred his membership interest in the Marina Properties to his wife, Cecile Dean. (*Id.* ¶¶ 59-70.) The Amended Counterclaim filed by Mr. Dean has expanded the scope of the dispute to encompass much of Mr. Dean and Mr. Clavet's shared business portfolio and the breakup of their thirty-year partnership. (*See generally* Def's Countercl.)

DISCUSSION

I. MOTIONS TO DISMISS

A. Standard of Review

In reviewing a motion to dismiss under Rule 12(b)(6), courts "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.* "The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law" and thus subject to *de novo* appellate review. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141.

B. Ms. Dean's Motion to Dismiss

1. Count VII

Ms. Dean moves to dismiss Count VII of the Complaint on the ground that Maine does not recognize a claim for aiding and abetting a breach of fiduciary duty. (Dean Mot. Dismiss 3-4.) Mr. Clavet responds that Maine law recognizes the joint liability of a person who substantially

encouraged and assisted the tortious conduct of another. (Pl's Opp. Mot. Dismiss 3.)

Our Law Court has "explicitly decided as general law that 'conspiracy' fails as the basis for the imposition of civil liability absent the *actual commission* of some *independently recognized tort*["] *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972) (emphasis in original); *see also Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 8, 708 A.2d 283. In other words:

Maine law generally denies that there is a *separate and independent tort* of "civil conspiracy," [but] allegations of concerted action do operate to assist in the promulgation of an actionable claim that the tort . . . *having been allegedly committed*, all of the named defendants [alleged] to have acted in combination in relation to the [tort] are vicariously liable to plaintiff for its commission Thus, the allegations of the existence of a "conspiracy," and of acts done in furtherance of it, serve to make the claim of a [tort] committed by one . . . defendant . . . a sufficient claim of liability for the entire damage as attributable to each of the other defendants.

Cohen, 288 A.2d at 111-12 (emphasis added). In short, under Maine law, if two people conspire to commit a tort but no underlying tort is committed, no claim lies for the mere act of conspiring. But if an underlying tort is actually committed by one person, the other person who encourages and assists the actual tortfeasor can be jointly liable for "conspiring" in its commission.

Here, Mr. Dean is alleged to have committed the tort of breach of fiduciary duty. (Pl's Compl. ¶¶ 43-45.) Ms. Dean is alleged to have encouraged, aided, and participated in Mr. Dean's actions in breach of his fiduciary duties of Mr. Clavet. (*Id.* ¶ 68.) Contrary to Ms. Dean's argument on her motion to dismiss, Mr. Clavet was not required to additionally allege the existence of a fiduciary relationship between himself and Ms. Dean in order for her to be liable to Mr. Clavet under a conspiracy theory. (Dean Mot. Dismiss 4.) Such a requirement would effectively eliminate liability for a person who encourages and assists another person in committing a tort, such as

breaching a fiduciary duty. Provided the underlying tort is alleged to have been completed, the *Cohen* Court expressly acknowledged that the person who encourages or assists the actual tortfeasor can be held liable under a conspiracy theory. *See Cohen*, 288 A.2d at 112. Indeed, in *Cohen*, it was reversible error for the trial court to dismiss the defendants who were alleged to have conspired in the commission of the tort of libel by another defendant. *Id.* This Court therefore declines to dismiss Count VII because the facts alleged are sufficient to state a claim against Ms. Dean for aiding and abetting Mr. Dean in his breach of fiduciary duties owed to Mr. Clavet.

2. Count VI

In his opposition to Ms. Dean's motion to dismiss, Mr. Clavet points out that the Complaint states a claim against Ms. Dean for fraudulent transfer, for which claim Ms. Dean does not raise an argument for dismissal in her motion. (Pl's Opp. Mot. Dismiss 6.) Ms. Dean addresses this claim in her reply memorandum and argues for its dismissal. (Dean Reply Mot. Dismiss 1-3.)

Section 3575 of Title 14 of the Maine Revised Statutes defines a fraudulent transfer as to a present or future creditor:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

A. With actual intent to hinder, delay or defraud any creditor or debtor; or B. Without receiving reasonably equivalent value in exchange for the transfer or obligations and the debtor: (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as the debts became due.

Id. Ms. Dean's principle argument is that she cannot be liable as the recipient of a fraudulent

transfer, because the allegation that she did not take the ownership interests in the Marina Properties in good faith or for reasonably equivalent value (Pl's Compl. ¶ 65) is an element of the fraudulent transfer claim against *Mr. Dean*, and not an individual cause of action against *Ms. Dean*. (Dean Reply Mot. Dismiss 3.) While this may be true, *Ms. Dean* could nonetheless be held liable pursuant to a fraudulent transfer claim to the extent of her interests in the Marina Properties. See 14 M.R.S. § 3579(2)-(3). The Court thus rules that Count VI states a claim against *Ms. Dean*.

3. Conclusion

Based on the foregoing, *Ms. Dean's* motion to dismiss is DENIED.

C. The Marina Properties' Motion to Dismiss

The Marina Properties argue that they should be dismissed from this lawsuit because there are no allegations or claims against the Marina Properties themselves. (Marina Props. Mot. Dismiss 3.) The Marina Properties further argue that they are not indispensable or necessary parties under M.R. Civ. P. 19. (*Id.*) Mr. Clavet responds that it is immaterial that the Complaint does not state a claim against the Marina Properties because that is not the reason they were joined in this lawsuit. (Pl's Opp. Mot. Dismiss 1-3.) Rather, Mr. Clavet argues that they were joined because their interests are potentially implicated by the relief sought. (*Id.* 1.) Mr. Clavet thus directly disputes the Marina Properties' proposition that their joinder is not mandatory under M.R. Civ. P. 19. (*Id.* 2-3).

A person subject to service of process "shall" be joined in a lawsuit when that person "claims an interest relating to the subject of the action" and "disposition of the action in the person's absence may [either:] (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring . . . inconsistent obligations by reason of the claimed interest." M.R. Civ. P. 19(a). The

rule “protects unjoined but interested parties by assuring that their interests will not be prejudiced without their participation and it protects active parties by assuring that issues will not have to be relitigated.” *Ocwen Fed. Bank, FSB v. Gile*, 2001 ME 120, ¶ 14, 777 A.2d 275. *See also Gauthier v. Gerrish*, 2015 ME 60, ¶ 11, 116 A.3d 461 (“Rule 19(a) require[s] the joinder of a party holding a property interest that will be affected by the litigation.”).

As a result of the claims pleaded here against Mr. Dean and Ms. Dean, the Court could rule Mr. Clavet is entitled to relief implicating the interests of the Marina Properties. (*See* Pl’s Compl. ¶ 56-61, Prayer for Relief at *6.) If the Court grants such relief, Mr. Clavet has a right to be protected against having to relitigate his entitlement to that relief in some later proceeding involving the Marina Properties. Similarly, the Marina Properties have a right to oppose such relief, to the extent their interests are implicated.

The Court thus rules that M.R. Civ. P. 19(a) requires that the Marina Properties be joined in this lawsuit.¹ The Marina Properties’ motion to dismiss is DENIED.

II. CROSS-MOTIONS FOR ATTACHMENT

A. Standard of Review

Both Mr. Clavet and Mr. Dean (as Counterclaim-Plaintiff) have moved for attachment and trustee process. *See* M.R. Civ. P. 4A(e) (“An attachment may be made by a party bringing a counterclaim . . . in the same manner as upon an original claim.”); *see also* M.R. Civ. P. 4B(g) (same). A party seeking either attachment or trustee process must show “that it is more likely than not that the plaintiff will recover judgement, including interest and costs, in an amount equal to or greater than the aggregate sum of attachment” M.R. Civ. P. 4A(c); M.R. Civ. P. 4B(c); *Libby*

¹ The Court notes that its ruling that the Marina Properties are necessary parties is based on the remedies sought by Mr. Clavet in this case, and the impact that relief could have on the Marina Properties’ assets. The Court does not mean to suggest that an entity is always a necessary party when members or owners of that entity dispute a transaction that implicates those membership or ownership interests, as opposed to the assets of the entity.

O'Brien Kingsley & Champion, LLC v Blanchard, 2015 ME 101, ¶ 5, 121 A.3d 109. Accordingly, the movant must show a greater than 50% chance of successfully recovering a judgment. *Richardson v. McConologue*, 672 A.2d 599, 600 (Me. 1996). "Motions for attachment must be supported by affidavit evidence." *Lindner v. Barry*, 2003 ME 91, ¶ 5, 828 A.2d 788 (citing *Wilson v. DelPapa*, 634 A.2d 1252, 1254 (Me. 1993)). Orders for attachment and trustee process are reviewable on appeal for an abuse of discretion or clear error. *Libby O'Brien Kingsley & Champion, LLC*, 2015 ME 101, ¶ 5, 121 A.3d 109.

B. Mr. Clavet's Motion

1. Factual Support

As noted *supra*, Mr. Dean and Mr. Clavet were long-time business partners. (Clavet Aff. ¶ 2; Dean Aff. ¶ 2.) The Marina Properties were two of several companies that Mr. Dean and Mr. Clavet co-owned equally. (Clavet Aff. ¶¶ 3-6; Dean Aff. ¶ 2.) Mr. Dean had primary managerial responsibility for the Marina Properties. (Clavet Aff. ¶ 6, Dean Aff. ¶ 8(b)-(c).)

On September 15, 2016, Mr. Dean sent Mr. Clavet a text message telling Mr. Clavet the situation with the Marina Properties was dire and the lenders would require Mr. Clavet and his wife to post personal guarantees over the Marina Properties' credit facilities, and suggesting that Mr. Dean buy out Mr. Clavet's interest. (Clavet Aff. ¶ 8; Pl's Ex. A; Dean Aff. ¶ 18.) In their discussions over the following days, Mr. Dean suggested that the fair value of the Marina Properties was the \$2.5 million Mr. Dean and Mr. Clavet had originally paid for them, minus the outstanding debt of \$320,000. (Clavet Aff. ¶ 9.) Mr. Clavet agreed to this valuation. (Dean Aff. ¶ 19.) The buyout closed on September 26, 2016, with an effective date of January 1, 2016. (Clavet

⁷ Mr. Clavet and Mr. Dean both attached affidavits in support of their Motion and Opposition, respectively. See M.R. Civ. P. 4A(c), (i), 4B(c). The facts laid out in this Part, and on which the Court bases its determination of the likelihood of Mr. Clavet's success on the merits, is thus taken from a limited, preliminary record developed before discovery. See *Porrizzo v. Karofsky*, 1998 ME 182, ¶ 7, 714 A.2d 826.

Aff. ¶ 10; Dean Aff. ¶¶ 21-22.)

Meanwhile, Mr. Dean was purportedly in negotiation with TCRG Opportunity X, LLC, for TCRG to purchase all the Marina Properties' non-cash assets for \$7.9 million. (Clavet Aff. ¶ 11.) TCRG provided Mr. Dean with a draft purchase and sale agreement on those terms on or about September 16, 2016. (Clavet Aff. ¶ 13; Dean Aff. ¶ 27.) Mr. Dean executed the purchase and sale agreement with TCRG on October 5, 2016. (Clavet Aff. ¶ 12; Pl's Ex. B; Dean Aff. ¶ 30.) The sale of the Marina Properties was completed on February 5, 2017. (Dean Aff. ¶ 34.)

Mr. Clavet swears that Mr. Dean did not tell him about the pending sale of the Marina Properties' assets, or the "true value" of the Marina Properties based on that pending sale, while he and Mr. Clavet were negotiating the sale of Mr. Clavet's interest to Mr. Dean. (Clavet Aff. ¶ 11.) Mr. Dean swears that he did communicate the broker's "contact" with him to Mr. Clavet between August 31 and September 16, 2016. (Dean Aff. ¶ 35.) Regardless, Mr. Clavet swears he was not otherwise aware of important details of the pending sale. (Clavet Aff. ¶ 11; Dean Aff. ¶ 36.) Accordingly, Mr. Clavet agreed to sell his interest in the Marina Properties to Mr. Dean for \$1.09 million, half the value as represented by Mr. Dean (half of \$2.5 million minus \$320,000 in debt). (Clavet Aff. ¶ 10; Dean Aff. ¶ 36.) Mr. Clavet swears that he would not have agreed to that sale price but for Mr. Dean's misrepresentations. (Clavet Aff. ¶¶ 18-19, 21.)

2. It Is More Likely Than Not Mr. Clavet Will Prevail on the Merits

Several of Mr. Clavet's counts against Mr. Dean are based on Mr. Dean's alleged affirmative misrepresentations and misrepresentations by omission during discussions of the valuation of the Marina Properties pursuant to Mr. Dean's buyout of Mr. Clavet's interest in those companies. (Pl's Compl. ¶¶ 33-50.) The limited evidence before the Court supports a preliminary finding that it is more likely than not that Mr. Clavet will prevail on these counts.

A defendant is liable for fraud if she makes a false representation of a material fact with knowledge of its falsity or in reckless disregard for whether it is true or false for the purpose of inducing a plaintiff to act or refrain from acting in reliance on the misrepresentation, and the plaintiff justifiably relies on the representation as true and thereby suffers damages. *See Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 9, 832 A.2d 771. Intentional fraud must be proved by clear and convincing evidence. *Rand*, 2003 ME 122, ¶ 9, 832 A.2d 771.

Maine has adopted the definition of negligent misrepresentation from the Restatement (Second) of Torts § 552(a)(1):

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Rand, 2003 ME 122, ¶ 13, 832 A.2d 771 (citing Restatement (Second) of Torts § 552(a)(1)) (emphasis omitted).

A fiduciary duty arises at common law where (1) there is an actual placing of trust and confidence in fact by one party in another, and (2) there is a great disparity of position and influence between the parties. *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 18, 133 A.3d 1021. Under Maine law, the members of a LLC may expressly impose or eliminate fiduciary duties for members or managers pursuant to the LLC's operating agreement. 21 M.R.S. §§ 1521(3), 1559(3).

Mr. Clavet points out that the facts averred in his affidavit establish that Mr. Dean made both affirmative misrepresentations to Mr. Clavet and misrepresentations by omission. (Pl's Mot.

¹ The parties seem to agree that Blue Water Marina, LLC is a Maine LLC and Covered Marina, LLC is a Texas LLC. (Dean Aff. ¶ 2; Pl's Compl. ¶¶ 5-6.) Texas law thus controls the rules governing the management of Covered Marina. *See* 14 M.R.S. § 1621(1).

Attachment 4-6.) It would have been fraudulent to represent that the value of the Marina Properties was \$2.5 million if Mr. Dean knew that a prospective buyer was willing and able to pay \$7.9 million for the non-cash assets of the Marina Properties and they had an additional \$320,000 in cash. (Clavet Aff. ¶¶ 9-10.) It would have been a misrepresentation by omission for Mr. Dean to fail to inform Mr. Clavet of the TCRG negotiations and the subsequent offer. (Clavet Aff. ¶¶ 11-13, 15-18.) Mr. Clavet suggests that his sworn statements establish that Mr. Dean owed him fiduciary duties—and breached that duty through his deception, (*See* Clavet Aff. ¶¶ 2-6, 22.)

Mr. Dean does not necessarily dispute that Mr. Clavet's averments would satisfy the elements of his claims for fraud, breach of fiduciary duty, and negligent misrepresentation. Instead, Mr. Dean argues that the story is not so simple as Mr. Clavet's affidavits would lead the Court to believe. (Def's Opp. Mot. Attachment 6.) Mr. Dean claims that Mr. Clavet's motion presupposes that Mr. Clavet lacked knowledge of the financial condition of the Marina Properties and the potential buyer. (*Id.*) Mr. Dean emphasizes that Mr. Clavet is a highly sophisticated investor who decided to sell his interest in the Marina Properties after months of negotiations and on favorable terms. (Dean Aff. ¶¶ 1, 19-22.) Mr. Dean further points out that he swears that he did inform Mr. Clavet that he had been contacted by a broker for a potential sale of the Marina Properties. (Dean Aff. ¶¶ 25, 35.)

Mr. Dean's argument misses the point. There is no dispute that Mr. Clavet—as well as Mr. Dean—are experienced, sophisticated businessmen who make investment decisions upon their own, independent determination that the terms are favorable. Contrary to Mr. Dean's characterization, the Court does not read Mr. Clavet's affidavit as telling the story of how “he was unwittingly duped into selling his interests in” the Marina Properties. (Def's Opp. Mot. Attachment 6.) Rather, on the preliminary record before it, the Court reads Mr. Clavet's affidavit as telling the

story of how his business partner of over three decades lied to him (at worst) and withheld crucial information from him (at best) during their months of negotiations over Mr. Dean's buyout of Mr. Clavet's interest in the Marina Properties. Absent from Mr. Dean's affidavit is any testimony that he disclosed to Mr. Clavet any of the material terms of the offer from the broker or the extent of his negotiations with the purchaser—only that he disclosed that there was an offer. Mr. Dean may well have not taken the offer seriously—even after the broker told him, during a phone call four days before the buyout of Mr. Clavet's interest, that the buyer would be sending him a purchase and sale agreement. (Clavet Aff. ¶¶ 10-11; Dean Aff. ¶¶ 21-22, 27-30.) But regardless, the Court preliminarily finds it is more likely than not that Mr. Dean will be liable for withholding that information and/or failing to account for it in his valuation of the Marina Properties. (Clavet Aff. ¶ 18.) Furthermore, Mr. Clavet's affidavit casts doubts on the timeline sworn to by Mr. Dean. (Clavet Aff. ¶¶ 13-17.) Eventually, a factfinder will need to sort out the details of who knew or believed what, and when. However, based on the limited affidavits and exhibits now before the Court, the Court finds it more likely than not that Mr. Clavet will prevail on Counts I-III of his Complaint against Mr. Dean.

3. Conclusion

Mr. Clavet's motion argues that he is likely to prevail on his remaining counts against Mr. Dean. These counts state an alternative claim for relief (Count IV: unjust enrichment), seek a specific remedy that requires liability on a substantive claim for survival, *see Francis v. Stinson*, 2000 ME 173, ¶ 32 n.5, 760 A.2d 209 (Count V: constructive trust); or seek to impose liability on Mr. Dean for his subsequent transfer of the Marina Properties to his wife (Count VI: fraudulent transfer). Mr. Clavet need not demonstrate a likelihood of success on these additional claims at this point because they do not affect the question before the Court. On a motion for attachment,

this Court must determine “that it is more likely than not that the plaintiff will recover judgment . . . in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance,” M.R. Civ. P. 4A(c).¹ Based on the Court’s finding above that Mr. Clavet is more likely than not to prevail against Mr. Dean on Counts I-III of his Complaint, the Court further finds that it is more likely than not that he will recover judgment in the amount of \$2,972,500: the value of his interest in the Marina Properties based on Mr. Dean’s sale of the Marina Properties (\$3.95 million), minus the amount Mr. Dean agreed to pay Mr. Clavet for his interest (\$1.09 million), plus what Mr. Dean still owes Mr. Clavet from the agreed-to buyout price (\$112,500).

C. Defendants’ Motion

1. Factual Support

As noted *supra*, the Marina Properties were just two of several businesses Mr. Clavet and Mr. Dean owned jointly. (Clavet Aff. ¶¶ 3, 6; Dean Aff. ¶ 2.) Mr. Dean’s Amended Counterclaim alleges Mr. Clavet is liable to him for breach of fiduciary duty, unjust enrichment, misrepresentation, usurpation of joint business opportunities, and breach of the duty of good faith and fair dealing for actions he took relative to certain businesses owned jointly by both men and certain independent investments made by Mr. Clavet that Mr. Dean suggests are closely enough related to the men’s jointly held business enterprises to be actionable. (Def’s Countercl.; Dean Aff. ¶¶ 37-52.) It is undisputed that both men are highly sophisticated and educated investors who made investments independently of their partnership, and that each man gave the other great discretion and autonomy with respect to decision-making. (Clavet Aff. ¶¶ 11-12; Dean Aff. ¶¶ 2, 5.)

¹ Mr. Clavet’s suggestion that there is no insurance or other security available to satisfy his claims goes unchallenged by Mr. Dean in opposition. (Pl’s Mot. Attachment 9.)

² See this Order at 7 n.3 *supra*. References to the Affidavit of Mr. Clavet in this Part are to his affidavit filed in support of his Opposition to Mr. Dean’s motion for attachment and attachment on trustee process. Mr. Dean’s affidavit filed in support of his own motion is substantively identical to his affidavit filed in support of his Opposition to Mr. Clavet’s motion.

Mr. Dean's affidavit explicates in considerable detail various aspects of the companies both men owned jointly, how those companies interact with each other and with third parties, problems and successes the companies have had, and his perspective on several of Mr. Clavet's independent investments. (*See generally* Dean Aff. ¶¶ 37-52.) Facts averred are discussed to the extent they are relevant in the Discussion section *infra*.

1. It Is Not More Than Likely That Mr. Dean Will Prevail on the Merits

While Mr. Dean's Affidavit and Counterclaim—and, to a certain extent, his motion (*see* Def's Mot. Attachment 2-5)—describe a great number of activities undertaken by Mr. Clavet, Mr. Dean's motion only identifies two with quantifiable damages from which the Court may determine “that it is more likely than not that the [counterclaim] plaintiff will recover judgment . . . in an amount equal to or greater than the aggregate sum of the attachment [sought].” M.R. Civ. P. 4A(c). These are (a) Mr. Clavet's purchase and subsequent sale of two mobile home parks located in Unity and Corinth, Maine (the “mobile home parks”) and (b) Mr. Clavet's purchase and development of the Charity Shores subdivision and subsequent sale of the lots. (Def's Mot. Attachment 6-10; Dean Aff. ¶¶ 50-52.) The Court thus dedicates its analysis to Mr. Dean's likelihood of success on the merits as to causes of action based on these transactions. M.R. Civ. P. 4A(c).

Mr. Clavet's liability to Mr. Dean for his purchase of the mobile home parks is based on Mr. Dean's sworn statement, “on information and belief,” that a business broker—who has regularly been retained by both gentlemen for many years to seek out business opportunities for them jointly—referred the opportunity to Mr. Clavet alone, surreptitiously and at Mr. Clavet's direction. (Dean Aff. ¶¶ 47-50.) On the contrary, Mr. Clavet swears that he learned about the opportunity through advertisements to the general public that the mobile home parks were

available for auction. (Clavet Aff. ¶ 22.) A factfinder may eventually be asked to decide which explanation is more credible. But even as a legal matter, the Court is not convinced that the business broker's involvement would make Mr. Clavet's purchase and sale of the parks actionable, and Mr. Dean's motion offers no explanation on that point. There is no evidence that Mr. Clavet used any property or proprietary information of any jointly held LLCs in his purchase and sale of the mobile home parks. (Clavet Aff. ¶ 22.) The Court is unsure how the use of a business broker is relevant, regardless of that broker's former dealings with the parties.

The Charity Shores subdivision is an asset of Quahog Bay, LLC, a company formed by Mr. Clavet, his wife, and his parents-in-law. (Dean Aff. ¶¶ 51-52.) The subdivision is on land that Mrs. Clavet's family has owned for over one hundred years. (Clavet Aff. ¶ 45.) Mr. Dean claims that Mr. Clavet usurped the business opportunity to put a subdivision on the land based on a conversation the two men had about the land in 2014. (Dean Aff. ¶ 51.) Mr. Dean swears that based on that conversation, he believed that Mr. Clavet was utilizing jointly owned development companies to develop the Charity Hills subdivision. (Dean Aff. ¶ 51.)

This single conversation is juxtaposed with Mr. Clavet's averments that the development of Charity Shores was part of a plan negotiated by Mr. Clavet and his wife's family to develop land owned by her family for over a century to benefit her family and involved many family members. (Clavet Aff. ¶¶ 43-52, 54-55.) Notably, Mr. Clavet does not deny that he spoke with Mr. Dean about this project; in fact, he is sure that he did. (Clavet Aff. ¶¶ 51, 53.) However, he swears that it was always clear that the project was not anything Mr. Dean or their joint businesses were involved in, or that Mr. Dean expressed any interest in. (Clavet Aff. ¶¶ 53-55.) Mr. Clavet further swears that he used no property or proprietary information of any jointly-held LLCs in this project. (Clavet Aff. ¶ 52.)

These two gentlemen were business partners for over three decades who shared a business office and would regularly confer with each other. (Clavet Aff. §§ 5-6.) While much, even most, of their conversations were likely about joint business concerns, it is more than likely that they also discussed their own individual business projects. (See Clavet Aff. §§ 3, 5.) If it is true that Mr. Clavet merely discussed an independent, family-based project on family-owned land with Mr. Dean, that conversation cannot convert the project into a joint enterprise. A factfinder will eventually need to decide which man's characterization of the conversation is more credible, or whether Mr. Dean believed that Mr. Clavet intended to involve Mr. Dean in the project. However, based on the preliminary record now before the Court, the Court finds that Mr. Dean is not likely to prevail on any claims based on that conversation.

2. Conclusion

The Court finds that it is not more than likely that Mr. Dean will prevail on any claims based on Mr. Clavet's purchase and sale of the mobile home parks or his development of the Charity Shores subdivision. As these are the only transactions on which Mr. Dean bases his claim that he is more likely than not to recover in an amount equal to or greater than \$1,215,000 against Mr. Clavet, Mr. Dean's motion for attachment and attachment on trustee process in that amount is DENIED.

CONCLUSION

Based on the foregoing, it is hereby ORDERED:

1. Defendant Cecile Dean's motion to dismiss is DENIED.
2. Parties-in-Interest Blue Water Marina, LLC's and Covered Marina, LLC's motion to dismiss is DENIED.
3. Plaintiff Emile Clavet's motion for attachment and attachment on trustee process is GRANTED. The Court ORDERS attachment on all attachable assets of Kevin Dean up to the amount of \$2,972,500. The Court further ORDERS attachment on trustee process

against all parties in possession of property payable to Kevin Dean to the amount of their attachable credits not to exceed \$2,972,500.

4. Defendant/ Counterclaim-Plaintiff Kevin Dean's motion for attachment and attachment on trustee process is DENIED.

5/23/18

DATE

Michael J.

SUPERIOR COURT JUSTICE
BUSINESS AND CONSUMER COURT

Entered on the Docket: 5/23/18
Copies sent via Mail ☐ Electronically ☒