IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1869

NATIONAL MEDICAL ENTERPRISES, INC.,

Plaintiff-Counter
Defendant-Appellant,

versus

JET EAST, INC., ET AL.,

Defendants,

JET EAST, INC.,

Defendant-Counter
Plaintiff-Appellee.

Appeal from the United States District Court for
the Northern District of Texas
(3:90 CV 1176 X c/w 90 2235)

March 14, 1995

Before REAVLEY, DUHÉ and PARKER, Circuit Judges.

PER CURIAM:*

The judgment for Jet East is reversed, and the case is remanded for new trial, for the reason that the district court abused its discretion in excluding the evidence of the condition

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of the plane after it left Jet East's facility. The record does not show bad faith by National Medical Enterprises (NME) or that Jet East was unfairly prejudiced.

A court has discretion to sanction a party for destroying evidence where a party has been prejudiced by the destruction of evidence and by the bad faith conduct of the adversary. *See Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir. 1990) ("We have confined sanctions under the district court's inherent power to instances of bad faith or willful abuse of the judicial process."); *EEOC v. General Dynamics Corp.*, 999 F.2d 113, 115 (5th Cir. 1993) (noting that one factor to consider in reviewing order excluding expert testimony is "the potential prejudice that would arise from allowing the testimony"); *1488, Inc. v. Philsec Inv. Corp.*, 939 F.2d 1281, 1288 (5th Cir. 1991) (same). *See also Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3d Cir. 1994) (key considerations in reviewing exclusion of testimony on grounds of destruction of evidence include "the degree of fault of the party who altered or destroyed the evidence," and "the degree of prejudice suffered by the opposing party").

Jet East suggests that the court's sanction was also permitted under FED. R. CIV. P. 37. Jet East fails to explain which provision of this Rule allows for the striking of testimony as a sanction for the destruction of evidence. The version of the Rule in effect at the time contemplated monetary sanctions as part of an order compelling discovery (subdivision (a)), sanctions for violating a court order (subdivision (b)), and

certain other sanctions, but it does not appear to contemplate the sanction awarded here for the conduct in issue here. In any event, even if we reviewed the sanction as one entered pursuant to Rule 37, our analysis would proceed along similar lines. *See Pressey*, 898 F.2d at 1020-21 (noting that we review Rule 37 sanctions for abuse of discretion and that "[w]e have . . . usually required a finding of bad faith or willful misconduct to support the severest remedies under Rule 37(b) -- striking pleadings or dismissal of a case."). The sanction here was very severe.

Jet East said in its motion, and by an unverified letter of counsel, that NME refused to permit it to correct or even inspect the alleged deficiencies and that NME's bad faith was established by the refusal to permit an inspection before the evidence was destroyed. All of the verified evidence was to the contrary: that Jet East failed to demand inspection of the plane until after the suit was filed and the plane had been delivered to the manufacturer for repairs, and that the motive in delivering the plane to the manufacturer was simply to effect needed repairs.

Bruce Carpenter, in-house counsel for NME, stated by affidavit that "[d]uring my many telephone conversations, written correspondence, and face-to-face meetings in both Dallas and Southern California with Jet East and Triton representatives, they did not ask to inspect the Falcon 50 aircraft. . . . Despite our negotiations and this [February 8, 1990] letter, Jet East did not request the opportunity to inspect the airplane

until April 1990. [] Had Jet East or Triton ever asked to see the airplane, NME would have allowed their representatives to inspect it. . . . The decision to allow Falcon Jet to repair the airplane, rather than Jet East, was based upon competence and ability. There was not [sic] intent to destroy evidence as alleged by defendants. Rather, we wanted the plane fixed so we could continue to operate it safely and comfortably." Paul Stevens, NME director of maintenance for its aviation department, stated by affidavit that "I participated in numerous telephone conversations with Jet East, exchanged correspondence with Jet East, and met with Jet East and Triton Energy Corporation representatives when they came to Southern California to discuss NME's problems with the work they performed on the airplane. . . . Although Jet East wanted NME to bring the plane back to them so they could repair the shoddy work they had performed, Jet East never asked to inspect the airplane, not even when they were in Southern California. Had Jet East asked to inspect the plane, we would have made it available to them. . . . We did not take the plane to Falcon Jet to destroy evidence." David Hill, the Jet East executive in charge of the NME project, was asked: "Did Jet East ever offer to go out to California to look at the NME airplane?" He answered: "No, not that I'm aware of." Patrick Gordon, NME's pilot for the plane, stated by affidavit that "[d]uring my communications with Jet East, Jet East asked NME to bring the plane back to them so they could repair the squawks. We made it clear that NME was reluctant to

do so since it now had little confidence in Jet East's abilities. Jet East never asked to inspect the plane. If Jet East had asked to look at the plane, NME would have honored that request."

Moreover, NME established that it gave Jet East almost two months notice of its intention to deliver the plane to Falcon Jet. By letter dated February 8, 1990, Bruce Carpenter, in-house counsel for NME, wrote Roger Crabb, in-house counsel for Triton, Jet East's parent corporation. Crabb was representing Triton and Jet East in negotiations with NME regarding the plane. The letter states, in terms that could hardly have been more explicit, that (1) NME was extremely dissatisfied with Jet East's work on the plane, (2) although there had been earlier discussions of returning the plane to Jet East, NME's concern about Jet East's ability and competence had led it to solicit Falcon Jet to inspect the plane and provide a bid "to correct the problems that resulted from the work initiated by Jet East," (3) NME had obtained a bid from Falcon Jet and intended to turn the plane over to Falcon Jet for repairs, (4) Falcon Jet's work was scheduled to commence on April 1, (5) to secure a time slot, this date was firm and NME had made an advance of $95,000 to Falcon Jet for the work, and (6) NME was looking to Jet East to cover the costs of Falcon Jet's corrective repairs, which could exceed $500,000, and "[i]f Jet East ultimately rejects our offer, NME will commence suit to recover all damages reasonably related to the problems arising from Jet East's work on our Falcon 50." The letter went on to set out the factual and legal basis for the

claims NME intended to assert if a settlement could not be reached.

Summarizing the proof, NME advised Jet East that it had lost confidence in Jet East's ability to make repairs NME thought necessary and was turning the plane over to the manufacturer for corrective work. It gave NME almost two months notice of the date of delivery to the manufacturer, and explained that this date was firm and was secured by a large deposit. NME delivered the plane to Falcon Jet on April 1 as it had stated in the February 8 letter. While there had been earlier discussions about letting Jet East do further work on the plane, Jet East never demanded the right to inspect the plane until after the suit was filed and the plane had been delivered to Falcon Jet. Jet East never made such a demand even though it was represented by in-house counsel during the months of negotiations prior to suit and had retained outside counsel about one month before suit was filed. Three NME witnesses swore by affidavit that if such a demand had been made NME would have allowed an inspection.

These circumstances do not establish bad faith on NME's part. Further, they do not establish that Jet East was unfairly prejudiced. Not only was Jet East advised of NME's intentions, but Miller, the expert whose testimony was excluded, relied on photographs which were available to Jet East. A videotape was also prepared while Miller was at NME making his inspection, and he stated by affidavit that "[v]irtually everything I saw at the NME hangar is recorded on the videotape and in pictures." Jet

East itself had also taken photographs of the interior of the plane before it left Jet East's shop. Given this recorded evidence, and Jet East's own knowledge of the scope and nature of the work it had done, Jet East was not in a position where it had no fair opportunity to rebut Miller's testimony because of the subsequent repair work by Falcon Jet.

Jet East did not meet this proof. Its arguments in support of the court's order go to the merits or the weight of the evidence and not to the admissibility of the excluded evidence.

NME was severely prejudiced by the erroneous exclusion of the evidence. Miller was prepared to offer extensive testimony about the quality of Jet East's work and the defects about which NME complained. The proof was critical to NME's case.

The court also excluded other evidence for different reasons. The same questions will not be presented on retrial and need not be addressed here.

REVERSED and REMANDED.