

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

KURATLE CONTRACTING, INC.,)
a Delaware Corporation)
)
)
Plaintiff,)
)
v.)
)
LINDEN GREEN CONDOMINIUM,)
ASSOCIATION, a Delaware)
Corporation)
)
Defendant.)

C.A. No. N12C-03-079 MJB

Submitted: October 31, 2013
Decided: November 15, 2013

Upon Plaintiff Kuratle’s Motion to Exclude Expert Testimony of Andrew T. Patterson, CPA,
GRANTED.

ORDER

On this 15th day of November, 2013, it appears to the Court as follows:

1. Kuratle Contracting, Inc. (“Kuratle”), the plaintiff, entered into a contract with the Linden Green Condominium Association (“Linden Green”), the defendant, in November 2002, whereby Linden Green retained Kuratle “to manage the maintenance, operations, landscaping, snow removal and finances of [Linden Green].”¹
2. The 2002 contract was about to expire, so Kuratle and Linden Green entered into a new contract in 2007. The 2007 contract was to be operative from January 1, 2008 until December 31, 2012. According to Kuratle, in early September 2010 Linden

¹ Pl.’s First Mot. for Part. Summ. J. Tab 1, Ex. A.

Green's then-current President, Ronald Jones ("Jones"), requested that Kuratle draft a new contract, despite the fact that the 2007 contract, by its terms, would not expire until the end of 2012. Shortly after Jones' request, Kuratle drafted a new contract, which was signed by the respective agents of Linden Green and Kuratle at the end September 2010.² According to its terms, the 2010 contract was operative from January 1, 2010 through December 31, 2017.

3. On December 12, 2011, over a year after the 2010 contract was executed, Linden Green sent a letter to Kuratle contending that it submitted the 2010 contract to an attorney who advised that the contract was "invalid and unenforceable." Linden Green's December 12 letter further indicated that their attorney found some "problems" with the 2007 contract. Linden Green thereafter requested Kuratle sign an addendum to the 2007 contract. Kuratle refused to sign the addendum and, as a result, Linden Green terminated its business relationship with Kuratle.
4. Kuratle filed suit against Linden Green on March 7, 2012, alleging breach of contract. Kuratle contends that Linden Green breached the 2010 contract by failing to perform its obligations and by wrongfully terminating the parties' business relationship. Kuratle seeks \$1,088,519.30 in damages for Linden Green's alleged breach of the 2010 contract. Kuratle asserts, in the alternative, that assuming the 2007 contract was not superseded and replaced by the 2010 contract, Linden Green breached the 2007 contract by wrongfully terminating the contract before the contract's December 31,

² The parties dispute at what point Jones signed the 2010 contract on behalf of Linden Green; however, there is no dispute that he signed the contract on the evening of September 21, 2010, as his signature was notarized. Additionally, although representative of Linden Green signed the contract on September 21, 2010, the representatives from Kuratle did not sign until September 24, 2010.

2012, expiration term. Kuratle seeks \$120,541.50 for Linden Green's alleged breach of the 2007 contract.

5. Linden Green filed its Answer and asserted a counterclaim on April 13, 2012. Linden Green's counterclaim alleges that "Kuratle mismanaged Linden Green and failed to perform as required under the 2002 and 2007 Agreement[s]" in a number of ways, including, *inter alia*, "fail[ing] to properly maintain [Linden Green's] books and records" as well as "[o]vercharging Linden Green and owners for work."³
6. To support its counterclaim that Kuratle mismanaged its books and records, Linden Green retained Andrew T. Patterson, CPA ("Patterson"). Patterson evaluated the accounting, financial reporting, financial management, and financial administration of Linden Green during the period when Linden Green was under Kuratle's management. In conducting his evaluation, Patterson analyzed extensive accounting records provided by Linden Green for the years 2003 through 2011.
7. Based on his findings, Patterson drafted a twenty-four page report ("Expert Report" or "Report") that outlines his findings and states that Kuratle's management was, in many ways, "deficient."⁴
8. On October 15, 2013, Kuratle moved to exclude Patterson from testifying at trial,⁵ contending "based on the information contained in his report his anticipated testimony will not be admissible under DRE 702."⁶ Although not taking issue with Peterson's qualifications as an expert, Kuratle asserts that Patterson's testimony should be

³ Def.'s Answer and Counterclaim (Apr. 13, 2012).

⁴ Pl.'s Motion for Partial Summ. J. and to Exclude Expert Test. Ex. B (Oct. 15, 2013) (hereinafter "Expert Report").

⁵ Pl.'s Motion for Partial Summ. J. and to Exclude Expert Test. (Oct. 15, 2013) (hereinafter "Pl.'s Mot. to Exclude").

⁶ *Id.* at 2.

excluded because the conclusions reached in the Expert Report “are not the product of reliable principles or methods and there is no evidence that he applied any principles or methods in rendering his opinion.”⁷

9. Linden Green responded in opposition to Kuratle’s Motion to Exclude on October 25, 2013.⁸ Linden Green contends that

the report details basic findings such as unreported and unrecorded account activity, missing bank statements, cancelled checks, etc. Those opinions are rather basic. Anyone who has a checking account can attest the need to balance your checkbook and in order to do so you need the bank statements and cancelled checks. In addition, . . . the report lists six reasons why it is necessary to retain bank statements. A review of the entire report details the deficiencies and the reasons why what Kuratle did is inconsistent with basic accounting procedures.⁹

Finally, Linden Green contends that “Patterson is eminently qualified to testify in this matter” based on his knowledge, education, and work experience.¹⁰ The Court heard oral argument from all parties on October 31, 2013.

10. Delaware Rule of Evidence (“DRE”) 702 governs the admissibility of expert testimony. DRE 702 provides:

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 product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.¹¹

⁷ *Id.* at 3.

⁸ Counter Claim Df.’s Resp. to Mot. Partial Summ. J. and to Exclude Expert Test. (Oct. 25, 2013) (hereinafter “Df.’s Resp. to Mot. to Exclude”).

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ DRE 702.

11. DRE 702 “imposes a special obligation upon a trial judge to ensure that any and all scientific testimony . . . is not only relevant, but reliable.”¹² The trial judge acts as the “gatekeeper” in deciding whether an expert's testimony “has a reliable basis in the knowledge and experience of [the relevant] discipline.”¹³ The analysis focuses on the “principles and methodology” used in formulating an expert's testimony, not on the expert's resulting conclusions.¹⁴
12. To help determine whether an expert's “principles and methodology” are rooted in science and derived from the scientific method, this Court applies a five-step test to determine the admissibility of expert testimony. The trial judge must determine whether: (1) the witness is qualified as an expert by knowledge, skill, experience, training or education; (2) the evidence is relevant; (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.¹⁵ The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.¹⁶
13. The Court is satisfied there is sufficient information relating to all the prongs excepting the third prong. Prong three of the governing five-prong test requires the expert's opinion be based on information reasonably relied on by experts in the particular field. Patterson’s Expert Report does not reference by what standard he

¹² *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del. 2006) (internal quotation marks omitted) (citation omitted).

¹³ *Id.* (citation omitted).

¹⁴ *Id.* (citation omitted).

¹⁵ *Bowen*, 906 A.2d at 794.

¹⁶ *Id.* at 795.

finds Kuratle's management and record keeping to be deficient. There are Generally Accepted Accounting Principles as well as other objective accounting standards on which Patterson could have relied, including, for example, publications by the American Institute of Certified Public Accountants. Patterson's Expert Report merely recites his factual findings and states that he finds Kuratle's management and conduct to be "deficient" in many regards, without identifying the standard he is using to form his opinion. Without identifying an objective standard, the Court cannot permit Patterson's expert testimony.

14. Linden Green is still, of course, permitted to call Patterson as a fact witness, to identify the "unreported and unrecorded account activity, missing bank statements, cancelled checks, etc."¹⁷ As Linden Green acknowledges, "[a]nyone who has a checking account can attest the need to balance your checkbook and in order to do so you need the bank statements and cancelled checks,"¹⁸ and therefore expert testimony is not required to permit admission of those facts.

IT IS SO ORDERED.

M. Jane Brady
Superior Court Judge

¹⁷ Df.'s Resp. to Mot. to Exclude at 4.

¹⁸ *Id.*