

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re)	Chapter 11
)	
MCI, INC., et al.,)	Case No. 02-13533 (AJG)
)	
Debtors.)	(Jointly Administered)

**ORDER ON MOTION OF REORGANIZED DEBTOR, MCI, INC. FOR SUMMARY
JUDGMENT ON AND TO DISMISS THE CLAIM OF MAX V. MCLAUGHLIN**

Upon consideration of the Motion of Reorganized Debtor MCI, Inc. for Summary Judgment on and to Dismiss the Claim of Max V. McLaughlin (the “Summary Judgment Motion”) and the parties’ briefs and argument on the Summary Judgment Motion, and for the reasons stated in the Court’s December 13, 2005 decision on the Summary Judgment Motion, which is attached hereto as Exhibit A, it is hereby

ORDERED that the Summary Judgment Motion is granted, and it is further

ORDERED that the claim of Max V. McLaughlin, No. 12223, is dismissed with prejudice.

Dated: February 1, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE

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AS REVIEWED AND MODIFIED BY THE COURT
ON 12/13/05.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In re

WORLD COM, INC., et al, Case No. 02-13533
**SEE BELOW

Reorganized Debtors.

-----x

December 13, 2005
3:05 p.m.

United States Custom House
One Bowling Green
New York, New York 10004

DIGITALLY RECORDED PROCEEDINGS
E X C E R P T

03:05 WORLD COM, INC., ET AL
DECISION TO BE RENDERED

Motion filed by the Debtors for Summary
Judgment on claim of Max McLaughlin, Claim
No. 12223.

Response by Max McLaughlin filed.

B E F O R E:

THE HONORABLE ARTHUR J. GONZALEZ
United States Bankruptcy Judge

DEBORAH HUNTSMAN, Court Reporter
198 Broadway, Suite 903
New York, New York 10038
(212) 608-9053 (917) 723-9898

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BY: ALEX WARD, ESQ.
(via telephone)

1 Proceedings

2 157(b)(1). In re S.G. Phillips Constructors,
3 Inc., 45 F.3rd 702, 705 (2nd Cir. 1995).

4 Rule 56(c) states that summary
5 judgment should be granted if the record
6 demonstrates that "there is no genuine issue
7 as to any material fact and that the moving
8 party is entitled to judgment as a matter of
9 law." A "genuine issue" exists where "the
10 evidence is such that a reasonable jury could
11 return a verdict for the non-moving party."

12 Anderson v. Liberty Lobby, Inc., 477 U.S.
13 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202
14 (1986). The evidence must be "viewed in the
15 light most favorable to the party opposing
16 the motion." Terminate Control Corp. v.

17 Horowitz, 28 F.3d 1335, 1352 (2nd Cir. 1994)

18 (citations omitted). "When the movant
19 demonstrates through competent evidence that
20 no material facts are genuinely in dispute,
21 the non-movant must set forth specific facts
22 showing that there is a genuine issue for

23 trial." Western World Ins. Co. v. Stack Oil,
24 Inc., 922 F.2d 118, 121 (2nd Cir.

25 1990)(internal quotation omitted). "However,

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2 mere conclusory allegations, speculation, or
3 conjecture will not avail a party resisting
4 summary judgment." Cifarelli v. Village of
5 Babylon, 93 F.3d 47, 51 (2nd Cir. 1996).
6 "The non-movant cannot 'escape summary
7 judgment by merely vaguely asserting the
8 existence of some unspecified disputed
9 material facts.'" Western World, 922 F.2d,
10 at 121 (citing Borthwick v. First Georgetown
11 Securities, Inc., 892 F.2d 178, 181 (2nd Cir.
12 1989)).

13 Rule 56(f) provides that the
14 non-moving party may file an affidavit
15 stating the reasons why it cannot provide the
16 facts necessary to deny the summary judgment
17 motion. This affidavit must explain "1) what
18 facts are sought and how they are to be
19 obtained, 2) how those facts are reasonably
20 expected to create a genuine issue of
21 material fact, 3) what effort the affiant has
22 made to obtain them, and 4) why the affiant
23 was unsuccessful in those attempts." Hudson
24 River Sloop Clearwater, Inc. v. Department of
25 the Navy, 891 F.2d 414, 422 (2nd Cir. 1989).

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2 Ordinarily, it is true that summary judgment
3 is not appropriate where the non-movant has
4 not "had the opportunity to discover
5 information that is essential to the motion
6 for summary judgment." Hellstrom v. U.S.
7 Dept. of Veteran Affairs, 201 F.3d 94, 97
8 (2nd Cir. 2000)(citations omitted). However,
9 it is equally true that it is within the
10 discretion of the Court to reject the 56(f)
11 affidavit where the affidavit "merely
12 restates the conclusory allegations contained
13 in [the] complaint and amplifies them only
14 with speculation about what discovery might
15 uncover." Contemporary Mission, Inc. v. U.S.
16 Postal Service, 648 F.2d 97, 107 (2d Cir.
17 1981). See also, Trebor Sportswear Co., Inc.
18 v. The Limited Stores, Inc., 865 F.2d 506,
19 512 (2nd Cir. 1989) (Affiant "proffered no
20 persuasive basis for the district court to
21 conclude that further discovery would yield
22 proof.")

23 The state law claims asserted in
24 the McLaughlin Claim are founded on the
25 misuse of easements the class-action members'

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2 predecessors-in-interest granted MPC for the
3 construction of powerlines. These easements
4 state in their relevant part that MPC has the
5 right "to construct, operate and maintain
6 electric transmission lines and all telegraph
7 and telephone lines, towers, poles and
8 appliances necessary or convenient therewith.
9" Debtor's Memorandum in Support of
10 Motion, Exhibit H. In a similar case
11 litigated by MPC involving other easements
12 containing the same language, the Mississippi
13 Supreme Court interpreted the easement as
14 allowing the installation of fiber optic
15 cable, but also as limiting the use of the
16 cable to purposes "necessary or convenient"
17 to the provision of electricity. McDonald v.
18 Mississippi Power Company, 732 So.2d 893, 897
19 (Miss. 1999). The McDonald Court held that
20 material issues of fact existed as to whether
21 MPC's sublease of spare capacity to
22 telecommunications providers, such as the
23 Debtor, was "necessary or convenient" to the
24 provision of electricity, and therefore
25 reversed the trial court's grant of summary

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2 judgment on that issue and remanded. Id. A
3 Mississippi Chancery court in a separate, but
4 related action subsequently concluded that
5 such subleasing does not in fact violate the
6 terms of the easement, but that finding of
7 fact was not reviewed by the Mississippi
8 Supreme Court on appeal. See Mississippi
9 Power Company v. Hanson, 905 So.2d 547, 550
10 (Miss. Jan. 6, 2005). The record here before
11 the Court does show that the issue unresolved
12 by McDonald, that is, whether or not MPC's
13 subleasing of spare capacity is "necessary or
14 convenient" to the provision of electricity,
15 is a genuine issue of material fact, as
16 McLaughlin's Rule 56(f) affidavit is almost
17 solely focused on disputing the Debtor's
18 contention that such subleasing is
19 "necessary." Therefore, this issue is not a
20 proper subject for summary judgment.

21 However, this conclusion is not
22 dispositive of the summary judgment motion
23 before the Court. McLaughlin alleges that
24 the Debtor is liable for misuse of the
25 easement, a different issue. The first

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2 question this Court must address in resolving
3 the liability of the Debtor concerns what
4 action or actions could constitute violation
5 of the subject easements. This Court
6 recognizes that McDonald, upon which decision
7 McLaughlin's claims rest, found that the
8 potential violation of the easement related
9 to the granting of a sublease to another
10 party. Accordingly, this Court also
11 recognizes that no material facts are in
12 dispute that could lead to the conclusion
13 that the Debtor is liable for violating the
14 subject easements. Most obviously, MPC, not
15 the Debtor, is a party to the easement and
16 bound by its terms. The Debtor simply
17 entered into an otherwise valid lease
18 agreement with MPC unrelated to any
19 easements. Moreover, the Debtor did not and
20 could not grant a sublease, that is, commit
21 the action that might constitute misuse of
22 the easement under McDonald. MPC alone was
23 in the position to sublease any spare
24 capacity. McLaughlin argues, however, that
25 the Debtor could be liable as an assign of

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2 MPC, thus holding the same rights and bearing
3 the same responsibilities as the assignor.
4 It is true, as McDonald recognized, that an
5 assign may be liable for misuse of the
6 easement. However, no factual dispute has
7 been raised as to whether the Debtor is an
8 assignee of MPC rather than a subleasee.
9 McLaughlin offers a vague suggestion that the
10 Debtor is an assign and that discovery is
11 needed to resolve a factual dispute as to the
12 exact relationship between MPC and the
13 Debtor. This is, however, only a conclusory
14 allegation and thus insufficient to raise a
15 factual dispute and preclude summary
16 judgment. Moreover, as the affidavit offers
17 no basis upon which to believe that discovery
18 might possibly prove fruitful as to this
19 issue, McLaughlin has not satisfied the
20 requirements of Rule 56(f). Accordingly,
21 this Court finds as a matter of law that the
22 Debtor has not violated the easement and is
23 entitled to summary judgment on this claim.

24 The Court will now turn to
25 McLaughlin's trespass claims. Mississippi

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2 trespass law "allows a plaintiff damaged by a
3 physical invasion to recover upon a simple
4 showing that the defendant was responsible
5 for the physical invasion." Donald v. Amoco
6 Prod. Co., 735 So.2d 161, 169 (Miss.
7 1999)(quoting City of Jackson v. Filtrol
8 Corp., 624 F.2d 1384, 1389 (5th Cir. 1980).
9 McLaughlin's first trespass claim is founded
10 upon MPC's physical invasion of the
11 class-action members' property during the
12 installation of those fiber optic cables that
13 violate the easement. The second alleges
14 that the presence of those fiber optic cables
15 that violate the easement constitutes a
16 physical invasion of the class-action
17 members' property. To surmount McDonald's
18 legal conclusion that MPC had the authority
19 under the easement to install the fiber optic
20 cable, McLaughlin proposes to quantitatively
21 sever "necessary" from "unnecessary" cable.
22 This Court finds no need to accept
23 McLaughlin's invitation to engage in a minute
24 parsing of fiber optic cables to determine
25 which strands exceed the easement. Rather,

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2 as with the easement claim, these two
3 trespass claims fail to put on any material
4 facts into dispute that would suggest the
5 Debtor is "responsible" for either purported
6 invasion. McLaughlin offers only speculation
7 to dispute the Debtor's proof that these
8 fiber optic cables are owned by MPC, and thus
9 that MPC is liable for any physical invasion
10 due to the physical presence of the cables.
11 Similarly, McLaughlin's contention that the
12 Debtor could be liable under an agency theory
13 if the Debtor paid MPC to commit the trespass
14 is inapposite where it is supported only by
15 suppositions that the Debtor exercised that
16 degree of control. Moreover, McLaughlin's
17 Rule 56(f) affidavit fails to provide any
18 support for these speculations and
19 suppositions or any grounds for a reasonable
20 expectation that discovery would provide such
21 support.

22 McLaughlin's third trespass claim
23 concerns the Debtor's use of the fiber optic
24 cable. McLaughlin alleges that the "pulses
25 of light" that flow through a fiber optic

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2 cable during use constitute a physical
3 invasion of the class-action members'
4 property and therefore trespass. However,
5 "trespass requires an actual physical
6 invasion of the plaintiff's property." Leaf
7 River Forest Products, Inc. v. Simmons, 697
8 So.2d 1083, 1085 (Miss. 1996) (en banc)
9 (citing Blue v. Charles F. Hayes &
10 Associates, Inc., 215 So.2d 426 (Miss. 1968)).
11 Interpreting Mississippi case law, this Court
12 concludes as a matter of law that "pulses of
13 light" do not satisfy the requirement of a
14 "physical" invasion, and are, in the language
15 of other decisions, "intangible" physical
16 presences. See e.g., this Court's decisions
17 in In re Worldcom, Inc., 320 B.R. 772 (Bankr.
18 S.D.N.Y. 2005) and In re Worldcom, 2005 WL
19 1691048 (Bankr. S.D.N.Y. 2005). See also,
20 Cook v. Rockwell International Corp., 273
21 F.Supp.2d 1175, 1200-1201 (D.Colo. 2003);
22 Maddy v. Vulcan Materials Co., 737 F.Supp.
23 1528, 1540 (D.Kan. 1990); Borland v. Sanders
24 Lead Co., 369 So.2d 523, 531 (Ala. 1979). To
25 hold that these presences constitute trespass

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2 would be to render the "physical" requirement
3 meaningless. "Pulses of light" are nothing
4 more than energy radiation of specific
5 frequencies, like radio waves, x-rays, and
6 UHF transmissions, and considering such an
7 energy radiation "physical" for purposes of
8 trespass law would be inappropriate. This is
9 to say nothing of the additional problem of
10 determining what party owns or is responsible
11 for such pulses of light in the course of a
12 fiber optic communication.

13 Mississippi law does recognize,
14 however, that such "intangible" invasions can
15 constitute trespass when they result in
16 damage to the physical property. Where "the
17 property of the plaintiff was damaged by the
18 physical invasion of deleterious agents ...
19 the right of the plaintiff to recover damages
20 to the extent that it may be shown that they
21 proceed from a physical invasion by harmful
22 agents proceeding from the plant of the
23 defendant is clear." King v. Vicksburg Ry. &
24 Light Co., 42 So.204 (Miss. 1906). In King
25 the "deleterious agents" were noise, smoke,

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2 shoot, cinders, and vibration, which may be
3 analogized to "pulses of light." Even under
4 this theory, however, McLaughlin's claim
5 fails, for there is no factual dispute that
6 the "pulses of light" are harmless to the
7 class-action members' property.

8 Therefore, this Court concludes as
9 a matter of law that the Debtor is not liable
10 on any of McLaughlin's theories of trespass,
11 and is thus entitled to summary judgment on
12 those claims.

13 McLaughlin has alleged two
14 additional claims for unjust enrichment and
15 negligence. To sustain a claim for unjust
16 enrichment under Mississippi law, "the
17 plaintiff need only allege and show that the
18 defendant holds money which in equity and
19 good conscience belongs to the plaintiff."
20 Dorsey Mississippi Sales, Inc. v. Newell, 168
21 So.2d 645, 651 (Miss. 1964). See also, Koval
22 v. Koval, 576 So.2d 134, 136 (Miss. 1991)
23 (unjust enrichment is found where "the person
24 sought to be charged is in possession of
25 money or property which in good conscience

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2 and justice he should not retain but should
3 deliver to another"). As McLaughlin has not
4 provided evidence, or suggested the
5 production of such evidence in his Rule 56(f)
6 affidavit, that the Debtor engaged in any
7 illegal or inequitable conduct in relation to
8 McLaughlin, this Court finds as a matter of
9 law that the Debtor is not liable for unjust
10 enrichment and grants the Debtor summary
11 judgment on this claim.

12 As to McLaughlin's claim of
13 negligence, the complaint and supporting
14 documents fail to state a recognizable cause
15 of action for negligence. McLaughlin's Rule
16 56(f) affidavit similarly fails to state any
17 basis upon which discovery may proceed on
18 this issue. Therefore, this Court grants the
19 Debtor summary judgment on this claim.

20 Finally, McLaughlin has requested
21 an injunction against the Debtor to enjoin
22 further use of the fiber optic cable passing
23 across the class-action members' property.
24 Though it is true that injunctions may be
25 granted to halt or prevent misuse of an

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2 easement, this Court declines to do so here.

3 McLaughlin has no valid claim upon which to

4 rest such an injunction as a remedy.

5 Moreover, even if there was such a claim, the

6 remedial imposition of an injunction is

7 foreclosed by the eminent domain provisions

8 under Miss. Code Ann. Section 77-9-715.

9 Based upon the foregoing,

10 McLaughlin's Rule 56(f) request is denied,

11 the Debtor's Motion for Summary Judgment is

12 granted, and Claim No. 12223 is disallowed in

13 its entirety and no injunction is granted.

14 * * * *

15 The Debtor is to settle an Order

16 consistent with this Court's opinion.

17 Further, in the settling of the Order, the

18 Debtor should settle a copy of the transcript

19 of this Court's decision as read into the

20 record today.

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