

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SARKES TARZIAN INC,)	
)	
Plaintiff,)	
vs.)	
)	
U S TRUST COMPANY OF FLORIDA)	CAUSE NO. IP99-0165-C-Y/S
SAVINGS BANK AS PERSONAL)	
REPRESENTATIVE OF THE ESTATE OF)	
MARY TARZIAN,)	
BULL RUN CORPORATION DISMISSED)	
WITHOUT PREJ 5/3/99,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SARKES TARZIAN, INC.,)	
Plaintiff,)	
)	
vs.)	IP 99-0165-Y/S
)	
U.S. TRUST COMPANY OF FLORIDA)	
SAVINGS BANK, as Personal Representative)	
of the Estate of Mary Tarzian,)	
Defendant.)	
)	

ENTRY DENYING MOTION FOR NEW TRIAL

Plaintiff Sarkes Tarzian, Inc. (“STI”), moves the court, pursuant to Fed.R.Civ.P. 59(a) and 60(b), for a new trial based on the recent discovery of new evidence that it contends was improperly withheld from STI by defendant U.S. Trust Company of Florida Savings Bank, as personal representative of the Estate of Mary Tarzian (“U.S. Trust”). For the reasons explained below, the court **DENIES** STI’s motion.

I. Background

STI sued U.S. Trust for breach of an oral contract allegedly entered into by U.S. Trust’s attorney, James Pressly (“Mr. Pressly”). Following a six day trial, the jury returned a verdict in favor of STI. Implicit in that verdict was a finding, based upon the jury instructions, that Mr. Pressly had actual authority to bind U.S. Trust to a contract for the sale of STI stock owned by the Estate of Mary Tarzian. U.S. Trust appealed the verdict to the Seventh Circuit, and a Panel of three circuit judges (the “Panel”) unanimously reversed with instructions to enter judgment in favor of U.S. Trust.

The Seventh Circuit concluded that there was no evidence presented at trial that Mr. Pressly had actual authority to bind U.S. Trust. Specifically, the Panel determined that there was un rebutted testimony by U.S. Trust’s Chairman, Mr. Callaway, and Senior Vice President, Ms. Cavanaugh, that Mr. Pressly’s authority was limited to negotiating the terms of a potential contract, subject to final approval by U.S. Trust. The Panel noted that New York law imposes the burden on STI to ascertain that Mr. Pressly had actual authority to enter into a contract on behalf of U.S. Trust, and the Panel ultimately found that STI did not discharge its burden because STI made no effort to reach out to or call U.S. Trust’s principals to determine the extent of Mr. Pressly’s authority.

STI now seeks a new trial based upon “newly discovered evidence” in the form of Mr. Pressly’s handwritten notes related to his conversations with Bull Run between the end of the negotiation session with STI in New York on January 25, 1999, and the sale of the STI stock to Bull Run three days later. Those notes were designated as attorney work-product on the privilege logs served in this case in 2000. (Declaration of Paul Sweeney (“Sweeney Dec.”), Ex. E at 68). The notes were produced four years later in litigation between STI and Bull Run pursuant to a subpoena served on Mr. Pressly, after U.S. Trust elected to waive the applicable work product privilege. STI contends these notes are evidence that Mr. Pressly believed he had actual authority to bind U.S. Trust to a contract.

II. Discussion

A party moving for a new trial under Rule 59, based on newly discovered evidence, must prove: “(1) the evidence was discovered following trial; (2) [d]ue diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) [t]he evidence is not

merely cumulative or impeaching; (4) [t]he evidence is material; and (5) [t]he evidence is such that a new trial would probably produce a new result.” *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999). If any one of these elements is not satisfied, the movant’s motion must be denied. *Id.*

The handwritten notes of Mr. Pressly read, in relevant part:

Steve Opler [Bull Run’s representative] 404-881-7693
Alston & Bird in Atlanta
How clean is their offer?
He says it is very clean.
It says that we represent that
we own the stock. They represent
that they’ll close ‘tomorrow.’
I tell him we want to be indemnified.

(Sweeney Dec., Ex. A at 0001). Later that same day, Mr. Pressly wrote, “We agreed upon terms and they are to draw up contract. I asked him about indemnification.” (*Id.*, Ex. A at 0002).

The court finds this evidence does not satisfy elements (3), (4), or (5) above. The notes are cumulative and immaterial because the notes do not address the deficiencies in STI’s proof. For example, Mr. Pressly’s notes do not address the scope of his authority. Mr. Pressly’s notes do not contradict Mr. Callaway’s and Ms. Cavanaugh’s testimony that although Mr. Pressly had the authority to negotiate a deal, he did not have the authority to bind U.S. Trust to a contract without first obtaining its approval. Finally, Mr. Pressly’s notes do not demonstrate an effort on the part of STI to reach out to or call U.S. Trust’s principals before or after the January 25th meeting to determine the scope of Mr. Pressly’s authority. Accordingly, a new trial would not produce a different result.

III. Conclusion

For the reasons stated above, the court **DENIES** STI’s Motion for New Trial.

SO ORDERED this ____ day of June 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

Distribution:

Steven M. Edwards
Paul Sweeney
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, New York 1002

Alan H. Goldstein
ICE MILLER DONADIO & RYAN
One American Square
Bos 82001
Indianapolis, IN 46282-0002

L. Louis Mrachek
Alan B. Rose
PAGE MRACHEK, FITZGERALD & ROSE, PA
505 South Flagler Drive, Suite 600
West Palm Beach, FL 33401

Scott D. Himsel
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204