

1 of 4 DOCUMENTS

MCI WORLDCOM v. KRAMER TREE SPECIALISTS

Case Number: 02 C 7150

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION**

2003 U.S. Dist. LEXIS 16925

August 15, 2003, Decided

August 18, 2003, Docketed

PRIOR HISTORY: MCI Worldcom Network Servs. v. Kramer Tree Specialists, 2003 U.S. Dist. LEXIS 10542 (N.D. Ill., June 19, 2003)

DISPOSITION: Defendant's motions for leave to file motion to strike certain exhibits and for leave to file response to plaintiff's statement of facts denied.

LexisNexis (TM) HEADNOTES- Core Concepts:

COUNSEL: [*1] For MCI WORLDCOM NETWORK SERVICES, INC., plaintiff: John Peirce Morrison, Robert Raymond Brown, Bell, Boyd & Lloyd, Chicago, IL. James J. Proszek, Kimberly Biedler, Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, OK.

For KRAMER TREE SPECIALISTS INCORPORATED, defendant: Eric L. Samore, Kevin Dale Tessier, Kara M Craig, Ryan Arthur Mahoney, O'Hagan, Smith & Amundsen, L.L.C., Chicago, IL.

JUDGES: SUZANNE B. CONLON.

OPINIONBY: SUZANNE B. CONLON

OPINION:**ORDER**

In this diversity action, MCI WorldCom Network Services, Inc. ("MCI") sues Kramer Tree Specialists Incorporated ("Kramer") for trespass and negligence in connection with Kramer's severance of an MCI fiber optic telecommunications cable on September 15, 2001. Kramer does not contest liability. On June 19, 2003, the court denied Kramer's summary judgment motion on loss of use damages. MCI now submits evidence supporting its claim for damages. In response, Kramer moves for leave to file a motion to strike several MCI exhibits as well as for leave to file a response to MCI's

statement of facts filed during briefing on Kramer's summary judgment motion.

The background of this case is discussed in the court's June 19, 2003 order denying [*2] Kramer's summary judgment motion. MCI seeks \$13,212.00 in repair costs and \$307,847.35 for loss of use of its long distance network systems. Kramer does not contest MCI's repair costs. Rather, Kramer takes issue with MCI's calculation of its loss of use damages.

Kramer first argues MCI cannot recover for loss of DS-3 capacity because the ancillary equipment providing the DS-3 capacity was not damaged. The court considered and rejected this argument in ruling on Kramer's summary judgment motion. Indeed, Kramer once again fails to explain how MCI could use the DS-3s generated by the ancillary equipment without a fully functioning cable. Therefore, MCI may recover for the DS-3 loss caused by the severed cable.

However, MCI seeks to recover damages for the full DS-3 capacity of the severed cable, rather than just the active DS-3 circuits carried by the cable at the time of severance. *Compare* Motion at 7 (5,760 DS-3 capacity) with Motion at Ex. 7 (1,896 active DS-3s). MCI fails to offer any authority supporting its position. To the contrary, the measure of damages is the reasonable rental value of similar property for the period of the deprivation. *See Nisbet v. Yelnick* 124 Ill. App. 3d 466, 471, 464 N.E.2d 781, 784, 79 Ill. Dec. 877 (1st Dist. 1984) [*3] (damages for loss of use of basement property based on percentage of reasonable rental value of comparable lodging). Indeed,

It is hornbook law that an award of damages aims first and foremost at compensation. The goal is to place the injured party as nearly as reasonably possible in the same position that he would have occupied had the injury not been inflicted. The measure of damages is peculiarly a question for the

trier of fact, based on a proper consideration of all relevant facts. So-called 'rules' as to the proper measure of damages in a particular type of case are guides only, and should not be applied in an arbitrary, formulaic, or inflexible manner.

Id., quoting *Roark v. Musgrave*, 411 Ill. App. 3d 1008, 1011-12, 355 N.E.2d 91, 94 (5th Dist. 1976). At the time of severance, MCI only needed capacity to cover the active DS-3 circuits on the cable. Indeed, MCI has not offered any evidence that it required access to any additional DS-3 capacity on the severed cable during the outage. Accordingly, MCI may recover damages for the loss of the 1,896 active circuits on the cable at the time of severance. See *International Harvester Credit Corp. v. Helland*, 151 Ill. App. 3d 848, 859, 503 N.E.2d 548, 555, 104 Ill. Dec. 833 (2d Dist. 1986) [*4] (plaintiff is not entitled to loss of use damages for property not used or intended to be used at the time of the deprivation).

MCI's ability to reroute many of the active circuits to its own equipment does not change this result. In denying Kramer's motion for summary judgment, the court noted that Illinois courts routinely allow loss of use damages even when the plaintiff fails to rent substitute chattel. See June 19, 2003 order and cases cited therein. MCI should not be penalized for having a separate infrastructure in place to respond to emergency situations. Therefore, MCI was not required to seek substitute DS-3 capacity to recover loss of use damages.

Kramer next takes issue with the cost of replacement DS-3 capacity. To calculate its damages, MCI uses published rates from Ameritech for comparable DS-3 capacity. See *Palmer v. Connecticut Railway & Lighting Co.*, 311 U.S. 544, 561, 85 L. Ed. 336, 61 S. Ct. 379 (1941) ("certainty as to the amount [of damages] goes no further than to require a basis for a reasoned conclusion"). In response, Kramer fails to introduce any evidence that Ameritech's published rates are inapplicable or unreasonable. Kramer's attempt [*5] to demonstrate that MCI previously paid substantially less to lease 60 fibers from Commonwealth Edison must be rejected. The record does not reveal whether the Commonwealth Edison fibers were comparable in all respects to the severed cable, including DS-3 capacity. Based on this record, MCI's damages will be calculated using Ameritech's published rates.

Finally, Kramer claims that MCI overstated the time needed to repair the severed cable by .85 of an hour because 6 of the 8 systems that could not be rerouted, or were "down hard," were functional within 4 hours. Neither party explains why the court should use the arbitrary times of 4 hours or 4.85 hours to calculate MCI's damages when actual times are available for the systems that were down hard. Moreover, MCI's use of 4.85 hours as the restoration time for the rerouted DS-3s is reasonable given the fact that MCI completed splicing the cable at that time. MCI did not regain complete use of the cable until approximately 6 hours later. Therefore, MCI's loss of use damages are calculated as follows:

System	DS-3 Capacity	Hours Down	Cost
1.8 Gbs-A	36	3.48	\$ 1,380.55
1.8 Gbs-B	36	3.10	\$ 1,229.80
1.8 Gbs-C	36	3.48	\$ 1,380.55
1.8 Gbs-D	36	3.48	\$ 1,380.55
1.8 Gbs-E	36	4.85	\$ 1,924.05
1.8 Gbs-F	36	3.48	\$ 1,380.55
1.8 Gbs-G	36	4.85	\$ 1,924.05
OC-192 Optera	192	4.00	\$ 8,463.16
Other active DC-3s	1,452	4.85	\$ 77,603.19
		Total	\$ 96,666.45

[*6]

Kramer's motions for leave to file a motion to strike certain MCI exhibits and for leave to file its response to MCI's statement of facts filed during briefing on its

summary judgment motion are denied. The court did not rely on the cited exhibits or disputed facts in calculating MCI's damages.

SUZANNE B. CONLON

08-15-03

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing

before the Court. The issues have been tried or heard and a decision has been rendered.

Date: 8/15/2003