# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CIT COMMUNICATIONS FINANCE,	)	
CORPORATION	)	
	)	
Plaintiff,	)	
	)	
V.	)	C.A. No. 06C-01-236 JRS
	)	
LEVEL 3 COMMUNICATIONS, LLC	)	
and LEVEL 3 COMMUNICATIONS,	)	
INC.,	)	
	)	
Defendants.	)	

Date Submitted: May 15, 2008 Date Decided: June 6, 2008

Upon Defendants' Motion for Summary Judgment **DENIED.** 

This 6<sup>th</sup> day of June 2008, upon consideration of the motion for summary judgment brought by Defendants, Level 3 Communications, LLC and Level 3 Communications, Inc. (collectively "Level 3"), it appears to the Court that:

1. In 1995, Genuity, Inc. ("Genuity"), a telecommunications service provider, entered into a Master Equipment Lease Agreement ("MELA") with plaintiff, CIT Communications Finance Corporation ("CIT"), pursuant to which CIT

leased telephone systems to Genuity for use in its various offices throughout the United States.<sup>1</sup> In order to implement the MELA, Genuity and CIT entered into multiple Master Equipment Lease Agreement Schedules ("lease schedules") which indicated the specific pieces of equipment that would be supplied to the various Genuity offices.<sup>2</sup> Thirty-four of the schedules are at issue in this litigation.

2. On November 27, 2002, Genuity filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Southern District of New York. By order dated January 24, 2003, the bankruptcy court approved an Asset Purchase Agreement ("APA") pursuant to which Level 3 purchased a portion of Genuity's assets out of the bankruptcy estate. Neither the MELA nor the 34 lease schedules between CIT and Genuity were assumed by Level 3 as part of the APA or otherwise in the bankruptcy plan. Instead, the MELA and lease schedules were rejected by the bankruptcy estate as part of the confirmed plan, thereby leaving CIT to pursue all rights and remedies under the MELA directly against the debtor.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup>Genuity's predecessor, BBN Corp. and CIT's predecessor, AT&T Credit Corp. (which eventually became Newcourt Communications Finance Corporation and then CIT) were the original parties to the lease agreement.

<sup>&</sup>lt;sup>2</sup>Transaction Identification Number ("Trans. I.D. No.") 10389304, Ex. A.

<sup>&</sup>lt;sup>3</sup>Trans. I.D. No. 19212828, Wilburn Aff., Ex. D

- 3. In February 2003, Genuity and Level 3 entered into an Transition Services Agreement ("TSA") to accommodate the transfer of assets as contemplated by the APA. Under the terms of the TSA, Level 3 provided assistance to Genuity while it administered the bankruptcy estate and wound up its business. To facilitate the TSA, Level 3 occupied several of the remaining Genuity offices in order to phase out operations there and transfer operations to Level 3-owned offices. As part of this transition, Level 3 and CIT entered into three "purchase orders" by which Level 3 paid CIT for limited use of some of the leased telephone equipment during the wind up process.<sup>4</sup> In the course of performing the TSA, Level 3 employees assisted Genuity in the return of some, but not all, of the leased telephone equipment to CIT.
- 4. By the end of 2003, Level 3 had closed all of the Genuity offices. On January 17, 2006, counsel for CIT sent a letter to Level 3 demanding the immediate return of missing equipment.<sup>5</sup> On January 26, 2006, Level 3 responded to CIT's demand by denying that it had possession of or control over any of the missing CIT equipment.<sup>6</sup>
  - 5. CIT filed a complaint in this Court on January 23, 2006, alleging breach

<sup>&</sup>lt;sup>4</sup>Trans. I.D. No. 19212828, Wilburn Aff., Exs. H, I. And J.

<sup>&</sup>lt;sup>5</sup>Trans. I.D. No. Trans. I.D. No. 19598542, Lipkin Aff., Ex. 32.

<sup>&</sup>lt;sup>6</sup>*Id.* at Ex. 33.

of contract, unjust enrichment and conversion. On March 31, 2008, Level 3 moved for summary judgment on all counts. A hearing on the motion was held on May 15, 2008. At the conclusion of the hearing, the Court granted summary judgment with respect to the breach of contract claim but reserved decision on the conversion and unjust enrichment claims.<sup>7</sup>

#### Standard of Review

6. The standard of review for summary judgment is well settled. The Court's principle function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues." Summary judgment will be granted if, after reviewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. 

If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law

<sup>&</sup>lt;sup>7</sup>At oral argument, CIT conceded that its breach of contract claim was not viable as a matter of law because the MELA and lease schedules had been properly rejected by the bankruptcy estate.

<sup>&</sup>lt;sup>8</sup>Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992)(internal citations omitted).

 $<sup>^{9}</sup>Id.$ 

to the factual record, then summary judgment will not be granted.<sup>10</sup> The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.<sup>11</sup> If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.<sup>12</sup>

#### Conversion

- 7. Conversion typically results from "any distinct act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it . . ." For a plaintiff to recover under a theory of conversion, he must prove, *inter alia*, precisely what property the defendant converted and that his interest in the property was viable at the time of the conversion. <sup>14</sup>
- 8. Level 3's showcase summary judgment argument on the conversion claim is that CIT has failed to plead or prove a requisite element of the claim -

<sup>&</sup>lt;sup>10</sup>Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962). See also Cook v. City of Harrington, 1990 WL 35244, at \*3 (Del. Super.Ct. Feb. 22, 1990)(citing Ebersole, 180 A.2d at 467).

<sup>&</sup>lt;sup>11</sup>Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979)(citing Ebersole, 180 A.2d at 470).

<sup>&</sup>lt;sup>12</sup>See Brzoska v. Olson, 668 A.2d 1355, 1364 (Del. 1995).

<sup>&</sup>lt;sup>13</sup>Drug, Inc. v. Hunt, 168 A. 87, 93 (Del. 1933).

<sup>&</sup>lt;sup>14</sup>See e.g. Greenburg v. Norfolk & Western RY. Co., 29 F.2d 111 (4th Cir. 1928)(affirming judgment against plaintiff on a conversion claim because "there was no substantial evidence that the [converted property] which plaintiff claims to have lost was taken by defendant.").

demand for the property and refusal to return the property - - and, therefore, summary judgment must be granted as a matter of law.<sup>15</sup> The secondary argument - - that CIT cannot sustain its conversion claim with competent proof - - received only passing mention in Level 3's opening brief accompanied by very few citations to the record.<sup>16</sup> As discussed below, the Court cannot pass on the merits of either argument at this stage because it does not adequately understand the factual record *sub judice* to allow it to put the legal arguments in proper context.

9. As to Level 3's argument that the conversion claim falls short because CIT failed to make a demand, or to allege that it did so, the Court notes that Delaware law does support the notion that if a party was once in lawful possession of the plaintiff's property, the plaintiff must first make a demand upon that party for return of the property before bringing an action at law for conversion.<sup>17</sup> This requirement is excused, however, when "the alleged wrongful act is of such a nature as to amount, in itself, to a denial of the rights of the real owner." At first glance, the record appears to suggest that CIT did make a demand upon Level 3 for return of the leased

<sup>&</sup>lt;sup>15</sup>Trans. I.D. No. 19212828 at 19-26.

<sup>&</sup>lt;sup>16</sup>*Id.* (the conversion section of the opening brief contains references to only 4 exhibits from a record comprised of 20 separate exhibits).

<sup>&</sup>lt;sup>17</sup>See Drug, Inc., 168 A. at 94.

 $<sup>^{18}</sup>Id.$ 

equipment by letter dated January 17, 2006. It also appears, however, that it initiated this action before receiving Level 3's January 26, 2006, response to the demand. The circumstances surrounding this exchange, and the timing of the filing of this action, are not clear in the record. The Court cannot say, therefore, as a matter of law or undisputed fact, that CIT has failed to meet its obligation to demand the return of the converted property. Moreover, as discussed below, the circumstances surrounding the alleged conversion are far from clear in the record presented. Consequently, the Court cannot determine at this stage whether the conversion, if any, was of a nature that would justify excusing the demand requirement in this case.<sup>19</sup>

10. As stated, Level 3 has also challenged CIT's conversion claim on the ground that it lacks adequate factual support. The Court understands Level 3's principal argument to be that CIT cannot demonstrate what equipment was present at the Genuity sites when Level 3 took possession of those sites. In the absence of this proof, CIT cannot prove what, if any, equipment Level 3 converted. The argument makes sense and may well prevail at trial. Here again, however, the Court is unable to determine whether *vel non* the record supports Level 3's characterization of the undisputed evidence. While Level 3 did not assume any of Genuity's contractual obligations to CIT, it did gain possession of and/or control over at least

 $<sup>^{19}</sup>Id$ .

some of the leased equipment, as evidenced by the purchase orders.<sup>20</sup> Additionally, the record indicates that Level 3 employees exercised some level of control over other leased telephone equipment as they closed certain Genuity offices, and that Level 3 may have moved some of the leased equipment from Genuity sites to other Level 3 locations.<sup>21</sup> Level 3 concedes as much in its briefing.<sup>22</sup> The Court cannot determine the extent to which the equipment over which Level 3 exercised control was returned to CIT because it cannot, on its own accord, decipher the multiple charts, inventory schedules, and purchase orders that have been lashed together in the appendices. While the effort of counsel to walk through these charts at oral argument was appreciated, the Court needs more (competent testimonial evidence, for instance) to interpret the data.

11. The Court likewise is unable to evaluate the *bona fides* of Level 3's argument that CIT cannot prove exactly what leased equipment was present at the Genuity sites when Level 3 began to perform under the TSA. As the moving party, Level 3 was obliged to demonstrate by specific references to the existing record that

<sup>&</sup>lt;sup>20</sup>Trans. I.D. No. 19212828, Wilburn Aff., Exs. H, I. And J.

<sup>&</sup>lt;sup>21</sup>See Trans. I.D. No. 19598542, Lipkin Aff., Exs. 8, 10, 11-13 (e-mails from Lisa D'Avolio).

<sup>&</sup>lt;sup>22</sup>Trans. I.D. No. 19212828 at 3 ("Level 3 employees assisted the Genuity bankruptcy estate in returning some of the leased phone equipment to CIT, particularly the equipment which Level 3 was allowed to use during the first few months after the asset purchase.").

CIT cannot, under any reasonable view of the evidence, provide factual support for its claim of conversion. Simply stated, in the time allowed before trial, the Court cannot make meaningful use of the charts and schedules contained in the record without some further guidance from the fact witnesses that would enable the Court to understand what it is looking at.<sup>23</sup>

- 12. This is not to say that CIT will have an easy go at trial. In order to prevail, CIT must first demonstrate exactly what telephone equipment was used or controlled by Level 3 but never returned. In this regard, CIT must prove that Level 3, the defendant in this litigation, was the party that actually converted the leased equipment. It will not be enough for CIT to show what equipment it originally leased to Genuity back in 1995 and what equipment was not returned in 2003. CIT must prove that Level 3 actually converted the equipment that was not returned. Whether it can do so remains to be seen.
- 13. The parties dedicated some of their summary judgment briefing to a discussion of conversion damages. Since this claim will be tried, it is appropriate to discuss the damages issue now so that the parties will be guided accordingly in their

<sup>&</sup>lt;sup>23</sup>See In re Asbestos Litig., 2007 WL 2410879, at \*3 (Del. Super. C. Aug. 27, 2007)(explaining that the moving party must do more than simply *argue* that plaintiff's claim lacks evidentiary support to prevail on summary judgment; the motion must be supported by specific references to the evidentiary record accompanied by specific explanations of why the record is inadequate to allow the plaintiff to meet the *prima facie* elements of this claim).

trial preparations. If CIT prevails on the conversion claim, the Court sees no reason to depart from the well-settled damages model for conversion in Delaware: damages will be calculated based on the fair market value of the converted property at the time the conversion occurred.<sup>24</sup> The record indicates that the equipment was leased as component parts of a communication system. If the evidence bears this out at trial, then the pieces of equipment will be valued as component parts, not as an integrated system. This damages formulation is supported by the applicable case law and the facts of this case.<sup>25</sup>

14. In its summary judgment brief, Level 3 made a faint effort to have the Court strike the expert testimony of Mr. Robert Hillman.<sup>26</sup> A few conclusory

<sup>&</sup>lt;sup>24</sup>Wyndham v. Wilmington Trust, Co. 59 A.2d 456, 459 (Del. Super. 1948).

<sup>&</sup>lt;sup>25</sup>See id. The cases relied upon by CIT to support its contention that it is entitled to damages based on the value of an integrated phone system are easily distinguishable from the facts of this case. In Stickney v. Goldstein, 2002 WL 31999358 (Del.Com.Pl. March 14, 2002), the plaintiff was awarded the value of the entire vehicle that had been converted rather than the amount the defendant received when he stripped the vehicle for parts. Stickney is easily distinguishable because in that case the defendant divested the plaintiff of the entire automobile, not just various parts. Because the automobile was fully functional only as a unit, the court was justified in its award of the full value of the automobile, not just its salvage value. The other case law cited by CIT can be distinguished on the same basis - the property at issue in these cases was converted in its entirety. In this case, however, CIT concedes that it recovered some of the pieces of equipment it originally leased, but not all of it. It also admits that it was able to resell some of the equipment, indicating that the parts retained their value even when separated from the leased phone system. Trans. I.D. No. 19212828, Wilburn Aff., Ex. G, at 166:3-7; 167:13-15. If CIT prevails on this claim, it may recover the fair market value of the individual pieces of equipment Level 3 converted to its use if such value is established with competent evidence.

<sup>&</sup>lt;sup>26</sup>Trans. I.D. No. 19212828 at 28; Trans. I.D. No. 19773670 at 10-11.

statements at the end of a summary judgment brief, however, are not sufficient to allow the Court to measure the admissibility of Mr. Hillman's proposed testimony. CIT's expert disclosure suggests that Mr. Hillman will offer testimony at trial regarding the value of the converted equipment.<sup>27</sup> On its face, this testimony would appear to be relevant in the event that CIT proves the other elements of its conversion claim. A finding of relevancy, of course, does not end the admissibility analysis. Accordingly, the Court will entertain a properly supported *motion in limine* to strike or limit the proposed expert testimony either at the pretrial conference or prior to Mr. Hillman's testimony at trial.

### **Unjust Enrichment**

15. In order to prevail on a claim of unjust enrichment, the plaintiff must prove: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law."<sup>28</sup> The existence of an express contract governing the relationship of the parties precludes a claim of unjust enrichment arising from the

<sup>&</sup>lt;sup>27</sup>Trans. I.D. No. 19212828, Wilburn Aff., Ex. S, at 2 and 4.

<sup>&</sup>lt;sup>28</sup>Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 585 (Del. Ch. 1998). See also MetCap. Sesc. LLC v. Pearl Senior Care, Inc., 2007 WL 1498989, at \*6 (Del.Ch. May 16, 2007)(same).

same relationship.<sup>29</sup> According to the summary judgment record, Level 3 and CIT entered into purchase order agreements whereby Level 3 paid CIT for the use of certain leased telephone equipment at various Genuity locations.<sup>30</sup> CIT concedes that Level 3 paid CIT under the terms of these agreements, but argues that the purchase orders did not reflect all of the equipment Level 3 was using during the shut down of Genuity offices.<sup>31</sup>

16. After reviewing the record submitted, the Court is satisfied that the record needs to be developed further (or explained more thoroughly) before it can properly evaluate a request for dispositive relief.<sup>32</sup> As an initial matter, the Court reiterates that CIT is precluded from prosecuting an unjust enrichment claim if binding and enforceable contracts (the purchase orders) govern the parties'

<sup>&</sup>lt;sup>29</sup>See 66 Am. Jur. 2d *Restitution and Implied Contracts* § 24 (2001)("No [obligation] can be implied where there is an express one existing.").

<sup>&</sup>lt;sup>30</sup>Trans. I.D. No. 19212828, Wilburn Aff., Exs. H, I. And J.

<sup>&</sup>lt;sup>31</sup>Trans. I.D. No. 19598542 at 21 ("At best, a material issue of fact exists as to whether *the money paid by Level 3 to CIT pursuant to the purchase orders* adequately compensated CIT for the amount Level 3 was unjustly enriched.")(emphasis added).

<sup>&</sup>lt;sup>32</sup>Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962)("Summary judgment will not be granted under any circumstances when from evidence produces there is reasonable indication that material fact is in dispute or if it seems desirable to inquire thoroughly into them in order to clarify application of law to circumstances.").

relationship.<sup>33</sup> Moreover, CIT may not claim "an impoverishment" if Level 3 paid fair value for equipment it was using pursuant to the purchase orders.<sup>34</sup> There are gaps in the record (or at least the Court's understanding of the record) regarding the specific equipment that was subject to the purchase orders, and the extent to which Level 3 may have used CIT's equipment outside of the purchase orders without compensating CIT. The Court's identification of these outstanding factual issues flows directly from the Court's concerns regarding the conversion issue - if equipment (to be specifically identified by CIT) remained at the Genuity sites that Level 3 used but did not pay for, and that equipment was never returned to CIT, then CIT may well be able to meet its *prima facie* burden on both the conversion and unjust enrichment claims. As stated, the Court is unable to make this determination

<sup>&</sup>lt;sup>33</sup>66 AM JUR 2d. *Restitution and Implied Contracts* § 24 (2001)("There cannot be an express and an implied contract for the same thing existing at the same time...Thus an express contract preludes the existence of a contract implied by law or a quasi-contract.").

 $<sup>^{34}</sup>$ See Cantor Fitzgerald, L.P., 724 A.2d at 585; Trans. I.D. No. 19212828, Wilburn Aff., Exs. H, I. and J.

without further guidance from the parties.<sup>35</sup>

## Waiver Of Right To Jury Trial

17. Section 27 of the MELA states, in relevant part:

WAIVER OF JURY TRIAL; SUCCESSORS. LESSEE AND LESSOR EACH IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY LAWSUIT, PROCEEDING, COUNTERCLAIM OR ANY OTHER LITIGATION OR PROCEEDING UPON, ARISING OUT OF, OR RELATED TO THIS AGREEMENT, ANY OTHER FUNDAMENTAL AGREEMENT, OR THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG LESSOR, LESSEE, SELLER OR ANY OTHER PERSON...

18. Article I, Section 4 of the Delaware Constitution recognizes the right to a trial by jury in certain civil actions. While this right is significant, a party may waive the right to trial by jury in many ways, including by contract.<sup>36</sup> When determining whether a contract effectively provides for a waiver of jury trial, the court must consider: "(1) the negotiability of the contract terms; (2) any disparity in bargaining power between the parties; (3) the business acumen of the party opposing

<sup>&</sup>lt;sup>35</sup>The parties also disagree as to proper measure of damages for Level 3's unjust enrichment. CIT seeks damages for all profits derived by Level 3 from the APA on the theory that, without the phones, Level 3 would not have been able fully to exploit the assets it purchased from Genuity. Level 3 strongly contests this proffered damages formula. For now, the Court can only state that it has found no support for CIT's rather extraordinary request for relief. The issue will be resolved at the pretrial conference after further input from the parties. Given that disgorgment of profits is an equitable remedy, CIT should be prepared to discuss why allowing Level 3 to retain its profits would be "against the fundamental principles of justice or equity and good conscience." 66 AM JUR 2d. *Restitution and Implied Contracts* § 9 (2001).

<sup>&</sup>lt;sup>36</sup>Tracienda Corp. v. DaimlerChrysler AG, 2003 WL 22769051, at \*1 (D.Del. Nov. 19, 2003), aff'd, 502 F.3d 212 (3rd Cir. 2007).

the waiver; and (4) the conspicuousness of the jury waiver provision."<sup>37</sup> Additionally, when analyzing a contractual waiver, the Court may not consider parol evidence if the waiver provision appears is clear and unambiguous.<sup>38</sup> Under such circumstances, the Court will look no further than the four corners of the document memorializing the waiver to construe its meaning and effect.<sup>39</sup>

19. By signing the lease agreement with Genuity's predecessor, BBN, Inc., CIT knowingly, intelligently and voluntarily waived its right to a jury trial in this matter. The language of the lease clearly and unambiguously waives a jury trial "in any lawsuit...arising out of, or related to this agreement...or the dealings or relationship between or among lessor, lessee, seller or any other person." CIT argues that this provision is not applicable here because Level 3 was not a party to the MELA and, further, the waiver set forth in the MELA contemplated litigation involving CIT, Genuity, and a third party. CIT's arguments contradict the clear language of the contract. The penultimate sentence of Section 27 unambiguously states that the provision is applicable to the original "lessor, lessee *or* any other

<sup>&</sup>lt;sup>37</sup>*Id.* at 2 (citations omitted).

<sup>&</sup>lt;sup>38</sup>See Tracienda Corp. 2003 WL 22769051, at \*2 ("Reading the *plain and unambiguous* language of the [] agreement, I find, without question, that the jury trial waiver is enforceable.")(emphasis added).

 $<sup>^{39}</sup>Id.$ 

person." This action, involving CIT and Level 3, is captured within the broad language of Section 27.

- 20. Additionally, CIT challenges whether this action for conversion and unjust enrichment "arises out of or relates" to the MELA because the claims brought here are the result of tortious conduct, not a breach of the lease. Again, this argument is not supported by the clear language of the contract. The waiver provision contains a broad reference to *any* action that "arises out of or relates to" the lease, thereby deliberately expanding the coverage of this provision beyond actions for breach of contract to actions "arising out of or relating to" the MELA, including conversion of the equipment subject to the MELA and any resulting unjust enrichment.<sup>40</sup>
- 21. CIT has waived its right to trial by jury. Accordingly, the Court will conduct a bench trial to resolve the remaining factual disputes between the parties.

<sup>&</sup>lt;sup>40</sup>See Curtis Center L.P. v. Sumitomo Trust & Banking Co., 1995 WL 365411, \*2 (E.D. Pa. June 15, 1995)(recognizing that identical jury trial waiver language is "sweeping" and encompasses such claims as fraud, bad faith and misappropriation of trade secrets).

22. Based on the foregoing, Level 3's Motion for Summary Judgment is **DENIED.** 

IT IS SO ORDERED.

Judge Joseph R. Slights, III

J.o.n. 3600...

Original to Prothonotary