

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BELFINT, LYONS and SHUMAN :
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 Plaintiff, :
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 v. : C.A. No. 01C-04-046 - CLS
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 POTTS WELDING & BOILER REPAIR, :
 CO., INC., :
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 :
 Defendant/Counterclaim :
 Plaintiff :
 :
 :
 v. :
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 BELFINT, LYONS and SHUMAN, :
 :
 :
 Counterclaim Defendant. :

Upon Consideration of Plaintiff/Counterclaim Defendant's
Motion to Strike.

DENIED.

Mark L. Reardon, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A.,
Wilmington, Delaware, Jeffrey S. Welch, Esquire, Welch & Associates,
Wilmington, Delaware, Attorneys for Plaintiff/Counterclaim Defendant Belfint,
Lyons and Shuman.

John P. McShea, Esquire, McShea Tecce, P.C., Philadelphia, PA, Cheryl Siskin,
Esquire, The Bayard Firm, P.A., Wilmington, Delaware, Attorneys for
Defendant/Counterclaim Plaintiff Potts Welding & Boiler Repair Co.

SCOTT, J.

Before this Court is a Motion to Strike filed by Plaintiff/Third Party Defendant Belfint, Lyons & Shuman (“BLS”). Specifically, BLS seeks to strike two affidavits filed by Defendant/Third-Party Plaintiff Potts Welding & Boiler Repair Co. (“PW”) in their answering brief to BLS’ Motion for Summary Judgment. After reviewing the Motion and Response, and hearing argument, this Court is prepared to render its decision.

Background

Commencement of this action began nearly four years ago on April 5, 2001, when counsel for BLS filed a Complaint in this Court alleging breach of contract and debt collection. Subsequently, on May 29, 2001, default judgment was entered against PW in the amount of \$146,230.91. PW filed an Answer on May 31, 2001 and the next day, filed a Motion to Vacate the default judgment. Judge Jurden granted the Motion to Vacate and the case proceeded.

In its June 18, 2001 Amended Answer to BLS’ Complaint, PW filed a Counterclaim alleging Accounting Malpractice. In the meantime, St. Johns Holding Company acquired PW. It was the merger of “old” PW into “new” PW that PW claims BLS committed accounting malpractice. BLS filed a Motion to Sever the Counterclaim. The Motion was denied.

BLS and PW’s first Status Conference came on September 17, 2001. Among other things, Judge Jurden required both sides to identify their experts. A

year later, Plaintiff filed its first Motion to Modify the Scheduling Order. The Motion was granted. On August 14, 2002, Plaintiffs filed for Summary Judgment.

As of August 28, 2002, neither BLS nor PW had identified their experts. In fact, on September 25, 2002, BLS' counsel requested a time-extension to allow it to identify their experts. Michael J. Quigg, whose affidavit BLS wishes to strike, was deposed on October 14, 2002.

In October, both BLS and PW withdrew and substituted counsel. Also in October, the Motion for Summary Judgment was postponed until February 19, 2003. By December 2002, PW had substituted counsel for the second time. Michael Quigg's affidavit was filed on February 14, 2003. A month later, the Court amended the Scheduling Order for the third time.

To continue to detail the procedural posture of this case would be superfluous. Countless Motions to substitute counsel, amend the scheduling order, and compel expert witness lists appeared before Judge Jurden. On October 14, 2004, a conflict of interest was discovered, and the case was transferred before this Court. This Court is now considering the Motion to Strike the allegedly late-filed affidavits of Michael Quigg ("Quigg") and Daniel Rice ("Rice").

Discussion

BLS objects to the Quigg and Rice affidavits based on the time they were filed, their content, and the attachments to the affidavit. It is BLS' contention that

if the Quigg and Rice affidavits are not stricken from the record, they will be severely prejudiced in proceeding with their claims or defenses. PW counters that the affidavits are factual statements and not expert opinions. Accordingly, an expert phase of discovery yet to be performed will alleviate any of BLS' prejudice concerns. During argument, the parties conceded that to the extent that the affidavits are factual, they would not be stricken. It is this Court's job then, to determine which portion, if any, of the affidavits are purely expert opinion.

Superior Court Civil Rule 12(f) reads in pertinent part: "Motion to strike. Upon Motion made by a party before responding to a pleading . . . the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Motions to Strike "are not favored and are granted sparingly, and then only if clearly warranted, with doubt being resolved in favor of the pleading."¹ A Motion to Strike, however, will be granted "where a plea upon its face appears to be frivolous, dilatory, vexatious or nugatory."² This Court notes that granting a Motion to Strike is "permissive, not mandatory, and therefore a Court must exercise its own judgment."³

¹ *Pack & Process, Inc., v. Celotex Corp.*, 503 A.2d 646, 660 (Del. Super. 1985)(citing *Phillips v. Delaware Power and Light*, 194 A.2d 690 (Del. Super. 1963)).

² *Id.* (citing 1 Wooley on Delaware Practice § 433 (1906)).

³ *Topps Chewing Gum, Inc. v. Fleer Corp.*, 1986 WL 538 (Del. Ch. 1986).

BLS carries a heavy burden in proving that the Quigg and Rice affidavits should be stricken because they must show that the affidavits did not comply with Superior Court Civil Rules 12 or 56.⁴ Rule 56 states, in pertinent part,

[t]he motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . .

When affidavits are filed under Rule 56, the Court rules ensure fairness to the adversary by allowing the affidavits to be “opposed by depositions, answers to interrogatories, or affidavits.”⁵

This Court finds that the Rice and Quigg affidavits are factual in nature. Rice and Quigg were never identified as expert witnesses by PW, therefore, PW did not violate the expert witness list deadline. Accordingly, the affidavits will not be stricken.

BLS had prior notice of Quigg and Rice as fact witnesses. At the hearing, BLS conceded that it knew Rice had already been identified as a fact witness, but that PW “dropped the ball” in regard to the timing of identifying Rice as an expert

⁴ See *In re Estate of Cornelius*, 2002 WL 1732374 (Del. Ch. 2002)(stating that a party moving to strike must “show clearly and without doubt that the matter sought to be stricken has no bearing on the subject matter of litigation.”).

⁵ Super. Ct. Civ. R. 56(e).

witness. PW contends, and this Court agrees, that Quigg and Rice are not experts merely because they are accountants.

In addition, the Quigg and Rice affidavits were proper under Rule 56. This case is distinguishable from *Baxter International v. Rhone-Poulenc Rorer, Inc.*,⁶ insofar as it does not involve the already completed complex discovery phase. In *Baxter*, Vice-Chancellor Lamb struck an affidavit as late-filed because the defendants waited two and a half years to develop its trial theories.⁷ Here, discovery is not complete and no new legal theories are being asserted. The only challenge in the motion to strike goes to expert versus factual witnesses. It is not unreasonable to allow the affidavits to remain considering BLS' concession that they knew these accounting malpractice theories existed.

Finally, the information contained in the affidavits is not frivolous or scandalous. The Rice affidavit details his inspection of the PW books and records and applies directly to the counterclaim of accounting malpractice. BLS had notice of this claim because it was served with an answer and counterclaim. BLS also had notice because Quigg was specified as someone having "knowledge of facts" in PW's Second Set of Interrogatories and Second Request for Production of Documents and Things. This Court finds that BLS will not be prejudiced by Rice

⁶ 2004 WL 2158051 (Del. Ch. 2004).

⁷ *Id.* at *5.

and Quigg's factual assertions. Therefore, the Motion is **DENIED**.

IT IS SO ORDERED.

Judge Calvin L. Scott, Jr.