

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

eCclipse Enterprise
Solutions, LLC

v.

Civil No. 10-cv-547-LM

EndoCeutics, Inc.

O R D E R

After a jury trial, EndoCeutics, Inc. was found liable for breaching its agreement with eCclipse Enterprise Solutions, LLC ("eCclipse") by failing to pay certain invoices and by failing to participate in an electronic-data-capture ("EDC") trial. For the first breach, the jury awarded \$42,984.48 in damages, and for the second breach, it awarded \$134,950 in damages. The jury also found that that eCclipse did not breach the agreement. Before the court are: (1) EndoCeutics's motion to amend judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Federal Rules"), or, in the alternative, for judgment as a matter of law under Rule 50, to which eCclipse objects; and (2) EndoCeutics's counterclaim that eCclipse is liable for violating New Hampshire's Consumer Protection Act ("CPA"), N.H. Rev. Stat. Ann. ("RSA") chapter 358-A, which was tried to the court. For the reasons that follow, EndoCeutics's

motion for post-verdict relief is denied, and eCclipse is entitled to judgment on EndoCeutics's CPA claim.

EndoCeutics's Motion for Post-Verdict Relief

A. The Legal Standard

When considering a motion for judgment as a matter of law under Rule 50, the court must "consider 'the evidence presented to the jury, and all reasonable inferences that may be drawn from such evidence, in the light most favorable to the jury verdict.'" Osorio v. One World Techs., Inc., 659 F.3d 81, 84 (1st Cir. 2011) (quoting Granfield v. CSX Transp., Inc., 597 F.3d 474, 482 (1st Cir. 2010); citing Cigna Ins. Co. v. Oy Saunatec, Ltd., 241 F.3d 1, 8 (1st Cir. 2001)). Relief under Rule 50 may be granted only "if the facts and inferences point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have reached a verdict against that party." Osorio, 659 F.3d at 84 (quoting Santos v. Sunrise Med., Inc., 351 F.3d 587, 590 (1st Cir. 2003); citing Star Fin. Servs., Inc. v. Aastar Mortg. Corp., 89 F.3d 5, 8 (1st Cir. 1996)).

"Generally, to prevail on a Rule 59(e) motion [to amend a judgment], the moving party 'must either clearly establish a manifest error of law or must present newly discovered evidence.'" Markel Am. Ins. Co. v. Díaz-Santiago, 674 F.3d 21,

32 (1st Cir. 2012) (quoting FDIC v. World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992); citing Marie v. Allied Home Mortg. Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005)).

B. Discussion

EndoCeutics asks the court to rule that it did not breach the agreement between itself and eClipse, and that eClipse did breach the agreement, and is liable for damages. In support of that request, it raises three arguments: (1) the jury failed to follow the court's instructions or improperly considered matters outside the contract at issue; (2) counsel for eClipse made improper statements during his closing argument; and (3) the jury's award of damages is not supported by the evidence. eClipse disagrees, categorically. The court considers each argument in turn.

1. Alleged Failure to Follow Jury Instructions

According to EndoCeutics, the jury necessarily failed to follow the court's instructions, or improperly considered issues outside the contract at issue, because there was no evidentiary basis for two findings necessary to support its determination that EndoCeutics breached its agreement with eClipse. Specifically, EndoCeutics argues that if the jury had followed the court's instructions and/or had limited its attention to the issues properly before it, it could not have found that the

parties had agreed to waive the contract provision requiring modifications to be in writing and had agreed to modify eCclipse's contractual obligation to use OpenClinica software. The court does not agree.

On the issue of contract modification, the court instructed the jury as follows:

Obligations under a contract can be changed by either an express or an implied mutual agreement between the parties. The written terms of a contract may be waived orally or by implication. Whether the parties have agreed to change their obligations under a contract, or the terms of a contract, must be determined under the facts of each case. Thus, where one party to a contract claims that the other party agreed to a modification of their contract, and the contract includes a clause requiring modifications to be in writing, the party claiming that the contract was modified must prove both an agreement to the modification itself and an agreement to waive the in-writing requirement.

Tr. (doc. no. 49), at 51-52. Here, there was sufficient evidence from which a reasonable jury could have concluded, based on the course of dealing between Les Bihari and Lyne Lavoie, that EndoCeutics had agreed both to waive the in-writing requirement and to modify the substantive terms of the agreement. It is undisputed that the project milestones and dates of completion set out in Section 4.0 were altered without any written agreement by the parties. Those multiple alterations to the written terms of the contract are an implied waiver of the in-writing requirement. Moreover, there was

evidence at trial that the alterations eCclipse made to the OpenClinica code were made in response to requests from Lavoie in order to achieve functionalities desired by eCclipse that were not possible with OpenClinica. While there was testimony that Lavoie had no authority to agree to contract modifications, and did not realize that the functionalities she requested would require a shift from off-the-shelf OpenClinica to eCclipse's proprietary version, a jury could have concluded that Bihari reasonably understood Lavoie's communications to imply a properly authorized agreement to modify the substantive terms of the contract. Accordingly, EndoCeutics's first argument does not entitle it to the post-verdict relief it seeks.¹

2. Statements by Counsel During Closing Argument

EndoCeutics next challenges the propriety of the following portion of eCclipse's closing argument:

Okay. I talked a lot about credibility, and I have one more topic that I want to address with you, and that is the fundamental concept of fairness . . .

Is it fair now - I ask you as a jury **out here to determine fairness** - to now punish Les and eCclipse for acting in what he thought was EndoCeutics best

¹ The court further notes that while EndoCeutics devoted considerable attention at trial to hammering home the point that eCclipse had shifted from OpenClinica to its own software, it seems not to have established that any such shift constituted a material breach of the agreement. That is, EndoCeutics did not put on any evidence tending to show that eCclipse's proprietary software was different enough from OpenClinica to cause a problem with the Food and Drug Administration ("FDA").

interest? Is it fair to punish him for something really that Lyne had asked him to do? He should not be punished for following through with the requests of his customer.

Def.'s Mem. of Law (doc. no. 56-1), at 10 (quoting Tr. (doc. no. 49), at 35-36, emphasis added by EndoCeutics). In other words, EndoCeutics argues that it was "improper and highly prejudicial" for eClipse to "set into the minds of the jury that this trial [was] about determining what is 'fair' to eClipse and Mr. Bihari, indeed, emphasizing [that] its very job [was] to determine what is 'fair.'" Id. at 10, 11. eClipse's appeal to fairness was prejudicial, in EndoCeutics's view, because it encouraged the jury to resolve the case based on its sympathies rather than by applying the relevant law to the facts it found. EndoCeutics's argument, which it first raised at sidebar, is still unconvincing.

For one thing, eClipse's invocation of fairness was not an appeal to some sort of freestanding concept of justice untethered to the legal principles the jury was obligated to employ. Rather, eClipse's counsel asked the jury, rhetorically, whether it was fair to punish eClipse for abiding by the contract, as amended by Lavoie's various requests for modifications. Moreover, in the instructions given to the jury, the concept of fairness was expressly linked to the jury's obligation to apply the law:

The principles of law set forth in these instructions are intended to guide you in reaching a fair and just result in this case, which is important to all the parties. You are to exercise your judgment and common sense without prejudice and without sympathy, but with honesty and understanding.

Tr. (doc. no. 49), at 57-58. Finally, the jury's obligation to avoid basing its decision on sympathy was stated at several points in the instructions it was given. See id. at 44, 55, 58. In sum, EndoCeutics's argument that the jury was improperly influenced by an appeal to its sympathies is without merit.

3. Amount of Damages

EndoCeutics's final argument is that there was no evidence to support an award of damages in any amount for its failure to participate in eCclipse's EDC trial. EndoCeutics is mistaken.

According to EndoCeutics, "[t]here was no evidence that eCclipse lost a certain amount of profits, lost particular prospects, or [suffered] any other damages as a direct result of the breach." Def.'s Mem. of Law, at 13. To the contrary, Bihari testified that eCclipse absorbed the costs of providing all the services described in Section 6.0 of its agreement with EndoCeutics. See Tr. (doc. no. 48), at 12. Bihari also testified that the value of those services was \$134,950. See Tr. (doc. no. 50), at 58. Lavoie testified that EndoCeutics did not ultimately use the Clintrial metadata library that eCclipse created, see Tr. (doc. no. 48), at 106, and Claude Dore

testified to similar effect, see Tr. (doc. no. 51), at 51. But neither Lavoie nor Dore testified that eCclipse did not provide EndoCeutics with that product. Lavoie and Dore both testified that EndoCeutics received only an hour or two of the end-user training that eCclipse valued at \$15,000, see Tr. (doc. no. 48), at 107; Tr. (doc. no. 51), at 51, but Bihari testified that eCclipse provided all of the training described in the agreement, see Tr. (doc. no. 48), at 12. Dore further testified that eCclipse provided only one session of site end-user training (valued at \$3,000) and no UAT consulting and support (valued at \$26,250). See Tr. (doc. no. 51), at 52. The jury, however, was entitled to credit Bihari's testimony over Lavoie's and Dore's. To be sure, eCclipse's evidence on damages is not particularly strong, but, it is sufficient to support the jury's award.

EndoCeutics's CPA Claim

Count Four of EndoCeutics's counterclaim asserts that eCclipse willfully and knowingly violated the Consumer Protection Act. That claim was tried to the court, and EndoCeutics has submitted proposed findings of fact and rulings of law, see doc. no. 55, to which eCclipse has not responded. eCclipse is entitled to judgment on EndoCeutics's CPA claim.

The New Hampshire CPA makes it "unlawful for any person to use any unfair method of competition or any unfair or deceptive

act or practice in the conduct of any trade or commerce within this state.” RSA 358-A:2. The statute includes a non-exclusive listing of fourteen prohibited acts. See RSA 358-A:2, I-XIV. “In determining which commercial actions not specifically delineated are covered by the act, [the New Hampshire Supreme Court has] employed the ‘rascality’ test.” George v. Al Hoyt & Sons, Inc., 162 N.H. 123, 129 (2011) (citing State v. Sideris, 157 N.H. 258, 263 (2008)). “Under the rascality test, the objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.” George, 162 N.H. at 129 (citing ACAS Acqs. (Precitech) Inc. v. Hobert, 155 N.H. 381, 402 (2007)). In its proposed findings of fact and rulings of law, EndoCeutics relies on the rascality test and describes its CPA claim by arguing that

[t]he evidence in this matter demonstrated, by a preponderance of the evidence, that eCclipse (1) devised a plan well before the Agreement in this matter to create its own proprietary software based off of OpenClinica; (2) contracted with EndoCeutics to use OpenClinica; (3) continuously represented that it was using OpenClinica; and (4) instead, created a new software without EndoCeutics knowledge or consent.

Def.’s Proposed Findings & Rulings ¶ 14.

EndoCeutics has not proven its CPA claim by a preponderance of the evidence. EndoCeutics makes much of Bihari’s testimony that eCclipse intended, from the outset, to create its own

proprietary software, and appears to argue that eCclipse kept that intention to itself, to EndoCeutics's detriment. However, Section 1.0 of the agreement expressly provides that "[u]pgrades of OpenClinica will be covered under the hosting provisions of this document," Pl.'s Ex. 1, at 4. Moreover, under Section 2.0 of that agreement, EndoCeutics, "[a]s a participant [in] the eCclipse EDC partner program . . . agree[d] to: . . . [c]ollaborate with eCclipse in the development of the EDC service [by] offering providing feedback on the offering[']s effectiveness, OpenClinica's functionality and describe[ing] necessary areas of improvement," id. at 5.

Because the prospect of upgrading and improving OpenClinica was plainly stated in the agreement between eCclipse and EndoCeutics, EndoCeutics has not proven that eCclipse engaged in some kind of a "bait-and-switch" by promising to use "pure" OpenClinica while secretly planning to spring some completely different EDC program on EndoCeutics. And, while Lavoie testified that she was not aware that any of the functionalities she requested from Bihari would result in alterations to OpenClinica, the contract plainly contemplated "[u]pgrades to OpenClinica," which necessarily included alterations to the program, and required EndoCeutics to provide feedback describing areas in which OpenClinica needed improvement.

Beyond that, EndoCeutics's claim does not make common sense. eCclipse's whole point in providing EndoCeutics with more than \$135,000 in unbilled services was to exchange those services for an endorsement from EndoCeutics. Knowing full well the purposes behind EndoCeutics's clinical trials, i.e., FDA approval, and presumably targeting similarly situated pharmaceutical companies seeking to conduct similar clinical trials, it would make no sense for eCclipse to provide EndoCeutics with an EDC protocol that would not satisfy the FDA. As noted, other than proving that the EDC program eCclipse built off OpenClinica is different from OpenClinica, and has a different name, EndoCeutics did not offer any evidence that eCclipse's new OpenClinica-based EDC program would not satisfy FDA requirements. And, rather than exploring that issue with eCclipse, EndoCeutics simply canceled the agreement in a way that can only be characterized as precipitous. The court has already addressed EndoCeutics's argument that eCclipse created new software without its knowledge or consent; evidence introduced at trial supports a finding that the alterations eCclipse made to OpenClinica were made with EndoCeutics's knowledge and at its request.

It may well be that there were some miscommunications and misunderstandings between eCclipse and EndoCeutics as the contracted project unfolded. But, eCclipse's intention to use

the project as a clinical trial for its own application of OpenClinica could not have been more clearly expressed in the agreement, which made it nonsensical for eEclipse to have provided EndoCeutics with a product which, necessarily, would have inspired EndoCeutics to give a highly critical reference. In sum, EndoCeutics has not proven, by a preponderance of the evidence, that eEclipse engaged in conduct "that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." George, 162 N.H. at 129. Accordingly, eEclipse is entitled to judgment on EndoCeutics's CPA claim.

Conclusion

For the reasons detailed above, eEclipse is entitled to judgment on EndoCeutics's CPA claim, and EndoCeutics's motion for post-verdict relief, document no. 56, is denied. The clerk of the court shall enter judgment in accordance with this order and close the case.

SO ORDERED.



Landya McCafferty
United States Magistrate Judge

August 27, 2012
cc: Susan Aileen Lowry, Esq.
Philip L. Pettis, Esq.
Arnold Rosenblatt, Esq.