

Levin v. Jacobson, 2016 NCBC Order 16.

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 12062

ERIC LEVIN, HOWARD SHAREFF,
SHAREFF & ASSOCIATES, DDS
PA, individually and derivatively in
the right of LAKEBOUND FIXED
RETURN FUND, LLC, and
SILVERDEER OLDE LIBERTY,
LLC,

Plaintiffs,

v.

HOWARD A. JACOBSON, CILPS
ACQUISITION LLC, and
PROVINCE GRANDE OLDE
LIBERTY LLC,

Defendants.

ORDER ON PRETRIAL MOTIONS

1. **THIS MATTER** is before the Court upon (i) Plaintiffs Eric Levin, Howard Shareff, Shareff & Associates, DDS PA, individually and derivatively in the right of Lakebound Fixed Return Fund, LLC (“Lakebound”) and SilverDeer Olde Liberty, LLC’s (“SDOL”) (collectively, “Plaintiffs”) Motion *in Limine* (“Plaintiffs’ Motion *in Limine*”), (ii) Defendant Province Grande Olde Liberty, LLC’s (“PGOL”) Motion *in Limine* (“PGOL’s Motion *in Limine*”), and (iii) *sua sponte* to address and rule on various other matters related to trial in the above-captioned case.

2. After considering the Motions, the arguments of counsel at the August 17, 2016 Pretrial Conference, and the documents submitted by the parties submitted by the parties in support of and in opposition to the Motions, the Court orders as follows.

I.

BACKGROUND

3. The factual and procedural background of this case is recited in detail in *Levin v. Jacobson*, 2015 NCBC LEXIS 111 (N.C. Super. Ct. Dec. 7, 2015) (order on motions for summary judgment) and *Levin v. Jacobson*, No. 10 CVS 12062 (N.C. Super. Ct. Aug. 25, 2016) (order amending summary judgment ruling).

4. This action was initiated in 2010, and Plaintiffs filed their Second Amended Complaint on February 13, 2013, asserting various individual and derivative claims related to Defendants' alleged mismanagement and misappropriation of Plaintiffs' investments in Lakebound and SDOL.

5. On December 7, 2015, this Court issued an Order and Opinion on the parties' cross-motions for summary judgment (the "Summary Judgment Order") which dismissed several claims and left for trial Plaintiffs' (i) derivative claim for breach of fiduciary duty against Defendant Howard A. Jacobson ("Jacobson"), (ii) derivative claim for constructive fraud against Jacobson, (iii) derivative claim for conversion against Jacobson, and (iv) remedy for constructive trust and accounting.

6. The matter is now scheduled for a jury trial in Wake County Superior Court beginning on August 31, 2015. Plaintiffs and PGOL filed their Motions *in Limine* on August 5, 2016. The parties filed responses to the Motions between August 12, 2016 and August 15, 2016.

7. After the Court held a pretrial conference and heard arguments on the Motions *in Limine*, the Court amended its Summary Judgment Order to grant

summary judgment in defendants' favor on the claims for breach of fiduciary duty and constructive fraud.

II.

LEGAL STANDARD

8. "A Motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]" *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 793, 654 S.E.2d 708, 710 (2007). The Court's ruling on motions *in limine* is interlocutory and "subject to modification during the course of the trial." *Id.*

III.

ANALYSIS

A. Plaintiffs' Motion *in Limine*

9. Plaintiffs seek to exclude at trial any testimony or argument by counsel concerning "externalities such as the Great Recession, the subprime mortgage crisis, or changes in the economy" and that such externalities caused Plaintiffs' losses, negatively impacted Lakebound, or excused SilverDeer's ability to perform with respect to Lakebound. Plaintiffs argue that any such testimony would be irrelevant under N.C. R. Evid. 401 and 402 and would be impermissible opinion testimony under N.C. R. Evid. 701.

10. Under North Carolina law, "[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007) (quoting N.C.

R. Evid. 401). Generally, all relevant evidence is admissible. *Matthews v. James*, 88 N.C. App. 32, 39, 362 S.E.2d 594, 599 (1987). However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, [or] misleading the jury[.]” *Id.* All evidence favorable to Defendants will, by definition, be prejudicial to Plaintiffs; the test is whether such prejudice is unfair. *Id.* See generally N.C. R. Evid. 403.

11. N.C. R. Evid. 701 restricts the opinion testimony of a non-expert witness to those opinions or inferences “rationally based on the perception of the witness and [] helpful to a clear understanding of his testimony or the determination of a fact in issue.” In other words, this rule allows evidence “which can be characterized as a ‘shorthand statement of facts’ . . . or the ‘instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts.’” *State v. Roache*, 358 N.C. 243, 294, 595 S.E.2d 381, 414 (2004) (quotation omitted).

12. Based on the arguments and representations before the Court at this time, it currently appears to the Court that testimony regarding the Great Recession, the downturn in the economy, and the subprime mortgage crisis is relevant to the events giving rise to Plaintiffs’ remaining claims. It further appears to the Court that the prejudicial effect of any such evidence does not substantially outweigh the probative value of such evidence in the circumstances presented here. It further appears to the Court that Defendants’ lay witnesses should be entitled to testify to such subjects so long as the testimony is limited to the witness’s personal experiences and first-hand

knowledge. Accordingly, the Court will permit Defendants to present evidence concerning externalities such as the Great Recession, the subprime mortgage crisis, and changes in the economy to the extent that the testimony is limited to the witness's personal experiences and first-hand knowledge. The Court therefore, in the exercise of its discretion, DENIES Plaintiff's Motion *in Limine* consistent with the above.

B. PGOL's Motion *in Limine*

13. PGOL moves to exclude at trial evidence of the following: (1) any allegation that any Defendants conduct constitutes or resembles a "Ponzi scheme"; (2) any evidence arising solely out of allegations of the complaint that have been dismissed by summary judgment; (3) any evidence related to any investment made by any member of Lakebound in that entity; (4) any evidence of any purported solicitation or improper solicitation of any investment; (5) any evidence related to any individual damage or loss alleged by any member of Lakebound; (6) any evidence of any transaction other than the \$100,000 and the \$188,000 transactions identified in the Summary Judgment Order; and (7) any evidence outside the pleadings and viable claims.

14. With respect to category (1) identified above, PGOL argues that any reference to Defendants' conduct as a "Ponzi scheme" will unfairly prejudice Defendants because of the term's connotation and use by the media in connection with high-profile figures like Bernie Madoff. The Court concludes that the use of the term "Ponzi scheme" does have the potential to inflame the jury and be unduly prejudicial under N.C. R. Evid. 403, although Plaintiffs may be justified in using the

term depending on the evidence presented. Accordingly, the Court, in the exercise of its discretion, GRANTS IN PART PGOL's Motion as to category (1) and ORDERS as follows. Plaintiffs may not use the term "Ponzi scheme" in jury selection, opening statements, or witness examinations. Prior to closing arguments, the Court will entertain a motion from Plaintiffs to allow the use of the term "Ponzi scheme" based on the evidence presented. At all points in the trial, Plaintiffs will be entitled to use general terms such as fraud, scam, and fraudulent scheme.

15. With respect to category (2) identified above, PGOL seeks to exclude evidence related solely to those claims dismissed by summary judgment. PGOL has not pointed to specific items of proposed evidence that support only dismissed claims and are irrelevant to the remaining claims. Accordingly, at this time, the Court, in the exercise of its discretion, DENIES PGOL's Motion as to category (2) and will entertain specific objections to the relevancy of evidence as it is presented at trial.

16. With respect to categories (3) and (4) identified above, PGOL seeks to exclude evidence of the solicitation of individual Lakebound members' investments as well as evidence of the investments themselves. It appears to the Court that this evidence is primarily relevant in the related case, *Shareff v. Jacobon*, 09 CVS 009983 (Wake County), and is only tangentially relevant to the claims in this action. It further appears to the Court that the risk of prejudice from confusion of the issues outweighs the probative value of the evidence in this action under N.C. Evid. 403. The Court therefore, in the exercise of its discretion, GRANTS PGOL's Motion *in Limine* as to categories (3) and (4).

17. With respect to category (5) identified above, PGOL seeks to exclude evidence of losses alleged by individual members of Lakebound. The Court's Summary Judgment Order as amended dismissed all individual claims and left only derivative claims for trial. Because Plaintiffs will only be able to recover for losses to Lakebound, it appears to the Court that the probative value of evidence of the individual losses of Lakebound's members is outweighed by the prejudicial effect of such evidence under N.C. Evid. 403. Accordingly, the Court, in the exercise of its discretion, GRANTS PGOL's Motion *in Limine* as to category (5).

18. With respect to category (6) identified above, PGOL seeks to exclude evidence of any transaction other than the purported transfers of \$100,000 and \$188,000 discussed in the Summary Judgment Order. It appears to the Court that, while Plaintiffs identified those two transactions as the resulting monetary damages for Plaintiffs' conversion claim, the evidence offered to support Plaintiffs' claims should not be strictly limited to those two transactions. Plaintiffs' conversion claim requires that they show that Lakebound had rightful possession of the allegedly converted funds and that Jacobson wrongfully converted the property to his use, which should permit Plaintiffs to offer evidence concerning what Jacobson did with the allegedly converted funds. Furthermore, such evidence also appears to be relevant to Defendants' defenses to the conversion claim and the constructive trust remedy. As such, it appears to the Court that the probative value of such evidence outweighs the possible prejudicial effect on the Defendants. Accordingly, the Court, in the exercise of its discretion, DENIES the Motion *in Limine* as to category (6) but

will entertain specific objections to the relevancy or possible prejudicial effect of evidence as it is presented at trial.

19. With respect to category (7) identified above, Rule 15 of the North Carolina Rules of Civil Procedure allows a party to seek leave of Court to amend the pleadings at trial to include evidence or issues not within the pleadings and for an opposing party to object on the basis of unfair prejudice. N.C. R. Civ. P. 15(b). The Court concludes that category (7) of PGOL's Motion *in Limine* seeks to curtail the application of Rule 15(b) at trial. Accordingly, the Court, in the exercise of its discretion, DENIES the Motion *in Limine* as to category (7) consistent with the above.

C. Other Pretrial Matters

20. At the Pretrial Conference, the parties requested, and the Court agreed, to bifurcate the issue of punitive damages. Additionally, Plaintiffs' counsel announced on the record that they were abandoning any claims of Plaintiff SDOL.

IV.

CONCLUSION

21. For the foregoing reasons, the Court, after consideration of N.C. R. Evid. 401, 402, 403, and 701, in the exercise of its discretion, and without prejudice to the Court's right to modify these rulings during the course of the trial *sua sponte* or upon proper objection hereby (i) **DENIES** Plaintiff's Motion *in Limine*, (ii) **GRANTS in part and DENIES in part** PGOL's Motion *in Limine*, and (iii) memorializes other matters as explained above.

SO ORDERED, this the 26th day of August, 2016.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Special Superior Court Judge
for Complex Business Cases