

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNION MUTAL FIRE</b>	)	
<b>INSURANCE COMPANY,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
v.	)	
	)	<b>No. 2:15-cv-405-NT</b>
<b>ALLSTATE INSURANCE COMPANY,</b>	)	
	)	
<b>Defendant/Third-Party Plaintiff</b>	)	
	)	
v.	)	
	)	
<b>CLIFFORD G. DOW,</b>	)	
	)	
<b>Third-Party Defendant/ Fourth-Party Plaintiff</b>	)	
	)	
v.	)	
	)	
<b>VARNEY AGENCY, INC.,</b>	)	
	)	
<b>Fourth-Party Defendant</b>	)	

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiff Union Mutual Fire Insurance Company (“Union Mutual”) and defendant Allstate Insurance Company (“Allstate”) cross-move for summary judgment as to whether a lease agreement between Union Mutual’s insured, landlord Clifford G. Dow, and Allstate’s insureds, tenants David and Chandra Ritchie, permits Union Mutual to pursue an action for equitable subrogation against Chandra Ritchie. See Motion for Summary Judgment of Defendant Allstate Insurance Company (“Allstate’s Motion”) (ECF No. 35) at 1; Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment (“Union Mutual’s Motion”) (ECF No. 38) at 2. For the reasons

that follow, I conclude that it does not. Accordingly, I recommend that the court grant Allstate's cross-motion for summary judgment and deny that of Union Mutual.

## **I. Applicable Legal Standards**

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

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Ahmed v. Johnson*, 752 F.3d 490, 495 (1st Cir. 2014). “A dispute is genuine if ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party.’” *Johnson v. University of P.R.*, 714 F.3d 48, 52 (1st Cir. 2013) (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. *Johnson*, 714 F.3d at 52. 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.” *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 586 (1st Cir. 2007) (quoting *Clifford v. Barnhart*, 449 F.3d 276, 280 (1st Cir. 2006) (emphasis omitted)); Fed. R. Civ. P. 56(c). “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 Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

“This framework is not altered by the presence of cross-motions for summary judgment.” *Cochran v. Quest Software, Inc.*, 328 F.3d 1, 6 (1st Cir. 2003). “[T]he court must mull each motion separately, drawing inferences against each movant in turn.” *Id.* (citation omitted); *see also, e.g., Wightman v. Springfield Terminal Ry. Co.*, 100 F.3d 228, 230 (1st Cir. 1996) (“Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment *per se*. Cross motions simply require us to determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed. As always, we resolve all factual disputes and any competing, rational inferences in the light most favorable to the [nonmovant].”) (citations 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.*

Local Rule 56 directs that “[f]acts 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 statement of fact.” *Id.*; *see also, e.g., Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 5 (1st Cir. 2010); Fed. R. Civ. P. 56(e)(2) (“If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]”).

## **II. Factual Background**

The parties’ statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Local Rule 56, reveal the following.<sup>1</sup>

This suit arises out of a fire that occurred at property located at 25 Main Street in Gray, Maine, on or about June 25, 2014. Statement of Material Facts Supporting Motion for Summary Judgment of Defendant Allstate Insurance Company (“Defendant’s SMF”) (ECF No. 36) ¶ 1; Plaintiff’s Responses to Defendant’s Statement of Material Facts (“Plaintiff’s Opposing SMF”) (ECF No. 39) ¶ 1. The 25 Main Street property is and at all pertinent times was owned by third-party defendant Clifford Dow. *Id.* ¶ 2.

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<sup>1</sup> There are no disputed facts. Union Mutual has admitted all nine of Allstate’s statements of material facts, and Allstate has not filed a response to Union Mutual’s three additional statements of material facts, which are admitted to the extent supported by the record citations given.

At the time of the fire, Chandra Ritchie was a tenant of the 25 Main Street property subject to the terms of a lease agreement. *Id.* ¶ 3. Paragraph 18 of that lease agreement, titled **INSURANCE AND LIABILITY**, states, in relevant part:

The Tenant shall provide “[r]enter’s insurance” on the Premises protecting their personal property and shall hold the Landlord harmless from any damage incurred except damage resulting from the Landlord’s violation of Landlord’s responsibilities under the terms of this lease agreement. Landlord may request evidence of such insurance. Tenant accepts all liability and responsibility for fire damage on premise if tenant is the cause of the fire. Tenant agrees to indemnify and hold harmless the Landlord and Landlord’s agents from any loss or damage arising by reason of any injury to persons or property or any claim on account thereof, or claim which Landlord may incur and any costs or expenses to which Landlord may be put resulting from the Tenant’s use of the premises, this includes unintended negligence of landlord and landlord[’]s agents. Tenant agrees that all issues involving Tenant[’]s personal property shall be taken up with Tenant[’]s insurance company – Landlord is not responsible for any damage to Tenant[’]s personally (i[.]e[.] health issues) or tenant[’]s belongings due to water in the basement, flood damages, mold or any other issues beyond landlord[’]s control.

Rental Agreement, Exh. A (ECF No. 37) to Defendant’s SMF, at 8, ¶ 18.

At the time of the fire, the 25 Main Street property was insured against fire loss under a policy issued by Union Mutual to Dow. Defendant’s SMF ¶ 4; Plaintiff’s Opposing SMF ¶ 4. Pursuant to its obligations under this policy, Union Mutual paid Dow \$93,557.74 for damages resulting from the fire. *Id.* ¶ 5. At the time of the fire, the Ritchies were insured under a renter’s policy issued to them by Allstate. *Id.* ¶ 6. Allstate retained counsel to defend Chandra Ritchie in this suit. *Id.* ¶ 7. Acting by and through counsel, Chandra Ritchie has stipulated that the fire was caused by her negligence. *Id.* ¶ 8. In exchange for that stipulation, Union Mutual has voluntarily dismissed Chandra Ritchie from this suit. *Id.* ¶ 9.

Union Mutual notified Allstate of its subrogation interest related to its payments to Dow. Plaintiff’s Additional Statement of Material Facts in Support of Its Opposition to Defendant’s Motion for Summary Judgment and in Support of Plaintiff’s Cross-Motion for Summary Judgment

(“Plaintiff’s Additional SMF”) (ECF No. 40) ¶ 1; Complaint for Declaratory Relief; Equitable Subrogation (“Complaint”) (ECF No. 1) ¶ 13; Answer of Defendant Allstate Insurance Company and Demand for Jury Trial (“Answer”) (ECF No. 8) ¶ 13. On November 13, 2014, Allstate and Chandra Ritchie entered into a release of all claims with Dow for all damages arising out of the fire in return for a payment to Dow by Allstate in the amount of \$100,000. Plaintiff’s Additional SMF ¶ 2; Complaint ¶ 14; Answer ¶ 14.

Union Mutual has asserted a subrogation claim as to Chandra Ritchie. Plaintiff’s Additional SMF ¶ 3; Complaint ¶¶ 27-32.

### **III. Discussion**

In a 2002 decision, the Law Court answered the following question certified to it by Judge Hornby of this court: “May a residential tenant be liable in subrogation to the insurer of a landlord for damages paid as a result of fire, absent an express agreement to the contrary in a written lease?” *North River Ins. Co. v. Snyder*, 2002 ME 146, ¶ 1, 804 A.2d 399, 399-400. The Law Court responded:

No, a residential tenant may not be held liable in subrogation to the insurer of the landlord for damages paid as a result of a fire, absent an agreement to the contrary – that is, absent an express agreement in the written lease that the tenant is liable in subrogation for fire damage to the apartment complex.

*Id.*, 2002 ME 146, ¶ 1, 804 A.2d at 400. In so doing, the Law Court adopted the so-called *Sutton* rule, derived from *Sutton v. Jondahl*, 532 P.2d 478 (Okla. Civ. App. 1975). *See id.*, 2002 ME 146, ¶¶ 5, 11-16, 804 A.2d at 400, 402-04.

The Law Court noted that the *Sutton* court had crafted an “implied co-insured doctrine” based on the rationale that “[s]ubrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary, comparable to the permissive-user feature of automobile insurance.” *Id.*,

2002 ME 146, ¶ 12, 804 A.2d at 402 (citation, internal quotation marks, and footnote omitted). However, the Law Court clarified that it adopted the *Sutton* rule for residential tenants not on the basis of the “implied co-insured” rationale but, rather, on the basis of a different rationale advanced in *DiLullo v. Joseph*, 792 A.2d 819, 823 (Conn. 2002): the disfavoring of economic waste. *See id.*, 2002 ME 146, ¶¶ 15-16, 804 A.2d at 403-04.

The *DiLullo* court found the “implied co-insured” rationale contrary to general principles of insurance and contract law. *See DiLullo*, 792 A.2d at 853. Yet, it adopted the *Sutton* result as “sound as a matter of subrogation law and policy,” explaining:

Our decision is founded, in large part, upon the principle that subrogation, as an equitable doctrine, invokes matters of policy and fairness. One such policy implicated by the issue presently before us is that disfavoring economic waste. This strong public policy convinces us that it would be inappropriate to create a default rule that allocates to the tenant the responsibility of maintaining sufficient insurance to cover a claim for subrogation by his landlord’s insurer. Such a rule would create a strong incentive for every tenant to carry liability insurance in an amount necessary to compensate for the value, or perhaps even the replacement cost, of the entire building, irrespective of the portion of the building occupied by the tenant. That is precisely the same value or replacement cost insured by the landlord under his fire insurance policy. Thus, although the two forms of insurance would be different, the economic interest insured would be the same. The duplication of insurance would, in our view, constitute economic waste and, in a multiunit building, the waste would be compounded by the number of tenants. We think that our law would be better served by having the default rule of law embody this policy against economic waste, and by leaving it to the specific agreement of the parties if they wish a different rule to apply to their, or their insurers’, relationship.

*Id.* at 853-54 (citations omitted).

The *DiLullo* court upheld the application of the *Sutton* rule in circumstances in which (i) “[t]here was no agreement between the parties, either in the lease or otherwise, that the defendant [tenant] would insure the premises for fire or other casualty, although [one of the landlords] requested the defendant to carry liability insurance on his business contents and, at the time of the entering of the lease, the defendant provided [the landlords] with evidence of such

insurance[,]” (ii) “[t]he defendant and the [landlords] never discussed the possibility that they would provide insurance coverage for each other, and there was no agreement that the [landlords] would relieve the defendant of liability arising from his own negligence[,]” (iii) “[t]he defendant did not expect that any insurance that the [landlords] obtained would protect him, and he believed that his own insurance would cover his property losses and liability[,]” and (iv) “[p]rior to the March 24, 1998 fire, the defendant had not formed an expectation that the [landlords’] policy would provide him with coverage, and he acknowledged that his liability insurance would cover damage to [the landlords’] property.” *Id.* at 849-50.

In adopting the *Sutton* rule on the rationale advanced in *DiLullo*, the Law Court concluded, “When the lease does not contain an express agreement addressing the issue of subrogation in the event of a negligently caused fire by a tenant, as the magistrate [judge] found in this case, a landlord’s insurer may not proceed against the tenant as subrogee.” *North River*, 2002 ME 146, ¶ 16, 804 A.2d at 403-04. The Law Court explained:

The magistrate [judge] decided that the lease did not “mention insurance and cannot be construed as express agreements concerning insurance or liability for fire damage in particular.” Our assessment of the lease terms, an implicit subpart of the certified question, coincides with the preceding. The lease does not contain a specific, express agreement that the [tenants] would be liable in subrogation for fire damage.

*Id.*, 2002 ME 146, ¶ 16 n.9, 804 A.2d at 403 n.9. The Law Court noted that, while the lease provided that, “[i]n the case of a fire or casualty, the Resident must look to its own insurance company if the Resident’s personal property is damaged[,]” *id.* (internal quotation marks omitted), that provision “merely inform[ed] the tenant that if he wants his personal property protected in the event of a fire, he should get his own insurance because the landlord will not cover such losses[,]” *id.* It added that, while the lease, “to a varying degree[,] . . . ma[de] the tenant liable to the landlord for damages caused by the tenant or guest, none of [those] provisions explicitly ma[d]e the tenant

liable to the landlord's insurer in subrogation as required by *Sutton*." *Id.* Those liability provisions included promises that the tenants would be responsible for "any damages or deterioration as a result of negligence, carelessness, accident or abuse of the premises by the Resident or members of his/her household, invitees or guests" and that, "[w]henver the Landlord has to pay any expense, or suffers any loss, because of anything done by the Resident or any other person mentioned in this paragraph, the Resident must promptly provide full reimbursement to the Landlord." *Id.* (internal quotation marks omitted).

Against that backdrop, Allstate and Union Mutual dispute whether, as a matter of law, there was an express agreement between Dow and the Ritchies that the Ritchies could be held liable in subrogation to Union Mutual for damages paid as a result of the fire.

Allstate contends that the Dow-Ritchie lease is materially indistinguishable from that in *North River*, noting that it contains no express agreement that the Ritchies are liable in subrogation for fire damage and arguing that its indemnification/hold harmless provisions are no more effective than those in *North River* in creating such an agreement. *See* Allstate's Motion at 3-4.

Union Mutual counters that in this case, unlike in *DiLullo*, "[t]he lease clearly provide[d] that (1) the tenant assumes full responsibility and liability for any damage caused by fire; and (2) the tenant recognizes that entities acting on behalf of the landlord may seek to recover from the tenant for such damages." Union Mutual's Motion at 5. It disputes that the use of the word "subrogation" is necessary to avoid application of the *Sutton* rule, a proposition for which it cites *Dana Warp Mill, LLC v. Unger d/b/a Fore River Studio*, Civil Action Docket No. CV-08-636, 2009 Me. Super. LEXIS 115 (Me. Sup. Ct. Sept. 2, 2009). *See id.* at 4-5.

In *Unger*, the Maine Superior Court refused to apply the *Sutton* rule when a lease between commercial tenants and their landlord contained a provision in which the tenants agreed to

maintain “a policy of public liability and property damage insurance under which Tenant is named as insured and Landlord as additional insured, and under which the insurer agrees to indemnify and hold Landlord and those in privity with Landlord harmless from and against any and all costs, expenses and/or liability” arising from the tenants’ occupancy of the leased premises. *Unger*, 2009 Me. Super. LEXIS 115, at \*14-\*15 (internal quotation marks omitted).

Allstate argues that *Unger* is distinguishable on the basis that it concerned commercial tenants. *See* Defendant’s Reply Brief in Support of Motion for Summary Judgment (ECF No. 44) at 3. It adds that paragraph 18 of the Dow-Ritchie lease does not suffice to constitute an express agreement that the Ritchies could be held liable to Union Mutual in the event of a fire because, (i) insofar as it touches on the question of insurance, it merely obligates the Ritchies to purchase renters’ insurance to cover their own losses, (ii) it plausibly could be read as pertaining to responsibility for loss/damage to the tenants’ personal property, given that it mentions their personal property or belongings three times, (iii) the landlord purchased insurance covering the structure, (iv) no purpose is served by a lease provision requiring both parties to purchase insurance covering the same risk, (v) the lease does not reference either the landlord’s insurer or subrogation, and (vi) an insurer is not a landlord’s “agent” as it cannot act in the insured’s behalf. *See id.* at 3-4.

Even assuming *arguendo* that an insurer fairly can be described as a landlord’s “agent,” Allstate has the better argument. As discussed above, the Law Court adopted the *Sutton* rule on the rationale that the duplication of insurance covering a fire loss is an economic waste. The lease between Dow and the Ritchies merely required that the Ritchies purchase renters’ insurance, not insurance to cover the premises in the event of a fire. The fact that the Ritchies’ insurer, Allstate, paid Dow for damages caused by its insured’s negligence is not dispositive: in *DiLullo*, the

defendant tenant purchased liability insurance at the landlord's request covering the contents of his (the tenant's) business and acknowledged that his liability insurance would cover damage to the landlords' property. See *DiLullo*, 792 A.2d at 849; see also, e.g., *Beveridge v. Savage*, 830 N.W.2d 482, 487 (Neb. 2013) ("The lease provision requiring the tenant to obtain renter's insurance did not require the tenant to insure the building against loss by fire.").

Nor is the fact that the Ritchies agreed to hold harmless and/or indemnify the landlord for various damages, including damages resulting from a fire, dispositive in Union Mutual's favor. As *North River* makes clear, a residential tenant's promise to hold a landlord harmless and/or indemnify a landlord for damages caused by that tenant is not tantamount to an express agreement that the tenant may be held liable in subrogation to the landlord's insurer. See *North River*, 2002 ME 146, ¶ 16 n.9, 804 A.2d at 403 n.9. The fact that the Ritchies specifically agreed to hold the landlord harmless for losses resulting from a fire does not alter the analysis: it begs the question of whether the Ritchies agreed that they could be held liable in subrogation to their landlord's insurer for such losses.

Nor, finally, does the Ritchies' agreement to indemnify and hold harmless the landlord's agents for any losses/damages tip the scales in Union Mutual's favor. The lengthy sentence in which this promise is contained does not itself reference fire damage, the landlord's insurer, or any subrogation liability of the Ritchies. Even granting that, in *Unger*, the Maine Superior Court did not find the use of the word "subrogation" necessary to form an express agreement displacing the *Sutton* rule, *Unger* is distinguishable. The *Unger* lease was not only commercial rather than residential but also obligated the tenants to maintain "a policy of public liability and property damage insurance" naming the landlord as an additional insured and "under which the insurer agree[d] to indemnify and hold Landlord and those in privity with Landlord harmless from and

against any and all costs, expenses and/or liability” arising from the tenants’ occupancy of the leased premises. *Unger*, 2009 Me. Super. LEXIS 115, at \*15 (internal quotation marks omitted). The *Unger* tenants, hence, assumed property insurance liability that one might have expected their landlord otherwise to assume.

In this case, by contrast, as in *DiLullo*, “there was no agreement between the parties, either in the lease or otherwise, that the defendant [tenants] would insure the premises for fire or other casualty[.]” *DiLullo*, 792 A.2d at 849.

#### IV. Conclusion

For the foregoing reasons, I recommend that Allstate’s cross-motion for summary judgment be **GRANTED** and that of Union Mutual 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 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 8<sup>th</sup> day of May, 2016.

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