

Alrose Steinway, LLC v Jaspan Schlesinger, LLP

2023 NY Slip Op 31712(U)

May 22, 2023

Supreme Court, New York County

Docket Number: Index No. 151482/2017

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ALROSE STEINWAY, LLC,

Plaintiff,

INDEX NO. 151482/2017

MOTION DATE N/A, N/A, N/A

- v -

JASPAN SCHLESINGER, LLP, STEPHEN P. EPSTEIN,
and STEVEN SCHLESINGER,

Defendants.

MOTION SEQ. NO. 009 010 011

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 346, 347, 348, 349, 350, 351, 352, 353, 354, 357, 360, 361, 364

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 343, 344, 345, 356, 362, 363, 365

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 355, 358, 359, 366

were read on this motion to/for PRECLUDE.

Upon the foregoing documents, it is

This decision supplements the decision on the record on May 16, 2023.

For the reasons stated on the record, plaintiff's motion 009 to preclude the testimony by defendants' expert James T. O'Brien,¹ in its entirety, is denied. Plaintiff's motion overlooks that plaintiff must prove causation but for defendants' alleged

¹ The Order to Show Cause (OSC) describes plaintiff's motion as one for "an order . . . precluding the presentation of the testimony and report of James T. O'Brien . . ." (NYSCEF 357.) As to O'Brien's report, it would not go into evidence at trial in any case, though it may be used at trial to impeach, rehabilitate, or refresh recollection. (CPLR 4514.)

malpractice. O'Brien's testimony is relevant to causation to the extent that plaintiff must show that but for defendants' alleged malpractice, it would have and could have exercised the option in 2024. O'Brien also rebuts Gary Rosen's report and offers an alternative calculation of damages. Otherwise, plaintiff's objections are appropriate for cross examination of O'Brien and go to the weight of his testimony.

For the reasons stated on the record, plaintiff's motion 010 to "exclud[e] from trial the presentation of evidence concerning the consolidated Chapter 11 litigation, [*In re Alrose Allegria LLC*, No. 15-11760/*In re Alrose King David LLC*, No 16-10536 (SD NY)]; evidence concerning any tax or other liabilities of [plaintiff's principal] Allen Rosenberg and other non-parties; evidence concerning [*Alrose Steinway LLC v Steinway Holding Corp.*, No. 650594/2016 (Sup Ct, NY County) (the Steinway Litigation)], and landlord-tenant communications concerning purported unpaid or late rent or other payments due, checks returned for insufficient funds, late or unpaid taxes or utilities, defaults, and related matters; and the partnership dispute and litigation, [*Hart v Rosenberg, et al.*, No. 652740/2022 (Sup Ct, NY County) (the Hart Litigation)] and any facts concerning that dispute; or in the alternative, bifurcating the trial as to liability and damages pursuant to CPLR 603 and excluding such evidence from the liability trial . . ." (NYSCEF 356, OSC) is denied. Again, plaintiff must establish but for causation. (*Alrose Steinway, LLC v Jaspán Schlesinger, LLP*, 205 AD3d 529, 531 [1st Dept 2022].) The bankruptcy and Rosenberg's tax liability are relevant to whether plaintiff would have stayed current under the ground lease and had the wherewithal to exercise the option in 2024. The bankruptcy is also relevant to defendants' damages theory. The Steinway Litigation is relevant to whether plaintiff could have exercised the option in 2024. Plaintiff put the

Hart Litigation at issue by seeking damages in connection with Hart's 25% interest in the property. Defendants' unfavorable evidence may be prejudicial, but the evidence here is not unfairly prejudicial; defendants are entitled to defend themselves. Plaintiff will have an opportunity at trial to counter defendants' evidence based on the bankruptcy, tax liabilities, defaults, partnership dispute, and landlord-tenant dispute; exclusion of defendants' evidence is not fair or reasonable. This is a complex commercial dispute; it is up to the lawyers to clearly explain the evidence in a way the jury will comprehend; exclusion of evidence or bifurcation is not the appropriate remedy for complexity. Complexity is not a reason to exclude defendants' evidence. As discussed on the record, if this evidence is linked to plaintiff's ability to exercise the option in 2024, it is admissible at trial. However, evidence solely about Rosenberg or unrelated to plaintiff's ability to exercise the option in 2024 shall not be admitted at trial.

For the reasons stated on the record, defendants' motion 011 to "(1) preclud[e] the testimony of Plaintiff's expert, Richard J. DiGeronimo, in its entirety, as well as the introduction of any of his appraisals into evidence; (2) preclude[e] the testimony of Plaintiff's expert, Gary Rosen, in its entirety; and (3) preclude[e] the testimony of Plaintiff's expert, Thomas Lavin, to the extent his opinion as to Jaspán's duty of care is predicated upon the Rules of Professional Conduct . . ." (NYSCEF 355, OSC) is denied. To reiterate, the court agrees that damages, if any, will be calculated as of the date of the alleged malpractice in 2016 including the present value, revenue and expenses. (See *Van Wagner Adv. Corp. v S & M Enterprises*, 67 NY2d 186, 195 [1986].) However, proof of damages on a certain date does not replace proof of but for causation; here whether plaintiff would have had the capacity to exercise the option in

2024. Defendants' objections to DiGeronimo's appraisals, are appropriate for cross examination; they are not a basis to exclude his testimony. Accordingly, Rosen's reliance on DiGeronimo's analysis is appropriate. Otherwise, defendants' objections are appropriate for cross examination and go to the weight of the testimony.

As discussed on the record, preclusion of Thomas Lavin's testimony is not necessary since he can be instructed to omit reference to the Rules of Professional Conduct. "[O]ur code was never intended to be used in civil litigation to compensate for an injury, nor that it would be the basis for negligence per se." (*Tilton v Trezza*, 12 Misc 3d 1152[A] [Sup Ct, Nassau County 2006].)

Pursuant to CPLR 3025(b), defendants also seek leave to amend their answer to assert an affirmative defense on the grounds that plaintiff lacks standing to assert damages on behalf of the non-parties. Defendants propose the following:

"AS AND FOR A NINTH AFFIRMATIVE DEFENSE

94. Plaintiff's recovery, if any, should be limited to damages sustained by Plaintiff and not to any other individuals, companies or entities."

(NYSCEF 340, redline of proposed amended answer at 9.)

Defendants insist that plaintiff did not sustain damages when Alrose Plaza, LLC allegedly prematurely sold the Utica property in Brooklyn to raise funds to purchase the properties here. Defendants also challenge the financing of the acquisition of the properties here by related entities Dagny and Horsey, not by plaintiff. Finally, defendants challenge plaintiff's damages based on the sale of the Broadway Property by Dagny and Horsey, not by plaintiff. The First Department has twice rejected defendants' standing argument. (*See Alrose Steinway, LLC*, 205 AD3d at 531; *Alrose Steinway, LLC v Jaspán Schlesinger, LLP*, 2022 NY Slip Op 74295[U] [1st Dept 2022]

[denying defendants' motion to reargue]; see *also* NYSCEF 29, order denying motion to reargue [in App Div index no. 2021-01144].) However, defendants may attack the expert's damages testimony at trial. Since defendants were not aware of plaintiff's damage calculation until years after they filed their motion to dismiss and their answer, defendants could not have waived their right to challenge the damages calculation. Accordingly, this court cannot read the First Department decision as barring defendants from challenging expert opinions on damages that did not exist until after the motion to dismiss and answer.

Accordingly, it is

ORDERED that plaintiff's motion sequence number 009, to preclude the testimony by defendants' expert, James T. O'Brien, is denied; and it is further

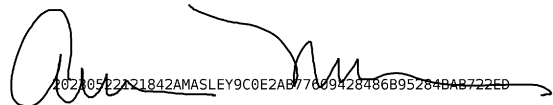
ORDERED plaintiff's motion sequence number 010, to exclude from trial the presentation of evidence concerning the consolidated Chapter 11 litigation, *In re Alrose Allegria LLC*, No. 15-11760/*In re Alrose King David LLC*, No. 16-10536 (SD NY); evidence concerning any tax or other liabilities of Allen Rosenberg and other non-parties; evidence concerning the Steinway Litigation, and landlord-tenant communications concerning purported unpaid or late rent or other payments due, checks returned for insufficient funds, late or unpaid taxes or utilities, defaults, and related matters; and the Hart Litigation and any facts concerning the Hart Litigation is denied; or in the alternative, bifurcating the trial as to liability and damages pursuant to CPLR 603 and excluding such evidence from the liability trial is denied; and it is further

ORDERED that defendants' motion sequence number 011 to (1) preclude the testimony of plaintiff's expert, Richard J. DiGeronimo, in its entirety, as well as the

introduction of any of his appraisals into evidence; (2) preclude the testimony of plaintiff's expert, Gary Rosen, in its entirety; and (3) preclude the testimony of plaintiff's expert, Thomas Lavin, to the extent his opinion as to Jaspán's duty of care is predicated upon the Rules of Professional Conduct is denied. Lavin shall not use the term "Rules of Professional Conduct" during his testimony; and it is further

ORDERED that defendants' motion sequence number 011 for leave to amend their answer to assert an affirmative defense on the grounds that plaintiff does not have standing to assert damages on behalf of non-parties is denied; and it is further

ORDERED that parties shall submit the transcript to be so ordered.



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5/22/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE