

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NEW ENGLAND TELEPHONE &)
TELEGRAPH COMPANY,)

Plaintiff)

v.)

UNITED VIDEO CABLEVISION, INC.,)

Defendant and Third)
Party Plaintiff)

Docket No. 96-298-P-H

v.)

WHITE MOUNTAIN CABLE)
CONSTRUCTION CORP.,)

Third Party Defendant)

RECOMMENDED DECISION ON PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT

A fall from a utility pole in Cushing, Maine, in 1989 and the resulting negligence action in state court give rise to this action for indemnification. The plaintiff, New England Telephone & Telegraph Company (“NET”), moves for summary judgment on its claim based on a license agreement dated April 7, 1989, among NET, Central Maine Power Company (“CMP”), and defendant United Video Cablevision, Inc. (“United”), and on United’s counterclaim. I recommend that the court deny the motion.

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 facts and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). 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 if 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 to be drawn in its favor.” *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). “Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a genuine and material issue for trial.” *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e). A fact is “material” if it may affect the outcome of the case; a dispute is “genuine” only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. Factual Background

The plaintiff and CMP, as licensors, entered into a license agreement with the defendant, as licensee, dated April 7, 1989. Complaint (Docket No. 1) ¶ 4 & Exh. A; Answer (Docket No. 2) ¶ 20. The agreement allowed the defendant to place attachments on poles owned by the licensors “for any lawful communications purpose” in certain towns, including Cushing, Maine, during a period of five years from the date of the agreement. License Agreement, Exh. A to Complaint, at Articles II(A) and XIX; Answer ¶ 20. The agreement includes the following indemnification clause at Article XIII(C):

Except, as may be caused by the sole negligence of Licensor, or either of them, Licensee shall defend, indemnify and save harmless Licensor, or either of them, against and from any and all liabilities, claims, suits, fines, penalties, damages, losses, fees, costs and expenses (including reasonable attorneys' fees) including, but not limited to, those which may be imposed upon, incurred by or asserted against Licensor, or either of them by reason of (a) any work or thing done upon the poles licensed hereunder or any part thereof performed by Licensee or any of its agents, contractors, servants, or employees; (b) any use, occupation, condition, operation of said poles or any part thereof by Licensee or any of its agents, contractors, servants or employees; (c) any act or omission on the part of Licensee or any of its agents, contractors, servants, or employees, for which Licensor may be found liable; (d) any accident, injury (including death) or damage to any person or property occurring upon said poles or any part thereof arising out of any use thereof by Licensee or any of its agents, contractors, servants or employees; (e) any failure on the part of Licensee to perform or comply with any of the covenants, agreements, terms or conditions contained in this Agreement; (f) payments made under any Workers' Compensation Law or under any plan for employees disability and death benefits arising out of any use thereof by Licensee or any of its agents, contractors, servants or employees or by (g) the erection, maintenance, presence, use, occupancy or removal of Licensee's attachments by Licensee or any of its agents, contractors, servants or employees or by their proximity to the facilities of other parties attached to Licensor's poles.

Donald Gearhart sued NET for injuries sustained in a fall on August 23, 1989, from a utility pole in Cushing, Maine, owned by CMP and jointly used by NET and CMP. Complaint, Exh. B; Deposition of Donald W. Gearhart, February 25, 1993 ("Second Gearhart Dep."), Exh. D to Plaintiff's Supplemental Statement of Undisputed Material Facts ("Plaintiff's Supp. SMF") (Docket No. 16), at 22-23, 30, 34-35; Affidavit of Richard P. Owens ("Owens Aff."), Exh. E to Plaintiff's Supp. SMF, ¶ 5. The pole was one of those on which the defendant was authorized to place attachments under the license agreement. Owens Aff. ¶ 5. At the time of his injury, Gearhart was an employee of Buckley Brothers, a subcontractor hired to string television cable in Cushing by third-party defendant White Mountain Cable Construction Corporation, a contractor hired by the

defendant. Second Gearhart Dep. at 11; Deposition of Donald W. Gearhart, August 16, 1990 (“First Gearhart Dep.”), Exh. C to Plaintiff’s Supp. SMF, at 8-10; Letter dated October 5, 1994, from Martin J. Cerullo to Dennis Nolin, attached to Defendant’s Response to Plaintiff’s Second Request for Production of Documents, Exh. A to Plaintiff’s Supp. SMF.

NET made a demand upon the defendant for defense and indemnification in the state court action by letter dated September 19, 1994. Defendant’s Supplemental Response to Plaintiff’s Request for Admissions, Exh. B to Plaintiff’s Supp. SMF, ¶ 3. The defendant rejected this demand. Letter from Robert A. Prentice to Ernest J. Babcock, Esq., dated May 30, 1995, Exh. 1 to Owens Aff., at [15]. After trial, the jury in the state court action found that both NET and Gearhart had been negligent in a manner that caused his injuries. Defendant /Third-Party Plaintiff’s Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment (“Defendant’s Opposition”) (Docket No. 11) at 5. The jury awarded Gearhart \$150,000 in damages, making no deduction from the damages award for Gearhart’s negligence. Jury Verdict Form, *Gearhart v. New England Telephone Company*, Docket No. CV-92-486 (Cumberland County), Exh. D to Complaint.¹ NET subsequently settled the Gearhart action by paying \$150,000. Owens Aff. ¶ 3. NET incurred legal fees and costs in the amount of \$36,227.81 for defense of the Gearhart action. *Id.* ¶ 4.

NET brought this action in diversity, seeking to recover the settlement payment and its legal

¹ The jury verdict form is not properly before the court on this motion for summary judgment. It is attached to the complaint, but the answer denies the paragraph of the complaint that incorporates it. Complaint ¶ 11; Answer ¶ 26. United also objected under Fed. R. Civ. P. 56 to NET’s inclusion of the form by reference in its Statement of Material Fact. Defendant’s Opposition at 5. United nevertheless refers extensively to the form in its opposition, *id.* at 10-11, 13-14, basing its second argument in opposition to the motion for summary judgment solely on that document. The content of the verdict form is ultimately irrelevant to the determination of the motion for summary judgment, but counsel are reminded that they may not rely on documents not properly part of the summary judgment record, particularly when they themselves have objected to such documents.

fees and costs under the indemnification clause of the license agreement, on October 11, 1996. United filed an answer and a counterclaim seeking contribution and indemnification from NET. Docket No. 2. United was granted leave to file a third-party complaint against White Mountain, seeking indemnification for the claim of NET, on December 23, 1996. Docket No. 6 (endorsement). The pending motion for summary judgment does not involve the claim against White Mountain.

III. Analysis

United opposes the motion for summary judgment on several grounds: (1) the language of the indemnification clause is not sufficiently clear and unequivocal to require United to indemnify NET for NET's own negligence; (2) the *Gearhart* jury's verdict does not establish that the negligence of Gearhart and NET was concurrent, but rather that NET was the sole negligent party; (3) United may not be bound by the jury's verdict; (4) the indemnification exception does not apply when the concurrent negligence is that of the injured party; (5) NET has not established that Gearhart's injury arose out of United's operations under the license agreement; and (6) the license agreement is not applicable because the utility pole at issue belonged to CMP, not NET. The first ground is sufficient and dispositive.

Maine law views clauses indemnifying a party against its own negligence with disfavor, requiring courts to construe them strictly against such a result. *Emery Waterhouse Co. v. Lea*, 467 A.2d 986, 993 (Me. 1983). While the indemnification language at issue here clearly precludes indemnification when the negligence at issue is *solely* that of the indemnitee, that fact does not end the inquiry. Indemnification of the indemnitee for any negligence on its part will be enforced only where the provision "expressly extends indemnification to indemnitee negligence." *International*

Paper Co. v. A & A Brochu, 899 F. Supp. 715, 719 (D. Me. 1995). The language of Article XIII(C) does not expressly extend indemnification to any negligence of NET. *See id.* n.3 (example of acceptable express language).

This conclusion is required by *Fowler v. Boise Cascade Corp.*, 739 F. Supp. 671, 673-75 (D. Me. 1990), where this court held that the following indemnity clause was insufficient to require indemnification of the indemnitee for its own negligence:

Contractor shall indemnify, save and hold [indemnitee] harmless from and against any and all loss, damage, expense, responsibility and/or liability for all loss or injury of any kind or nature (including death) to all persons or property, or for claims therefor, whether or not [indemnitee] has suffered actual loss, damage or expense, resulting from, pertaining to or arising out of performance of this Contract by Contractor, its employees, agents, assigns or subcontractors, including all attorney's fees incurred by [indemnitee] in enforcing the provisions of this indemnity or in connection with any claim or demand anticipated or asserted against [indemnitee] which may be covered under the terms of this indemnity. The Contractor shall assume, on behalf of [indemnitee], the defense of any law suit or administrative proceeding which may be brought against [indemnitee] upon any such claim, demand, right, action or cause of action, and pay on behalf of [indemnitee], upon its demand, the amount of any judgment that may be entered against [indemnitee] in connection therewith. This indemnity shall not cover losses cause by [indemnitee's] sole negligence.

Id. at 673 n.3.

Contrary to NET's argument, the placement of the exception language at the end of the clause, in a separate sentence, rather than in a phrase at the beginning of the clause as it appears in the license agreement at issue, is a distinction without a difference under Maine law. Like the *Fowler* contract language quoted above, Article XIII(C) does not expressly indemnify NET for its own negligence, whether sole or concurrent. NET's reference to *Law v. Reading Co.*, 312 F.2d 841, 845 (3d Cir. 1963), decided under Pennsylvania law, does not compel a different interpretation.

Under this court's holding in *Fowler*, NET's motion for summary judgment should be denied.

This conclusion is not altered by the fact that the First Circuit, which entertained an appeal after trial had taken place on Fowler's claim, upheld this court's ruling on indemnification by relying only on the final sentence of the indemnification clause, because the jury found that Fowler's injuries were due to the indemnitee's sole negligence. *Fowler v. Boise Cascade Corp.*, 948 F.2d 49, 58 (1st Cir. 1991). That ruling in no way contravenes the broader holding of this court on summary judgment, before trial had taken place.

In the face of *Fowler*, *Max Oil Co. v. Shell Oil Co.*, 945 F. Supp. 241, 245-46 (M. D. Ala. 1996), upon which NET relies, is unavailing. While *dicta* in the *Max* opinion is at odds with this court's conclusion in *Fowler*, *Max* was decided under Alabama law and does not bind this court.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff'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, 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 ____ day of April, 1997.

*David M. Cohen
United States Magistrate Judge*

