Sieger v Zak
2010 NY Slip Op 33045(U)
October 19, 2010
Supreme Court, Nassau County
Docket Number: 19978/05
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

STUART M. SIEGER and DAVID R. SPENCER,

Plaintiffs,

INDEX No. 19978/05

MOTION DATE: Aug. 19, 2010
Motion Sequence # 013, 014

-against-

LOUIS ZAK and POWERSYSTEMS INTERNATIONAL, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion..... XX
Affirmation in Opposition..... X
Memorandum of Law..... XXXXX
Reply Memorandum of Law..... X

Motion by plaintiffs to preclude defendants from offering expert testimony is **granted** to the extent indicated below. Motion by plaintiffs to preclude defendants from characterizing Joel Sieger's calculations as a "valuation" is **denied**. Motion by defendants to preclude plaintiffs from offering expert testimony on their direct or rebuttal case is **granted** to the extent indicated below. Motion by defendants to dismiss plaintiffs' fraud claims is **denied**. Motion by defendants to preclude plaintiffs from referring to the preliminary investment banker reports as "valuations" is **denied**.

This is an action for fraud and breach of fiduciary duty. Plaintiffs Stuart Sieger and David Spencer each held a 1/6 interest in defendant PowerSystems International, Inc.

Defendant Louis Zak held a 2/3 interest and was the principal manager of the company. In July 2004, Zak purchased plaintiffs' interest for $3.4 million and subsequently sold the company to Hunter Defense Technologies, Inc for a considerably higher price. Plaintiffs allege that Zak breached his fiduciary duty to plaintiffs by concealing material information concerning the value of the company.

Plaintiffs assert claims for breach of fiduciary duty (first cause of action), fraud (second cause of action), constructive fraud (third cause of action), mismanagement and self-dealing (fourth cause of action), and breach of the stock purchase agreement (fifth cause of action). Plaintiffs filed a note of issue on December 11, 2008. On January 9, 2009, the parties agreed to "forego scheduling the exchange of expert disclosures pending resolution of the summary judgment motions." Defendants' motion for summary judgment dismissing the complaint and plaintiffs' motion for partial summary judgment were denied by the court on June 10, 2009. In the same order, the court granted plaintiffs summary judgment dismissing defendants' third counterclaim.

On January 4, 2010, defendants served expert disclosure, identifying Michael J. Garibaldi, CPA as their expert witness in the field of valuation of businesses and forensic accounting. In the disclosure, defendants state that Mr. Garibaldi will testify as to the "business value" of PowerSystems at the time that plaintiffs sold their interest in the company. The disclosure also states that Garibaldi will "reconcile" the value of PowerSystems between the time plaintiffs sold their interest and the time the company was sold to Hunter Defense Technologies. Additionally, the expert will testify as to the "due diligence" that plaintiffs could have conducted to value their interests based upon publicly available documents. Finally, the expert will "critique" reports which were prepared by investment bankers, estimating the amount which could be realized upon a sale of the company.

On July 23, 2010, defendants served an amended expert disclosure, reiterating the substance of the facts and opinions to which Mr Garibaldi will testify. While the expert disclosure refers to "standard valuation methods and procedures," it does not specify the method by which Mr Garibaldi would value the company.

Plaintiffs move to preclude defendants from offering expert testimony based upon their failure to make disclosure as required by CPLR § 3101(d). Plaintiffs argue that defendants' expert disclosure is vague and conclusory. Plaintiffs also argue that the expert disclosure is untimely because the parties agreed that expert disclosure would be served by January 4, 2010. Plaintiffs further move to preclude defendants from claiming that certain

calculations prepared by plaintiff Stuart Sieger's brother, Joel, were a "valuation" of plaintiffs' interest in the property. Joel's analysis consists of a schedule of PowerSystems' pre-tax income for January through June 2004 and a forecast of pre-tax income for 2004, 2005, and 2006. It appears that, based upon the assumption that the company should be valued at three times pre-tax earnings, Joel estimated the value of a 1/6 interest at $3,014,250.

Defendants move to i) preclude plaintiffs from offering expert testimony during their case in chief, ii) dismiss plaintiffs' fraud claims, iii) preclude plaintiffs from offering expert testimony on rebuttal, and iv) preclude plaintiffs from referring to the preliminary investment banker reports as "valuations."

CPLR § 3101(d) provides that upon request, each party shall identify each person whom the party expects to call as an expert witness at trial. The party shall also disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion (Id). Where an expert is testifying on the issue of liability, the expert's theory of liability must be disclosed in reasonable detail (***Dalrymple v Koka***, 2 AD3d 769 [2d Dept 2003]). Similarly, where an expert is testifying on the issue of damages, the theory and methods utilized by the expert should be reasonably disclosed.

Defendants did not adequately comply with CPLR § 3101(d) because their expert disclosure did not explain in reasonable detail the method by which their expert proposed to value the company. However, CPLR § 3101(d) does not require a party to respond to a demand for expert witness information at any specific time, nor does it mandate that a party be precluded from offering expert testimony merely because of noncompliance with the statute, unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party (***Ocampo v Pagan***, 68 AD3d 1077 [2d Dept 2009]).

There is no evidence of a willful failure to disclose on defendants' part or any showing of prejudice on the part of the plaintiffs. Accordingly, plaintiffs' motion to preclude expert testimony is **granted** only to the extent that defendants shall serve an amended expert disclosure, stating the method or methods by which Mr Garibaldi will estimate the value of PowerSystems, both at the time plaintiffs sold their interest and at the time the company was sold to Hunter Technologies, within 15 days of service of a copy of this order.

Because Joel Sieger is not a party to the action, his out-of-court statement as to the earnings or value of PowerSystems is not admissible as an admission, unless it is shown that he was authorized to speak on behalf of plaintiffs (***People v Cassas***, 84 NY2d 718 [1995]). Nevertheless, assuming that there is a good faith basis for the admission of Joel's calculations, reference to his brief analysis as a "valuation" would not exceed the bounds of permissible commentary at the trial (***People v Fairley***, 63 AD3d 1288 [3d Dept 2009]). Plaintiffs' motion to preclude defendants from characterizing Joel Sieger's calculations as a valuation is **denied**.

In their memorandum of law in support of their motion in limine, plaintiffs state that they do not intend to offer expert testimony on their case in chief as to the value of PowerSystems. In plaintiffs' view, no expert testimony as to the value of the company is necessary because the measure of damages is the profit which defendants made on the sale of plaintiffs' interest. Nevertheless, pursuant to the out-of-pocket- rule, the measure of damages for plaintiffs' fraud claim is the value of their Powersystems stock on the date they sold less the value of the consideration which they received (***Lama Holding v Smith Barney***, 88 NY2d 413, 421 [1996]). Thus, it would appear that without expert testimony as to the value of the company on their direct case, plaintiffs may be subject to a motion for judgment during trial (CPLR 4401). Nevertheless, as the trial has not yet commenced, defendants' motion to dismiss plaintiffs' fraud claims for legal insufficiency is **denied**.

Defendants move to preclude plaintiffs from offering expert testimony on their direct or rebuttal case on the ground that plaintiffs have also failed to serve notice pursuant to CPLR § 3101(d). Plaintiffs respond that they are unable to frame a rebuttal notice because defendants have not provided sufficient expert discovery. Since the court has determined that defendants' expert disclosure was not adequate, it further concludes the plaintiffs' failure to comply with CPLR § 3101(d) was not willful. Defendants' motion to preclude plaintiffs from offering expert testimony on their direct or rebuttal is **granted** only to the extent that plaintiffs shall serve a notice complying with CPLR § 3101(d) within 15 days of receipt of defendants' amended notice.

The preliminary reports prepared by the investment bankers may have been more sophisticated that Joel Sieger's analysis. Nevertheless, the court concludes that characterizing the reports as valuations would similarly be within the bounds of fair commentary. Defendants' motion to preclude plaintiffs from referring to the investment bankers' reports as valuations is **denied**.

So ordered.

Dated OCT 19 2010

ENTERED

OCT 21 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A Bucaria
J.S.C.