

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**TONYA DALBO, Personal Representative)
of the Estate of Michael J. Moore,)
)
Plaintiff)
)
v.)
)
NIELSEN B. CLARK,)
)
Defendant)**

No. 2:15-cv-249-JAW

RECOMMENDED DECISION ON MOTION TO DISMISS COUNT II

The defendant landlord in this action arising out of a fatal residential fire moves to dismiss Count II of the complaint, which alleges breach of the warranty of fitness for human habitation. Complaint (ECF No. 4-2) ¶¶ 19-23. Specifically, Count II alleges violation of 14 M.R.S.A. §§ 6021 and 6026. *Id.* ¶¶ 21-22. For the reasons that follow, I recommend that Count II be dismissed.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). The Supreme Court has stated:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and internal punctuation omitted). This standard requires the pleading of “only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads

factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In ruling on a motion to dismiss under Rule 12(b)(6), a court assumes the truth of all of the well-pleaded facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Román-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 (1st Cir. 2011). Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted).

II. Discussion

The defendant argues that Count II fails to state a claim as to which relief can be granted, because the complaint does not plead compliance with the conditions precedent to relief included in the cited statutes and because the statutes provide specific relief that is not sought by the complaint. Defendant’s Motion to Dismiss Count II (ECF No. 7) at 3-5. He also contends that there is no common law warranty of habitability under the factual circumstances of this case, even if the complaint could be read to allege such a claim. *Id.* at 5-6. He emphasizes that 14 M.R.S.A. § 6021(4)(D) expressly states, in relevant part, that “[t]he court may not award consequential damages for breach of the warranty of fitness for human habitation.” *Id.* at 4.

In response, the plaintiff disavows any intent to claim the damages provided by the cited statutes; “rather, [the estate] seeks tort damages for breach of the duty of care and of the implied

warranty of habitability created by the statute.” Plaintiff’s Objection to Defendant’s Motion to Dismiss Count II of Plaintiff’s Complaint (“Opposition”) (ECF No. 21) at 2. She cites section 17.6 of the Restatement (Second) of the Law of Property in support of her implied warranty theory. *Id.*; Restatement (Second) of Prop.: Landlord and Tenant § 17.6 (Am. Law Inst. 1977) (landlord subject to liability for physical harm caused to tenant “by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of: (1) an implied warranty of habitability; or (2) a duty created by statute or administrative regulation”). However, she concedes that this section has not been adopted in Maine, citing caselaw for the proposition that at least nine other jurisdictions have adopted it. Opposition at 2-4. She asserts that “[t]he Law Court would most probably adopt [this section of the Restatement] when called upon to decide the issue.” *Id.* at 5. However, the only authority that she cites in support of that proposition is this court’s observation in *Hearts with Haiti, Inc. v. Kendrick*, No. 2:13-cv-00039-JAW, 2015 WL 3649592 (D. Me. June 9, 2015), that, “[w]hen addressing novel tort issues, the Maine Law Court has traditionally looked to the Restatement.” *Id.* (quoting *Hearts with Haiti*, 2015 WL 3649592, at *7).

Maine’s express statutory prohibition against recovery of consequential damages for violation of the cited statute, 14 M.R.S.A. § 6021, makes it unlikely, in my view, that its highest court would adopt a contrary Restatement provision. *Hearts with Haiti* does not help the plaintiff: In that case, this court made an “informed prophecy” that the Law Court would *not* recognize a corporation’s right to maintain an action for false light invasion of privacy, noting, *inter alia*, that the Restatement (Second) of Torts adopted a view that corporations did not enjoy a right of privacy, “the overwhelming majority of courts” had declined to recognize a corporation’s right to maintain such an action, and, “[a]bsent clear legislative directive[.]” this court would not interpret Maine

statutory law to afford such a right simply because it provides corporations with a right to sue and be sued. *Hearts with Haiti*, 2015 WL 3649592, at *6-*8. Indeed, the court noted:

[T]he First Circuit has cautioned litigants who choose to come to federal rather than state court through diversity jurisdiction that they cannot expect that new trails will be blazed and litigants must provide a federal court with a well-plotted roadmap showing an avenue of relief that the state's highest court would likely follow.

Id. at *3 (citation and internal quotation marks omitted). The plaintiff has provided no such roadmap here.

The plaintiff argues in the alternative that Count II “articulates a valid negligence claim for breach of the standard of care established in Sections 6021 and 6026.” Opposition at 5. She asserts that this count “articulates a different duty and a different standard of care than Count I” because Count I “merely articulates a reasonable person standard” and Count II “defines the standard of care as the requirement to maintain the premises in good repair and fit for human habitation[.]”

Id. However, even if such an end run around the prohibition of consequential damages imposed by 14 M.R.S.A. § 6021(4)(D) were permissible, which I find unlikely, the complaint fails to allege compliance with the statutory requirements, including but not limited to written notice to the landlord of the specific condition that renders the dwelling unfit for human habitation, and the failure of the landlord, following receipt of said notice, to take prompt steps to remedy the condition.

In addition, Count I alleges that the defendant “fail[ed] to maintain the building in a safe and habitable condition,” and “fail[ed] to meet minimum standards for residential apartment housing owners in the State of Maine,” which do not appear to me to differ significantly from the plaintiff's characterization of Count II, which, after all, is titled “Breach of Warranty.” Complaint ¶¶ 17, 19-23. As a count alleging negligence, Count II is superfluous.

III. Conclusion

For the foregoing reasons, the motion to dismiss Count II should be **GRANTED**.

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 fourteen (14) days after being served with a copy thereof. A responsive memorandum 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 30th day of September, 2015.

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

Plaintiff

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V.

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