

OFFICE OF THE CLERK

DOCKET NO.: HHB-CV-13-602 JUDGE: J. CARDANI SUPERIOR COURT

REDDING LIFE CARE LLC v. TOWN OF REDDING JUDICIAL DISTRICT OF NEW BRITAIN

JUDICIAL DISTRICT OF
NEW BRITAIN

TOWN OF REDDING

APRIL 7, 2021

RULING ON PLAINTIFF'S MOTION TO PRECLUDE EXPERT (#227.00)

This tax appeal has been pending since 2013. There are many reasons for the delay, none of which are particularly relevant to this ruling except that they prompted the court, *Cardani, J.*, to issue a clear and unequivocal scheduling order on July 23, 2020. That order required the parties to exchange appraisals on or before October 30, 2020. The order further stated, "[f]urther extensions of the scheduling order are unlikely to be granted given the age of this matter."

The defendant Town of Redding ("Town") did not disclose its expert appraisal until late December 2020-nearly two months after the deadline. The plaintiff now moves for an order precluding the testimony and report of the Town's expert. The Town objects and argues that the untimely disclosure did not prejudice the plaintiff and that preclusion would be inequitable under the facts and circumstances of the case.

To say that the court is displeased with the Town's failure to comply with Judge Cardani's appraisal disclosure deadline would be an understatement, particularly given his emphatic statement that further extensions of the deadline were unlikely to be granted. However, because the case has not yet been scheduled for trial-and cannot be tried sooner than December 2021 given the court's trial calendar-the late disclosure will not unduly prejudice the plaintiff in preparing for trial.

While the absence of undue prejudice to the plaintiff saves the Town from the harsh preclusion order the plaintiff seeks, it does not immunize the Town from sanctions entirely for

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A. Jordanopoulos, April 7, 2021.

240

violating *the court's* scheduling order. The court determines that an award of attorneys' fees and costs to the plaintiff for the time and expense associated with preparing and arguing its motion to preclude is warranted.



FACTUAL BACKGROUND

The plaintiff commenced this property tax appeal in 2013 to challenge the Town's fair market valuation of the subject property as of October 1, 2012. The case has been hotly contested; as of the date of this ruling the docket contains over 239 entries.

Much of the litigation heat this tax appeal has generated resulted from friction between the parties over the Town's insistence on deposing a non-party expert, David Salinas, who had provided appraisals for the plaintiff's lenders in 2010 and 2011. When the court, *Schuman, J.*, denied Salinas's motion for a protective order to bar the Town from taking his deposition, Salinas, through counsel, filed a writ of error. The appellate proceedings concerning the writ lasted more than four years and produced decisions from both the Appellate Court and the Supreme Court, the latter of which dismissed the writ for lack of a final judgment. The matter was remanded to this court in May 2019.

Thereafter the Town moved to take the deposition of the plaintiff's bank concerning a 2017 appraisal of the subject property, i.e., an appraisal dated five years after the valuation date at issue here. The plaintiff moved to quash. The court, *Cardani, J.*, issued the following order:

This matter has been pending since 2013, far too long for a property tax appeal. Both parties agree that the issue to be decided in this matter is the valuation of the subject property in 2012. The defendant has issued a document only subpoena to a third party, the plaintiff's bank, seeking a valuation report concerning the subject property allegedly valuing the property in 2017 for the purpose of a financing arrangement. The bank has put the plaintiff on notice that it will seek indemnification from the plaintiff for the cost of dealing with the subpoena pursuant to the terms of its lending agreement with the plaintiff.

In discovery matters, the court may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. In view of the defendant's document only subpoena to a third party bank seeking an appraisal prepared five years after the date at issue in this matter and for the purposes of a financial transaction, the court finds that the discovery being sought is oppressive and unduly burdensome. The 2017 appraisal is not relevant to the issue to be decided in this matter and is not reasonably calculated to lead to the discovery of relevant admissible evidence. The cost to the plaintiff through indemnification is significant. Given the very long pendency of this matter, this type of last minute, irrelevant discovery is inappropriate.

The court therefore respectfully grants the plaintiff motion and quashes the subpoena.

Order (#193.02) (dated 3/30/20).

Two months later Judge Cardani issued a similar order denying the Town's motion to compel the deposition of Salinas:

The defendant moves to compel the testimony of non-party David Salinas. Mr. Salinas submitted to a deposition on January 22, 2020. At the deposition, Mr. Salinas answered basic factual questions, however his counsel objected to and he refused to answer questions that would have him either render expert opinions or explain the reasoning behind expert opinions that he had expressed in the past. Mr. Salinas has no role in this litigation. He is not a party, and he has not been retained by any party to act as an expert witness in this matter. No party to this litigation has retained Mr. Salinas to express expert opinions concerning issues in this lawsuit or concerning the properties at issue in this litigation. Mr. Salinas has objected to being compelled to act as an expert in this matter and objects to any involvement in this litigation.

Mr. Salinas was retained some time ago by the plaintiff's banks to appraise the properties in question. In connection with that retention, Mr. Salinas issued a report to Sovereign Bank on October 6, 2010 and a report to Capital Source on July 12, 2011. As noted, Mr. Salinas was retained by the foregoing banks, not the plaintiff, for the purpose of providing the banks with an assessment of the properties for use by the banks internally in making decisions concerning making loans to the plaintiff. The defendant has obtained copies of the foregoing reports through discovery in this matter. Mr. Salinas has not been involved in this matter other than being subpoenaed by the defendant.

This matter has been pending since 2013, far too long for a property tax appeal. In discovery matters the court may make any order that justice requires in order to protect any party from annoyance, embarrassment, oppression, or undue burden or

expense. The issue to be decided in this matter is the proper valuation of the subject property as of October 1, 2012. The defendant has already retained its own experts to express opinions concerning the value of the subject property as of October 1, 2012. The defendant already has copies of Mr. Salinas' reports and may provide them to the defendant's experts for analysis and commentary. The defendant has provided no substantial reason why they need to depose non-party Salinas who otherwise would have no role in this litigation.

As noted, the issue to be decided here is the proper valuation of the subject property as of October 1, 2012. Mr. Salinas' reports, which are dated October 6, 2010 and July 12, 2011, and which were provided to banks for their internal considerations in providing financing to the plaintiff, are at best only marginally relevant to the issues in this matter. The defendant has caused delays in this matter of nearly seven years in a misguided attempt to obtain this deposition concerning at best marginally relevant information from a non-party when the defendant's own experts could have considered and commented on the reports to the extent necessary and appropriate. The court finds that this attempt and delay were not justified and did not promote justice in this matter. In view of all of the foregoing, this court finds that justice requires that the motion to compel be denied and that Mr. Salinas not be put to the undue burden of further deposition.

Order (#194.01) (dated 5/4/20).

On May 29, 2020, Judge Cordani issued a scheduling order requiring the parties to exchange their expert appraisal reports by August 31, 2020. On July 10, 2020, the Town moved to modify that deadline because the expert it had retained years earlier "has declined further participation and would no longer be available for this case." Motion to Modify Scheduling Order (#204) (dated 7/10/20), p. 1. The Town specifically requested a new appraisal disclosure deadline of October 31, 2020. Judge Cordani issued the following order:

The scheduling order in this matter is modified as follows:

On or before 10/30/20, the parties shall exchange any appraisal and/or expert reports that they will introduce at trial, and will disclose, as provided for in the Practice Book, any expert that they will call at trial.

On or before 12/31/20, all discovery, fact and expert, shall be completed.

Within thirty days after the close of discovery, the plaintiff shall file a case flow request asking the court to set a trial date.

Further extensions of the scheduling order are unlikely to be granted given the age of this matter.

Order (#204.01) (dated 7/23/20) (Emphasis supplied).

On October 23, 2020, the Town filed a motion seeking two forms of relief: 1) an order directing the plaintiff to make a representative available to answer certain questions the Town's new appraiser had concerning the subject property's historical income and expenses; 2) an order modifying the existing appraisal exchange deadline of October 30, 2020 to an unspecified date 14 days after the plaintiff's representative answers the questions. The court, *Klau, J.*, denied the motion. Order (#220.10) (dated 10/27/20).

On October 29, 2020—one day before the October 30 deadline for the exchange of appraisals—the Town filed another motion to modify the scheduling order (#223). The plaintiff objected to the Town's motion on November 12, 2020 (#226). Although the Town initially marked its motion "ready" for the short calendar, it subsequently marked the motion "off."

On December 24, 2020, the Town disclosed its expert's appraisal of the subject property. On December 30, the plaintiff filed a motion to preclude the Town's expert, including his report. The Town objected to the motion to preclude on January 11, 2021. The court heard oral argument on March 24, 2021.

II

DISCUSSION

There is no dispute that the Town missed the court-ordered appraisal deadline of October 30, 2020 by nearly two months. What the court must decide is whether the appropriate sanction is to preclude the Town's expert and his appraisal entirely.

In its written objection to the motion to preclude, the Town expends considerable digital ink describing a discovery dispute that the parties were attempting to resolve during the late

fall/early winter of 2020. The Town repeated its description of this discovery issue at oral argument on the motion to preclude. The gist of the Town's argument is that the parties were engaged in good faith negotiations to resolve a discovery dispute; that the court had not scheduled trial dates; that the plaintiff had not explained how the late disclosure caused any prejudice given the lack of scheduled trial dates; and that precluding the Town's expert would be inequitable under these circumstances.¹ The plaintiff cited *Cavallaro v. Hospital of Saint Raphael*, 92 Conn. App. 59, 65, 882 A.2d 1254 (2005) for the proposition that Practice Book § 13-4 (g) (4) requires a party to show undue prejudice resulting from a late expert disclosure before a court may preclude the expert.

The plaintiff responds that Practice Book § 13-4 (g) (4) does not control. Rather, the plaintiff characterizes Judge Cordani's July 23, 2020 scheduling order establishing the appraisal disclosure deadline as a case management order. Citing *Barnes v. Connecticut Podiatry Group, PC*, 195 Conn. App. 212, 224 A.3d 916 (2020), the plaintiff contends that this court has the inherent authority to enter such orders and to preclude a party's expert if the party failed to meet a disclosure deadline the order established. The court considers each of these positions .

A

Practice Book § 13-4 governs expert disclosures and related matters. Section 13-4 (g) (1) requires parties to submit a proposed schedule for expert discovery. If they cannot agree on discovery deadlines, the court shall convene a scheduling conference to set the deadlines. Section 13-4 (g) (4) permits parties, "by agreement," to modify an approved expert discovery scheduling order "so long as the modifications do not interfere with an assigned trial date." That subsection

¹ At oral argument, the Town conceded that at no time during these discussions did the plaintiff agree to modify the appraisal disclosure deadline.

further provides that a party who wants to modify an expert scheduling order without the agreement of the opposing party "may file a motion for modification with the court stating the reasons therefore. Said motion shall be granted if: (A) the requested modification will not cause undue prejudice to any other party; (B) the requested modification will not cause undue interference with the trial schedule in the case; and (C) the need for the requested modification was not caused by bad faith delay of disclosure by the party seeking modification."

Significantly, § 13-4 (h) provides that "[a]judicial authority may, after a hearing, impose sanctions on a party for failure to comply with the requirements of this section. *An order precluding the testimony of an expert witness may be entered only upon a finding that: (1) the sanction of preclusion including any consequence thereof on the sanctioned party's ability to prosecute or to defend the case, is proportional to the noncompliance at issue, and (2) the noncompliance at issue cannot adequately be addressed by a less severe sanction or combination of sanctions.*" (Emphasis supplied.)

B

The plaintiff argues that § 13-4 does not control this dispute and that the expert preclusion order it seeks is not only permissible, but warranted, based on *Barnes v. Connecticut Podiatry Group, PC*, 195 Conn. App. 212. *Barnes* has a lengthy factual history which the court will not repeat here. Suffice it to say, the trial court in *Barnes* entered an order (the "preclusion order") permitting the plaintiff to supplement a previously-disclosed expert's opinions, but precluding the plaintiff from disclosing additional experts. When the trial court issued the preclusion order, trial was scheduled to begin in six days. Although the trial was subsequently rescheduled, the preclusion order remained in place and, ultimately, was enforced when the plaintiff attempted to disclose an additional expert.

On appeal, the plaintiff argued that trial court violated Practice Book § 13-4 (h) by entering the preclusion order without a hearing. The defendant responded that the preclusion order was not entered as a sanction under § 13-4 (h), but was instead a case management order which the trial court had the inherent authority to enter. The Appellate Court agreed with the defendant. Nothing in the record suggested that the trial court entered the preclusion order as a sanction for any violation of an order previously entered pursuant to § 13-4. Rather, the trial court entered the preclusion order because trial was scheduled to begin in less than a week and because plaintiff had made comments that suggested she was considering disclosing an additional expert. The trial court had the inherent authority to both issue and enforce its case management order.

C

Barnes is distinguishable. Unlike the order in *Barnes*, which expressly forbid the disclosure of additional experts, Judge Cordani's scheduling order simply established a deadline for the disclosure of experts and their appraisals; it was silent on any sanction the court might impose if a party did not comply with the deadline. Further, no trial has been scheduled in this case, whereas the preclusion order in *Barnes* was issued just days before the scheduled start of trial. The court concludes that Judge Cordani's scheduling order was a "schedule for expert discovery" under Practice Book § 13-4 (g). Therefore, the court must consider and apply the relevant provisions of § 13-4 (g) and (h).

The Town's October 29, 2020 motion to modify the expert disclosure deadline was a motion to modify a schedule for expert discovery under § 13-4 (g) (4). As noted, the Town did claim that motion to the short calendar. Instead, the Town simply allowed the October 30 disclosure deadline to pass and did not disclose its appraisals until two months later. The March

24, 2021 oral argument on the plaintiff's motion to preclude the Town's expert constituted a "hearing," pursuant to Practice Book § 13-4 (h), on that motion. Because the court's calendar will not permit trial of this matter until December 2021, the court determines that the Town's violation of the July 23, 2020 scheduling order does not unduly prejudice the plaintiff and can be addressed through a lesser sanction than outright preclusion of the Town's expert.

III

CONCLUSION

Although the court declines to impose the harsh sanction of expert preclusion, the Town's non-compliance with Judge Cordani's scheduling order warrants a judicial response. "It is well known that justice delayed is justice denied. In order to fulfill our responsibility of dispensing justice we in the judiciary must adopt an effective system of caseflow management. Caseflow management is based upon the premise that it is the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards. Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system. To reduce delay while still maintaining high quality justice, it is essential that we have judicial involvement in managing cases." *In re Mongillo*, 190 Conn. 686, 690-91, 461 A.2d 1387 (1983), overruled in part on other grounds, *State v. Salmon*, 250 Conn. 147, 154-55, 735 A.2d 333 (1999).

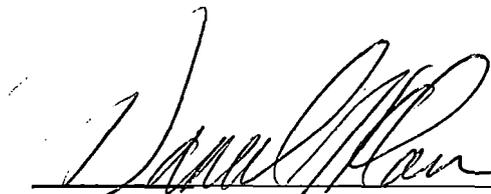
Practice Book § 13-4 (h) authorizes the court to impose a "lesser sanction" than preclusion of the Town's expert. Although the court has concluded that preclusion is too harsh a remedy, the plaintiff acted reasonably in seeking that relief. No doubt the plaintiff incurred significant legal fees and costs in connection with the motion to preclude. The lesser but

appropriate sanction is to require the Town to reimburse the plaintiff for those legal fees and costs.

The plaintiff shall submit an itemized statement of its fees and costs to the Town within fifteen days of the date of this order. The Town shall promptly pay those fees and costs unless it believes they are unreasonable. In that event, the Town shall promptly pay the portion of the fees and costs that it does not dispute and shall file a motion objecting to the portion it believes are unreasonable. Any such motion shall identify the specific time charges and costs that the Town contends are unreasonable. The plaintiff may file a response to the motion. The court will then schedule a hearing and thereafter issue a ruling resolving the dispute.

SO ORDERED.

Dated: April 7, 2021



Daniel J. Klau, Judge