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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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AVAIL SHIPPING INC., *et al.*,

Plaintiffs,

and

SHERO SHIPPING, LLC, d/b/a UNITED SHIPPING SOLUTIONS, *et al.*,

Plaintiffs-Intervenors,

- *against* -

DHL EXPRESS (USA), INC.,

Defendant.

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Index No.: 600112/2009
Motion Date: 03/06/2015
Motion Seq. No.: 030

BRANSTEN, J.

Defendant DHL Express (USA), Inc. ("DHL") seeks to exclude from trial the part of the Plaintiffs' expert's report that discusses "terminal value" damages. Plaintiffs oppose the motion. For the reasons set forth below, the motion is denied, without prejudice.

Plaintiffs' expert, Richard S. Hoffman, calculated two categories of lost-profit damages. First, Hoffman calculated the difference between what Plaintiffs would have received if DHL had not breached and the profits that Plaintiffs actually received. Hoffman performed this calculation from the time of the breach in 2008 through 2013. Second, Hoffman performed a "terminal value" analysis. This analysis calculated the value of Plaintiffs' businesses as going-concerns as of 2013, based on the assumption that Plaintiffs would have been in business beyond the end of the contract's term in 2015.

The contract at issue in this case, the Reseller Agreement, is governed by California law. *See Avail Shipping, Inc. v. DHL Exp. (USA), Inc.*, 119 A.D.3d 433, 433 (1st Dep't 2014) ("[T]he agreement . . . is governed by California law"). Under California law, a plaintiff may recover damages that are sufficiently certain and were reasonably foreseeable at the time of contract. *See Ash v. N. Am. Title Co.*, 223 Cal. App. 4th 1258, 1268 (2014).

DHL argues that the terminal value portion of Hoffman's report must be excluded for two reasons. Initially, DHL contends that Hoffman's report includes damages that Plaintiffs suffered beyond the end of the Reseller Agreement. According to DHL, damages beyond the contract term were not reasonably foreseeable when the Reseller Agreement was signed and must be excluded. Second, DHL argues that Hoffman's terminal value damages are impermissibly speculative and must be excluded because Hoffman unreasonably assumes that Plaintiffs would have been able to replace DHL with another domestic shipping service, such as FedEx or UPS.

I. *The Court Cannot Determine if Terminal Damages Were Reasonably Foreseeable*

DHL's motion in limine must be denied at this juncture because it improperly seeks summary judgment on the issue of "terminal value" damages.

Plaintiffs seek to introduce evidence about "terminal value" damages. DHL seeks an order limiting evidence to damages that were reasonably foreseeable at the time of contracting. Granting DHL's motion would be "the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages . . . in excess of the damages that defendants believe are appropriate." *See Scalp & Blade, Inc. v. Advest, Inc.*, 309 A.D.2d 219, 224 (4th Dep't 2003).

In essence, DHL asks this Court to rule that no reasonable juror could find that Plaintiffs could reasonably expect to profit from the Reseller Agreement after the end of its term. By arguing that the terminal value damages were not, as a matter of law, reasonably foreseeable at the time of contracting, DHL asks this Court to determine whether an issue of fact exists.

Whether or not an issue of fact exists is a question properly resolved on summary judgment. *See* CPLR 3213(b) ("the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact"); *Lindgren v. New York City Hous. Auth.*, 269 A.D.2d 299, 303 (1st Dep't 2000) ("On a motion for summary judgment, this court's role is limited to finding triable issues").

New York courts limit the use of motions in limine when they decide dispositive issues, as if on summary judgment, but are not accompanied by a motion for summary judgment. *See, e.g., Downtown Art Co. v. Zimmerman*, 232 A.D.2d 270, 270 (1st Dep't 1996) ("Plaintiff's motion in limine was an inappropriate device to obtain relief in the

nature of partial summary judgment"); *Ofman v. Ginsberg*, 89 A.D.3d 908, 909 (2d Dep't 2011) ("Under the circumstances, we agree with the plaintiff that the defendant's trial motion was, in effect, an untimely motion for summary judgment.").

Recently, in *Sadek v. Wesley*, 117 A.D.3d 193, 203 (1st Dep't 2014), the First Department reversed the grant of "in limine motions to preclude all seven of plaintiffs' expert witnesses . . . [that] were intended to be, and turned out to be, dispositive . . . ." The First Department cautioned trial courts to "take care that the informal procedure of in limine evidentiary applications is not abused so as to unfairly tip the scales." *See Sadek*, 117 A.D.3d at 203.

As in *Sadek*, the Fourth Department also held that motions in limine can be improper when they are dispositive. *Charter Sch. for Applied Technologies v. Bd. of Educ. for City Sch. Dist. of Buffalo*, 105 A.D.3d 1460, 1464 (4th Dep't 2013). The Fourth Department held that the "motion to preclude plaintiffs from introducing evidence with respect to damages was the functional equivalent of a motion for partial summary judgment." *See Charter Sch. for Applied Technologies*, 105 A.D.3d at 1464 (quotation omitted).

In a posture similar to this case, the Fourth Department denied a motion in limine to preclude plaintiffs from offering proof of additional damages. *See Scalp & Blade, Inc. v. Advest, Inc.*, 309 A.D.2d 219, 224 (4th Dep't 2003). The Fourth Department held that "the defendants' motion, although labeled one in limine, actually was the functional

equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages . . . in excess of the damages that defendants believe are appropriate." *See Scalp & Blade, Inc.*, 309 A.D.2d at 224 (quotation omitted).

DHL contends that the above-cited cases hold that the Court may rule on DHL's motion, but that unlike other in limine rulings, this ruling would be appealable. *See Rondout Elec., Inc. v. Dover Union Free Sch. Dist.*, 304 A.D.2d 808, 810 (2d Dep't 2003). DHL correctly points out that the *Rondout* court noted that evidentiary in limine rulings are typically not appealable, but nevertheless allowed the plaintiff to appeal the grant of a motion in limine. *See Rondout Elec., Inc.*, 304 A.D.2d at 810.

The Second Department allowed the appeal in *Rondout* because the trial court's order was more than an advisory opinion. *See Rondout Elec., Inc.*, 304 A.D.2d at 811. The Second Department held that the trial court's order was not a typical advisory evidentiary ruling because it involved the merits of the controversy and affected a party's substantial rights. *See Rondout Elec., Inc.*, 304 A.D.2d at 811.

The fact that the Second Department accepted an appeal of a motion in limine does not bolster DHL's position. One of the grounds that the *Rondout* court ruled on was that "a motion in limine is an inappropriate substitute for a motion for summary judgment." *See Rondout Elec., Inc.*, 304 A.D.2d at 810-11 ("Dover's motion was the functional equivalent of a motion for partial summary judgment dismissing the complaint insofar as it sought damages in an amount in excess of the damages pleaded in the

plaintiff's initial notice of claim . . . [and] could necessitate a second trial on the issue of damages"). The Second Department's reversal of an improper grant of a motion in limine does not persuade this Court that it should rule on DHL's motion in limine seeking to limit damages and issue an order that "could necessitate a second trial on the issue of damages." *See Rondout Elec., Inc.*, 304 A.D.2d at 810-11.

DHL also argues that its motion is not akin to a summary judgment motion because it seeks to preclude irrelevant expert testimony. DHL cites *Wey v. New York Stock Exchange*, 15 Misc.3d 1127(A), at *13 (Sup. Ct. N.Y. County April 10, 2007), for the proposition that "a motion in limine is the appropriate vehicle to determine what evidence may be presented at trial regarding damages."

In cases such as *Wey*, where in limine motions were granted to limit evidence regarding damages, the in limine motions accompanied summary judgment motions. *See W. 90th Owners Corp. v. Schlechter*, 165 A.D.2d 46 (1st Dep't 1991) (affirming grant of partial summary judgment and in limine motion precluding evidence of damages); *Wey*, 15 Misc. 3d at *13 (granting summary judgment, in part, and motion in limine to preclude evidence as to speculative damages theory, in full).

DHL moved for summary judgment over two years ago, at the proper time. When DHL moved for summary judgment, it had received Hoffman's expert report but chose not to seek summary judgment concerning the measure of Plaintiffs' damages.

Without commenting on whether Defendants would have been entitled to summary judgment, the Court finds that the motion to preclude evidence on terminal value damages is the functional equivalent of a partial summary judgment motion. *See, e.g., Brewi-Bijoux v. City of New York*, 73 A.D.3d 1112, 1113 (2d Dep't 2010) ("while the defendants characterized their motion as one for in limine relief . . . the record reveals that the motion actually was one for summary judgment. [A] motion in limine is an inappropriate substitute for a motion for summary judgment") (quotation omitted).

DHL seeks to have the Court determine that no issue of fact exists as to terminal value damages. The Court cannot allow DHL to make a second summary judgment motion over 700 days after the Note of Issue was filed. *See* CPLR 3212(a) ("such motion shall be made no later than one hundred twenty days after the filing of the notice of issue"); *Rivera v. City of New York*, 306 A.D.2d 456, 456 (2d Dep't 2003) (Defendants motion in limine "to preclude the plaintiffs' expert from testifying at trial . . . was improper . . . [because] a motion in limine is an inappropriate substitute for a motion for summary judgment") (quotation omitted). Accordingly, the Court cannot determine, at this time, whether an issue of fact exists as to terminal value damages.

II. *Sufficient Foundation*

DHL next contends that Hoffman's expert report must be excluded because it is too speculative. DHL argues that it relies on too many assumptions, including that the Plaintiffs would have been able to continue their shipping businesses with another domestic shipping company when the Reseller Agreement expired.

DHL is correct that expert testimony on lost-profit damages may be excluded where it is too speculative. *See Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83, 88 (1st Dep't 2012). An expert's testimony may be too speculative if it is based on unrealistic assumptions regarding a party's future prospects. *See Wathne Imports, Ltd.*, 101 A.D.3d at 88.

Plaintiffs contend that Hoffman's report is premised on the reasonable assumption that Plaintiffs could have replaced DHL or sold their business before the Reseller Agreement expired. DHL argues that Hoffman gives no explanation for how he could assume that Plaintiffs would be able to replace DHL.

Here, the Court cannot say that the Hoffman's report is without any foundation because "a degree of uncertainty is to be expected in assessing lost profits." *See Wathne Imports, Ltd.*, 101 A.D.3d at 88. Plaintiffs' expert's report is not based on an unrealistic or imaginary foundation. The perceived flaws in Hoffman's report are relevant to the weight a jury should give to the expert's report and testimony, but they do not present

sufficient grounds for ruling that analysis inadmissible. *See Wathne Imports, Ltd.*, 101 A.D.3d at 87. Hoffman's conclusions will be subject to challenge on cross-examination. *Id.*

DHL's motion is denied without prejudice.

Conclusion

Accordingly, it is hereby

ORDERED that Defendant's motion in limine is denied without prejudice; and it is further

ORDERED that the parties shall appear on April 29, 2015, at 10:00 a.m., at 60 Centre Street, Room 442, ready to proceed with trial.

This constitutes the decision and order of the court.

Dated: New York, New York
March 12, 2015

ENTER:

Hon. Eileen Bransten, J.S.C.