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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7 MODESTO DIVISION
8

9 In re) Case No. 09-92985-E-7
10)
11 EDDIE A. JEBRI and)
WAYLET M. JEBRI,)
12)
Debtor(s).)
13 _____)
14 EFRAIN RAMIREZ,) Adv. Pro. No. 09-9086
15) Docket Control No. RLA-4
Plaintiff(s),)
16 v.)
17)
EDDIE A. JEBRI and)
WAYLET M. JEBRI,)
18)
Defendant(s).)
_____)

19 **This memorandum decision is not approved for publication and may**
20 **not be cited except when relevant under the doctrine of law of the**
21 **case or the rules of claim preclusion or issue preclusion.**

22 **MEMORANDUM OPINION AND DECISION**

23 The court has been presented with a Motion for New Trial in
24 this Adversary Proceeding by the Defendant Eddie A. Jebri
25 ("Jebri"). Proper notice was provided and an opposition filed by
26 Efrain Ramirez, the prevailing Plaintiff ("Plaintiff").

27 Jebri, seeks a new trial in this adversary proceeding on the
28 basis that he has discovered new evidence. A motion for new trial

1 is governed by Federal Rule of Bankruptcy Procedure 9023 which
2 incorporates Federal Rule of Civil Procedure 59. The Federal Rule
3 of Bankruptcy Procedure 9023 also supplemented Federal Rule of
4 Civil Procedure 59 by requiring that the motion for a new trial or
5 a motion to alter or amend a judgment be filed not later than
6 14 days after entry of judgement. A motion is filed when it is
7 delivered into the actual custody of the proper officer. *U.S. v.*
8 *Lombardo*, 241 U.S. 73, 76-77 (1916).

9 The Motion seeks a new trial under Rule 59(a)(1) or in the
10 alternative for the court to reopen the judgment under
11 Rule 59(a)(2). The first asserted ground for a new trial is stated
12 to be

13 (a) In General.

14 (1) Grounds for New Trial. The court may, on motion,
15 grant a new trial on all or some of the issues--and to
any party--as follows:

16 (A) after a jury trial, for any reason for
17 which a new trial has heretofore been granted in an
action at law in federal court; or

18 (B) after a nonjury trial, for any reason for
19 which a rehearing has heretofore been granted in a suit
in equity in federal court.

20 Rule 59(a)(1), Fed. R. Civ. P. No points and authorities have
21 been provided to the court as to what grounds exist for granting a
22 new trial in a non-jury case for a suit in equity.

23 The alternative relief sought is to reopen the judgment
24 pursuant to Rule 59(a)(2), Fed. R. Civ. P., which states,

25 (2) Further Action After a Nonjury Trial. After a
26 nonjury trial, the court may, on motion for a new trial,
27 open the judgment if one has been entered, take
additional testimony, amend findings of fact and
28 conclusions of law or make new ones, and direct the entry
of a new judgment.

1 Again, no points and authorities are provided to the court
2 with respect to when it is appropriate for a court to reopen a
3 judgment and subject the parties to further litigating what had
4 been a decided issue. For both grounds stated, Jebri appears to
5 take it as a matter of faith that a final ruling of the court will
6 be reopened because Jebri wants to present and argue additional
7 evidence.

8 The Motion asserts that relief is warranted under either Rule
9 59(a) (1) and (a) (2) because:

10 a. Page 6 of the Court's Findings of Fact and Conclusions of
11 Law states that it is undisputed that Jebri knowingly
12 sold illegal franchises to the Plaintiff.

13 b. Jebri believed prior to trial that it was Plaintiff's
14 burden of proof to prove the damages set forth in
15 Plaintiff's Exhibit No. 27. Jebri asserts he was further
16 lulled into complacency based on page 2 of Exhibit 27
17 listing alleged lost activations while unable to do
18 business during the period of February 2006 through
19 December 2007, because Jebri believed that his numerous
20 Exhibits proved that commissions were paid by Jebri's
21 company, EZ Wireless, for the period from November 2005
22 through December 2007.

23 c. Plaintiff provided a July 2005 invoice as evidence of
24 double book keeping by Defendant. Exhibits 22 and 24
25 submitted by Jebri were generated by the Defendant's
26 software. Exhibit 22 "came from Sprint" which states the
27 full commission payable to Jebri's corporation and
28 Exhibit 24 shows the commission payable from Jebri's

1 corporation to Plaintiff. Based on these, no commissions
2 were owed.

3 d. Since the trial, Jebri has begun retrieving evidence from
4 Sprint to support Jebri's defense that all commissions
5 have been paid. Jebri asserts that evidence from Sprint
6 shows that commissions are not due.

7 e. Failure to grant a new trial or reopen the judgment to
8 take the Sprint evidence will result in a great
9 injustice.

10 The court applies these grounds to Rule 59(a)(1) and (2) to
11 determine whether a new trial should be granted or the judgment
12 reopened. Because Jebri has sought to merely state the grounds and
13 not provide any legal authorities for the proper application of the
14 Rule, he has chosen to make this task more difficult for the court.
15 Shifting the burden of conducting legal research on the court is
16 inappropriate. However, the court will not prejudice Jebri for
17 this shortcoming and issue a final ruling supported by appropriate
18 legal analysis.

19 **CREDIBILITY OF WITNESS DETERMINED AT TRIAL**

20 A significant part of Jebri's contention is that he should be
21 believed and not the Plaintiff and Plaintiff's witnesses. The
22 court made extensive filings at trial, expressly determining that
23 Jebri's testimony and exhibits were not credible. Some of the
24 reasons stated by the court as to why Jebri's testimony was not
25 credible included: (1) Jebri electing to only producing his
26 companies business records for the amounts he alleged were due and
27 not what would be corroborating Sprint records which were available
28 to him, (2) Jebri's testimony that he consciously chose to only

1 produce his records since the Plaintiff's dealing were with him and
2 not Sprint (though the commissions were based on amounts paid by
3 Sprint to Jebri's company), (3) the inference drawn by the court
4 that Jebri failed to produce the Sprint records because they would
5 not corroborate the evidence produced by Jebri at trial, (4) Jebri
6 testifying that he sold franchises after being advised by counsel
7 that to do so would be illegal, leading the court to conclude that
8 Jebri would say or do whatever (whether legal or illegal) he
9 believed would advance his financial interests, (5) the selective
10 memory of Jebri when the lack of knowledge worked to his tactical
11 advantage at the trial, and (6) testimony by Zee Tawasha (former
12 business associate of Jebri and former co-CEO of EZ Wireless which
13 did business with Plaintiff) that Jebri's company maintained two
14 sets of books reflecting the commissions due and the EZ Wireless
15 information provided to Plaintiff by Jebri was inaccurate. The
16 court's full findings and conclusions are stated in detail in the
17 record pursuant to Rule 52(a)(1), Fed. R. Civ. P., and Rule 7052,
18 Fed. R. Civ. P.

19 Though Jebri tries to reargue the issues and contend that the
20 evidence he submitted was better than that presented at trial by
21 Plaintiff and Plaintiff's witnesses (including his former business
22 associate and co-CEO of EZ Wireless), he ignores the court making
23 a determination that Jebri's testimony and evidence was not
24 credible. The court was required to determine which, of the
25 conflict evidence, was more credible.

26 **PROPER GROUNDS FOR A NEW TRIAL**

27 Though Rule 59(a)(1) and (2) grant the authority to reopen the
28 judgment or grant a new trial, they do not specify the proper

1 grounds for granting such relief in the Rule. The court's analysis
2 begins with a general review of this Rule. As stated in WRIGHT-
3 MILLER-KANE, FEDERAL PRACTICE AND PROCEDURE, § 2803,

4 Rule 59 give the trial judge ample power to prevent what
5 he considers to be a miscarriage of justice. It is the
6 judge's right, and indeed his duty, to order a new trial
7 if he deems it in the interest of justice to do
8 so...Courts do not grant new trials unless it is
reasonably clear that prejudicial error has crept into
the record or that substantial justice has not been done,
and the burden of showing harmful error rests on the
party seeking the new trial....

9 In the event of a non-jury trial, a motion for new trial or
10 rehearing should be based upon "manifest error of law or mistake of
11 fact, and a judgment should not be set aside except for substantial
12 reasons." *Id.*, § 2804.

13 **Newly Discovered Evidence**

14 Jebri comes to the court seeking a new trial or to reopen the
15 judgment because after the trial he obtained records from Sprint
16 which he asserts supports his defense. No explanation is offered
17 as to why the records were not produced at the trial, other than
18 the statement in the Motion that Jebri was "lulled into
19 complacency." Making a strategy decision to be complacent with
20 the evidence to be presented at trial is not the basis for finding
21 newly discovered evidence.

22 A motion for new trial may be granted if there has been a
23 change in the law or facts, or there is newly discovered evidence.
24 *In re Basham*, 208 B.R. 926, 934 (B.A.P. 9th Cir. 1997), *aff'd*, 152
25 F.3d 924 (9th Cir. 1998). To obtain a new trial based upon newly
26 discovered evidence, Jebri must show that the evidence:

- 27 (1) existed at the time of the trial,
28 (2) could not have been discovered through due diligence, and

1 (3) was of such magnitude that production of it earlier would
2 have been likely to change the disposition of the case.
3 *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (per
4 curiam).

5 It is not merely sufficient that Jebri steps forward and says
6 that he now has additional evidence to present to the court, which
7 is "new" to the court because Jebri chose not to obtain it during
8 discovery and present it at trial. To prevail on this ground,
9 Jebri must establish that the "new" evidence was discovered after
10 the trial and that through the exercise of due diligence Jebri
11 could not have discovered it earlier. *Defenders of Wildlife v.*
12 *Bernal*, 204 F.3d 920, 929 (9th Cir. 1999).

13 The colloquy between the Plaintiff's counsel and Jebri
14 demonstrates this conscious decision by Jebri not to introduce
15 third-party evidence.

16 Q. [Plaintiff's Counsel], Well, those records all have your
17 stationery on them, don't they? It says EZ Wireless on them?

18 A. [Jebri]. Yes.

19 Q. I'm interested in something that has Sprint on it. Do you
20 have any records that say Sprint? When they send you when I
get a bill from Sprint, it says Sprint all over it. And it
gives me an itemization of the bill.

21 A. The contract between me and Central Valley Communication,
22 is not a contract between Sprint and Central Valley
Communication. Whatever is sent from Sprint is between EZ
Wireless, not --

23 ...

24 Q. Now, you say you can download any Sprint records because
25 you are the master agent, right?

26 A. Yes.

27 Q. Why didn't you present the Sprint records.

28 A. The - the Sprint record is exactly what's shown on our

1 record for Efrain Ramirez [Plaintiff].

2 Q. How can we verify that? We don't have the Sprint record.
3 We just have the record you made of what you think you owe Mr.
4 Ramirez. We just have to trust you, is that it?

5 A. You don't have to trust me. Efrain Ramirez, if you have
6 a complaint about this - this is not his records, he should
7 show me proof of that this is not his records and I owe him
8 more money than what I submitted to him every single month.

9 Q. Well, Mr. Ramirez doesn't have access to the Sprint
10 records, does he?

11 A. He has access to his contract.

12 Q. The contract between you ----

13 THE COURT: Gentlemen, a question will be asked and answer will
14 be given. You're not going to get into a
15 running argument.

16 THE WITNESS: Certainly.

17 Q. At any time did Mr. Ramirez have access to the Sprint
18 records of his sales?

19 A. No.

20 Q. He had to go through you?

21 A. Yes.

22 Q. Did you ever give him Sprint records of the sales?

23 A. The exhibit, all of this activations.

24 Q. You gave him your records, didn't you?

25 A. I did give him records. All this record is Sprint
26 Activations.

27 Trial Transcript, Pgs. 124: 22-25, 125:1-7, 131:7-25, 132:1-15,
28 Dkct.50. Jebri's testimony was clear that he sought only to
present his records of the transaction, believing that third-party
records irrelevant since the dispute was between Plaintiff and
Jebri.

As the Plaintiff argues, Jebri cannot meet the second factor.
The new evidence consists of records obtained directly from Sprint

1 showing new cell phone activations. There is no explanation for
2 how this evidence could not have been discovered through due
3 diligence before trial. At trial, when questioned as to why
4 corroborating evidence of Sprint records was not provided, Jebri
5 asserted that he did not have to produce anything other than his
6 own records. It is clear from the Motion and supporting affidavits
7 that this is not evidence discovered after trial, but evidence
8 which Jebri was aware of before trial but consciously chose not to
9 present that available evidence to the court. Presumably, Jebri
10 made the strategy decision believing that his testimony would be so
11 significantly more credible than the Plaintiff's and his former co-
12 CEO.

13 The court has also carefully reviewed the affidavits provided
14 in support of the Motion. The only affidavits filed are those of
15 Richard Anderson, the trial attorney, and Diane Denato, paralegal
16 for the trial attorney.¹ No evidence is presented to indicate that
17 the Sprint records represent evidence that Jebri did not know about
18 and was not available at the time of trial. Rather, the
19 declarations are consistent with the Motion that no effort was made
20 to obtain the Sprint records until after the court ruled against
21 Jebri, issued its judgment, and Jebri realized that his conscious
22 strategy to not present third-party evidence had failed.

23 For whatever strategy reason, Jebri chose not to obtain these
24

25 ¹ The statements titled as "affidavits," are not signed or
26 attested to under penalty of perjury. See Fed. R. Evid. 603, Fed. R.
27 Civ. P. 43, and Fed. R. Bankr. P. 9017. These statements are not
28 evidence. The Plaintiff objected to these statements on those
grounds. Out of an abundance of caution the court has reviewed the
statements, and even if they were a sufficient presentation of
testimony under penalty of perjury, they do not support a basis for
new trial or to reopen the judgment.

1 records to present at trial, and cannot now claim they are newly
2 discovered after the evidence he chose to present did not carry the
3 day. This is not cause to grant a motion for new trial.

4 **Finding that Jebri Illegally Sold Franchise**

5 Jebri contends that the court's finding that it was undisputed
6 that Jebri sold a franchise to Plaintiff was a material error.
7 Jebri contends that he admits to selling at least one franchise to
8 another person, but does not admit to selling a franchise to
9 Plaintiff. It was undisputed at trial that Plaintiff entered into
10 an agreement with Jebri's company which was promoted by Jebri. To
11 the extent that Jebri ceased illegally selling franchises, he did
12 have Plaintiff enter into a Subcontractor Agreement for which
13 commissions were due Plaintiff. Jebri's Exhibits A and B are the
14 EZ Wireless Subcontractor Agreement outlining 2006 Commission Plan
15 and the EZ Wireless Subcontractor Agreement outlining 2005
16 Commission Plan, respectively. Jebri's Exhibit C was the Jebri's
17 summary of commissions which he computed were due, and Exhibits D
18 through L are copies of commission checks paid to Plaintiff under
19 the Agreement with EZ Wireless. There was no dispute as to
20 Plaintiff having entered into an Agreement by which commissions
21 were due from EZ Wireless, Jebri's company. The right to the
22 commissions, and any damages flowing from such commissions were not
23 dependent upon whether Jebri sold a franchise or a Subcontractor
24 Agreement to Plaintiff. The dispute in this case was whether
25 Plaintiff was properly paid the commissions he was due, or whether
26 Jebri misrepresented the amount of commissions due and diverted
27 monies due Plaintiff to himself or one of his companies. Whether
28 it was in the context of an "illegal franchise" is not material to

1 the decision fo the court.

2 Whether Jebri illegally sold a franchise to this Plaintiff or
3 promised to and then switched to a Subcontractor Agreement makes no
4 material difference with respect to Plaintiff's right to receive
5 commissions under the Agreement. As stated in the Motion, Jebri
6 admitted to illegally selling franchise agreements, and as set
7 forth in the record, Jebri did so after receiving advice of counsel
8 that it was illegal.

9 Jebri's contention that there was not a sale of an illegal
10 franchise to Plaintiff is also inconsistent with Jebri
11 acknowledging at trial that the state court has issued a
12 restitution order in the amount of \$73,342.46 which is asserted to
13 be nondischargeable. Transcript 7:1-7. The restitution order
14 relates to franchises illegally sold by Jebri. Transcript 7:8-12,
15 17-18, and testimony of Jebri that he illegally sold franchises
16 after obtaining the advice of counsel. Jebri sought to obtain a
17 dismissal of the complaint at the time of trial on the grounds that
18 he was already obligated to Plaintiff for \$73,342.46 in restitution
19 damages for selling an illegal franchise and that such damages for
20 selling an illegal franchise were all the damages to which
21 Plaintiff was entitled. To the extent that the determination that
22 Jebri illegally sold a franchise to Plaintiff is material to the
23 commissions owed to Plaintiff, clear, unequivocal evidence,
24 including admissions by Jebri, support such a determination.
25 However, the court's ruling is not dependent on Jebri having sold
26 an illegal franchise.

27 No sufficient grounds have been established for a new trial or
28 reopen the judgment on the issue of whether the court's findings

1 state that a franchise was sold to Plaintiff or there was a
2 Subcontractor Agreement under which Plaintiff was entitled to the
3 commissions in dispute. The Motion is denied on this ground.

4 **Plaintiff's Burden of Proof**

5 As amplified at the hearing, Jebri also contends that the
6 Plaintiff did not carry his burden of proof. Jebri has also made
7 statements that the court shifted the burden to Jebri to prove that
8 alleged sales did not exist. These contentions are incorrect.

9 As stated at trial, the Plaintiff had the burden of proof for
10 his case by a preponderance of the evidence. As determined by the
11 court, the Plaintiff carried that burden for \$141,870.08 of
12 damages. The court determined that the Plaintiff did not carry his
13 burden of proof for the additional \$1,370,848.97 in damages sought
14 by Plaintiff. The court accepted Jebri's statement of the amount
15 of commissions due per transaction, using the amounts set forth in
16 Jebri's exhibits.

17 The court did find persuasive the evidence of transactions for
18 which compensation had not been paid which had been prepared while
19 the Plaintiff had access to its business records as a Subcontractor
20 for EZ Wireless. The testimony at trial is that the computer
21 system and records from which much of the information was produced
22 had been taken by Jebri when the Plaintiff ceased being a
23 subcontractor for EZ Wireless. Exhibit 27 was prepared for the
24 California Department of Justice when it was investigating Jebri
25 for the illegal sale of franchises. The substance of Jebri's
26 argument on the burden of proof is that he doesn't believe the
27 testimony and methodology, so his testimony is more credible. The
28 court did not find such to be the case.

1 To the extent that Jebri argues that a new trial should be
2 granted or the judgment reopened because the court erroneously
3 shifted the burden of proof to Jebri, the Motion is denied.

4 **CONCLUSION**

5 As discussed in MOORE'S FEDERAL PRACTICE - CIVIL § 59.13, MATTHEW
6 BENDER AND COMPANY, there are no fixed standards which apply to a new
7 trial, and the general grounds are that (1) the verdict is against
8 the clear weight of the evidence, (2) the damages are excessive,
9 (3) the trial was not fair, or (4) substantial errors occurred in
10 the admission or rejection of evidence or that giving or refusal of
11 instructions. False testimony of a witness may be grounds for a new
12 trial if the falsity of the testimony is established. Id.,
13 § 59.13[c][ii]. None of those grounds have been shown in this
14 adversary proceeding.

15 Jebri made a strategy decision as to what evidence he was
16 going to produce at trial, specifically electing not to use third-
17 party Sprint records for his case or rebuttal. Now, regretting
18 that decision he seeks to retry the case and use a different
19 strategy. Regret and a desire to implement multiple strategies in
20 a series of trials is not grounds for granting a new trial.

21 Because the motion has failed to established a basis for
22 granting a new trial, the motion is denied. This Memorandum
23 Opinion and Decision constitutes the court's findings of fact and
24 conclusions of law pursuant to Fed. R. Civ. P. 52 and Fed. R. Bank.
25 P. 7052.

26 Dated: September 30, 2011

27 /s/ Ronald H. Sargis
28 RONALD H. SARGIS, Judge
United States Bankruptcy Court