SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. O. PETER SHERWOOD** **PART** **IAS MOTION 49EFM**

Justice

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INDEX NO. 602985/2009

NORTH AMERICAN AIRLINES, INC.,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 013

- v -

WILMINGTON TRUST COMPANY, ET AL.

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 013) 435, 436, 437, 438, 439, 440, 441, 442, 443, 445, 446

were read on this motion to/for PRECLUDE.

Under motion sequence 013, defendant seeks by order to show cause (1) an order pursuant to CPLR 3126, 3101 (d), and the Commercial Division Rules precluding the testimony of plaintiff's expert, Mark R. Benson, or alternatively precluding Mr. Benson from testifying about issues that are not germane to the narrow issues to be tried and/ or that are beyond his expertise; (2) precluding Mr. Benson from offering any opinions concerning documents, information, and/or data that are not referenced specifically in the substantive portion of his report; (3) precluding the plaintiff from producing an expert reply report, witness testimony or evidence at trial beyond the scope of the finding and conclusions contained in Mr. Benson's Supplemental Expert Report (4) pursuant to CPLR 2201 a stay of expert discovery pending adjudication of the within application; (5) pursuant to CPLR 6313 a temporary restraining order staying and enjoining all proceedings in the above-referenced matter, including any trial; and (6) such other and further relief as this Court deems just and proper (NYSCEF Doc. No. 436 [Donato affirmation] ¶ 2).

This action arises out of various agreements for the lease and repair of a Boeing 767 aircraft. In a decision and order on summary judgment dated July 6, 2017, this court stated, in relevant part, that

> "[t]he court rejects WTC's argument that the blade failure falls within the 'accidental cause' exception and thus excuses WTC for liability from the work… [section 4.3 (b) (iv) (A) (cc) of the Lease] does not excuse reimbursement for all repairs necessitated by an accidental cause, but merely states that where a full performance restoration is performed on the occasion of such an event, no reimbursement is required for the costs of repairs relating to such accidental cause. As provided for in section 4.3 (b) (ii) (A) (2) of the Lease, NAA is entitled to reimbursement of the 'actual costs incurred… of any off wing maintenance… which consists of a [shop] visit for full performance restoration to restore… EGT margin.' NAA is not entitled to recover for repairs relating solely to damage caused by the blade failure."

(NYSCEF Doc. No. 437 [July 6, 2017 order] at 27). Defendants appealed that decision on August 8, 2017 (NYSCEF Doc. No. 414 [Notice of Appeal]).

The first branch of defendants' application turns on differing interpretations of the July 6, 2017 order. Defendants argue that "Plaintiff must affirmatively establish its prima facie case by proving which, if any, of the subject airplane engine work was performed to restore the engine's Exhaust Gas Temperature ("EGT") margin (Donato affirmation ¶ 8; *see* NYSCEF Doc. No. 438 [August 8, 2018 order]). Plaintiff may not recover for damage caused by "the liberated blade" because this court has already determined that it was "an accidental cause" pursuant to the terms of the agreements between the parties (*id.* ¶ 3, citing July 6, 2017 order). The Benson Report does not, however address the question of what work was done to restore the EGT margin. Rather, the report "once again attempt[s] to redefine the scope and parameters of this damages trial…[by] redefin[ing] the terms 'accident' and or 'accidental cause' as used in the Lease and substitute[ing] them with the definitions of 'accident' and/or 'accidental cause' as used by the FAA, NTSB and IATA" (*id.* ¶ 12).

Defendant argues that the Benson testimony should be precluded for two reasons. First, the Court has already determined that the Lease is unambiguous; therefore extrinsic evidence about the meaning of the agreement, including an expert report, is not permitted (*id.* ¶ 13). Second, Mr. Benson is not qualified to offer an expert opinion about the meaning of certain terms used by administrative agencies (*id.*). He is a purported aviation expert. He is not a person with "professional experience in a government regulatory or administrative role", nor does he have the "skill or expertise relevant to the internal regulatory processes employed by these agencies to define these terms" (*id.* ¶¶ 16 - 18, citing *Mattot v Ward*, 48 NY2d 455, 459 [1979]).

Plaintiff argues Mr. Benson's testimony should not be precluded because it is "relevant to issues that the Court has reserved for trial" (opp at 4). The Court's decision on summary judgment declined to grant the motion on the question of "accidental cause" and reserved the question for trial. The Court did not make a finding, as defendant argues, that "the blade liberation here *was*... 'an accidental cause'" (*id.*). Defendants' arguments regarding Mr. Benson's qualifications are "absurd" – Mr. Benson has "decades of relevant experience" in aviation that certainly qualify him to opine on the meaning of a term used industry-wide (*id.* at 5).

"Whether or not expert testimony is admissible on a particular point is a mixed question of law and fact addressed primarily to the discretion of the trial court . . . [a]s a general rule the expert should be permitted to offer an opinion on an issue which involves professional or scientific knowledge or skill not within the range of ordinary training or intelligence" (*Selkowitz v Nassau Co*, 45 NY2d 97 [1978] [internal quotations and citations omitted]; *see Gomez by Gomez v NYCHA*, 217 AD2d 110, 116 [1st Dept 1995]). Although it is true that "[w]here the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected" (*Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351 [1st Dept 2001]).

An expert "need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented" (*Estate of Lawler v Mt Sinai Med Ctr, Inc.*, 115 AD3d 620, 621 [1st Dept 2014] [quotations and citations omitted]). Furthermore, "the issue of his or her qualifications to render such opinion must be left to trial, as this goes to the weight rather than the admissibility of his testimony" (*id.*).

Because there has not yet been a decision on defendants' appeal of the July 6, 2017 order, this court declines to expound further on its contents. To the extent the motion seeks to preclude Mr. Benson's testimony based on his qualifications, the expert disclosure report does not indicate that Mr. Benson purports to be an expert on the usage of "terms defined by the FTA, IATA or NTSB". Rather, he "will testify about the commercial airline industry's understanding of the term 'accident'" (NYSCEF Doc. No 440 [Expert Disclosure Report]) as someone with 44 years of experience in the industry, including in

aircraft maintenance and management, oversight of aviation assets, and technical compliance with lease terms (NYSCEF Doc. No. 440 [Supplemental Expert Report] at 1). Mr. Benson does not appear to be unqualified as an expert.

Defendant also argues that pursuant to Commercial Division Rule 13 (c), Mr. Benson should be precluded from offering any opinions concerning documents, information, and/or data that are not referenced specifically in the substantive portion of his report. Moreover, plaintiff should not be permitted to effectively shift the burden to defendant by producing "an expert report that is utterly devoid of any substantive opinion on the ultimate issue in this case", only to then use a reply report to "simply rebut the defense experts' findings and conclusions" (Donato affirmation ¶ 21).

Plaintiff argues that the Court should deny these requests. "NAA is entitled to submit all expert testimony contemplated under the CPLR and Commercial Division Rules, including rebuttal of any expert testimony that the Defendants choose to submit" (opp at 6). Furthermore, defendants expressly agreed to allow plaintiff's expert to produce an expert reply (*id.*, citing NYSCEF Doc No 433).

Plaintiff is already required by Commercial Division Rule 13 (c) and CPLR 3101 to provide, with respect to Mr. Benson, "a complete statement of all opinions the witness will express and the basis and the reasons for them". With respect to the request to preclude Mr. Benson from offering an expert reply report, expert testimony, and/or evidence beyond the scope of that which is contained within the four corners of the expert report, Commercial Division Rule 13 (c) requires the parties to "confer on a schedule for expert disclosure — including the identification of experts, exchange of reports, and depositions of testifying experts". If through that process, the parties came to an agreement that NAA's expert would be permitted to produce a reply report the rule does not now act to prevent it.

With respect to defendants' request to stay expert discovery pending adjudication of this application, the court already denied that request at the hearing on September 28, 2018.

With respect to defendants' application for a temporary restraining order pursuant to CPLR 6313, defendants have not demonstrated "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in [their] favor" (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Defendants argue only that they will be "significantly prejudiced" if required to continue with expert discovery while this application is pending, while plaintiff will suffer none if expert discovery or trial are briefly postponed (Donato affirmation ¶ 11). This court has already determined that a stay of expert discovery was not justified at the time of the application. Defendants have therefore not made an adequate showing satisfying the requirements for a temporary restraining order.

However, because the outcome of the appeal may have a material effect on the outcome of this litigation, the court finds it appropriate to stay further proceedings pursuant to CPLR 2201 pending resolution of the appeal. Upon the foregoing documents, it is hereby

ORDERED that the motion is **DENIED** with the respect to the requests to preclude or limit plaintiff's expert testimony, and for a temporary restraining order; and it is further

ORDERED that with respect to the branch of the motion to preclude plaintiff's expert's testimony based on purported findings made in the decision now on appeal, the motion is **DENIED** without prejudice to renew within 30 days of a decision from the Appellate Division, should a decision of that court require this court to revisit its ruling; and it is further

ORDERED that further proceedings in this action, including discovery, are **STAYED** pending a decision from the Appellate Division on defendants' appeal; and it is further

ORDERED that, within 15 days of a decision from the Appellate Division on defendants' appeal, the parties shall inform the court of any such development by letter to the court or by teleconference with all parties.

4/9/2019
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:	[ ]	CASE		[X]	NON-FINAL		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE		[ ]	SUBMIT ORDER		
CHECK IF	[ ]	INCLUDES		[ ]	FIDUCIARY	[ ]	REFERENCE