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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON : CIVIL ACTION
 :
v. : NO.: 2:17-cv-01139-JHS
 :
BART E. LEVY, ESQUIRE and :
LEVY LAW, LLC :

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION TO EXCLUDE THE
TESTIMONY OF DAVID DENENBERG**

Defendants Bart E. Levy, Esquire and Levy Law, LLC, by and through their attorneys Clemm and Associates, LLC, hereby respond to Plaintiffs’ Motion to Exclude the Testimony of David Denenberg as follows:

I. **INTRODUCTION**

Defendants Bart E. Levy, Esquire and Levy Law, LLC (collectively, “Levy”) were retained by a landlord, Argentina Perez Irineo (the “Owner”) to file a landlord-tenant complaint against Plaintiffs. The Owner (or her agents) indicated to Levy that the Plaintiffs had not paid rent for three months. Therefore, on November 7, 2016, Levy sent a Notice of Default letter to Plaintiffs. On November 8, 2016, Levy, on behalf of the landlord, filed a landlord-tenant complaint (the “LT Complaint”) against Plaintiffs in the Philadelphia Municipal Court (the “LT Action”). Levy filed the Complaint after having conferred with his client regarding the allegations stated in the LT Complaint.

Other than the Notice of Default and LT Complaint, Levy had no further direct communications with Plaintiffs. Ultimately, the LT Complaint was withdrawn on March 2, 2017.

II. STATEMENT OF PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiffs initiated this action on March 15, 2017 by filing a complaint. Defendants filed an answer to the complaint on May 15, 2017. The parties participated in a Pre-Trial Conference on July 13, 2017. The parties participated in a Settlement Conference on October 16, 2017. Discovery has been completed. Plaintiffs filed a Motion for Partial Summary Judgment on March 2, 2018 to which Defendants responded on March 27, 2018. Defendants supplemented its initial disclosures on June 13, 2018 to include David Denenberg, Esquire as a fact witness shortly after Defendants learned that Mr. Denenberg had knowledge of certain relevant facts and was willing and available to testify on behalf of Defendants. Counsel for Defendants promptly thereafter advised counsel for Plaintiffs that Mr. Denenberg would be testifying regarding the practices and procedures of Philadelphia attorneys who specialize in landlord-tenant matters in Philadelphia Municipal Court and that they would not object to the deposition of Mr. Denenberg if Plaintiffs wished to take his deposition. Plaintiffs filed a Motion to Exclude Testimony of David Denenberg on June 21, 2018. The parties filed their Pre-Trial Memoranda on June 27, 2018. The trial in this case is currently scheduled to commence on September 5, 2018.

III. QUESTIONS PRESENTED

1. Should Plaintiffs' Motion to Exclude the Testimony of David Denenberg be denied because Mr. Denenberg will testify at trial as a fact witness under Federal Rules of Evidence 602 and 701?

Suggested Answer: Yes.

2. Should Plaintiffs' Motion to Exclude the Testimony of David Denenberg be denied because Plaintiffs are not prejudiced by the disclosure of Mr. Denenberg as a fact witness after the discovery deadline when Defendants stated that they would not object to the deposition of Mr. Denenberg and there are over two months until the trial is scheduled to begin?

Suggested Answer: Yes.

IV. ARGUMENT

A. Mr. Denenberg will be testifying at trial as a fact witness under Federal Rules of Evidence 602 and 701.

The Federal Rules of Evidence define an expert witness as “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education . . .” who “may testify in the form of an *opinion* or otherwise . . .” F.R.E. 702 (emphasis added).

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly 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 702. F.R.E. 701.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703. F.R.E. 602.

Rules 602 and 701 in combination provide that an opinion of a nonexpert witness is admissible if based upon personal knowledge and helpful to the trier in fact in determining a fact of consequence. Opinions of witnesses as to the routine practice of an organization or habit of an individual based upon personal knowledge of the witness should normally be permitted on such grounds. Fecho v. Eli Lilly and Co., 914 F.Supp. 2d 130, 141 (D. Mass. 2012)(citing Michael H. Graham, Handbook of Federal Evidence §406:4 (6th ed. 2006)).

Unlike an expert’s opinion, a layman’s opinion must be rationally based on the witness’s perception. Id. Under the rule, courts allow lay witnesses to express opinions about a business based on the witness’s own perceptions and knowledge and participation in the day-to-day affairs of the business. Id. at 142 (citing United States v. Munoz-Franco, 487 F.3d 25, 35-36 (1st Cir. 2007)(internal citations omitted). The Third Circuit Court has consistently allowed testimony concerning business customs and practices. U.S. v. Fallon, 470 F.3d 542, 547 (3d Cir. 2006)(referencing United States v. Leo, 941 F.2d 181, 196 (3d Cir. 1991)(providing that such evidence is relevant to explain the practice of the industry in question in the case and to establish what someone with the defendant’s extended background in the industry probably would know)). The Court in Fallon found that prohibiting a fact witness from testifying as to industry custom

and practice was error. Id. See also Fecho, *supra*, 914 F.Supp. 2d at 142(finding that a surgeon's opinion testimony about the standard medical practice in the Hazleton area was proper under F.R.E. 701 because he practiced medicine as a surgeon in the area for 30 years, was intimately familiar with the small community of doctors who practiced in the Hazleton area including the defendant, and therefore had the requisite knowledge within the meaning of Rule 701(a), and his opinion was helpful to determine an issue in the case); United States v. Thompson, 229 F.Supp. 3d 91, 94 (D. Mass. 2012)(finding that two proffered witness on double breasted operations in the construction industry could testify regarding their observations of industry custom and practice under F.R.E. 701 because one had personal knowledge of multiple double breasted operations from his twenty-plus years as the Executive Director of the Building Trades Employers Association and the other was an executive of an environmental consulting company who had experience working with asbestos abatement companies and clients who retained those companies, had experience with construction contract bidding, and that through that experience he commonly observed the existence of a union company and nonunion company operating out of the same location with similar names sharing management and laborers).

Mr. Denenberg is a Philadelphia attorney who practices mainly in the Philadelphia Municipal Court in landlord-tenant matters. Mr. Denenberg has been practicing law in Philadelphia, and specifically the Philadelphia Municipal Court, for over 30 years. Mr. Denenberg is familiar with landlord-tenant attorneys who focus a majority of their practice in the Philadelphia Municipal Court for landlord-tenant matters based upon his personal observations of the industry custom and practice. Mr. Denenberg is familiar with Levy's customs and practices in the Philadelphia Municipal Court regarding landlord-tenant matters based upon his personal observations of Levy's practice. Mr. Denenberg will be called to testify solely on the issue of the standard practice and procedure in the Philadelphia Municipal landlord-tenant court in 2016 and 2017 based upon his personal experience in the Philadelphia Municipal landlord-tenant court and of Levy during that timeframe. The purpose of Mr. Denenberg's testimony will be to state facts which support Levy's bona fide error defense and which show that Levy was following customs and procedures which were standard in the industry during the 2016 and 2017 timeframe. Mr. Denenberg will not be called as an expert witness. Mr. Denenberg has not produced an expert report and will not be producing an expert report. Therefore, his testimony

regarding Philadelphia Municipal Court landlord-tenant customs and practices does not constitute an expert opinion, and is admissible under Federal Rule of Evidence 602 and 701.

B. Plaintiffs are not prejudiced by the disclosure of Mr. Denenberg as a fact witness after the discovery deadline when Defendants have stated that they would not object to the deposition of Mr. Denenberg and there are over two months until the trial commences.

In addition to Initial Disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment: (i) the name and, if not previously provided, the address and telephone number of each witness – separately identifying those the party expects to present and those it may call if the need arises . . .” F.R.Civ.P. 26(3)(A).

Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. F.R.Civ.P. 26(3)(B). Federal Rules of Civil Procedure 26(a) and 26(e) place an initial and ongoing burden on all parties to disclose the identities of individuals and copies or descriptions of documents that they may use to support their claims or defenses EMI Music Marketing v. Avatar Records, Inc., 334 F.Supp.2d 442, 445 (S.D.N.Y. 2004). Rule 37(c)(1) prevents a party who fails to disclose that information without substantial justification from using that evidence at trial, unless the failure to disclose is harmless. Id.

Levy became aware that Mr. Denenberg had knowledge of relevant facts and was willing and able to testify on behalf of Levy shortly prior to Levy supplementing its Initial Disclosures on June 13, 2018. Once Levy became aware of this witness, it immediately supplemented its Initial Disclosures and stated to counsel for Plaintiffs that Levy would have no objection if Plaintiffs wished to depose Mr. Denenberg. Mr. Denenberg will be testifying only regarding the limited issue of the customs and practices of attorneys filing landlord-tenant complaints in the Philadelphia Municipal Court during 2016 and 2017. Mr. Denenberg has personal knowledge of the Philadelphia Municipal Court customs and practices as well as personal knowledge of the practices and procedures of Levy in filing such complaints in 2016 and 2017. Counsel for Defendants has stated to counsel for Plaintiffs that they would not object to the deposition of Mr. Denenberg. If Plaintiffs wish to take the deposition of Mr. Denenberg, the deposition would be limited to this discrete issue. Any documents in Mr. Denenberg’s possession related to his testimony (of which there is very little if any) would be produced to Plaintiffs prior to or at his

deposition. If Plaintiffs wish to rebut the testimony of Mr. Denenberg, they may do so by calling a rebuttal witness at trial. There is plenty of time prior to trial for these additional actions to be taken and, at most, the failure to disclose Mr. Denenberg prior to the discovery deadline is harmless. Therefore, Plaintiffs are not prejudiced by the Court allowing the testimony of Mr. Denenberg at trial and Plaintiffs' Motion should be denied.

V. CONCLUSION

For the reasons stated above, defendants Bart E. Levy and Levy Law, LLC respectfully request that this Honorable Court deny the Motion to Exclude the Testimony of David Denenberg filed by plaintiffs Gerrell Martin and Curtis Sampson and enter the attached Order.

CLEMM AND ASSOCIATES, LLC

Dated: July 5, 2018

By: /s/ Mark C. Clemm
Mark C. Clemm, Esquire
Katie M. Clemm, Esquire
Attorneys for Respondents