

STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER COURT
Docket No. BCD-CV-11-13

CENTRAL MAINE POWER COMPANY

Plaintiff

v.

DEVEREUX MARINE, INC., DEVEREUX
FAMILY, LLC, ANDREA DEVEREUX,
WILLIAM STEVENSON, and
ANDREA DEVEREUX, LLC

Defendants

STATE OF MAINE
Cumberland, ss, Clerk's Office

JUL 20 2011

RECEIVED

ORDER ON PLAINTIFF'S MOTION FOR ATTACHMENT

Plaintiff Central Maine Power Company's Motion for Attachment is before the court. Plaintiff and Defendants have fully briefed the motion and the court held oral argument telephonically July 7, 2011. For the reasons given herein, the court denies the motion.

BACKGROUND

The present action is founded on a claim for indemnification by Central Maine Power Company (CMP) arising out of personal injury litigation in which CMP was found liable to Bryan Smith, an employee of Devereux Marine, Inc.

Mr. Smith was attempting to unstep a mast on a sailboat while working in the Devereux Marine yard in Penobscot, Maine, when the mast came into contact with an overhead high-voltage electric line, owned and operated by CMP. Mr. Smith was seriously and permanently injured as a result and brought a personal injury action suit against CMP. That case resulted in a \$4,890,631 judgment, exclusive of interest and costs, against CMP in favor of Mr. Smith. *See Smith v. Central Maine Power Co.*, Super. Ct., Pen. Cty. Docket No. CV-07-174, Judgment (Nov. 4, 2008). The judgment was upheld on appeal to the Supreme Judicial Court of

Maine, sitting as the Law Court. *See Smith v. Central Maine Power*, 2010 ME 9, ¶ 1, 988 A.2d 968, 969.

CMP has now filed suit against Devereux Marine, Mr. Smith's employer; Andrea Devereux, principal of Devereux Marine; William Stevenson, the Devereux Marine manager who was unstepping the mast with Bryan Smith at the time of the accident, and two limited liability companies, Andrea Devereux, LLC and Devereux Family, LLC. As to Devereux Marine, Andrea Devereux and William Stevenson, CMP asserts that it is entitled to be indemnified for its entire liability to Mr. Smith, because that liability resulted from those Defendants' violation of the Maine Overhead High-Voltage Line Safety Act ["the Act"], 35-A M.R.S. §§ 751-61(2010). CMP's complaint also asserts claims for piercing the corporate veil and challenging allegedly fraudulent transfers among the four Defendants other than Mr. Stevenson.

The Defendants, for various reasons, oppose the attachment motion in its entirety.

ANALYSIS

A party seeking approval of a writ of attachment or attachment upon trustee process must establish that it is more likely than not that the party will recover judgment in an amount equal to the attachment, over and above any insurance or other security shown to be available to satisfy the judgment. *See* M.R. Civ. P. 4A(c), 4B(c). Neither party has identified any such insurance or other security. Thus, CMP has the burden under the applicable rules to show that it is more likely than not to recover judgment against the Defendants in the amount of its requested attachment.

1. CMP's Indemnification Claims Under the Maine High-Voltage Line Safety Act

The initial focus must be on CMP's likelihood of prevailing on its indemnification claims against Devereux Marine, Andrea Devereux and William Stevenson under the Maine

Overhead High-Voltage Line Safety Act [“the Act”], because success on those claims is a prerequisite to success on CMP’s piercing and fraudulent transfer claims.

The Act provides as follows:

A person is liable to the owner or operator of the overhead high-voltage line and 3rd parties, if any, for all damages to facilities, injuries to persons and all costs, expenses and liabilities incurred by the owner or operator of the overhead high-voltage lines and 3rd parties, if any, as a result of any contact with an overhead high-voltage line if the person causes, permits or allows any work or activity in violation of a provision of this chapter and, as a result, a physical or electrical contact with an overhead high-voltage line occurs.

35-A M.R.S. § 760.

It is undisputed that CMP owns the high-voltage line and that the accident that injured Mr. Smith resulted from the mast coming into physical contact with that line. The disputed element of CMP’s indemnification claim, for purposes of this motion at least, is whether any of the three defendants—Devereux Marine, Andrea Devereux and William Stevenson—caused, permitted or allowed work or activity in violation of the Act, resulting in the physical contact between the mast and the line.

According to the complaint, the Defendants violated section 754 of the Act,¹ which defines five types of violations. Of those, only one appears to apply. If there was any violation of the Act by the Defendants, it most likely was of the provision making it a violation to “transport” “covered equipment” (defined to include sailboat masts specifically) within 10 feet of an overhead high-voltage line. *See* 35-A M.R.S. § 754(2). The other four defined prohibitions in section 754—relating to tools and materials, aircraft, storage, and movement of an overhead high-voltage line to provide more clearance—appear not to apply.²

¹ Sections 756 and 757 of the Act also define violations, in terms of failure to provide warning signs and notification in certain circumstances. The complaint does not appear to allege any independent violation of these sections.

² The prohibitions at section 754(3) and (5) relating to aircraft and movement of an overhead line are plainly not applicable. The provision at section 754(1) prohibiting anyone from performing any work or

The Act defines “person” to include human beings and legal entities, such as corporations and limited liability companies. *See* 35-A M.R.S. § 752(3). Under the violation definitions contained in Section 754, a “person” is in violation of the Act if the person violates the Act either “individually or through an agent or employee or as an agent or employee.”

Thus, if the activities of Mr. Smith and Mr. Stevenson in unstepping the mast indeed violated the Act, the just-quoted phrase plainly makes Devereux Marine liable because it was acting through its employees, and also makes Mr. Stevenson liable because he was acting as an employee.³ Because Andrea Devereux was not present during the unstepping process, the case against her is less direct. However, as the Devereux Marine principal responsible for day-to-day activity, it is likely that CMP can prove that she at least allowed Devereux Marine employees to engage in the practice of unstepping masts—including the mast in question—in the vicinity of the overhead line.

Given that CMP is likely to be able to prove that Devereux Marine, Andrea Devereux and/or William Stevenson caused, permitted or allowed the unstepping actions that resulted in the accident, the issue distills to whether CMP is likely to be able to prove that the unstepping actions actually violated the Act.

The record before the court includes excerpts of trial testimony in *Smith v. Central Maine Power*, as well as the Superior Court’s factual findings. *See Smith v. Central Maine Power*

activity that “may cause a tool or material to be brought within 10 feet of an overhead high-voltage line” applies only if a sailboat mast were deemed to constitute a “tool or material”. The storage subsection at section 754(4) appears not to apply because it prohibits storage “underneath or in proximity to an overhead high-voltage line [of] any materials that are expected to be moved or handled by covered equipment in a manner that could bring the materials or the covered equipment within 10 feet of an overhead high-voltage line.” Obviously, a sailboat mast would not be expected to move or handle anything, so the covered equipment contemplated by this section would presumably be some type of construction equipment, such as a crane. Moreover, the Superior Court in its findings noted that the mast was not stored under the line. *See Smith v. Central Maine Power Co.*, Super. Ct., Pen. Cty. Docket No. CV-07-174, *supra*, slip op. at 18.

³ Bryan Smith was also acting as an employee but is not named as a defendant, so the issue of how the Act applies to him is not presented here.

Co., Super. Ct., Pen. Cty. Docket No. CV-07-174, Findings and Conclusions (Nov. 9 2008); *id.* Trial Transcript, vol. I (July 8, 2008). Although that testimony and those findings are likely not binding in the sense of claim preclusion or issue preclusion on the Defendants in this case because none of them was a party in that case, all of the testimony and findings can be considered as information believed to be true for purposes of a motion for approval of attachment. See M.R. Civ. P. 4A(i), 4B(c).

Although the record before the court is not crystal-clear on whether Mr. Stevenson and/or Mr. Smith were actually transporting the mast within 10 feet of the overhead line (or whether it was farther away than that while they were maintaining control of it and then toppled toward the line), the Superior Court's finding that the Occupational Safety and Health Administration (OSHA) cited Devereux Marine for violating a regulation prohibiting "an 'unqualified person' from working in an elevated position . . . 'such that the person and the longest conductive object' were less than 10 feet from unguarded power lines" is evidence that the unstepping actions were in violation of the Act. See *Smith v. Central Maine Power Co.*, Super. Ct., Pen. Cty. Docket No. CV-07-174, *supra*, Findings and Conclusions, at 17.

Thus, the court concludes that CMP is likely to succeed in proving, for purposes of section 760 of the Act, that Devereux Marine, Andrea Devereux and William Stevenson caused, permitted or allowed work or activity in violation of the Act, resulting in the physical contact with CMP's overhead line that in turn led to CMP's liability to Mr. Smith.

2. The Availability of a Defense of CMP's Own Negligence in Causing the Loss

The next step in the inquiry is to determine whether the Defendants can defend against CMP's indemnification claim on the basis of CMP's own negligence. The parties have framed that issue in terms of whether the defense of comparative negligence is available to the Defendants in response to CMP's claim under the Act. See 14 M.R.S. § 156 (2010).

CMP has argued vehemently that its own negligence is irrelevant to its claims under section 760 of the Act, and that the Act entitles it to indemnification in full, regardless of its own fault in causing the accident. However, several points induce the court to conclude otherwise.

First, the Act is silent on whether a utility's own negligence in causing the loss for which it claims indemnification can be raised as a defense, and on whether the Act provides for apportionment of fault. In arguing that it is entitled to full indemnification with no potential reduction for its own negligence, CMP focuses on the word "all" in the clause imposing liability for "all damages to facilities, injuries to persons and all costs, expenses and liabilities incurred by the owner or operator of the overhead high-voltage lines" 35-A M.R.S. § 760. However, apart from whatever might be made of that one word, nothing else in the language of the Act (or anything that has been brought to the court's attention regarding the Act's legislative history) states or implies that a utility claiming under the Act is entitled to be made whole for losses caused by its own negligence.

Second, CMP's interpretation of the Act would cause CMP to be fully indemnified for its own negligence, in derogation of the common law. "It is a well-settled rule in the construction of statutes that legislative enactments will be construed to alter the common law only to the extent that the Legislature has made that purpose clear." *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 996 (Me. 1983). The Law Court has said:

When the Legislature enacts a statute in derogation of the common law, the statute must be clear and unambiguous in its effect; the common law is not to be changed by doubtful implication [and] a statute in derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by necessary implication. For this reason, we will strictly interpret a statute that runs counter to established common law principles.

State Farm Mut. Auto Ins. Co. v. Koshy, 2010 ME 44, ¶ 30, 995 A.2d 651, 662 (citation and quotation mark omitted); accord *Emery Waterhouse Co.*, 467 A.2d at 996 ("Statutes in derogation

of the common law are to be strictly construed, and the Legislature will not be presumed to intend any innovation upon the common law further than the necessity of the case requires.”) This basic principle of statutory construction thus bolsters the conclusion that the Act should not be construed to permit CMP to avoid a comparative negligence defense.

Third, the fact that CMP’s conduct is itself subject to duties of care arising from statute, regulation and the common law, *see, e.g., Smith v. Central Maine Power*, 2010 ME 9, 988 A.2d 968, 971-974, furnishes a compelling public policy justification for interpreting the statute to require CMP’s own fault to be considered under the Maine Overhead High-Voltage Wire Safety Act.

Fourth, the comparative negligence statute applies to claims based on “breach of statutory duty.” *See* 14 M.R.S. § 156. CMP’s indemnification claims are plainly grounded on the Defendants’ alleged breach of their statutory duty under the Act. On its face, therefore, the comparative negligence statute encompasses claims under the Act. Moreover, the comparative negligence statute was enacted in 1965, thirty years before the Maine Overhead High-Voltage Line Safety Act was enacted in 1995. *See* 1995 Me. Pub. L. ch. 348; 1965 Me. Pub. L. ch. 383. The comparative negligence statute was amended in 1999, since the enactment of the Act. 1999 Me. Pub. L. ch. 633. Thus, the Legislature has had at least two opportunities to exclude breaches of duty under Maine Overhead High-Voltage Line Safety Act from the broad applicability of the comparative negligence statute to claims based on “breach of statutory duty,” but has not done so.

The parties have thoroughly researched and briefed the relevant court decisions around the country, and the court acknowledges the contrary authority relied on by CMP, which is not repeated here, at least in detail, because it is debated in depth in the parties’ well-reasoned memoranda.

All of the authority from other jurisdictions is distinguishable in one way or another, and the parties' combined efforts have persuaded the court that none of that authority is dispositive. However, the reasoning of the Alaska Supreme Court in *Atwater v. Matanuska Electric Association, Inc.*, seems particularly *apropos*:

[W]e believe that a comparative causation approach is more consistent with the policy of promoting public safety which underlies the high voltage statutes. This policy would not be served by interpreting the statute as requiring indemnification for the utility's own negligence. As the facts of this case graphically illustrate, if the utility shirks its duty of due care there may be tragic consequences. Placing a strong incentive on the utility, as well as on would-be violators, to exercise due care will maximize public safety. This incentive is best provided by an interpretation of the statute which requires indemnification of the utility only for that portion of the total liability caused by the violator's unlawful activities and not for that portion caused by the utility's negligence.

727 P.2d 774, 777-78 (Alaska 1986).

CMP attempts to distinguish *Atwater* on the basis of the Law Court decision in *Emery Waterhouse Company v. Lea*, 467 A.2d 986 (Me. 1983). However, *Emery Waterhouse* is of limited relevance because it says only that contracts calling for a party to be indemnified against its own negligence are permissible and not void under public policy. The issue here is not whether the Act *might* permissibly be interpreted as CMP suggests, but whether it *should* be interpreted in that manner.

As the Superior Court in *Smith v. Central Maine Power* noted in its findings and conclusions, CMP owes the public a duty of care at common law and is also subject to a variety of statutory and regulatory requirements aimed at promoting public safety. On the other hand, as CMP argues here, one of the purposes of the Act is to provide people who work near such lines with a strong incentive to notify the utility before doing so.

It cannot have been the Legislature's purpose in enacting a statute titled the Maine Overhead High-Voltage Line Safety Act to reduce an electric utility's incentive to make its overhead high-voltage lines safe. Yet, that is precisely what CMP's interpretation of the Act

would do. CMP's interpretation would allow an electric utility to avoid any financial accountability whatsoever for its own negligence in installing or maintaining its overhead high-voltage lines, as long as it could prove a violation of the Act by someone else.

Construing the Act to permit the electric utility to seek full indemnification for a loss, but also to permit the utility's own fault in the loss to be raised as a defense, advances the purposes of the entire statutory and regulatory framework governing utilities and their overhead high-voltage lines. Such a construction also assures that ultimate liability for a loss is allocated rationally according to actual culpability. Finally, it balances the incentives on the utility and on those working near overhead lines to fulfill their respective responsibilities safely.

For these reasons, the court concludes that the Defendants may defend against CMP's claim under the Act based on CMP's own negligence, meaning that CMP's likelihood of success in this case will likely hinge on an apportionment of fault with respect to the accident between it and the Defendants.

However, although the court agrees with the Defendants that CMP's own fault in causing the accident is relevant as a defense to its claim for indemnification in full, the court does not agree with their position that the comparative negligence statute applies, at least as it does in an ordinary personal injury case, to CMP's claim.

The comparative negligence statute provides that the claimant plaintiff may not recover at all if its fault is found to equal or exceed the defendant's fault. *See* 14 M.R.S.A. § 156. Under the court's interpretation of the Maine Overhead High-Voltage Line Safety Act, even if CMP's fault is greater than that of Devereux Marine and the other Defendants, CMP should still be entitled to recover what it has paid to Bryan Smith to the extent CMP can prove that the loss for which it has paid is attributable to fault of the Defendants. In that sense, as interpreted here, the Act creates a statutory right of contribution. In a contribution case, a

contribution plaintiff whose fault in causing the underlying loss is greater than that of the contribution defendant can still obtain contribution if the contribution plaintiff proves that it has satisfied a claim for which the contribution defendant is partially responsible.

In *Packard v. Whitten*, the Law Court described the right of contribution as follows:

The right of one joint tort-feasor to contribution from another is a derivative right based upon a final determination that negligence of the crossclaim defendant contributed to the . . . injury. This determination may be made by a judgment in favor of the injured party or, when the injured party has not included the cross-claim defendant in his action, by a finding of concurring negligence which *would* have entitled the injured party to such a judgment if he had sought one.

274 A.2d 169, 174 (Me. 1979) (citations omitted) (emphasis in original).

Thus, a contribution plaintiff's own negligence, or at least its own liability for the underlying loss, is virtually assumed in a contribution action—in fact, the very basis for the action is that the contribution plaintiff has satisfied an obligation—by settling or paying a judgment, for example—for which the contribution defendant is at least partly responsible. A contribution claim focuses on the extent to which the contribution defendant is also at fault for causing the loss paid for by the contribution plaintiff.

Section 156, the comparative negligence statute, provides, “In a case involving multiparty defendants, each defendant is jointly and severally liable to the plaintiff for the full amount of the plaintiff's damages. However, any defendant has the right through the use of special interrogatories to request of the jury the percentage of fault contributed by each defendant.” 14 M.R.S. § 156. The court interprets the section 760 of the Maine Overhead High-Voltage Line Safety Act to be a vehicle under which an electric utility can seek an apportionment of responsibility for the loss it has sustained as a result of a violation of the Act resulting in physical contact with an overhead line.

The court thus concludes that the Maine Overhead High-Voltage Line Safety Act

should be construed to confer on CMP a right of contribution upon proof of a violation, not necessarily for the full amount paid by CMP to Bryan Smith, but for the portion of that full amount attributable to the Defendants' fault.

The inquiry therefore must turn to whether CMP has proved that the Defendants' violation of the Act justifies awarding it some or all of the amount it paid to Mr. Smith. That inquiry necessarily involves an assessment of the Defendants' fault for the accident.

3. The Comparative Fault of the Parties with Respect to the Accident

In analyzing the likely outcome of an apportionment of the parties' relative fault regarding the accident, the court is guided largely by the Superior Court's findings and conclusions. As noted above, because none of the Defendants was a party to the underlying case, they are not legally bound by any of the court's findings or conclusions. Also, the question before the Superior Court in *Smith v. Central Maine Power* regarding Devereux Marine's negligence—whether CMP had proved that Devereux Marine's negligence was the sole cause of the accident—was different than the question here. However, as previously noted, the court's findings and conclusions certainly constitute information of the kind the court can consider in ruling on a motion for attachment.

The Superior Court decided that Devereux Marine was at fault in causing the accident. Obviously, the accident would not have happened had Devereux Marine employees not been unstepping the mast close enough to the line for it to make contact. The fact that Devereux Marine was also cited for OSHA violations relating to the accident is likely to be deemed evidence of its fault. The fact that CMP can likely prove a violation of the Act means CMP is likely to prevail in its claims under the Act.

On the other hand, the Superior Court also concluded that CMP was negligent in several material respects—failing to train its employees regarding applicable height

requirements for the overhead line in question; failing to respond adequately to a 1998 incident involving a similar accident, though one that did not involve injury; and failing to follow its own internal line clearance standards for the line, as well as standards under the National Electrical Safety Code (NESC). Further, the court found that the accident would not have occurred had the line been maintained according to the NESC requirements as well as CMP's own standards. Finally, the court found that CMP was on notice that Devereux Marine regularly handled sailboat masts near the overhead line, but apparently never checked to see if the height of the line complied with applicable requirements.

Predicting the outcome of a trial is difficult, but that is what the attachment rules call for the court to do. CMP is likely to be able to prove that Devereux Marine, Mr. Stevenson and Ms. Devereux all violated the Maine Overhead High-Voltage Line Safety Act, but it seems equally likely that CMP will be found to be at least partially at fault for the accident. Thus, the likely outcome of this case is that CMP will recover judgment, at least on its "indemnification" claims under the Act (which in context are really contribution claims against alleged joint tortfeasors) in some dollar amount.

However, the fact that CMP is likely to be found at least partially at fault for the accident, if not mostly at fault, means that it has not proved a likelihood of success for the full amount requested in its Motion for Attachment. When a party seeking an attachment fails to prove that it is likely to recover judgment for the full amount of the attachment sought, the court may simply deny the attachment because the moving party has not met its burden, or may approve an attachment for any lower amount that the moving party has been able to justify in terms of likely recovery. The court has considered the latter choice, but elects the former.

This is because both sides have taken an all-or-nothing approach to the analysis rather

than attempting to separate CMP's degree of fault from that of the Defendants in the manner that a contribution action requires. CMP's premise is that the Act absolutely entitles it to full indemnification with no consideration whatever of its own fault. The Defendants' premise is that because CMP's fault exceeds any of theirs, the comparative negligence statute precludes any recovery by CMP. *See* Defendants' Opposition to Plaintiff's Motion for Attachment, at 22.

As noted above, the court disagrees with both premises, but the fact remains that neither side has supplied the court with a basis for assigning a dollar amount to CMP's likely recovery on its claims under the Maine Overhead High-Voltage Line Safety Act.

Accordingly, CMP's motion for attachment is denied.


The court would in any event have denied CMP's motion as to the two limited liability companies, based on CMP's failure to show it is likely to recover judgment on its fraudulent transfer claims.

CONCLUSION

For the reasons stated, Plaintiff Central Maine Power's Motion for Attachment is DENIED.

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

Dated 19 July 2011



A. M. Horton
Justice, Superior Court

Entered on the Docket: 7.21.2011
Copies sent via Mail Electronically

STATE OF MAINE
Cumberland, ss, Clerk's Office

JUL 20 2011

RECEIVED