

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

Plaintiffs,

v.

NEUROSCIENCE, INC. and
PHARMASAN LABS, INC.,

Defendants.

OPINION AND ORDER

10-cv-37-bbc

For a short time the parties in this case were involved in a joint business venture involving medical testing of patient specimens. Plaintiff Aristo Vojdani and his company plaintiff ImmunoSciences Lab, Inc. provided the materials for the tests and defendants NeuroScience, Inc. and Pharmasan Labs, Inc. ran the tests and sent the results to customers. After the relationship fell apart, plaintiffs brought this diversity lawsuit, asserting 10 claims under various theories of state contract and tort law; defendants filed counterclaims for fraud and breach of contract. I dismissed some of the claims on summary judgment, dkt. #105, and the rest were tried before a jury.

In a 19-question special verdict form on liability, the jury found the following: (a)

defendants did not breach their agreement to pay plaintiffs the amount owed on invoices for laboratory-developed assays; (b) defendants breached their agreement to pay plaintiffs “50% of the revenue” for the Natural Killer Cells test; (c) plaintiffs did not breach their agreement to provide quality materials to defendants; (d) defendants continued using plaintiffs’ customer lists after the relationship ended, in violation of trade secret law and a confidentiality agreement; (e) defendants continued using three of defendants’ testing methods (T&B Cell Function, Stimulated Cytokines and Natural Killer Cell) after the relationship ended, in violation of a confidentiality agreement. In the damages phase, the jury awarded plaintiffs \$136,000 for the unauthorized use of customer lists (\$36,000 in compensatory damages and \$100,000 in punitive damages), \$17,000 for sales before June 5, 2009 of the Natural Killer Cells test and \$1,165,230 for defendants’ use after June 5, 2009 of the testing methods for T&B Cell Function, Stimulated Cytokines and Natural Killer Cell. (I later granted defendants’ motion for judgment as a matter of law as to plaintiff’s claims related to unauthorized use of the customer lists.)

Three motions are now before the court: (1) defendants’ renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b), or, in the alternative, for a new trial under Fed. R. Civ. P. 59; (2) plaintiffs’ motion for a “partial new trial”; and (3) plaintiffs’ motion to amend the judgment to add prejudgment interest and postjudgment interest.

I am denying defendants’ renewed motion for judgment as a matter of law or a new

trial. Defendants either waived their arguments by failing to raise them in a motion under Fed. R. Civ. P. 50(a) or by failing to cite any legal authority in support of them. I am granting plaintiffs' motion for a new trial as to one of their breach of contract claims. Unfortunately, the jury's answer to Question No. 2 on the special verdict form cannot be squared with the undisputed evidence. Finally, I am granting in part and denying in part plaintiffs' motion to amend the judgment to include prejudgment and postjudgment interest.

OPINION

I. DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

UNDER RULE 50(b)

A. Confidentiality Agreement

1. Differences between plaintiffs' testing methods and those used by defendants after June 5, 2009

Defendants devote many pages of their briefs to arguing that plaintiffs failed to prove that defendants used plaintiffs' "confidential recipes" after June 5, 2009. Although it is not always easy to follow their argument, the gist of it seems to be that plaintiffs' claim for breach of the confidentiality agreement must fail as a matter of law if there are *any* differences between the methods plaintiffs gave defendants and the methods defendants used after June 5, 2009.

Defendants do not point to any language in the contract, the verdict form, the jury instructions or case law that supports their argument. In any event, I agree with plaintiffs that defendants waived the argument by failing to raise it at the close of trial in the motion for a judgment as a matter of law under Rule 50(a). “Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. Thus, if a party raises a new argument in its Rule 50(b) motion that was not presented in the Rule 50(a) motion, the non-moving party can properly object.” Wallace v. McGlothan, 606 F.3d 410, 418-19 (7th Cir. 2010).

Curiously, defendants cite a statement from *plaintiffs’* counsel as evidence that defendants preserved the argument in their Rule 50(a) motion. Even if I assumed that statements of opposing counsel were relevant, they do not help defendants because counsel for plaintiffs said only that “there’s no dispute in this case that the defendants continue to use the most recent standard operating procedures, the ones that are at issue here with respect to containing confidential information.” Tr. Trans., Vol. 5P, dkt. #241, at 36. Needless to say, a statement that “there’s no dispute” over a particular issue is not evidence that defendants in fact did dispute the issue. The truth is that defendants did not think to make the argument until the jury asked a question about the issue. Dkt. #232. At that point it was too late. The issue is waived.

2. Exceptions to the confidentiality agreement

Defendants include a brief argument that “there is insufficient evidence to support the conclusion that information used by NeuroScience subsequent to June 5, 2009 did not fall into any of the exceptions to the Confidentiality Agreement as a matter of law.” Dfts.’ Br., dkt. #258, at 16. This argument ignores both the agreement and the proper allocation of the burden of proof.

The language of the confidentiality agreement is broad. It covers “information and materials relating to [plaintiffs’] business model, laboratory services for the purpose of health care delivery and patient management.” Defendants do not argue that plaintiffs’ testing methods are outside the scope of these categories.

The agreement includes various exceptions, including information that is “public.” Defendants argue that plaintiffs have failed to show that their testing methods are not public, but I concluded in the summary judgment opinion that *defendants* have the burden of proof on this issue because they are relying on an exception to the contract. Dkt. #105, at 20 (citing State v. Big John, 146 Wis. 2d 741, 756, 432 N.W.2d 576, 583 (1988), and L. L. Richards Machinery Co. v. McNamara Motor Express, Inc., 7 Wis. 2d 613, 616, 97 N.W.2d 396, 398 (1959)). More important to defendants’ motion, the special verdict question related to this issue placed the burden on defendants. Dkt. #233, at 9-10, Question No. 17. Defendants did not challenge that question at trial and they do not

challenge it now. This means that any argument on this issue by defendants that begins, “plaintiffs failed to prove that . . .” is doomed to fail. To prevail on this issue, defendants would have to show affirmatively that every aspect of the testing methods at issue was “public” within the meaning of the confidentiality agreement. Defendants do not attempt to do this, so the argument is waived.

3. Damages for breach of confidentiality agreement

The jury awarded plaintiffs damages for defendants’ continued use of three of plaintiffs’ testing methods, in violation of the parties’ confidentiality agreement. Defendants argue that plaintiffs failed to prove any damages related to that agreement.

At trial, plaintiffs’ measure of damages for defendants’ continued use of the confidential information was 50% of the sales defendants made on the tests using that information. Defendants point out that the agreement to pay plaintiffs 50% of defendants’ sales was separate from the confidentiality agreement and was no longer in effect at the time relevant to plaintiffs’ claim for breach of the confidentiality agreement. Further, defendants say, because plaintiffs were not running a working laboratory in 2009 and 2010, they cannot show that they were harmed during that time by another laboratory’s use of their confidential information.

Defendants are correct that the two agreements are separate, but this does not

necessarily mean that the parties' past agreement regarding the appropriate payment for use of plaintiffs' confidential information has no bearing on valuing defendants' continued use of that information in violation of the confidentiality agreement. Defendants' position seems to be that a party may use another's confidential information with impunity unless the owner of that information and the breaching party are in direct competition. That would not be a fair result.

One fair way to measure damages in a case like this could be to determine the value of the information defendants took. That is, if defendants were required to pay for the information they used, what would be a reasonable price for it? A reasonable royalty rate is one way to determine damages in other areas of intellectual property law. Wis. Stat. § 134.90(4) (trade secret misappropriation); ResQNet.com, Inc. v. Lansa, Inc., 594 F.3d 860, 869 (Fed. Cir. 2010) (patent infringement). Further, in determining a reasonable royalty, a primary factor is the rate awarded for comparable licenses. ResQNet.com, 594 F.3d at 869.

In this case, it is not necessary to look for "comparable" licenses because defendants had a "license" with plaintiffs. Obviously, the amount that defendants had been paying plaintiffs in the past for access to their confidential information is strong evidence of what it was worth to defendants. Defendants do not point to any circumstances that would have diminished the value of the confidential information after they stopped paying plaintiffs to use it. To the extent that the 50% rate included materials or services plaintiffs provided

beyond the confidential information, defendants do not develop an argument on this point.

“[A] reasonable royalty is an appropriate measure of damages for the breach of a non-disclosure contract.” Veritas Operating Corp. v. Microsoft Corp., 2008 WL 7404617, *4 (W.D. Wash. 2008). See also Snepp v. United States, 444 U.S. 507, 511-15 (per curiam) (constructive trust on profits from book was an appropriate remedy for breach of contract requiring author to submit his material for clearance by Central Intelligence Agency before publication, where government's harm from breach was unquantifiable, but author's unjust gains were result of breach); Celeritas Technologies, Ltd. v. Rockwell International Corp., 150 F.3d 1354, 1360 (Fed. Cir.1998) (“Celeritas's damages may include that which Rockwell might have paid for use of the technology at the time of the breach in 1994 if it had chosen not to breach the contract.”); Ajaxo Inc. v. E*Trade Group, Inc., 135 Cal. App. 4th 21, 37 Cal. Rptr. 3d 221, 247-49 (2005) (disgorgement of improperly obtained profits can be appropriate remedy for breach of contract protecting confidential information).

Although defendants devote many pages of their brief to opposing the jury's damages award for the breach of the confidentiality agreement, defendants do not cite a single case suggesting that the jury awarded damages to plaintiffs under a legally impermissible theory. Accordingly, this is another argument that defendants have waived for failing to cite relevant authority. United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir.1991) ("undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived"). Accord

Carmichael v. Village of Palatine, Illinois, 605 F.3d 451, 460-61 (7th Cir. 2010); Fabriko Acquisition Corporation v. Prokos, 536 F.3d 605, 609 (7th Cir. 2008).

In the alternative, defendants raise a narrower argument that plaintiffs were not entitled to damages for anticipated breaches that will occur until the expiration of the confidentiality agreement in March 2012. (The special verdict form did not separate past and future damages, but the parties seem to agree that the jury's award includes future damages.) In the context of their discussion of this issue, defendants repeat a number of the same arguments I have rejected already. The only new argument is that plaintiffs failed to prove that defendants will continue to use plaintiffs' confidential information in the future.

Again, defendants cite no authority to support a view that it would be unreasonable to infer from defendants' past practices that future breaches are likely, at least in the absence of evidence to the contrary. Defendants cite testimony that they are "constantly updating and reviewing" their laboratory procedures, tr. trans., vol. 5A, dkt. #244, at 95, but they cite no specific evidence that they will stop using plaintiffs' confidential information. Accordingly, I am denying defendants' motion for judgment as a matter of law in all respects.

B. Agreement to Pay Plaintiffs' 50% of Revenue for Natural Killer Test

Defendants devote multiple sections in their briefs to the question whether plaintiff adduced sufficient evidence to support the jury's findings that defendants owe plaintiffs

\$17,000 for failing to pay plaintiffs “50% of the revenue” for sales of the Natural Killer Cells test made before June 5, 2009. Although defendants raise many arguments, they can be distilled to two: (1) defendants never used a test identical to plaintiffs’ test after December 2007; and (2) the amount awarded by the jury does not take into account defendants’ expenses related to running the tests, even though plaintiffs agreed that defendants could deduct their expenses from the 50%.

I need not consider the first argument because it is simply a reiteration of defendants’ waived argument that plaintiffs failed to show that the testing methods used by defendants were identical to the tests used by plaintiffs. With respect to the second argument, defendants assume that it was plaintiffs’ burden to prove the amount of costs, but they cite no relevant authority for this argument. “Generally, it is the plaintiff’s burden to establish damages which result from the defendant’s tortious acts or breach of contract. However, it is the defendant’s burden to establish matters asserted in mitigation or reduction of the amount of plaintiff’s damages.” Wingad v. John Deere & Co., 187 Wis. 2d 441, 452, 523 N.W.2d 274, 278 (Ct. App. 1994). Because defendants are asking for a reduction in plaintiff’s damages, it makes sense to place the burden of proof on defendants, particularly because defendants are in a much better position to know what their own costs were. Metzl v. Leininger, 57 F.3d 618, 622 (7th Cir. 1995) (“Economy in litigation also requires that burdens of presenting evidence be assigned to the parties that can produce the necessary

evidence at least cost.”). See also Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 96 (2000) (“where fairness so requires, burden of proof of a particular fact may be assigned to ‘party who presumably has peculiar means of knowledge’ of the fact”) (quoting 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. ed.1981)).

The only specific evidence of expenses that defendants point to is testimony by Mieke Kellermann that defendants spent “about \$55,000” on a “gamma counter” at “the end of 2008.” Tr. Trans., Vol. 7P, dkt. #243, at 48. Although Kellermann said that defendants bought the equipment to run the Natural Killer Cell test, the jury was not required to find that defendants were entitled to deduct that expense. As defendants acknowledge, the written agreement said nothing about defendants’ expenses. Although defendants cite testimony of plaintiff Vojdani and his wife in which they admitted that they had agreed orally to deduct certain expenses from the amount owed, the only expenses they identified were kits and reagents. Tr. Trans., Vol. 3P, dkt. #238, at 54; Tr. Trans. Vol. 2A, dkt. #233, at 108-109. Defendants cite no evidence that the agreement permitted defendants to deduct more general expenses, such as equipment. Accordingly, defendants have failed to show that they are entitled to judgment as a matter of law.

C. Motion for a New Trial

A court may grant a new trial under Rule 59 if the verdict is against the clear weight of the evidence or if the trial was unfair to the moving party. David v. Caterpillar, 324 F.3d 851, 863 (7th Cir. 2003). In their motion for a new trial, defendants repeat the same arguments from their motion for judgment as a matter of law, so I need not consider these again. Williams v. Liefer, 491 F.3d 710, 716 (7th Cir. 2007). The one exception is defendants' argument that plaintiffs failed to prove that defendants used plaintiffs' "confidential recipes" after June 5, 2009. I rejected this argument in the context of defendants' Rule 50(b) motion because defendants failed to raise it in their Rule 50(a) motion, but Rule 59 does not include the same requirement. 9A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2539 (3d ed. 2010) ("[T]he evidence may be wholly insufficient to support the verdict but the trial court cannot order judgment as a matter of law under Rule 50(b) if the party did not properly renew the motion after the unfavorable verdict was returned. In those circumstances the district court, on proper motion, has the authority to order a new trial.") (footnotes omitted).

Regardless, defendants do not develop any argument that the confidentiality agreement protected plaintiffs' testing methods only if the entire "recipe" was confidential. Defendants argue repeatedly that plaintiffs characterized their claim as involving a "secret recipe," but defendants fail to explain the legal relevance of this argument. For the purpose of a motion under Rule 50 or Rule 59, it does not matter what buzz words plaintiffs' counsel

used during closing arguments. The question is whether the evidence adduced at trial would allow a reasonable jury to conclude that defendants breached their agreement. Because defendants ignore that question, they have waived another argument.

II. PLAINTIFFS' MOTION FOR A NEW TRIAL

The special verdict form included two questions relevant to plaintiffs' motion for a new trial. Question No. 1 asked, "Has plaintiff ImmunoSciences Lab, Inc. proven by a preponderance of the evidence that defendant NeuroScience, Inc. agreed in the June 21, 2007 letter of intent (first paragraph under the heading "Pricing") to pay plaintiff the invoiced amount for each LDA (laboratory-developed assay) plate sent to defendant NeuroScience whether the plate was sold to a client or not?" The jury answered "yes." Question No. 2 asked, "Has plaintiff ImmunoSciences proven by a preponderance of the evidence that defendant NeuroScience did not pay plaintiff the full amount of the invoices for the LDA plates plaintiff supplied?" The jury answered "no."

Plaintiffs argue that all witnesses who testified on this issue, including Mieke Kellermann (the chief financial officer for defendant NeuroScience and the president of defendant Pharmasan), agreed that defendants did *not* pay "the full amount of invoices," so the jury's answer to this question was against the great weight of the evidence. In response, defendants argue that evidence at trial would allow a reasonable jury to infer that the parties

had agreed to modify their written agreement such that defendants “had fulfilled their payment obligation.” Dfts.’ Br., dkt. #262, at 7.

The problem with defendants’ argument is that Question No. 2 does not address what the parties’ agreement was; that is addressed by Question No. 1. (Defendants do not challenge the jury’s answer to Question No. 1 as legally insufficient.) Question No. 2 simply asks whether defendants paid the invoices. Tellingly, defendants never address the language of the special verdict question in their briefs. Instead, they paraphrase it in various ways as asking whether defendants paid what was “owed” or whether defendants made “full payment.” However, the question relates specifically to the invoices. Defendants point to no evidence that they paid these invoices.

Distilled, defendants’ argument is that the verdict form should have included a different or additional question regarding whether the parties modified their original written agreement so that the invoices were not controlling. However, defendants cite no portion of the record in which they requested a question like that. Plaintiffs deny that the record includes evidence supporting a finding that the agreement was modified, but even if a reasonable jury *could* have made such a finding, the bottom line is that the jury was not asked to answer that question and I cannot speculate now on what its answer might have been.

Defendants cite City of Los Angeles v. Heller, 475 U.S. 796, 806 (1986), for the proposition that, “when faced with an apparently inconsistent verdict, a court has a duty to

attempt to read the verdict in a manner that will resolve inconsistencies.” To the extent there is a problem with this verdict, it is not that the jury’s answers are inconsistent, but that they may be incomplete. Defendants seem to be asking this court to assume that the jury interpreted the second question to incorporate the principle of modification, but defendants identify no language in the question that would support drawing such an inference.

It is unfortunate that the parties did not request special verdict questions that more accurately described the dispute as they saw it. In particular, if defendants believed that the parties had modified their written agreement and that the invoices did not reflect that modification, they should have asked to include a question addressing that issue. Further, if plaintiffs believed that the undisputed evidence showed that defendants had not paid the full amount of the invoices, they should have sought to remove that question from the verdict. If the parties had taken either action, the current problem could have been avoided. Because of the parties’ failure to understand the relevant issues of their own case, it will be necessary to hold a new trial and require another group of citizens to devote their time and energy to resolving the same dispute a second time.

III. PLAINTIFFS’ MOTION TO AMEND THE JUDGMENT TO INCLUDE INTEREST

Plaintiffs seek prejudgment interest at a rate of 5% under Wis. Stat. § 138.04 and postjudgment interest at a rate of .3% under 28 U.S.C. § 1961. Defendants do not object

to an award of postjudgment interest. With respect to prejudgment interest, they agree that an award is appropriate as to plaintiffs' claim related to sales of the Natural Killer Cells test before June 5, 2009. However, they object to an assessment of prejudgment interest for damages related to breach of the confidentiality agreement.

The basic rule in Wisconsin is that prejudgment interest can be awarded only on amounts that are either liquidated prior to judicial determination or are readily ascertainable because there is a reasonably certain standard of measurement. First Wisconsin Trust Co. v. L. Wiemann Co., 93 Wis. 2d 258, 276, 286 N.W.2d 360 (1980). "The most frequently stated rationale for the rule is that if the amount of damages is either liquidated or determinable by reference to some objective standard, the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages." Johnson v. Pearson Agri-Systems, Inc., 119 Wis. 2d 766, 771, 350 N.W.2d 127 (1984).

I agree with defendants that plaintiffs have not met the relevant standard in this case. The confidentiality agreement does not include a liquidated damages provision and the measurement of damages for a breach is not obvious. As defendants point out, the agreement itself includes language acknowledging that "the full amount of damages which would result from such breach are not readily susceptible to being measured in monetary terms." Although I am upholding the jury's award of damages for defendants' breach of the confidentiality because defendants have failed to show that the award was contrary to

Wisconsin law, this does not mean that plaintiffs' damages were readily ascertainable in advance.

ORDER

IT IS ORDERED that

1. The motion for judgment as a matter of law filed by defendants NeuroScience, Inc. and Pharmasan Labs, Inc., dkt. #257, is DENIED.

2. Plaintiffs Aristo Vojdani's and ImmunoSciences Labs, Inc.'s motion for a new trial on its breach of contract claim related to laboratory-developed assays, dkt. #254, is GRANTED.

3. Plaintiffs' motion to amend the judgment to include prejudgment interest and postjudgment interest is GRANTED with respect to postjudgment interest and with respect to prejudgment interest on the \$17,000 awarded for sales before June 5, 2009. The motion is DENIED in all other respects. The court will enter a new judgment once plaintiffs' remaining breach of contract claim is resolved.

4. The clerk of court is directed to set a scheduling conference before the magistrate judge.

Entered this 18th day of May, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge