

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 ENTRY OF SUMMARY JUDGMENT

On May 28, 1997 this court entered an order affirming my recommended decision dated April 25, 1997 (Docket No. 18) denying the plaintiff's motion for summary judgment on its claim against defendant United Video Cablevision, Inc. in this action. Docket No. 22. The parties have now raised, in their final pretrial memoranda, Docket Nos. 24 & 26, the question whether any issue concerning liability remains to be tried in this case. After review of the relevant authority and the circumstances of this case, I conclude that no unresolved issue of liability remains and, accordingly, recommend that the court enter summary judgment *sua sponte* for the defendant on the plaintiff's

claim.

The complaint asserts only one claim against the defendant — that, under the terms of a contract between the parties, the defendant “is legally obligated to indemnify [the plaintiff] for all of its costs and expenses incurred in defending the lawsuit brought [against the plaintiff by Donald Gearhart], and to indemnify [the plaintiff] for the settlement payment made to Donald Gearhart.” Complaint (Docket No. 1) ¶ 16. The plaintiff’s motion for summary judgment (Docket No. 9) was based solely on the language of the indemnification clause of the License Agreement that constituted the contract between the parties.

The recommended decision on the plaintiff’s motion for summary judgment was based on this court’s decision in *Fowler v. Boise Cascade Corp.*, 739 F. Supp. 671, 673-75 (D. Me. 1990), in which the court granted a defendant’s motion for summary judgment based on the insufficiency of indemnification language in the contract at issue to require indemnification of the indemnitee for its own negligence. That result differs from the result in this case only in the identity of the party bringing the motion for summary judgment.

In an appropriate case, a court may grant summary judgment to the non-moving party *sua sponte*. *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 29 (1st Cir. 1996); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720 at 29-30, 34 (1983). This is such a case. The original movant, the plaintiff, has had an adequate opportunity to show that there is a genuine issue in dispute or that the defendant is not entitled to summary judgment as a matter of law. *See Bonilla v. Nazario*, 843 F.2d 34, 37 (1st Cir. 1988); *Renaissance Yacht Co. v. Stenbeck*, 810 F. Supp. 15, 16

(D. Me. 1992).¹ The statement in the plaintiff's Pretrial Memorandum that "the effect of the Court's denial of the summary judgment motion is that it will be up to the factfinder to determine what the parties intended when they included the indemnification clause in the contract," *id.* at [2], is incorrect. The court has held, in denying the motion for summary judgment, that the indemnification clause at issue was insufficient as a matter of law to obligate the defendant to indemnify the plaintiff for its own negligence, whether sole or concurrent. Recommended Decision at 6-7. The intent of the parties, a factual question, is not an issue for trial under these circumstances. Indeed, the plaintiff also states that it is "unaware of any controverted evidentiary issues." Plaintiff's Pretrial Memorandum at [2]. Nothing remains to be resolved on the plaintiff's sole claim.

Accordingly, I recommend that the court **GRANT** summary judgment in favor of the defendant, United Video Cablevision, Inc.

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 at Portland, Maine this 30th day of July, 1997.

¹ In any event, since my decision is only a recommended one, the plaintiff's right to a *de novo* determination upon its written objection to my recommendation will, if invoked by the plaintiff, provide it with ample notice and opportunity to be heard in connection with the result recommended here.

David M. Cohen
United States Magistrate Judge