

**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 Defendant Linden Green’s Motion to Exclude Expert Testimony of David J. Ford, CPA,
DENIED.

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 Green’s then-

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

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, 2012, expiration term. Kuratle seeks \$120,541.50 for Linden Green’s alleged breach of the 2007 contract. Linden Green filed its Answer and asserted a counterclaim on April 13, 2012.

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.

5. To support its claim that Linden Green’s alleged breach of contract caused it to suffer compensable damages, Kuratle retained David J. Ford, CPA (“Ford”). Ford was engaged by Kuratle to calculate damages associated with Kuratle’s claim that Linden Green breached the 2010, or alternatively the 2007, contract. Ford drafted and submitted two expert reports, one assuming Linden Green breached the 2007 contract and the second assuming Linden Green breached the 2010 contract (collectively “Reports”).
6. Relying on the American Institute of Certified Public Accountants in their *Practice Aid on Calculating Lost Profits*, the Reports explain that only lost “net” profits are allowed as damages. Ford explains, through the Reports, that lost net profit is computed, in general, by estimating the gross revenue that would have been earned but for the wrongful act, from which the avoided costs, which are defined as those costs that were avoided because of the loss of revenue, are subtracted.
7. In drafting the Reports, Ford analyzed relevant books and records to determine the historical amount of revenue earned by Kuratle from the 2007 and 2010 contracts, respectively, prior to the alleged breach. Ford also determined the historical gross profit earned by Kuratle during the five-year period immediately before Linden Green’s alleged breach. In conducting the wages component of Kuratle’s direct costs, Ford relied on information provided in the *Delaware Wages 2011 Survey*,³ rather the wage expenses historically incurred by Kuratle. Ford estimated the lost net profit that, in his opinion, Kuratle could have earned under the 2007 and 2010 contract, respectively, if it were not for Linden Green’s alleged breach. Following computation of the lost net profit, Ford then computed the pre-judgment interest

³ *Delaware Wages 2011 Survey*, Occupational Employment Statistics, Office of Occupational & Labor Market Information, Delaware Department of Labor (2012).

that Kuratle could have earned on the lost net profit between the dates of the breach through the date of trial.

8. Linden Green takes issue with Ford's analysis, methods, and conclusions. On October 15, 2013, Linden Green moved to exclude Ford's testimony, contending Ford's "opinions operate under a flawed factual predicate, are unreliable and not of use to the jury."⁴ Linden Green cites four errors with Ford's Reports.
9. First, Linden Green asserts that the Reports "understat[e] costs and consequently overstat[e] revenue;" because the Reports identified only 6 of the 25-30 expenses listed on Kuratle's Profit and Loss statements as being the direct costs associated with generating revenue from the 2007 and 2010 Agreements, respectively. Although Ford was aware that Kuratle "had a few contracts beyond [that with] Linden Green," Linden Green asserts that virtually all costs incurred by Kuratle are related to its contract with Linden Green, and therefore Ford erred by only considering six expenses as direct costs.
10. Second, Linden Green argues that Ford should have used the wage expenses historically incurred by Kuratle, as shown in Kuratle's Profit and Loss Statements, to calculate the wages component of the direct costs to be deducted from revenues when calculating lost profits. Linden Green contends that it was improper for Ford, instead, to rely on the information provided in the *Delaware Wages 2011 Survey* in calculating the wages component.
11. Third, Linden Green contends that the Reports "do not take into account the fact that Kuratle had an employee, Anne Peterson [(“Peterson”)], who worked exclusively for the Linden Green contract."⁵ Linden Green presented a paystub indicating that Kuratle paid Peterson approximately \$1,000 for a two-week period in 2005, in which Peterson worked eighty-three

⁴ Mot. of Def. to Exclude Testimony of Pl.'s Expert David J. Ford, CPA at 1 (Oct. 15, 2013) (hereinafter "Def.'s Mot. to Exclude").

⁵ *Id.* at 3.

hours. The paystub indicates that Peterson received a pay rate of \$12.00 per hour. Linden Green points out that Ford testified during his deposition that he would need to investigate what services Peterson provided in order to determine whether his analysis would be materially changed.

12. Fourth, Linden Green contends that the Reports use inconsistent methodologies when calculating gross revenue. Specifically, for the years 2007, 2010, and 2011, the Reports use account ledger extracts, but for 2008 and 2009, they use Linden Green's Profits and Loss statements. Linden Green contends that Ford did not compare the source materials to ensure that the general ledger extracts and Profit and Loss statements added up to the same number to ensure uniformity in the analysis.

13. Kuratle responded in opposition to Linden Green's Motion to Exclude on October 23, 2013. Regarding Linden Green's first claim of error, Kuratle asserts that Ford properly concluded that only six costs were directly associated with generating revenue from the Linden Green contracts, because Ford testified that the remaining overhead expenses shown on the Profit and Loss statements (*i.e.*, advertising and automobile expenses) would have been incurred by Kuratle as fixed expenses, and as such are not directly associated with generating the revenue derived from the Linden Green contracts.⁶ Kuratle contends that this methodology is directly supported by the case law⁷ and Linden Green has failed to offer any competing expert testimony to rebut Ford's methodology or opinion.

14. Regarding Linden Green's second claim of error, Kuratle emphasizes that Ford testified that the accepted methodology is to normalize wages paid to owners when calculating lost profits,

⁶ Pl.'s Resp. to Mot. of Def. to Exclude Testimony of Pl.'s Expert, David J. Ford, CPA at 4 (Oct. 23, 2013) (hereinafter "Pl.'s Resp. to Def.'s Mot. to Exclude").

⁷ Pl.'s Resp. to Def.'s Mot. to Exclude at 4 (citing *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *11 (Del. Ch. Aug. 9, 2004); *Agilent Tech., Inc. v. Kirkland*, 2010 WL 610725 (Del. Ch. Feb. 18, 2010); *Vitex Mfr. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967)).

because owners of closely-held companies who work for the company can, and do, pay themselves wages above fair market rates. Kuratle contends that Linden Green has failed to offer any support that Ford's method for calculating the wages component of the direct costs is in any way improper.

15. Kuratle's response in opposition does not address Kuratle's contention that Ford's Reports should be excluded for failing to account for Peterson's employment. However, at oral argument Kuratle asserted that Peterson's employment was not material, and further contended that factual deficiencies in an expert opinion goes to the credibility, rather than admissibility, of the testimony.

16. Regarding Linden Green's fourth and final claim of error, Kuratle contends that it was proper for Ford to use two different methods to calculate gross revenue. Ford used Linden Green's general ledger of expenses to calculate Kuratle's revenue for the services provided to Linden Green by Kuratle, because Kuratle was the exclusive provider of these services to Linden Green from 2002 to the termination of the parties' business relationship in early 2012. Ford was unable to use the general ledger information for the years 2008 and 2009, however, because the ledger information was not available for those years. Kuratle contends that ledger information was unavailable through no fault of its own, and Linden Green provides no authority to support the argument that either method used by Ford to calculate revenue was improper in any way, or that the same method must always be used.

17. 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.⁸

18. DRE 702 “imposes a special obligation upon a trial judge to ensure that any and all scientific testimony . . . is not only relevant, but reliable.”⁹ 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.”¹⁰ The analysis focuses on the “principles and methodology” used in formulating an expert's testimony, not on the expert's resulting conclusions.¹¹
19. 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 scientific or technical 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.¹² The party seeking to introduce the expert testimony bears the burden of establishing its admissibility by a preponderance of the evidence.¹³
20. In the case *sub judice*, there is no dispute that Ford is qualified as an expert. Further, the expert opinions offered in the Reports are relevant under DRE 104, because Ford's findings are directly related to the damages Kuratle sustained as a result of Linden Green's alleged

⁸ DRE 702.

⁹ *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 794 (Del. 2006) (internal quotation marks omitted) (citation omitted).

¹⁰ *Id.* (citation omitted).

¹¹ *Id.* (citation omitted).

¹² *Bowen*, 906 A.2d at 794.

¹³ *Id.* at 795.

breach of contract. Additionally, the expert testimony, if admitted, would assist the trier of fact in understanding the evidence, because Ford's testimony would provide the jury with an explanation regarding complex accounting principles at issue, which are beyond the understanding of the lay juror. Therefore, three of the five considerations in the governing five-part test support this Court finding Ford's testimony to be admissible.

21. The remaining two considerations are (1) whether the expert's opinion is based upon information reasonably relied upon by experts in the particular field and (2) whether the expert testimony will create unfair prejudice or confuse or mislead the jury. With these two considerations, the Court will consider the four claims of error cited by Linden Green, which, according to Linden Green, warrant exclusion of Ford's expert testimony.

22. As stated above, Linden Green first contends that Ford's testimony should be excluded because Ford considered only six of the expenses listed on Kuratle's Profit and Loss statements as being the direct costs associated with generating revenue from the 2007 and 2010 Agreements, respectively, and therefore did not include the remaining expenses when calculating Kuratle's lost net profit. Ford testified, under oath, that the remaining overhead expenses shown on the Profit and Loss statements (*i.e.*, advertising and automobile expenses) were fixed expenses, and as such are not directly associated with generating the revenue derived from the Linden Green contracts. Ford provided this testimony while understanding that Kuratle "had a few contracts beyond Linden Green."¹⁴ Additionally, decisions from Delaware courts, both state and federal, support excluding fixed costs when calculating damages, because "[t]he amount of these costs [is] not affected by the breach or tortious

¹⁴ Def.'s Mot. to Exclude Ex. C at 37 (Ford's Deposition).

interference.”¹⁵ Linden Green has not offered any contrary expert opinion or legal authority to support its contention that Ford erred by only considering six of the listed expenses as direct costs. While Linden Green is free to cross-examine Ford regarding his methodology, the Court cannot conclude that Ford’s method is flawed or improper such that exclusion on that basis is a proper remedy.

23. Regarding Linden Green’s second claim of error, the Court is satisfied that Ford’s decision to use figures from the *Delaware Wages 2011 Survey* when calculating the wages component of Kuratle’s direct costs is not a basis to exclude the Reports. Ford testified—again, under oath—that the accepted methodology when dealing with a closely-held corporation is to normalize wages paid to owners when calculating lost profits, because owners of closely-held companies who work for the company can, and do, pay themselves wages above fair market rates. The *Delaware Wages 2011 Survey* provides objective figures to support Ford’s opinion. Linden Green has not offered any expert testimony or legal authority to support its contention that Ford’s method for calculating the wages component of the direct costs is improper.

24. Third, Linden Green asserts that Ford’s opinion is unreliable and should be excluded, in part, because Ford was unaware that Kuratle employed Peterson to work exclusively for the Linden Green contract. Ordinarily, factual deficiencies go to an expert report’s credibility, rather its admissibility. The Delaware Supreme Court has explained:

We recognize that, as a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is for the opposing party to challenge the factual basis of the expert opinion on cross-

¹⁵ *All Pro Maids, Inc. v. Layton*, 2004 WL 1878784, at *11 (Del. Ch. Aug. 9, 2004) (“The federal district court for Delaware has held that ‘fixed overhead is not to be charged against Plaintiff’s damages.’”) (quoting *W.L. Gore & Assoc., Inc. v. Carlisle Corp.*, 1978 U.S. Dist. LEXIS 17698, at *39 (D. Del. May 17, 1978)); *Vitex Mfr. Corp. v. Caribtex Corp.*, 377 F.2d 795, 799 (3d Cir. 1967) (holding that overhead should not be deducted from lost profits because overhead remained constant and was unaffected by the contract).

examination. When the expert's opinion is not based upon an understanding of the fundamental facts of the case, however, it can provide no assistance to the jury and such testimony must be excluded.¹⁶

25. The Court concludes that Ford had a fundamental understanding of the facts of the case when he formed the opinions expressed in the Reports. Although Ford was unaware of Peterson's employment with Kuratle, no evidence has been presented that indicates her employment was material. The only evidence presented by Linden Green regarding the extent of Peterson's employment is a paystub dated January 9, 2005, for a two-week pay period, which indicates that Kuratle paid Peterson approximately \$1,000 for eighty-three hours of work. Additionally, the paystub indicates that Peterson's rate of pay is \$12.00 per hour. This evidence does not support finding Peterson's employment with Kuratle to be material or fundamental to Ford's opinions. Given this evidence, the Court concludes that the general rule applies and Ford being unaware of Peterson's employment goes to the credibility of his opinion, rather than its admissibility.

26. Finally, the Court disagrees with Linden Green's contention that the Reports should be excluded because Ford used two different methodologies when calculating gross revenue. As stated above, Ford was unable to use the general ledger information for the years 2008 and 2009, because the ledger information was not available for those years. In place of the general ledger information, Ford resorted to using Linden Green's Profit and Loss statements. Although Ford did not specifically compare the source material between the general account ledger information and the Profit and Loss statements, when questioned, Ford explained, "In Quickbooks, the general ledger typically rolls up or equals what is reflected on the profit and loss statement."¹⁷ Linden Green has not offered any contrary

¹⁶ *Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010).

¹⁷ Def.'s Mot. to Exclude Ex. C at 71 (Ford's Deposition).

