SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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2497 REALTY CORP.,

Plaintiff,

- v –

RODOLFO FUERTES, JONATHAN ABAD, 2497 PARTNER LLC, 145TH STREET PROPERTY INVESTOR LLC,

Defendants.

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INDEX NO. 151947/2014

MOTION DATE 05/20/2024

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 275, 276, 277, 278, 279, 280

were read on this motion to/for PRECLUDE.

I. INTRODUCTION

This breach of contract action arises from a series of agreements relating to real property located at 2497 Adam Clayton Powell Jr. Boulevard in Manhattan (the "Property") that was contaminated by an oil spill (the "Spill") originating from non-party ExxonMobil's adjacent gas station. The defendants now move to preclude the testimony and reports of the plaintiff's environmental experts, Andrew Lockwood and Derek Ersbak of P.W. Grosser Consulting ("PWGC"), arguing, *inter alia,* that they are not qualified to opine on the issue of "highest and best use" of the subject property. The plaintiff opposes the motion. The motion is denied.

II. BACKGROUND

In February 2010, the plaintiff, 2497 Realty Corp., executed the Contract of Sale of Membership Interests in 2497 Holding LLC, the no-party entity that owns the property, the buyer being defendant, 2497 Partner LLC (the "Contract"). The parties thereafter amended the Contract to give defendants sole control over remediation of the Property and settlement negotiations with ExxonMobil. The amendments also created a distribution plan (the "Waterfall") for any proceeds received from a settlement agreement with ExxonMobil. In June 2011, ExxonMobil settled with 2497 Holding LLC for $1,500,000 (the "Settlement Agreement").

In the instant action, commenced in 2014, the plaintiff alleges the defendants breached the Contract by failing to make distributions pursuant to the Waterfall. The court (Ramos, J. [Ret.]) by an order dated June 9, 2014, enjoined the plaintiff from taking further action until the remediation of the Property was completed to the level set forth in the Contract (i.e., the "highest and best use under applicable zoning laws, and all stages of that remediation are approved by all relevant federal, state and local authorities") (MOT SEQ 001). By an order dated June 7, 2022, the Appellate Division, First Department, restored the case to the active calendar, holding that the plaintiff demonstrated, *prima facie*, that remediation was complete in accordance with the June 9, 2014, order (2497 Realty Corp. v Fuertes, 206 AD3d 419 [1st Dept. 2022]). The key issue in dispute is whether, per the Contract, the Property has been remediated to "its highest and best use under applicable zoning laws, as the Purchaser shall determine in its sole and absolute discretion." Both parties have commissioned expert reports that document the remediation of the Property.

The plaintiff served two expert reports to establish the environmental condition of the Property—an initial report, dated March 27, 2017, authored by Lockwood, and a subsequent reply report (the "Reply Report"), dated August 30, 2023, jointly authored by both Ersbak and Lockwood (collectively, "Plaintiff's Reports"). Lockwood is a graduate of SUNY Potsdam, where he studied geology. He is a licensed Professional Geologist in New York and a licensed Environmental Professional in Connecticut. He has over thirty (30) years of experience managing environmental remediation, including the investigation and remediation of land contaminated by gasoline, radiation, and poly fluoroalkyl substances (PFAS). Ersbak is a graduate of SUNY Binghamton, where he studied biology. He is a licensed Professional Geologist in New York with twenty (20) years of experience in environmental due diligence, environmental compliance and state and federal remedial programs, including the federal Superfund cleanup law, New York's Brownfield Cleanup Program, and regulations promulgated by New York City's Office of Environmental Remediation.

The initial, two-page report from Lockwood is a summary directed to defendants' counsel that explains the significance of a Site Status Update Report provided by environmental consultant ARCADIS and a No Further Action letter provided by the New York State Department of Environmental Conservation ("NYSDEC"). The report does not include a C.V. and Lockwood does not describe his qualifications, but merely identifies himself as "Andrew Lockwood, PG, LEP, Principal."

The defendants produced their own expert environmental analysis, prepared by Scott Green, P.G., of First Environmental, Inc. (the "FEI Report"). The FEI Report opines, *inter alia*, that the remediation of the Property has not been completed in compliance with the NYSDEC's requirements, and that the contamination of the Property is an ongoing condition that will require further remediation once the site is redeveloped.

In response to the FEI Report, the plaintiff served its Reply Report, in which Ersbak and Lockwood opine that the remediation of the Property, as defined by the Contract and the Settlement Agreement, is complete. The Reply Report concludes that the concentration of chemicals on the Property does not exceed the NYSDEC's Soil Cleanup Objectives for a commercial property and any further compliance necessary to achieve an unrestricted use would involve the removal of contaminants unrelated to the Spill. The Reply Report also details both Lockwood's and Ersbak's professional qualifications.

On October 25, 2023, the defendants deposed Ersbak. In addition to testifying in regard to the findings and conclusions of the plaintiff's expert reports, Ersbak also testified that he had not previously provided testimony in any legal proceeding, and that he had not authored, in whole or in part, any publications. He further testified that he has no formal training in the law, including contractual interpretation or real estate and zoning laws, and that the opinions stated in the Reply Report are based on his experience as a geologist working with environmental regulations.

The defendants now move to preclude the Plaintiff's Reports from evidence and to preclude Lockwood and Ersbak from testifying at trial. The defendants argue that (i) the subject reports contain impermissible legal conclusions that reach the ultimate issue in the case; (ii) the plaintiff's experts are not qualified to opine on the "highest and best use" of the Property; and (iii) the subject reports fail to satisfy the disclosure requirements of Commercial Division Rule 13(c). In opposition, the plaintiff argues that (i) the content of the subject reports is environmental analysis that necessarily and incidentally involves "legal" issues like the interpretation of terms and definitions of contracts and regulations; (ii) the reports substantially comply with commercial division rules; and (iii) the defendants are not prejudiced by any failures to disclose. The plaintiff also submits, as relevant here, an affirmation from Lockwood, subscribed under penalty of perjury, in which he avers that he has not testified as an expert witness at trial or at a deposition in the last four (4) years and has not published within the last ten (10) years.

III. DISCUSSION

The admissibility and scope of expert testimony is a determination within the discretion of the trial court. See De Long v Erie Cnty., 60 NY2d 296, 307 (1983); Williams v Perez 150 AD3d 1314 (2nd Dept. 2017). "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." De Long v Erie Cnty., supra. So long as that principle is met, an expert witness may testify "to both the ultimate questions and those of lesser significance." Sanders v Otis Elevator Co., 232 AD2d 327, 328 (1st Dept. 1996) (internal quotation marks omitted). It is well established, however, that "[e]xpert testimony as to a legal conclusion is impermissible" (Measom v Greenwich & Perry St. Hous. Corp., 268 AD2d 156, 159 [1st Dept. 2000]), and "expert witnesses should [thus] not be called to offer opinion as to the legal obligations of parties under a contract; that is an issue to be determined by the trial court" (Colon v Rent-A-Ctr., Inc., 276 AD2d 58, 61 [1st Dept. 2000]).

The necessity of expert testimony in this case is beyond dispute as the subject matter—involving a technical analysis of environmental remediation efforts—is clearly beyond the ken of the typical juror. Moreover, the court finds unavailing the defendants' arguments that the plaintiff's expert geologists are not qualified to opine on the real estate development concept of "highest and best use," and that the Contract grants the defendants sole discretion to determine the highest and best use of the Property. The First Department has already held that "the [Contract] cannot be reasonably interpreted to permit defendants to . . . unilaterally declar[e] that the highest and best use of the property is residential[.]" 2497 Realty Corp. v Fuertes, supra at 421. That is law of the case. See Apollo Asset Mgmt., Inc. v Cernich, 226 AD3d 466 (1st Dept. 2024). As the First Department explained, the Contract conditions the defendants' distribution of the proceeds of the Settlement Agreement "upon remediation of the property to its highest and best use under applicable zoning laws" (2497 Realty Corp. v Fuertes, supra at 421), and the highest and best use of the property is thus determined according to what "applicable zoning laws" will allow (id. at 421-22 [holding that defendants failed to rebut the plaintiff's showing that "remediation has been performed to the site's highest and best use under applicable zoning law (Commercial Use)"] [internal quotation marks omitted]).

The plaintiff's experts' opinions are in keeping with the First Department's reading of the contract language. They do not opine on the issue of what is or is not the theoretical highest and best use of the Property. Rather, they opine on the environmental remediation of the Property—

an appropriate issue for expert testimony that is within their area of expertise—taking as their starting point the First Department's aforementioned analysis of the Contract's terms, the Property's current zoning for commercial use, and the defendants' current use of the land for commercial purposes.

The defendants accurately observe, however, that the Plaintiff's Reports also include opinions that veer into contract interpretation and other legal conclusions, including (i) whether "the remediation of the [Property] has been completed as required by the terms of the [Settlement Agreement] and the [Contract]"; (ii) whether an "unrestricted use" remedy was required by the Settlement Agreement; (iii) whether the defendants were required to remove a designation for further remediation by New York City's Office of Environmental Remediation (the E-Designation) to achieve "Closure" under the Settlement Agreement; (iv) the definition of "Alleged Damages" under the Settlement Agreement; (v) ExxonMobil's ongoing liability to remediate the property; and (vi) whether the defendants have a legitimate basis to withhold the settlement proceeds. In each of the six examples above, the experts are opining on the legal obligations of parties under a contract and not on scientific facts about the environmental condition of the Property.

As such, while the court declines, in the exercise of its discretion, to strike the Plaintiff's Reports, the defendants may inquire at trial as to the expert witnesses' qualifications and may object to particular questions asked of the witnesses, if there are proper grounds therefor. Since no expert witness is permitted to testify on matters of contract interpretation or other purely legal issues, questions put to Lockwood and Ersbak at trial should be limited to the environmental condition of the Property without requesting opinions on particular legal obligations of the parties under the Contract.

The defendants further contend that the Plaintiff's Reports and the testimony of Lockwood and Ersbak should be precluded because the expert disclosure provided by the plaintiff does not comply with Commercial Division Rule 13(c) in that the Plaintiff's Reports fail to list Ersbak and Lockwood's recent publications and experience as expert witnesses. The defendants also take issue with Ersbak and Lockwood's joint authorship of the Reply Report. These arguments are without merit.

Commercial Division Rule 13(c) requires that, "expert disclosure must be accompanied by a written report, prepared and signed by the witness," and must contain:

> (A) a complete statement of all opinions the witness will express and the basis and the reasons for them;
> (B) the data or other information considered by the witness in forming the opinion(s);
> (C) any exhibits that will be used to summarize or support the opinion(s);
> (D) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (E) a list of all other cases at which the witness testified as an expert at trial or by deposition during the previous four years; and
> (F) a statement of the compensation to be paid to the witness for the study and testimony in the case (22 NYCRR 202.70.13[c]).

First, there is no bar to jointly authored reports. The defendants' argument that the Commercial Division Rules prohibit joint authorship of expert reports because the Rules only refer to a singular "witness," rather than plural "witnesses," is unsupported by any decisional or statutory authority and can be summarily rejected as illogical.

Second, preclusion of expert testimony based on noncompliance with Commercial Division Rule 13(c) is a question of judicial discretion. See Taxi Tours Inc. v Go N.Y. Tours Inc., 227 AD3d 530, 531 (1st Dept. 2024). The defendants do not contend they have been prejudiced by the plaintiff's failure to comply with Rule 13(c). Indeed, the defendants had the opportunity to depose Ersbak at length about his qualifications, findings, and conclusions. At his deposition, Ersbak testified that he had no publications to disclose and had never previously provided testimony in a legal proceeding (Ersbak Deposition at 14:16-22). As to Lockwood, he has submitted an affirmation stating that he has no prior testimony or publications that needed to be disclosed, as he has not testified as an expert witness at trial or at a deposition in the last four (4) years and has not published within the last ten (10) years. Therefore, all required information was disclosed to the defendants.

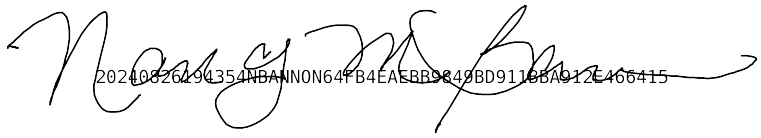
For these reasons, Lockwood and Ersbak will not be precluded from testifying since, under the circumstances here, the preclusion of the expert witness's trial testimony for failing to fully comply with disclosure rules "would be too drastic a remedy at this stage of the proceeding." See Rutledge v Petrocelli Elec. Co., 309 AD2d 506 (1st Dept. 2003).

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that the defendants' motion to preclude the testimony and reports of the plaintiff's environmental experts (MOT SEQ 007) is denied.

This constitutes the Decision and Order of the court.



8/21/2024
DATE

NANCY M. BANNON, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☒ **DENIED**	☐	**GRANTED IN PART**	☐	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**