

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

EXPERI-METAL, INC.,
a Michigan corporation,

Plaintiff,

Case No. 2:09-CV-14890

v.

Hon. Patrick J. Duggan

COMERICA, INC.,
a foreign corporation,

Defendant.

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Joseph W. Thomas (P33226)
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**DEFENDANT COMERICA, INC.'S MOTION IN LIMINE REGARDING
PRESENTATION OF EVIDENCE AT TRIAL**

Defendant, Comerica, Inc. ("Comerica"), by and through its undersigned attorneys, hereby requests and moves in limine for an order that Comerica be allowed to present its evidence first at the trial of this matter for the reason that the Court has ruled that Comerica bears the burden of proof on the two issues remaining to be tried in this matter. Defendant specifically seeks an order allowing Comerica to present its opening statement first, put on its case and witnesses first, and give its closing statement first at the upcoming trial.

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**BRIEF IN SUPPORT OF DEFENDANT COMERICA, INC.'S MOTION IN LIMINE
REGARDING PRESENTATION OF EVIDENCE AT TRIAL**

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CONTROLLING AUTHORITY

A. Regarding the Burden of Proof

The only two issues remaining in this case are (1) whether Comerica complied with its security procedure when it accepted the wire transfer orders initiated with Maslowski's user information on January 22, 2009, and (2) whether Comerica accepted the wire transfer orders in Experi-Metal's name on January 22, 2009 in "good faith." (Exhibit A, p. 13, 16).

M.C.L. § 440.4702(2) provides that the bank, Comerica, has the burden of proof on these issues:

If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) *the bank proves* that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

M.C.L. § 440.4605(g) defines "prove" as it is used in the section above as follows:

"'Prove' with respect to a fact means to meet the burden of establishing the fact."

In addition, the Court has held that Comerica has the burden of proof on both of these remaining issues, stating "Comerica has the burden of proving that it accepted the wire transfer orders in good faith and in compliance with commercially reasonable security procedures and any instruction by Experi-Metal restricting acceptance of payment orders issued in the company's name." Exhibit A, p. 15.

B. Regarding the Order of the Presentation of Evidence at Trial

Federal Rule of Evidence 611 provides that “the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth.”

It is customary for the party bearing the burden of proof to open the argument and present its evidence first at trial. *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir.1992). Where the defendant bears the burden of proof, such as when the only remaining issue is the applicability of an affirmative defense, courts have granted the defendant’s request to open at trial and present evidence first. *See Moylan, supra; see also Silver v. New York Life Ins. Co.*, 116 F.2d 59 (7th Cir. 1940) (appellant carried the burden to go forward and thus, was entitled to open and close the evidence and arguments).

The decision to grant a defendant's request to open the case and present evidence first rests within the sound discretion of the trial court. *Moreau v. Oppenheim*, 663 F.2d 1300, 1311 (5th Cir.1981)

INTRODUCTION

This matter arises from an internet phishing scam that the plaintiff Experi-Metal, Inc. (“Experi-Metal”) fell victim to. Experi-Metal released its confidential login and password information for its bank account with Comerica to a third party, who stole over approximately \$560,000 of Experi-Metal’s money out of that account using unauthorized wire transfers. Experi-Metal thereafter filed a complaint against Comerica alleging that it was responsible for the loss.

Whether the risk of a loss for an unauthorized wire transfer falls on the bank or its customer is governed by M.C.L. § 440.4702. The risk of loss is on the customer if a fraudulent payment order is accepted by the bank after verifying the authenticity of the source of the order in compliance with a commercially reasonable security procedure. *See* M.C.L. § 440.4702(2).

Comerica filed a motion for summary judgment on Experi-Metal’s complaint, arguing that it had a commercially reasonable security procedure in compliance with M.C.L. § 440.4702. On July 8, 2010, the Court issued a written Opinion and Order Denying Defendant’s Motion for Summary Judgment. *See* Exhibit A. However, in denying the motion, the Court held that Comerica’s secure token technology, utilized and agreed to by Experi-Metal, by which Comerica authenticated and accepted Experi-Metal’s wire transfer payment orders, was commercially reasonable. (Exhibit A, p. 12). The Court denied the motion because it held that two issues of material fact remained: (1) whether Comerica complied with the security procedure when it accepted the wire transfer orders initiated with Maslowski’s user information on January 22, 2009, and (2) whether Comerica accepted the wire transfer orders in Experi-Metal’s name on January 22, 2009 in “good faith.” (Exhibit A, p. 13, 16).

The Court specifically found that Comerica has the burden of proof on both of these remaining issues, stating “Comerica has the burden of proving that it accepted the wire transfer

orders in good faith and in compliance with commercially reasonable security procedures and any instruction by Experi-Metal restricting acceptance of payment orders issued in the company's name." Exhibit A, p. 15.

Further, M.C.L. § 440.4702(2) likewise provides that the bank, Comerica, has the burden of proof on these issues:

If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) *the bank proves* that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

In addition, M.C.L. § 440.4605(g) defines "prove" as it is used in the section above as follows: "'Prove' with respect to a fact means to meet the burden of establishing the fact."

Comerica has the burden of proving these two remaining issues in this case at trial. As such, pursuant to the Federal Rules of Evidence and current case law, Comerica should be allowed to open and present its evidence first at the trial of this matter.

ARGUMENT

There are only two issues remaining in this case and it is undisputed that Comerica bears the burden of proof on each. The Federal Rules of Evidence provide that "the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth." F.R.E. 611.

It is customary for the party bearing the burden of proof, which is usually the plaintiff, to open the argument and present its evidence first at trial. *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246, 1251 (7th Cir.1992). However, where the defendant bears the burden of proof, such as

when the only remaining issue is the applicability of an affirmative defense, courts have granted the defendant's request to open at trial and present evidence first. *See Moylan, supra; see also Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359 (8th Cir.1985) (district court's decision to allow defendant to argue first and last at closing affirmed where defendant had the burden of proof on the only remaining issue); *Silver v. New York Life Ins. Co.*, 116 F.2d 59 (7th Cir. 1940) (appellant carried the burden to go forward and thus, was entitled to open and close the evidence and arguments).

The decision to grant a defendant's request to open the case and present evidence first rests within the sound discretion of the trial court. *Moreau v. Oppenheim*, 663 F.2d 1300, 1311 (5th Cir.1981) ("The matter of a court's allocation of the right to open and close ... does not go to the merits of a controversy and has long not been the subject of writ of error, even when coupled with the denial of requested party realignment."); *see also Montwood Corp. v. Hot Springs Theme Park Corp.*, 766 F.2d 359, 364 (8th Cir.1985).

In *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246 (7th Cir.1992), the Seventh Circuit addressed the propriety of allowing a defendant to present closing argument first and last in an FLSA overtime action. *Moylan v. Meadow Club, Inc.*, 979 F.2d 1246 (7th Cir.1992). As in the present case, the defendant in *Moylan* bore the burden of proof on its affirmative defense that the plaintiff was not entitled to overtime compensation because he was an exempt employee. *Id.* at 1251. The Seventh Circuit upheld the court's ruling, finding it is customary for the party bearing the burden of proof to present evidence first. *Id.* It acknowledged that the plaintiff is usually the party bearing the burden of proof, but the only issue that remained was the defendant's affirmative defense that plaintiff was exempt from overtime pay provisions of the FLSA. *Id.* Relying on the well-established principle that the order of argument lies within the discretion of

the court, the Seventh Circuit found no error in the district court's ruling. *Id.*

Similarly, the Eastern District of Pennsylvania permitted a defendant to open and present evidence first because it bore the burden of proving that its employee was exempt under the FLSA. *Goldman v. Radioshack Corp.*, 2005 WL 1155751, *2 (E.D. Pa. May 13, 2005) (Exhibit B). Although, plaintiff contended that it was still required to prove its prima facie case, the court determined that that burden was not as significant as the burden on the employer defendant to dispute liability and the employer defendant offered to stipulate to the prima facie case. *Id.*

In addition, citing *Moylan*, a Wisconsin district court also allowed the defendant to open and present evidence first “because it [was] defendant rather than plaintiff that must prove facts to prevail, [so] it makes sense to allow defendant to open first and close last.” *Latino Food Marketers, LLC v. Ole Mexican Food, Inc.*, 2004 WL 632872, *1 (W.D.Wis. March 30, 2004) (Exhibit C). Rejecting plaintiff's argument that the court should not realign the case because it was plaintiff's lawsuit, the court stated “the privilege of opening first and closing last is not given to plaintiffs simply because they are plaintiffs. Rather, fairness requires that the party with the burden of proof should have the first and last opportunity to persuade the jury of its position.” *Id.*

Finally, in *Reyes v. Texas EzPawn, L.P.*, unpublished, 2007 WL 3143315 (S.D. Tex. October 24, 2007) (Exhibit D), the defendant's motion to open and close at trial was granted by the court. The court found that the predominant issue remaining in the case was the exempt status of the plaintiff in another FLSA dispute. The court relied on *Moylan*, stating that “[b]ecause it is EzPawn's burden to prove that Reyes falls within this exemption, it is appropriate to allow EzPawn to open and close the case first and initiate the presentation of the evidence.” *Id.* at *2.

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system and the Court will send notification of such filing to the parties.

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