STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-47 ✓

ANDROSCOGGIN SAVINGS BANK, Plaintiff, v. BARTON MORTGAGE CORP. & DERON BARTON, Defendants/Counterclaim Plaintiffs	)	ORDER STRIKING LAY OPINION TESTIMONY

Androscoggin Savings Bank (the "Bank") has submitted to the Court in support of its motion for summary judgment the affidavit testimony of an individual named Mary Miller ("Miller"). Defendants/Counterclaim Plaintiffs Barton Mortgange Corporation and Deron Barton ("Barton") object to the testimony, and have moved to strike the testimony on the grounds that the Bank has not designated Miller as an expert; the testimony contained in Miller's affidavit constitutes expert testimony; and as such, Miller's testimony constitutes impermissible lay opinion testimony.

Lay opinion testimony is permissible under M.R. Evid. 701, but only under certain carefully circumscribed conditions. First, the testimony must be grounded on the personal knowledge of the witness, just as would be the case with simple statements of fact. *Chrysler Credit Corp. v. Bert Cote's L/A Auto Sales*, 1998 ME 53, ¶ 21, 707 A.2d 1311 (omitting citation). Second, the testimony must be within the common knowledge of an ordinary person, and must not be derived from specialized

knowledge. *Mitchell v Kieliszek*, 2006 ME 70, ¶ 14, 900 A.2d 719. The categories of expert and lay opinion testimony are thus mutually exclusive. *Id.*

For the purposes of deciding this motion, the Court has reviewed Miller's affidavit. The testimony provided in the affidavit is not based on Miller's personal observations of events involving Defendants. Further, the testimony is based on specialized knowledge, rather than the common knowledge of an ordinary person. Hence, Miller's affidavit testimony constitutes expert testimony and is impermissible lay opinion testimony. However, the Bank has not designated Miller as an expert, and the deadline for such a designation has long since expired. Accordingly, the Court GRANTS Barton's motion to strike Miller's affidavit testimony, and the testimony shall not be considered in connection with the Bank's motion for summary judgment.

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.

February 22, 2019.

Michael A. Duddy
Judge, Business and Consumer Docket

Entered on the Docket: 2-22-19
Copies sent via Mail __ Electronically ✓

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-17-47 ✓

ANDROSCOGGIN SAVINGS BANK Plaintiff/ Counterclaim-Defendant, v. BARTON MORTGAGE CORP., et al., Defendants/ Counterclaim-Plaintiffs,	ORDER ON COUNTERCLAIM DEFENDANT'S MOTION FOR PARTIAL DISMISSAL OF COUNTERCLAIM PLAINTIFF'S COUNTERCLAIM

Before the Court is Plaintiff/ Counterclaim-Defendant Androscoggin Savings Bank's ("ASB") motion for partial dismissal of the Counterclaim filed by Defendants/ Counterclaim Plaintiffs Barton Mortgage Corporation ("BMC") and Deron Barton ("Barton"). ASB moves to dismiss Counts I, III, IV, VI, VII, VIII, XI, XII, XIII, XVI, and XVII of the Counterclaim on the basis that those counts fail to state a claim upon which relief may be granted. M.R. Civ. P. 12(b)(6). ASB further moves for the dismissal of Counts VI and VIII on the grounds that those claims do not contain a short and plain statement showing that Barton is entitled to relief. M.R. Civ. P. 8(a). BMC and Barton oppose the motion. Pursuant to its discretionary authority, the Court chose to rule on the motion without hearing. M.R. Civ. P. 7(b)(7).

FACTUAL BACKGROUND

ASB filed its three-Count Complaint against BMC & Barton alleging default on a commercial promissory note for $110,000 in principal (Count I), violation of commercial sublease and $8,221.90 in unpaid rent (Count II-BMC), and default of obligations under personal guaranty (Count III-Barton). The Complaint attached the Sublease (Ex. 1), the Note (Ex. 2), and the Guaranty (Ex. 3). BMC and Barton answered the Complaint and filed their eighteen-count

Counterclaim. The gist of the Counterclaim, which goes into great detail, is that Barton, the principal of mortgage originator BMC, was "strung along" by executives and agents of ASB under the false pretense that ASB was interested in formalizing a joint venture or partnership with BMC. (Def's Countercl. ¶ 24.) This allegedly resulted in great advantage to ASB, and devastating harm to Barton and BMC. (*See generally* Def's Countercl.) The details of ASB and BMC's ill-fated putative partnership will be addressed to the extent they are relevant in the Discussion section *infra*.

DISCUSSION

I. THE ALLEGED CONTRACT IS SUBJECT TO THE STATUTE OF FRAUDS & NO EXCEPTION APPLIES

A. Legal Standard, Factual Background, and Summary of Arguments

Maine's statute of frauds requires that certain agreements be memorialized in writing and signed by the party "to be charged therewith." 33 M.R.S. § 51. "The purpose of a statute of frauds is to preclude false allegations of contract." *Wells Fargo Home Mortg., Inc. v. Spaulding*, 2007 ME 116, ¶ 20, 930 A.2d 1025 (quotation omitted). In particular:

> No action shall be maintained . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . [or] [u]pon any agreement to refrain from carrying on or engaging in any trade, business, occupation or profession . . . unless the promise, contract or agreement on which such action is brought . . . is in writing and signed by the party to be charged therewith . . . .

33 M.R.S. § 51(5),(8). In its Counterclaim, BMC alleges "various contractual commitments" owed by ASB to BMC. (Def's Countercl. ¶¶ 57, 60.) These contractual commitments are alleged to have arisen out of ASB President Paul Andersen's oral promises to BMC to refer all mortgage leads from ABS's Portland office to BMC and that BMC would be the bank's "exclusive partner" for residential lending in Southern Maine and its sole originator of mortgages in Cumberland and York

counties. (*Id.* ¶ 57.) It is undisputed that the alleged contract was intended to last for more than one year and that it required ASB to refrain from engaging in business or trade with other mortgage originators. (*See id.* ¶¶ 10, 13, 35.)

ASB's primary argument is that BMC's[1] breach of contract count, and any other claims flowing from the alleged breach of contract, should be dismissed because the alleged contract would be unenforceable due to operation of Maine's statute of frauds and no exception applies under the facts as alleged. (Pl's Mot. Dismiss 6-8.) BMC does not contest the proposition that its alleged agreement with ASB would fall within the statute of frauds. Instead, BMC counters that an affirmative defense cannot form the basis of a motion to dismiss, and that in any event, the statute of frauds cannot bar its claims because the facts alleged could support an exception to the application of the statute of frauds, specifically either part performance or promissory estoppel. (Def's Opp. Mot. Dismiss 5-12.) The Court considers these arguments and counterarguments in turn.

B. A Motion to Dismiss can be Grounded in an Affirmative Defense

BMC first argues that this Court may not dismiss any claims based on an affirmative defense. (Def's Opp. Mot. Dismiss 3-6.) "Various of the defenses listed as affirmative under Rule 8(c) may be raised by motion to dismiss if the facts appear on the face of the summons and/or complaint." 2 Harvey *Maine Civil Practice* § 12.12 at 423 (3d. 2011). The statute of frauds is likely one of the "various" defenses, although our Law Court has not expressly ruled on the issue. *Id.* at 425; *see also Barrett v. Greenall*, 139 Me. 75, 78, 27 A.2d 599, 600-01 (1942) (dictum that statute of frauds could have formed the basis of a directed verdict in contract for the sale of land); *Berkowitz v. Marean*, No. CV-16-450, 2017 Me. Super. LEXIS 157, at *2 (Feb. 3, 2017) (citing

[1] Some Counts of the Counterclaim are brought only by BMC, some only by Barton, and some by both.

Gray v. TD Bank, N.A., 2012 ME 83, ¶ 10, 45 A.3d 735) ("[A]n affirmative defense [is] typically asserted in the answer to a complaint rather than a motion to dismiss, [but] such a procedure is appropriate if facts giving rise to the defense appear on the face of the complaint.") (quotations omitted)). The weight of authority supports ASB's position that the Court may dismiss claims based on the affirmative defense of the statute of frauds.

C. Two Problems with Part Performance

BMC next argues that on the facts alleged in its Counterclaim, the doctrine of part performance is "clearly applicable" as an exception to the statute of frauds. (Def's Opp. Mot. Dismiss 6-10.) "'After having induced or knowingly permitted another to perform in part an agreement, on the faith of its full performance by both parties and for which he could not well be compensated *except by specific performance*, the other shall not insist that the agreement is void.'" *Landry v. Landry*, 641 A.2d 182, 183 (Me. 1994) (quoting *Bell v. Bell,* 151 Me. 207, 211, 116 A.2d 921, 923 (1955) (emphasis added)). *See also Wells Fargo Home Mortg., Inc. v. Spaulding*, 2007 ME 116, ¶ 23, 930 A.2d 1025 ("well-established exceptions to the statute of frauds, such as part performance") (citing *Sullivan v. Porter*, 2004 ME 134, ¶ 10, 861 A.2d 625, 630).

As *Landry* and *Bell* make clear, part performance only applies where a party requests equitable relief in the form of specific performance—which BMC does not seek in its Counterclaim. The Superior Court (Cumberland County, *Warren, J.*) has expressly held that "part performance is only available as an exception to the Statute of Frauds in cases when specific performance is sought." *Jones v. Adam*, No. CV-06-226, 2007 Me. Super. LEXIS 141, *12 (July 13, 2007) (citing *Great Hill Fill & Gravel Inc. v. Shapleigh*, 1997 ME 75 ¶¶ 6-7, 692 A.2d 928; *Northeast Investment Co. Inc. v. Leisure Living Communities Inc.*, 351 A.2d 845, 855 (Me. 1976)).

Furthermore, under Maine law, part performance likely cannot operate as an exception to

the requirement that contracts that are not to be performed within one year must be memorialized in writing. Our Law Court has expressly held that part performance cannot obviate the writing requirement of the statute of frauds where a plaintiff seeks specific performance of an employment contract for a term of more than one year. *Stearns v. Emery-Waterhouse Co.*, 596 A.2d 72, 75 (Me. 1991). The Superior Court (Cumberland County, *Wheeler, J.*) has cited the Restatement (Second) of Contracts and *Stearns* for the proposition that "part performance does not generally apply to make the one-year provision inapplicable." *Thomsen v. Ward*, No. CV-11-14, 2012 Me. Super. LEXIS 75, at *22 (June 4, 2012) (citing Restatement (Second) of Contracts § 130, cmt. e).[2]

D. Promissory Estoppel is Likewise Barred by the Statute of Frauds

Finally, BMC argues that its claim for promissory estoppel cannot be barred by the statute of frauds. (Def's Opp. Mot. Dismiss 10-12.) "The doctrine of promissory estoppel applies to promises that are otherwise unenforceable, and is invoked to enforce such promises so as to avoid injustice." *Harvey v. Dow*, 2008 ME 192, ¶ 11, 962 A.2d 322. Maine has adopted the definition of promissory estoppel set out in Section 90(1) of the Restatement (Second) of Contracts:

> 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.

Id. Our Law Court has limited the application of promissory estoppel as an exception to the statute of frauds in contracts for the sale of land to those situations where the party seeking to enforce the promise to convey has made substantial, physical improvements to the land in reasonable reliance on the promise. *See Harvey v. Dow*, 2008 ME 192, ¶ 13, 962 A.2d 322; *Tozier v. Tozier*, 437 A.2d

[2] Although the *Thomsen* court goes on to rule on summary judgment that the counterclaim-defendant had "fully performed his obligations" under the purported contract, rendering the statute of frauds inapplicable in any event, *see id.*, at * 27-28, this Court cites to the opinion for its persuasive reasoning rather than as *stare decisis*.

II. EMOTIONAL DISTRESS COUNTS

A. BMC Has Adequately Alleged A Claim for Negligent Infliction of Emotional Distress

ASB offers only one ground for the dismissal of Count VI: that because all of BMC's tort and breach of contract claims fail, NIED must fail as well. (Pl's Mot. Dismiss 8-9.) This is belied by the fact that ASB is moving only for partial dismissal. The Court thus DENIES the motion to dismiss as to Count VI.

B. ASB's Alleged Conduct Does Not State a Claim for Intentional Infliction of Emotional Distress

ASB urges the Court to perform a "gatekeeper" function and evaluate the claim for IIED to determine whether the facts alleged could reasonably justify a verdict for BMC. (Pl's Mot. Dismiss 10; Reply Br. 6.) BMC responds that the Court should not weigh the facts on a motion to dismiss, and the question of whether the facts alleged could support a finding of liability is better left to the jury. (Def's Opp. Mot. Dismiss 13-15.)

IIED requires, *inter alia*, that a plaintiff prove by a preponderance of the evidence that "the [defendant's] conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community . . . ." *Lyman v. Huber*, 2010 ME 139, ¶ 16, 10 A.3d 707. "Recent Law Court decisions have endorsed the trial court's role as gatekeeper regarding IIED claims, meaning to evaluate an IIED claim to determine whether the facts alleged could reasonably justify a verdict for the plaintiff." *Temm v. LPL Fin. LLC*, No. BCD-CV-16-14, 2016 Me. Super. LEXIS 68, at *7 (Bus. & Consumer Ct. Apr. 29, 2016). "[I]t is for the Court to determine, in the first instance whether the Defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery . . . ." *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 16, 711 A.2d 842 (quoting *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 (Me. 1996)).

In *Temm*, the Business & Consumer Court (*Horton, J.*) dismissed a count for IIED where the plaintiff alleged that the defendant had "lock[ed] him out, tr[ied] to prevent him from taking clients with him, spread[ ] misinformation about him to clients and others, and access[ed] his client files with his password." *Temm*, 2016 Me. Super. LEXIS 68, at *8. In *Lyman v. Huber*, 2010 ME 139, 10 A.3d 707, our Law Court vacated a judgment awarding IIED damages following a bench trial because the requisite severity of the plaintiff's emotional distress could not "be inferred from the extreme and outrageous nature of the defendant's conduct alone" where the defendant subjected the plaintiff, his domestic partner, to 15 years of verbal and emotional abuse. *Id.*, ¶ 24. *Lyman* was thus decided on a different but related issue. While the holding is therefore not controlling, the case does suggest that the Law Court is hesitant to allow a plaintiff to recover emotional distress damages unless the behavior complained of is truly abhorrent. *Cf. Liberty v. Bennett,* No. CV-09-459, 2010 Me. Super. LEXIS 2, *13-15 (Jan. 19, 2010) (declining to dismiss IIED claim because the "court [could] not say as a matter of law that the Defendant's actions definitively were not extreme and outrageous such that they would be regarded as atrocious and utterly intolerable" where the defendant was alleged to have, *inter alia*, destroyed "the parent/child relationship between the Plaintiff and her father," "took control of the day-to-day lives of the family," "threatened to foreclose a mortgage . . . if [Plaintiff] did not comply with his dictates," "disparaged Plaintiff by screaming at her, calling her names, and telling lies about Plaintiff to other people in her community . . . .").

Here, Barton has alleged that ASB stole his business plan and customers (Def's Countercl. ¶¶ 36, 39-40), tried to drive him out of business (*Id.* ¶ 37), attempted to sabotage his relationship with another bank (Countercl. ¶¶ 43-47), and stole or destroyed BMC property including customer files. (Countercl. ¶¶ 48-52.) This is in addition to Mr. Andersen's alleged misrepresentations that

"strung [Mr. Barton] along" under the false pretense of forming a joint partnership with him (Def's Countercl. ¶ 24) and the general allegations that ASB's misdeeds have cost him a lot of money. (Def's Countercl. ¶¶ 53-55.)

These allegations are analogous to the allegations in *Temm*. As the Business and Consumer Court stated in *Temm*, "lockouts and competing over clients, and more nefarious tactics like accessing private data and spreading rumors and misinformation about competitors are by no means unheard of in the context of the breakup of businesses, reprehensible though some of the tactics may be." *Temm*, 2016 Me. Super. LEXIS 68, at *8. The same principle applies here. The Court therefore GRANTS the motion to dismiss Count VII (IIED) on the grounds that the facts alleged are not sufficiently serious to warrant recovery of emotional distress damages.

III. THE SUBLEASE CANNOT VITIATE THE TRESPASS CLAIMS

ASB urges this Court to dismiss Count XI (trespass) and Count XVI (trespass/ violation of eviction statute) based on the Sublease. (Pl's Mot. Dismiss 11-12.) The Sublease was attached to the Complaint and is referred to in the Counterclaim. *See Moody v. State Liq. & Lott. Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 4. BMC argues that ASB's argument is premised on factual assertions by ASB that are not found in the Counterclaim. (Def's Opp. Mot. Dismiss 15-16.) Notably, ASB does not dispute this contention in its reply brief.

The Court agrees with BMC that ASB relies on certain legal conclusions that require factual determinations: *e.g.* whether BMC "abandoned" the premises, when the lease was "terminated," and when (or if) an event constituting "default" took place. The Court therefore DENIES the motion to dismiss as to Count XI and XVI.

IV. CORPORATIONS HAVE ONLY A LIMITED RIGHT TO PRIVACY

BMC alone brings a claim for invasion of privacy. (Def's Countercl. ¶ 105.) ASB argues

that only a "living individual" can maintain an action for invasion of privacy. (Pl's Mot. Dismiss 14.) BMC counters that "entities have been recognized as having the same fundamental rights as human beings." (Opp. Mot. 17-18.)

"[A]n action for invasion of privacy can be maintained only by a living individual whose privacy is invaded." *Nelson v. Me. Times*, 373 A.2d 1221, 1225 (Me. 1977) (quoting Restatement (Second) of Torts, § 652I (1979)). "A corporation, partnership or unincorporated association has no personal right of privacy . . . . It has, however, a limited right to the exclusive use of its own name or identity in so far as they are of use or benefit, and it receives protection from the law of unfair competition." Restatement (Second) of Torts, § 652I(c) (1979).

In the Counterclaim, BMC alleges that ASB physically intruded upon the premises leased by BMC, examined personal effects therein, and gained access to personal property, and that these actions constituted an intentional intrusion upon the solitude and seclusion that BMC enjoyed in its private property. (Def's Countercl. ¶¶ 107-108.) The Counterclaim also alleges that BMC had a reasonable expectation of privacy in the contents of the files in its office. (Def's Countercl. ¶ 106.)

Nelson controls the outcome here. The invasion of privacy alleged is not an invasion of "the exclusive use of its own name or identity in so far as they are of use or benefit," as contemplated by the Restatement. *See Nelson*, 373 A.2d at 1225. BMC's attempt to narrow *Nelson*'s holding is unavailing, particularly in consideration of the full Restatement section relied upon by the *Nelson* Court.[3] The Court therefore GRANTS ASB's motion to dismiss Count XII.

[3] BMC cites to decisions of intermediate appellate courts in California and Michigan, which have held that entities have a right to privacy similar to that alleged by BMC in this case, but the Court declines to follow those cases in light of *Nelson*'s controlling holding.

V. NO DEMAND WAS REQUIRED UNDER THE FACTS ALLEGED TO STATE A CLAIM FOR CONVERSION/ INTERFERENCE WITH CHATTELS

ASB argues that because BMC does not allege that any demand was made on ASB for the return of the items allegedly removed from BMC's office space, Count XIII (Conversion/ Interference with Chattels) must be dismissed. (Pl's Mot. Dismiss 13.) BMC counters that where a party charged with conversion has acquired possession of the property wrongfully, a demand for return by the person entitled to possession is not required. (Def's Opp. Mot. Dismiss 16-17.)

"The necessary elements to establish a claim for conversion are a showing that (1) the person claiming that his or her property was converted has a property interest in the property; (2) the person had the right to possession at the time of the alleged conversion; and (3) the party with the right to possession made a demand for its return that was denied by the holder." *Estate of Barron v. Shapiro & Morley, LLC*, 2017 ME 51, ¶ 14, 157 A.3d 769 (citing *Withers v. Hackett*, 1998 ME 164, ¶ 7, 714 A.2d 798). However, "[t]he person with the right to possession need only make a demand if the holder took the property rightfully . . . ." *Withers*, 1998 ME 164, ¶ 7, 714 A.2d 798. *Accord* Simmons, Zillman, & Gregory, *Maine Tort Law* § 6.09 at 132-33 (1999 ed.) ("Demand and refusal are not necessary to maintaining . . . a [conversion] action . . . whenever an act of conversion has been committed . . . . [U]nlawful possession obviates any need for demand and refusal . . . .").

Here, BMC has alleged explicitly that ASB wrongfully took possession of BMC's property. (Def's Countercl. ¶ 113.) This obviates the need for demand and refusal. The Court therefore DENIES ASB's motion to dismiss Count XIII.

VI. THE COURT CANNOT DETERMINE WHETHER THE PURPORTED TRADE SECRET DERIVED INDEPENDENT ECONOMIC VALUE

ASB argues that because Barton/BMC shared his "Residential Mortgage Lending

Program" and "Unique Portfolio Products" with ASB that the Court should conclude that the information does not derive independent economic value. (Pl's Mot. Dismiss 14-15.) BMC counters that the determination of whether specific information is a trade secret is a factual question and thus cannot be resolved on a motion to dismiss. (Def's Opp. Mot. Dismiss 19-20.)

In order to qualify as a trade secret, information must, *inter alia*, "[d]erive[] independent economic value . . . ." 10 M.R.S. § 1542(4)(A). Our Law Court has announced a five-factor test for determining whether information derives independent economic value, including *inter alia* "the nature and extent of measures the plaintiff took to guard the secrecy of the information." *Bernier v. Merrill Air Eng'rs*, 2001 ME 17, ¶ 26 n.6, 770 A.2d 97 (citing *Spottiswoode v. Levine*, 1999 ME 79, ¶ 27 n.7, 730 A.2d 166). "The definition of a trade secret is a matter of law, while the determination in a given case whether specific information is a trade secret is a factual question." *Id.* ¶ 27 (quoting *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 941 (Wash. 1999)) (quotation marks omitted).

ASB's motion asks the Court to apply one of six factors—"the nature and extent of measures the plaintiff took to guard the secrecy of the information"—and determine as a matter of law that the information at issue (Residential Mortgage Lending Program and Unique Portfolio Products) does not derive independent economic value. ASB points to the allegations in the Counterclaim that BMC shared this information with ASB as grounds for this determination. (Def's Countercl. ¶ 136.)

The Court cannot determine on this allegation alone that the purported trade secrets do not derive independent economic value. There are five other factors for the Court to consider that ASB does not address in its motion. Furthermore, the Court would be required to make a factual determination regarding whether the information is a trade secret. *Bernier*, 2001 ME 17, ¶ 27, 770

A.2d 97. The Court therefore DENIES the motion to dismiss as to Count XVII.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

Plaintiff/ Counterclaim-Defendant ASB's motion for partial dismissal is GRANTED IN PART and DENIED IN PART as follows:

ASB's motion for partial dismissal is GRANTED as to Count I, Count III, Count IV, Count VII, Count VIII, and Count XII.

ASB's motion for partial dismissal is DENIED as to Count VI, Count XI, Count XIII, Count XVI, and Count XVII.

Dated: 5/29/18

Richard Mulhern
Judge, Business and Consumer Court

Entered on the Docket: 5-30-18
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