

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 Partial Summary Judgment Dismissing the Sixth Cause of Action ("Motion for Partial Summary Judgment") of Defendant Starlight Communications Holding, Inc. I d/b/a Starlight Communication ("Starlight"). 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 Partial Summary Judgment be denied.

Overview of Sixth Cause of Action

Verizon Connected Solutions, Inc. ("Verizon" or "Plaintiff"), and Starlight entered into a contract whereby Verizon agreed to install a cable television system at the Bayside Country Club apartment complex ("Bayside") in exchange

for \$44,000.00 (the "Bayside Contract"). The work involved burying 5,300 feet of coaxial cable. Starlight paid \$22,000 to Verizon at the outset of the project, but it refused to pay the remaining balance upon completion. As grounds for nonpayment, Starlight claimed that Verizon had breached the Bayside Contract by failing to bury the coaxial cable eighteen inches deep. Verizon filed this action against Defendants to recover the unpaid balance allegedly due from Starlight.¹ Defendants then moved for partial summary judgment, contending that Verizon's work is worthless and that the court should rule as a matter of law that Verizon failed to substantially perform its obligations under the Bayside Contract, thereby excusing Starlight from payment of the balance due. Because genuine issues of material fact exist, Starlight's Motion for Partial Summary Judgment should be denied.

Facts

In or about June of 2000, Verizon² and Starlight, a private cable operator that sells cable services to paying subscribers, entered into a contract pursuant to which Verizon was to install a cable television system at Bayside. See Defendant's Local Rule 12.1 Statement of Undisputed Facts

¹ Verizon Connected Solutions, Inc. ("Verizon" or "Plaintiff"), in counts one through five of its Complaint also seeks recovery of amounts it alleges are due pursuant to a different agreement between itself and Starlight Communications Holding, Inc. I, d/b/a Starlight Communication ("Starlight"). See Complaint ¶¶ 1-53. The individual Defendants are named in connection with count five, which relates to guarantees they executed relative to that agreement. See id. ¶¶ 40-46.

² Plaintiff, at the time it entered into the contract which is the subject of this dispute, was a subsidiary of Bell Atlantic named Bell Atlantic Communications and Construction Services, Inc. ("BACCS"). With the merger of GTE and Bell Atlantic, BACCS was renamed Verizon Connected Solutions, Inc. See Plaintiff Verizon Connected Solutions, Inc.'s Memorandum in Opposition to Defendant's Motion for Summary Judgment Dismissing the Sixth Cause of Action ("Plaintiff's Mem.") at 2 n.1.

("DSUF") ¶ 4. The work included the underground installation of approximately 5,300 feet of coaxial cable. See DSUF ¶ 5(A). The Bayside Contract required Verizon to perform the installation "in a safe and workmanlike manner," Letter from W. James MacNaughton to Judge Martin of 7/1/03, Exhibit ("Ex.") A (Agreement for Wire and Cable Installation and Design Services) § 5.01, and to comply with the provisions of all permits and state and federal laws, see id. The contract also stated that any modification to its requirements must be made through a written change order, see id. § 4.03, agreed to, see id. § 4.07, and signed by both parties, see id.

Verizon hired a subcontractor, Plan B Communications, L.L.C. ("Plan B"), to provide the labor for the Bayside Contract. See DSUF ¶ 6. Plan B performed the work in July and August of 2000. See id. ¶ 15; Plaintiff Verizon Connected Solutions, Inc.'s Statement of Disputed Material Facts in Opposition to Defendant's Motion to Dismiss the Sixth Cause of Action ("PSDF") ¶ 27.³ Harris Shulman, a contractor who served as Starlight's design consultant for the Bayside Contract and also performed work at Bayside, saw Plan B employees burying the coaxial cable at depths less than eighteen inches. See DSUF ¶ 23; see also PSDF ¶ 20. When deposed in connection with this matter, Mr. Shulman stated that he relayed this information to Mike Derderian, President of Starlight, see DSUF ¶ 23, and per Mr. Derderian's instruction told David McCaul, a Plan B employee, to bury the cable deeper, see id. ¶ 25; PSDF ¶¶ 20-21. According to Mr.

³ Defendants apparently do not disagree with the facts stated in Plaintiff Verizon Connected Solutions, Inc.'s Statement of Disputed Material Facts in Opposition to Defendant's Motion to Dismiss the Sixth Cause of Action ("PSDF"). See Reply Memorandum of Law in Support of the Motion by the Individual Defendants [sic] Dismissing the Sixth Cause of Action ("Defendant's Reply Mem.") at 1 n.2.

Shulman, Mr. McCaul responded that Plan B could not bury the cable eighteen inches deep because it was experiencing difficulties with the soil at Bayside. See DSUF ¶ 24. Mr. Shulman testified at the deposition that, with Starlight's knowledge, he then told Mr. McCaul to bury the cable as deep as was possible with eighteen inches being the goal. See DSUF ¶ 25. Mr. McCaul does not recall any conversations with Mr. Shulman concerning a specified depth for the coaxial cable at Bayside. See id. ¶ 26. On or about October 30, 2000, Mr. Derderian signed a customer acceptance form stating that the work performed at Bayside had been completed in a satisfactory manner. See id. ¶ 38.

In December of 2002, Starlight conducted a physical inspection of the cable installed at Bayside. See id. ¶ 40. Eight random test holes were dug, and the depth of the cable at each hole was measured. See id. The depth of the cable at these holes ranged from three to twelve inches, with an average depth of 8.75 inches. See id.

The cable buried by Plan B is presently being used by Starlight to provide cable television services to the residents of Bayside. See id. ¶ 42. Since its installation, the cable has been cut once by a company repairing a septic system. See id. ¶ 43. As a result, the residents were without cable service for approximately four hours. See id. The cost of repairing a cut cable is about \$200.00. See PSDF ¶ 47.

Travel

Plaintiff 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. Starlight

filed the Motion for Partial Summary Judgment on April 21, 2003. Plaintiff Verizon Connected Solutions Inc.'s Objection to Defendants' [sic] Motion for Summary Judgment Dismissing the Sixth Cause of Action 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

Starlight's argument, broadly stated, is that it is excused from paying the amount owed under the Bayside Contract because Verizon did not substantially perform its obligations under the Contract as would render payment due. Therefore, Starlight asserts, it is entitled to summary judgment on the sixth cause of action.

"As incorporated into Rhode Island law, the doctrine of substantial performance shields contracting parties from the harsh effects of being held to the letter of their agreements.

Instead, substantial fulfillment of an obligation by one party suffices to trigger a corresponding duty on behalf of the other party." URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F.Supp. 1267, 1284-85 (D.R.I. 1996). Conversely, "[a] party's material breach of contract justifies the nonbreaching party's subsequent nonperformance of its contractual obligations." Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 158 (R.I. 2001).

Determining the legal threshold for "materiality" is "necessarily imprecise and flexible." Restatement (Second) Contracts § 241 cmt. a at 237 (1981). One court has described a material breach as "a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose;" in other words, such a breach is one that "upon a reasonable construction of the contract, it is shown that the parties considered the breach as vital to the existence of the contract." UHS-Qualicare, Inc. v. Gulf Coast Community Hospital, Inc., 525 So.2d 746, 756 (Miss. 1987).

Women's Dev. Corp., 764 A.2d at 158.

Whether a party to a contract has substantially performed or materially breached its obligations is usually a question of fact for a jury to resolve after considering all of the relevant evidence. See id. at 158, 160; URI Cogeneration Partners, 915 F. Supp. at 1285 (citing Nat'l Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985)). "However, if the issue of materiality admits of only one reasonable answer, then the court should intervene and resolve the matter as a question of law." Women's Dev. Corp., 764 A.2d at 158; see also Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921)("The question is one of degree, to be answered, if there

is doubt, by the triers of the facts and, if the inferences are certain, by the judges of the law.") (citations omitted).

Starlight concedes that substantial performance ordinarily is a factual question. See Memorandum of Law in Support of Motion by Defendant Starlight Communications Holding Inc. I for Partial Summary Judgment Dismissing the Sixth Cause of Action ("Defendant's Mem.") at 4. It claims, however, that "in a case such as this, where Verizon did not bury the coaxial cable anywhere near the required minimum depth of 18" ... the Court can determine the lack of substantial performance as a matter of law." Id. at 4-5.

If, on the record before it, the court can determine as a matter of law that Verizon did not substantially perform the Bayside Contract, then Starlight is excused from rendering payment of the balance due and summary judgment should be granted as to the sixth cause of action. However, if the court finds that a question of fact exists as to whether Verizon breached the contract or as to the materiality of any such breach, then the court cannot make such a determination at this stage of the proceedings and summary judgment is precluded.

I. Eighteen Inch Requirement

Starlight's claim that Plaintiff did not substantially perform under the Bayside Contract is based on the alleged failure of Plan B's employees to bury the coaxial cable eighteen inches deep beneath unpaved surfaces at Bayside. See Defendant's Mem. at 4-5. Such a specification is not explicitly stated in the Bayside Contract.⁴ Starlight argues,

⁴ The Bayside Contract states that the cable should be buried at a minimum depth of eighteen inches below *paved* surfaces, but does not expressly state a depth requirement for the cable under

however, that an eighteen inch depth requirement is implicit in Verizon's agreement to perform the work in a "workmanlike" manner, see Reply Memorandum of Law in Support of the Motion by the Individual Defendants [sic] Dismissing the Sixth Cause of Action ("Defendant's Reply Mem.") at 1-2, or, presumably, via its agreement to abide by state laws,⁵ see Defendant's Mem. at 5 n.6. As an initial matter, therefore, the court must decide whether the term "workmanlike" in the Bayside Contract unambiguously imposed the requirement that the cable be buried at a depth of eighteen inches below unpaved surfaces.

Contract interpretation presents, in the first instance, a question of law, and is therefore the court's responsibility. Fashion House, Inc. v. K mart Corp., 892 F.2d 1076, 1083 (1st Cir. 1989). Under Rhode Island law, a court's objective in construing contractual language is to determine the parties' intent. Johnson v. Western Nat. Life Ins. Co., 641 A.2d 47, 48 (R.I. 1994). As a first step, the court must determine whether the contract's terms are clear or ambiguous as a matter of law. Kelly v. Tillotson-Pearson, Inc., 840 F. Supp. 935, 944 (D.R.I. 1994).

unpaved surfaces. See PSDF ¶ 2; Defendant's Local Rule 12.1 Statement of Undisputed Facts ("DSUF") ¶ 21; see also Letter from W. James MacNaughton to Judge Martin of 7/1/03, Exhibit ("Ex.") A (Agreement for Wire and Cable Installation and Design Services). In addition, no change order relating to a depth requirement was issued, and the parties agree that this aspect of the contract was not subsequently modified. See Plaintiff's Mem. at 12, 18-19; Memorandum of Law in Support of Motion by Defendant Starlight Communications Holding Inc. I for Partial Summary Judgment Dismissing the Sixth Cause of Action ("Defendants' Mem.") at 9-10.

⁵ Starlight's argument as to this latter point is not altogether clear. In its memorandum, Starlight notes that the Rhode Island Building Code ("RIBC") incorporates the National Electrical Code ("NEC"). See Defendant's Mem. at 5 n.6. Seemingly, Starlight claims that the NEC, in Table 300-5, explicitly states a requirement that coaxial cable be buried at least 18 inches deep. See id. Additionally, Starlight notes that Section 820-6 of the NEC requires communications equipment to be installed in a "neat and workmanlike manner," id., and cites case law and deposition testimony to support an inference that this phrase, in the present circumstances, equates with an 18 inch depth, see id.

To be sure, the actual meaning of a contractual provision which can reasonably accommodate two or more interpretations should be left to the jury. But the question whether a provision can reasonably support a proffered interpretation is a legal one, to be decided by the court. Fleet Nat'l Bank v. Anchor Media Television, Inc., 45 F.3d 546, 556 (1st Cir. 1995)(citations omitted).

URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F.Supp. 1267, 1281 (D.R.I. 1996).

To perform work in a workmanlike manner "is to do the work as a skilled workman would do it." Morris v. Fox, 135 N.E. 663, 664 (Ind. App. 1922); see also Nash v. Sears, Roebuck & Co., 174 N.W.2d 818, 821 (Mich. 1970)("[T]he standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which [the worker] is employed.")(quoting 17 Am. Jur. 2d Contracts § 371); Nulite Indus. Co. v. Horne, 556 S.E.2d 255, 256 (Ga. App. 2001)(holding duty to perform in workmanlike manner breached when worker "fails to exercise a reasonable degree of care, skill, and ability under similar conditions and like surrounding circumstances as is ordinarily employed by others in the same profession.")(quoting Hall v. Harris, 521 S.E.2d 638, 643 (Ga. App. 1999)).

An agreement to perform in a workmanlike manner does not promise a certain end result but, rather, is an "'in process' concept" focusing on "the nature of the conduct [a contracting party] provides when rendering services." 3 Bruner & O'Connor Construction Law § 9:68; see also id. § 9:54 n.3 ("[T]he 'workmanlike performance' warranty is an in-process or 'proper

efforts' warranty that is more in the nature of a standard of care rather than a true warranty."); Nash, 174 N.W.2d at 821 (holding that in absence of express provision so requiring, contractor does not become "guarantor of results.")(quoting 17 Am. Jur. 2d Contracts § 371).

In arguing that the court can determine as a matter of law what the parties contemplated when they agreed that Verizon would install the cable in a "workmanlike" manner, Starlight here is claiming, in essence, that a particular industry standard as to cable depth is wholly determinative of the question. See Defendant's Reply Mem. at 1 ("The prevailing industry standard determines whether the work has been performed to the generally accepted level of skill."). It further claims that the evidence before the court definitively establishes what that depth standard is. See id. at 2. After reviewing relevant case law and the evidence presently in the record, the court finds that Starlight's arguments in this regard are unpersuasive.

First, exactly what constitutes "workmanlike" performance in a particular circumstance ordinarily is a question of fact. See 17B C.J.S. Contracts § 780; M.J. Oldenstedt Plumbing Co. v. K Mart Corp., 629 N.E.2d 214, 219 (Ill. App. 1994); Previews, Inc. v. Everets, 94 N.E.2d 267, 268 (Mass. 1950)("The law can supply no standard of performance beyond the bare statement of the rule that a contract for services must be performed in a reasonably diligent, skillful, workmanlike, and adequate manner. Whether the requirement of the rule has been met in a particular instance is commonly a question of fact, even if the evidence as to what was done is undisputed."); cf. Iowa-Illinois Gas & Elec. Co. v. Black & Veatch, 497 N.W.2d 821, 825 (Iowa 1993)(finding jury question

generated where parties disputed exact substance of "highest standards of the engineering profession").

The cases cited by Defendants demonstrate that industry standards are relevant evidence of what constitutes workmanlike performance, see High Plains Genetic Research, Inc. v. J K Mill-Iron Ranch, 535 N.W.2d 839, 843 (S.D. 1995); D/S Ove Skou v. Hebert, 365 F.2d 341, 347-48 (5th Cir. 1966), but they do not support the notion that such standards are wholly dispositive of the issue. Typically, as in High Plains, the factfinder determines whether the work has been performed with the necessary level of skill by considering all the evidence, including any evidence of industry standards. See High Plains Genetic Research, Inc., 535 N.W.2d at 843; see also Maguire Co., Inc. v. Herbert Const. Co., Inc., 945 F.Supp. 72, 75-77 (S.D.N.Y. 1996); D/S Ove Skou, 365 F.2d at 347-50.

Second, in this case, the evidence of record regarding the industry standard for the proper depth of coaxial cable is contradictory, and, upon reviewing it, the court finds that Starlight's characterization of some of that evidence is either inapt or unverifiable. For example, to establish the purported standard, Starlight relies upon the deposition testimony of Robert Zuba, Chief Electrical Inspector for the City of Warwick, claiming that he "testified that the Rhode Island Building Code requires coaxial cable to be buried at least 18" deep [and that] he 'would ask them to correct the violation' if the cable was not buried 18" deep." Defendant's Mem. at 4; see also DSUF ¶¶ 30-31. However, a review of the excerpts of Mr. Zuba's testimony that have been provided to the court discloses that while he spoke generally about the

typical requirements of the National Electrical Code (“NEC”)⁶ and how he would handle a situation of noncompliance therewith, he never actually specified that the NEC required “coaxial” or “telecommunications” cable to be buried 18” deep or stated that he would consider the failure to do so a violation needing correction.⁷ Furthermore, as additional

⁶ The NEC has been incorporated into the RIBC. See Rhode Island State Building Code Electrical Code Regulation SBC-5 (August 1, 2002)(“The Building Code Standards Committee ... adopts the provisions of the National Electrical Code ... as the Rhode Island Electrical Code”).

⁷ The relevant testimony is as follows:

Q. Is there a requirement for how deep the cable is supposed to be buried in Warwick?

* * *

A. Table 300-5 of the NEC has specific requirements. *In most cases*, it’s 18 inches. *It could be less depending on if it’s installing concrete or conduit, et cetera.*

Q. If cable were buried a depth of – coaxial cable were buried at a depth of less than 18 inches *or in violation of this article in the NEC you described*, is there any penalty for that in the City of Warwick?

* * *

A. We would ask them to correct the violation.

Q. And the correction would consist of what?

A. Complying with the State Building Code.

Q. Burying it at 18 inches or whatever the requirement is?

A. *Or whatever the requirement is.*

Exhibits in Support of Motion for Partial Summary Judgment Dismissing the Sixth Cause of Action (“Defendant’s Ex.”), Ex. E (Excerpts of Deposition of Robert Zuba) at 10 (italics added)(objections omitted).

Mr. Zuba also explained that Table 300-5 of the NEC “consists of a listing of burial depths for different types of cable and different types of installations depending on how it’s installed,” id., and replied in response to counsel’s question that, to his understanding, that table applied to telecommunications cable, see id. at 11. Mr. Zuba’s understanding, however, is contradicted by the deposition testimony of Harris Shulman. Mr. Shulman testified that he was familiar with the NEC and used it regularly in the course of his business. See Exhibits in Opposition to Motion for Partial Summary Judgment Dismissing the Sixth Cause of Action (“Plaintiff’s Ex.”), Ex. 1 (Excerpts from Shulman Deposition Transcript) at 4. He stated further that there was no requirement in the NEC as to the burial of coaxial cable and that he was not aware of any code providing for the minimum depth for burial thereof. See id.

Additionally, Plaintiff in its memorandum argues that “chapter 820” of the NEC governs installation of the cable at issue in this case, that “chapter 820” does not have a minimum depth requirement for coaxial cable, and that Table 300-5 is inapplicable. See Plaintiff’s Mem. at 6. At the

evidence of a depth standard, Starlight cites to one sentence from the deposition testimony of a purported expert, Dennis Heron, see Defendant's Reply Mem. at 2 n.6, but has not provided the court with any more of the transcript of that testimony or with any information regarding Mr. Heron's qualifications. Finally, while Starlight also quotes testimony from Verizon's project manager, Dennis Matthews, saying that eighteen inches is "kind of an industry standard, National Electrical Code, Bell Standard," Defendant's Reply Mem. at 2 n.4, it does not acknowledge contrary testimony from Mr. Shulman concerning whether the NEC, or any other code, included an applicable standard. See Discussion supra at 12-13 n.7. As such, Starlight's assertion that "[i]t is undisputed in this case that the prevailing industry standard for the depth at which coaxial cable should be buried is at least 18" beneath unpaved surfaces ... [and that] Plaintiff has offered nothing to contradict it," Defendant's Reply Mem. at 2, must be rejected.

The court concludes, therefore, based on the foregoing analysis, that the "workmanlike" provision in the Bayside Contract is ambiguous and it cannot be said, as a matter of

hearing on the present motion, Defendants' counsel conceded that it was not clear to him, in reading the code, whether there could be a citation issued against Defendants for the cable being buried at less than eighteen inches. See Tape of June 25, 2003, Hearing. The court has obtained copies of the cited portions of the NEC and, although it is unable to make a definitive determination as to how or whether they apply to the cable used at Bayside, it notes that Plaintiff's claims, which are consistent with Mr. Shulman's testimony, seem plausible. See NEC § 820-1 ("**Scope.** This article covers coaxial cable distribution of radio frequency signals typically employed in community antenna television (CATV) systems."). Article 820 does not specify minimum burial depths. Chapter 8, which encompasses Article 820, applies to "Communications Systems," see National Electrical Code Handbook at vii (8th ed. 1999), while Chapter 3, which encompasses Table 300-5, covers "Wiring Methods and Materials." See id. at v.

law, that it imported a standard requiring that the cable be buried at a depth of eighteen inches. Obviously, the cable needed to be buried at some depth, but the intent of the parties as to a required depth is not clear. When a contract is ambiguous and more than one possible interpretation exists, the intent of the parties is a question of fact not properly resolved in a motion for summary judgment. See URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F.Supp. 1267, 1281 (D.R.I. 1996); see also Westinghouse Broad. Co., Inc. v. Dial Media, Inc., 410 A.2d 986, 990-91 (R.I. 1980). Furthermore, even if it were established that the parties intended to import the industry standard for the burial depth of coaxial cable, the record contains conflicting evidence as to what that standard is.⁸

⁸ Even if the court had found that an eighteen inch requirement clearly was part of the contract, the question of whether Starlight subsequently waived the requirement would remain, and there appears to be conflicting evidence on that point as well. “As defined by the Rhode Island Supreme Court, ‘waiver is the voluntary intentional relinquishment of a known right. It results from action or nonaction[.]’” URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ., 915 F.Supp. 1267, 1285 (D.R.I. 1996)(quoting Pacheco v. Nationwide Mut. Ins. Co., 337 A.2d 240, 242 (R.I. 1975)). “As a general rule, the question of whether a party has voluntarily relinquished a known right is one of fact for a jury.” Id. (quoting Haxton’s of Riverside, Inc. v. Windmill Realty, Inc., 488 A.2d 723, 725-26 (R.I. 1985)).

Verizon claims that Starlight waived the requirement on at least two occasions: “[f]irst, when Starlight ‘authorized’ Plan B to dig as deeply as it co[u]ld and [indicated] that 18” was a ‘goal’ rather than a minimum and, second, when Mr. Derderian signed the Customer Acceptance Form with complete knowledge of the cable’s depth.” Plaintiff’s Mem. at 19. Starlight disputes this claim of waiver by arguing that Mr. Derderian, at the time he signed the form, did not know the actual depth of the cable and, therefore, could not have waived a latent defect. See Defendant’s Mem. at 10. Starlight further claims that even if Mr. Derderian knew the depth was less than eighteen inches, his waiver was based on Plan B’s misrepresentation of the soil conditions and thus was not binding. See id.

There is obviously conflicting evidence as to these matters. Mr. Derderian, in a certification submitted to the court in support of this motion, states that he was unaware of the cable depth at the time he signed the Customer Acceptance Form. See Certification of Mike Derderian in Support of Motion by Defendant Starlight Communications Holdings, Inc., for Partial Summary Judgment Dismissing the Sixth Cause of Action ¶ 5. However, Mr. Shulman, who was present at Bayside during the time Plan B was performing the work, stated in his deposition that he witnessed the cable being buried at depths between 6 and 13 or 14 inches and that he relayed that information to Mr. Derderian. See Defendant’s Ex., Ex. D

Insofar as a preliminary factual question exists regarding the exact depth requirement to which the parties agreed, it is impossible for the court to determine, as a matter of law, whether there has been substantial performance of the contract. Without knowing what the parties contemplated as full compliance, there is simply no way to assess the materiality of the alleged defects in performance. Accordingly, for this reason alone, summary judgment ought to be denied.

II. Substantial Performance

Even if the contract were unambiguous as to the depth requirement, other material factual disputes exist within the broader question of whether Verizon substantially performed the Bayside Contract. The court will address these briefly.

A. Cable depth

First, the current evidence as to the actual depth at which the cable has been buried is both sparse and conflicting. Starlight, through its president, attests that when eight random test holes were dug and the depth of the cable measured, the depths ranged from 3 inches to 12 inches

(Excerpts from the Deposition of Harris B. Shulman) at 6.

Starlight's claim of misrepresentation is based on arguably inconsistent deposition testimony regarding Plan B employee David McCaul's characterization of the soil conditions at Bayside. Mr. Shulman stated that Mr. McCaul, while the work was ongoing, told him that Plan B's equipment could not dig any deeper because of difficulties with the soil. See id. at 6-9. Mr. McCaul, at his deposition, after stating that he remembered the Bayside project "vaguely," Defendant's Ex., Ex. C (Excerpts from Deposition of David McCaul) at 4, testified that he "th[ought] it was easy to dig out there," id. He subsequently clarified that "[i]n some areas, I'd say it was very simple to trench ...," id. at 5, and that he thought "the first few trenches went easily ...," id. Because the excerpt of McCaul's deposition provided to the court ends here, it is unable to determine what, if anything, Mr. McCaul had to say about the remainder of the trenches and consequently, whether his testimony taken as a whole conflicts with Mr. Shulman's. In any event, the evaluation of the credibility of the witnesses and the resolution of conflicting testimony are matters for a jury.

with an average depth of 8.75 inches. See Certification of Mike Derderian in Support of Motion by Defendant Starlight Communications Holdings, Inc., for Partial Summary Judgment Dismissing the Sixth Cause of Action ("Derderian Certification") ¶¶ 10-11; id., Ex. C (photographs of test holes with notations as to depth). However, Verizon challenges whether Starlight's sample is representative of the entire system, see Plaintiff's Mem. at 10, and Starlight has submitted nothing to support the proposition that eight random holes accurately reflect, with any degree of reliability, the depth overall of a mile's length of cable. See Speen v. Crown Clothing Corp., 102 F.3d 625, 635 (1st Cir. 1996)(finding Plaintiff's statistical evidence insufficient to prove discrimination where he failed to explain why group selected was appropriate and representative sample).

Furthermore, Verizon has submitted contrary evidence of the cable's depth in the deposition testimony of Jack Kennedy, a Plan B employee, and also that of Mr. Shulman. Mr. Kennedy testified that he witnessed the cable being buried 24 inches deep. See Exhibits in Opposition to Motion for Partial Summary Judgment Dismissing the Sixth Cause of Action ("Plaintiff's Ex."), Ex. 3 (Excerpts from Kennedy Deposition Transcript) at 2. Mr. Shulman stated that he saw the cable being buried at depths varying from 6 to 13 or 14 inches. See Plaintiff's Ex., Ex. 1 (Excerpts from Shulman Deposition Transcript) at 2. Based on the foregoing, the court concludes that a factual question exists as to the actual depth at which the cable is buried at Bayside.

B. Worth of the System

Starlight further claims that, due to the cable's insufficient depth, the work done by Plan B at Bayside is

worthless and, therefore, cannot constitute substantial performance. See Defendant's Mem. at 5-6. It argues that, for both legal and business reasons, it is necessary to cure the alleged defect. See Tape of June 25, 2003, Hearing. As to the former, Starlight claims that the Rhode Island Building Code ("RIBC") requires that the cable be buried at a depth of eighteen inches, see Defendant's Mem. at 5, and it implies that an official of the city of Warwick will inspect the premises and force Starlight into compliance, see id. at 6 n.7. Regarding the latter, Starlight alludes to the potential frost damage to a cable buried at less than eighteen inches and to the danger of its being accidentally cut. See Tape of June 25, 2003, Hearing. According to Starlight, the cost to cure the defect would be the cost of completely reburying the cable, which "would render the work performed by Plaintiff worthless." Defendant's Reply Mem. at 3. These arguments are not persuasive.

Under Rhode Island law, when a contractor has substantially performed its obligations, it is entitled to recover the contract price less the amount needed to remedy the defect. See Nat'l Chain Co. v. Campbell, 487 A.2d 132, 135 (R.I. 1985). However, in a situation where the defect renders the contractor's performance worthless and the work has to be completely redone, that formula does not apply and the contractor is liable for the full cost to remedy the work. See id. Thus, the court agrees that the need to completely rebury the cable would render Plaintiff's work worthless.

Starlight, in support of its argument that there is a legal need to completely rebury the cable, relies on the deposition testimony of Mr. Zuba regarding the requirements of the NEC, which has been incorporated into the RIBC. See

Defendant's Mem. at 4, 6 n.7. As earlier explained, however, Starlight's characterization of Mr. Zuba's testimony is not wholly accurate. See Discussion supra at 12-13 n.7. Although Mr. Zuba indicated that if he were confronted with a violation of the NEC he would require its correction, he never explicitly stated that burial of coaxial cable at depths of less than 18 inches was in fact such a violation necessitating repair. See id. While his other statements may be read to imply that an 18 inch requirement from Table 300-5 of the NEC is applicable, there is other, contrary evidence in the record such that a factual dispute remains as to whether that Table controls. See id. Additionally, there is no evidence that any governmental authority has ordered Starlight to rebury the cable or that such an order is forthcoming. However, there is evidence to the contrary. See Plaintiff's Ex., Ex. 2 (Excerpts from Derderian Deposition Transcript) at 2 (stating that Starlight has not been fined by any Rhode Island municipality, nor have there been any discussions with any municipal employee regarding cable installed by Verizon).

Starlight's argument that there is a business need to have the cable reburied, based on the purported threat to cable buried at under eighteen inches from frost and from being accidentally cut, is similarly unfounded. First, Starlight itself claims that the frost line at Bayside is located at a depth of thirty-six inches. See Defendant's Mem. at 2. Assuming that is true, it follows that a cable buried at eighteen inches would not necessarily be protected from frost damage. At the hearing, Starlight's counsel conceded that there was no evidence in the record to support the contention that there is more frost damage done to cable buried at less than eighteen inches than to cable buried at

eighteen inches. See Tape of June 25, 2003, Hearing. Second, Starlight, through its president, has identified only one instance in approximately three years in which the cable has been accidentally cut, see Derderian Certification ¶ 12, and no evidence has been produced to show that the cut would not have occurred had the cable been buried at eighteen inches. Further, the only evidence before the court on the matter suggests that the cost to repair a cable cut is nominal, see PSDF ¶ 47 (stating cost is \$200), and the resultant inconvenience minimal, see DSUF ¶ 43 (noting cable cut resulted in four hour interruption in service).

In fact, contrary to Starlight's assertion of worthlessness, the cable, at its present depth, apparently has been used for approximately three years to generate revenue by providing cable television service to the residents at Bayside. See Derderian Certification ¶ 12. There is no evidence that the present depth of the cable has any negative effect on the operation of the cable system. Rather, according to Mr. Shulman, burial of cable at less than 18 inches "wouldn't affect its technical performance in terms of its signal carrying capability." Plaintiff's Ex., Ex. 1 (Excerpt from Shulman Deposition Transcript) at 7. Further, Starlight did not inform Verizon of any defects in the work at Bayside either during or after the one year warranty period provided for in the Bayside Contract, see PSDF ¶¶ 24-25; Plaintiff's Ex., Ex. 2 (Excerpts from Derderian Deposition Transcript) at 1, which, arguably, indicates that the system was functioning properly.

Given the foregoing, the court is unable to conclude that the cable, at its current depth, "frustrate[s] the purpose of the contract." Jacob & Youngs, Inc. v. Kent, 129 N.E. 889,

891 (N.Y. 1921). Nor can it necessarily be said that it deprives Starlight of any "reasonably expected contractual benefits." Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 158 (R.I. 2001). Accordingly, Starlight's argument that Plaintiff did not substantially perform the Bayside Contract because the system is worthless must be rejected.

C. Bad Faith

Starlight also argues that Verizon cannot rely on the doctrine of substantial performance because the alleged defects in the work were done intentionally and in bad faith. See Defendant's Mem. at 7-8. However, the intentional and bad faith argument is premised upon allegations that Plan B intentionally and in bad faith deviated from an agreed upon minimum depth. As earlier determined, a minimum depth requirement is not clearly expressed in the contract, so the question remains as to the depth to which the parties agreed. Because the court at this stage of the proceedings is unable to determine even if the work is defective, it necessarily cannot reach the question of whether any defects were intentional.⁹

D. Summary

Contrary to Defendants' claims and based on the foregoing

⁹ Starlight's bad faith claim rests almost entirely on two isolated, out-of-context statements regarding Bayside soil conditions made by Plan B employee David McCaul, see Discussion supra at 14 n.8, which are arguably inconsistent with one another. The significance of inconsistencies in a witness' statements, as well as his credibility and sincerity, are factual matters for a jury to evaluate, see Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281, 286 (1st Cir. 1993), not the court on a motion for summary judgment. Defendants also rely on their allegation that Plaintiff failed to comply with licensing and permit requirements. Even if the evidence as to these matters were unequivocal, which it is not, it is not clear to the court how it would establish Plaintiff's bad faith deviation in performing the cable installation work.

analysis, the question of substantial performance in this case does not admit of "only one reasonable answer." Women's Dev. Corp., 764 A.2d at 158. On the record evidence, a reasonable jury could very well conclude that the work done at Bayside is not worthless and that Verizon has substantially or even fully performed the requirements of the Bayside Contract in a good faith manner. Therefore, even if the requirements of that contract were unambiguously expressed, the question of whether or not Verizon substantially performed its obligations thereunder could not be determined by the court as a matter of law.

Conclusion

For the reasons stated above, I recommend that Defendants' Motion for Partial Summary Judgment be denied. 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 7, 2004

