

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>ESTECH INVESTMENTS, INC.,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil No. 92-105-P-H</b>
	)	
<b>A.C. LAWRENCE LEATHER</b>	)	
<b>COMPANY, INC., et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO AMEND AND  
RECOMMENDED DECISION ON DEFENDANT PARIS UTILITY DISTRICT'S  
MOTION FOR SUMMARY JUDGMENT**

In this diversity action against defendants A.C. Lawrence Leather Company, Inc. ("Lawrence") and Paris Utility District ("PUD"),<sup>1</sup> the plaintiff, Estech Investments, Inc. ("Estech"), seeks to establish the various rights and obligations of the parties arising from an agreement in which it guaranteed the full satisfaction of certain obligations due from Lawrence to PUD relating to the latter's construction and operation of a sewage and waste water treatment facility. In Counts I and III, Estech seeks judgment against Lawrence and PUD in the amount of \$209,098.30 representing the sum of payments it made to PUD under the guaranty which were due from Lawrence on February 1, 1990 and February 1, 1991.<sup>2</sup> In Count II, Estech seeks a declaration that its liability under the agreement has now been extinguished and that the February 1, 1992 and all future payments due under the agreement are the exclusive obligation of Lawrence. In response, PUD has counterclaimed against

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<sup>1</sup> A third defendant, Ashland Leather Company, Inc., has been dismissed.

<sup>2</sup> The two payments, one for \$105,657.20 and the other for \$103,906.00, in fact total \$209,563.20.

Estech for the \$102,078.05 payment due on February 1, 1992, plus interest.<sup>3</sup> Before the court now are PUD's motion for summary judgment on its counterclaim and on Count II of Estech's complaint and Estech's motion to amend its complaint.

## I. SUMMARY JUDGMENT AND AMENDMENT STANDARDS

Fed. R. Civ. P. 56(a) and (b) when read together provide that "[a] party seeking to recover upon a . . . counterclaim [or] against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

Such motions must be granted 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). 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 material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it

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<sup>3</sup> Estech has deposited the principal amount of \$102,078.05 with the court pending the outcome of this litigation.

may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve an evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

Whether to allow Estech to amend its complaint is also at issue here. Under Fed. R. Civ. P. 15(a), leave to amend "shall be freely given when justice so requires." Although this appears to create a broad allowance for amendments, a district court may deny a motion to amend if, among other reasons, amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

## II. FACTS

The essential facts may be briefly summarized. On July 3, 1973 Estech, a company then engaged in manufacturing operations in the Town of Paris, Maine, entered into an agreement with PUD by the terms of which PUD undertook to construct, finance, operate and maintain a sewer and waste water treatment facility and collection system which would serve Estech's needs, among others. In exchange, Estech obligated itself to contribute to the cost of the enterprise in amounts determined by certain contract schedules and formulae. On March 5, 1976 Estech entered into a new agreement with PUD covering the same subject matter ("March Agreement"). This version, however, reflected Estech's plans to divest itself of its Paris operation by including the following provision as part of paragraph 15:

The District, by the execution of this AGREEMENT, hereby gives its written approval to the Assignment of this AGREEMENT by ESTECH, INC. to A. C. Lawrence Leather Co., Inc., (hereinafter "Lawrence"), a Massachusetts corporation, as successor owner, subject to the following terms and conditions:

- A. ESTECH INC. shall remain secondarily liable as the guarantor of the performance and fulfillment, by Lawrence, of all of ESTECH, INC.'s obligations hereunder for a period of at least five (5) years from the date of this AGREEMENT and thereafter until Lawrence demonstrates that it has adequate financial resources by meeting all of the following tests:

- i. Lawrence shall have a Net Worth of at least Five Millions Dollars (\$5,000,000.00); and
- ii. Lawrence shall have a ratio of Total Debt (including obligations to the District) to Net Worth no greater than 2 to 1; and
- iii. Lawrence shall have had pre-tax earning (before ESOT contributions), for the two (2) most recent consecutive fiscal years, of at least Two Million Dollars (\$2,000,000.00) for each year; and
- iv. The foregoing financial tests of the adequacy of Lawrence's financial resources shall have been verified to the District by an independent firm of certified public accountants, selected by the District, the expense of which shall be borne by Lawrence.

After five (5) years from the date hereof, and upon the satisfaction, by Lawrence, of the foregoing financial tests, ESTECH, INC. shall be relieved of its obligations hereunder.

#### Exh. D to Complaint.

Estech did, in fact, sell its Paris facility to Lawrence and, in connection therewith, assigned to Lawrence its obligations under the March Agreement which Lawrence by agreement specifically assumed.

On the basis of a construction cost estimate derived by the project engineers, a 40-year bond was issued of which the principal amount payable by Lawrence was \$1,750,525. Lawrence each year was to pay to PUD its portion of the annual bond payment and PUD, in turn, was to make payment of the full amount of the annual sum due. Lawrence failed to make the \$105,657.20 payment due by it on February 1, 1990 and its \$103,906.00 payment due on February 1, 1991. Estech subsequently made these payments. Lawrence's bond payment due on February 1, 1992 remains outstanding

notwithstanding PUD's demand therefor directed at Lawrence and ConAgra, Estech's successor-in-interest.

PUD has never been requested to select an independent firm of certified public accountants to provide verification of the financial tests of the adequacy of Lawrence's financial resources required by paragraph 15(A) of the March Agreement and no such verification has ever been furnished to PUD.

### III. DISCUSSION

#### A.

PUD rests its claim of entitlement to summary judgment on its characterization of Estech as the "absolute and unconditional guarantor" of Lawrence's obligations to PUD, Memorandum in Support of Paris Utility District's Motion for Summary Judgment (Docket No. 11) ("PUD's Memorandum") at 1, and its assertion that the verification of the financial tests of the adequacy of Lawrence's financial resources required by paragraph 15(A)(iv) of the March Agreement as a condition precedent to the release of Estech's guaranty obligation has never been made, *id.* at 2. In its original opposition to the motion, Estech asserted that paragraph 15(A) of the March Agreement contained two ambiguities, one relating to the intended meaning of the term "secondarily liable" and the other to the question of who was responsible for securing the verification called for in subparagraph (iv), and also claimed that it was unclear whether or not the required verification had ever been made. It argued that these questions presented issues of material fact that needed to be resolved and that the summary judgment motion was premature inasmuch as the parties had not as of then conducted any discovery and a scheduling

order had not yet issued.<sup>4</sup> Memorandum in Opposition to Motion for Summary Judgment of Defendant PUD (Docket No. 14) ("Estech's Memorandum") at 4-12.

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<sup>4</sup>The motion was filed less than a month after the action was commenced and nearly four months before the Scheduling Order issued. This notwithstanding, it is uncontroverted that Estech's counsel visited PUD's offices more than forty days prior to the initiation of suit and that he was given unlimited access to PUD's files bearing on the issue of its liability to make annual payments on the construction loan as guarantor of Lawrence's obligations. Second Affidavit of W. John Barlow (Docket No. 20) §§ 2, 4-8.

In response to Estech's expressed concern about the need for discovery, I permitted it the opportunity to conduct all requested discovery on the verification question and to file supplemental affidavits or other information of evidentiary quality bearing on that issue. *See* Report of Telephone Conference of Counsel and Order (Docket No. 29). Estech has now effectively conceded that there is no evidence that the required verification has ever been made. *See* Supplemental Response to the Motion for Summary Judgment Filed by the Paris Utility District (Docket No. 33) ("Estech's Supplemental Response") at 1-2.<sup>5</sup> It does not concede, however, that it was responsible for obtaining the verification.

In its supplemental filing, however, Estech raised as a new issue an alleged 1981 default by Lawrence and subsequent restructuring of Lawrence's payment owed PUD under the March Agreement which Estech argues affects the enforceability of its guaranty. *See id.* at 2-4.

I address each of these remaining issues in turn.

## B.

It is well settled under Maine law that guaranties are governed by the same rules of construction as other contracts." *Rosenthal v. Means*, 388 A.2d 113, 114 (Me. 1978) (quoting *Clark v. Anderson*, 123 Me. 165, 167 (1923)). Though proper interpretation of ambiguous language is to be determined by the trier of fact, *Hare v. Lumbermens Mut. Casualty Co.*, 471 A.2d 1041, 1044 (Me. 1984), the threshold question of whether contract language is ambiguous is one of law for the court, *ITT Corp. v. LTX Corp.*, 926 F.2d 1258, 1261 (1st Cir. 1991); *American Policyholders' Ins. Co. v.*

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<sup>5</sup> W. John Barlow, manager of PUD, stated in an affidavit submitted in support of PUD's summary judgment motion that no one has requested PUD to select an independent firm of certified public accountants to provide the required verification and that such verification has never been made to it. Affidavit of W. John Barlow (Docket No. 12) && 3-4. Even with the benefit of the discovery it has sought and received on this issue, Estech has not been able to unearth any verification. Thus, there

*Kyes*, 483 A.2d 337, 340 (Me. 1984). Contract language is ambiguous when it is reasonably susceptible of different interpretations. *Kyes*, 483 A.2d at 340. However, unambiguous language must be given its plain and generally accepted meaning. *Aroostook Valley R.R. v. Bangor & Aroostook R.R.*, 455 A.2d 431, 433 (Me. 1983).

(i)

I find that the phrase "secondarily liable as guarantor" unambiguously creates an unconditional guaranty whereby Estech's liability to PUD arises directly upon default by Lawrence. In asserting that the terms "secondarily liable" and "as guarantor" are ambiguous and could be read to create secondary liability requiring PUD to exhaust all other remedies before having any recourse to Estech, Estech's Memorandum at 6-7, Estech both has failed to distinguish the difference in meaning between the term "secondarily liable" and the legal concept of "secondary liability" and has confused each term's relationship to guaranty law. A guaranty can be one of two types, conditional or absolute and unconditional. The Tenth Circuit has offered the following well-regarded articulation of the difference:

An absolute guaranty is an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or will perform, and such a guarantor is liable immediately upon default of the principal without notice. A conditional guaranty is an undertaking to pay or perform if payment or performance cannot be obtained from the principal obligor by reasonable diligence.

*Pavlantos v. Garoufalis*, 89 F.2d 203, 206 (10th Cir. 1937), *quoted in United States v. Willis*, 593 F.2d 247, 254 (6th Cir. 1979). Regardless of the type of guaranty, all guarantors are secondarily liable; the word "guarantor" means a "[p]erson who becomes secondarily liable for another's debt or

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remains no genuine and material issue for trial relating to the fact of verification.

performance in contrast to a strict surety who is primarily liable with the principal debtor." *Black's Law Dictionary* 705 (6th ed. 1990). In contrast, "secondary liability" is a type of liability which does not attach until or except upon the fulfillment of certain conditions." *Id.* at 1351.

The issue presented here is whether the juxtaposition of the terms "secondarily liable" and "as guarantor" could reasonably be read to create a conditional guaranty which would impose only secondary liability on Estech as guarantor. Because use of the term "secondarily liable" is in no respect inconsistent with the use and meaning of the phrase "as guarantor," I conclude that it does not. Further, nowhere in the March Agreement, which is fully integrated, *see* March Agreement & 18, does the language evidence the existence of any conditions which PUD must fulfill prior to triggering Estech's liability under the guaranty. Thus, I find that the guaranty is absolute and unconditional and that under Maine law PUD was not required to institute a collection suit against Lawrence in order to collect from Estech. *See, e.g., Top Line Distribs., Inc. v. Spickler*, 525 A.2d 1039, 1040 (Me. 1987).

**(ii)**

I likewise disagree with Estech's assertion that paragraph 15(A)(iv) of the March Agreement can be read to require PUD to initiate the verification process and that summary judgment is therefore precluded. Nowhere in the March Agreement is there any indication that PUD bears the burden of initiating or following up on verification regardless of whether PUD did in fact ever receive any unverified financial documentation or knew of Lawrence's ability to satisfy the other conditions set out in subparagraphs 15(A)(i) through (iii).<sup>6</sup> On the contrary, the terms of the guaranty unambiguously

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<sup>6</sup> Although Estech asserts that whether Lawrence did demonstrate or could have demonstrated that it met the first three conditions of paragraph 15(A) of the March Agreement raises material and genuine issues for trial precluding material summary judgment, the fact remains that Estech's ability to extinguish its guaranty liability is dependent on satisfaction of all four conditions, including verification, and that failure to satisfy any one is fatal to its position.

place the duty of verification on Lawrence. The language of the passage clearly states that Estech shall remain liable until "` *Lawrence* demonstrates that it has adequate financial resources by meeting all . . . [four] tests." March Agreement & 15(A) (emphasis added). Further, the fourth test or condition itself indicates that the cost of the verification is to be borne by Lawrence. Moreover, the language directly following recitation of the four conditions unambiguously states that "` [a]fter five (5) years from the date hereof, and upon the satisfaction, *by Lawrence*, of the foregoing financial tests, ESTECH, INC. shall be relieved of its obligations hereunder." *Id.* & 15 (emphasis added). Without doubt, no fair reading of the contract language can be said to impose any obligation on PUD to initiate and/or follow through on verification in order to satisfy the fourth condition of paragraph 15(A).

### C.

Finally, Estech seeks to amend its complaint so that it may assert: (i) that Lawrence failed to make the payment due on July 1, 1981 pursuant to the March Agreement thereby materially defaulting under its terms, (ii) that PUD and Lawrence restructured this payment over time, (iii) that neither Lawrence nor PUD provided it with notice either of the default or of the restructuring, (iv) that in 1990 Lawrence divested itself of virtually all of its assets rendering it unable to honor its obligations to PUD and/or any subrogation claims of Estech and (v) that, as a consequence, Estech's liability as guarantor has been discharged by operation of law. *See* Amended Complaint (Exh. A to Motion to Amend Complaint (Docket No. 41)); Memorandum in Support of Motion to Amend Complaint (Docket No. 42) ("` Amendment Memorandum"). Central to Estech's discharge defense is that its guaranty obligation was materially changed by PUD and Lawrence without notice to it when the so-called July 1, 1981 payment due was restructured.<sup>7</sup>

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<sup>7</sup> Estech relies on *University Bank & Trust Co. v. Dunton*, 655 F.2d 23 (1st Cir. 1981), in asserting

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this proposition. *Dunton* involved the application of Massachusetts common law. Estech cites no Maine law to the same effect. Instead, it cites three ancient Maine cases that relieve guarantors of their guaranty obligations in circumstances where creditors have failed to inform them of the defaults of primary obligors in a timely manner and before the primary obligors became insolvent. *See Globe Bank v. Small*, 25 Me. 366 (1845); *Gamage v. Hutchins*, 23 Me. 565 (1844); *Howe v. Nickels*, 22 Me. 175 (1842). For purposes of discussion, I will assume that Maine's common law is not dissimilar from that of Massachusetts.

Estech's discharge defense is based on four letters it discovered during a July 1991 deposition. See Amendment Memorandum at 1; Exhs. A-D to Affidavit of James J. Neimeier (Docket No. 34) ("Neimeier Affidavit"). However, as the uncontroverted affidavit of J. Daniel Morse, former superintendent of PUD, indicates, a 40-year bond was issued to amortize the estimated cost of construction of the facilities which are the subject of the March Agreement. Once a final cost was determined, yielding an additional sum due from Lawrence, pursuant to the unchanged terms of the March Agreement, of \$132,741.30, PUD and Lawrence negotiated a payment schedule covering that amount. In this action, Estech seeks to be relieved of payments due from Lawrence on the original bond issue which remains unchanged and which is unaffected by the 1981 documents cited by Estech<sup>8</sup> or the agreement between PUD and Lawrence respecting payment of the additional sum due from Lawrence.<sup>9</sup> See Affidavit of J. Daniel Morse (Docket No. 39).

Because the known facts do not support the predicate on which Estech's new claim is necessarily grounded, amendment would be futile. *Foman v. Davis*, 371 U.S. at 182.

#### IV. CONCLUSION

For the foregoing reasons, I hereby ***DENY*** Estech's motion to amend and recommend that PUD's motion for summary judgment be ***GRANTED*** and that the \$102,078.05 on deposit with the court be dispersed to PUD.

#### **NOTICE**

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<sup>8</sup> The first of the four letters corroborates the separateness from the bond obligation of the additional sum sought. See Exh. A to Neimeier Affidavit.

<sup>9</sup> Although not proffered in evidentiary quality form, PUD represents that this additional sum was paid in full long before the present litigation was commenced. See PUD's Opposition to Plaintiff's Motion to Amend Complaint (Docket No. 43) at 2.

***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 28th day of December, 1992.***

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***David M. Cohen  
United States Magistrate Judge***