

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>GUY DEFEO,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Docket No. 99-303-P-C</b>
	)	
<b>HANOVER INSURANCE COMPANY,</b>	)	
	)	
<i>Defendant</i>	)	

**RECOMMENDED DECISION ON PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT**

In this insurance coverage dispute, plaintiff Guy DeFeo<sup>1</sup> seeks summary judgment on his breach of contract claim against defendant Hanover Insurance Company stemming from its refusal to cover his losses following a fire at his residence. Plaintiff Guy DeFeo’s Motion for Summary Judgment, etc. (“Motion”) (Docket No. 10) at 1. The plaintiff also moves for summary judgment on the defendant’s counterclaims for indemnification and for damages pursuant to the insurance fraud prevention statute, 24-A M.R.S.A. § 2186. *Id.* at 1, 17-18. For the reasons that follow, I recommend that the Motion be denied.

**I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R.

---

<sup>1</sup>Although the plaintiff is referred to in most of his own papers as “Defeo,” it appears that he spells his name “DeFeo.” *See* Affidavit of Guy DeFeo, D.O. (“DeFeo Aff.”), attached as Exh. 1 to Index of Record Materials Used in Support of Plaintiff’s Motion for Summary Judgment (“Index”), at 2.

Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

## **II. Factual Context**

The following facts, for purposes of summary judgment, are not in dispute. The plaintiff at all relevant times owned real property and buildings situated thereon (the “Residence”) in Kennebunk, Maine. Plaintiff Guy DeFeo’s Statement of Material Facts in Support of Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 11) ¶ 1; Defendant’s Opposing Statement of Material Facts in Opposition to Plaintiff’s Motion for Summary Judgment (“Defendant’s SMF”) (Docket No. 13) ¶ 1. On or about December 10, 1998 a fire occurred at the Residence, damaging both the structure and personal property. Plaintiff’s SMF ¶¶ 2, 7, 9; Defendant’s SMF ¶¶ 2, 7, 9. At the time of the fire, the Residence and its contents were insured for fire loss under a contract of insurance (the “Policy”) issued by the defendant. Plaintiff’s SMF ¶ 3; Defendant’s SMF ¶ 3.

The Policy expressly excludes from coverage intentional loss “arising out of any act committed by . . . an ‘insured’ and with the intent to cause a loss.” Defendant’s SMF ¶ 46; Plaintiff

Guy DeFeo's Reply Statement of Material Facts, etc. ("Plaintiff's Reply SMF") (Docket No. 16) ¶ 46. The Policy also contains the following condition: "The entire policy will be void if, whether before or after a loss, an 'insured' has intentionally concealed or misrepresented any material fact or circumstance, engaged in fraudulent conduct, or made false statements relating to this insurance." Defendant's SMF ¶ 47; Plaintiff's Reply SMF ¶ 47.

The plaintiff notified the defendant of the fire, submitting proof-of-loss statements. Plaintiff's SMF ¶¶ 4, 6, 8; Defendant's SMF ¶¶ 4, 6, 8. The defendant concurred that the proof-of-loss statements reasonably reflected the plaintiff's losses but nevertheless denied coverage for the claims. Plaintiff's SMF ¶¶ 10, 13; Defendant's SMF ¶¶ 10, 13. Specifically, by letter dated July 22, 1999 the defendant informed the plaintiff of its conclusion following investigation that "the weight of the evidence suggests that this fire was set and that you were the only individual with motive and opportunity to attempt this act." Letter from Norman H. Bustin to Guy Defeo [sic], D.O. dated July 22, 1999, attached as Exh. 7 to Fed. R. Civ. P. 30(b)(6) Deposition of Defendant (testimony of Norman Bustin), attached as Exh. 6 to Index, at 3. The defendant asserted as a defense to coverage both the Policy's intentional-act exclusion and its concealment condition. *Id.* The plaintiff on or about September 10, 1999 brought a breach of contract claim against the defendant in Maine Superior Court (York County). Complaint for Breach of Contract (Docket No. 1a). Invoking diversity jurisdiction, the defendant removed the action to this court. Notice of Removal (Docket No. 1).

There is no direct evidence that the plaintiff set the fire that damaged the Residence — an allegation that he denies. Plaintiff's SMF ¶¶ 14-15; Defendant's SMF ¶¶ 14-15. The plaintiff has designated two expert fire investigators in this action; the defendant has designated six experts.

Defendant's SMF ¶¶ 58-59; Plaintiff's Reply SMF ¶¶ 58-59. Plaintiff's expert Richard J. Splaine states that "all accidental fires were not eliminated"; plaintiff's expert George F. Williams is of the opinion that "the cause of this fire cannot be ruled incendiary inasmuch as there are other possible sources of accidental ignition that cannot be, and were not, eliminated." Defendant's SMF ¶¶ 60-61; Plaintiff's Reply SMF ¶¶ 60-61. The defendant's experts include Michael J. Keely, who concludes that the fire was incendiary and was "a deliberate and intentional act to damage/destroy the property." Defendant's SMF ¶¶ 52, 58; Plaintiff's Reply SMF ¶¶ 52, 58. Keely found divorce and child-support paperwork and car-related paperwork on the plaintiff's bureau and his homeowner's insurance policy on the kitchen floor. Defendant's SMF ¶¶ 81, 83; Plaintiff's Reply SMF ¶¶ 81, 83.

The plaintiff has been in private practice as an osteopathic physician since July 1997. Plaintiff's SMF ¶ 27; Defendant's SMF ¶ 27. His post-tax 1998 income was approximately \$65,000. Plaintiff's SMF ¶ 28; Defendant's SMF ¶ 28. He sees patients three days a week, rather than full-time, to ease the discomfort of a back ailment. Deposition of Guy A. DeFeo, D.O. ("DeFeo Dep."), attached as Exh. A to DeFeo Aff., at 11. At the time of the fire the plaintiff was meeting all his debts as they became due. Plaintiff's SMF ¶ 29; Defendant's SMF ¶ 29. He had a MasterCard account with more than \$12,000 in available credit and a retirement account with a balance of \$81,559.78 as of September 30, 1998. DeFeo Dep. at 43; TIAA CREF retirement annuity statement attached as Exh. A to Plaintiff's Reply SMF. However, the plaintiff (i) was required in 1998 to pay some back alimony owing from 1997, (ii) had not as of May 1999 paid his October 1998 property taxes and (iii) had extended his business line of credit, which had been due to mature in October 1998, to October 1999. Defendant's SMF ¶ 29; Plaintiff's Reply SMF ¶ 29. By the calculations of Susan MacKay, an arson investigator for the defendant, the low range of the plaintiff's monthly expenses

was just barely less than his monthly income, while the high range possibly exceeded his monthly income. Defendant's SMF ¶ 80; Plaintiff's Reply SMF ¶ 80.

### III. Discussion

The parties agree on two fundamentals: that, in this diversity action, Maine law applies and that, in circumstantial-evidence cases such as this, an insurer must demonstrate the following to prevail on an arson defense: (i) that the fire in question was deliberately set; (ii) that the insured had an opportunity to set the fire; and (iii) that the insured possessed a motive for so doing. Motion at 5, 7; Defendant's Opposition to Plaintiff's Motion for Summary Judgment, etc. ("Opposition") (Docket No. 12) at 8, 11-12; *see also Ferrara & DiMercurio, Inc. v. St. Paul Mercury Ins. Co.*, 169 F.3d 43, 53 (1st Cir. 1999) (applying Massachusetts law).

The parties nonetheless sharply dispute the applicable standard of proof. The plaintiff contends that an insurer's arson defense must be proved by clear and convincing evidence, a test pursuant to which, he argues, the defendant's evidence falls short. Motion at 7-17. The defendant presses for application of the less stringent standard of preponderance of the evidence, a test pursuant to which, it argues, it evinces sufficient evidence to reach a trier of fact. Opposition at 8-17. The plaintiff rejoins that even under the preponderance standard, he is entitled to summary judgment. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment (Docket No. 15) at 7.<sup>2</sup>

The plaintiff relies in part on nineteenth-century Maine caselaw for the proposition that

---

<sup>2</sup>The plaintiff nowhere argues in his motion for summary judgment that he would prevail were a preponderance standard used. *See generally* Motion. The court generally will not address an argument advanced for the first time in a reply memorandum. *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991). However, inasmuch as the defendant in its Opposition puts into play the issue whether it would prevail under a preponderance standard, I have considered the late-made argument.

insurers must prove an arson defense by clear and convincing evidence. *See* Motion at 8-10 and cases cited therein. The defendant argues that at least one of those cases, *Decker v. Somerset Mut. Fire Ins. Co.*, 66 Me. 406 (1877), actually sets forth a preponderance standard. Opposition at 8. This confounds semantics with substance. Although *Decker* uses the label “preponderance of the evidence,” it sets forth a standard recognizable as a species of “clear and convincing evidence”:

To fasten upon a man a very heinous or repulsive act requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. To fasten upon a man the act of willfully and maliciously setting fire to his own buildings, should certainly require more evidence than to establish the fact of payment of a note, or the truth of an account in set-off; because the improbability or presumption to be overcome in the one case is much stronger than it is in the other. Hence it can never be improper to call the attention of the jury to the character of the issue, and to remind them that more evidence should be required to establish grave charges than to establish trifling or indifferent ones. Such an instruction does not violate the rule that in civil suits a preponderance of evidence is all that is required  
.....

*Decker*, 66 Me. at 408-09; *see also Taylor v. Commissioner of Mental Health & Mental Retardation*, 481 A.2d 139, 153 (Me. 1984) (describing and abandoning definition of “clear and convincing evidence” laid out in *Horner v. Flynn*, 334 A.2d 194 (Me. 1975), which did “not identify a level of proof higher than proof by a preponderance, but rather denote[d] the better quality of evidence that is required to satisfy the preponderance standard in that and some other special cases.”).

The plaintiff asserts, and my research corroborates, that the Law Court has not recently addressed the question of the standard to be applied to an insurer’s arson defense. *See* Motion at 8. Nonetheless, I am persuaded that were the issue to arise, the court would diverge from *Decker*. The Law Court in *Decker* applied the more exacting standard on the basis that an insured should not lightly be held to have committed such a grave act as arson. This apparently remains the rationale for imposing the higher standard in the minority of jurisdictions that continue to do so. *See, e.g.,*

*Horrell v. Utah Farm Bureau Ins. Co.*, 909 P.2d 1279, 1280-81 (Utah Ct. App. 1996) (minority of jurisdictions adhering to higher standard “generally conclude that arson, and the subsequent misrepresentations, essentially constitute fraudulent behavior and, as such, should be proven by clear and convincing evidence.”).

However, the Law Court in 1996 cast doubt on the continuing validity of the application of anything other than a preponderance standard in the context of civil cases entailing accusations of fraud. In *Petit v. Key Bank of Maine*, 688 A.2d 427 (Me. 1996), the court declined to apply the clear-and-convincing evidence standard to the “fraud or intimidation” element of the tort of wrongful interference with an advantageous economic relationship. *Id.* at 431. The court found that inasmuch as the case (i) consisted of a tort dispute between private parties, (ii) involved no reliance interest in the validity of a written document and (iii) implicated neither a statute applying a higher standard of proof nor a constitutional or other policy consideration justifying its application, “there exists no compelling reason requiring the factfinder to have a higher degree of confidence in the correctness of its factual conclusions than can be established by a preponderance of the evidence.” *Id.* at 432-33. The court expressed no heightened concern for a party accused of fraud in the context of a private dispute: “The rationales advanced in other jurisdictions for importing a higher standard of proof into the common law fraud context never have been emphasized in our case law and are of questionable persuasiveness.” *Id.* at 432.

The Law Court’s reasoning in *Petit* aligns with that of courts in the majority of jurisdictions that have chosen to apply a preponderance standard in evaluating an insurer’s arson defense. *See, e.g., Horrell*, 909 P.2d at 1281 (jurisdictions adopting majority view “have done so primarily because they view the intentional burning of an insured structure not as fraud, but as a ‘simple breach

of contract.”) (citations omitted); *Verrastro v. Middlesex Ins. Co.*, 540 A.2d 693, 696 (Conn. 1988) (noting, in adopting majority view, that “[w]e have never held . . . that proof of a criminal activity in a civil action must be established by a quantum of proof more stringent than that necessary to prove the underlying claim.”). Accordingly, I find that were the Law Court confronted with the question, it would apply a preponderance standard to an insurer’s arson defense.

I turn briefly to the question whether, under the preponderance standard, the defendant adduces sufficient evidence to generate a trialworthy issue. The plaintiff concedes that a genuine issue of material fact exists as to whether he had the opportunity to set the fire. Motion at 5 n.1. On the question whether the fire resulted from accident or arson the parties adduce clashing expert testimony — a classic instance of a dispute properly left to a trier of fact. Finally, the defendant sets forth a sufficient constellation of facts from which a fact-finder could discern (by a preponderance of the evidence) the requisite motive, notably: (i) that the plaintiff’s income at best barely exceeded his monthly expenses, (ii) that although the plaintiff was paying his debts in a timely manner at the time of the fire, he had been required in 1998 to pay back alimony, (iii) that the plaintiff minimized back discomfort by seeing patients only three days per week, (iv) that the plaintiff had extended a business line of credit and (v) that items found in the Residence included divorce, child-support and car-related paperwork as well as a copy of the Policy. *See State Farm Fire & Cas. Ins. Co. v. Vandiver*, 970 S.W.2d 731, 736-38 (Tex. App. 1998) (noting, in reversing directed verdict in favor of insured, that with respect to motive record contained significant evidence that insured was experiencing financial stress at time of fire); *Pham Vo, Inc. v. Colony Ins. Co.*, 692 So.2d 1306, 1308 (La. Ct. App. 1997) (noting, in affirming trial court’s judgment in favor of insurer, that record demonstrating insureds’ financial difficulty bore out motive to commit arson).

Inasmuch as proof that the plaintiff committed arson is central to the defendant's counterclaims for indemnification and insurance fraud, denial of summary judgment as to those claims is warranted as well.

#### IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **DENIED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge'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 this 10th day of April, 2000.*

---

*David M. Cohen  
United States Magistrate Judge*

STNDRD  
U.S. District Court District of Maine (Portland)  
CIVIL DOCKET FOR CASE #: 99-CV-303  
DEFEO v. HANOVER INSURANCE CO  
Filed: 09/27/99  
Assigned to: JUDGE GENE CARTER  
Jury demand: Defendant  
Demand: \$150,000  
Nature of Suit: 110  
Lead Docket: None

Jurisdiction: Diversity  
Dkt # in York Cty SC is CV99-193  
Cause: 28:1332 Diversity-Breach of Contract  
GUY DEFEO

CRAIG J. RANCOURT plaintiff [COR LD NTC]  
THE HORIZON PROFESSIONAL BUILDING  
13 CRESCENT STREET SUITE 100  
BIDDEFORD, ME 04005  
(207) 282-6949

v.

HANOVER INSURANCE COMPANY  
LAURENCE H. LEAVITT defendant 761-0900 [COR LD NTC]  
FRIEDMAN, BABCOCK & GAYTHWAITE  
SIX CITY CENTER  
P.O. BOX 4726  
PORTLAND, ME 04112-4726  
761-0900

---

STNDRD  
HANOVER INSURANCE COMPANY  
LAURENCE H. LEAVITT counter-claimant 761-0900  
[COR LD NTC]  
FRIEDMAN, BABCOCK & GAYTHWAITE  
SIX CITY CENTER  
P. O. BOX 4726  
PORTLAND, ME 04112-4726  
761-0900

v.

GUY DEFEO  
CRAIG J. RANCOURT counter-defendant [COR LD NTC]  
THE HORIZON PROFESSIONAL BUILDING  
13 CRESCENT STREET SUITE 100  
BIDDEFORD, ME 04005  
(207) 282-6949