UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 15-01921-DFM	Date	June 21, 2018
Title	Bennion and Deville Fine Homes Inc. v. Windermere Real Estate Servs. Co. et al.		

Present: The Honorable	Douglas F. McCormick	
Nancy Boehme		n/a
Deputy Clerk		Court Reporter / Recorder
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:
n/a		n/a

Proceedings: (In Chambers) Order re: Defendant's Motion in Limine to Exclude Portion of Wrobel's Expert Opinion (Dkt. 167)

Defendant Windermere Real Estate Services Company ("Defendant" or "WSC") moves to exclude Plaintiffs' expert Peter Wrobel's opinion regarding the net value as of January 2015 of Windermere Services Southern California, Inc. ("WS SoCal"). See Dkt. 167. For the reasons below, the Court GRANTS Defendant's motion.

I. Background

Defendant and WS SoCal entered into the Area Representation Agreement ("ARA") in 2004. See Dkt. 154-4 at 5-23 (ARA). Section 4.1 of the ARA states that the ARA shall continue until it is terminated (a) by mutual written agreement, (b) on 180 days written notice, (c) on 90 days written notice "for cause based upon a material breach of the Agreement described in the notice and not cured within the" 90 day period, or (d) without notice if a party goes bankrupt or takes other action not applicable in this case. Section 4.2 of the ARA provides for liquidated damages in the event of a termination without stated cause (i.e., under scenario (b))—the "Termination Obligation."

Plaintiffs' damages expert, Peter D. Wrobel, authored a report dated September 16, 2016, in which he opined on four categories of damages suffered by WS SoCal (and two other Plaintiffs): (1) net value of WS SoCal as of January 2015 ($2,592,526), (2) settlement amounts improperly withheld from WS SoCal ($66,037), (3) certain past losses and future lease obligations ($1,431,482), and (4) net unreimbursed Windermere Watch expenses ($146,954). See Dkt. 154-4 at 25-28. Wrobel described the net value calculation as follows:

> It is my understanding that [Defendant] effected a constructive termination of the area representation relationship with [WS SoCal] by late summer 2014, and later provided [WS SoCal] a formal notice of termination in January 2015. In either event, it is my further understanding that the termination of the area representation relationship was without cause. *This* termination triggered a clause in the [ARA]

> which provided for the terminating party to pay the terminated party "an amount equal to the fair market value of the Terminated Party's interest in the Agreement." The value of [WS SoCal in January 2015] . . . was $2,592,526.

See id. at 26 (emphasis added) (quoting § 4.2 of the ARA). At his deposition, Wrobel repeatedly confirmed his assumption that the Termination Obligation was equal to WS SoCal's net value as of January 2015, explaining that he had been so instructed by Plaintiffs' counsel. See Dkt. 169-2 at 16-17, 22-23.

On April 11, 2018, the Court granted Defendant's motion for partial summary judgment on the narrow issue of how the Termination Obligation should be calculated. See Dkt. 164. The Court determined that Wrobel did not follow the unambiguous language of the ARA when he calculated the Termination Obligation by equating it with the net value of WS SoCal at a particular date. See Dkt. 164 at 5-6. First, Wrobel "adjusted" the 2015 through 2019 cash flows "due to the failure of [Defendant] to properly register" its Franchise Disclosure Document ("FDD"). Section 4.2 of the ARA does not permit such an "adjust[ment]." Id. at 6. Second, Wrobel did not limit his calculations to gross revenues from existing licensees that remained with or affiliated with Defendant, as § 4.2 of the ARA requires. Id. Wrobel had accordingly calculated something different from what the unambiguous language of the ARA defined as the Termination Obligation.

II. Arguments

Defendant moves to exclude testimony and evidence relating to Wrobel's opinion regarding the Termination Obligation, which Wrobel calculated as the net value of WS SoCal in January 2015. See Dkt. 167-1 at 2-3. Defendant argues that (1) this opinion is no longer relevant under Fed. R. Evid. 402 and 702, given the Court's partial summary judgment ruling that "Wrobel has [ ] calculated something different from what the unambiguous language of the contract defines as the Termination Obligation," and (2) under Fed. R. Evid. 403, this evidence is unfairly prejudicial, would confuse the issues, and mislead the jury. See id. at 2-7. Defendant further argues that, under Fed. R. Civ. P. 37(c)(1), Plaintiffs should not be permitted to offer any other basis for Wrobel's net value opinion. See id. at 7-11.

In opposition, Plaintiff WS SoCal states that it has two theories of damages: (1) that Defendant constructively terminated the ARA by failing to register a Franchise Disclosure Document ("FDD"), and (2) Defendant "breached the ARA by failing to pay the 'Termination Obligation' following" Defendant's termination of the ARA. Dkt. 169 at 4. WS SoCal acknowledges that, "until recently," it had taken the position that under either theory, the final damages figure must reflect a total loss of the business. Id. at 5. Given the Court's partial summary judgment ruling, WS SoCal states that it will not introduce Wrobel's net value opinion to support

its "second theory of damages." Id.[1] WS SoCal argues that Wrobel should, however, be permitted to testify about WS SoCal's "six other contract claims" arising from Defendant's constructive termination—i.e., failure to register the FDD (sections 2, 7, 10, Ex. A of the ARA, and the ARA's implied terms). Id. at 7-8, 15-16.

In reply, Defendant argues that Wrobel's net value opinion had nothing to do with WS SoCal's alleged damages from other ARA breaches. See Dkt. 170 at 2. Defendant also argues that WS SoCal and Wrobel have always pinned the "constructive termination" theory damages to the Termination Obligation, citing WS SoCal's complaint, Wrobel's report, and the Court's partial summary judgment ruling. Id. at 3-6.

III. Law

Rule 402 states only relevant evidence is admissible. "Relevant" means having "any tendency to make a fact more or less probable than it would be without the evidence," if "the fact is of consequence in determining the action." Fed. R. Evid. 401.

Rule 702 states that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 403 states that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Fed. R. Civ. P 37(c)(1) states that if a party fails to provide expert witness information as required by Rule 26(a) (governing disclosure of expert witness report) or 26(e) (governing supplementing expert witness report), the party is not allowed to use that information or witness to supply evidence at trial unless the failure was substantially justified or is harmless. "Among the factors that may properly guide a district court in determining whether [violation of this rule] is justified or harmless are: (1) prejudice or surprise to the party against whom the evidence is offered;

[1] WS SoCal also argues that Defendant's motion under Rule 702 and 703 present the "identical" arguments presented to Judge Real in 2017. See Dkt. 169 at 6; see also Dkt. 141 (Judge Real's order denying Defendant's Daubert motion). The Court disagrees. Judge Real was never presented with a motion for partial summary judgment on how to calculate the Termination Obligation, and he therefore never ruled on that matter.

(2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." Lanard Toys Ltd. v. Novelty, Inc., 375 F. App'x 705, 713 (9th Cir. 2010) (citing David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003)).

The burden is on the party facing exclusion of its expert's testimony to prove the delay was justified or harmless. Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001).

In California, the measure of damages for breach of contract is generally "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300. These damages take the form of general damages or special damages. Lewis Jorge Const. Mgmt., Inc. v. Pomona Unified Sch. Dist., 34 Cal. 4th 960, 968 (2004). General damages flow directly and necessarily from a breach of contract, i.e., are a natural result of a breach. Id. Special damages are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties, that were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). Id. at 968-69. Damages can include lost profits if sufficiently certain. Id. at 970. Parties can also recover damages under a contract's liquidated damages provision. See Cal. Civ. C. § 1671(b).[2]

IV. Analysis

The Court has already determined that to the extent Wrobel's calculation of "net value" purports to identify Defendant's Termination Obligation under the ARA, such calculation is improper and violates the ARA's unambiguous language. See Dkt. 164. Thus, Wrobel's opinion on the Termination Obligation would be irrelevant under Rule 402 and would confuse the issues under Rule 403. The harder question is whether Wrobel's net value calculation should be excluded entirely. The Court concludes that it should.

Wrobel's report and his deposition testimony are both clear: Wrobel calculated the net value figure to arrive at the Termination Obligation. Plaintiffs now argue that Wrobel was also doing something else—calculating Plaintiffs' damages in the form of the total loss of WS SoCal's business value due to Defendant's other breaches of the contract. There is no support for that argument in

[2] WS SoCal also brings claims of breach of implied covenant of good faith and fair dealing. Other than in the insurance context, breach of this covenant generally does not give rise to tort damages. See Ragland v. U.S. Bank Nat'l Ass'n, 209 Cal. App. 4th 182, 206 (2012) ("Outside the insured-insurer relationship and others with similar qualities, breach of the implied covenant of good faith and fair dealing does not give rise to tort damages.").

Wrobel's report or his deposition testimony. Thus, if Wrobel offered this opinion, it would be outside the scope of his September 2016 report. Plaintiffs therefore must demonstrate that their failure to disclose this alternative opinion is substantially justified or harmless. See Goodman v. Staples The Office Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011) (citing Fed. R. Civ. P. 37(c)(1)).

Plaintiffs have not met this burden. Plaintiffs argued at the hearing that their failure was substantially justified because (1) the ARA's use of the phrase "fair market value" was misleading, and (2) it would have been superfluous to ask Wrobel to clarify that his net value calculation reflected both the Termination Obligation and a measure of damages for Defendant's other breaches. As for the first argument, the Court has already held that the ARA's language was unambiguous in this regard. See Dkt. 164. As for the second argument, if the two figures were identical, a few additional sentences in Wrobel's report would have alerted Defendants to this opinion. While Plaintiffs did not act willfully or in bad faith by not disclosing Wrobel's opinion, Plaintiffs were not substantially justified in failing to do so.

As for harmlessness, allowing Wrobel to now testify about this re-engineered theory would result in prejudice and unfair surprise to Defendant, who relied on Wrobel's report and corresponding testimony that the net value figure represented the Termination Obligation. Defendant had no reason to attack Wrobel's net value calculation on its own terms—that is, as a flawed opinion on the "fair market value" of WS SoCal—because Defendant's interpretation of how to calculate the Termination Obligation had nothing to do with WS SoCal's "net value." As for the other two Rule 37(c)(1) prongs, it is unlikely that Wrobel's testimony would disrupt the trial, but it is also unlikely that Defendant would be able to cure the prejudice: trial begins in less than three weeks and Defendant's expert is out of the country for two of those weeks.

Wrobel may still testify about his other three damages opinions. Furthermore, subject to other rules of civil procedure and evidence, Plaintiffs may present other evidence of damages. But Wrobel may not testify about his opinion regarding the net value of WS SoCal as of January 2015.