

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<i>MICHAEL J. CONSTANTINE, II,</i>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<i>Civil No. 09-345-P-H</i>
	)	
<i>PORTLAND TUGBOAT, LLC,</i>	)	
	)	
<i>Defendant and Third-Party</i>	)	
<i>Plaintiff,</i>	)	
	)	
v.	)	
	)	
<i>CITY OF PORTLAND,</i>	)	
	)	
<i>Third-Party Defendant</i>	)	

**RECOMMENDED DECISION ON THIRD-PARTY DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT**

In this admiralty action arising out of the crewman plaintiff’s slip and fall on the Maine State Pier, the third-party defendant, City of Portland (“Portland”), seeks summary judgment on the claims asserted against it by the defendant employer and third-party plaintiff, Portland Tugboat, LLC (“Tugboat”).<sup>1</sup> I recommend that the court deny the motion.

**I. Summary Judgment Standard**

**A. Federal Rule of Civil Procedure 56**

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 judgment as a matter of law.” Fed.

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<sup>1</sup> While the plaintiff has not asserted a claim directly against the third-party defendant, the defendant invoked Fed. R. Civ. P. 14(c) in its third-party complaint, and asked that judgment be entered for the plaintiff directly against the third-party defendant. Third[-]Party Complaint (Docket No. 11) at 4. This pleading gives the plaintiff standing to oppose the motion for summary judgment.

R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

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. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

### **B. Local Rule 56**

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and

supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit, deny or qualify the facts by reference to each numbered paragraph of the moving party’s statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party’s statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant’s statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statements of fact.” *Id.*; *see also, e.g., Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209, 213-14 (1st Cir. 2008).

## **II. Factual Background**

The following undisputed material facts are appropriately presented in the parties’ statements of material facts.

On April 14, 2004, Portland and Tugboat entered into a lease agreement to provide berthing space at a marine facility called the Portland Ocean Terminal. Third[-]Party Defendant's Statement of Material Facts in Support of its Motion for Summary Judgment ("Portland SMF") (Docket No. 36) ¶ 1; Third[-]Party Plaintiff Portland Tugboat, LLC's Opposing Statement of Material Facts and Statement of Additional Material Facts ("Tugboat Responsive SMF") (Docket No. 43) ¶1; Plaintiff's Opposing Statement of Material Facts with Additional Facts ("Plaintiff's Responsive SMF") (Docket No. 49) ¶ 1. This lease was in effect in December 2007. *Id.* ¶ 2.

Tugboat operated the Tug Iona McAllister in December 2007. *Id.* ¶ 5. Brian Fournier is now and was in December 2007 the president of Tugboat. *Id.* ¶ 6. According to the April 14, 2004, lease, Tugboat was required to indemnify Portland for all claims resulting from Tugboat's acts or omissions and to defend any actions brought against Portland on any such claims. *Id.* ¶ 7. Tugboat was also required to procure and maintain insurance to protect Portland from claims and damages arising from Tugboat's operations under the lease. *Id.* The April 2004 lease required that Portland be named as an additional insured on all of Tugboat's insurance policies. *Id.* Tugboat apparently obtained such insurance. *Id.* ¶ 8.<sup>2</sup>

On January 19, 2006, Portland entered into a Lease Agreement with Tugboat to rent office and parking space at the Portland Ocean Terminal. *Id.* ¶ 3. This lease was in effect in December 2007. *Id.* ¶ 4.

The January 19, 2006, lease required Tugboat to indemnify Portland for any claims arising out of Tugboat's acts or omissions and to defend any actions brought against Portland on any such claims. *Id.* ¶ 9. The January 2006 lease also required Tugboat to procure and maintain

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<sup>2</sup> Tugboat qualifies its response to paragraph 8 of Portland's statement of material facts by adding additional information that does not affect the validity of the statement included in the text. Tugboat Responsive SMF ¶ 8.

insurance to protect Portland from claims and damages arising from Tugboat's operations under the lease. *Id.* Tugboat apparently obtained such insurance. *Id.* ¶ 10.<sup>3</sup> Both leases were drafted by Portland. Third[-]Party Plaintiff Portland Tugboat, LLC's Statement of Additional Material Facts ("Tugboat SMF") (included in Tugboat Responsive SMF, beginning at 4) ¶ 5; Third[-]Party Defendant's Reply Statement of Material Facts to Third[-]Party Plaintiff's Statement of Additional Material Facts ("Portland Responsive SMF/Tugboat") (Docket No. 54) ¶ 5.

Section 23 of the April 2004 lease provides that Portland's obligations under the lease inure to the benefit of Tugboat. *Id.* ¶ 10. Portland collected rent from Tugboat, which included payment for snow and ice removal. *Id.* ¶ 11. Portland purchased its own marine terminal operator's liability insurance, which was in effect at the time of the incident giving rise to this action and which covers Portland for any liability in this action up to \$1 million. *Id.* ¶ 12. By letter dated April 21, 2010, Liberty International Underwriters, Tugboat's general liability insurer, advised Portland that it was not covered by Tugboat's general liability policy for the claim at issue here. *Id.* ¶¶ 14-15. Tugboat is not covered by this policy either. *Id.*

Tugboat's general liability policy with Liberty Mutual does not cover Jones Act claims brought by Tugboat's employees. *Id.* ¶ 18.

From December 5 to December 10, 2007, the plaintiff worked as a deckhand on the Tug Iona McAllister. Portland SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11; Tugboat Responsive SMF ¶ 11. The plaintiff alleges that, on December 6, 2007, while walking across the Maine State Pier (Portland Ocean Terminal), he slipped on ice while carrying buckets of paint to store

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<sup>3</sup> Tugboat qualifies its response to this paragraph of Portland's statement of material facts with additional information that does not affect the portion of the paragraph included in the text. Tugboat Responsive SMF ¶ 10.

in a building leased by Portland to Tugboat. *Id.* ¶ 12.<sup>4</sup> He alleges that, as a result of the fall, he suffered damages from physical injuries, mental suffering, permanent impairment, loss of earnings and earning capacity, and other economic damages. *Id.* It was part of the usual job duties of the crew of a tugboat to go to the storage bay from time to time for parts or other business reasons. Plaintiff's Statement of Additional Facts ("Plaintiff's SMF") (included in Plaintiff's Responsive SMF at [3]) ¶ 6; Third[-]Party Defendant's Reply Statement of Material Facts to Plaintiff's Statement of Additional Material Facts ("Portland's Responsive SMF/Plaintiff") (Docket No. 57) ¶ 6.

The plaintiff sued his employer, Tugboat, for alleged personal injuries and damages. Portland's SMF ¶ 13; Plaintiff's Responsive SMF ¶ 13; Tugboat Responsive SMF ¶ 13. His claims are based upon Jones Act negligence and unseaworthiness, including claims for maintenance and cure. *Id.* ¶ 14.<sup>5</sup> Tugboat filed a third-party complaint against Portland, alleging, among other things, that Portland failed to remove ice and snow pursuant to the two leases. *Id.* ¶ 16. The amended complaint alleges that Portland was acting as Tugboat's agent and failed to take steps to ensure that the area of the pier where the plaintiff was expected to work was kept reasonably safe and cleared of ice and snow, and adequately sanded and salted. *Id.* ¶ 17. According to Tugboat's answer, the plaintiff was the beneficiary of Portland's obligation to remove ice and snow pursuant to the leases. *Id.* ¶ 18. If the lease between Portland and Tugboat did not obligate Portland to remove ice and snow from the pier, someone else would have had to do it for the purposes of Tugboat's business. Plaintiff's SMF ¶ 4; Portland's Responsive SMF/Plaintiff ¶ 4.

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<sup>4</sup> The plaintiff qualifies his response to this paragraph of Portland's statement of material facts in a manner that does not affect the portion of that paragraph included in the text. Plaintiff's Responsive SMF ¶ 12.

<sup>5</sup> Tugboat qualifies its response to paragraph 14 of Portland's statement of material facts by adding a legal argument that has no place in a responsive statement of facts. Tugboat's Responsive SMF ¶ 14.

The third-party complaint alleges that the plaintiff should recover directly against Portland and also seeks to recover indemnity, costs, and attorney fees against Portland. Portland's SMF ¶ 19; Plaintiff's Responsive SMF ¶ 19; Tugboat Responsive SMF ¶ 19.

The Portland Ocean Terminal's pier provides limited access for public and private individuals and businesses. *Id.* ¶ 22.<sup>6</sup> Passengers and visitors to the passenger vessels and other vessels using the pier at the Portland Ocean Terminal use the pier as access to those vessels. *Id.* ¶ 23.

### **III. Discussion**

The first amended complaint asserts a claim under the Jones Act, 46 App. U.S.C. § 688; a claim of unseaworthiness; and a claim for maintenance and cure, all against Tugboat. First Amended Complaint and Demand for Jury Trial ("Complaint") (Docket No. 23) at 2-3. All of these claims sound in admiralty. Tugboat filed a third-party complaint against Portland that alleges that Portland is liable for any damages caused to the plaintiff. Third[-]Party Complaint (Docket No. 11) ¶¶ 10, 12, 15. Portland offers arguments that apply to all three counts.

#### **A. Insurer Suing Its Insured**

First, Portland contends, Tugboat cannot sue Portland on behalf of any of its insurers because the city is an additional insured under all of the relevant insurance policies with a waiver of subrogation against it. Third[-]Party Defendant's Motion and Memorandum of Law for Summary Judgment ("Motion") (Docket No. 35) at 7-9. It is true, as Portland asserts, that an insurance underwriter cannot sue its own insured for that insured's negligence. *Farr Man & Co.*

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<sup>6</sup> Tugboat qualifies this paragraph of Portland's statement of material facts in a manner that has no effect on the substance of the sentence in the text. Tugboat Responsive SMF ¶ 22. The plaintiff qualifies this paragraph of Portland's statement of material facts in a manner that does not affect the substance of the sentence in the text. Plaintiff's Responsive SMF ¶ 22.

*v. M/V Rozita*, 903 F.2d 871, 878 (1st Cir. 1990). But, it is not clear from the face of the pleadings or from Portland’s summary judgment submissions that Tugboat’s third-party complaint is brought “on behalf of” any of Portland’s insurers. Nor is it necessarily true that “this [suing its own insured for its negligence] is exactly what Steamship Mutual Underwriting Association, Ltd. is attempting to do[.]” here. Motion at 7.

Steamship Mutual Underwriting Association is not a party to this action, so it would seem that it cannot be the party asserting claims against Portland. Portland’s argument is based on the following assertion: “Once Plaintiff sued Portland Tugboat for a maritime personal injury, Steamship Mutual took over the defense and, through Portland Tugboat, then sued the City of Portland.” *Id.* This factual assertion, in turn, is based on paragraph 15 of Portland’s statement of material facts, *id.* at 5, which provides:

Portland Tugboat, LLC’s protection and indemnity insurance carrier, Steamship Mutual Underwriting Association, Ltd., has taken over the defense of Plaintiff’s Complaint and Amended Complaint on behalf of Portland Tugboat, LLC, Defendant and Third Party Plaintiff. *See* Exhibits cited above in Paragraphs 8 and 10, Certificates of Insurance.

Portland’s SMF ¶ 15.

There are at least two problems for Portland here. The first is that both the plaintiff and Tugboat deny this paragraph of its statement of material facts. Plaintiff’s Responsive SMF ¶ 15; Tugboat Responsive SMF ¶ 15. A party is entitled to summary judgment only on the basis of undisputed material facts. The two authorities cited by Tugboat<sup>7</sup> in support of its denial make it clear that there is no sense in which Steamship Mutual Underwriting Association has “taken over the defense” of the initial action in this case. Affidavit of Laura Moore in Opposition to Third[-] Party Defendant, City of Portland, Maine’s Motion for Summary Judgment (Docket No. 44) ¶ 6;

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<sup>7</sup> The plaintiff merely adopts Tugboat’s denial. Plaintiff’s Responsive SMF ¶ 15.

Declaration of Richard Allen in Opposition to Third[-]Party Defendant, City of Portland, Maine's Motion for Summary Judgment (Docket No. 45) ¶ 9.

The second problem for Portland is that the authorities it cites in support of paragraph 15 of its statement of material facts demonstrate only that insurance was extended to Tugboat, not that it provides coverage for the incident at issue here, and certainly not that the insurer “has taken over the defense” of the claims brought against Tugboat in this action. Docket Nos. 31-1 & 38-2 at 5-11.

The court need go no further. Portland is not entitled to summary judgment on the basis of this argument.

### **B. The Plaintiff's Status**

Portland next argues that the plaintiff does not have a direct cause of action against it and that he is not a beneficiary of Portland's obligation under the leases to remove snow and ice. Motion at 9-12.<sup>8</sup> The plaintiff's direct cause of action against a third-party defendant is created by Fed. R. Civ. P. 14(c). That rule requires only that a third-party plaintiff demand judgment in the plaintiff's favor against the third-party defendant, and that it may do so whenever the third-party defendant may be liable to the third-party plaintiff “on account of the same transaction, occurrence, or series of transactions or occurrences” that give rise to the initial complaint. Fed. R. Civ. P. 14(c)(1) & (2). Whether there is a substantive legal basis for a direct claim by the original plaintiff against the third-party defendant is not at issue when Rule 14(c) is invoked.

*E.g., Royal Ins. Co. of Am. v. Southwest Marine*, 194 F.3d 1009, 1018-19 (9th Cir. 1999) (Rule

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<sup>8</sup> Portland contends that the plaintiff “does not oppose Third[-]Party Defendant's Motion for Summary Judgment on the issue as to whether Plaintiff substantively has a direct cause of action against the City of Portland. Since this specific issue pertains to Plaintiff only, then this Court has no reason to grant Third[-]Party Defendant's Motion to [D]ismiss Plaintiff's direct claim against the City of Portland.” Third[-]Party Defendant's Reply to Plaintiff's Opposition to Third[-]Party Defendant's Motion for Summary Judgment (“Reply”) (Docket No. 56) at 2. This is an incorrect characterization of the plaintiff's opposition to the motion for summary judgment; it states that the plaintiff joins in Tugboat's opposition to the motion. Plaintiff's Response in Opposition to Third[-]Party Defendant City of Portland's Motion for Summary Judgment (Docket No. 50) at 4-5.

14(c) *creates* direct relationship between plaintiff and third-party defendant, citing 6 Wright & Miller, *Federal Practice and Procedure*, § 1465 at 483-85 (1990)); *Aljalham v. American S. S. Co.*, No. 08-14043, 2010 WL 777331 (E.D.Mich. Mar. 4, 2010), at \*5 (same); *Vogt-Nem, Inc. v. M/V Trampler*, 263 F.Supp.2d 1226, 1230 (N.D.Cal. 2002) (same).

Accordingly, the parties' arguments concerning the plaintiff's possible status as a third-party beneficiary of the leases between Portland and Tugboat are beside the point. While it is true, for example, that Maine case law makes clear that pedestrians are not third-party beneficiaries of contracts for snow removal, *see, e.g., Denman v. Peoples Heritage Bank, Inc.*, 704 A.2d 411, 413, 414 (Me. 1998); *Alexander v. Adelpia Cablevision Corp.*, No. CV-05-264, 2006 WL 2959564 (Me.Super. Sept. 8, 2006), the plaintiff has a direct claim against Portland by operation of Rule 14(c) and needs no other legal basis upon which to assert that claim.

### **C. Statutory Immunity**

Finally, Portland contends that 23 M.R.S.A. § 1005-A(1) exempts it from liability for the plaintiff's injuries. Motion at 12-13. That statute provides: "The State or the town shall not be liable for accidents while the road surface is covered with snow or ice." The parties differ on the question of whether the pier surface on which the plaintiff fell can be considered a "road" surface for purposes of the statute. Neither side cites any controlling authority on the point.

Portland argues that the pier is covered by the statute because "it is obvious that the Portland Ocean Terminal is an extension of a public roadway, . . . allowing public and private vehicles, along with the public, to have access to the Portland Ocean Terminal[.]" Motion at 6-7. But, this interpretation would allow sidewalks and parking lots to be included in the definition of a "road surface," and the Maine Superior Court has rejected the contention that parking lots are covered by the statute. *Hamner v. Town of Winthrop*, No. CV-92-493 (Kennebec County), 1994

Me.Super.LEXIS 96 (Mar. 16, 1994). I find it unlikely that the Maine Law Court would adopt Portland's argument.

Portland also emphasizes the fact that the public had access to the pier, contending that, where the public has access to certain specific premises, the statute must apply to those premises. Reply at 6-7. This argument, logically extended, would render Portland City Hall, along with many other public buildings, parks, and other facilities, a "road surface" for purposes of the statute. Such an expansive definition is not compatible with the limited intent apparent on the face of the statutory language. Again, it is unlikely that the Maine Law Court would adopt this definition.

Portland is not entitled to summary judgment on this basis.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the City of Portland'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 and request for oral argument before the district judge, if any is sought, within fourteen (14) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within fourteen (14) 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 16th day of September, 2010.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

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V.

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