

FINAL ANALYSIS COMMUNICATION
SERVICES, INC.,

Plaintiff,

v.

BALLARD SPAHR ANDREWS &
INGERSOLL, et al.,

Defendants.

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IN THE CIRCUIT COURT
FOR BALTIMORE CITY

PART 20

Case No. 24-C-04-009146

Amended Memorandum Opinion

In the motions presently before the Court, defendants seek summary judgment on all of plaintiff's claims because plaintiff has failed to comply with the pre-trial scheduling order, dated November 15, 2005, or its extension, in designating expert witnesses and because the undisputed material facts demonstrate that plaintiff cannot prove that its damage claims were proximately caused by defendants' actions, as alleged in the amended complaint.

Expert Witness Designations

The complaint in this case was filed on December 13, 2004. An amended complaint was filed on April 20, 2005. Defendants moved to dismiss the amended complaint and, following briefing and a hearing, the Court entered an Order on July 8, 2005 dismissing three individual defendants only. Defendants then answered the amended complaint and, on November 15, 2005, the Court issued a pre-trial scheduling order, which required plaintiff to designate experts expected to testify at trial by June 1, 2006. On June 27, 2006, the Court approved a first

amended scheduling order, which extended the expert witness deadline for plaintiff to July 31, 2006. Plaintiff met neither deadline. To date, the only expert witness designations that have been made by plaintiff accompanied its opposition to the pending summary judgment motion and these designations fall woefully short of meeting the requirements of Maryland Rule 2-402(f)(1)(A) as instructed by the Court's scheduling orders.¹

Plaintiff asks the Court to excuse its failure to make timely expert witness designations because there was a change in its legal representation in early 2006; because there was an unsuccessful but time consuming effort to bring its parent corporation, Final Analysis Inc., ("FAI") into the litigation;² because defendants had previously suggested a six month stay of the case; and because it asserts that defendants are not prejudiced and now have notice of plaintiff's proposed experts. Plaintiff also wants the Court to take note of its extensive document production and the efforts of its new counsel to narrow the scope of the case and to resolve discovery disputes with opposing counsel.

Defendants merely ask that plaintiff be required to play by the rules. At the hearing, defendants' counsel insisted that his clients are substantially prejudiced by having inadequate information on plaintiff's proposed experts, with discovery closed and trial to begin in mid-February, 2007. They request that plaintiff be barred from presenting expert testimony at trial.

¹The scheduling orders actually cite to Maryland Rule 2-401(e)(1)(A) but the incorrect subsection referenced is little excuse, as the reference is obviously to expert witnesses expected to be called at trial.

²Counsel for the respective parties exchanged correspondence with the Court from late July, 2006 until late September, 2006 concerning the effort to have the U.S. Bankruptcy Court approve the sale of FAI's claims against Ballard Spahr to FACS. Plaintiff advised the Court of its desire to impose a brief stay, litigate defendants' opposition to this proposed action and then create a new discovery/trial schedule. Ultimately, plaintiff abandoned this effort.

The Maryland cases can be relied on for either proposition: that the unexcused failure to designate any expert witnesses pursuant to the Court's scheduling order should result in having plaintiff barred from calling the witnesses at trial, *Helman v. Mendelson*, 138 Md.App. 29, 44-47, *cert. denied*, 365 Md. 66 (2001); *Shelton v. Kirson*, 119 Md.App. 325, 332-333, *cert. denied*, 349 Md. 236 (1998); *Naughton v. Bankier*, 114 Md.App. 641, 654 (1997)... or that the extreme sanction of precluding evidence necessary to support a claim should be reserved for persistent and deliberate violations that cause actual prejudice. *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000); *Swann v. Prudential Ins. Co. of America*, 95 Md.App. 365, 382 (1993); *Starfish Condominium Assoc. v. Yorkridge Service Corp., Inc.*, 295 Md. 693, 712 (1983). The issue is one in which the trial judge has discretion and it is generally not overturned absent an abuse of discretion. *Shelton v. Kirson*, 119 Md.App. at 331.

The circumstances are case specific. In that respect, the present litigation is somewhat unique. It is the most recent in a series of lawsuits involving the struggle between Michael Ahan and Nader Modanlo for the control of plaintiff corporation and its parent corporation, FAI. Since at least 2000, these two individuals have been directly or indirectly involved in claims against one another, other investors, strategic business partners and the attorneys who at one time or another represented them or the corporation. The cases have been brought in United States District Court, U.S. Bankruptcy Court, and the Circuit Courts for Prince George's County, Montgomery County and Baltimore City. At this point in time, FACS claims that it has lost the value of any assets it or FAI once possessed. As addressed *infra*, plaintiff blames its tremendous losses on defendants' actions, which it perceives to have been in support of Mr. Ahan and in opposition to the interests of Mr. Modanlo, who emerged in control of FACS. Despite this

lengthy history, involving three jury trials, countless hearings and relentless discovery proceedings, plaintiff was unable or unwilling to file appropriate expert witness designations even as of the date of the hearing on these motions, December 22, 2006.

The Court, under normal circumstances, might consider granting FACS a brief period in which to provide detailed expert witness disclosures and a brief discovery extension to permit expert witness depositions. But the Court here is not persuaded that doing so would accomplish anything more than postponing the inevitable. Plaintiff's inability to proceed with discovery in this case while pursuing its bankruptcy court petition or to present any substantial justification in the record for its attenuated claims against these defendants suggests to the Court that this lawsuit represents merely another chapter in the never-ending saga of the Ahan-Modanlo dispute and that, frankly, is not something the Court is willing to entertain, given plaintiff's pitiful efforts thus far.

Under these exceptional circumstances and for the reasons expressed below in determining defendants' second summary judgment motion, the Court believes that it is appropriate to grant summary judgment, precluding FACS from presenting expert testimony at the trial of this case.³

Causation Evidence

In a second summary judgment motion, defendants challenge plaintiff's theory that their actions proximately caused any of the damages claimed in this case. While conceding that causation is generally an issue to be decided by the jury, defendants urge the Court to grant

³This is a legal malpractice action, which cannot succeed in the absence of expert testimony. Accordingly, summary judgment will be granted on both of defendants' motions.

summary judgment due to plaintiff's inability to present expert testimony at trial and due to plaintiff's failure to oppose their motion by submitting affidavits, deposition testimony or other written statements under oath which would place material facts in dispute. Maryland Rule 2-501(b).

Defendants complained in their supporting memoranda and at oral argument that plaintiff has been purposely vague about its theories of causation and damage. At oral argument, plaintiff's counsel sought to clarify these issues by identifying three specific damages claims: (1) \$29.9 million in lost investment in engineering hardware and software research and development; (2) \$17.5 million, representing the value of lost "know-how," FACS' contribution to a planned joint effort with the General Dynamics Corporation; (3) \$3 million in counsel fees incurred by FACS in its defense of a shareholder derivative action initiated by Dr. Raymond Schettino, an individual investor and FACS board member. Plaintiff also seeks punitive damages on any claims giving rise to them.

The record before the Court at this time consists of plaintiff's answer to defendants' interrogatory No. 5, containing a general description of its damage claims and, more specifically, one page of FACS' December 31, 2000 balance sheet itemizing \$29,994,500 of property and equipment for a mobile satellite system under construction and another single page from a lengthy valuation report prepared by Sturgill & Associates, LLP, dated March 17, 2000, estimating the value of the technology FAI⁴ has developed at \$17,500,000.⁵ There is no record

⁴FACS claims it paid for this asset. There is no record evidence of this fact.

⁵These documents were attached as Exhibits G & H to plaintiff's opposition memorandum, without accompanying affidavits.

evidence to support plaintiff's claim for counsel fees in the Schettino litigation.

In the absence of admissible evidence to oppose defendants' motion, plaintiff attempts to utilize a loosely connected series of pleadings, correspondence and testimony from other cases to bolster its theory that Ballard Spahr caused damage to FACS by secretly agreeing to represent Mr. Ahan's interests in the corporation, by issuing two opinion letters⁶ which Mr. Ahan relied upon both to cause the FAI bankruptcy liquidation and to spark Dr. Schettino's successful litigation against the Modanlo controlled FACS board.⁷ Plaintiff also alleges continuing cooperation with Schettino's lawyers during the course of that litigation. As a final resort to fend off summary judgment, FACS contends that issues of witness credibility and weight of evidence are for the jury to determine.

On the latter point, it is interesting that FACS cites the decision in *Pittman v. Atlantic Realty Co.*, 359 Md. 513 (2000). While *Pittman* does recite the principle upon which plaintiff relies, it is a case in which a fatal failure of proof on causation was cured simply by filing additional affidavits in opposition to a summary judgment motion. *Id.* at 523-225. That is a step plaintiff failed to take here.

⁶At a duly noted board meeting on November 14, 1999, new by-laws were adopted for both FACS and FAI and the FACS board was expanded to five members. Defendants' opinion letters, dated November, 17, 2000, indicated that the new by-laws impermissibly altered quorum requirements and voting requirements because Maryland corporation law states that any such provision which deviates from statutory terms must be authorized by the corporate charter. These were not. The letters also challenged the validity of the by-law adoption proceedings. Defendants assert that the letters are legally correct. Plaintiff intended to adduce expert testimony to the contrary, but the court has now precluded it from presenting expert testimony at trial.

⁷The litigation was settled by the plaintiff's board, without reimbursement to the corporation for fees incurred.

On the more significant issues of whether Ballard Spahr's actions proximately caused plaintiff's damages, the Court cannot help but note the comments made on the record by U.S. District Judge Peter J. Messitte when ruling on a motion for judgment notwithstanding the verdict in the General Dynamics case. Judge Messitte summarized the facts leading up to the contract disputes between FACS and General Dynamics and then turned to the jury's damage awards. He said, in pertinent part:

This court finds, and believed then, and believes now, that as a matter of law, it was not foreseeable that the total value of the company would be in play should the defendants effect a...an efficient breach of this case...

The Court finds, as a matter of law, that there were other factors that were simply intertwined here that made performance of - the existence of this company problematic to the point of demise, whether - and the first and foremost about that was the failed bond offering.

The failure of the bond offering was a very, very weak [sic] market, and that was stressed everywhere, and all the time. And with the failure of the bond market, and, again, Mr. Modanlo testified to this, there is no future for this company.

But you add to that issues of a management dispute and loss of the FCC license, among other things, and you have a company that, frankly, is not really going to suffer damages that are proved with reasonable certainty, in the Court's view.

And notwithstanding the testimony of Dr. Fristcot Roth, notwithstanding the testimony of Mr. Roberts, in my view - and, again, the Fourth Circuit can enlighten us all on this - that as a matter of law, causation was not proved in this case.

Final Analysis v. General Dynamics, et al., 03-CV-0307-PJM, TS. at 95-96 (D.Md. Apr. 10, 2006).

While the context involved in the federal lawsuit was contract disputes between FACS and General Dynamics, much the same can be said in the present case about the foreseeability of

plaintiff's claimed damages flowing from defendants' issuance of its opinion letters or its agreement to continue representation of FACS at Mr. Ahan's request. Although defendants' actions need not be the only cause of plaintiff's losses, they must be a substantial factor in bringing about that harm. *Johnson & Higgins v. Hale*, 121 Md. App. 426, 451, *cert. denied*, 351 Md. 162 (1998).

The Court has serious doubts about plaintiff's ability to prove that any of its damage claims were proximately caused by defendants' opinion letters, its representation of Mr. Ahan, FACS, or its cooperation with any third party. The record, for purposes of the present motions, is void of evidence which would even begin to make the necessary factual connections or place those material facts in dispute.

Without the ability to present expert testimony on this issue, FACS cannot, as a matter of law, prove either that defendants breached a duty owed to plaintiff or that plaintiff suffered consequential damages resulting therefrom. *Peterson v. Underwood*, 258 Md. 9, 21 (1970). Consequently, the Court must enter summary judgment for defendants on all claims as a result of plaintiff's inability to generate disputed questions of material fact on proximate causation.

For the reasons cited above, defendants' motions for summary judgment will be GRANTED.

ALBERT J. MATRICCIANI, JR.
JUDGE

Date: January 2, 2007

Cc: All Counsel of Record