

The undisputed material facts may be briefly summarized.² At the time the plaintiffs bought the condominium units in question they also entered into two other separate agreements. One was a lease agreement with a Kearns and Waterman affiliate, Atlantic Hospitality, Inc. The other was a buyback agreement which obligated Kearns and Waterman to repurchase the units for a stated price. On February 19, 1989 Kearns and Waterman entered into an agreement to sell the entire Shawmut Inn project to one Ralph Bruno. As part of the sale Kearns and Waterman prepared an agreement which stated that, in exchange for consideration paid, the plaintiffs agreed to extend to May 1, 1991 the lease term and repurchase closing date and to execute a general release. The plaintiffs were provided with copies of the agreement to sign. The agreement named as the parties thereto the plaintiffs as Owner, defendants Waterman and Kearns, Atlantic Hospitality, Inc. and Bruno. The agreement also contained the following section:

III ACKNOWLEDGEMENT, CONSENT TO ASSIGNMENT OF LEASE AND BUYBACK AND GENERAL RELEASE:

The Owner hereby acknowledges and consents to the assignment by Waterman and Kearns of all rights and obligations of the extended Lease and amended Buyback to Bruno. Bruno accepts the assignment of all such rights and obligations and agrees to be bound by all the terms and conditions of the Lease as extended and the Buyback as extended and amended.

The Owner hereby forever releases Waterman and Kearns, (individually and as a partnership), Atlantic Hospitality, Inc., Ocean Realty, Inc. and also all affiliates and employees of same and their successors, heirs and assigns, of and from all claims of any kind and any and all causes of action of any kind or type, whether at common

² As a consequence of the plaintiffs' failure to object to this motion in a timely manner, all material facts set forth in Kearns's and Waterman's statement of material facts which are supported by appropriate record citation are deemed admitted. *See* Local Rule 19(b)(2); *McDermott v. Lehman*, 594 F. Supp. 1315, 1321 (D. Me. 1984).

law or pursuant (sic) to federal, state or local statutes, whether said matters released herein are known or disclosed. This release is limited to matters which in any way arise out of, or are connected with, or related to the purchase of the Unit, the Lease and Buyback of the Unit and including all aspects of the transaction relating in any way to the Unit. Specifically excepted from this release is the obligation of Waterman and Kearns to pay all past due lease payments and 1988 real estate taxes owed by Waterman and Kearns related to the Unit.

The agreement was signed by all parties except Bruno.

Kearns and Waterman contend that the plaintiffs' complaint arises directly out of the plaintiffs' purchase of the condominium units and the related lease and buyback agreements. They argue that they are entitled to summary judgment because the plain language of the releases bars the plaintiffs from asserting these claims.

When a party fails to object to a motion for summary judgment the court shall grant the motion only when appropriate. Fed. R. Civ. P. 56(e); *McDermott v. Lehman*, 594 F. Supp. at 1320-21. Contrary to Kearns's and Waterman's contentions, the evidence submitted in support of their motion clearly generates a genuine issue of fact. The releases upon which Kearns and Waterman rely are expressly conditioned on the assumption by Bruno of their obligations to the plaintiffs under the amended lease and buyback agreements. Bruno's signature, however, is absent from these purported releases. Viewing these facts in the light most favorable to the plaintiffs and indulging all inferences favorable to them, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 895 (1st Cir. 1988), the conclusion may be drawn that the plaintiffs intended these releases to be effective only upon the attachment of Bruno's signature. It is well established in Maine law that, if the written expression of an agreement is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed." *Paris Utility Dist. v. A. C. Lawrence Leather Co.*, 665 F. Supp. 944, 954 (D. Me. 1987) (quoting *Mississippi & D. Steamship Co. v. Swift*, 86 Me. 248, 258-59, 29 A. 1063 (1864));

see also Akerley v. Lammi, 217 A.2d 396, 398 (Me. 1966). Here, there is a genuine issue of fact as to whether the releases in the form presented to the court represent the consummation of the negotiation and are effective absent Bruno's signature. I conclude that summary judgment is not appropriate on this record because Kearns and Waterman have failed to sustain their burden of establishing that there is no genuine issue as to any material fact. Accordingly, I recommend that the motion be **DENIED**.³

³ In addition, Waterman and Kearns failed to submit any evidence or affidavits supporting their motion against the claims of plaintiff Peter Haroutian. Accordingly, the motion must be decided upon the pleadings alone. *See* Fed. R. Civ. P. 56(b). Based upon the pleadings and for the reasons stated above, I also conclude that as to plaintiff Haroutian genuine issues of fact exist and recommend that the motion be denied.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of August, 1990.

*David M. Cohen
United States Magistrate*