IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EMPIRE FINANCIAL SERVICES, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 00C-09-235 SCD
	:	
THE BANK OF NEW YORK (Delaware)	:	
	:	
Defendant.	:	

Submitted: June 4, 2007
Decided: June 8, 2007

Defendant The Bank of New York (Delaware) ("the Bank") has filed motions *in limine* to exclude the testimony and opinions of two of plaintiff's experts, Fred Landrum ("Landrum") and Yuri Zelenovskiy ("Zelenovskiy"). Briefs were filed in support of those motions, plaintiff filed answers, and the defendant replied.

The plaintiff, Empire Financial Services, Inc. ("Empire") was in the collection business. Empire's principal is Joseph Maccari ("Maccari"). In January, 1997, an employee of Empire, Elviro Ocasio, disrupted Empire's business by entering into an agreement with James Armistead,[1] an employee of the Bank, to transfer active accounts from Empire to the new business Ocasio was starting, called DBA. When Maccari

[1] This is a factual finding reached by the jury which considered liability only. The jury answered YES to each of the following three interrogatories:

> 1. Do you find that the plaintiff, Empire, has proven by a preponderance of the evidence that before Elviro Ocasio left his employment with Empire, he and James Armistead reached an agreement about what would happen with the Bank's accounts.
>
> 2. Do you find that the plaintiff, Empire, has proven by a preponderance of the evidence that the agreement included the commission of an unlawful or improper act?
>
> 3. Do you find that plaintiff, Empire, was damaged.

arrived at work one day in January, he found that his records had been stolen, that equipment had been removed or destroyed, and that a number of his employees had quit. His business was effectively destroyed. There have been numerous legal proceedings between Empire and Ocasio, culminating in a settlement agreement and release dated August 23, 2000,[2] which resolved, *inter alia*, allegations of the misappropriation of property and tortuous interference by Ocasio with Empire's contractual relations. This case involves Empire's claim against the Bank arising out of the same incident. The issue pending is damages, the Bank's liability having previously been determined.

Certain of the accounts transferred to DBA were accounts for which payment schedules had been entered into by the debtor with Empire prior to February 1, 1997, these are referred to as "paying accounts." Certain of the accounts transferred to DBA were accounts which Empire referred to outside attorneys for suit and collection prior to February 1, 1997, these are referred to as "legal accounts."

Before me now are the plaintiff's motions to exclude the testimony and opinions of defendant's experts Fred Landrum and Yuri Zelenovskiy.

Legal Standard

Delaware Uniform Rules of Evidence 702 and 705 govern the admissibility of expert testimony. D.R.E. 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the

[2] *See* Settlement Agreement and Release, Tab 3 to defendant's opening brief in support of its motion for summary judgment on damages, filed May 18, 2007.

> product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Delaware Supreme Court has adopted the United States Supreme Court's holdings in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), as the proper interpretation of D.R.E. 702.[3]

In *Daubert*, the Supreme Court held that "the trial judge is a 'gatekeeper,' who must determine whether the proffered expert testimony is both relevant and reliable."[4] *Daubert* described the "relevance" requirement in terms of "fit," thus requiring that the expert testimony is relevant to an issue in the case.[5] The "reliability" requirement is designed to ensure that the expert's opinion is grounded in a proper factual foundation and is based on sound methodology.[6]

The "gatekeeper" obligation applies not only to expert testimony based on "scientific" knowledge, but to all types of expert testimony.[7] The objective of the gate keeping requirement is to make certain that expert testimony, whether based on professional studies or personal experience, employs "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[8] "The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence."[9]

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[3] *See M.G. Bancorporation v. Le Beau*, 737 A.2d 513 (Del. 1999).
[4] *Ward v. Shoney's, Inc.*, 817 A.2d 799, 802 (Del. 2003).
[5] *State v. McMullen*, 900 A.2d 103, 113-14 (Del. Super. 2006) (citing *Daubert*, 509 U.S. at 591).
[6] *Id*. at 113 (citing *Daubert*, 509 U.S. at 590).
[7] *Kumho Tire*, 526 U.S. at 147.
[8] *Ward*, 817 A.2d at 803 (quoting *Kumho Tire Co.*, 526 U.S. at 141).
[9] *See Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006).

Fred Landrum

The testimony of Landrum was presented at a *Daubert* hearing on June 4, 2007. In its brief, the plaintiff identified eight areas of testimony from Landrum. I will address each one as designated in the plaintiff's brief.

A. The Bank would not have recalled the accounts in question but for the wrongful interference by the conspirators.

Expert testimony on this issue is not required. The Bank does not intend to defend the claim with an argument that the accounts would have been recalled.[10]

B. In the absence of the unlawful conspiracy, Empire would have collected more on the wrongfully recalled accounts than the Bank did.

Landrum testified that transfer of accounts from one collection agency to another necessarily involves less efficiency in securing payments. This is because the first agency has already done the work to establish these accounts as paying or legal accounts. A collection agency has demographic information on the debtors, it has phone numbers, it knows what assets are available to attach, and the agency's employees have established a rapport with the debtors. If the accounts are withdrawn and placed with another collection agency all of that information is lost and must be redeveloped by the new agency resulting in reduced collections. Landrum explained that payment notices are delayed, and having a new payee for the money causes confusion with the debtor. He also explained that the reduced productivity is often reflected in the fact that the next-in-

[10] June 4, 2007 Hearing Transcript pg. 30 lines 11-21, pg. 32 lines 13-19.

time collection agency is generally paid more because the owner Bank has a lowered expectation of collecting the debt.[11]

Landrum could not quantify what "more" meant in the context of this opinion.[12] His opinion about payment was not factually consistent with this case because Empire had a 50-50 revenue split with the Bank, while DBA, the agency operated by Ocasio had a 40-60 revenue split; i.e., a less lucrative fee sharing arrangement.[13] Furthermore, when Ocasio left Empire he took the account information needed to service the Bank's accounts. All of the Empire collections agents, with the exception of Ms. Woods, also went with Ocasio to DBA, so there was continuity of some employees. Landrum testified that DBA should have been able to do a good job of collecting on these accounts if they had the account information and the collections staff from Empire.[14]

In view of Landrum's inability to quantify the extent of the improved recovery Empire would have enjoyed, this opinion is inadmissible as too speculative. Landrum fails to provide sufficient facts or data to support his opinion. His opinion is not consistent with the facts of this case. Expert testimony must be offered as a probability, and not left to speculation. He has not met that standard of proof.

C. The cost of servicing the wrongfully recalled paying accounts would have averaged less than $7,000 per year over four years.

Landrum testified that the greatest expenditure of time on a new account occurs when the account is first referred. That is the time when the research is done about the

[11] June 4, 2007 Hearing Transcript pg. 33 lines 13-14.
[12] June 4, 2007 Hearing Transcript pg. 112 lines 1-12.
[13] June 4, 2007 Hearing Transcript pg. 39 line 22 - pg. 40 line 7.
[14] June 4, 2007 Hearing Transcript pg. 116 lines 19-22.

debtor's whereabouts, employment, and assets, and the initial contact is made with the debtor. Once the account is paying, his calculations assume that all accounts will continue to pay until the debt is resolved.

Landrum explained that his calculation of the cost for processing the paying accounts assumes that half the paying accounts would require only a reminder notice each month costing about $.50 and half would also require a telephone call. He said that "to err on the side of reasonableness" he would estimate the cost at $6,000 rather than the "calculated value of $6,868."

Landrum did not factor in any employee benefits, rent, or other operating costs.[15] Nor did he have a clear understanding of the percentage of Empire's work which was derived from Bank, and thus relevant to this litigation.

At deposition Landrum was unable to reconstruct the mathematical basis for the $6,868 annual cost estimate.[16] Later, through plaintiff's attorneys, the defendant was provided with a different figure, $5,226 a year.[17] The uncertainty of the methodology used to do these calculations, and the apparent lack of reproducibility of the number, renders the opinion unreliable.

There is no expert testimony regarding the cost of handling legal accounts from which a calculation of lost profits could be derived.

D. (withdrawn)

[15] June 4, 2007 Hearing Transcript pg. 130 lines 4-23.
[16] June 4, 2007 Hearing Transcript pg. 124 lines 5-21.
[17] *Id*.

E. Of the account histories supplied by Empire for which the bank did not supply documentation before July 31, 2006, "Most of them (78%) would have been paid in full before July, 2001."

Landrum has concluded after reviewing one-third of the RMS accounts provided (he could not recite the number provided) that "most of them (78%) would have been paid in full before July 2001 based on their payment history with Empire." He bolsters that opinion with the fact that Ms. Daws said that records were purged in July 2001, and in his professional experience, it is the accounts that are paid in full which would have been included in the purge.

Upon careful examination it became clear that the one-third sample used to develop this opinion was simply the top one-third of the documents in the stack supplied by the plaintiff.[18] There was no particular rationale for selecting that sample, other than the belief that it was sufficient. Further, the opinion was not reevaluated and updated when other data became available later in the litigation.[19]

Rather than the 78% recovery rate previously projected, Landrum testified that Empire would have collected "80 to 82 percent of the paying accounts."[20]

The opinion rests on the "assumption" that "all the accounts on which BNYD could not provide information could have been paid in full prior to July 2001." This opinion, reached "absent information to the contrary," lacks an adequate foundation.

[18] June 4, 2007 Hearing Transcript pg 74. line 14 - pg. 77 line 5.
[19] June 4, 2007 Hearing Transcript pg. 105 line 5 - pg. 107 line 8.
[20] June 4, 2007 Hearing Transcript pg. 70 line 15 - pg. 72 line 9.

F. A majority of the RMS accounts in the data supplied by the bank before July 31, 2006 were miscoded.

Landrum correctly noted at the hearing, through the presentation of the RMS account summaries for several individuals [Collazo, Rajewski, Ortiz, and Francke] that they were miscoded. The relevance of this testimony is unclear because RMS accounts provide a full record of the account, miscoding does not effect the actual payment history.

The miscoding may be relevant to the assumptions in the PricewaterhouseCoopers report, but presenting that miscoding does not require expert testimony. The RMS sheets make the point.

G. The inventory calculations made by the bank through Ms. Daws are inaccurate.

Landrum's opinion addresses calculations done by an in-house employee of the Bank for purposes of this litigation. The Bank does not intend to call her as a witness. She was not identified as a person speaking on behalf of the Bank, such as a 30(b)(6) witness. The defendant's expert, PricewaterhouseCoopers, does not rely on her work to support its calculations. That being the case, the inaccuracy of her calculations has no probative value.

Landrum was not permitted to testify at the *Daubert* hearing regarding Daws' inaccuracies as plaintiff's proffer did not support a conclusion that it was relevant.

H. An estimated settlement percent of 50% is below the industry norm.

Landrum's opinion in this regard is entirely anecdotal. He has no data developed by the industry or from any reliable source to support this opinion.

Yuri Zelenovskiy

The testimony of Zelenovskiy was not permitted at the *Daubert* hearing. The defendant argued in the brief which accompanied its *Daubert* motion that Zelenovskiy's testimony was not relevant as it was related to the issue of document retention. Indeed, Zelenovskiy's involvement in this case arose in connection with the spoliation motion filed by the plaintiff. His affidavit was attached to the plaintiff's brief in support of that motion. The spoliation issue was decided in February, 2007. That ruling will not be reviewed. The evidence related to the unavailable documents is not admissible at trial.[21]

Conclusion

Empire has failed to meet its burden of establishing by a preponderance of the evidence that its proffered expert testimony is admissible under *Daubert* and D.R.E. 702. Zelenovskiy's opinions are simply not relevant to the issue of damages. Landrum's opinions do not comport with D.R.E. 702 for the reasons stated.

The Bank's motions *in limine* to exclude the testimony of Fred Landrum and Yuri Zelenovskiy are GRANTED.

IT IS SO ORDERED.

The Honorable Susan C. Del Pesco

[21] June 4, 2007 Hearing Transcript pg. 144 line 20 - pg. 148 line 13, pg. 158 lines 4-21.

Original to Prothonotary
xc:
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