

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMPIRE FINANCIAL SERVICES, INC.,	§ § §	No. 345, 2007
Plaintiff Below, Appellant,	§ §	Court Below-Superior Court of the State of Delaware
v.	§	in and for New Castle County
THE BANK OF NEW YORK (DELAWARE),	§ § §	C.A. No. 99C-01-207-SCD and C.A. No. 00C-09-235-SCD
Defendant Below, Appellee.	§ §	

Submitted: January 16, 2008

Decided: March 19, 2008

Before **STEELE**, Chief Justice, **BERGER** and **RIDGLEY**, Justices

ORDER

This 19th day of March, 2008, on consideration of the briefs and arguments of the parties, it appears to the Court that:

(1) This is Empire Financial Services, Inc.’s second appeal after a jury found The Bank of New York (Delaware) liable for entering into a civil conspiracy with Empire’s former president. This Court’s first decision describes the underlying facts. ¹ In brief, the Bank contracted with Empire, a collection agency, to attempt recovery of numerous unpaid debts. In 1997, Empire’s

¹ *Empire Financial Services v. The Bank of New York (Delaware)*, 900 A.2d 92 (Del. 2006).

president stole most of the company's account records, and opened a new agency. The Bank then transferred its business to the new agency. At a trial on liability only, the jury found that the Bank conspired with the Empire president. The trial court determined that Empire's claim was limited to contract damages, however, and entered a zero dollar judgment because the contract between Empire and the Bank was terminable at will. On appeal, this Court reversed, holding that Empire was entitled to recover the profits it would have earned from servicing the Bank's accounts.

(2) On remand, discovery became contentious when Empire learned that the Bank, during a database upgrade, had destroyed or modified the records showing what had happened to each of the misappropriated accounts. Although it appears that there may be a complete back-up of those records, the back-up information would have been costly to access, was not specifically requested, and was never produced. After learning about the missing evidence, Empire moved for sanctions, requesting what amounted to a default judgment. The trial court found that the Bank's modification of its records was unintentional and denied Empire the relief it sought. Instead, the trial court awarded fees associated with the motion.

(3) Empire retained a collections expert, Fred Landrum, to establish its lost profits at the anticipated damages trial. Landrum concluded that the modifications to the records provided by the Bank rendered those records

misleading and inaccurate. As a result, he based his calculations primarily on Empire's records of the accounts' statuses prior to the theft. Empire also planned to introduce testimony from its spoliation expert at trial to address the Bank's challenges to the reliability of Landrum's opinion.

(4) Before trial, however, the court conducted a *Daubert* hearing,² and excluded Landrum's expert reports. The trial court also excluded any evidence concerning the missing/incomplete Bank records. Empire responded to those rulings by submitting affidavits from its owner and a long-time employee. Those affidavits addressed the marginal operating costs related to, and expected income from, the misappropriated accounts. Notwithstanding the affidavits, the Superior Court granted the Bank's motion for summary judgment on the ground that Empire lacked sufficient evidence from which a jury could reasonably assess damages.

(5) On appeal, Empire argues that the trial court abused its discretion by refusing to award the sanctions it sought with respect to the missing Bank records. We disagree. The trial court made a factual finding that the Bank's conduct was negligent; not intentional or reckless. The court noted that many records were produced and that Empire did not pursue its document request during the four years that the parties were arbitrating a separate issue.

² *Nelson v. State*, 628 A.2d 69, 74 (Del.1993) (Delaware follows *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

Moreover, slightly more than half of the account records remained available to Empire after the Bank changed its database system. Thus, Empire could have analyzed the amount recovered on those accounts and used that number to estimate the total recovery. In sum, the records were not totally destroyed, and the Bank did not alter the records with the intent of interfering with Empire's claim. Thus, the trial court acted within its discretion in refusing the extreme sanction sought by Empire.³

(6) Empire also contends that the trial court erred in excluding Landrum's expert reports and related testimony. Empire says that the collections business involves estimations, and that Landrum was qualified to estimate the value of Empire's stolen accounts. The problem with Empire's argument is that Landrum did not provide support for his estimations. For example, he opined that Empire would have collected more on the stolen accounts than the Bank collected. Although he explained the basis for his opinion, Landrum failed to explain how he quantified "more." We recognize that the absence of complete records hampered Landrum's analysis, and we agree that he should have been given some leeway in making assumptions based on the information that was available. But the trial court noted numerous gaps in his analysis, and we find no abuse of discretion in its decision to exclude his opinions.⁴

³*Sundor Elec., Inc. v. E.J.T. Const. Co., Inc.*, 337 A.2d 651 (Del. 1975).

⁴*M.G.Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999).

(7) Even without Landrum's expert opinion, Empire argues that there was sufficient record evidence to support its damages claim, and that the Bank should not have been granted summary judgment. We agree. The Bank admits that it collected several hundred thousand dollars on the misappropriated accounts. In addition, there is some evidence of Empire's costs of collection from two fact witnesses, Gwyn Wood and Joseph Maccari. Even the Bank apparently acknowledges that the costs of collecting on the accounts would be 88% of the amount recovered. Based on that assessment, Empire would be entitled to 6% of the total recovery (based on its original contract whereby it was to receive 50% of amounts collected). Thus, we conclude that Empire has presented sufficient evidence to survive a motion for summary judgment on the issue of lost profits.⁵

(8) Empire also argues the trial court erred in granting summary judgment to the Bank on its claims for office damages, punitive damages, and attorneys' fees. We find no merit to these claims and affirm on the basis of the trial court's decision.⁶

⁵*Grabowski v. Mangler*, 938 A.2d 637 (Del. 2007).

⁶*Empire Financial Services, Inc. v. The Bank of New York (Delaware)*, C.A. No. 00C-09-235 SCD (Preliminary Order June 12, 2007).

(9) Finally, we reject Empire’s contention that the trial judge was attempting to circumvent this Court’s first decision, and that this matter must be assigned to a different judge on remand. Both parties have made this a difficult case to litigate. The Bank created a problem with its account records, and Empire relied on an expert who did not support his conclusions. Moreover, Empire appears to have proceeded on the assumption that it is entitled to damages and that it does not need to quantify what its profits would have been, but for the misappropriation. The trial court attempted to deal with those problems and, in the end, decided that Empire had failed to provide sufficient evidence from which a jury could determine damages. That was a close question, although we have concluded that there is *some* evidence that might support a damage award.

(10) In sum, we are satisfied that Empire’s lost profits claims survive summary judgment. On remand, the trial court will not be restricted by the “law of the case” doctrine with respect to previous rulings on the admissibility of evidence, including expert evidence. That is not to say that the trial court must allow additional discovery or reconsider its rulings, only that the trial court is free to do so.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED in part, and this matter is REMANDED for further proceedings in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger
Justice