

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

MERCHANTWIRED, LLC; )  
MACERICH MERCHANTWIRED, )  
LLC; ROUSE-MERCHANTWIRED, )  
INC.; SIMONWIRED INVESTMENT, )  
LLC; TRG TELECOM LLC; URBAN )  
MERCHANTWIRED LLC; and )  
WESTFIELD MERCHANTWIRED, )  
INC., )

Plaintiffs, )

v. )

C.A. No. 02C-08-244-FSS

TRANSACTION NETWORK )  
SERVICES, INC., )

Defendant. )

Submitted: May 7, 2003  
Decided: July 16, 2003

**ORDER**

Upon Defendant's Motion to Dismiss – **GRANTED** as to Count I With Leave to Amend, and **DENIED** as to Counts II and III

Arthur G. Connolly, Jr., Esquire, Connolly Bove Lodge & Hut, LP, 1220 Market Street, P.O. Box 2207, Wilmington, Delaware 19899. Attorney for Plaintiffs.

Philip A. Rovner, Esquire, Potter Anderson & Corroon LP, Hercules Plaza, P.O. Box 951, Wilmington, Delaware 19899. Attorney for Defendant.

**SILVERMAN, J.**

This is a contract dispute between two corporate joint venturers. Plaintiff, MerchantWired LLC, argues that Defendant, TransactionNetwork Services, Inc., breached their contract when TNS did not purchase MerchantWired. TNS argues that MerchantWired's own complaint reveals that the deal fell through because MerchantWired failed to perform several, important conditions precedent. MerchantWired offers reasons why it did not meet the contract's terms. Most importantly, MerchantWired alleges that TNS gave it an extension, but TNS backed out before MerchantWired could perform. The court must read the complaint, including the contract, and decide whether MerchantWired potentially has a case.

## I.

MerchantWired was created in 1999 through a collaboration between six of the largest retail property owners in the United States in order to provide high-speed network services to shopping mall retailers. By late 2001, MerchantWired was teetering on the brink, looking for its financial salvation. Along came TNS, a larger data telecommunication company providing similar broadband services to a wider market. In November 2001, representatives from both companies began discussing a potential "transaction."

MerchantWired's complaint alleges that on April 15, 2002, MerchantWired and TNS signed a contract. The contract provided that TNS would acquire MerchantWired at an agreed upon price if MerchantWired met twenty-four preconditions by:

the later of (I) April 19, 2002; and (ii) a business day mutually agreed upon by the parties after all conditions to closing set forth in this Agreement have been satisfied; provided, however, that such date shall occur on or before the outside termination date [on or before May 31, 2002.]

MerchantWired does not allege that it fulfilled all twenty-four preconditions.<sup>1</sup> Instead, MerchantWired explains here that TNS gave MerchantWired an extension, or it waived the deadline. Before the extension or waiver expired, however, TNS backed out of the deal, leaving MerchantWired stranded.

## II.

In its complaint, MerchantWired comes at TNS three ways: First, MerchantWired alleges that TNS breached their contract. Second, MerchantWired alternatively alleges that if the contract fails, then MerchantWired has a promissory estoppel claim. Finally, in its third count, MerchantWired alleges fraud against TNS.

MerchantWired filed suit on August 26, 2002. Instead of filing an answer, TNS moved to dismiss the complaint in its entirety. TNS argues that the complaint, itself, reveals that MerchantWired failed to meet all the conditions precedent, and some of MerchantWired's failures obviously are material. As for the alleged extension or waiver, TNS concedes nothing. But it argues that even if there were an extension, it is apparent that the extension was a nullity because it was granted after MerchantWired had already missed the deadline. Thus, any purported extension was ineffective. Along the same line, TNS argues that MerchantWired fails

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<sup>1</sup> See Superior Court Civil Rule 9(c).

to allege any consideration for an extension.

TNS challenges MerchantWired's promissory estoppel claim by pointing out that MerchantWired's first count alleges a written contract. TNS contends that, in the face of a written contract, MerchantWired's promissory estoppel claim is mutually exclusive.

Finally, as to MerchantWired's fraud claim, TNS argues that claim is co-extensive with, and subsumed in, MerchantWired's breach of contract claim. TNS emphasizes that MerchantWired makes no fraud allegations, beyond contending that TNS failed to live up to its bargain.

### III.

It appears from MerchantWired's complaint that it did not meet material conditions precedent before the contract's deadline.<sup>2</sup> For example, MerchantWired admits it did not provide final Network Service Agreements to TNS, nor did it provide information related to these agreements until June 1, 2002. To the extent that the complaint's Count I attempts to avoid the deadline by alleging an extension, the court is less concerned about the purported extension's timing. But the complaint barley alleges an extension: "TNS waived the outside termination date by representing to plaintiffs that a closing after May 31, 2002 would be acceptable."

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<sup>2</sup> See *Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1198 (Del. 1992) (affirming summary judgment for plaintiff on its declaratory judgment claim where defendant failed to satisfy all conditions precedent in insurance contract).

And the complaint does not allege at all that the extension was supported by consideration.<sup>3</sup> The complaint's vagueness concerning the who, what, where and when surrounding the alleged extension will have to be addressed before this litigation continues. Meanwhile, the complaint's failure to allege performance of all conditions precedent, or an extension supported by consideration, is fatal.

#### IV.

TNS's challenge to the promissory estoppel claim, Count II, seems to ignore the alternative nature of MerchantWired's second count. At this point, TNS has not answered the complaint. Accordingly, it remains to be seen whether TNS admits the contract. So far, TNS seems primed to deny the contract. So, Count II potentially makes sense as a pleading in the alternative.

Preliminarily, the court tends to agree that if MerchantWired establishes TNS breached the contract during the alleged extension, MerchantWired's promissory estoppel claim will be inconsistent or duplicative.<sup>4</sup> Nevertheless, for now the promissory estoppel survives.

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<sup>3</sup> *Continental Insurance Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1232-1233 (Del. Ch. 2000) (finding no oral modification because of lack of consideration.)

<sup>4</sup> *Genencor Int'l., Inc. v. Novo Nordisk A/S*, 766 A.2d 8,12 (Del. 2000); *In re U.S. West, Inc. Securities Litig.*, 201 F. Supp 2d 302, 308 (D. Del 2002); *Weiss v. Northwest Broadcasting, Inc.*, 140 F. Supp. 2d 336, 345 (D. Del 2001).

## V.

And finally, the same reasoning that applies to Count II also applies to TNS's attack on MerchantWired's fraud claim. If TNS admits the contract or MerchantWired establishes it, MerchantWired's fraud claim will be subsumed in its breach of contract claim.<sup>5</sup> As TNS observes, the fraud claim alleges nothing more than TNS's breach of contract. MerchantWired alleges no additional fraudulent acts. Thus, if MerchantWired amends its complaint to properly allege an extension supported by consideration and if MerchantWired proves TNS breached during the extension, then Count III will be subject to a dispositive motion.

## VI.

For the foregoing reasons, Defendant's Motion To Dismiss is **GRANTED** with leave to amend as to Count I, and **DENIED** as to Counts II and III. If MerchantWired, consistent with Superior Court Civil Rules 9(c) and 11, files an amended complaint alleging that MerchantWired performed all conditions precedent, or TNS granted MerchantWired an extension supported by specified consideration, Count I will go forward. Otherwise, this dismissal of Count I shall be with prejudice.

If MerchantWired files an amended complaint and TNS answers it, admitting the contract and the extension, TNS has leave to file a motion for summary judgment on Counts II and III. But the court anticipates the case will go forward,

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<sup>5</sup> *Christiana Marine Serv. Corp. v. Texaco Fuel and Marine Mktg., Inc.*, 2002 WL 1335360, at \*5, (Del. Super. Ct.).

centering on whether there was an extension supported by consideration and if so, whether TNS breached the extended contract.

For now, it is difficult to see how MerchantWired will establish that with an extension it would have met the twenty-four preconditions. This also leaves open litigation over MerchantWired's alleged damages. It is difficult to see how MerchantWired's potential damage claim is more than speculative. Nevertheless, MerchantWired should have the opportunity to prove that TNS gave MerchantWired a valid extension and then pulled the rug out from under it, which caused a quantifiable loss. Or alternatively, that TNS is liable under promissory estoppel or fraud.

**IT IS SO ORDERED.**

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Judge

oc: Prothonotary (Civil Division)  
pc: Barry S. Simon, Esquire  
David C. Rieveschl, Esquire  
Michael K. Stern, Esquire,  
Kenneth A. Gallo, Esquire,  
Leiv H. Blad, Jr., Esquire  
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