UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON, Plaintiffs, vs. LEVYLAW, LLC and BART E. LEVY, Defendants.	CIVIL ACTION No.: 17-1139

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR SECOND MOTION TO EXCLUDE THE TESTIMONY OF DAVID DENENBERG

Rule of Evidence 701 "is carefully designed to exclude lay opinion testimony that amounts to little more than choosing up sides, or that merely tells the jury what result to reach." *United States v. Fulton*, 837 F.3d 281, 293 (3d Cir. 2016). In spite of that admonition, Bart E. Levy seeks to have David Denenberg—*Levy's own attorney*—sanction his practices in landlord-tenant court as mistakes of law. Any mistake of law defense is in clear derogation of the holdings of the Supreme Court and the Third Circuit, and Denenberg's testimony is therefore irrelevant and prejudicial. But even were it not, Denenberg must be excluded, for he has no knowledge of this matter, and seeks to opine about the law, all in an attempt to tell the jury to find that Levy's conduct was permissible.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs Gerrell Martin and Curtis Sampson filed this Fair Debt Collection Practices Act matter, alleging that Defendants Bart E. Levy and LevyLaw, LLC sued them for money they did not owe, and for possession of their home when no such outcome was permissible, while making numerous other material misrepresentations along the way. Trial is scheduled for November 8, 2018.

Defendants seek to prove the statute's bona fide error defense, 15 U.S.C. § 1692k(c), through an argument that they made a mistake of law, suggesting that it was standard industry practice (and allowable by at least some judges) to file evictions against Philadelphia consumers even when those consumers' landlords failed to comply with Philadelphia's preconditions on the collection of rent. To that end, they proffered that David Denenberg, a Philadelphia landlord lawyer, should be able to offer opinion testimony under Federal Rule of Evidence 701.

Plaintiffs filed a motion to exclude Denenberg on various grounds. ECF No. 44. The Court denied the motion without prejudice, and ordered Defendants to provide a more detailed proffer of Denenberg's testimony. ECF No. 62. On July 31, 2018, Defendants proffered that Denenberg would testify about "the practices and procedures of other attorneys and municipal court judges who worked within [landlord-tenant court] in" 2016 and 2017. Defs.' Offer of Proof Regarding the Testimony of David Denenberg ("Offer of Proof"), ECF No. 60 at 1.

On September 17, 2018, Denenberg was deposed and stated that he "[doesn't] know the facts of this case." Ex. A at 19:12.[1] Even more important, and as detailed below, Denenberg disclaimed any first-hand knowledge of the subjects for which he seeks to testify. This motion followed.

II. LEGAL STANDARD

A. Only Witnesses Helpful to a Jury May Testify under Rule 701

Defendants proffer Denenberg under Rule 701, which holds that a lay witness may only testify if his opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly

[1] He also revealed a fact that Defendants omitted during their various discussions of Denenberg: he is Levy's own lawyer. Specifically, Denenberg represented Levy in at least one recent malpractice action—for which Levy paid him $5,000—and he is *currently representing* Levy in a commercial landlord-tenant dispute, for which Levy will again compensate him $5,000. Ex. A at 37:1-39:8.

understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule [of Evidence] 702." Fed. R. Evid. 701. If the witness fails to meet any of the Rule's three prongs, he is excluded. Courts considering witnesses under Rule 701 must play a gatekeeper role similar to that for witnesses under Rule 702. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1201-03 (3d Cir. 1995). In that role, courts must bar testimony from a biased witness who is merely instructing the jury on the result it should reach. *Fulton*, 837 F.3d at 291.

III. ARGUMENT

A. Defendants Propose to Use Denenberg for an Impermissible Purpose under the FDCPA

As more fully explained by Plaintiffs in their pending motion in limine, the Supreme Court and Third Circuit have made clear that the FDCPA's bona fide error defense does not apply to a debt collector's claims that he made a mistake of law.[2] *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010); *see also Daubert v. NRA Group, LLC*, 861 F.3d 382 (3d Cir. 2017). That is, "FDCPA violations forgivable under § 1692k(c) must result from 'clerical or factual mistakes,' not mistakes of law." *Daubert*, 861 F.3d at 394 (quoting *Jerman*, 559 U.S. at 577).

The bona fide error defense requires *procedures*. 15 U.S.C. 1692k(c). "Procedures, the [Supreme] Court said, are 'processes that have mechanical or other such regular orderly steps' designed to 'avoid errors like clerical or factual mistakes,' and 'legal reasoning is not a

[2] *See, e.g.*, ECF No. 50 (Plaintiffs' Motion In Limine To Exclude Evidence of Mistake of Law and Industry Practices For Defendants' Liability), ECF No. 54 (Defendants' Response), and ECF No. 61 (Plaintiffs' Reply). For brevity's sake, Plaintiffs will not restate their entire briefings here. But to the extent the Court grants that motion, this motion will be likely be moot.

mechanical or strictly linear process' amenable to such procedures." *Daubert*, 861 F.3d at 394 (quoting *Jerman*, 559 U.S. at 587)). "In other words, a mistake of law isn't a bona fide error." *Id.*

Accordingly, Denenberg's proposed testimony is in support of a defense Levy may not make, and it is therefore both irrelevant and prejudicial. In fact, it is "the antithesis of helpful—it [is] dead wrong and even misleading." *Fulton*, 837 F.3d at 292 (holding that District Court should have excluded witness under Rule 701).

B. Denenberg May Not Testify About Governing Law

Defendants state that Denenberg will testify about "the practices and procedures of . . . municipal court judges" in landlord-tenant court. The shroud of the "practices and procedures" label cannot obscure that Denenberg is merely describing how he allegedly has heard judges interpret Philadelphia law. In his words, "Judges don't make written opinions in municipal court. During your course and practice, you learn what their policy and procedures are." Ex. A at 66:22-67:1.

He then made clearer that he was merely describing how judges rule from the bench:

> Q. So in your proffer when you describe the practices and procedures of the municipal court judges who work within the system in that time frame, are we talking about the decisions you would hear them render from the bench?
>
> MR. CLEMM: Objection. Redundant, and you can answer the question I guess.
>
> THE WITNESS: The answer is by listening to other lawyers try cases . . . I would understand how those judges think in -- in rendering decisions in 2016 and 2017.
>
> BY MR. UREVICK-ACKELSBERG:
> Q. You would understand how they think based upon what you had heard them say in open court, correct?
>
> A. What their decisions were; not what they would say. They would render a decision.
>
> Q. The decisions they would render when you were in court listening to them, correct?

A. That is correct; waiting my turn to try my case.

Ex. A. at 100:7-101:9; *see also id.* at 66:22-67:4; 68:7-15; 70:1-7.

The flaws in this proposed testimony are two-fold. First, recounting the rulings of Municipal Court judges is rank hearsay. Denenberg seeks to offer out-of-court statements of judges to prove the matter asserted: his desired interpretation of Philadelphia law. *See* Fed. R. Evid. 801.

Second, even were it not hearsay, Denenberg's proposed opinion violates one of the most basic rules of evidence: that "since it is the district court's duty to explain the law to the jury," a witness may not "testify as to the governing law." *United States v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991). This prohibition is "so well established that it is often deemed a basic premise or assumption of evidence law - a kind of axiomatic principle." *Holman Enters. v. Fid. & Guar. Ins. Co.*, 563 F. Supp. 2d 467, 472-73 (D.N.J. 2008) (citations and internal quotation marks omitted). That is, "testimony pertaining to 'the governing law' is *indisputably inadmissible*." *Jordan v. Temple Health Sys.*, No. 16-5561, 2018 U.S. Dist. LEXIS 128747, at *5-7 (E.D. Pa. Aug. 1, 2018) (citation omitted) (emphasis added); *accord United States ex rel. Bahnsen v. v. Bos. Sci. Neuromodulation Corp.*, No. 11-1210, 2017 U.S. Dist. LEXIS 206508, at *7 (D.N.J. Dec. 15, 2017) ("At the outset, to the extent that [witnesses] will seek to testify about the governing law and regulations, the Court will not allow them do so. Interpreting the law (and instructing the jury accordingly) is solely within the province of the Court."). Instructing the jury on the law is the Court's job, not Denenberg's, and any testimony relating to the supposed practices and procedures of judges should be precluded.

C. Denenberg Knows Nothing about the Practices and Procedures of Attorneys in Landlord Tenant Court

Under limited circumstances, and if they avoid testifying about the law, witnesses may testify about industry practices. *Leo*, 941 F.2d at 196. To that end, Defendants have attempted to shoehorn Denenberg's testimony into this exception by arguing that "Denenberg possesses information regarding the practices and procedures of Philadelphia attorneys who specialize in landlord-tenant matters in Philadelphia Municipal Court." ECF No. 44-2 at 5. Moreover, according to Defendants, Denenberg is "very familiar with the relatively small group of attorneys who focus their practices on Philadelphia Municipal Court landlord-tenant matters, including Bart E. Levy, Esquire." Offer of Proof, ECF No. 60 at 1. Accordingly, they proffer that Denenberg will testify regarding "the practices and procedures of other attorneys . . . who worked within that system in that time frame." *Id.* at 1. Contrary to these representations, however, Denenberg knows *nothing* about the practices and procedures of the other lawyers in landlord-tenant court, including Levy. As a consequence, he is ill equipped to provide any evidence on this score at all.

a. Denenberg Disclaimed Any Knowledge of Levy's Practices and Procedures

Despite the fact that Denenberg is Levy's own attorney, Denenberg made clear that he has no knowledge of Levy's practices and procedures in landlord-tenant court:

Q. Can you describe for me Bart Levy's intake procedure?

A. I have no idea what Bart Levy's intake procedure is.

Ex. A. at 92:1-4.

He continued:

Q. So do you know anything about Mr. Levy's practices and procedures in 2016?

A. No.

Ex. A at 95:6-8.

He was asked again, and his answer was the same:

Q. Do you know anything about Mr. Levy's procedures in landlord tenant court in 2016?

A. If I go back and look at cases that I have had against Mr. Levy, maybe, but sitting here today, no. He has to follow—he had to follow what the rules were in 2016. . . .

Ex. A at 96:2-9.

In short, Denenberg has no knowledge about Levy's procedures, and he therefore cannot testify about them.

b. Denenberg Disclaimed Any Knowledge of the Practices and Procedures of Other Landlord-Tenant Attorneys

Denenberg's lack of knowledge is not limited to Levy. During his deposition, Denenberg disclaimed any knowledge of "the practices and procedures of other attorneys . . . who worked within that system in that time frame." Proffer at 1.

Q. You don't—do you have any firsthand knowledge of practices and procedures of Robert Wilwerth in landlord tenant court in 2016?

MR. CLEMM: Objection. Relevance.[3]

THE WITNESS: No.

Q. Do you have any knowledge of practices and procedures of Glenn Ross in landlord tenant court in 2016?

MR. CLEMM: Objection. Relevance.

THE WITNESS: No.

BY MR. UREVICK-ACKELSBERG:
Q. Do you have any knowledge of procedures of Michael Williams in landlord tenant court in 2016?

[3] That the Defendants' proffer states that Denenberg will "testify regarding . . . the practices and procedures of other attorneys" in landlord-tenant court makes clear that counsel's repeated relevance objections are meritless.

MR. CLEMM: Objection. Relevance.

THE WITNESS: No.

BY MR. UREVICK-ACKELSBERG:
Q. Do you have any knowledge of the practices and procedures of Harold Ford in landlord tenant court in 2016?

MR. CLEMM: Objection. Relevance.

THE WITNESS: No.

. . . .

Q. Those attorneys that I just listed: Mr. Ford, the Baritz Firm, Mr. Willwerth, Mr. Ross, Mr. Williams, those are part of the small group of attorneys that are most frequently at landlord tenant court; is that correct?

A. That's a correct statement.

Q. Did I miss anybody; anyone obvious?

A. No.

Ex. A. at 98:2-99:19; *see also id.* at 96:10-97:24.

Thus Mr. Denenberg cannot testify about the practices and procedures of other attorneys, because he admittedly knows nothing about them.

IV. CONCLUSION

Defendants seek to have their own attorney help them establish a defense the Supreme Court precludes, with prejudicial, irrelevant evidence. They seek to do that through a combination of testimony about topics for which Denenberg admits he has no knowledge, along with hearsay and an invasion of this Court's role in instructing the jury on the law. They should not be permitted to do so, and the motion should be granted.

Date: September 28, 2018

Respectfully submitted,

/s/ Cary L. Flitter

Cary L. Flitter (Bar No. 35047)
Andrew M. Milz (Bar No. 207715)
FLITTER MILZ, P.C.
450 N. Narberth Ave, Suite 101
Narberth, PA 19072
(610) 822-0782
cflitter@consumerslaw.com

/s/ Daniel Urevick-Ackelsberg

Mary M. McKenzie (Bar No. 47434)
Daniel Urevick-Ackelsberg (Bar No. 307758)
George A. Donnelly (Bar No. 321317)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
(267) 546-1316
dackelsberg@pubintlaw.org