IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ENCOMPASS TELESERVICES, INC.,

Plaintiff,

v.

RANDALL LEE SCHEETS, aka RANDY SCHEETS,

Defendant.

RANDY SCHEETS,

Third Party Plaintiff,

v.

SAVANT CALL CENTER ASSOCIATES, INC., an Arizona corporation; JOHN J. CARGAL; MICHAEL A. BOYLE; PATRICK BOYLE; and KAROL W. KERSH,

Third Party Defendants.

No. 04-821-HU

OPINION AND ORDER

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HUBEL, Magistrate Judge:

The matters before the court are a joint motion by Patrick and Michael Boyle (the Boyles) to reopen the case and grant a new trial (doc. # 372); and a motion by William Holmes and W. Holmes & Co., LLP (Holmes) to intervene or alternatively, for a new trial, and to amend the court's Findings of Fact and Conclusions of Law (the Opinion) entered on December 9, 2008 (doc. # 373).

I. Joint Motion by the Boyles

The Boyles request that the court reopen the case to allow testimony from Scott Jonsson, ETI's former attorney, and Scott Roberts, a certified public accountant. They request a new trial on the grounds that 1) the testimony of John Cargal should have been excluded, 2) newly discovered evidence from the bankruptcy adversary proceeding calls into question the outcome of the case, 3) the court improperly allowed third party plaintiff Randall Scheets to amend the pretrial order, and 4) the court's valuation of Scheets's shares is not supported by the evidence.

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Standards

Under Rule 59(a)(1)(B), the court may, on motion, grant a new trial on some or all of the issues, and to any party, after a nonjury trial, for "any reason for which a rehearing has heretofore been granted in a suit in equity in federal court." Under Rule 59(a)(2) the court may, on motion for a new trial, open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment. Such a motion must be filed no later than 10 days after the entry of judgment, and, when the motion is based on affidavits, they must be filed with the motion. Rule 59(c). A post-judgment motion is considered a motion under Rule 59 when it involves "reconsideration of matters properly encompassed in a decision on the merits." Osterneck v. Ernst & Whinney, 480 U.S. 169, 174 (1989); McCalla v. Royal Maccabees Life Ins. Co., 369 F.3d 1128, 1130 (9th Cir. 2004). Judgment is not properly reopened "absent highly unusual circumstances," such as newly discovered evidence, clear error by the district court, or an intervening change in the controlling law. Weeks v. Bayer, 246 F.3d 1231, 1236 (9th Cir. 2001). Consideration of the motion is committed to the discretion of the district court. Id. at 1234.

Discussion

Excluded testimony of Jonsson and Roberts

The court excluded Scott Jonsson as a trial witness because the Boyles had not filed a witness statement before trial. The Boyles assert in this motion that if allowed, Jonsson would testify

about representations made to Jonsson by Holmes about ETI's books, and about Holmes's concealment of financial information from the Boyles.

I deny the motion to reopen the trial to allow testimony from Jonsson because 1) the Boyles submitted no written summary of his testimony or the basis for it at the time of trial, and 2) Jonsson's proposed testimony is hearsay.

The court issued court trial management orders, setting out, among other things, the requirements for witness statements, on January 18, 2007 (doc. # 211), September 24, 2007 (doc. # 285), and July 3, 2008 (doc. # 321). The court repeated this information at the final pretrial conference held on July 24, 2008. Other orders issued by the court also contained reminders about witness statements. See Orders dated April 30, 2008 (doc. # 308) and July 16, 2008 (doc. # 330). The Boyles were aware, or should have been aware, that they required to submit a written summary for each of their witnesses. This was never done by the Boyles for Jonsson, although they did do it, for better or worse, for other witnesses they called.

The Boyles could have avoided the hearsay problem by calling Holmes, who was subject to subpoena and had personal knowledge about the state and completeness of ETI's books. Again, they chose not to call Holmes as a witness despite having identified him as one of their witnesses and providing a witness statement for his testimony that covered this information in part.

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Roberts is an accountant for the Parrot Group, the successor auditors to Holmes Royer. The court excluded Roberts's testimony at trial because the Boyles failed to identify him as a trial witness and further because they did not file and serve an expert witness statement from him before trial. The Boyles request that Roberts be permitted to testify that Holmes had complete control over all of ETI's financial information, and that consequently the Boyles had "no idea there were any missing revenues" from ETI's books.

I deny the motion to reopen the trial to allow testimony from Roberts because 1) the Boyles failed to identify him as a trial witness and to file and serve an expert witness statement before trial, or explain their failure to do so, and 2) the Boyles themselves could have testified at trial as to their lack of knowledge about ETI's books, and did not elect to do so. I also note that coming in after this case started, Roberts would have no personal knowledge of what the Boyles knew or did not know from any source other than the Boyles. Likewise, no source of personal knowledge for Roberts about Holmes's control of ETI's financial information was ever revealed or apparent.

Newly discovered evidence

The Boyles assert that evidence from the ETI bankruptcy proceeding, indicating that a loan from Michael Boyle to ETI was incorrectly booked as revenue from T-Mobile, constitutes newly discovered evidence that could have changed the outcome of the litigation. However, the Boyles' motion was not, at the time of filing, accompanied by an affidavit showing that this evidence is

newly discovered, i.e., was not within the custody or control of the Boyles before the entry of judgment, as required by Rule 59(c). See also Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003)(evidence in the possession of the party before the judgment was rendered is not newly discovered). I deny the motion for new trial on the basis of newly discovered evidence because the Boyles have not made a showing that the evidence was beyond their custody or control before the entry of judgment in this case.

Testimony of John Cargal

The Boyles assert that the court erred by allowing testimony from John Cargal because Scheets filed no witness statement for Cargal. They argue that because Cargal was allowed to testify, I must also allow Jonsson and Roberts to testify. I disagree.

First, John Cargal was a party to this action, not a non-party witness. Second, Michael Boyle participated in two depositions of Cargal, in December 2007 and June 2008. Third, the Boyles designated Cargal as a witness before trial and designated his entire deposition for use at trial (Exhibit 502). See Watkins Affidavit, Exhibits A, B, C and D. Cargal was also extensively cross examined at trial by Michael Boyle. The Boyles were not surprised by, nor unprepared for, Cargal's testimony. The same cannot be said for either Jonsson, former counsel for ETI, Savant and the Boyles, nor for Roberts. It does not appear that they were deposed, an event that would be unusual for Jonsson, an attorney for several parties in the case including the Boyles.

Amendment of pretrial order

The Boyles contend that the "Court incorrectly granted [Scheets] leave to amend the Pre-Trial Order on the third day of the five day trial, which shifted the basis of the complaint from interference of [sic] a statutory purchase to diversion." In fact, although both the Boyles and Scheets proffered proposed pretrial orders to the court, neither of the parties' proposed pretrial orders, nor any other pretrial order, was lodged in this case. The court and the parties knew what the claims were in this case, as set forth in the complaint, answer, counterclaim, and answer to the counterclaim. The claims were the subject of several motions with opinions by the court prior to trial as well. The claims were tried and a decision was reached.

Inadequate basis for damages

The Boyles assert that the valuation of Scheets's shares at $900,000, arrived at by the court as finder of fact is not supported by the evidence,[1] and that the court should have an independent third party determine the value of those shares. I have reviewed the testimony and exhibits relating to this issue and adhere to my Findings of Fact and Conclusions of Law.

The court's valuation started with the parties' stipulation to a valuation date of July 24, 2004. As the finder of fact, I declined to use the cost approach to valuation because it was not

[1] As a matter of law, the court declined to award any damages representing excess contributions to the Boyles, because this claim is properly asserted by the corporation, not by a shareholder, and as such the claim belongs to ETI's trustee in bankruptcy.

well suited to a services-based business. Scheets's evidence on the issue of valuation of his shares as of July 24, 2004 was in the form of the testimony of Mr. William Partin. "Some witnesses, because of education or experience, are permitted to state opinions and the reasons for these opinions." Ninth Circuit Model Civil Jury Instructions 2.11 (Expert Opinion). As the finder of fact, the court is to judge expert opinion "like any other testimony," and may "accept it or reject it, and give it as much weight as [the court] think[s] it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case." Id. The fact finder followed this instruction in evaluating Mr. Partin's testimony and all the evidence on the damages issues.

I decline the Boyles' apparent invitation to explain with mathematical precision the damages as determined by the court. I do note, however, several issues that caused me not to adopt Mr. Partin's valuation under the income approach, the market approach, or his blend of the two, weighing the income approach three times as heavily as the market approach. For all his belief in the inherent strength of the income approach over the market approach, Mr. Partin arrived at a figure of $2,389,690 for the income approach and $2,364,822 for the market approach, a difference of less than $25,000, or about 1%. One would expect a greater difference if one number were entitled to three times the credibility of the other.

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I awarded substantially less than Mr. Partin's valuations under either approach for several reasons. However, none of those reasons suggested that the shares had no value on July 24, 2004. Indeed, the testimony in this case and all the evidence supports a finding that they had substantial value on that date.

While Mr. Partin testified about the theories of business valuation and presented his opinions about the value of Mr. Scheets's shares as if they were as mathematical and precise as the laws of physics, they clearly are not. It is not the Heisenberg Uncertainty Principle or any similar concept that makes it difficult to "measure" the value of shares of a corporation; it is all the assumptions, approximations, and extrapolations of data regarding non-identical businesses that produce much of the imprecision. This imprecision is then used to forecast the future success of a business largely dependent on the efforts of human beings--hardly something that is susceptible to mathematics--and the finder of fact is asked to accept these predictions as a "measurement" of the value of the business. At its root, valuing a business is no more or less than establishing what a willing buyer would pay a willing seller. The reasons for a buyer's confidence in the business add to its value; those that weaken confidence lower its value. Many such variables are subjective, not objective.

Some of the court's primary reasons for rejecting Mr. Partin's conclusion on valuation include his glib assumption that ETI's profits would continue into the future relatively unabated from the exponential growth experienced in 2003 and 2004, despite a number

of disquieting circumstances that would have been apparent to a potential buyer. These circumstances included serious fraud allegations against Cargal, the revelation of significant preferential distributions to the Boyles over other shareholders, the development of two shareholder lawsuits, and ETI's dependence on one client, T-Mobile, with the account being based in some unquantifiable way on a romantic relationship between Michael Boyle and a T-Mobile employee. All this would make a potential purchaser skeptical about the continued viability of ETI, and the finder of fact disbelieve Mr. Partin's conclusions. The assumption that a potential buyer would treat these events as non-recurring expenses or problems, so that the business could be valued without regard to them except for subtracting out the losses and expenses, is simply not believable.

While someone trying to value the business in mid-2004 would not have had the actual performance figures for 2005-2007 to assist him, those figures bear out the doubts I express here. The continued success of the business seemed inextricably tied to the success of the Boyles. In other words, a potential buyer would have had to be comfortable dealing with the Boyles in light of the poorly kept financial records, the evidence of excessive and preferential compensation for them, the fraud alleged against Cargal, and the heavy reliance on a single customer.

On the other hand, the rapid growth of ETI, generating the huge sums that were taken advantage of by the Boyles and Cargal, do support a substantial value for the Scheets shares in mid-2004. In

deciding the Boyles' post trial motion, I have reexamined my findings of fact regarding the damage award and again find it supported by the evidence in the record. Therefore, I deny the motion.

II. Motion to intervene

Holmes moves to intervene, either as of right pursuant to Rule 24(a), or permissively pursuant to Rule 24(b). The purpose of the intervention is to request that the court enter an order amending some of the findings of fact and conclusions of law contained in the Opinion. Alternatively, Holmes moves the court to exercise its inherent power to amend and correct findings that 1) William Holmes and Holmes Royer participated in a conspiracy with the Boyles, Cargal and Kersh to conceal and misdirect corporate assets of ETI; and 2) Holmes and Holmes Royer participated in acts of malfeasance intended to prevent Scheets from realizing the full value of his interest in ETI. Holmes asserts that the court's Opinion has had an adverse effect on the business reputations and earning capacities of Holmes and Holmes Royer, and that Holmes, as a non-party, was denied his due process rights because he had no opportunity to present evidence, cross-examine witnesses, or otherwise defend himself from the adverse findings. Holmes has set out seven specific findings of fact referring to Holmes and Holmes Royer's conduct and requested that they be amended to remove those references.

Holmes contends that if William Holmes and Holmes Royer had been able to participate at trial, they would have presented

evidence showing that 1) the financial reports prepared for ETI disclosed that Holmes Royer was not an independent accountant; 2) their financial reports were accurate based on information made available by ETI management to them at the time; 3) neither Holmes nor Holmes Royer was involved in any scheme to oppress Scheets, divert ETI funds, or withhold or misstate any ETI financial information; and 4) Holmes and Holmes Royer communicated to Scheets the existence of previously undisclosed bank accounts as soon as they were discovered and after their withdrawal of the financial statements they prepared.

Standards

Under Rule 24(a), intervention as of right is allowed to anyone who

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Rule 24(b) gives the court discretion to permit anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Rule 24(b)(1)(B). Both sections of the rule require timely application. League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997).

A motion under Rule 24(a) requires satisfaction of four criteria: 1) the motion must be timely; 2) the proposed intervenor must assert an interest relating to the property or transaction which is the subject of the action; 3) the proposed intervenor must be so situated that without intervention the disposition of the

action may as a practical matter impair or impede its ability to protect that interest; and 4) the party's interest must be inadequately represented by the other parties. See, e.g., Californians for Safe Dump Truck Transp. v. Mendonca, 152 F.3d 1184, 1189 (9th Cir. 1998). In determining whether intervention is appropriate, the court is guided "primarily by practical and equitable considerations." Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998). If the court finds that the motion to intervene is not timely, it need not reach any of the remaining elements of Rule 24. United States v. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996).

In determining whether a Rule 24(a) motion is timely, the court considers 1) the stage of the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay. United States v. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996). In considering these factors, the court must bear in mind that "any substantial lapse of time weighs heavily against intervention." Id.

Permissive intervention under Rule 24(b) is granted if the proposed intervenor provides an independent basis for jurisdiction, the motion is timely, and the proposed intervenor's claims or defenses share a question of law or fact with the action. League of United Latin American Citizens, 131 F.3d at 1308. Even when the proposed intervenor satisfies these three requirements, the district court has discretion to deny permissive intervention if the intervention will unduly delay the main action or will unfairly

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prejudice the existing parties. Fed. R. Civ. P. 24(b)(2); Donnelly, 159 F.3d at 409.

Discussion

Timeliness

Actual or imputed knowledge

Holmes must show that he filed his motion to intervene as soon as he knew or had reason to know that his interests might be adversely affected by the outcome of the litigation. United States v. Oregon, 913 F.2d 576, 589 (9th Cir. 1990).

Holmes argues that his application is timely because he had no reason to know his interest was adversely affected until the date the Opinion was issued, and he filed the motion within the 10 day period for amending or correcting findings pursuant to Rules 52 and 59. Holmes argues further that no party will sustain prejudice from the intervention, because the relief Holmes seeks does not affect the outcome of the case.

I am unpersuaded by Holmes's assertion that he had no reason to know the court might enter an opinion with findings adverse to him. Holmes knew or should have known of the existence and nature of the present case. Holmes was a party in the ancillary malpractice case, Scheets v. Holmes, CV 07-1147-HU, and in that case was at all times represented by counsel, Mary Anne Rayburn, who was appointed by Holmes's insurance carrier. He was apparently also represented by Robert Schlachter, hired by Holmes independently, on issues related to Scheets v. Holmes, but Mr. Schlachter was never counsel of record. The court held joint

scheduling conferences for this case and the Scheets v. Holmes case. (Doc. ## 259, 262, 272, 277, 282). Discovery was to some extent conducted jointly in both cases, including the depositions of John Cargal, a primary accuser of Mr. Holmes. Ms. Rayburn represented Holmes at at the Cargal depositions taken in December 2007 and June 2008. Much of the evidence used in the trial of this case was discovered in the course of Scheets v. Holmes, which ended when Holmes settled with both Scheets and ETI's bankruptcy trustee. See Watkins Affidavit, ¶¶ 4, 6, 7. Scheets v. Holmes was settled before the court entered the Opinion in this case. Ms. Rayburn attended at least part of the trial of this case.[2]

Holmes asserted at oral argument that he thought he had "bought his peace" when he settled Scheets v. Holmes, and had no reason to think the court might make findings adverse to him once Scheets v. Holmes was dismissed with prejudice on December 1, 2008, and the bankruptcy trustee's dispute with Holmes was resolved. He

[2] Ms. Rayburn has submitted a declaration stating that she attended portions of the first two or three days of trial. Holmes had initially been identified as a trial witness by both Scheets and Michael Boyle, Boyle having served Holmes with a subpoena. She says that the evening before Holmes was to testify, Michael Boyle told her he would not be calling Holmes. Unbeknownst to her, Scheets had also withdrawn Holmes as a witness. Because the court excluded lay witnesses from observing the trial and it appeared that Holmes would be a witness, she was unable to inform Holmes about the testimony and evidence she had seen and heard while in the courtroom. Declaration of Mary Anne Rayburn ¶ 3. The trial ended on August 8, 2008, with Holmes never testifying. Nothing precluded Ms. Rayburn from that date on from telling Holmes about the trial testimony and arguments regarding Holmes. Schlachter has submitted a declaration stating that neither he nor anyone from his firm attended any portion of the trial. Declaration of Robert Schlachter ¶ 2.

argues that this court was not required to make findings against Holmes to support its conclusions or the judgment against the Boyles. I do not find this assertion persuasive, for several reasons.

This case was tried to the court, not a jury; the court is required to make findings of fact and issue conclusions of law. Fed. R. Civ. P. 52(a)(1). Both sides in this case accused Holmes of misconduct, and Holmes should have anticipated that the court could not and would not ignore those accusations in its Opinion.

Holmes could not reasonably have believed that the mere existence of a stipulated judgment of dismissal with prejudice in Scheets v. Holmes, presumably based on a settlement the terms of which were not revealed to the court, protected him from any possibility that the court would make findings adverse to him in its Opinion in this case when all parties pointed at Holmes's conduct in one way or another. In fact, it is highly likely that the manner in which this case was tried, and the evidence that was produced at trial in this case, formed some basis or motivation for the settlement of Scheets v. Holmes. The official court reporter for the trial of this case received an order, on either August 4 or 5, 2008, for the transcripts of the opening statements of counsel and the Boyles, and the trial testimony of Cargal and Scheets. The Cargal transcript was delivered to Ms. Rayburn on August 14, 2008, and the Scheets transcript was delivered to her on September 18, 2008. Whether Holmes made a deliberate decision not to intervene or simply failed to appreciate the consequences of not intervening in

this case, the length of time between the trial, in August 2008, and the settlement of Scheets v. Holmes in December 2008, gave Holmes ample time to intervene in this case while negotiating the settlement of Scheets v. Holmes, a course of conduct that truly would have "bought his peace."

Stage of the proceedings

Scheets asserts that postjudgment intervention is generally disfavored because it creates delay and prejudice to existing parties and undermines the orderly administration of justice. Calvert v. Huckins, 109 F.3d 636, 638 (9th Cir. 1997); see also United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 436 (C.D. Cal. 1967), *aff'd sub nom.* Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968)(motion after entry of decree should be denied in any but the "most unusual circumstances," and such circumstances are not present where proposed intervenors had for some time been aware of the existence and nature of the case, been given every opportunity to be heard, and had not moved to intervene until "lengthy and complex negotiations had been completed, arguments had been heard, and a consent judgment entered"). Holmes has not responded directly to this argument.

Prejudice to parties

Holmes asserts that neither Scheets nor the Boyles has pointed to any prejudice they would suffer if his motion to intervene were allowed, arguing that the court could grant the relief he seeks without making any new factual determinations and without disturbing the judgment. I do not find this argument persuasive.

First, Holmes has included in his motion the argument that intervention would permit him to rebut allegations underlying the court's findings of fact, including the following: 1) Holmes and Holmes Royer were engaged as litigation consultants, rather than as independent accountants engaged to review ETI records and value Scheets's shares; 2) Holmes and Holmes Royer did not participate in any diversion of business from ETI to Savant; 3) Holmes had learned that Cargal embezzled money from Savant; 4) Holmes and Holmes Royer had no reason to believe that ETI's revenue numbers were inaccurate because the financial information they generated were based on representations to them by Cargal and the Boyles; and 5) neither Holmes nor Holmes Royer knew of or participated in the Boyles's alleged use of undisclosed ETI accounts. See Declaration of William Holmes and attached exhibits.

The Boyles respond to this argument with a promise to offer evidence, should Holmes be allowed to intervene and rebut the allegations summarized above, that Holmes was the custodian of ETI and Savant's financial information, and that he, not the Boyles, was the one who caused incomplete and inaccurate financial information to be given to Scheets.

On the basis of these arguments, I conclude that granting Holmes's motion to intervene could very well inject new issues, well beyond the scope of the original claims and defenses, into this case and delay its ultimate resolution. These issues--the knowledge, access to information, and conduct of the Boyles in relation to the knowledge, access and conduct of Holmes and Holmes

Royer--would mire the court and the parties in retrying facts and deciding issues that are tangential to the issues as originally tried in this case. It is by no means certain that such a process would leave the facts unchanged and the judgment undisturbed. It clearly would delay ultimate disposition of the case. In such circumstances, I exercise my discretion to deny the motion to intervene. See Smith v. Marsh, 194 F.3d 1045 (9th Cir. 1999).

The motion to intervene as of right under Rule 24(a)is denied as untimely. Accordingly, I do not reach any of the remaining elements of Rule 24(a). The motion for permissive intervention under Rule 24(b) is denied on the grounds that it is untimely and that intervention would be likely to result in unnecessary relitigation of facts, would delay disposition of this case, and could prejudice the judgment Scheets has obtained.

III. Inherent authority to amend Opinion

Holmes urges the court, if it denies the motion to intervene, to exercise its inherent authority *sua sponte* to correct "manifest errors of fact and law." Gumbel v. Pitkin, 124 U.S. 131, 145-46 (1888)(equitable powers of court over own process, to prevent abuse, oppression and injustice, are inherent). Holmes has not, however, directed the court to any "manifest errors" of fact or of law in its Opinion. I therefore decline to exercise such power.

IV. Conclusion

The Joint Motion of Patrick and Michael Boyle to Reopen and for New Trial (doc. # 372) is DENIED.

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The motion of William Holmes and W. Holmes & Co. to Intervene or, in the Alternative for a New Trial or Other Orders (doc. # 373) is DENIED.

IT IS SO ORDERED.

Dated this 7th day of May, 2009.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge