

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3172-13T4

SWARNA ALLAM and AVIGHNA GLOBAL
TRADERS, LLC,

Plaintiffs-Appellants,

v.

DEEPAK VERMA and PIONEER
ENTERPRISES, INC.,

Defendants-Respondents,

and

GULF OIL, PETROLEUM PRODUCTS
CORPORATION, PETROCOM ENERGY,
RAHNI SETHI, DHARMINDER SETHI,
FINE ENTERPRISES, INC.,

Defendants.

Submitted May 5, 2015 - Decided October 22, 2015

Before Judges Ostrer and Sumners.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Docket No. L-574-12.

Jeremy Esakoff, attorney for appellants.

Litchfield Cavo LLP, attorneys for
respondents (Robert L. Sanzo, on the brief).

The opinion of the court was delivered by

OSTRER, J.A.D.

This appeal arises from the purchase of a wholesale gasoline company. Plaintiffs Swarna Allam and Avighna Global Traders, LLC (AGT) purchased one hundred percent of the shares of Pioneer Enterprises, Inc., which were held by defendant Deepak Verma.¹ Plaintiffs asserted various tort and contract claims against Verma, who responded with various counterclaims. The matter proceeded to trial without a jury before Judge Barry A. Weisberg. Upon the close of plaintiffs' proofs, the court granted defendant's motion for dismissal. The court later dismissed the counterclaims after defendant rested. Only plaintiffs appeal.

On appeal, plaintiffs contend the court erred in excluding testimony of plaintiffs' outside accountant, Sukumar Majmudar, C.P.A. The court permitted Majmudar to testify as a fact witness, but barred testimony that the court deemed to be expert opinion. The court did so because plaintiffs had not identified Majmudar as an expert or provided an expert report in discovery. Plaintiffs also argue that they could have proven their conversion claim even without Majmudar's opinion testimony. Having considered plaintiffs' arguments in light of the record and applicable principles of law, we affirm.

¹ Plaintiffs named Pioneer Enterprises, Inc. as a defendant. However, plaintiffs controlled Pioneer at the time. Consequently, it appears that the only genuine defendant was Verma.

I.

We discern the following facts from the record. The parties entered into a Stock Purchase Agreement on March 1, 2011.² Many terms of the contract were not clearly specified, including the purchase price. Verma agreed to sell his stock in return for the buyers' payment of certain accounts payable of Pioneer. The contract stated the sale was "in consideration of payment against open invoices to the refineries only, which will come [to] approximately SEVEN HUNDRED AND FIFTY THOUSAND (\$750,000.00) dollars." However, the contract did not identify the outstanding invoices, or even the involved creditors.

The evidence demonstrated that the nature of the wholesale gasoline business depended on substantial lines of credit. Larger wholesalers or refiners sold product to Pioneer on short-term lines of credit. Pioneer in turn sold gasoline to retailers on shorter terms. The volume of product was substantial, and the profit margins were narrow. Pioneer took advantage of the "float" between its purchase and sale transactions.

² AGT was formed by Swarna Allam and Daneesh Garlurgada. Swarna Allam testified that her husband, Rajasekha Allam, managed the business. Rajasekha Allam insisted that his wife was involved in the management. We will refer to the Allams by their first names for the reader's convenience. We intend no disrespect in doing so.

The parties recognized the critical role of credit in the operation of the business. The contract stated, in a provision that was far from a model of clarity: "Supplier or refinery related lines of credit shall remain consistent with current practices and will be transferred to the buyer. All the guarantees for the refinery lines, refinery lines of credits will be transferred to the buyer from March 1st 2011." The contract did not identify the lines of credit, let alone provide any descriptive information about their amounts, terms, or whether they were transferrable.³

Verma agreed to assist the buyers in the operation of the business for three months. The agreement included a restrictive covenant that barred Verma from competing with the buyers. However, Verma remained in a related business, as a retail gasoline station owner.

The parties agreed that the buyers were not responsible for liabilities of the "seller" before March 1, 2011. The parties did not expressly address the disposition of Pioneer's accounts receivable. However, plaintiffs apparently conceded that those were not included in the purchase.

In the months following the closing, AGT made substantial

³ Rajasekha allegedly believed that he would not need to apply for credit after the closing, and that over ten lines of credit would be transferred.

payments to suppliers on Pioneer's pre-closing accounts payable. It was undisputed that by March 22, 2011, AGT had paid \$652,945. Plaintiffs made these payments without presentation of the invoices from the suppliers.

In the meantime, however, the parties engaged in numerous other transactions - some in cash, others inadequately documented - that gave rise to competing claims that one side was indebted to the other.

Verma continued to collect payment from Pioneer's customers after the closing, for deliveries made by the new owners. It was undisputed that this amounted to \$526,389. However, Verma contended that this sum was more than offset by other transactions.

Plaintiffs collected payment on pre-closing accounts receivable. Verma presented the forensic accounting opinion of John P. Morey, C.P.A., who asserted that these amounts totaled \$338,000. However, the court ultimately determined that amount was unreliable, as it was unsupported by invoices to demonstrate that the amounts AGT received were tied to deliveries that preceded the closing.

After the closing, Verma remained the guarantor of one line of credit, from Petroleum Products Corporation (PPC), that had been transferred to plaintiffs. Verma remained the debtor of another supplier, Daibes Oil, LLC (Daibes), because it was

unwilling to transfer its line of credit to Pioneer under the new owners until it reviewed a credit application; that occurred in mid-March. Verma also continued to purchase product from Daibes in connection with his continuing gas station business, utilizing the same line of credit.

The accounting of transactions became confused. Daibes delivered product to Pioneer and billed Verma, and delivered product to Verma and billed Pioneer. Petrocom Energy also billed defendant for a delivery on behalf of Pioneer. Verma claimed to have paid for shipments to Pioneer that exceeded the amounts Verma received from Pioneer customers. In late March, payments by plaintiffs to suppliers were refused for insufficient funds.

Plaintiffs filed a complaint against Verma in January 2012, later amended, which alleged that Verma did not transfer the stock of the corporation; he competed with Pioneer; he failed to transfer the lines of credit as promised; and he diverted to himself payments due to Pioneer, while orchestrating plaintiffs' payment of his obligations to other creditors. Plaintiffs asserted claims of breach of contract, breach of the covenant of good faith and fair dealing, common law fraud, conversion, and unjust enrichment.

In March 2012, defendant served interrogatories on plaintiffs requesting the name, and resume of any expert

plaintiffs intended to call at trial. Although not expressly requesting service of a "report," the interrogatories requested a statement of the expert, signed by the expert, providing "[t]he substance of the facts and opinions to which he/she is expected to testify; and . . . [a] summary of the grounds for each opinion." The interrogatories also sought the identification of "any documents prepared or generated by the expert which . . . contain the facts and opinions to which the expert is expected to testify"

In his document production request, Verma expressly demanded production of any expert reports. In an apparent effort to secure notice of any anticipated lay opinion testimony, Verma also requested the identity of any other opinion witness who was not an expert, as well as the substance and basis for that witness's opinion.

Plaintiffs apparently disclosed Majmudar as a non-expert opinion witness.⁴ Defense counsel served a deposition subpoena upon Majmudar, but he did not appear.

Majmudar testified at trial that plaintiffs hired him in early April 2011 to analyze their financial data. He testified that he examined purchase invoices, bank statements, checks, and wire transfers to reconcile the accounts. He also examined

⁴ The record does not include plaintiffs' written responses to Verma's interrogatories or document production requests.

defendant's records, including bank statements and invoices. He admitted that he had not participated in the operations of plaintiffs' business. Majmudar stated it took him six months to complete a reconciliation of the accounts "because there [were] far too many things co-mingled." Majmudar stated that in addition to review of voluminous documents, he consulted with Rajasekha. He requested from Rajasekha the documents he deemed necessary to "tie the accounts together . . . to figure it all out." He also asserted that he confirmed with personnel at Daibes that the invoices he reviewed included every invoice between AGT and Daibes. Majmudar compiled a listing of every AGT purchase invoice. He finished his work in December 2011, shortly before plaintiffs filed their complaint.

At trial, the court sustained defense counsel's objections to Majmudar offering any opinions on the ground that they constituted expert testimony. Majmudar was not permitted to offer his "observations" about the significance of specific financial records when he first reviewed plaintiffs' financial documents in early April. He was also prevented from presenting his "conclusions as to what [was] properly owed to Daibes," which he formulated after he completed his account reconciliation. He was barred from identifying payments he believed "belong[ed] to Pioneer." Plaintiffs were also not permitted to introduce into evidence the compilations or

reconciliations that Majmudar had prepared.⁵ These charts included Majmudar's conclusions that certain invoices were incorrect, disputed, or duplicative of others. The court prohibited Majmudar from offering what it deemed expert testimony because plaintiffs had failed to disclose him as an expert or serve a report of his proposed opinions.

Plaintiffs' counsel argued that Majmudar's proposed testimony did not constitute opinion, and if it did, that it qualified as lay opinion. Plaintiffs' counsel argued that Majmudar simply compiled documents that he personally reviewed and his calculations involved little more than addition and subtraction.

The judge disagreed. He explained, "He's taken facts and draw[n] conclusions based on the facts, that's the essence of an expert opinion." The judge noted that one schedule included various conclusions that Majmudar had drawn based on his review of the documents; Majmudar had characterized entries as "wrong invoice, duplicate invoice."

The judge further explained to plaintiffs' counsel, "[T]he thrust of what you're trying to get him to do . . . is . . . to look at the books and records of the business, and to draw conclusions about where monies came from, about where monies

⁵ These were marked for identification, but are not included in the record before us.

went, about who owed what to whom, based on his analysis of the documentation" The judge held that was expert opinion.

The court rejected plaintiffs' argument that Majmudar's work was simply a summary of transactions. These conclusions "represent his accounting work, which is in essence, his expertise and his drawing of conclusions." The court dismissed the suggestion that anyone could have made the compilations Majmudar had prepared. The judge noted that plaintiffs sought to present the compilations through Majmudar because of his accounting expertise and his ability to review the documentation and draw conclusions. The judge explained that Majmudar could, for example, testify as to the content of bank records, but any testimony regarding the significance of those records constituted expert opinion.

The judge also explained that Majmudar's testimony did not qualify as lay opinion admissible under N.J.R.E. 701, which authorizes opinions based on the perception of the witness, because Majmudar did not directly observe any of the transactions. The judge found that he was not involved in the day to day bookkeeping or processing of invoices as they were generated. The judge observed that Majmudar's analysis was based on hearsay, which is acceptable in the presentation of an expert opinion, but not a lay opinion. "He has no direct knowledge of those invoices, or of those transactions, he only

knows what he knows by review [of] documents, or what other people told him and then drawing a conclusion as an accountant, that these are improper charges."

At the close of plaintiffs' proofs, the court granted defendant's motion to dismiss. In particular, the court rejected plaintiffs' conversion claim.⁶ The court noted that plaintiffs failed to present an admissible compilation setting forth the amount allegedly converted. The court noted that the evidence demonstrated that substantial sums of money were going "back and forth" between the parties. The court deemed uncontroverted Verma's testimony that he paid Daibes for invoices for plaintiffs' purchases in early March 2011. The schedule prepared by Moyer indicated that these payments exceeded \$1 million. The court recognized that Verma received payments from customers for sales made by plaintiffs, as

⁶ The judge also found that the stock was transferred. He rejected the claim of breach of the promise to transfer letters of credit, noting that some lines were transferred. Although plaintiffs alleged others were promised, the court noted that the agreement did not identify them and held that plaintiffs failed to present any proof of damages resulting from the alleged failure to provide other lines of credit. The court also found no basis in the evidence for the claim that Verma violated the restrictive covenant. Verma continued in the retail gasoline business, but there was no proof that he competed as a wholesaler. The court rejected the unjust enrichment claim because the parties had a contractual relationship and defendant performed his obligations under the contract. The fraud claim was dismissed as well, for failure to present sufficient proof of false representations or damages.

reflected in the schedule reviewed at trial. The court held that the proofs did not demonstrate these funds were converted, explaining: "There was clearly a co-mingling between these companies."

On appeal, plaintiffs contend the court unduly limited Majmudar's testimony. Plaintiffs renew many of the arguments presented to the trial court in the midst of trial.

II.

We review for an abuse of discretion a court's decisions regarding discovery, see Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011), and its evidentiary rulings. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008). Applying this standard of review, we discern no basis to disturb Judge Weisberg's limitation of Majmudar's testimony.

At the outset, we note that plaintiffs failed to avail themselves of the opportunity to make a specific offer of what testimony would be elicited from Majmudar. See R. 1:7-3. Moreover, the record on appeal does not include the calculations or reconciliations that were marked for identification at trial but excluded from evidence. We cannot reasonably assess the admissibility of evidence that is not placed before us. See R. 2:6-1(a)(1) (stating that the appendix "shall contain . . . such other parts of the record . . . as are essential to the proper

consideration of the issues"); see also Cnty. Hosp. v. Blume Goldfaden, 381 N.J. Super. 119, 127 (App. Div. 2005) ("Nor are we obliged to attempt review of an issue when the relevant portions of the record are not included.").

As for the court's limitation of Majmudar's testimony, the court correctly characterized the barred testimony as expert opinion, and appropriately exercised its discretion to bar it based on plaintiffs' failure to make requested pre-trial disclosure. A witness may offer lay opinion "if it (a) is rationally based on the perception of the witness and (b) will assist in understanding the witness' testimony or in determining a fact in issue." N.J.R.E. 701. By contrast, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702.

"[L]ay opinion testimony is limited to what was directly perceived by the witness and may not rest on otherwise inadmissible hearsay." State v. McLean, 205 N.J. 438, 460 (2011). In the case of accountants, courts have distinguished between in-house and outside accountants. In-house employees, who contemporaneously review or participate in the transactions, may offer lay opinions based on their experience. By contrast,

accountants brought in after the transactions occur to perform an audit, review, or forensic examination may not offer lay, as opposed to expert opinions, based on their review. See DIJO, Inc. v. Hilton Hotels Corp., 351 F.3d 679, 686 (5th Cir. 2003) ("The further removed a layman is from a company's day-to-day operations, the less likely it is that his opinion testimony will be admissible under Rule 701."). First, Majmudar was not personally involved in the numerous financial transactions at issue. Rather, he analyzed the data after the fact. Majmudar explained that it took six months to make sense of the complex transactions, because of the extensive commingling of funds. His task required use of his skills and training as an expert accountant, and did not rely on any contemporaneous involvement with the transactions.

Second, Majmudar's analysis was informed by the hearsay statements of Rajasekha and financial personnel at Daibes. An expert may rely on hearsay in formulating his opinions. McLean, supra, 205 N.J. at 449. A lay witness may not. Id. at 460.

Also lacking in merit is plaintiffs' argument that Majmudar did not propose to offer opinions at all, and the court barred factual testimony. Plaintiffs' counsel repeatedly sought to elicit Majmudar's conclusions, and observations, regarding the financial relationship of the parties. It was evident that Majmudar had characterized certain invoices as duplicative or

erroneous. In drawing connections between various documents – for example, by matching evidence of a delivery, with an invoice, and then a payment, and then a deposit of the payment – Majmudar evidently relied on his own judgment and inferences. As Judge Weisberg correctly observed, this is the essence of opinion testimony.

Finally, we reject plaintiffs' argument that its conversion claim could have been proved without an expert. "Conversion is the wrongful exercise of dominion and control over property owned by another [in a manner] inconsistent with the owners' rights." LaPlace v. Briere, 404 N.J. Super. 585, 595 (App. Div.) (internal quotation marks and citation omitted), certif. denied, 199 N.J. 133 (2009). "It is essential that the money converted by a tortfeasor must have belonged to the injured party." Commercial Ins. Co. v. Apgar, 111 N.J. Super. 108, 115 (Law Div. 1970).

Although defendant did not dispute that he accepted over \$500,000 in payments from Pioneer customers for post-closing deliveries, he asserted he did so while he was paying significantly more than that sum to Daibes for deliveries to Pioneer. In other words, defendant contended that the exercise of control over those receivables was not wrongful. See Chi. Title Ins. Co. v. Ellis, 409 N.J. Super. 444, 456 (App. Div. 2009) ("Where a sum of money is identifiable, courts look to the

relative rights of each party to possession and use of the money to determine whether a cause of action lies for conversion."). By virtue of defendant's offsetting payments to Daibes, the court could reasonably find defendant had a greater right to the portion of Pioneer's payments representing the difference between the two sums. Plaintiffs failed to present sufficient, admissible evidence to the contrary.

Plaintiffs' remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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