

Ayoob v. Cor-Bon et al.

CV-96-464-B 01/31/01

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Dorothy Ayoob, et al.

v.

Civil No. 96-464-B

Cor-Bon Custom Bullet Co., et al.

O R D E R

Dorothy Ayoob seeks a new trial of Cor-Bon Custom Bullet Company's breach of contract claim. She bases her claim on "newly discovered evidence," suggesting that she made a \$10,000 wire transfer to Cor-Bon which Cor-Bon failed to apply to her outstanding balance. She asserts that if this evidence had been presented to the jury, it would have reduced its award on the counterclaim by \$10,000. Cor-Bon concedes that Ayoob sent the wire transfer but contends that it applied the \$10,000 to other invoices, and thus the wire transfer could not have affected the jury's verdict. It also argues that the wire transfer evidence does not qualify as "newly discovered" evidence because it was in

Ayoob's possession prior to trial. I deny Ayoob's motion.

The First Circuit Court of Appeals has determined that evidence offered in support of a new trial motion will not be treated as newly discovered if the evidence could have been discovered prior to trial by the moving party through the exercise of due diligence. See Mitchell v. United States, 141 F.3d 8, 18 (1st Cir. 1998). Here, it is undisputed that Ayoob had the wire transfer evidence in her possession prior to trial. Further, her only excuse for not producing the evidence earlier is that she claims she did not keep the wire transfer records with her other financial records and she did not recall the wire transfer until the middle of trial when it was too late to admit the evidence without causing Cor-Bon unfair prejudice. Ordinarily, evidence cannot be treated as newly discovered if it is in the moving party's possession prior to trial even if the moving party is unaware of the evidence or fails to appreciate its significance. See Atkinson v. Prudential Prop. Co., 43 F.3d 367, 371 n.3 (8th Cir. 1994). Such is the case here. If Ayoob and her counsel had been reasonably diligent, they would have discovered the wire transfer evidence well before trial. Thus, Ayoob cannot rely on this evidence to support her new trial

motion regardless of the effect that it might have had on the jury's verdict if it had been admitted.

SO ORDERED.

Paul Barbadoro
Chief Judge

January 31, 2001

cc: Robert Johnson, Esq.
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