

STATE OF NORTH CAROLINA
COUNTY OF DAVIDSON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

W. CHRISTOPHER CHESSON;
JAMES G. LOVELL; and DAVID D.
FRASER,

Plaintiffs,

v.

W. LEON RIVES; LEON L. RIVES, II;
and RIVES & ASSOCIATES, LLP,

Defendants.

12-CVS-3382

W. LEON RIVES; LEON LITTLE
RIVES, II; and R&A HOLDINGS,

Plaintiffs,

v.

W. CHRISTOPHER CHESSON,

Defendant.

15-CVS-3430

**ORDER GRANTING MOTION TO STRIKE PLAINTIFFS’ DESIGNATION
OF EXPERT PETER BELL**

THIS MATTER is before the Court on Defendants’ Motion to Strike Plaintiffs’ Designation of Expert Witness Peter Bell (“Motion”).

Defendants seek to preclude Mr. Bell’s proposed testimony regarding applicable accounting standards as applied to the audit of TowerWorx/TelWork conducted by Rives & Associates, LLP (the “Audit”). Defendants do not contest Mr. Bell’s expert testimony regarding valuation or determination of the amounts that

may be owed to Plaintiffs pursuant to their partnership agreement with Defendants. The basis of the Motion is that Plaintiffs did not make a timely designation that Mr. Bell would testify as to opinions related to the Audit.

With regard to the expert designation process, the Parties stipulated in their Case Management Report, which the Court adopted, that “[n]o person not identified in accordance with this provision shall be permitted to testify as an expert witness at trial.” (Case Management Report ¶ 5, ECF No. 8; *see* Case Management Order, ECF No. 19.) The Court granted numerous consent motions to extend the time within which the Parties were required to designate experts to testify as to matters on which they had the burden of proof. After the Court granted the parties’ third consent motion to amend the Case Management Order, expert designations were due on August 29, 2014. (Third Am. Case Management Order ¶ 2, ECF No. 57.) The parties then agreed to extend the deadline to September 5, 2014.

On September 5, 2014, Plaintiffs designated Mr. Bell to testify as an expert. Plaintiffs’ September 5, 2014 designation included the following statement:

Mr. Bell reserves the right to supplement and/or revise his disclosures, including to provide testimony and disclosures in rebuttal to Defendants’ expert and counterclaims and/or with respect to Rives & Associates L.L.P.’s compliance with applicable accounting standards in connection with the TowerWorx/TelWorx audit and related consent, independence issues related to School Efficiency Consultants and other client services provided by Rives & Associates and referred to in Plaintiffs Document Request No. 14.

(Defs.’ Br. Supp. Mot. Strike Pls.’ Designation Expert Witness Peter Bell Ex. C., Interrog. 2, ECF No. 222.) Defendants’ expert witness designation did not identify

any expert to opine on matters related to the Audit or the application of general accounting standards.

On November 25, 2014, Plaintiffs filed a supplemental interrogatory response that stated that “Mr. Bell is currently expected to testify as to the opinions set forth in Exhibit A,” which is Mr. Bell’s written report, dated November 18, 2014, assessing “the audit performance [of] Rives and Associates, LLP in the audit of the Financial Statements of TelWorx Communications, LLC and Towerworx, LLC for the years ended December 31, 2011 and 2010.” (Defs.’ Br. Supp. Mot. Strike Pls.’ Designation Expert Witness Peter Bell Ex. D. (“Pls.’ Supp. Resp. Defs.’ First Set Interrog.”), Interrog. 2, ECF No. 223; Pls.’ Supp. Resp. Defs.’ First Set Interrog. Ex. A.) Mr. Bell testified at his December 16, 2014 deposition that his report was preliminary and subject to change based on documents that may be later provided in discovery. (*See* Bell Dep. 63:22–25.)

Defendants on June 30, 2015, filed this Motion. Defendants do not challenge Mr. Bell’s testimony as regards to certain matters, but contend that Mr. Bell’s designation should be stricken and his testimony excluded as relates to the Audit.

The Court deferred its consideration of the Motion pending its ruling on dispositive motions. At a hearing in March 2017, the Court inquired whether, in fact, the Motion had been rendered moot by the Court’s ruling on the dispositive motions. Plaintiffs contend that the Court’s ruling does not preclude Mr. Bell’s proposed testimony.

The Court defers its further consideration of what testimony, if any, regarding the Audit will be admissible at the trial pursuant to Rule 402 and Rule 403 of the North Carolina Rules of Evidence. The Court's ruling, at this time, is limited to its determination that the Motion should be granted because Plaintiffs did not make a timely designation regarding Mr. Bell's expert opinions as relates to the Audit.

The Court first concludes that the Case Management Order did not contemplate that Plaintiffs could "reserve" an expert designation beyond the deadlines provided.

The Court further concludes that Plaintiffs have not demonstrated that their time for designating Mr. Bell should have been extended for good cause because of Defendants delay, if any, in producing documents. Perhaps, had Plaintiffs made a timely designation on September 5, 2014 of Mr. Bell's preliminary opinion related to the Audit, the Court might have considered allowing the timely designation to be amended and expanded based on subsequent discovery. But Plaintiffs did not make a timely initial disclosure.

The record makes clear that Plaintiffs cannot reasonably contend that they did not know, on September 5, 2014, that they intended to present testimony challenging the Audit. To the contrary, Plaintiffs have consistently maintained that a primary reason for their leaving Rives and Associates in October 2012 was because of their belief that Defendants improperly conducted the Audit and, as a result, their association with the Defendants would tarnish their professional reputation. Plaintiffs were aware by no later than Spring 2014 that PCTEL had instituted

litigation against Rives and Associates based on the contention that the Audit was not performed in accordance with accounting standards. In fact, Plaintiffs received subpoenas in regard to that litigation in July 2014.

In sum, there is no reasoned argument that Plaintiffs did not know, on September 5, 2014, that they intended to present expert testimony related to the Audit, therefore there is no excuse for Plaintiffs failure to take the appropriate steps necessary to comply with their obligation to timely designate such testimony. Plaintiffs were not entitled to “reserve” their consideration and designation to a later date.

Accordingly, the Court GRANTS the Motion.

IT IS SO ORDERED, this the 31st day of May, 2018.

/s/ James L. Gale

James L. Gale
Chief Business Court Judge