STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss.

JAY McLAUGHLIN,

Plaintiff

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

EMERA MAINE, f/k/a Bangor Hydro-Electric Company,
and **HAWKEYE, LLC**

Defendants

ORDER ON EMERA MAINE'S CLAIM FOR ATTORNEY FEES AND COSTS OF DEFENSE

The application for attorney fees and other costs of defense of Defendant/Cross-Claim Plaintiff Emera Maine [Emera] is before the court, together with the opposition of Defendant/Cross-Claim Hawkeye, LLC [Hawkeye] and Emera's reply. The court elects to dispense with oral argument in light of the thoroughness of briefing. *See* M.R. Civ. P. 7(b)(7).

Emera's application for attorney fees and costs arises under the indemnification provisions of the Supplier of Choice Agreement (SOCA) between it and Hawkeye. Emera's claim is for $409,443.08 in professional fees and $48,789.46, for a total of $458,232.54.

1. Hawkeye's Opposition

Hawkeye's opposition to Emera's application raises multiple objections to the claim, some of which have already been addressed, *see* Amended Decision ¶¶93-104, at 29-32 (Nov. 1, 2016), but which Hawkeye raises again. Those objections that relate to Emera's right to be indemnified are summarized here. Those that relate to the specifics of Emera's application for an award of its expenses are addressed later.

Waiver, Estoppel, Release/Accord and Satisfaction: Hawkeye argues that Emera's cross-claim is barred by virtue of waiver, estoppel and/or accord and satisfaction—the three

affirmative defenses pleaded in Hawkeye's reply to Emera's cross-claim—because Emera approved Hawkeye's work and issued a final payment without conditions. However, nothing in the SOCA indemnification provisions on which Emera relies says that they expire or terminate on final payment for the project.

As to waiver and accord and satisfaction, there is no evidence that, when Emera gave final approval to Hawkeye's work and issued final payment, Emera intended or Hawkeye understood, that Emera was waiving or agreeing to relinquish its right to indemnification. As to estoppel, there is no evidence of detrimental reliance by Hawkeye on Emera's final approval and payment. As to release, there is no evidence of a formal release beyond what is reflected in Emera's final approval and payment.

In substance, Hawkeye's position that Emera's final payment and approval terminated Hawkeye's broadly defined duty to indemnify Emera would render the indemnification provisions of the SOCA meaningless and without value.

Tender of Defense: Hawkeye also argues that Emera's failure to tender the defense of Plaintiff's claims to Hawkeye bars Emera's cross-claim. Whether Emera ever tendered the defense or was asked to tender the defense was not addressed in the evidence at trial.

In any event, Hawkeye's argument fails for several reasons. First, Hawkeye's argument is at odds with its denial of liability under the indemnification provisions of the SOCA. As noted above, Hawkeye's response to Emera's cross-clam denied any responsibility for indemnifying Emera and contended that Emera's claim was barred on a variety of grounds. Hawkeye did not plead Emera's failure to tender the defense in its response. Thus, the court is not persuaded that Hawkeye would have accepted the defense had Emera tendered it—Hawkeye's belated claim that Emera should have tendered the defense is too little, too late. Second, nothing in the SOCA indemnification provisions requires a tender of defense as a

prerequisite to indemnification. Third, as discussed in the Amended Decision, Maine law does not appear to require an indemnitee to tender the defense unless the indemnity contract so requires.

Insurance Coverage: Hawkeye's opposition to Emera's fee application contends that "Emera refused and/or failed to take advantage of [insurance] coverage" *See* Defendant Hawkeye, LLC's Memorandum in Opposition at 6, and includes copies of insurance contract declarations and other material that Hawkeye asserts shows that Emera's defense costs could have been covered by insurance had Emera tendered the defense to Hawkeye. Given that the evidence is closed, the court declines to consider the materials, and declines to speculate on what insurance coverage might have been available to Emera.

Indemnification Limited to Negligence: Hawkeye's next argument in its opposition to Emera's application is that the SOCA limits Hawkeye's indemnification obligation to claims based on Hawkeye's negligence, citing section 16.2 of the SOCA. Section 16.2 provides for Hawkeye to indemnify Emera (then Bangor Hydro-Electric) "from and against any liabilities, losses, expenses (including reasonable attorneys' fees), claims, demands, actions, and causes of action, whatsoever arising out of, or in any way attributable to, the operation of [the SOCA] or ancillary to [Hawkeye's] negligent provision of the Products and/or Services contemplated herein."

The "or" in the phrase "arising out of, or in any way attributable to, the operation of [the SOCA] or ancillary to [Hawkeye's] negligent provision" means that there are two independent grounds for indemnification, one based on the operation of the SOCA and the other on Hawkeye's negligence, whether or not it involved work under the SOCA. There is no doubt that Plaintiff's claims in this case arise out of the operation of the SOCA, even if the Plaintiff's claims were not entirely based on Hawkeye's negligence.

Also, as Emera's reply points out, section 16.3 of the SOCA provides that the indemnification provision "shall apply and be effective with respect to any claim, cause of action, or legal theory whatsoever including without limitation, claims based upon breach of contract, breach of warranty, failure to meet performance guarantees, tort (including negligence) and strict liability." This resolves in favor of Emera any doubt about whether Hawkeye's duty to indemnify extends beyond claims of negligence.

The analysis now turns to Emera's application for attorney fees and other costs of defense.

2. Emera's Application

Most of the amount claimed by Emera constitutes the attorney fees it incurred in defending against Plaintiff's claims, although the attorney fees incurred by Emera in prosecuting its cross-claim appear also to be included. Emera's amended application seeks reimbursement under the SOCA for the following, *see* Amended Affidavit in Support of Attorney's Fee and Costs Application by Cross-claim Plaintiff Emera Maine, ¶¶11-13 (Dec. 1, 2016).

> $401,189 in attorneys fees and $18,661.09 in costs relating to services rendered by the Eaton Peabody law firm.
>
> $8,254.08 billed by the Curtis Thaxter law firm, which represented a witness subpoena'ed in connection with the case. The bills are stated to be to Curtis Thaxter's client, not to Emera, but Emera evidently agreed to pay the bills.
>
> $26,440.87 billed to Emera's counsel by CES, Inc., which furnished expert witness services to Emera in the case
>
> $3,687.50 billed to Emera's counsel by Shelterwood Forest Solutions, which also furnished expert witness services to Emera in the case.
>
> The total sought by Emera is $458,232.54.

Because the SOCA requires Hawkeye to indemnify Emera against any expenses, including attorney fees, arising out of the operation of the SOCA, Emera is not limited to recovery of attorney fees. This means that Hawkeye's objection to costs of paralegal services is not categorically valid. Likewise, the $2,822 reflecting Eaton Peabody's audit service to Emera is an "expense . . . arising out of, or in any way attributable to, the operation of [the SOCA]," and therefore recoverable. On the other hand, all of Emera's claim is subject to a requirement of reasonableness, meaning that Emera is entitled to indemnification only for its reasonable expenses.

In making an award of attorney fees, the court is to consider a range of factors:

> (1) the time and labor required; (2) the novelty and difficulty of the questions presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorneys due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Poussard v. Commercial Credit Plan, Inc., 479 A.2d 881, 885 (Me. 1984).

Of the foregoing factors, the court considers most important the factors numbered (1) and (8).

The court agrees with Hawkeye that a downward adjustment for time entries not in fact connected with the case and for the services of second-chair attorney time and also for paralegal time is appropriate. This reduction totals $40,000. Also, the court will not credit Emera for the $8,254.08 paid to the Curtis Thaxter firm, because the court is not persuaded that the payment was required. It can be inferred that Emera chose to cover the Curtis Thaxter bill as a matter of good will, but it is not entitled to pass the cost along to Hawkeye.

The other adjustment to be considered is whether it was reasonable for Emera to incur an expense approaching a half million dollars in the defense of this case. As noted above and in

the court's Amended Decision, Emera's failure to tender the defense of this case to Hawkeye does not defeat Emera's indemnification claim, because the SOCA does not require Emera to tender the defense, because Maine law does not require tender of defense as a prerequisite to indemnification, unless the indemnity contract requires it, and because Hawkeye's response to Emera's cross-claim denied any obligation. On the other hand, whether Emera needed to mount a defense as robust and expensive as it did is a factor in determining whether its expenses were reasonably incurred.

The answer to whether Emera had to mount a defense seems clear, in light of Hawkeye's denial of its obligation to indemnify. Emera had to mount a defense to Plaintiff's claims or risk being found liable to Plaintiff without any right to indemnification by Hawkeye.

Still, there may be steps Emera could have taken to reduce its costs of defense. For example, Emera could have moved for summary judgment on the cross-claim, and attempted to establish its right to indemnification before trial. However, Hawkeye's denial of its obligation to indemnify, beginning with its reply to the cross-claim and persisting through the trial, suggests strongly that Hawkeye would have opposed a summary judgment on the cross-claim had Emera made a motion. Moreover, even had Emera prevailed on summary judgment, that outcome might not have withstood an appeal.

For all of these reasons, the court cannot say that Emera's defense was unnecessary in whole or in part. Accordingly, the only reductions taken will be those identified above, totaling $48,254.08. Subtracting that amount from the total results in a net award of $409,978.46.

IT IS ORDERED: Emera's application for its attorney fees, costs and other expenses recoverable under the SOCA is granted in the amount of $409,978.46. Judgment on Emera's cross-claim is entered in that amount.

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

Dated February 17, 2017 ___s/_____

A. M. Horton, Justice