

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 PLAINTIFF’S CLAIM FOR ATTORNEY FEES AND COSTS

The application for attorney fees and costs of Plaintiff Jay McLaughlin is before the court, together with the opposition of Defendant/Cross-Claim Hawkeye, LLC [Hawkeye] and Plaintiff’s reply. Plaintiff’s reply was filed very late and it is the subject of a motion to strike by Hawkeye. Because the reply memorandum was over a month late, the motion to strike will be granted. The court elects to dispense with oral argument in light of the thoroughness of briefing. *See* M.R. Civ. P. 7(b)(7).

Plaintiff’s claim arises under 14 M.R.S. § 7552(5), which permits the recovery of “the reasonable costs of professional services necessary for determining damages and proving the claim as long as the person first has written notice or actual knowledge that a claim is being asserted.” *Id.*

Plaintiff has submitted a bill of costs as well as attorney fee affidavits, reflecting fees and costs for services rendered by Plaintiff’s attorneys and by the consultants and experts for Plaintiff. Plaintiff’s incurred attorney fees are as follows: \$282,029.21 for services and costs rendered in this case by Willey Law Offices, and \$91,346.85 for services by Joseph L. Ferris, Esq., P.A. and Gross, Minsky & Mogul, P.A. Attorney Ferris transitioned from his sole

practice to the Gross Minsky firm during the pendency of the case, so his services were rendered in the name of both firms at different times. In addition, Plaintiff's bill of costs seeks reimbursement for the cost of services of Norman Turner in the amount of \$212,438.91, and for the cost of services rendered by Calvin Hafford and Stephen Howell. The total amount of professional fees and costs incurred by Plaintiff is in excess of \$600,000.

Hawkeye raises multiple objections to the claim, some of which have already been addressed, and need not be revisited in detail. Hawkeye's opposition also asks the court to reconsider its prior ruling to the effect that Plaintiff is entitled to recover attorney fees under section 7552. The court declines to do so, for the following reasons:

- Hawkeye notes that section 7752 applies only to trees damaged without the owner's permission, and contends that the evidence showed that Plaintiff permitted Hawkeye to damage the trees at issue. That is not a finding that the court has made. The fact that Hawkeye tendered Plaintiff a check for damaged trees belies Hawkeye's position.
- Hawkeye's tender of the \$1,433.18 check did not trigger the offer of settlement provisions of section 7552(6) for at least two reasons. First, by statute, Plaintiff is entitled to double damages at a minimum, so to trigger subsection 7552(6), Hawkeye's offer had to be twice what Hawkeye tendered. Also, the evidence did not indicate whether Hawkeye at the time it provided the check also provided Plaintiff with Mr. Kolenik's analysis and other "liability and damage information" available to Hawkeye and "necessary or pertinent to an evaluation" of the Plaintiff's claim. *See id.* § 7552(6).

In sum, for these and the further reasons set forth in the Amended Decision, Hawkeye has not persuaded the court that Plaintiff's attorney fee claim under section 7552 is barred.

Accordingly, the analysis turns to the claim.

As a threshold matter, it should be noted that the statute covers the “costs of professional services”, which may in appropriate cases include, not only attorney fees, but also the costs of other professionals such as surveyors and foresters. Here, the court’s award of damages for loss of trees was based on the analysis done by Hawkeye’s witness, John Kolenik of the Prentiss & Carlisle forest resource management firm. Accordingly, to the extent Plaintiff seeks reimbursement for his expert witness expenses, it is denied. The court did rely on the testimony of Norman Turner, Plaintiff’s road damage expert, but not for issues relating to the Plaintiff’s section 7552 claim, which is the only claim on which he is entitled to an award of professional fees.

Accordingly, the focus is on Plaintiff’s attorney fee request, and not on any other professional fees.

Applicable Law

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). This case involved a plethora of claims and issues, but the legal issues were not particularly novel or difficult. The time spent and the hourly rates involved on the part of Plaintiff’s counsel are reasonable. However, as the Law Court noted in *Poussard*, “[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead . . . [a] court to adjust the fee upward or downward,

including the important factor of the 'results obtained'. 479 A.2d at 885, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 1940 (1983).

The time and labor involved, the amount at issue and results obtained, all have to be evaluated solely in terms of the section 7552 claim, because it is the only claim as to which the Plaintiff is entitled to an award of attorney and other professional fees, although it was only one of many claims pressed by Plaintiff in the case. In fact, most of the Plaintiff's effort at trial was focused on other aspects of the case, primarily Plaintiff's claims regarding damage to the roads on his property and his claims regarding road material shifted (or "spewed", to use the term applied at trial) into the woods on either side of the roads. No attorney fees are recoverable for these aspects of the case.

Based on the entire record, the court awards the Plaintiff \$20,000 in attorney fees and \$2,000 in costs on his section 7552 claim. This is much more than the amount Plaintiff recovered on the claim, but the amount recovered does not set a cap on attorney fees. In *Poussard*, for example, the attorney fee award was \$20,000, based on a judgment for \$1,000 (although the Law Court noted that the plaintiffs' total recovery amounted to \$10,000, considering that the judgment relieved them of various loan obligations). As the Law Court noted, "Given the complexity of the case and the other factors found by the court, the ratio between recovery and fees is not so disproportionate as to compel the rejection of the number of hours expended as the basis for the fee." 479 A.2d at 886. Such is the case here. The fact that Hawkeye and Emera chose to litigate every aspect of Plaintiff's claims, and thereby drove up the costs of litigation for themselves and Plaintiff, should not count against Plaintiff. On the other hand, Hawkeye and Emera did prevail on many aspects of the case. As noted in the Final Judgment that accompanies this Order, the fact that Plaintiff prevailed on some aspects and the

Defendants on others, leads the court to find and conclude that, except for the award to Plaintiff on his section 7552 claim, the parties should bear their own costs.

IT IS ORDERED:

1. Plaintiff's application for professional fees and costs on his claim in Count III (14 M.R.S. § 7552) is granted in part, to the extent of this Order, and is otherwise denied.

2. Plaintiff is awarded a total of \$20,000 in attorney fees and \$2,000 in costs on Count III pursuant to 14 M.R.S. § 7552(5).

3. Hawkeye's Motion to Strike Plaintiff's reply memorandum is granted.

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