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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BENNION & DEVILLE FINE HOMES, INC., a California corporation, BENNION & DEVILLE FINE HOMES SOCAL, INC., a California corporation, WINDERMERE SERVICES SOUTHERN CALIFORNIA, INC., a California corporation,

Plaintiffs,

v.

WINDERMERE REAL ESTATE SERVICES COMPANY, a Washington corporation; and DOES 1-10

Defendant.

AND RELATED COUNTERCLAIMS

Case No. 5:15-CV-01921 R (KKx)

Hon. Manuel L. Real

DEFENDANT'S AND COUNTERCLAIMANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE GARY KRUGER FROM TESTIFYING AT TRIAL

Date: August 7, 2017
Time: 10:00 a.m.
Courtroom: 880

Complaint Filed: September 17, 2015

I. INTRODUCTION

On August 29, 2016, the parties filed witness lists pursuant to the Court's initial scheduling order. (Document Nos. 50, 53). On May 22, 2017, nearly nine months after the close of non-expert discovery and mere weeks before trial was scheduled to begin, Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., Robert L. Bennion and Joseph R. Deville (collectively "Counter-Defendants") filed an amended witness list that included a new witness, Gary Kruger, who was not disclosed in their original list, was not disclosed pursuant to Federal Rule of Civil Procedure 26, and was not included in Counter-Defendants' initial witness list. (Document No. 128). This obviously biased and unfairly prejudicial witness was sprung on Defendant and Counterclaimant Windermere Real Estate Services Company ("WSC") long after discovery closed, thereby preventing WSC from deposing Kruger to understand the substance of his anticipated testimony. WSC is severely and unfairly prejudiced by this eleventh hour addition of a new witness. Federal Rule of Civil Procedure 37 and Federal Rules of Evidence 401 and 403 all require exclusion of this witness under these circumstances. This gamesmanship cannot be rewarded. Kruger must be precluded from testifying at trial.

II. FACTUAL BACKGROUND

In or about 2002, Kruger filed a lawsuit against a WSC franchisee in the Seattle, Washington area. After he lost the lawsuit, Kruger began to voice his negative opinions regarding WSC and some of its franchisees. Kruger created and launched a negative marketing campaign he named "Windermere Watch," consisting initially of postcards and other materials sent through the US mail and via fax. Later, Kruger registered the internet domain name "windermerewatch.com," and published a website at that address in an effort to disparage the WSC name and it franchisees.

Although it now appears Kruger has been in touch with Counter-Defendants' counsel during this litigation, Kruger never had any dealings with Bennion or Deville while they were WSC franchisees. Kruger was not involved in drafting the relevant documents and has no relevant knowledge about the parties' obligations under their various agreements or their performance of the agreements.

On December 14, 2015, Counter-Defendants served their Rule 26 Initial Disclosures identifying 24 individuals likely to have discoverable information they anticipated using to support their claims or defenses. (Exhibit A.) That list included, *inter alia*, Bennion, Deville, and several principals of WSC. (*Id.*, p. 2-7.) Counter-Defendants never supplemented those disclosures. Counter-Defendants' original witness list, filed on the day non-expert discovery closed, did not include Kruger. (*See* Document No. 50.) Kruger was also not listed as a witness in the Final Pretrial Conference Order. (*See* Document No. 79.) In fact, Kruger was not designated as a potential witness by any of the parties until Counter-Defendants filed their amended witness list, nine months after the close of discovery. (*See* Document No. 128.)

On May 24, 2017, in response to the addition of witnesses not previously identified by Counter-Defendants, WSC filed an objection to Counter-Defendants' Amended Witness List. (Document No. 131.) At the time WSC filed its objections to the last-minute addition of witnesses, trial was scheduled to begin on June 13, 2017, so WSC could not file an *in limine* motion and have it heard before trial started. On May 25, 2017, the Court vacated the June 13, 2017 trial date.

On May 26, 2017, Counter-Defendants filed their response to WSC's objections to the Amended Witness List. In support of the opposition, Counter-Defendants' counsel filed a declaration stating that he spoke to Kruger on May 20, 2017 and Kruger indicated he was planning to attend trial. (Document No. 137-1.) Counter-Defendants' counsel also stated, without any support, that "Mr. Kruger's testimony is central to this case." *Id.* Even after speaking with Kruger, Plaintiffs'

counsel has not indicated the subject matter of Kruger's proposed testimony, explained how that testimony is relevant, or explained why Kruger was not disclosed pursuant to Rule 26.

III. LEGAL ANALYSIS

A. Kruger Must Be Excluded Because He Was Not Disclosed Pursuant to Rule 26

Counter-Defendants are perpetrating a trial by ambush. Counter-Defendants' counsel claims without support that Kruger has testimony that "is central to this case." (Document No. 137-1, ¶ 10). However, if Counter-Defendants truly believed that Kruger's testimony was "central" to this case, they should have identified him as a potential witness in their initial disclosures under Rule 26(a)(1), supplemented those disclosures under Rule 26(e), and identified him in their initial witness list, and the Final Pretrial Conference Order. They did not. Instead, Counter-Defendants waited until the eve of trial and after the discovery cutoff to spring this "central" witness on WSC. Such late disclosure is clearly inappropriate and prejudicial.

Federal Rule of Civil Procedure 37(c)(1) "forbids the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Neurovision Medical Products, Inc. v. NuVasive, Inc.*, No. 09-6988, 2013 WL 12112578, at *1 (C.D. Cal. April 29, 2013) (quoting *R&R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012) and excluding witnesses that were not properly disclosed pursuant to Fed. R. Civ. Proc. 26.)

Counter-Defendants did not meet their Rule 26 disclosure obligations. They did not identify Kruger as a potential witness during discovery and never disclosed the subject matter of his supposedly relevant testimony.[1] Instead, Counter-

[1] Even after communicating with Kruger and determining that his testimony "is central to the case," Counter-Defendants have not supplemented their Rule 26 disclosures or identified the subject matter of Kruger's proposed testimony.

Defendants identified Kruger as a person with potentially relevant information ***for the first time*** when they filed their amended witness list on May 22, 2017, nearly nine months after non-expert discovery closed. (Document No. 128.) Furthermore, Counter-Defendants' failure was neither substantially justified nor harmless because they knew Kruger's identity since the start of this litigation, and waited until non-expert discovery closed to prevent the individuals from being deposed.[2] As the court recognized in *Neurovision*, automatic exclusion is required under these circumstances. *Neurovision*, 2013 WL 12112578, at *1. Kruger and his negative marketing campaign have been a subject of this lawsuit since its inception. Despite knowing this, Counter-Defendants never properly identified him as a potential witness.

Moreover, despite Counter-Defendant's claims to the contrary, there are no remaining issues in this case for which Kruger could provide relevant testimony. The only issue in this litigation regarding Kruger and Windermere Watch is whether WSC undertook "commercially reasonable efforts" to combat Windermere Watch as required by the parties' Modification Agreement.[3] (*See* Document No. 72-6, Ex. H, ¶ 3.A., p. 78 of 104.) Kruger has no relevant evidence to offer regarding what constitutes "commercially reasonable efforts," WSC's efforts to combat Windermere Watch or Plaintiffs' acknowledgement in June 2014 that WSC had fulfilled its obligations under the Modification Agreement.

Counter-Defendants attempt to avoid Kruger's automatic exclusion by arguing that WSC knew about Kruger the whole time. (Document No. 137, p. 4.)

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[2] Even if the Court reopened discovery for the limited purpose of deposing Kruger, WSC would still be prejudiced because it had already completed its trial preparation and adding a new witness at this stage would force WSC to incur substantial additional cost.

[3] As the Court will recall, Counter-Defendants agreed in June, 2014 that WSC had met its obligations in this regard. (See Document No. 72-6, Ex. K, pp. 102-103 of 104.)

This argument misses the point. WSC was aware that Kruger operated a negative marketing campaign that impacted the relationship between WSC and Counter-Defendants. WSC did not know, and does not believe, that Kruger has any testimony that is relevant to any of the parties' claims or defenses in this matter. As Counter-Defendants admit in the Amended Pretrial Conference Order, the only relevant issue regarding Kruger and Windermere Watch is whether WSC fulfilled its contractual obligations to Counter-Defendants. Kruger does not, and cannot, have any relevant information about that issue. Therefore, WSC's mere awareness of Kruger and his negative marketing campaign does not relieve Counter-Defendants of their duty to disclose all witnesses with potentially relevant information pursuant to Rule 26 or to include all witnesses they intend to call on their initial witness list and the Final Pretrial Conference Order.

Critically, Counter-Defendants' claim that Kruger's testimony is "central" is belied by their conduct in this action. Counter-Defendants do not explain why they waited until May 22, nine months after the close of discovery, to contact this essential witness to determine if he would voluntarily make himself available for trial. If, as Counter-Defendants claim, Kruger's testimony is "central to this case," in addition to disclosing him pursuant to Rule 26, they should have contacted him at the outset of this case and determine whether he would make himself available for trial. Yet, this "central" witness was not included in Counter-Defendants' initial witness list. Counter-Defendants now claim that Kruger was left off their first witness list because he could not be compelled to testify via subpoena. (Document No. 137, p. 4.) This is not the appropriate standard.

Local Rule 16-2.4 required Counter-Defendants to disclose all "witnesses (including expert witnesses) to be called at trial other than those contemplated to be used solely for impeachment." The rule does not require the disclosure of only those witnesses that can be compelled through subpoena to testify at trial. Further, Counter-Defendants' initial witness list directly contradicts this *ex post* reasoning.

Gretchen Pierson, identified in Counter-Defendants' initial witness list, lives and works in the San Francisco area more than 300 miles from the Courthouse, and is therefore potentially outside the Court's subpoena power. She was identified in Counter-Defendants' initial witness list even though the Court may not be able to compel her to testify at trial. Clearly, Counter-Defendants realized they must identify all potential witnesses they planned to call at trial, not simply those who can be compelled through subpoena to testify.

There are only two possible reasons why Kruger was only identified as a potential witness on May 22: either a) his testimony is not relevant and Counter-Defendants never planned to call him as a witness until they spoke to him on May 20; or 2) Counter-Defendants always planned to call Kruger as a witness and simply gamed the system to ensure WSC did not have an opportunity to depose Kruger. Either way, Rule 37 requires Kruger's exclusion from testifying at trial because Counter-Defendants did not meet their discovery obligation to disclose his identity and contact information and to provide the subject matter of his proposed testimony

B. Kruger Must Be Excluded Because His Testimony is Irrelevant and Unfairly Prejudicial

Evidence is relevant if it: (1) tends to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence to the action. Fed. R. Evid. 401. Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issue, misleading the jury, or undue delay. Fed. R. Evid. 403.

Counter-Defendants acknowledge that the only remaining issue regarding Windermere Watch is whether WSC fulfilled its contractual obligations to Counter-Defendants regarding its "commercially reasonable efforts" to combat Kruger's negative marketing campaign. Kruger does not, and cannot, have any relevant information about the contractual relationship between the parties, WSC's

performance of those obligations, or WSC's commercially reasonable efforts to counteract his negative marketing campaign. Consequently, Kruger does not have any information that is relevant to this action and he should be excluded.

Even if Kruger did have some minimally relevant information, it would be unfairly prejudicial to WSC based on Kruger's history with WSC and Counter-Defendants' gamesmanship. Because Counter-Defendants identified Kruger as a potential witness nine months after non-expert discovery closed and have failed and refused to identify the subject matter of Kruger's proposed testimony, WSC does not know what Kruger plans to say at trial. However, based on his 15-year negative marketing campaign and his recent communications with Counter-Defendants' counsel, it is safe to assume that any such testimony would be biased against WSC. For the past 15 years, Kruger has continually executed a negative marketing campaign directed at WSC owners, agents, and clients. Clearly, he is biased against WSC and will do anything in his power to harm WSC whenever possible. Because any testimony from Kruger would be of minimal relevance, if at all, it would be substantially outweighed by the risk of unfair prejudice to WSC. Kruger's clearly established bias against WSC, coupled with WSC's inability to depose Kruger and adequately prepare for his testimony, would unfairly and substantially prejudice WSC in this matter.

Therefore, Kruger should be excluded from testifying at trial pursuant to Fed. R. Evid. 401 and 403.[4]

[4] To the extent the Court is inclined to allow Kruger to testify at trial, it should only do so after (1) Counter-Defendants produce all notes for their attorneys regarding conversations with Kruger; and (2) WSC has deposed Kruger (*see Rodriguez v. City of Los Angeles*, 2015 WL 13308598, *9-10 (C.D. Cal. 2015) finding no prejudice to allow witnesses who were not properly identified but were deposed to testify at trial). The attorney notes can be redacted to protect the attorneys' impressions and conclusions. *See* Adv. Comm. Notes to 1970 Amendment to Fed. R. Civ. Proc. 26(b)(3).

IV. CONCLUSION

For all of these reasons, WSC respectfully requests that the Court grant its Motion In Limine to Exclude Kruger from testifying at trial.

DATED: July 10, 2017

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