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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-JCG

Hon. Jay C. Gandhi

DEFENDANT'S AND COUNTERCLAIMANT'S REPLY 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

In their opposition, filed nearly two years after their original complaint and 11 months after discovery closed, Plaintiffs and Counter-Defendants Bennion & Deville Fine Homes, Inc., Bennion & Deville Fine Homes SoCal, Inc., Windermere Services Southern California, Inc., Robert Bennion and Joseph Deville (collectively "Counter-Defendants") have identified Gary Kruger as a witness with allegedly discoverable information for the first time. Throughout their brief, Counter-Defendants make the incorrect assertion that identifying the name of an individual satisfies disclosure obligations under Federal Rule of Civil Procedure 26. Rule 26 requires a party to identify the name, contact information, *and the subject matter of allegedly discoverable information* that person may have. Fed. R. Civ. P. 26(a)(1)(A)(i). Counter-Defendants do not, and cannot, point to a single pleading or communication with counsel, prior to their opposition to this motion, wherein they identified the subject matter of Kruger's allegedly discoverable information. Simply identifying his name was not enough to put Windermere Real Estate Services Company ("WSC") on notice that Kruger had information purportedly relevant to WSC's performance of its contractual obligations to Counter-Defendants. Although all parties knew Kruger existed and also knew WSC's response to his negative marketing campaign was an issue in this case, WSC did not, and still does not, believe that he has information relevant to the parties' performance of their contractual obligations. The mere mention of Kruger in numerous pleadings, absent the disclosure of the subject matter of his allegedly discoverable information, did not satisfy Counter-Defendants' disclosure obligations under Rule 26(a) or their duty to supplement incomplete disclosures under Rule 26(e).

Now that Counter-Defendants finally identified the subject matter of Kruger's proposed testimony, it is obvious his testimony would be irrelevant. Counter-Defendants admit that one of the few remaining issues left in this case is whether WSC performed its obligations under the Modification Agreement. Kruger's

testimony about what efforts could have been taken or whether anyone from WSC contacted him, are completely irrelevant to determining if WSC fulfilled its obligations to Counter-Defendants. Moreover, any testimony about how Kruger hypothetically would have responded to hypothetical actions from WSC is not only irrelevant but completely speculative.

If, despite Counter-Defendants' clear violation of Rule 26, the Court is inclined to allow Kruger to testify as an affirmative witness at trial, WSC must be given the opportunity to depose him in preparation for trial. Allowing Counter-Defendants to ambush WSC with this eleventh hour witness without giving WSC an opportunity to depose him further rewards Counter-Defendants' gamesmanship and would further prejudice WSC.

II. COUNTER-DEFENDANTS DID NOT MEET THEIR RULE 26 OBLIGATIONS

Counter-Defendants admit they had an obligation to include Kruger in their initial disclosures, provide his contact information, and identify the subject matter of his allegedly discoverable information. (Document No. 144, pp. 5-7.) Counter-Defendants further acknowledge that they had an obligation to supplement their initial disclosures if they discovered those disclosures were incomplete. (*Id.* pp. 7-8.) Moreover, Counter-Defendants do not dispute that if a proposed witness was not properly identified pursuant to Rule 26, Rule 37 requires that those witnesses be excluded from testifying at trial.[1] *See Id.* pp. 5-8; *Ollier v. Sweetwater Union High School Dist.*, 768 F.3d 846, 863-864 (9th Cir. 2014) (trial court did not abuse its discretion in excluding untimely disclosed witnesses from testifying at trial.)

[1] Counter-Defendants argue that, regardless of whether Kruger was properly disclosed (he was not), he cannot be excluded from testifying at trial as an impeachment witness. (Document No. 144, pp. 10-11.) If, after the Court properly excludes Kruger from testifying at trial as an affirmative witness, he is called as an impeachment witness, Counter-Defendants can make an offer of proof and the Court can determine if Kruger's proffered testimony is truly impeachment at that time.

Therefore, if Counter-Defendants failed to meet their Rule 26 disclosure obligations regarding Kruger, he must be excluded from testifying at trial.[2]

Despite their assertions to the contrary, Counter-Defendants unquestionably failed to properly identify Kruger as a witness with potentially discoverable information. Throughout their opposition, Counter-Defendants continually rely on the fact that Kruger was discussed by both parties during this case. Merely discussing an individual, does not fulfill Rule 26 disclosure obligations. *Wallace v. U.S.A.A. Life General Agency, Inc.*, 862 F.Supp.2d 1062, 1065-066 (D. Nev. 2012) (excluding witnesses because, although their names were provided, the subject matter of their allegedly discoverable information was not disclosed). Counter-Defendants do not, and cannot, cite to a single instance where they identified the subject matter of Kruger's proposed testimony. Tellingly, on page 4 of Counter-Defendants' opposition where they identify for the first time the subject matter of Kruger's proposed testimony, they do not cite to any previous pleading or communication with counsel. (Document No. 144, p. 4.) That is because their opposition to this motion was the first time Counter-Defendants ever disclosed the proposed subject matter of Kruger's allegedly discoverable information.

Further, even if an individual is identified during discovery, a party has not fulfilled its Rule 26 disclosure obligations unless and until they identify that person as someone they may use to support their claims or defenses. *Id.* Counter-Defendants' Amended Proposed Witness List, filed on May 22, 2017 nine months after the close of discovery, was the first time Counter-Defendants identified Kruger

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[2] In his declaration filed in support of Counter-Defendants' opposition, counsel argues that three witnesses, York Baur, Cass Herring, and Kendra Vita, should be excluded from trial because they were not included in WSC's Initial Rule 26 disclosures. (Document No. 144-1, ¶¶ 14-15.) York Baur was identified as a witness with relevant information pursuant to a Rule 30(b) deposition notice and was deposed by Counter-Defendants. (Declaration of Jeffrey Feasby ("Feasby Decl,") ¶ 3.) WSC no longer intends to call Cass Herring or Kendra Vita as trial witnesses in this matter. (Feasby Decl., ¶ 4.)

as someone they may use to support their claims or defenses in this matter. This is not surprising. Counter-Defendants allege that Windermere Watch, Kruger's negative marketing campaign, "had a significant and monetarily damaging effect on Bennion and Deville's businesses." (Document No. 31, First Amended Complaint, ¶53.) In fact, until Kruger called Counter-Defendants' counsel on May 20, 2017, two days before they filed the Amended Proposed Witness List, Bennion and Deville were adamant that no one from WSC or anyone affiliated with WSC should approach Kruger because it would upset him and make his attacks worse. (Feasby Decl., Exs. A, B.) Now, after speaking with Kruger, Counter-Defendants have decided Kruger is a "central witness" that must be allowed to testify. The timing is convenient. From the outset of this case, Counter-Defendants proclaimed to be upset that WSC reached out to Kruger in an attempt to negotiate a resolution that would put an end to his negative marketing campaign. Now, on the eve of trial, Counter-Defendants claim that WSC should have contacted him during this litigation and should have known he was a "central" witness. Clearly, Counter-Defendants are playing games.

A. Counter-Defendants' Untimely Disclosure Was Not Harmless

Counter-Defendants do not even argue that their failure to timely disclose Kruger as a potential witness in this matter or the subject matter of that proposed testimony was substantially justified. Instead, Counter-Defendants argue that their failure was harmless. This is untrue. If Kruger is allowed to testify at trial, the Court will need to re-open discovery to given WSC an opportunity to depose Kruger and adequately prepare for trial. This will cause further delay in a case that is already nearly two years old, and will force WSC to prepare for additional depositions and trial witnesses, and WSC may need to identify additional witnesses of its own to address whatever issues Kruger raises at this late stage. The Ninth Circuit has repeatedly held that untimely disclosures of witnesses this late in litigation are not harmless and justify exclusion from trial. *Ollier*, 768 F.3d at 863-

864 (affirming trial court exclusion of untimely disclosed witness); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001) (same); *Hoffman v. Construction Protective Services, Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008) (excluding untimely disclosed damages evidence).

Counter-Defendants' admittedly unjustified delay in disclosing Kruger is not harmless and he should be excluded from testifying at trial in this matter.

III. KRUGER'S PROPOSED TESTIMONY SHOULD BE EXCLUDED AS IRRELEVANT AND UNFAIRLY PREJUDICIAL

Kruger's proposed testimony is clearly irrelevant. In Counter-Defendants' opposition, they finally disclosed the subject matter of his proposed testimony: (1) WSC's efforts to contact him after the Modification Agreement; (2) WSC's efforts to "stop Windermere Watch" after the Modification Agreement; and (3) efforts WSC *could* have taken to "avoid the Windermere Watch marketing campaign altogether." (Document No. 144, p. 4.) None of that proposed testimony is admissible. WSC does not allege that it made efforts to contact Kruger after the Modification Agreement. In fact, as discussed above, Counter-Defendants were adamant that WSC not contact Kruger after the Modification Agreement. (Feasby Decl., Exs. A, B.)

Further, because WSC did not contact Kruger after entering the Modification Agreement, he cannot have any relevant information or personal knowledge regarding WSC's attempts to "stop Windermere Watch." As will be established at trial, WSC consulted several attorneys, conducted extensive Search Engine Optimization efforts, and engaged in public relations efforts all in an attempt to combat Kruger's negative marketing campaign. Because Kruger was not involved in these efforts, he will have no personal knowledge of any such activity and is therefore not qualified to testify and can provide no relevant testimony on that issue. Therefore, this proposed testimony is of no consequence to the action and should be excluded. Fed. R. Evid. 402.

Finally, any proposed testimony regarding what steps WSC "could have taken to avoid" Kruger's negative marketing campaign would be pure speculation at best. The central remaining issue regarding Windermere Watch is if WSC made "commercially reasonable efforts" to combat Windemere Watch, which Counter-Defendants agreed in June 2015 that it had. The issue is not what efforts Kruger thinks WSC could have made, or what hypothetical efforts he now thinks could have ended his negative marketing campaign. The issue is whether the efforts WSC made were, as Counter-Defendants previously agreed, commercially reasonable. Therefore, any testimony about hypothetical efforts Kruger thinks WSC could have made are speculative and, as such, would unfairly prejudice WSC, confuse the issues, and mislead the jury.

Therefore, because none of this proposed testimony is even remotely relevant to the present dispute, its probative value is substantially outweighed by the risk of unfair prejudice, delay, and confusing and misleading the jury. Thus, even if the Court ignores Counter-Defendants' discovery violations and failure to properly disclose Kruger as a potential witness, Kruger should be excluded from testifying at trial pursuant to Federal Rule of Civil Procedure 403.

IV. IF THE COURT ALLOWS KRUGER TO TESTIFY, WSC MUST BE ALLOWED TO DEPOSE HIM BEFORE TRIAL

As discussed above, the Court should exclude Kruger because Counter-Defendants failed to identify him as a potential witness with information supporting their claims or defenses, failed to disclose the subject matter of his allegedly discoverable information until nearly 11 months after discovery closed, and his proposed testimony is irrelevant, unduly prejudicial and would confuse and mislead the jury. However, if the Court is inclined to allow Kruger to testify at trial, WSC must be allowed to depose him first. *Ollier*, 768 F.3d at 863-864 (if untimely disclosed witnesses were allowed to testify at trial, opposing party "would have had to depose them"); *see also Yeti by Molly*, 259 F.3d at 1107 (parties receiving

untimely disclosures on the eve of trial must be given an opportunity to depose the newly disclosed witness); *see also Rodriguez v. City of Los Angeles*, 2015 WL 13308598, *9-10 (C.D. Cal. 2015) (courts reopen discovery for limited purpose of deposing proposed witnesses who were not timely disclosed pursuant to Rule 26).

Therefore, if the Court allows Kruger to testify at trial, it should re-open discovery for the limited purpose of deposing Kruger and order Counter-Defendants to make him available for that deposition. The Court should also order Counter-Defendants to provide WSC with their attorneys' notes regarding their conversations with him.

V. 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 24, 2017 PEREZ VAUGHN & FEASBY INC.

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