

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>ESTATE OF DONALD C. HERRICK,¹</i>)	
<i>et al.,</i>)	
)	
<i>Plaintiffs,</i>)	
)	
<i>v.</i>)	<i>Civil No. 96-153-P-H</i>
)	
<i>AMES REALTY II, INC., et al.,</i>)	
)	
<i>Defendants</i>)	

**RECOMMENDED DECISION ON MOTION TO DISMISS AND/OR FOR SUMMARY
JUDGMENT OF DEFENDANTS AMES REALTY II, INC., AMES STORES, AMES
DEPARTMENT STORES, INC. AND ZAYRE NEW ENGLAND CORP.**

This is a products liability action, originally filed in state court, arising out of injuries allegedly sustained by Donald Herrick while wearing a bathrobe purchased at an Ames Department Store in Rockland, Maine. The plaintiffs are Herrick’s estate and his widow, Marion Herrick. They assert claims for breach of implied warranties (Counts I and II) unfair trade practices (Count III) and strict liability (Count IV). Defendant Foster Industries, Inc. removed the action to this court where it proceeds in diversity. In addition to Foster Industries, the Amended Complaint names Ames Realty II, Inc. as a defendant. The court has previously granted the plaintiffs’ motion for joinder of Ames Stores, Ames Department Stores, Inc. and Zayre New England Corp. as defendants.

The latter four defendants, hereinafter referred to collectively as the “Ames defendants,” have

¹ The court has substituted the Estate of Donald C. Herrick for originally named plaintiff Donald Herrick. See Docket No. 16 (endorsement).

filed a motion for summary judgment in favor of the Ames defendants except Ames Stores.² Their contention is that only Ames Stores was the seller of the bathrobe in question and, therefore, none of the other Ames defendants are amenable to a products liability suit. For the reasons that follow, I recommend that summary judgment be entered in favor of only Ames Realty II, Inc.

I. Summary Judgment Standards

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. 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 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 the party the benefit of all reasonable inferences to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no

² Although the Ames defendants style their motion as one seeking dismissal and/or summary judgment, the text of their motion makes clear that it is actually only summary judgment they seek. Given that they rely on matters outside the pleadings in support of their position, it would not be appropriate to treat their motion as one for dismissal in any event. *See* Fed. R. Civ. P. 12(b) (dismissal motion treated as one for summary judgment motion in such circumstances).

genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

The plaintiffs have not controverted what the Ames defendants deem to be the material facts.³

Viewing them in the requisite plaintiff-favorable light reveals the following:

The plaintiffs allege in their complaint that on or about April 17, 1995 plaintiff Marion Herrick purchased a men’s bathrobe at the Ames Department Store in Rockland, that the bathrobe

³ The Ames defendants have appended certain additional material to their memorandum in reply to the plaintiff’s opposition to the summary judgment motion. The plaintiffs quite properly object to this submission as one that is not permitted under the Local Rules. *See* Plaintiffs’ Response to Reply, etc. (Docket No. 24). Treating this response as a motion to strike the additional material filed by the Ames defendants, I grant the motion. Therefore, nothing in this additional material is reflected in the factual recitation herein. I note, parenthetically, that the plaintiffs are incorrect in their assertion that the Ames defendants failed to file their reply memorandum on a timely basis.

I deem it noteworthy that the Ames defendants, after seeking to supplement the factual showing in support of their summary judgment motion, have reacted with anything but grace. Erroneously invoking the Maine Rules of Civil Procedure, they move to strike the plaintiffs’ objection to their improper supplementation on the hypertechnical ground that the objection is a “responsive pleading” rather than a motion to strike. *See* Ames Defendants’ Motion to Strike Plaintiffs’ Response to Reply of the Ames Defendants Regarding Defendants’ Motion for Summary Judgment, etc. (Docket No. 25) at 1. *This* motion to strike is denied. *See* Fed. R. Civ. P. 1 (Rules of Civil Procedure construed “to secure the just, speedy, and inexpensive determination of every action”). As noted, *infra*, the resources of the parties in arguing the pending summary judgment motion would have been better applied had they been directed to presenting the court with the authorities applicable to their respective positions on the merits.

ignited and burned on April 26, 1995 while being worn by Donald Herrick, and that Mr. Herrick was severely injured as a consequence. Amended Complaint (Docket No. 8) at ¶¶ 5, 9-10. Defendant Ames Stores, a partnership, was the operator of the store at all relevant times. Affidavit of David H. Lissy (“Lissy Aff.”) (Docket No. 20) at ¶¶ 2, 4, 6. As such, Ames Stores is the entity that owned the store’s inventory and was responsible for the sale of merchandise at the store. *Id.* The store was not operated by defendants Ames Realty II, Inc., Ames Department Stores, Inc. or Zayre New England Corp. *Id.* at ¶ 5. Defendant Ames Realty II, Inc. is a corporation that was the lessee of the store, but did not hold title to any of the store’s merchandise. *Id.* at ¶ 3. Defendant Zayre New England Corp. is one of two partners in Ames Stores, but did not otherwise have a role in operating the Rockland store or in buying and selling merchandise for the store. *Id.* at ¶ 4. Defendant Ames Department Stores, Inc. was not responsible for the operation of the Rockland store, held no interest in its inventory but did act as agent for Ames Stores in purchasing and selling merchandise. *Id.*

II. Discussion

Without recourse to any authority whatsoever, the Ames defendants assert that only one of them, Ames Stores, is amenable to suit on the plaintiffs’ claims. They therefore seek summary judgment in favor of Ames Department Stores, Inc., Zayre New England Corp. and Ames Realty II, Inc.

The Local Rules of this court provide that every motion “shall incorporate a memorandum of law, including citations and supporting authorities.” Loc. R. 19(a).⁴ The court has previously and

⁴ Effective on March 1, 1997, the Local Rules are being recodified, in part to cause their numbering to correspond to that of the Federal Rules of Civil Procedure. As of March 1, the requirements discussed herein will be contained in Local Rules 7 and 56. Their substance remains
(continued...)

emphatically made clear that the requirements of the Local Rules, and Local Rule 19 in particular, are binding, and that the court will therefore not take note of arguments on motions when such arguments are made in a “perfunctory manner.” *See, e.g., Carey v. M.S.A.D. No. 17*, 754 F. Supp. 906, 924 (D. Me. 1990) (citations omitted). Local Rule 19 is “not a mere battle of the forms” and the court “will not, and in fairness to all the parties, cannot do the work of the litigants as well as its own. *Id.* Carey discussed this problem in the context of a non-moving party that disregarded its obligation to develop “more than a bare objection” to a summary judgment motion. *Id.* The principle is all the more applicable to a moving party, whose obligation on a summary judgment motion is, after all, to demonstrate its entitlement to judgment as a matter of law. *See Fournier v. Joyce*, 753 F. Supp. 989, 991 n. 4 (D. Me. 1990) (noting lack of “sufficient explanation of, or justification for, such woefully inadequate briefing by attorneys”).

The plaintiffs have shown only slightly more diligence than the Ames defendants, citing precisely one case in support of their position that the instant proceedings must go forward as to all defendants. In fairness, it is not realistic to expect parties resisting such an unsupported summary judgment motion to guess which authorities tend to support the moving parties’ positions and then to offer citations that support the argument to the contrary. But the plaintiffs are presumably familiar with the causes of action they assert and their elements. In the circumstances it would not be unreasonable to expect them to state some basis, grounded in statute and reported case law, for the case as they would have it proceed against each of the Ames defendants. This they have not done, and the court is left to its speculation even as to such preliminary matters as which jurisdiction’s law

⁴(...continued)
unchanged.

applies to this case.

The Ames defendants' position, though unsupported, is nonetheless sufficiently apparent. They contend that only Ames Stores sold the bathrobe at issue to Donald Herrick, and therefore all of the other Ames defendants are not amenable to this lawsuit. In response, the plaintiffs maintain that "[w]hether or not any Ames Defendant is entitled to [summary judgment] depends on whether or not it has shown as a matter of law that it is not a seller or supplier of the bathrobe at issue." Plaintiffs' Objection to Ames Defendants' Motion, etc. (Docket No. 21) at 1. The plaintiffs misconstrue the nature of the Ames defendants' burden here. Although these defendants are the moving parties, the ultimate burden of proof remains with the plaintiffs as to every element of each of their claims, and it is therefore incumbent upon them to cite specific facts indicating the existence of trialworthy issues on these claims. *Winship Green Nursing Ctr., supra*.

The plaintiffs and the Ames defendants appear to agree that the latter's liability depends on their status as sellers of the bathrobe. However, relying on *Ware v. Public Serv. Co. of New Hampshire*, 412 A.2d 84 (Me. 1980), the plaintiffs contend that Ames Department Stores, Inc. is the agent of Ames Stores and is therefore liable as Ames Stores' principal. *Ware* does indeed contain the observation that, under Maine law, "if the principal is a wrongdoer, the agent is a wrongdoer too." *Id.* at 85 (citing *Kimball v. Billings*, 55 Me. 147, 151 (1867)). Therefore, the fact that Ames Department Stores, Inc. is the agent of Ames Stores forecloses summary judgment in favor of Ames Department Stores, Inc. because of the possibility that tortious conduct by the principal was also committed by Ames Department Stores, Inc. as agent.

Although the plaintiffs do not specifically address issues concerning defendant Zayre New England Corp., I am not aware of any authority supporting the proposition that this defendant may

not be sued because its sole relationship to the wrongs at issue is that it is a partner of the entity that is the proper defendant. To the contrary, it is hornbook law that partners are jointly and severally liable for obligations of a partnership. The hornbook law to which I refer is the relevant provision of the Uniform Partnership Act as it has been adopted in Maine, 31 M.R.S.A. § 295, *repealed and replaced by* 31 M.R.S.A. § 295-A(1), and in Delaware, 6 Del. Code Ann. § 1515(a). I mention Delaware law because it appears that Ames Stores is a Delaware partnership. *See* Reply to Plaintiffs' Objection, etc. (Docket No. 23) at 1. Given the state of the summary judgment record, and the absence of any authority invoked by the Ames defendants contrary to these provisions of the Uniform Partnership Act, it would be inappropriate to enter summary judgment in favor of Zayre New England Corp.

However, I must agree with the Ames defendants that Ames Realty II, Inc. is entitled to summary judgment in its favor. It remains uncontroverted that the sole involvement of this defendant in the sale of the bathrobe is as the lessee of the premises at which the transaction took place. Plainly, Ames Realty II, Inc. is the real estate arm of the Ames department store chain and, in contrast to the other Ames defendants, there is nothing in the record from which the court could infer that Ames Realty II, Inc. was connected to the transaction through some kind of agency relationship. At least under Maine law, all of the causes of action asserted by the plaintiffs bear no resemblance whatsoever to premises liability; all require the defendant to have assumed the status of a seller. *See* 11 M.R.S.A. § 2-314(1) (implied warranty of merchantability exists "if the seller is a merchant with respect to goods of that kind"); 11 M.R.S.A. § 2-315 (implied warranty of fitness for particular use exists when "seller . . . has reason to know" certain things about transaction); 5 M.R.S.A. § 207 (declaring unlawful "unfair or deceptive acts or practices in the conduct of any *trade*

or commerce”) (emphasis added); 14 M.R.S.A. § 221 (strict liability applies to “[o]ne who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property”). In these circumstances, Ames Realty II, Inc. is entitled to judgment as a matter of law on all pending claims.

III. Conclusion

For the foregoing reasons, I recommend that the Ames defendants’ motion for summary judgment be **GRANTED IN PART** and **DENIED IN PART** as follows: judgment in favor of defendant Ames Realty II, Inc. on all claims, with the motion otherwise being **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 20th day of February, 1997.

*David M. Cohen
United States Magistrate Judge*