

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:11-bk-19510-FMD
Chapter 11

Basil Street Partners, LLC,

Debtor.

Antaramian Properties, LLC,

Plaintiff,

v. Adv. No. 9:12-ap-00863-FMD

Basil Street Partners, LLC,
F. Fred Pezeshkan, Iraj Zand, and
Raymond Sehayek,

Defendants.

ORDER GRANTING MOTION IN LIMINE

THIS PROCEEDING came on for hearing on December 12, 2013, April 1, 2014, and April 11, 2014, of the *Individual Defendants' Motion in Limine to Exclude the Antaramian Parties' Proposed Expert on Attorneys' Fees* (Doc. No. 321) (the "Motion in Limine") filed by Defendants and Counterclaimants, F. Fred Pezeshkan, Iraj Zand, and Raymond Sehayek (collectively, "PZS"). The Court has considered the Motion in Limine, related filings,¹ and the trial testimony of proposed expert witness Michael Brychel. For the reasons that follow, the Court grants the Motion in Limine.

Background

The Motion in Limine arises in connection with a contested motion for attorney's fees filed by PZS in the underlying adversary proceeding, in which PZS seeks an award of attorney's fees in the

amount of \$2,696,705.14.² Although the Antaramian Parties³ did not contest the reasonableness of the hourly rates or the time incurred, they objected to PZS's entitlement to fees incurred in connection with the affirmative defenses and counterclaims on which PZS did not prevail. The affirmative defenses and counterclaims on which PZS prevailed arose from an asserted breach of fiduciary duty. PZS did not prevail on their affirmative defenses and counterclaims based on allegations of fraud. The two sets of claims arose out of unrelated events and involved different parties and time periods.

The Antaramian Parties argued that PZS's motion for fees should be denied in its entirety because PZS did not allocate their attorney's fees between the breach of fiduciary duty affirmative defenses and counterclaims and the fraud-related affirmative defenses and counterclaims. As a backstop, the Antaramian Parties retained an expert witness, Michael Brychel, the legal audit director of the legal auditing firm Stuart Maue, to prepare a report and opine on the allocation between the two sets of affirmative defenses and counterclaims. Prior to the commencement of the trial, PZS filed the Motion in Limine. Despite the pending motion, the Court allowed Mr. Brychel to testify, with the admissibility of his testimony being subject to this ruling.

Mr. Brychel testified that he used Stuart Maue's proprietary software program to "sort" PZS's attorneys' billing records. The software program searched the billing records for designated key terms provided to him by the Antaramian Parties' counsel. Based on the search results, Mr. Brychel prepared a report that allocates the time entries to PZS's defenses and claims. The time entries, totaling 7,886.15 billable hours and \$2,770,522.39 in attorney's fees, consisted of over 670 pages of billing records for three law firms,

² PZS Exh. 12. PZS originally requested attorney's fees in the amount of \$2,770,522.39, but, as described herein, they have voluntarily reduced their request to \$2,696,705.14.

³ Plaintiff and Counterclaim Defendant, Antaramian Properties, LLC, and Counterclaim Defendants, Jack J. Antaramian, Antaramian Family, LLC, and the Antaramian Family Trust.

¹ Doc. Nos. 326, 330, 355, 357.

and spanned the time period from September 28, 2010, to May 8, 2013. The billing records included time incurred in numerous depositions and a contested trial in the underlying litigation that lasted for eight days. Mr. Brychel opined that of the total amount of attorney's fees sought by PZS, just under \$45,000.00 was incurred in connection with PZS's successful breach of fiduciary duty affirmative defenses and counterclaims.⁴

Discussion

Federal Rule of Evidence 702 permits a witness who is qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion 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.

1. *Mr. Brychel's Testimony Was Not Based on Sufficient Facts or Data.*

Mr. Brychel was not involved in the protracted litigation that culminated in an eight-day trial before this Court, and he was not retained by the Antaramian Parties until after this Court determined that PZS were entitled to their attorney's fees and costs as the prevailing parties in the underlying litigation. Mr. Brychel testified that his firm's proprietary software sorted the time entries into categories based upon a list of search terms provided to him by the Antaramian Parties' attorneys. After the initial sorting of time entries was complete, Mr. Brychel and his staff reviewed the sorted entries to determine if they had been

properly allocated to the correct search term or category. Mr. Brychel admitted that he did not have any information regarding the underlying claims and defenses. Without such knowledge, it would have been impossible for Mr. Brychel to exercise any independent judgment concerning which tasks contained in PZS's attorneys' billing records reasonably related to their successful breach of fiduciary duty defenses and counterclaims.

2. *Mr. Brychel's Testimony Was Not the Product of Reliable Principles or Methods.*

Mr. Brychel admitted at trial that he could not recall what process he undertook to perform the allocation that led to specific time entries being included in the various categories. Nor did Mr. Brychel explain how his firm's proprietary software works. Without any recollection of the process he used to prepare his work product or the ability to explain how his software works, the Court is left essentially to rely on the *ipse dixit* of the purported expert (that is, the conclusion is correct because the expert says so). Of course, courts do not accept such conclusions as reliable, and the *ipse dixit* testimony of a proffered expert is subject to exclusion.⁵

3. *Mr. Brychel Did Not Reliably Apply the Principles and Methods to the Facts of the Case.*

Assuming that Mr. Brychel utilized reliable principles and methods, Mr. Brychel did not reliably apply those principles and methods to reach his conclusion. For example, one of the categories that the Antaramian Parties asked Mr. Brychel to include in his allocation was for all billing entries mentioning "Fifth Third Bank," because the issues related to Fifth Third Bank were not part of the litigation before this Court.

Mr. Brychel conceded that the software's sorting of the time entries captured certain entries that were incorrectly allocated to the "Fifth Third" category because they included the words "fifth" or "third," such as time entries that included the

⁴ Doc. No. 339, p. 255, ll. 5-19.

⁵ *Badillo v. Playboy Entertainment Group, Inc.*, 2006 WL 752840 (M.D. Fla. Mar. 23, 2006) (Moody, J.).

descriptions “third day of trial” and “prepare for fifth day [of trial].”⁶ In other words, the terms “third” and “fifth” were picked up in Mr. Brychel’s search for “Fifth Third,” even though they had nothing to do with Fifth Third Bank. And this error was not uncovered in the review of the allocations performed by Mr. Brychel and his staff.

While examples like that are relatively isolated, they underscore that the methodology used, and as applied, resulted in errors that call the overall credibility of the report into serious question. And, ultimately, Mr. Brychel’s opinion as an expert witness that the amount of fees incurred on the successful breach of fiduciary duty defense and counterclaims totaled only \$45,000.00 (i.e., less than two percent of the total fees sought) is simply not credible in light of the significance of that defense theory and the trial time devoted to that issue.⁷

Conclusion

Although Mr. Brychel’s testimony and report may have provided a “ball park” allocation of time entries to various categories that could have provided the Court with some guidance, his opinion that only \$45,000.00 in attorney’s fees related to the breach of fiduciary duty issues was so far out of the ball park that the Court is unable to ascribe any reliability to the balance of Mr. Brychel’s report and testimony. In addition, as set forth in the Court’s *Order Determining Amount of Attorney’s Fees*, entered concurrently herewith, the Court has determined that because PZS’s fraud claims were part of an overall defensive strategy and PZS prevailed completely in defending the claims against them, PZS are entitled to the total amount of attorney’s fees incurred in the litigation. Therefore, the Court did not give any weight or consideration to Mr. Brychel’s testimony or report.

Accordingly, it is

ORDERED that the Motion in Limine is GRANTED.

DATED: July 18, 2014.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney Robert Landon, III, is directed to serve a copy of this order on interested parties and to file a proof of service within three days of entry of the order.

⁶ Doc. No. 354, p. 58, ll. 10-25; p. 59, ll. 1-2.

⁷ To Mr. Brychel’s credit, his report brought to PZS’s attorneys’ attention that a number of time entries had been incorrectly billed to this litigation matter. PZS voluntarily reduced its request for fees by approximately \$72,000.00.