IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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BOWEN MEDICAL COMPANY, LTD.,
A/K/A MASSACHUSETTS MEDICAL
COMPANY, LTD.,

OPINION AND ORDER

Plaintiff,

02-C-0170-C

v.

NICOLET BIOMEDICAL INC.,

Defendant.

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Plaintiff Bowen Medical Company, Ltd. brought this suit against defendant Nicolet Biomedical Inc. (and a number of other defendants whom it never served), contending that defendant had breached the parties' contract, breached its fiduciary duty to plaintiff, committed fraud, engaged in negligent misrepresentation and interfered with plaintiff's prospective business advantage as well as with the contract. Defendant moved for summary judgment; the motion was briefed by both parties and decided on November 14, 2002, with respect to all of plaintiff's claims of liability. A ruling was reserved on the amount of interest plaintiff owed defendant under a counterclaim for $266,756.87 for service rendered by defendant and for equipment defendant had delivered to plaintiff in accordance with their

agreement.

In deciding the motion, I found that plaintiff had failed to address any breach of contract arguments, such as whether the contract permitted defendant to terminate its contract with plaintiff if plaintiff did not have staffing adequate to meet its responsibilities under the contract or for any other reason. Instead, plaintiff argued breach under the Wisconsin Fair Dealership Act, contending that the act covered the parties' agreement. This argument was of no help to plaintiff because it is not an entity situated in Wisconsin and therefore, is not covered by the act. I found that plaintiff had no viable claim for breach of a fiduciary relationship because the parties did not have a relationship that gave rise to a fiduciary duty and that plaintiff could not pursue its tort claims against defendant because Wisconsin law bars tort claims that seek only economic losses related to a commercial transaction. (Plaintiff argued that the economic loss doctrine applied only to purchases of commercial products and not to manufacturer-distributor relationships, but it had no legal support for this argument.) I concluded that judgment should be granted to defendant on its motion for summary judgment and that it was entitled to damages in the amount of $266,756.87 because plaintiff had failed to show any error in defendant's calculation of the damages it was owed but had asserted simply that the amount was incorrect. I did, however, give defendant an opportunity to explain to the court how interest was to be calculated on the amount due because neither party had addressed this matter in its brief.

In response to the court's invitation, defendant filed a brief in which it explained how it believed interest was to be calculated. Plaintiff responded with a motion for reconsideration of the motion for summary judgment, informing the court that it was substituting new counsel for the lawyer that had been representing it. Plaintiff asserted that the court had erred in dismissing plaintiff's tort claims insofar as they related to defendant's alleged interference with plaintiff's relationships and contracts with persons other than defendant, that the court had relied improperly on changed testimony submitted by a witness in a reply affidavit and that it had overlooked the potential argument that defendant had breached the contract by violating its duty of good faith.

The threshold question is whether I should exercise my discretion to reconsider the order granting defendant's motion for summary judgment in all respects except the calculation of damages. The doctrine of law of the case militates against reopening the matter. See Christianson v. Colt Industries Operating Corp., 486 U.S. 400, 416-17 (1988) ("as a rule courts should be loathe to [revisit prior decisions of their own] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice'") (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). The doctrine is a practical one. Courts would be hard pressed to handle their pending cases if they had to reconsider each decision and parties would be prejudiced if they had to devote time to re-arguing matters that had been decided. On the other hand, the

doctrine is not inflexible. Appleton Electric. Co. v. Graves Truck Line, Inc., 635 F.2d 603, 607-08 (7th Cir. 1980) ("law of case" rule not a limitation on court's power to reconsider prior ruling in case). There are unusual circumstances in which it would work an injustice to refuse to re-examine a prior ruling and there are situations in which a court should correct its own errors. Russell v. Delco Remy Div. of General Motors Corp., 51 F.3d 746, 749 (7th Cir. 1995).

Plaintiff's newly retained counsel has not addressed the doctrine of law of the case directly. He seems to be arguing primarily that the decision should be vacated because of obvious error but he advances new facts and suggests that the court should re-examine the original holding in light of new arguments. To the extent that plaintiff argues error, I will re-examine the previous order. However, I will not consider any new allegations of fact or new legal arguments. Plaintiff is not entitled to a second chance to defend against a motion simply because its first attorney failed to develop the facts or advance persuasive arguments in opposition to defendant's motion.

Plaintiff's new counsel filed a "tentative" brief and followed it with a more detailed supplemental brief in support of its motion for reconsideration. In the second brief, plaintiff has abandoned its assertion that the court relied improperly on new information in a supplemental affidavit of Wilson Chan filed by defendant. This is a sensible decision. Plaintiff's assertion has no basis in fact; I never referred to anything in the supplemental

affidavit or relied on it in any way in deciding defendant's motion.

Plaintiff continues to pursue its arguments that the facts support a viable claim of breach of contract and tortious interference with plaintiff's business relationships. With respect to breach of contract, plaintiff has not shown that it was error to conclude that the only issue plaintiff argued originally was its claim that defendant had violated the Wisconsin Fair Dealership Act, Wis. Stat. ch. 135, or that plaintiff could not prevail on this claim. Rather, plaintiff argues that, with certain additional facts it has gathered, it would be able to show that defendant breached its duty of good faith under the contract by luring away plaintiff's key employees and then using the loss of those employees as a ground for terminating the agreement when plaintiff could not meet its services and sales responsibilities. This is different from arguing that the court erred in deciding the original motion. Instead, plaintiff is asking the court to consider new evidence that plaintiff could have made part of its original opposition to defendant's motion and to consider an argument plaintiff could have made but did not. I decline to grant plaintiff's request. I conclude that on this issue, plaintiff's motion for reconsideration should be denied.

On the issue of tortious interference, plaintiff alleged in its complaint that it was involved in a number of existing business relationships with customers and had a number of prospective business relationships from which it expected to make profits, that defendant acted through its agents to disrupt these business relationships intentionally and wrongfully

by contacting clients and telling them that if they dealt with plaintiff they would not receive prompt shipments of products and would not have technical support for the repair and maintenance of the products. In this way, plaintiff asserts, defendant induced plaintiff's clients to cancel their contracts with plaintiff. (Plaintiff pleaded an additional claim of intentional interference with existing contract but it does not seem to be arguing that it was error to grant summary judgment on this claim on the ground that the economic loss doctrine bars tort claims seeking only economic losses related to a commercial transaction. See Plt.'s Supp. Br., dkt. #56, at 6 (plaintiff "is not seeking recovery of economic losses arising out of its contractual relationship with [defendant], but rather seeking the tort damages resulting from [defendant's] interference with contracts between [plaintiff] *and others*, most notably its employees and customers") (emphasis added).)

A tortious interference claim requires a showing that (1) the injured party had an actual or prospective contractual relationship with a third party; (2) the defendant interfered with the contract or the prospective contract; (3) the interference was intentional; (4) there is a causal connection between the interference and the damages; and (5) the defendant was not privileged to interfere. Minnesota Mining & Mfg. Co. v. Pribyl, 259 F.3d 587, 602 n.4 (7th Cir. 2001); Dorr v. Sacred Heart Hosp., 228 Wis. 2d 425, 456-57, 597 N.W.2d 462 (1999). In opposing defendant's motion for summary judgment, plaintiff adduced no evidence in support of its allegation that defendant or its alleged agents had told plaintiff's

customers that plaintiff would not provide equipment promptly or that it would provide inadequate service. According to the undisputed facts, Wilson Chan wrote letters to some of plaintiff's customers in early November 2000, but did so only to notify customers that he was no longer working for plaintiff. He did not say anything in the letters about timely delivery, support or service for equipment. Thus, this claim fails on the facts. It fails the economic loss barrier as well, as I held in the order granting summary judgment to defendant.

Although plaintiff alleged in its complaint that defendant had interfered with plaintiff's existing contracts and with prospective contracts plaintiff might have been able to negotiate, it never identified any resulting damages that would be independent of the damages it incurred by defendant's cancellation of the parties' contract. For example, it did not propose facts showing that it sold other machines than defendant's to its customers and that its ability to make these sales was harmed by defendant's alleged interference. So far as the undisputed facts show, plaintiff's ability to deliver and service equipment rested entirely on its contractual arrangements with defendant. When defendant terminated the contract, plaintiff was unable to meet its existing contractual obligations or commit to new ones. Its damages arise out of the breach of contract claim; they are not the consequences of actions "extraneous to the contract." Dinsmore Instrument Co. v. Bombardier, Inc., 199 F.3d 318, 321 (6th Cir. 1999) (holding that economic loss doctrine barred claim by

manufacturer that installer tortiously interfered with manufacturer's relationship with buyer by altering contract terms regarding certain specifications and terms of performance; this claim arose out of contractual relationship between manufacturer and installer). Plaintiff's intentional interference claim is merely another way of saying that its expectations under the contract were frustrated by defendant's termination of that contract.

Plaintiff has argued a variation of its claim in its supplemental brief for reconsideration: that defendant interfered with plaintiff's contracts with its employees by persuading them to leave plaintiff and begin their own distributorship. Plaintiff never raised this claim in its original pleadings. I decline to take it up now.

The one remaining question is the interest calculation on defendant's claim for damages. Defendant has submitted a spread sheet, showing interest at the rate of 5% per annum, which is the statutory rate under Wisconsin law when the parties do not specify any other rate in their contract, for a total amount of $29,383.55. Plaintiff has raised no objection to the interest rate or the calculations, although it continues to object to some of the damage calculation. Notwithstanding plaintiff's failure to object properly to defendant's calculation of damages, I have some reluctance to find for defendant in the full amount of $266,756.87, without knowing more about plaintiff's assertions that defendant had promised it certain offsets against the claimed $266,756.87. Plaintiff does not deny that it owes defendant $180,342.87, see Plt.'s Supp. Br., dkt. #56, at 8, but it indicates that it

disputed certain items on defendant's invoices and has been unable to obtain a satisfactory explanation why they continue to be shown. It seems to be in the interest of justice to explore these disputes. However, I will allow defendant an opportunity to object to doing so, since it has not had a chance to be heard on plaintiff's motion for reconsideration.

ORDER

IT IS ORDERED that plaintiff Bowen Medical Company, Ltd.'s motion for reconsideration of the order granting defendant Nicolet Biomedical Inc.'s motion for summary judgment is DENIED, with the exception of its request for reconsideration of the damages due defendant. FURTHER, IT IS ORDERED that I will reserve a ruling on that aspect of the motion for reconsideration to give defendant a chance to be heard. Defendant may have until January 16, 2003, in which to file and serve any objections it has to taking up the amount of damages due (limited to the difference between $266,756.87 and $180,342.87, plus interest). Plaintiff may have until January 23, 2003, in which to reply

to defendant's objections, if defendant does object.

Entered this 30th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge