

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

VERIZON CONNECTED SOLUTIONS,	:	
INC.,	:	
Plaintiff,	:	
	:	
v.	:	CA 02-201ML
	:	
STARLIGHT COMMUNICATIONS	:	
HOLDING INC. I, d/b/a STARLIGHT	:	
COMMUNICATION, JOHN G. PICERNE,	:	
ANNETTE F. PICERNE, RAYMOND M.	:	
URITESCU, and DONNA M. URITESCU,	:	
Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Motion for Summary Judgment Dismissing the Fifth Cause of Action ("Motion for Summary Judgment") of Defendants John G. Picerne, Annette F. Picerne, Raymond M. Uritescu, and Donna M. Uritescu (collectively, the "Guarantors"). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on June 25, 2003. After reviewing the memoranda and exhibits submitted and performing independent research, I recommend that the Motion for Summary Judgment be granted.

Overview

Verizon Connected Solutions, Inc. ("Verizon" or "Plaintiff") and Starlight Communications Holding Inc. I, d/b/a Starlight Communication ("Starlight"), entered into a contract whereby Verizon agreed to install cable television

systems at thirteen apartment complexes in exchange for \$1,003,277.00 (the "Work"). See Complaint ¶ 8. Financing for the Work was to be provided by Verizon's financing arm, Verizon Credit, Inc. ("Verizon Credit"). See id. ¶ 12. Repayment of the money advanced by Verizon Credit on behalf of Starlight was personally guaranteed by two owners of Starlight and their wives. See id. ¶ 15. Under the terms of the financing agreement, Verizon Credit could only pay Verizon once Starlight approved Verizon's invoices. See id. ¶ 13. Verizon performed a substantial portion of the Work, see id. ¶ 18, but Starlight refused to approve Verizon's invoices, see id. ¶ 22, on the ground that it was being overcharged for the Work, see Exhibits in Opposition to Motion for Partial Summary Judgment Dismissing the Fifth Cause of Action ("Plaintiff's Ex."), Exhibit ("Ex.") 1 (Derderian Deposition Excerpt) at 1-2. Verizon brought this action. It alleges in its Fifth Cause of Action that the Guarantors are liable to Verizon for the amounts owed by Starlight. See Complaint ¶¶ 40-46.

Facts

On or about September 11, 2000, Verizon and Starlight executed a document captioned "Verizon Connected Solutions Proposal for Starlight Communications" (the "September Proposal"). See Defendants' Local Rule 12.1 Statement of Undisputed Facts ("DSUF") ¶ 1. The September Proposal provided that Verizon would install cable television systems for Starlight at thirteen apartment complexes in Rhode Island. See id. ¶ 2. Verizon began performing the Work on or about September 12, 2000.¹ See id. ¶ 3. Almost a month later, on

¹ Although Verizon Connected Solutions, Inc. ("Verizon" or "Plaintiff") alleged in the Complaint that installation of the cable television systems at the thirteen apartment complexes (the "Work")

or about October 10, 2000, Verizon and Starlight executed a contract (the "Contract") for the Work at a price of \$1,003,277.00. See Complaint ¶ 8; see also Affidavit of Dennis Matthews in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Fifth Cause of Action ("Matthews Aff."), Ex. 1 (Agreement). Verizon's performance was conditioned upon Starlight obtaining financing in that amount from a third party financial institution or other financing company that would be payable to Verizon for the Work. See Complaint ¶ 9; see also Matthews Aff. ¶ 3.

On or about October 25, 2000, Starlight entered into an agreement (the "Flex Lease") with Verizon Credit to finance the Work which would be performed by Verizon. See Complaint ¶ 12; DSUF ¶ 7. Under the terms of the Flex Lease, Verizon Credit could advance funds to Verizon only upon Starlight's prior written approval. See Complaint ¶ 13. As a condition of obtaining the financing, Verizon Credit required two owners of Starlight and their wives, the Guarantors, to personally guarantee that Starlight would perform its obligations under the Flex Lease. See DSUF ¶ 8. This was accomplished by having the Guarantors execute a document captioned "Individual Guaranty" (the "Guaranty"). See id. By October 25, 2000, the date Starlight executed the Flex Lease, see Affidavit of Bonnie M. Meyer in Opposition to Defendants' Motion to Dismiss Plaintiff's Fifth Cause of Action ("Meyer Aff."), Ex. 4 (Flex

commenced on or about October 10, 2000, see Complaint ¶ 11, Verizon has not disputed the earlier starting date of "[o]n or about September 12, 2000," Defendants' Local Rule 12.1 Statement of Undisputed Facts ("DSUF") ¶ 3; see also Plaintiff Verizon Connected Solutions, Inc.'s Statement of Disputed Material Facts in Opposition to Defendants' Motion to Dismiss the Fifth Cause of Action ("PSDMF"). Accordingly, the earlier starting date is deemed admitted by Verizon. See Local Rule 12.1(d).

Lease), and the Guarantors signed the Guaranty, see Certification of John G. Picerne in Support of Motion by [sic] for Summary Judgment Dismissing the Fifth Cause of Action ("Picerne Cert."), Ex. A (Guaranty), Verizon had already installed a substantial portion of the underground coaxial cable which was part of the cable television systems, see DSUF ¶ 10.

On or around November 30, 2000, Verizon submitted two invoices to Starlight which totaled \$702,293.90. See Complaint ¶ 20; DSUF ¶ 11. Starlight did not authorize Verizon Credit to pay these invoices (or a prior invoice for \$538.00 which Verizon had submitted to Starlight around the end of October), see Complaint ¶¶ 19, 22; DSUF ¶ 11, and they remain unpaid, see Complaint ¶23.

Travel

Verizon filed its Complaint on May 2, 2002. Defendants filed their Answer, Counterclaims and Jury Demand on June 21, 2002. Plaintiff replied thereto on July 3, 2002. The Guarantors filed the Motion for Summary Judgment on April 21, 2003. Plaintiff Verizon Connected Solutions Inc.'s Objection to Defendants' Motion for Summary Judgment Dismissing the Fifth Cause of Action ("Plaintiff's Objection") was filed on May 21, 2003.

Law

Summary judgment is appropriate where "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." Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting

Fed. R. Civ. P. 56(c)). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)(quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996)). "[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). Furthermore, "[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper." Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)(citation and internal quotation marks omitted). However, the non-moving party may not rest merely upon the allegations or denials in its pleading, but must set forth specific facts showing that a genuine issue of material fact exists as to each issue upon which it would bear the ultimate burden of proof at trial. See Santiago-Ramos, 217 F.3d at 53

(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

In the present matter, this court, sitting in diversity jurisdiction, must apply the law of Rhode Island, the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); see also Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am., 338 F.3d 42, 46 (1st Cir. 2003) ("It is a black-letter rule that state substantive law supplies the rules of decision for a federal court sitting in diversity jurisdiction.")(citing Erie, 304 U.S. at 78).

Discussion

In support of their Motion for Summary Judgment, the Guarantors point out that they guaranteed Starlight's performance of its obligations under the Flex Lease to Verizon Credit. See Memorandum in Support of Motion for Summary Judgment Dismissing the Fifth Cause of Action ("Defendants' Mem.") at 1. Thus, if Starlight failed to repay Verizon Credit, the Guarantors would make the payments for Starlight. See id. They note that Verizon Credit never advanced any money to or on behalf of Starlight. See DSUF ¶ 12. As a consequence, neither Starlight nor the Guarantors owe any money or have any obligation to Verizon Credit. See Defendants' Mem. at 2; see also DSUF ¶ 13. Furthermore, Verizon is not a party to either the Flex Lease or the Guaranty. See DSUF ¶ 17. Therefore, according to the Guarantors, there is no basis on which they can be liable to Verizon by virtue of the Guaranty made to Verizon Credit, and they are entitled to Summary Judgment. See Defendants' Mem. at 3-7.

Verizon asserts, however, that "the Guarantors accepted

responsibility for Starlight's non-performance not only to Verizon Credit for breaches of the financing agreement, but also to third parties for breaches of any other agreements in connection with the transaction. This includes responsibility to Verizon for breaches by Starlight of the construction contract." Plaintiff Verizon Connected Solutions, Inc.'s Memorandum in Opposition to Defendants' Motion for Summary Judgment Dismissing the Fifth Cause of Action ("Plaintiff's Mem.") at 2. Verizon makes four arguments to support this assertion: 1) that Verizon is an intended third party beneficiary of the Flex Lease, see id. at 7-8; 2) that the Guaranty expressly gives Verizon third party beneficiary rights, see id. at 9-10; 3) that the Flex Lease, the Contract, and the Guaranty are all part of a single transaction, see id. at 10-12; and 4) that the Guarantors cannot rely upon a non-occurrence of a condition precedent to avoid their obligations, see id. at 12-14. The court discusses these arguments seriatim.

1. Was Verizon an Intended Third Party Beneficiary?

Verizon claims that there is no dispute that it is an intended third party beneficiary of the Flex Lease, see Plaintiff's Mem. at 7 (citing Defendants' Mem. at 6 n.4), and asserts that it should also be deemed an intended third party beneficiary of the Guaranty, see id. The applicable law regarding third party beneficiaries was explained by Senior Judge Ronald R. Lagueux in Forcier v. Cardello, 173 B.R. 973 (D.R.I. 1994):

The Rhode Island Supreme Court recognizes the general rule that only intended, and not incidental, third party beneficiaries can maintain an action for damages

resulting from a breach of a contract between two other contracting parties. See Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I.1990); Finch v. Rhode Island Grocers Association, 93 R.I. 323, 329-30, 175 A.2d 177, 184 (1961). This rule holds true even where the duty imposed by the contract relates to matters which have a direct bearing upon the damages sustained. Oliver v. Pettaconsett Con. Co., 36 R.I. 477, 484, 90 A. 764, 771 (1914). Incidental third part[y] beneficiaries of a contract do not have a right to recovery on the contract in the event of a breach.

The Rhode Island Supreme Court has looked for guidance in the past from the *Restatement (Second) of Contracts* to determine the rights and status of third party beneficiaries. See, e.g., Finch v. Rhode Island Grocers Assn., *supra*, 93 R.I. at 330, 175 A.2d 177. Section 302 of the *Restatement (Second) of Contracts* contains a test to determine the difference between intended and incidental third party beneficiaries. Section 302 reads:

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the intended promise.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

The *Restatement* test essentially requires that the parties directly and unequivocally intend to benefit a third party in order for that third party to be considered an intended beneficiary.

Forcier v. Cardello, 173 B.R. at 984-85 (bold added); see also

Davis v. New England Pest Control Co., 576 A.2d 1240, 1242 (R.I. 1990) ("If the third party is an intended beneficiary, the law implies privity of contract.").

Verizon contends that from "all of the facts and circumstances, including the language of the guarantees themselves, it is clear that Verizon is an intended third party beneficiary." Plaintiff's Mem. at 7. Verizon emphasizes that the Contract for the Work was expressly conditioned upon Starlight receiving the financing, see id. at 2, and that without the financing Verizon would not proceed with the work and Starlight's goal of constructing cable television systems would likely fail, see id. Further, Verizon asserts that "the Guarantors are attempting to avoid the obligation they accepted in this transaction-- to guarantee that Verizon would be paid for the work it performed." Id. at 3.

The court is not persuaded. There is no language in the Guaranty by which the Guarantors made an express promise that they would pay Verizon or even that Starlight would pay Verizon. See Picerne Aff., Ex. A. The Guarantors guaranteed only that they would repay Verizon Credit money advanced by Verizon Credit on behalf of Starlight in the event Starlight failed to fulfil its obligations under the Flex Lease. See id. There is simply no evidence which would allow the court to find that the parties "directly and unequivocally intend[ed] to benefit [Verizon]" Forcier v. Cardello, 173 B.R. at 985.

Moreover, Verizon has not directly disputed the Guarantors' statement that "none of the [Guarantors] intended to guarantee the contractual obligations of Starlight to Plaintiff." DSUF ¶ 9; see also Plaintiff Verizon Connected

Solutions, Inc.'s Statement of Disputed Material Facts in Opposition to Defendants' Motion to Dismiss the Fifth Cause of Action ("PSDMF"). Facts not disputed are deemed admitted. See Local R. 12.1(d). The closest Verizon comes to a formal response to DSUF ¶ 9 is to state that "Defendant John G. Picerne never read the guaranty or the financing agreement before he signed them." PSDMF ¶ 15. This falls far short of demonstrating an intent by the Guarantors to benefit Verizon.

Verizon does question how Mr. Picerne, the source cited for DSUF ¶ 9, can know what the other Guarantors intended. See Plaintiff's Mem. at 12 ("Mr. Picerne does not explain how he gained this familiarity with the other Guarantors' state of mind, or when."). However, Verizon was free to take the depositions of the other Guarantors to support its claim that "Verizon is an intended third party beneficiary of the Guaranties," Complaint ¶ 16. At the summary judgment stage a party may not rest merely on the conclusory allegations of the Complaint. See Angulo-Alvarez v. Aponte de la Torre, 170 F.3d 246, 249 (1st Cir. 1999). Once the Guarantors supported the Motion for Summary Judgment, the burden shifted to Verizon to demonstrate that a trier of fact reasonably could find in its favor. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000). Merely raising questions in its memorandum as to the source of Picerne's knowledge does not provide a basis on which a trier of fact could find that the Guarantors intended Verizon to be a third party beneficiary of the Guaranty.

For the reasons stated above, the court finds that Verizon has failed to identify any evidence in the record from which a trier of fact could reasonably find that the Guarantors and Verizon Credit directly and unequivocally

intended to make Verizon a third party beneficiary of the Guaranty. Thus, the court rejects Verizon's first argument.

2. Does the Guaranty Expressly Give Verizon Third Party Beneficiary Rights?

Verizon next argues that paragraph 1(3) of the Guaranty makes the Guarantors "expressly ... responsible to third parties for any losses due to Starlight's defaults in connection with other agreements that are related to the transaction." Plaintiff's Mem. at 9. Consequently, according to Verizon, the Guaranty "confer[s] Verizon with third party beneficiary status and entitles it to directly enforce its rights under the guaranties for the breaches by Starlight." Id. at 10.

Paragraph 1 of the Guaranty in relevant part provides:

1. For valuable consideration, receipt of which is hereby acknowledged, the undersigned (hereinafter called "Guarantors") hereby jointly and severally unconditionally guarantee and promise on demand (1) to pay Verizon Credit Inc. (hereinafter called "Leasing") all rents, installments and all other sums reserved in all agreements, including leases or finance and security agreements now or at any time hereafter **entered into between Starlight Communications Holding, Inc. (hereinafter called "Customer") and Leasing (either directly or as assigned), (hereinafter called "Agreement")** as set forth in the Agreement, and (2) to pay all amounts due or to become due to Leasing under any instruments **delivered** in connection with the transactions contemplated by the Agreement (all of which instruments are hereinafter collectively called "Other Agreements") and (3) to pay all losses and perform all of the terms the Agreement and the Other Agreements require to be performed by Customer.

Guaranty (bold added). Verizon contends that the "Other Agreements" referred to in paragraph 1(3) include the Contract between Verizon and Starlight and that, therefore, Verizon has

the right to maintain this action against the Guarantors. See Plaintiff's Mem. at 9-10.

Verizon misreads paragraph 1. An agreement must be more than simply related to the transaction in order to constitute an "Other Agreement[]." The term "Other Agreements" is defined in subparagraph (2). It is clear from the definition (when read in conjunction with the definition of "Agreement" contained in subparagraph (1)), that Verizon Credit must itself be a party to the "Other Agreement[]" and the "Other Agreement[]" needs to have been delivered. The Contract between Verizon and Starlight does not include Verizon Credit as a party. There is also no evidence that the Contract was delivered to Verizon Credit or to the individual Guarantors.²

Further evidence that "Other Agreements" includes only agreements to which Verizon Credit is a party appears in paragraph 3 of the Guaranty. A provision in that paragraph authorizes Verizon Credit to waive or modify "Other Agreements" without notice to the Guarantors:

3. Guarantors authorize Leasing, without notice or demand, and without affecting their liability hereunder, from time to time [to]: (a) change the amount, time or manner or payment of rent or other sums reserved in ... Other Agreements; (b) change any of the provisions of the ... Other Agreements; (c) modify the ... Other Agreements; (d) assign the ...

²The Guaranty does not identify to whom the Other Agreement is to be delivered. However, the court agrees with Guarantors that it is reasonable to conclude that the delivery would be to Verizon Credit, the party which is to receive money pursuant to the Flex Lease, and the Guarantors, the parties who are guaranteeing the payment. See Reply Memorandum of Law in Support of the Motion by the Individual Defendants Dismissing the Fifth Cause of Action ("Defendants' Reply Mem.") at 2 n.3.

Other Agreements or the rents and other sums payable under the Agreement and Other Agreement...

Guaranty. If Verizon Credit were not a party to the "Other Agreements," it would not be able to make any of the changes or modifications described in paragraph 3. Paragraph 3 would be rendered meaningless as applied to "Other Agreements."

"[I]t is a basic principle of contract law that constructions which render contract terms meaningless should be avoided." Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16, 21 (1st Cir. 2001). The definition of "Other Agreements" which Verizon urges upon the court cannot be reconciled with the provisions of paragraph 3 discussed above. Those provisions require that Verizon Credit be a party to the "Other Agreements" if that paragraph is have any meaning.

In summary, both the definition of the term "Other Agreements" in paragraph 1 and the use of that term in paragraph 3 persuade the court that the Contract cannot be an "Other Agreement[]" under which the Guarantors are obligated. Accordingly, the court rejects Verizon's argument that the Guaranty expressly gives Verizon third party beneficiary rights.

3. Were the Flex Lease, the Contract, and the Guaranty All Part of a Single Transaction?

Verizon argues that the "negotiation, execution and performance of these agreements were so intertwined that they must be considered parts of a single transaction." Plaintiff's Mem. at 11. It asserts that the three documents "were all integral parts of a single transaction consummated simultaneously." Id. In short, Verizon contends that "[t]his was simply one transaction consisting of three agreements, all

of which must be read together to ascertain the intent of the parties," id., and that "looking at the totality of the transaction, it is evident that the parties intended the guarantees to run not only to Verizon Credit but to the construction contract and Verizon as well." Id.

The facts do not support Verizon's claim of simultaneous consummation and its assertion that the Work would not have happened unless the Guarantors provided the guaranties. See Plaintiff's Mem. at 11. Verizon has not disputed that it began the Work approximately seven weeks before the Guaranty was signed, see DSUF ¶ 3; see also PSDMF, or that a significant portion of the underground coaxial cable had already been installed at the thirteen properties by October 25, 2000, the date the Guaranty was executed, see DSUF ¶ 10; see also PSDMF. Thus, Verizon actually performed a substantial portion of the Work even though neither the Flex Lease nor the Guaranty had yet been executed. See DSUF ¶¶ 3, 7-8, 10. This undercuts Verizon's implicit claim that it performed the Work in reliance on the Guaranty. See Plaintiff's Mem. at 11.

The court agrees with the Guarantors that the purpose of the Guaranty was to ensure that Verizon Credit got paid after it wrote a check to Verizon. See Defendants' Reply Mem. at 5. The record is devoid of any evidence which indicates that Verizon Credit ever gave any consideration to what Verizon's remedies would be if Verizon Credit never wrote Verizon a check in the first place. Strikingly absent from the affidavit of Bonnie M. Meyer, the person "principally involved," Meyer Aff. ¶ 2, in the transaction on behalf of Verizon Credit, is any statement or implication that Verizon Credit intended Verizon to be the beneficiary of the Guaranty,

see Meyer Aff.

Thus, to the extent Verizon contends that the three documents represent a single transaction and that together they demonstrate that Verizon Credit and the Guarantors intended Verizon to be a third party beneficiary of the Guaranty, the court finds this argument unpersuasive. To the contrary, the evidence supports the conclusion that Verizon was only an incidental beneficiary of the Guaranty.

4. Can the Guarantors Rely upon a Non-occurrence of a Condition Precedent?

In responding to the Guarantors' point that Verizon Credit did not advance any money on behalf of Starlight, Verizon notes that the Guarantors, by virtue of Mr. Picerne's and Mr. Uritescu's positions³ with Starlight, controlled the performance of the condition precedent, approval of Verizon's invoices. See Plaintiff's Mem. at 12. Because a party's performance is not excused by the non-occurrence of a condition precedent where that party prevented the happening of that condition, see id. at 13 (citing 3A Corbin on Contracts, § 767; Restatement (Second) of Contracts § 245 (1981); Northeast Drilling, Inc. v. Inner Space Servs., Inc., 243 F.3d 25, 40 (1st Cir. 2001)), Verizon argues that the Guarantors should not be excused from performing here because two of them, Mr. Picerne and Mr. Uritescu, wrongfully decided not to approve the invoices. See id. It asserts that "[t]he Court cannot allow the Guarantors to frustrate the intent of the transaction and allow the Guarantors to escape their responsibilities because of their own wrongdoing." Id. at 14.

³ Mr. Picerne and Mr. Uritescu were each an owner, officer, and member of the Board of Directors of Starlight. See PSDMF ¶¶ 13-14.

The short answer to this argument is that the evidence simply does not support Verizon's claim that Verizon was an intended third party beneficiary of the Guaranty. Hence, the Guarantors are not "escap[ing] their responsibilities because of their own wrongdoing." Id. They have no legal obligation to Verizon. If Picerne and Uritescu had approved the invoices and Starlight failed to pay Verizon Credit, Verizon would still be unable to sue the Guarantors. The suit would have to be brought by Verizon Credit. Thus, it is not the non-occurrence of a condition precedent that is excusing performance of contractual obligations to Verizon, but rather the non-existence of such obligations.

Verizon complains that granting the instant Motion for Summary Judgment will create "an inequitable result since two of the Guarantors were intimately involved in the decision [not to approve the invoices], which was a breach by Starlight." Plaintiff's Mem. at 14. However, Verizon was free to insist that the Guarantors personally guarantee payment to Verizon. The Guarantors equally were free to accept or reject such a requirement. It is entirely plausible to this court that the Guarantors may have agreed to the Guaranty because they concluded they enjoyed a measure of protection in that before any obligation would arise on the part of Starlight (which performance they were guaranteeing), Starlight had to approve the work performed by Verizon. Absent such protection, the Guarantors may have declined to give their personal guarantees.

Verizon is a sophisticated business entity and could have proceeded differently. For whatever reasons, it chose not to do so. This court cannot find liability where none exists merely because Verizon failed to anticipate the present

factual circumstances.

Conclusion

For the reasons stated above, I recommend that the Motion for Summary Judgment of Defendants John G. Picerne, Annette F. Picerne, Raymond M. Uritescu, and Donna M. Uritescu be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
January 6, 2004