

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID L. PITCHER,)	
)	
Plaintiff)	
)	
v.)	Civil No. 89-0022 P
)	
DAVID N. ROLLINS, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

In this diversity action the plaintiff seeks damages for personal injuries sustained when he slipped and fell in the outside walkway/driveway area constituting part of the residential premises he and his wife leased from the defendants in South Berwick, Maine. The plaintiff alleges that his injuries were occasioned by the negligence of the defendants in failing to maintain the leased premises in a safe condition thereby creating a hazard upon the outside walkways. Before the court at this time is the plaintiff's motion for partial summary judgment on the defendants' affirmative defense that the plaintiff's complaint is barred by contractual waiver and/or estoppel.¹

Although the plaintiff has failed to annex to his motion the separate statement of material facts required by Local Rule 19(b) -- an omission which ordinarily will cause a summary judgment motion to

¹ Despite the availability of Fed. R. Civ. P. 12(f) as a means of attacking the sufficiency of an affirmative defense, it is nevertheless appropriate for the court to entertain a motion for partial summary judgment on an affirmative defense. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 2737 at pp. 462-63 (1983); see e.g., *Gagne v. Ralph Pill Elec. Supply Co.*, 630 Fed. Supp. 1095, 1096 (D. Me. 1986).

fail -- in the circumstances of this case, where it is clear that there exists no dispute as to any material fact and that only a question of law is presented, I proceed to decide the motion. *See Federal Deposit Insurance Corp. v. Roldan Fonseca*, 795 F.2d 1102, 1106 (1st Cir. 1986).

At issue is the effect to be given paragraph 8 of the November 7, 1987 lease agreement between the plaintiff and his wife as "tenant" and the defendants as "owner." That provision reads as follows:

8. It is expressly understood and agreed that the owner of said premises will not be liable for any damages or any injury to tenant or his/her family or to his/her family's property from whatever cause arising from the occupancy of said premises by tenant and his/her family.

May paragraph 8 be asserted as a bar if the defendants are otherwise found liable for damages sustained by the plaintiff as a result of their negligence? Under the law of Maine, immunity clauses like that here, although generally lawful and not *per se* against public policy, are nevertheless looked upon with disfavor and are construed strictly against parties who seek immunity from their own negligence. *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983); *see also Doyle v. Bowdoin College*, 403 A.2d 1206 (Me. 1979).

The defendants can avail themselves of the immunity protection accorded them as owners in paragraph 8 of the lease only if:

on its face by its very terms [it] clearly and unequivocally reflects a mutual intention on the part of the parties to provide [the owners immunity from their own] negligence . . . , and words of general import will not be read as expressing such an intent and establishing by inference such [immunity].

Emery Waterhouse Co., 467 A.2d at 993. The contract provision at issue in *Emery Waterhouse* required indemnification of "any and all claims" arising out of "any occurrence." The Law Court

held that the provision did not include damage from the indemnitee's own negligence because such coverage was not specifically or even inferentially intended. As this court has previously observed:

Under *Emery Waterhouse*, it is clear that anything less than an explicit statement clearly manifesting an intent to indemnify against the indemnitee's own negligence will not be sufficient to create an obligation to do so.

Burns & Roe, Inc. v. Central Maine Power Co., 659 F. Supp. 141, 144 (D. Me. 1987).

Here, the words "from whatever cause" are themselves words of general import; as such, paragraph 8 of the lease falls short of indicating that the parties meant to include damages from the owners' own negligence within the scope of the immunity provided for therein.

Accordingly, I recommend that the plaintiff's motion for partial summary judgment be **GRANTED.**

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 28th day of September, 1989.

David M. Cohen
United States Magistrate