

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.,

Plaintiff,

ORDER

02-C-0170-C

v.

NICOLET BIOMEDICAL INC.,

Defendant.  
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On December 30, 2002, I denied plaintiff Bowen Medical Company, Ltd.'s motion to reconsider the order granting summary judgment in favor of defendant Nicolet Biomedical Inc. However, I reserved a ruling as to plaintiff's request for reconsideration of defendant's counterclaim for damages and instructed the parties to limit their arguments to the difference between \$266,756.87 (defendant's position) versus \$180,342.87 (plaintiff's position). On January 15, 2003, defendant filed a response. On January 24, 2003, plaintiff replied. (Each party also filed a letter in surreply.)

In addition to arguing that the court's decision was not clearly erroneous, defendant

addresses plaintiff's four contested charges (\$41,221, \$16,993, \$22,400 and \$5,800) that make up the \$86,414 difference between \$266,756.87 and \$180,342.87. See Supp. Aff. of Monita Cheung, dkt. #57, at ¶ 4. In its reply, plaintiff incorporates by reference the Second Supp. Aff. of Monita Cheung, dkt. #62, in which Cheung provides further details regarding these four charges. Although I agree with defendant that plaintiff has not shown that this court's decision is clearly erroneous, see Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988) (clearly erroneous decision is one that is "dead wrong" and "strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish"), I will nevertheless address each of the four charges that plaintiff disputes.

As to the \$41,221 charge, although Cheung concedes that plaintiff never returned the equipment in question, plaintiff argues that it would do so if defendant would "give assurances" to credit it accordingly. Cheung avers that "this transaction occurred at the same time that [defendant] was unilaterally terminating its contract with [plaintiff], which led to confusion about whether [plaintiff] would, in fact, receive a credit if the equipment was returned." Defendant authorized plaintiff to return this piece of equipment as early as September 8, 2000. Instead, plaintiff opted to hold on to it. Defendant asserts that because plaintiff never returned the machine, defendant could not repair and resell it and, moreover, at this time the machine is outdated. Defendant contends that plaintiff's position is not an argument but a new, last-minute proposal. I agree. Because plaintiff failed to return the

equipment, the \$41,221 charge stands.

As to the \$16,993 charge, plaintiff asserts that “it still has not been explained why the amount credited is not the full \$16,993.” However, defendant’s response provides a clear explanation. In its response, defendant asserts that on March 8, 1999, plaintiff sent a \$144,400 wire transfer that covered several outstanding charges but was insufficient to cover all the listed items fully. The \$16,993 charge (for an EEG machine) was the last item listed on the wire transfer. Thus, defendant credited plaintiff’s \$16,993 invoice for all but \$413, the shortfall amount. In fact, defendant’s detailed spreadsheet (supplied in support of its interest calculation) shows that only \$413 remains outstanding on that invoice. In other words, defendant used \$413, not \$16,993, in calculating its total damages of \$266,756.87.

As to the \$22,400 charge, in plaintiff’s “detailed” motion to reconsider, Cheung averred that the \$22,400 “relate[s] to a defective product.” In plaintiff’s reply, Cheung now avers that this figure represents “two pieces of equipment costing \$22,400 each . . . [one machine] was under the control of Wilson Chan . . . . If Mr. Chan returned this item to [defendant], [plaintiff] has received no credit to this date.” On the basis of these facts, it appears that at most plaintiff might have a claim against Wilson Chan, not defendant.

As to the \$5,800 charge, plaintiff originally argued in its detailed motion to reconsider that this figure represented “miscellaneous expenses” advanced to Ben So. Defendant responded that it could not even investigate such a vague claim. Plaintiff now alleges in its

reply brief that the figure is more precisely \$5,713, which covers courier fees, telephone charges and a video splitter as identified in a September 4, 2000 letter. Defendant argues, among other things, that because plaintiff keeps changing the figures and the rationale behind the figures, plaintiff's claim is nothing more than a moving target that is impossible to hit. I agree. The time for plaintiff to provide specific details as to the disputed charges has long passed. Accordingly, I will deny plaintiff's motion to reconsider defendant's counterclaim for \$266,756.87 in damages.

#### ORDER

IT IS ORDERED that

1. Plaintiff Bowen Medical Company, Ltd. a/k/a Massachusetts Medical Company, Ltd.'s motion for reconsideration as to damages is DENIED;
2. The clerk of court is directed to enter judgment in favor of defendant in the amount of \$266,756.87 plus interest and close this case.

Entered this 12th day of February, 2003.

BY THE COURT

BARBARA B. CRABB  
District Judge