200695 Ontario, Inc. v
Goodrich Aerospace Can., Ltd.

2022 NY Slip Op 35241(U)

July 6, 2022

Supreme Court, Erie County

Docket Number: Index No. 810322/2018

Judge: Timothy J. Walker

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

200695 ONTARIO, INC.,

Plaintiff,

- against

GOODRICH AEROSPACE CANADA, LTD.,
DINO SOAVE,

Defendants.

8TH JUDICIAL DISTRICT
COMMERCIAL DIVISION
DECISION AND ORDER
Index No. 810322/2018

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **ZDARSKY, SAWICKI & AGOSTINELLI LLP**
Joseph E. Zdarsky, Esq., Of Counsel
David E. Gutowski, Esq., Of Counsel
Daniel J. Bobbett, Esq., Of Counsel
Attorneys for Plaintiff

DAY PITNEY, LLP
John W. Cerreta, Esq., Of Counsel
Attorneys for Defendant

And

NASH CONNORS, P.C.
Philip M. Gulisano, Esq., Of Counsel
Andrew J. Kowalewski, Esq., Of Counsel
Attorneys for Defendant

WALKER, J.

Defendants, Goodrich Aerospace Canada, Ltd. ("Goodrich") and Dino Soave, have applied for: (i) an order (Motion 10; Doc. 474) precluding the trial testimony of Ronald Qunitero, a trial witness Plaintiff has identified as an expert witness; (ii) an order (Motion 11; Doc. 482) precluding evidence of, and references to, the comparative wealth, power, financial affairs, assets, employees, corporate status or size of Goodrich and of Goodrich's parent companies; and (iii) an order (Motion 12; Doc. 485) precluding evidence of and reference to (a) Soave signing a client's name on an insurance form in 1999 and employment termination from a job prior to his employment with Goodrich; (b) the cause of Soave's employment ending with Goodrich; and (c) Soave's alleged conduct in an audit resulting in a fellow employee's (Paul Meringer) termination from Goodrich.

BACKGROUND

Plaintiff is the successor to 2Source Manufacturing, Inc. ("2Source"), a Canadian manufacturer of copper bushings (Doc. 14, ¶2).

Goodrich is a wholly-owned subsidiary of Goodrich Corporation, a New York domestic corporation. Goodrich Corporation is a wholly-owned subsidiary of Raytheon Technologies Corporation ("Raytheon"), a public company established under Delaware law and headquartered in Waltham, Massachusetts (Doc. 483, ¶6). Raytheon is a successor to non-party, United Technologies Aerospace Systems ("UTAS") (Doc. 519, p. 1).

In 2014, 2Source entered into a two-year long-term purchase agreement ("LTA") with Goodrich to supply it with bushings for use in Goodrich's aircraft landing gear (Doc. 477). The LTA was non-exclusive, and contained no automatic-renewal provision (*Id.*, at §6). On August 23, 2016, Goodrich provided written notice to 2Source that the LTA would neither be extended, nor renewed, upon its expiration. The LTA expired on December 31, 2016, thereby ending 2Source and Goodrich's contractual relationship (Doc. 481, p. 1).

Shortly thereafter, 2Source's business began to deteriorate, its secured lender commenced insolvency proceedings in January of 2017, and 2Source ceased operations (*Id.*, at 1pp. 2-3).

In this action, Plaintiff claims that, beginning in April of 2016, Goodrich and its former employee, Mr. Soave, falsely stated to 2Source that Goodrich was interested in negotiating a new long-term supply agreement, when (according to Plaintiff) Goodrich never had any such intention. Plaintiff asserts claims for fraud and prima facie tort, alleging that Defendants' false claims of an intent to negotiate lulled 2Source into "refrain[ing] from soliciting business from competing purchasers" that might have replaced its lost Goodrich business and kept the company afloat" (Doc. 478, pp. 7-8).

In order to prevail, Plaintiff must establish a causal link between Defendants' alleged false statements of a bona fide intent to negotiate and some actual, out-of-pocket loss to 2Source. Plaintiffs intend to rely on the testimony of Ronald Quintero, a CPA and business-valuation expert. Mr. Quintero intends to present an opinion concerning the value of the 2Source business on "April 14, 2016," when 2Source and Defendant allegedly "began face-to-face negotiations" for a new fifteen (15) year supply contract, under which Defendant might have ""increase[d] [its] spend with [2Source] to 100% of its worldwide spend on aircraft landing gear bushings" (Doc. 476, p. 1).

According to Plaintiff's theory of the case, Defendant's alleged statements suggesting an openness to such terms were false, and, but for the alleged fraud, 2Source would have learned in April of 2016 that Defendant planned neither to renew, nor extend the LTA, and to terminate all 2Source business by year end.

Jury selection is scheduled for July 7, 2022, and the jury trial is scheduled to commence on July 11, 2022.

DISCUSSION

Application to Preclude the Trial Testimony of Ronald Qunitero (Motion 10; Doc. 474)

Whether "to strike [an] expert witness disclosure and to preclude the expert from testifying" ultimately rests in "the sound discretion of the trial court" (*Redmond v. Redmond*, 163 AD3d 1475, 1475-76 [4th Dept 2018]). "[E]expert opinion is proper when it would help clarify an issue calling for professional or technical knowledge" that is "possessed by the expert [but] beyond the ken of the typical juror" (*De Long v. County of Erie*, 60 NY2d 296, 307 [1983]). In arriving at an opinion, the expert must apply reliable "procedures and methodology" that are generally accepted within the relevant professional community (*People v. Angelo*, 88 NY2d 217, 222-23 [1996]). In addition, "the proffered expert testimony" must "be helpful in aiding a lay jury to reach a verdict" (*People v. Brown*, 97 NY2d 500, 505 [2002]).

In light of the foregoing, Mr. Quintero's valuation opinion must bear on some "actual pecuniary loss sustained as a direct result" of the Defendants' alleged fraudulent statements (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1996]). Proof of damages requires a "causal link" between a party's fraudulent statements and "the economic harm" to the opposing party (*Basis Pac-Rim Opportunity Fund v. TCW Asset Mgmt. Co.*, 149 AD3d 146, 149-50 [1st Dept 2017]).

Moreover, the recoverable loss attributable to a false statement is limited to actual, "out of pocket" harm, consisting of the amount necessary "to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" (*Lama*, 88 NY 2d at 421).

Based upon these principles, Defendants contend that Mr. Quintero's valuation opinions bear no causal connection to the alleged fraud for which Plaintiff seeks to recover.

At trial, Plaintiff will seek to prove that, beginning in April of 2016, Defendants falsely stated that Goodrich was interested in negotiating a new long-term supply agreement with 2Source extending beyond 2016, when in truth Goodrich's termination of the parties' relationship was already a *fait accompli*. According to Plaintiff, but for these false statements, 2Source would have learned that its "business relationship [with Goodrich] was over," and it would have had "sufficient time to find and engage substitute business before the sales to Goodrich ended on December 31, 2016," thereby saving 2Source from bankruptcy (Doc. 478, pp. 7-8).

Defendants contend that Mr. Quintero's valuation opinion calculates 2Source's damages based, in large part on the "value of lost profits from incremental business" attributable to Goodrich, which assumes that Goodrich would be "increas[ing] [its] spend with the Plaintiff to 100% of its worldwide spend on aircraft landing gear bushings" beginning in 2017 (Doc. 476, pp. 1-2).

However, in order to succeed on the merits, Plaintiff must prove that all of this supposed value was a mirage, because there was no prospect of 2Source receiving any continuing business from Goodrich after December 31, 2016 (Doc. 478, pp. 7-8). Accordingly, Defendants contend that Mr. Quintero's proffered testimony on damages and Goodrich's value cannot be squared with Plaintiff's claim that had Plaintiff not been defrauded, it would not have relied on any additional revenue from Goodrich and, instead, sought new business from other sources. For this reason, Defendants further contend that Mr. Quintero's damages opinions lack any causal connection to the alleged fraud, and have nothing helpful or relevant to tell the jury about the "actual pecuniary loss sustained [by 2Source] as a direct result" of defendants' statements (*Lama Holding*, 88 NY2d at 421).

Defendants mischaracterize Mr. Quintero's opinion. Mr. Quintero's reference to 2Source seeking to "increase [Goodrich's] spend with the Plaintiff to 100% of its worldwide spend on aircraft landing gear bushings" is stated in that limited part of Mr. Quintero's report defining the "Measurement Date" of Plaintiff's alleged damages (Doc. 476, p. 1). Defendants rely on this statement out of context and in doing so, mischaracterize it.

Mr. Quintero's opinion is based, in large part, on cash flows reflected on 2Source's 2015 audited financial statements, which provide a baseline of 2Source's available production capacity which could be redeployed for other customers in the absence of Goodrich's business. Mr. Quintero's use of 2Source's financial statements for this purpose are standard methodology in business valuation, and does not assume continued sales by 2Source to Goodrich or any existing customer, or that 2Source and Goodrich would have extended the LTA.

It is important to recognize that Mr. Quintero does not offer an opinion on whether the Defendants' alleged fraudulent statements were the proximate cause of Plaintiff's damages. Plaintiff must prove proximate cause as a precondition to reaching Mr. Quintero's opinion, which relates to the value 2Source lost as a result of the alleged fraud.

Mr. Qunitero's valuation of 2Source, like any valuation of a going concern, relies upon assumptions. "Valuations and projections are often done based on growth assumptions that are generally not detailed to the level of 'specific customers or specific products'" (Quintero Aff., ¶8, quoting Defendants' Memorandum of Law, p. 12; Doc. 520 and 481, respectively). Such assumptions are unavoidable and do not render Mr. Quintero's opinion fatally speculative on their face. Defendants shall have the opportunity to discredit Mr. Quintero's assumptions through cross-examination.

Defendants also contend that Mr. Quintero's valuation opinion violates the "out of pocket rule" for fraud damages, under which Plaintiff may recover only "what [2Source] lost because of the fraud, not . . . what [2Source] might have gained" (*Lama*, 88 NY 2d at 421]). "[N]o recovery" is available for "profits which would have been realized in the absence of the fraud" (*Id*)., or "the benefit of an alternative agreement overlooked" as a result of the fraud (*Alpert v. Shea Gould Klimenko & Casey*, 160 AD2d 67, 72 [1st Dept 2006]).

The court disagrees with Defendants and finds that Mr. Quintero's opinion does not violate the out-of-pocket rule, because Plaintiff is not seeking expectation damages (*Lama*, 88 NY2d at 421). Rather, as Mr. Quintero states in his affidavit opposing the application, Plaintiff seeks to recover the loss of 2Source, itself:

> As stated in both my expert report, and my Affidavit in Opposition to Motion for Summary Judgment of April 26, 2022, my charge was to analyze the enterprise value of the business that existed at the time of the alleged fraud. Since 2Source ultimately became bankrupt and its enterprise value was lost in its entirety shortly after Goodrich terminated its business with 2Source, such enterprise value constitutes the out-of-pocket loss.
>
> A potential acquirer of 2Source would normally be interested in the cash flows projected to be realized, since that is the underlying basis of value. Thus, a valuation report necessarily must consider current and projected cash flows because such considerations are inherent to the valuation methodology. The fact that such projected cash flows may also include revenues from performance of the deal under consideration does not change the methodology of appraising the value of an existing business. It was and is wholly proper to include such revenues anticipated in good faith by 2Source in its valuation. This is because valuations are based upon projections believed to be reasonable as of the measurement date.

> Historical financial performance is an important input for developing financial projections that are required to perform a discounted cash flow analysis.
>
> The damages based upon the value of the business do not put plaintiff in a "better position" than it would have been in the absence of the fraud, but rather, they compensate plaintiff for what 2Source lost - which was its fair market value as a going concern on the Measurement Date.

(Doc. 520, ¶¶9-11).

Application to Preclude Evidence of, *Inter Alia*, Goodrich's Wealth, Status, and Size (Motion 11; Doc. 482)

Plaintiff intends to introduce evidence at trial regarding Goodrich's and its parent companies', *inter alia*, size and wealth, in order to invoke juror emotions and prejudices regarding large companies.

It is well settled that a party's wealth should have no role in the adjudication of disputed matters:

> It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise[.]

(*Laidlaw v. Sage*, 158 NY 73, 103 [1899]).

Plaintiff seeks punitive damages. Accordingly, during the liability and compensatory damages stage of the trial, Defendant's wealth must be kept from the jury to prevent it from being used as a "weapon" against it (*Rupert v. Sellers*, 48 AD2d 265, 272 [4th Dept 1975] ["Defendant's wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice, thus entitling plaintiff to punitive damages]).

"To avoid such possible abuse, . . . the split trial procedure should be used, and . . . the court should take a special verdict as to whether [Goodrich] was guilty of such conduct that [P]laintiff is entitled to punitive damages. Not until [P]laintiff obtains such a special verdict that [it] is entitled to punitive damages is it necessary or important for [the jury] to know [Goodrich's] wealth (*Id.*).

The principle enunciated in *Laidlaw* and *Rupert* are well settled. In response, Plaintiff relies on *McBeth v. Porges* (2018 WL 5997918), a unreported federal court decision from the Southern District of New York. *McBeth* held that evidence of a party's wealth may be admissible during the compensatory damages stage of a trial in certain limited circumstances, such as to prove a person's status as a sophisticated investor, where such issue was "crucial" to the trial, and after the witness opened the door to the subject (*Id.*, at *3). Thus, at trial the court shall revisit the extent (if any) to which Plaintiff may introduce evidence of corporate wealth and power to the extent Defendants open the door to same.

Plaintiff seeks to offer the forms filed by Raytheon, which contain financial statements showing its net worth, with the Securities and Exchange Commission. Plaintiff shall be precluded from doing so during the compensatory damages stage of the trial, but (assuming a proper foundation is laid) shall be permitted to do so in the event it obtains a special verdict that it is entitled to punitive damages (*McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 265 AD2d 269, 270 [1st Dept 1998] [the net worth of a parent organization is admissible on the issue of an assessment of punitive damages]).

Application to Preclude Evidence of and Reference to Certain Matters Related to Mr. Soave (Motion 12; Doc. 485)

Evidence of Mr. Soave Signing a Client's Name on an Insurance Form in 1999 and Employment Termination in 1999

Mr. Soave began working as an insurance agent for non-party, Sun Life Insurance Company ("Sun Life"), immediately after graduating from college in 1997 or 1998.

The Financial Services Commission of Ontario ("Commission") prepares a bulletin reporting the decisions of the Financial Services Tribunal. The Commission's report from the fourth quarter of 1999 ("Report") states, as follows, with respect to Mr. Soave:

> Dino Soave By Minutes of Settlement, dated December 7, 1999, this former Level I agent admitted that he forged the signature of his client on an automatic monthly premium payment form. The agent has undertaken not to reapply for licensing as an insurance agent with [the Commission] for a period of five years.

(Doc. 489, p. 5).

At his deposition, Mr. Soave acknowledged the accuracy of the Commission's statement, as contained in the Report, and that he was terminated from Sun Life as a result the forgery.

It is well settled "that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness' credibility" (*People v. Schwartzman*, 24 NY2d 241, 244 [1969]). The nature and extent of such cross-examination is discretionary with the trial court (Richardson, Evidence § 500 [Prince 10th ed.]), and the cross-examination must "must have some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr v. Hogan*, 75 NY2d 629, 634 [1990]). The crime of forgery implicates moral turpitude (*Noakes v. People*, 11 E.P. Smith 380 [NY 1862]).

"[T]here are no *per se* rules requiring preclusion because of the age, nature and number of a defendant's prior crimes" (*People v. Walker*, 83 NY2d 455, 459 [1994]). "That prior convictions [are] remote in time [does] not automatically bar cross-examination of the defendant with respect thereto" (*People v. White*, 60 AD3d 1095, 1096 [2d Dept. 2009]).

However, the court is unaware of a reported decision in which evidence of a prior conviction was permitted on the issue of credibility where the offense occurred as many as twenty-three (23) years ago (*but see, People v. Myron*, 28 AD3d 681, 683 [2d Dept 2006] [evidence of prior conviction permitted where one of the defendant's convictions was "more than 20 years old"]).

The court finds that in light of the remoteness of the admitted forgery, the prejudicial effect of the evidence thereof (and the related termination of employment from Sun Life) outweighs its probative worth. Plaintiff shall be barred from introducing evidence at trial of the forgery and termination from Sun Life (*People v. Pippen*, 67 AD2d 413, 418 [1st Dept 1979] [excluding a 12-year-old criminal forgery conviction as "sufficiently remote in time as to have no substantive effect upon defendant's credibility"]).

Evidence of Mr. Soave's Termination from Goodrich

Mr. Soave's employment with Goodrich started in 2000, and at the time of the events relevant to this matter, he was a Commodity/Supply Chain Manager for Goodrich (Doc. 487, pp. 12, 23). Goodrich terminated Mr. Soave's employment in October 2016. Mr. Soave testified at his deposition that he was terminated, because Goodrich did not like his management style (*Id.*, at p. 115; Doc. 488, p. 358).

In 2016 (prior to his termination), Goodrich performed expense and purchase order audits of Mr. Soave ("Audits"). Mr. Soave testified that he was never informed of the results of the Audits or that they were related to his termination (Doc. 487, pp. 119-20).

On August 9, 2016, after the Audits were completed, Mary Moody, Goodrich's Manager of Human Resources, wrote an email to Curt Puthoff, a Vice-President of UTAS, that stated the following:

> As agreed we will close out the ethics issue with Paul Meringer and Dino Soave tomorrow as Paul is not in today.
>
> We will let them know that **our findings don't support fraudulent behavior**; however after reviewing the facts and documentation we conclude that process controls were lacking, budgets were overrun and approval/sign off accountability was misplaced.
>
> We will let them know you will follow up with them on the control issues and determine lessons learned and next steps.

(Doc. 530) (emphasis added).

Plaintiff shall be excluded from delving into the Audits at trial, because Goodrich determined that Mr. Soave's conduct did **not** support a finding of fraudulent behavior.

In light of the foregoing, it is hereby

ORDERED, that Defendants' application for an order (Motion 10; Doc. 474) precluding the trial testimony of Ronald Qunitero is denied; and it is further

ORDERED, that Defendants' application for an order (Motion 11; Doc. 482) precluding evidence of, and references to, *inter alia*, the comparative wealth and power of Goodrich and its parent companies is granted, in part, to the extent that such evidence shall be precluded during the compensatory stage of the trial, but such evidence shall be permitted in the event Plaintiff receives a favorable special verdict regarding punitive damages; and it is further

ORDERED, that Defendants' application for an order (Motion 12; Doc. 485) precluding evidence of and reference to (a) Mr. Soave signing a client's name on an insurance form in 1999 and employment termination from Sun Life prior to his employment with Goodrich; (b) the cause of Mr. Soave's employment ending with Goodrich; and (c) Mr. Soave's alleged conduct in connection with the Audits, is granted, in part, as follows: there shall be no reference at trial to Mr. Soave signing a client's name on an insurance form in 1999 and employment termination from Sun Life prior to his employment with Goodrich; and there shall be no reference to Mr. Soave's alleged conduct in connection with the Audits. However, and without delving into the Audits, Plaintiff may otherwise question Mr. Soave about the cause of his employment ending with Goodrich.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: July 6, 2022
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District