IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

J. SIMPSON DEAN, JR., Plaintiff, v. BRANDYWINE STUDIOS INC., a Delaware corporation, ANTHONY JOHN OBARA, JR., JANE W. OBARA, and BRANDYWINE SCULPTURE STUDIOS, INC., Defendants.	)	Civil Action No. 99-679-KAJ
BRANDYWINE STUDIOS INC., ANTHONY JOHN OBARA, JR., and JANE W. OBARA, Counter-Claimants, v. DEAN J. SIMPSON, JR., Counter-Defendant.	)	

MEMORANDUM ORDER

This breach of contract case, concerning a dispute over a sculpture that plaintiff commissioned, was tried to a jury in December of 2001. On December 20, 2001, the jury returned a verdict for the plaintiff, awarding him $756,495 in rescissory damages. (*See* Docket Item ["D.I."] 131.) Presently before the Court are the following post-trial motions, Defendants' Motion for Judgment as a Matter of Law (D.I. 132), Defendants' Motion to Alter or Amend the Judgment and/or for a New Trial (D.I. 133), Defendants'

Motion for Relief From Judgment (D.I. 151), Plaintiff's Motion to Amend the Judgment (D.I. 134), and Defendants' Motion to Dismiss the Plaintiff's Motion to Amend the Judgment (D.I. 140) . As set forth herein, the defendants' motions are denied and the plaintiff's motion is granted.

I. Defendants' Motion For Judgment As A Matter Of Law

As to the Defendants' Motion for Judgment as a Matter of Law, the defendants have not met the high burden imposed on them by Federal Rule of Civil Procedure 50(b). It is elementary that judgment as a matter of law can only be granted when "there is no legally sufficient basis for a reasonable jury to have found for the non-moving party." *Keith v. Truck Stops Corp. Of America*, 909 F.2d 743, 745 (3d Cir. 1990). Moreover, this Court must give the plaintiff, "as [the] verdict winner, the benefit of all logical inferences that could be drawn from the evidence presented, [it must] resolve all conflicts in the evidence in his favor, and in general, view the record in a light most favorable to him." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1999), *rehearing en banc denied*, 1991 WL 228122 (3d Cir. 1991).

The Court need not address the evidence, however, since the defendants have waived any right to seek relief on the basis that they claim. The defendants base their motion on the assertion that the Pennsylvania statute of limitations applicable to this case had run prior to the commencement of the action. (D.I. 132 at ¶ 11.) But while they pleaded the statute of limitations as an affirmative defense (D.I. 8; D.I. 64), the defendants failed to present any argument or support for a statute of limitations defense until seeking post-trial relief.

The defendants' inexcusable delay is also inexplicable. From the record, it appears that they vigorously contested this case at earlier stages of the proceedings, including seeking summary judgment. (D.I. 97.) At no point after their responsive pleading, however, did defendants raise the statute of limitations as a ground for relief, except, it seems, for a mention in the pretrial order that they had listed the defense in their pleadings. (D.I. 94)[1] Nothing in the post trial submissions indicates that the matter was presented at the trial. *See Stevens v. C.I.T. Group/Equipment Financing Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992) (judgment notwithstanding the verdict denial affirmed because statute of limitations defense waived when defendant failed to move for summary judgment and never mentioned limitation defense in trial proceedings); Fed.R.Civ.P. 16(e) (pretrial order controls the subsequent course of the trial unless modified to prevent manifest injustice). Having failed to raise the issue in the pretrial order and having failed to address it at trial, defendants have waived any right they might have had to assert a statute of limitations defense. *See CPC International Inc. v. Archer Daniels Midland Company*, 831 F.Supp. 1091, 1102-03 (D.Del. 1993); *cf. Cooper Distributing Company, Inc. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 283 (3d Cir. 1995) (party failing to request a jury instruction bears the consequences of that decision); *Stillwell v. Hertz Drvurself Stations*, 174 F.2d 714, 715 (3d Cir. 1949) (affirming denial of post-trial motions and finding waiver by defendant of statute of limitations defense because of failure to request an instruction on that issue).

[1] This Court's Local Rules 16.4(d)(4) and (5) require a party to include in its pretrial submission a recitation of the issues of fact and law that the party contends remain in the case.

Moreover, the defendants failed to raise the statute of limitations defense in their Rule 50(a) motion at the close of the evidence at trial. Having failed to make the issue a specific point in their motion, defendants are not permitted to raise it at this juncture. *Williams v. Runion*, 130 F.3d 568, 571-72 (3d Cir. 1997) (district court should have denied defendant's motion for judgment notwithstanding the verdict, since defendant failed to raise the issue upon directed verdict motion). Accordingly, the defendants' Motion for Judgment as a Matter of Law (D.I.132) is denied.

II. Defendants' Motion To Alter or Amend Judgment and/or Motion For A New Trial

Defendants have also filed a motion pursuant to Federal Rule of Civil Procedure 59, asking the Court to alter or amend the jury's judgment that defendants owe plaintiff $756,495.00 in rescissory damages (D.I. 133). In the alternative, defendants seek a new trial. (*Id*.) It is not entirely clear on what legal grounds the defendants base their motion. They allege that (1) plaintiff received certain tax benefits which defendants apparently believe had some bearing on the jury's understanding of the evidence (*see id*. at ¶¶ 3-4); (2) the sculpture at issue was damaged in shipping (*id*. at ¶ 5); and, (3) the Court at trial "admitted uncorroborated hearsay statements to prove material parts of the plaintiff's case[.]" (*Id*. at ¶ 6).

Once again, defendants' motion is not well founded and fails to meet the "high standard" required for motions under Rule 59. *See Price v. Delaware Department of Correction*, 40 F.Supp.2d 544, 550 (D.Del. 1999). The Third Circuit has noted that a new trial should be granted only when "a miscarriage of justice would result if the verdict were to stand," or the verdict "cries out to be overturned," or the verdict "shocks the

conscience". *See Williamson v. Consolidated Real Corp.*, 926 F.2d 1344, 1353 (3d Cir. 1991). The record in this case does not reveal any evidence that the foregoing criteria have been met. Nor do the defendants cryptic citations to matters it views as problems in the trial record provide any basis for overturning the jury's verdict or granting a new trial. Defendants' motion is therefor denied.

III. Defendants' Motion For Relief From Judgment

On August 8, 2002, some eight months after the conclusion of the trial, the defendants filed a "Motion for Relief from Judgment." (D.I. 151.) This was preceded on August 6, 2002 by an undocketed letter from defendants' counsel to the Court's Magistrate Judge (a copy of which letter is attached as Exhibit A to D.I. 155) stating that defendants' counsel would file a memorandum in support of the motion immediately upon his return from vacation with his family. Another six months has passed without counsel for the defendants filing anything in support of that motion. On February 3, 2002, the Court wrote to the attorneys in the case, setting forth deadlines for any response to the Motion to be filed by plaintiff by February 10, 2003 and any reply to such response to be filed by February 14, 2003. Rather than address the substance of the motion, counsel for the parties submitted a proposed briefing schedule that would have permitted defendants to file an opening memorandum in March 2003 and would have concluded briefing on April 18, 2003. The Court rejects any further delay in addressing this motion. Defendants have had more than ample time to provide support, to the extent there is any, for their motion. The motion will be considered on its face, without further submissions from the parties.

Other than the bare assertion in the motion that defendants believe they would have been more successful in challenging a certain witness's credibility had they been in possession of evidence they claim the plaintiff possessed, the motion is devoid of substance. Under Federal Rule of Civil Procedure 60(b)(2), a party may be relieved of a final judgment if, among other things, there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial ... ." The Third Circuit has stated that "[t]his standard requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." *Coregis Ins. Co. V. Barratta & Fenerty, Ltd.*, 264 F.3d 302, 309-10 (3d Cir. 2001)(internal quotes omitted). The defendants have failed to make a showing on any of these points. It is noteworthy that the supposedly new evidence goes solely to impeachment and credibility and does not appear to address the substance of the case at all. Thus, it is questionable that defendants could have shown, even if they had gone to the trouble of providing argument and authorities, that the evidence was material rather than simply impeaching and that it "would probably have changed the outcome of the trial."

Likewise, any claim that the defendants are entitled to relief from judgment because the behavior of the plaintiff constituted "fraud ..., misrepresentation, or other misconduct of an adversary party," *see* Fed.R.Civ.P. 60(b)(2), must fail since the defendants have provided no evidence whatsoever, let alone clear and convincing evidence, to support the allegation that the evidence was somehow wrongly withheld by the plaintiff or that the alleged withholding of the evidence substantially interfered with

the defendants' ability to fully and fairly present their case. *See Kolonski v. Mahlab,* 156 F.3d 255, 275 (1st Cir. 1998), *cert. denied,* 526 U.S. 1039 (1999). As with their earlier motion for a new trial, the defendants have failed to meet the high burden for overturning the jury's verdict and their motion must therefore be denied.

IV. Plaintiff's Motion To Amend The Judgment

The plaintiff also seeks to amend the judgment in this matter (D.I. 134). Unlike the defendants' motions, however, the plaintiff's motion is well founded. He accurately notes that the Court's judgment order, which was filed on December 21, 2001 (D.I. 131), failed to provide for post-judgment interest. Post-judgment interest on a monetary judgment is mandatory. *See* 28 U.S.C. § 1961 ("Interest shall be allowed on any money judgment in a civil case recovered in a district court."); *National Railroad Passenger Corporation v. New Castle County*, 636 F.Supp. 1482, 1490 (D.Del. 1986).

The defendants unusual response to the plaintiff's motion was to file both an "answer" to the motion (D.I. 139) and their own motion asking the Court to "dismiss" the plaintiff's motion (D.I. 140). In their response, they argue that the plaintiff's request to amend the judgment pursuant to Fed.R.Civ.P. 59(e) was not timely filed. (*See* D.I. 139 at ¶ 4.) In fact, however, plaintiff's motion was filed within ten days after the entry of judgment and, therefore, is in compliance with Rule 59(e). Accordingly, the defendants' "motion to dismiss the plaintiff's motion to amend the judgment" is denied and the judgment will be amended as requested by plaintiff.

V. Conclusion

In accordance with the foregoing,

IT IS HEREBY ORDERED that,

1. Defendants' motion for judgment as a matter of law (D.I. 132) is DENIED;

2. Defendants' motion to alter or amend the judgment and/or for a new trial (D.I. 133) is DENIED;

3. Defendants' motion for relief from judgment (D.I. 151) is DENIED;

4. Plaintiff's motion to amend the judgment (D.I. 134) is GRANTED; and

5. Defendants' motion to dismiss the plaintiff's motion to amend the judgment (D.I. 140) is DENIED.

An amended form of Judgment will be entered.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

DATE: February 10, 2003
Wilmington, Delaware