

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**VERIZON NEW ENGLAND, INC.,** )

**Plaintiff** )

v. )

**PIZZAGALLI PROPERTIES, LLC,** )

**Defendant** )

**Civil No. 00-385-P-C**

**RECOMMENDED DECISION ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

Verizon New England, Inc. (“Verizon”) and Pizzagalli Properties, LLC (“Pizzagalli”) cross-move for summary judgment in this action concerning whether Verizon, by virtue of tardy notice, forfeited its right to renew a lease of real property owned by Pizzagalli in Portland, Maine. Motion for Summary Judgment, etc. (“Plaintiff’s Motion”) (Docket No. 14) at 1-2; Defendant’s Motion for Summary Judgment, etc. (“Defendant’s Motion”) (Docket No. 16) at 1-2. For the reasons that follow, I recommend that the motion of the defendant be granted and that of the plaintiff denied.<sup>1</sup>

**I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “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). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome

---

<sup>1</sup> Verizon first filed the instant action in the Maine Superior Court (Cumberland County); Pizzagalli removed it to this court, invoking diversity jurisdiction. Complaint – Title to Real Estate Involved and Injunctive Relief Requested (“Complaint”), filed with Notice of Removal (Docket No. 1); Amended Notice of Removal (Docket No. 2).

of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). 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 whether 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 in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

## **II. Factual Context**

The parties’ statements of material facts, credited to the extent that they are either admitted (in certain instances solely for purposes of summary judgment) or supported by record citations in accordance with Local Rule 56, reveal the following:

On December 15, 1975 Verizon’s predecessor, New England Telephone and Telegraph Company (“NET”), leased an office building and land at 5 Davis Farm Road in Portland, Maine (“Leased Premises”) from Pizzagalli’s predecessor, Pizzagalli Riverside Company. Defendant’s Statement of Material Facts Not in Dispute in Support of Its Motion for Summary Judgment

(“Defendant’s SMF”) (Docket No. 17) ¶ 1; Plaintiff Verizon New England Inc.’s Opposing Statement of Material Facts (“Plaintiff’s Opposing SMF”) (Docket No. 26) ¶ 1; Plaintiff’s Local Rule 56(b) Statement of Undisputed Material Facts in Support of Its Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 22) ¶ 1; Defendant’s Local Rule 56(c) Responsive Statement of Material Facts (“Defendant’s Opposing SMF”) (Docket No. 24) ¶ 1.

The lease (“Lease”) ran for a twenty-five year term, from February 15, 1976 through February 14, 2001, at an annual rental rate of \$557,845. Plaintiff’s SMF ¶ 2; Defendant’s Opposing SMF ¶ 2. The Lease also provided for two five-year extensions, at the same rent, at the tenant’s option. *Id.* With respect to the first extension, the Lease provided:

Tenant shall have the option to extend this lease at the expiration of the term herein created, upon the same terms and conditions, including rent, for a further period of five (5) years by giving written notice of its desire so to extend not less than six months before the expiration of said term.

*Id.* Accordingly, notice of the intent to exercise the option to renew for the first five-year period was due by August 14, 2000. Defendant’s SMF ¶ 3; Plaintiff’s Opposing SMF ¶ 3. The Lease required that notice of the renewal be sent by certified or registered mail, postage prepaid, return receipt requested, to the landlord at its principal place of business or other location designated by the landlord. *Id.* ¶ 4. The Lease did not state that time was of the essence with respect to the giving of such notice. Plaintiff’s SMF ¶ 3; Defendant’s Opposing SMF ¶ 3.

The Leased Premises is part of a complex of adjacent facilities maintained by Verizon in Portland, including properties at 1 Davis Farm Road and 13 Davis Farm Road. *Id.* ¶ 4. The Leased Premises houses operations for Verizon in six areas, with almost five hundred employees, consisting of the Residential Service Center, General Business Service Center, ISDN (Integrated Services Digital Network) Center, WinBack Center, Dispatch, and Engineering. *Id.* The building at 1 Davis Farm Road is used as administrative offices, and 13 Davis Farm Road is a garage. *Id.*

Verizon recently performed substantial renovations at the Leased Premises, at a cost to it of approximately \$1.2 million, including an expansion of the Business Service Center and the addition of the ISDN and WinBack Centers, converting space formerly used as a kitchen and cafeteria. *Id.* ¶ 5. Pizzagalli was fully aware of these renovations, and even sold some of the kitchen and cafeteria equipment that was removed to make room for the new and expanded operations. *Id.* The expanded Business Service Center and the ISDN and WinBack Centers opened in September 2000 at a ceremony attended by the governor. *Id.* ¶ 6. Since the inception of the Lease, Verizon and its predecessors, NET, NYNEX and Bell Atlantic, have spent more than \$4 million on capital improvements to the Leased Premises. *Id.* ¶ 8.

Verizon could have renewed the Lease at any time from its execution until August 14, 2000. Defendant's Opposing SMF ¶ 34; Plaintiff's Response to Defendant's Statement of Additional Material Facts ("Plaintiff's Reply SMF") (Docket No. 30) ¶ 34.<sup>2</sup> Verizon's real estate planners asked David Ho, Verizon's New England real estate manager, in August 1999 to renew the Lease. *Id.* ¶ 35; Plaintiff's SMF ¶ 10; Defendant's Opposing SMF ¶ 10. By February 22, 2000 Verizon's broker had conducted a market analysis supporting exercise of the option to renew the Lease. Plaintiff's SMF ¶ 9; Defendant's Opposing SMF ¶ 9. The market analysis was completed at the request of regional employees in Verizon's real estate group who track the deadlines for such options under Verizon's hundreds of leases and recommend action on them as they become due. *Id.* After the market analysis, consideration of the renewal went through Ho to the Transaction Review Team ("TRT") sometime in spring 2000. *Id.* ¶ 10.

Upon approval by the TRT, Ho directed his assistant, real estate specialist Henry Woytaszek, to prepare a package of materials, including a letter exercising the option pursuant to the Lease, and to

---

<sup>2</sup> I follow the lead of the parties in using the shorthand "Verizon" to refer to actions taken by Verizon's predecessor(s), Verizon itself  
(continued on next page)

forward it to Verizon's national real estate office in Arlington, Virginia, for necessary approvals by Steven Masterman, regional manager – transactions, Scott Leo, regional manager – planning, and Steven Logan, regional manager – financial assurance, and for the option letter itself to be executed by Christopher Kelly, executive director, real estate portfolio management. *Id.* ¶ 11. Kelly was the person at Verizon charged with final authority for approving transactions of this nature and value. *Id.* Woytaszek prepared the package, including the letter for Kelly's signature exercising the option, and mailed it to Arlington on or about July 17, 2000. *Id.* ¶ 12. Masterman received the package, and approved exercising the option, on July 20, 2000. *Id.* ¶ 13. The front page of the renewal package was the July 17, 2000 letter. Defendant's Opposing SMF ¶ 38; Plaintiff's Reply SMF ¶ 38. It clearly stated that the renewal deadline was August 14, 2000. *Id.* Masterman admitted that it was his general practice to read the first page of the renewal packages that came to him. *Id.*

Leo and Logan signed their authorizations on July 26 and July 28, 2000, respectively. Plaintiff's SMF ¶ 13; Defendant's Opposing SMF ¶ 13. However, Kelly's authority to sign the letter had been temporarily suspended as the result of a corporate reorganization when Bell Atlantic merged with GTE to form the new corporation Verizon Communications Inc. effective June 30, 2000. *Id.* ¶ 14. Prior to June 30, 2000 Kelly was authorized to commit the company to lease transactions valued up to \$10 million by virtue of special delegation from the then operations vice-president of Bell Atlantic. *Id.* ¶ 15. As a result of the merger and new corporate structure, that delegation lapsed, and Kelly's level of authority for lease transactions reverted to \$100,000 as specified for the executive-director level by the applicable corporate policy. *Id.* Kelly's post-merger level of authority was insufficient to exercise the renewal of the Lease, which had a value in excess of \$2.5 million (annual rent of \$557,845 times five-year term). *Id.* ¶ 16.

---

having not come into existence until June 30, 2000. *See* Plaintiff's SMF ¶ 14; Defendant's Opposing SMF ¶ 14.

Kelly's diminution of authority delayed approval of a number of lease transactions nationally, and a telephone conference with Kelly's new immediate supervisor was scheduled for Friday, August 4, 2000, to resolve the issue. *Id.* ¶ 17. That same day, Kelly's special delegation of authority at the \$10 million level was restored by the new Verizon operations vice-president, John Bell. *Id.*<sup>3</sup> The following day, August 5, 2000, Verizon's contract with its union employees expired, and those employees went on strike. *Id.* ¶ 18. Management personnel, including Kelly, Masterman, Ho and Woytaszek, assumed strike assignments in addition to their regular job duties. *Id.*<sup>4</sup>

Verizon's strategy is to prepare in advance for a potential strike in order to reduce its effectiveness. Defendant's Opposing SMF ¶ 31; Plaintiff's Reply SMF ¶ 31. If strikes occur, they generally occur on the expiration of collective bargaining agreements. *Id.* ¶ 28. Verizon was engaged in negotiations with union representatives beginning in the last week of June and continuing throughout July, except for the week of July 4th. *Id.* ¶ 29. Units of Local 2327 of the International Brotherhood of Electrical Workers were voting whether to authorize strikes throughout the month of July. *Id.* Verizon "anticipated" the possibility of a strike, and had been preparing for it well in advance of August 4th. *Id.* ¶ 30. Ho received health and safety training in preparation for the strike months before it occurred. *Id.* Masterman received his work-stoppage assignment "weeks before" the strike. *Id.* However, based on past experience, even though union contracts may be set to expire on a certain day, actual strikes are very rare. Plaintiff's Reply SMF ¶ 31. In fact, prior to receiving a telephone call at midnight on August 5th, Masterman did not know whether or not there would be a strike. *Id.* Prior to accessing voice mail on the morning of August 5th, Ho did not know whether or not there would be a

---

<sup>3</sup> Sometime between July 28 and August 4, 2000, Ho called Masterman to inquire as to the status of the renewal. Defendant's Opposing SMF ¶ 43; Plaintiff's Reply SMF ¶ 43. Masterman told Ho that the renewal had not yet been authorized because Kelly had lost his authority to approve transactions valued at more than \$100,000. *Id.*

<sup>4</sup> Verizon's further statements that "[a]ll" management personnel assumed strike assignments, and that "[t]he strike lasted for several weeks, and Verizon's priority throughout was to minimize the impact on service provided to its customers," Plaintiff's SMF ¶ 18, are (continued on next page)

strike. *Id.* And even after management was informed of the strike, it was believed the strike would only last a couple of days. *Id.*<sup>5</sup>

Masterman did not take any extraordinary steps to ensure that his normal responsibilities would be carried out during the strike. *Id.* ¶ 30. Once notified of the strike, he made sure that he had nothing to do in the next day or two, but did not review his schedule beyond that because he believed the strike would last only a couple of days. *Id.* He continued to work on his “regular job duties” during the strike, concentrating on transactions designated as urgent. Defendant’s Opposing SMF ¶ 48; Plaintiff’s Reply SMF ¶ 48. The Lease renewal was not designated as urgent. *Id.*

During the strike Masterman, who was responsible for presenting the renewal letter to Kelly for his signature and then returning the executed letter to Woytaszek in Boston, assumed job duties in Laurel and Annapolis, Maryland, and was in Arlington to perform his regular job duties on only one day, August 14th, between August 5th and August 15th. Plaintiff’s SMF ¶ 19; Defendant’s Opposing SMF ¶ 19. Woytaszek, who was responsible for monitoring the Lease renewal and contacting Masterman as necessary to ensure its timely exercise, was in Vermont performing other job duties during the entire strike. *Id.* ¶ 20.

After returning to his regular office in Arlington on August 14th Masterman directed a clerk who had crossed picket lines to mail the renewal letter, which by then had been executed by Kelly pursuant to his redelegation of authority, to the Federal Express office in Boston where Ho could pick it up (mail carriers would not cross the picket lines at Verizon’s offices in Boston). *Id.* ¶ 21. The clerk mailed the executed letter to Ho on August 15th. *Id.* Upon sending the renewal letter Masterman did not warn Ho that it was late. Defendant’s Opposing SMF ¶ 50; Plaintiff’s Reply SMF ¶ 50. In

---

neither admitted nor supported by the record citations given.

<sup>5</sup> A further statement by Verizon that “[m]ore often, a strike is avoided either because the old contract is simply extended and negotiations continue, or an eleventh hour negotiation of a new contract occurs,” Plaintiff’s Reply SMF ¶ 31, is not supported by the (continued on next page)

fact, when Masterman called Ho, he did not even tell him what was in the package he had just mailed. *Id.* Ho did not know that the renewal was in the package and that it had not been exercised in a timely manner until he opened the package at the Federal Express office on the evening of August 16th. *Id.*; Plaintiff's SMF ¶ 22; Defendant's Opposing SMF ¶ 22. Ho mailed the renewal letter to Pizzagalli on August 17th, three days after the deadline set forth in the Lease. Plaintiff's SMF ¶ 22; Defendant's Opposing SMF ¶ 22.

While Verizon has a computer list of all leases and their renewal dates, it does not have an automated tickler system to flag upcoming deadlines, instead relying on its real estate managers to keep track of the deadlines. Defendant's Opposing SMF ¶ 36; Plaintiff's Reply SMF ¶ 36. Masterman does not recall how many times he checked the computer list of leases between July 17, 2000 (the date Ho sent the renewal to Masterman) and August 15, 2000 (the date Masterman sent the renewal back to Ho). *Id.* ¶ 37. Masterman relied on the local real estate managers, in this case Woytaszek, to inform him of approaching deadlines or if a transaction needed immediate attention. Plaintiff's Reply SMF ¶ 37.

Leo and Logan worked on the same floor as Masterman, within one hundred feet of his office. Defendant's Opposing SMF ¶ 39; Plaintiff's Reply SMF ¶ 39. Kelly worked on the same floor as Masterman, within fifty feet of his office. *Id.*<sup>6</sup> Masterman does not know why it took six days to obtain Leo's signature. *Id.* ¶ 40. Masterman could not recall when Logan returned the renewal letter to him, although it was Masterman's general practice for Logan to return the authorization form to him either the day Logan signed it or the next day. *Id.* ¶ 41. Masterman does not know "what [he] did with" the renewal notice after obtaining Leo's and Logan's signatures. *Id.* Nor does he recall whether

---

record citations given.

<sup>6</sup> Verizon's statement that Masterman did not recall seeing Kelly at any time from the start of the strike to the time the renewal letter was sent, Plaintiff's Reply SMF ¶ 39, is not supported by the record citation given.

he ever discussed the August 14, 2000 deadline with Kelly, although it was his general practice to schedule a meeting with Kelly to review pending transactions. *Id.* Masterman did not know of anyone, other than Kelly, who had the proper level of authorization to whom he could go for exercise of the option. Plaintiff's Reply SMF ¶ 44. Masterman does not recall when he received the renewal letter back from Kelly. Defendant's Opposing SMF ¶ 46; Plaintiff's Reply SMF ¶ 46. Nor does he recall how long he kept the letter before sending it to Boston. *Id.*

By letter dated August 24, 2000 Pizzagalli informed Verizon that Verizon's written notice to extend "does not constitute timely notice of exercise of the renewal option, and we therefore advise you that we do not recognize it for its intended purpose." Plaintiff's SMF ¶ 24; Defendant's Opposing SMF ¶ 24. No other reason was given for rejecting Verizon's notice to extend. *Id.* As of that date, Pizzagalli had not entered into any competing obligation with a third party or otherwise acted to its detriment in reliance on the delayed notice. *Id.* ¶ 23. Pizzagalli neither waived the deadline set forth in the Lease for the notice of renewal nor induced or caused Verizon in any manner not to timely renew the lease. Defendant's Opposing SMF ¶ 52; Plaintiff's Reply SMF ¶ 52.

Abrupt closure of the Residential and Business Service call centers without substitute facilities in place would cause a degradation in the level of service provided by Verizon to its residential and business customers, and could expose Verizon to financial penalties due to non-compliance with certain service standards set by public utility regulators. Plaintiff's SMF ¶ 25; Defendant's Opposing SMF ¶ 25. To replace these centers properly requires the establishment of completely duplicate facilities and equipment at another location before the original centers are closed, to avoid interruption or other interference with service. *Id.* ¶ 26. Based on Verizon's recent relocation of similar centers, this takes at least six to nine months from the date a lease is acquired at such a new location. *Id.* Capacity to absorb these operations at other existing Verizon facilities in the interim is

extremely limited. *Id.* ¶ 27. For some, but not all, of the operations centers, sister facilities exist but are already at or near full capacity in terms of personnel, equipment and physical space. *Id.*

The Lease permits Verizon to remove fixtures and equipment during its term or “within a reasonable time after the expiration or termination” of the Lease. Defendant’s Opposing SMF ¶ 32; Plaintiff’s Reply SMF ¶ 32. The Lease also provides that specific improvements to the Leased Premises “shall revert to the Landlord at the expiration of the term hereof or any extension or renewal [thereof].” Plaintiff’s Reply SMF ¶ 32.

### III. Analysis

Verizon seeks a declaratory judgment that it “is entitled to remain in possession of the Leased Premises under the terms and conditions set forth in the Lease through February 14, 2005, as if the written notice to extend was timely.”<sup>7</sup> Complaint at 4. Pizzagalli counterclaims for the converse declaration – that Verizon failed to timely exercise the option, losing its right to possession of the Leased Premises as of February 14, 2001. First Amended Answer and Counterclaim (Docket No. 9) at 7. Pizzagalli in addition requests damages “including, but not limited to, loss of market value rent for the Leased Premises and lost opportunities to rent the Leased Premises to third parties.” *Id.*<sup>8</sup> Verizon seeks summary judgment in its favor as to its complaint; Pizzagalli requests summary judgment in its favor as to both Verizon’s complaint and its counterclaim. Plaintiff’s Motion at 1-2, 18; Defendant’s Motion at 1.<sup>9</sup>

---

<sup>7</sup> Verizon also sought a preliminary injunction. Complaint at 4; Motion for Preliminary Injunction, etc. (Docket No. 1A). That request was resolved by entry of a consent order decreeing, *inter alia*, that during the pendency of the instant litigation Pizzagalli would comply with all terms of the Lease solely for purposes of preserving the status quo and without prejudice to any subsequent claim for additional rent for the period after February 14, 2001. Consent Order (Docket No. 10).

<sup>8</sup> Pizzagalli clarifies that it seeks summary judgment on its counterclaim on liability only and reserves the right to present testimony on the issue of the amount of its damages. Defendant’s Motion at 1 n.1.

<sup>9</sup> In a separate suit that was consolidated with this case, Pizzagalli filed a forcible entry and detainer (“FED”) action pursuant to 14 M.R.S.A. § 6001 *et seq.* to evict Verizon from the Leased Premises. Complaint (Docket No. 1), *Pizzagalli Props., LLC v. Verizon New England, Inc.*, Civil No. 01-131-P-C (D. Me.) (“*Pizzagalli I*”); Plaintiff’s Motion for Consolidation and Stay, etc. (“Stay Motion”) (Docket No. 2), *Pizzagalli II*, & endorsement thereto. The FED action is stayed until any judgment in the instant action (*continued on next page*)

Verizon concedes that notice of its intent to renew the Lease was mailed three days late. Plaintiff's Motion at 1. However, it contends that Maine recognizes an equitable doctrine pursuant to which, under certain "special circumstances," a slight delay in the exercise of an option to renew a lease is overlooked. *Id.* Specifically, Verizon argues that it is entitled to relief because (i) its delay was slight and due to exigent circumstances, (ii) Pizzagalli suffered no prejudice as a result of the untimely notice, and (iii) it would suffer an unjust forfeiture if the delay were not excused. *Id.* at 14-18. Pizzagalli counters that, whatever the contours of the "special circumstances" doctrine, Verizon seeks to stretch it too far. Defendant's Objection to Plaintiff's Motion for Summary Judgment ("Defendant's SJ Opposition") (Docket No. 23) at 5-14. I agree.

In making these counter-arguments, both sides properly focus on the half-century-old *Medomak Canning Co. v. York*, 143 Me. 190 (1948). Plaintiff's Motion at 7-11; Defendant's SJ Opposition at 5-14. In *Medomak*, a tenant entered into a five-year lease running through October 11, 1945 for the purpose of growing and harvesting blueberries on the leased land. *Id.* at 192. The lease granted the tenant the option to make two successive renewals of five years each upon giving the landlord "written notice in not less than thirty days prior to the end of the then existing term of renewal[.]" *Id.* (internal quotation marks omitted). No express notice of intent to renew, either written or oral, was ever given by the tenant to the landlord before the end of the first five-year period. *Id.*

The tenant sought equitable relief from loss of the privilege of renewal on grounds that the landlord's wife, acting as his agent, had waived the notice condition and that he (the tenant) had expended various sums in preparing the ground and land for the 1946 crop. *Id.* at 192-93.

The Law Court noted:

. . . Where the lessee has the right of renewal "Provided he gives notice at or before a specified time to the lessor of his intention to exercise the privilege of

---

becomes final for purposes of taking an appeal therefrom. Stay Motion.

renewal, it is ordinarily held that the giving of the notice is a condition precedent which must be complied with within the stipulated time, and that, in the absence of special circumstances warranting a court of equity in granting relief, the right to renewal is lost if the notice is not given in accordance with the provisions of the lease.” 27 A.L.R. 981, Sec. 2 and cases there cited.

Since thirty days’ written notice was a condition precedent to effect an extension of the lease, and was never given as provided for, the right to an extension of the lease was lost. *Pope v. Goethe*, 175 S. C. 394; 179 S. E. 319; 99 A.L.R. 1005; *Fountain Co. v. Stern* [sic], 97 Conn. 618; 118 A. 47; 27 A.L.R. 927. The plaintiff has no right of relief unless it can establish a waiver of the condition, or such acts as will bring it within the power of equity to relieve, and this it claims to have done.

*Id.* at 194-95. The Law Court found neither waiver nor any other reason for the tenant to have been granted the relief afforded by the court below, noting, “There is nothing in the evidence that appears to have been done by the defendant, of a malicious, wrongful or deceptive nature to induce the plaintiff not to exercise the option.” *Id.* at 196. It summed up:

The giving of the written notice was a condition precedent to an extension of the lease for an additional term of five years. Time was of the essence of the option. The parties made it so in the lease. . . . The condition not having been performed within the time prescribed, and not having been waived, equity cannot aid the lessee to avoid the natural and reasonable consequences of its own negligence, to which the lessor in no way contributed. *Goldberg Corporation v. Goldberg Realty & Invest. Co.*, 134 N. J. Eq. 415; 36 A. (2nd) 122; *Rogers v. Saunders*, 16 Me. 92 at 97; 33 Am. Dec. 635; *Jones v. Robbins*, 29 Me. 351 at 353; 50 Am. Dec. 593.

*Id.* at 197.

Pizzagalli argues that this summation means exactly what it says – that in cases in which a tenant (through no fault of the landlord) has negligently tendered a late notice, equity provides no relief. Defendant’s Motion at 3-5. Verizon rejoins that a careful parsing of the cases cited by the Law Court in support of this “dictum” establishes that, in fact, equity provides relief under certain “special circumstances” even when a tenant has been negligent, provided the default is neither willful nor grossly negligent. Plaintiff’s Motion at 8-11.<sup>10</sup> Pizzagalli ascribes Verizon’s tardiness to negligence,

---

<sup>10</sup> Verizon also relies on *Shriro v. Paganucci*, 113 Me. 213 (1915), for the proposition that in Maine equity provides relief from a  
(continued on next page)

even of a “gross” variety, Defendant’s SJ Opposition at 17-18; Verizon ascribes its delay to extenuating circumstances rather than negligence of any sort, Plaintiff’s Motion at 15-16; Verizon New England Inc.’s Reply to Pizzagalli’s Opposition to Summary Judgment (Docket No. 29) at 6-7; Plaintiff Verizon New England Inc.’s Objection to Defendant’s Motion for Summary Judgment (Docket No. 25) at 4.<sup>11</sup>

The Law Court has defined “gross negligence” *inter alia* as “the intentional failure to perform a manifest duty.” *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 114 Me. 361, 365 (1916). “The term ‘Gross negligence’ signifies wilfulness and involves intent, actual or constructive, which is a characteristic of criminal liability.” *Id.* “How much care will, in a given case, relieve a party from the imputation of gross neglect, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances, which the law cannot exactly define.” *Id.* at 366 (citation and internal quotation marks omitted).<sup>12</sup>

A good case can be made that the conduct at issue amounted to “gross” negligence. The story Verizon tells is not one of extenuating circumstances, but rather of bureaucratic snafu. Verizon, of its own making, created a complex bureaucracy for the renewal of lease options without implementing even the rudimentary check of an automated flagging system. In the wake of a corporate merger

---

forfeiture even in circumstances in which a tenant has been negligent. Plaintiff’s Motion at 10. This aspect of *Shriro* pertains to situations in which a tenant’s remaining leasehold term is forfeited for delayed payment of rent. *Shriro*, 113 Me. at 216 (“[A] court of equity will relieve the tenant from a forfeiture where the breach is the result of accident or mistake, or where it has been incurred by neglecting to pay a sum of money, the interest upon which can be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenants [sic] withholding payment.”). *Shriro* thus is inapposite.

<sup>11</sup> Pizzagalli further contends that time was “of the essence,” although the parties did not expressly make it so. Defendant’s Motion at 4-5 n.6. Time inherently is of the essence in lease-renewal option contracts; however, even so, equitable relief is available in certain circumstances (which I find not to be present in this case). See *Fletcher v. Frisbee*, 404 A.2d 1106, 1108 (N.H. 1979); *Sosanie v. Perneti Holding Corp.*, 279 A.2d 904, 907 (N.J. Super. Ct. Ch. Div. 1971); see also *Colbath v. H.B. Stebbins Lumber Co.*, 127 Me. 406, 411 (1929) (“In general, it may be said that at law time is always of the essence of the contract, although in equity a different rule prevails. Time in equity is held to be of the essence or not, according to the circumstances of the case.”) (citations omitted).

<sup>12</sup> The Law Court subsequently has questioned the utility of the distinction between mere negligence and gross negligence in the context of civil cases, repudiating the latter as a predicate for the imposition of punitive damages. *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (“Whatever qualitative difference exists between mere negligence and ‘gross’ negligence, it is insufficient to justify allowing punitive damages based upon the latter class of conduct. . . . ‘Gross’ negligence simply covers too broad and too vague an area of (continued on next page)

Verizon then permitted the authority of a key manager (Kelly) to lapse for a period of more than a month – delaying lease renewals nationwide. No suggestion is made that the merger was rushed or otherwise in the nature of an “emergency.” No excuse, other than the bare fact of the merger, is tendered for the gap in authority, which should have been seamlessly closed as part of the merger process itself. Nor was the strike, which unfortunately coincided with the restoration of Kelly’s authority, unforeseen. Moreover, even after the commencement of the strike Masterman (in whose court the Lease renewal then lay) continued to attend to portions of his regular workload designated as “priorities.” The Lease renewal was not so designated. Even as of August 14, 2000 – the day the Lease renewal notice was due – Verizon evidenced a complete disregard for its timeliness. Masterman on that day simply gave the renewal package to a clerk with instructions to forward it to Ho, without warning Ho of its contents or bothering to call, fax or otherwise notify Pizzagalli of Verizon’s intent to renew.

If not grossly negligent, Verizon’s conduct was at a minimum negligent. The parties agree that Pizzagalli did nothing to cause or contribute to Verizon’s tardiness. In my view, that ends the matter. This is, as the Law Court stated in *Medomak*, a situation in which “equity cannot aid the lessee to avoid the natural and reasonable consequences of its own negligence, to which the lessor in no way contributed.” *Medomak*, 143 Me. at 197. Verizon argues that the authorities cited in support of this proposition clarify that the Law Court meant to exclude only cases of willful conduct or gross negligence from equity’s reach. Plaintiff’s Motion at 8-11. I am not persuaded. In *Goldberg*, the Court of Chancery of New Jersey declined to afford a tenant equitable relief when the tenant resolved that it would not renew, failed to give the requisite written notice of renewal and then, more than a year later, after receiving notice to quit the premises at the end of the lease term, changed its mind.

---

behavior, resulting in an unfair and inefficient use of the doctrine of punitive damages.”) (citations omitted).

*Goldberg's Corp. v. Goldberg Realty & Inv. Co.*, 36 A.2d 122, 124 (N.J. Ch. 1944). In seeking equitable relief, the tenant averred that it would suffer irreparable harm if forced out of the leased premises. *Id.* The New Jersey court observed:

The jurisdiction of a court of equity to relieve against unjust and unconscionable forfeitures must be acknowledged. Penalties, forfeitures, and reentries for conditions broken are not favored in equity. Waiver, estoppel, accident, fraud or mistake are perhaps the common but not the exclusive grounds of avoidance. The circumstances of each case are usually determinative of the propriety of equitable relief.

\*\*\*

If the omission to adopt the option is to be ascribed to negligence, it was certainly negligence of a willful and gross character, and I am not acquainted with any case in which equitable relief has been afforded in delinquencies of that nature.

Nothing in the bills is indicative of any mutual intention to defer the time specified for the exercise of the option. Nothing is alleged to have been done by the landlords of a malicious, wrongful or deceptive nature to induce the complainant to renounce the option. Some considerations of righteousness, justice or morality must exist to enable a court of equity to rescue parties from the natural and reasonably probable consequences of their own imprudence. A judicial tribunal cannot make a contract for litigants *sui juris* or compel them to contract with each other.

*Id.* at 126-27. *Goldberg* thus stands for precisely the proposition articulated by the Law Court in *Medomak*: Imprudence (or negligence) on the part of a tenant, unaccompanied by waiver or by any malicious, wrongful or deceptive conduct on the part of the landlord, does not justify equitable relief.

Nor do the cases of *Rogers v. Saunders*, 16 Me. 92 (1839), or *Jones v. Robbins*, 29 Me. 351 (1849), help Verizon. In *Rogers* the Law Court noted, in refusing to grant the plaintiff specific performance of a contract to purchase real estate following his unexplained three-month delay in payment: “[P]erformance may in a proper case be decreed where the party has lost his remedy at law.

But laches and negligence in the performance of contracts are not thereby to be countenanced or encouraged, and the party seeking performance must shew, that he has not been in fault, but has taken all proper steps towards a performance on his own part, and has been ready, desirous, and prompt to

perform.” *Rogers*, 16 Me. at 97 (citations omitted). I fail to see how one could extract from this nugget the principle that negligence could form the basis for equitable excuse.

Finally, the Law Court in *Jones* decreed specific performance of a contract to purchase real estate when the plaintiff proved that he was unable to tender timely payment on account of illness. *Jones*, 29 Me. at 353, 355-56. The Law Court noted: “The party seeking relief from a forfeiture must show, that circumstances, which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived.” *Id.* at 353. “Upon the principles already stated, [the plaintiff’s] omission having been occasioned or accounted for by occurrences not within the power of the plaintiff to avert, and for the happening of which he was not in fault, should not be allowed to prevent a decree for specific performance.” *Id.* at 355. Presumably, if a tenant’s tardiness were caused by an occurrence not within its power to avert, and for the happening of which it was not at fault, its untimeliness could not be ascribed to negligence. Accordingly, *Jones* too is consistent with the Law Court’s conclusion in *Medomak* that negligence on a tenant’s part provides no springboard for equitable relief absent culpable behavior on the part of the landlord.<sup>13</sup>

Interestingly, and reinforcing the outcome hereof, I note that both of the two published decisions citing *Medomak* for the point at issue in this case have taken the contested language at face value. See *Host Int’l, Inc. v. Summa Corp.*, 583 P.2d 1080, 1082 (Nev. 1978) (citing *Medomak* for

---

<sup>13</sup> The Law Court in *Medomak* cites an American Law Reports annotation in support of the proposition that “in the absence of special circumstances warranting a court of equity in granting relief, the right to renewal is lost if the notice is not given in accordance with the provisions of the lease.” *Medomak*, 143 Me. at 195. The cited section of the annotation elaborates: “In general it may be said that courts of equity have granted relief in cases of special hardship or of failure to give notice within the required time because of some unavoidable accident or circumstance, where the delay has not been willful or the result of gross negligence, and the landlord has not been prejudiced thereby, and justice will be promoted by granting a renewal of the lease rather than by giving effect to the consequences of the tenant’s failure to give the notice of renewal within the time stipulated.” Annotation, *Effect of Lessee’s Failure or Delay in Giving Notice Within Specified Time, of Intention To Renew Lease*, 27 A.L.R. 981, 982 (1923). As discussed above, even assuming *arguendo* that Verizon’s delay was not willful or grossly negligent, the notion that its tardiness was attributable to an “unavoidable accident or circumstance” does not pass the straight-face test.

(continued on next page)

proposition that “[e]quity will not intervene to protect a lessee from its own negligent failure to give the required written notice.”); *McClellan v. Ashley*, 104 S.E.2d 55, 59 (Va. 1958) (citing *Medomak* for proposition that “[e]quity aids the vigilant. Negligence is not favored as a ground for equitable relief, and when the lessee is able to assign no excuse for his failure to give the required notice other than his own negligence, to which the lessor in no way contributed, he is not entitled to be rescued by a court of equity from the consequences of his negligence.”); *see also Western Sav. Fund Soc’y of Philadelphia v. Southeastern Pa. Transp. Auth.*, 427 A.2d 175, 177-78 (Pa. Super. Ct. 1981) (reversing grant of equitable relief to commercial tenant when six-day delay in giving of renewal notice was caused by “administrative oversight” incident to “massive branch expansion program”).<sup>14</sup>

Inasmuch as the Law Court has chosen not to afford equitable relief in circumstances when a tenant negligently submits late notice of intent to exercise a renewal option, and Verizon’s conduct in this instance was negligent, if not grossly so, Pizzagalli’s motion for summary judgment should be granted and that of Verizon denied.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the Defendant’s Motion be **GRANTED** and that the Plaintiff’s Motion be **DENIED**.

#### **NOTICE**

---

<sup>14</sup> As Verizon points out, Plaintiff’s Motion at 12-13, a line of more recent cases does espouse the view that equity will forgive a tardy lease-renewal notification under certain circumstances even when the tardiness is attributable to negligence and the landlord has not been at fault. This line of cases is founded on *F.B. Fountain Co. v. Stein*, 118 A. 47 (Conn. 1922), in which the court stated: “[I]n cases of mere neglect in fulfilling a condition precedent of a lease, which do not fall within accident or mistake, equity will relieve when the delay has been slight, the loss to the lessor small, and when not to grant relief would result in such hardship to the tenant as to make it unconscionable to enforce literally the condition precedent of the lease.” *Id.* at 50. *See also, e.g., Fleming Cos. v. Equitable Life Ins. Co. of Iowa*, 818 P.2d 813, 820 (Kan. Ct. App. 1991) (adopting *Fountain* rule); *Trollen v. City of Wabasha*, 287 N.W.2d 645, 648 (Minn. 1979) (same). Although *Fountain* is cited by *Medomak*, it is cited solely for the proposition, “Since thirty days’ written notice was a condition precedent to effect an extension of the lease, and was never given as provided for, the right to an extension of the lease was lost.” *Medomak*, 143 Me. at 195.

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated this 1st day of June, 2001.***

---

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

TRLIST LEAD  
STNDRD

U.S. District Court  
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-385

VERIZON NEW ENGLAND v. PIZZAGALLI PROPRTIE                      Filed: 11/30/00  
Assigned to: JUDGE GENE CARTER  
Demand: \$0,000                      Nature of Suit: 290  
Lead Docket: None                      Jurisdiction: Diversity  
Dkt # in Cumberland Sup : is 00-125

Cause: 28:1332 Diversity-Breach of Contract

VERIZON NEW ENGLAND INC.                      NATHAN V. GEMMITI, ESQ.  
    plaintiff                      [COR LD NTC]  
   PIERCE ATWOOD  
   ONE MONUMENT SQUARE  
   PORTLAND, ME 04101  
   791-1100

v.





