UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

GERRELL MARTIN and CURTIS SAMPSON,	
Plaintiffs,	
vs.	CIVIL ACTION
LEVYLAW, LLC and BART E. LEVY,	No.: 17-1139
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF DAVID DENENBERG

I. INTRODUCTION

Sixteen months ago Plaintiffs filed this Fair Debt Collection Practices Act matter, alleging that Defendants attempted to evict Plaintiffs and their children for money they did not owe, and demanded possession of their property when the law precluded such an outcome. Much has happened since that time. The parties submitted their initial disclosures a year ago. The deadline for fact discovery and expert reports passed in January. Plaintiffs' motion for summary judgment is pending, and the matter continues to progress towards trial. Exhibit lists and proposed stipulations have been exchanged. Pretrial memoranda are due next week, and motions in limine are due two weeks later.

Notwithstanding all of this, Defendants have suddenly disclosed an expert witness they believe should be allowed to testify "regarding the practices and procedures of Philadelphia attorneys who specialize in landlord-tenant matters in Philadelphia Municipal Court." Defendants have not justified their failure to disclose this witness sooner. Moreover, their eleventh hour disclosure seriously harms Plaintiffs' impeding trial preparation and will delay the

case. Finally, even in this late hour, Defendants provide no expert report with this disclosure. To get around *that* failure, they baldy assert their proposed expert, who by all accounts has witnessed nothing in this matter, is a fact witness.

As this Court is aware, Defendants already received a second bite at the apple in discovery, seeking and receiving leave to depose their own attorney, well after the close of discovery, as Plaintiffs filed their motion for summary judgment. *See* ECF. No. 34. Whatever label they seek to apply to their new witness, they should not get a third.

II. FACTS AND PROCEDURAL HISTORY

On March 15, 2017, Plaintiffs filed this action. ECF No. 1. Discovery commenced, and pursuant to the Court's deadlines, ended in January 2018. ECF Nos. 12, 26. Despite the close of discovery, Defendants sought and received leave to depose Paul Troy, their own former attorney. ECF No. 34. However, after a reminder that such testimony might force the piercing of attorney client and work product privileges, Defendants declined to do so. Plaintiffs filed for summary judgment as to liability on March 2, 2018, with the Court hearing argument on May 2, 2018. ECF No. 31. Pretrial memos are due June 27, 2018.

On June 13, 2018, the parties exchanged witness lists. At that time, Defendants' counsel stated the following:

> [P]ease let the following serve as Defendants' Supplement to their Initial Disclosure Numeral I:
>
> f. David H. Denenberg, Esquire
> Abramson & Denenberg, P.C.
> 1315 Walnut Street, Floor 12
> Philadelphia, PA 19107
> (215) 531-5011
>
> Mr. Denenberg possesses information regarding the practices and procedures of Philadelphia attorneys who specialize in landlord-tenant matters in Philadelphia Municipal Court.

We have no objection if you would like to depose Mr. Denenberg.

See Ex. A, Attorney Email Chain at 4.

Given the description of his testimony, Plaintiffs asked whether Defendants intended to have Mr. Denenberg qualified as an expert. *Id*. at 3. Defendants replied they did not, insisting that Mr. Denenberg was a fact witness. *Id*. at 2. Plaintiffs then twice requested a more detailed proffer as to the nature of Mr. Denenberg's testimony. Defendants' entire response was that "Mr. Denenberg will testify concerning the standard procedures utilized by attorneys filing complaints in the Philadelphia Municipal court during the timeframe in question." *Id.* at 1. The parties met and conferred on June 19, 2018, where Defendants did not justify the late submission, and stated that Mr. Denenberg was not an expert because he would not render an opinion. This motion followed.

III. STANDARD OF LAW

Under Rule 26 "a party must . . . provide to the other parties the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses. . . ." Fed. R. Civ. P. 26(a)(i). The rule "obligates a party to supplement the report if it 'learns that in some material respect the information disclosed is incomplete or incorrect.'" *Coal. to Save Our Children v. State Bd. of Educ.*, 90 F.3d 752, 775-76 (3d Cir. 1996) (quoting Fed. R. Civ. P. 26(a)(2)(B) & (e)(1)). "Supplementation must be made 'with special promptness as the trial date approaches.'" *Id.* (quoting Fed. R. Civ. P. 26(e) advisory committee's notes). Finally, with regard to expert witnesses in particular, Rule 26 requires that the party seeking to use an expert provide a written report. Fed. R. Civ. P. 26(a)(2)(B).

Whether a party has failed to disclose a fact witness or failed to produce an expert report, the consequence is the same: When "a party without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) [that party] shall not, unless such failure is harmless, be permitted to use as evidence at trial . . . any witness or information not so disclosed." *Nicholas v. Pa. State Univ.*, 227 F.3d 133, 148 (3d Cir. 2000) (quoting Fed. R. Civ. P. 37(c)). "The non-producing party shoulders the burden of proving substantial justification for its conduct or that the failure to produce was harmless." *Tolerico v. Home Depot*, 205 F.R.D. 169, 175 (M.D. Pa. 2002). While exclusion of testimony is often acknowledged as a harsh outcome, *see, e.g.*, *In re TMI Litig.*, 193 F.3d 613, 721 (3d Cir. 1999), it is "an appropriate sanction for failure to supplement in a timely manner." *Coal. To Save Our Children*, 90 F.3d at 775.

IV. ARGUMENT

a. Denenberg is an Expert Witness, but he has Produced no Report

It is black letter law that a witness may only testify if he "has personal knowledge of the matter." Fed. R. Evid. 601. Expert witnesses, of course, are the exception to this rule. They may testify using their "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. With expert testimony comes the responsibility of a party to file an expert report, Fed. R. Civ. P. 26(a)(2)(B), and a court's role as gatekeeper when that report is challenged, *see, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Denenberg's place in this dichotomy is clear. There is no suggestion that he knows anything about the condition of 1916 Clarence Street during the time the Plaintiffs lived there. Nor has counsel suggested he has knowledge as to the failure of Defendants' clients to timely secure a license or a Certificate of Rental Suitability. Similarly, he had nothing to do with Defendants' decision to file an eviction. In other words, he is not a fact witness.

Rather, despite Defendants' protestation to the contrary, Mr. Denenberg is a proposed expert. Defendants proffer that Mr. Denenberg will use his knowledge and experience to testify "regarding the practices and procedures of Philadelphia attorneys who specialize in landlord-tenant matters in Philadelphia Municipal Court." Ex. , at 4. Using specialized knowledge to testify about practices and procedures is precisely what experts do. *See, e.g.*, *Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, No. 04-5525, 2010 U.S. Dist. LEXIS 144271, at *22 (E.D. Pa. Mar. 31, 2010) (expert testimony about the "practice and procedure . . . on how patent applications are reviewed and examined by" a governmental agency).

That Mr. Denenberg will allegedly not render an opinion, and merely testify to "facts" does not change this calculation. Indeed, the comments to Rule 702 itself caution that such an "assumption is logically unfounded." Fed. R. Evid. R. 702, advisory committee's note; *see also Fisher v. Ciba Specialty Chems. Corp*, No. 03-0566, 2007 U.S. Dist. LEXIS 58392, at *11 (S.D. Ala. Aug. 7, 2007) ("[D]efendants' fixation on 'opinions' and their characterization of Dr. Farber's testimony as not taking the form of opinions distorts the applicable standard."); *Horowitz v. Jacoby Moving & Storage, Inc.*, 99-9798, 2000 U.S. Dist. LEXIS 4785, at *13 (S.D.N.Y. Apr. 14, 2000) ("While plaintiff's counsel claims that Mr. Burns is not an expert because he is testifying to 'facts' not 'opinions,' he is incorrect -- under Rule 702, Burns is an expert."). That is, the Rule is written in terms of "specialized knowledge," and whether or not Denenberg's testimony "is properly couched as an opinion or a recitation of specialized knowledge is not germane to the Rule 702 inquiry." *Fisher*, 2007 U.S. Dist. LEXIS 58392, at *11.

Accordingly, by January 5, 2018, Defendants were required to submit an expert report on behalf of Mr. Denenberg. ECF No. 12. But even at this late hour, they have yet to produce one. In other words, Defendants are not merely five months late. Rather, their noncompliance *is ongoing*.

b. Even were Denenberg a Fact Witness, Defendants Cannot Justify their Failure to Disclose him for a Year

Even were Defendants able to shoehorn Mr. Denenberg in as a fact witness, or even were they suddenly to produce an expert report, they "shoulder[] the burden of proving substantial justification for [their] conduct" or that their longstanding "failure to produce was harmless." *Tolerico*, 205 F.R.D. at 175. Defendants can do neither.

"[D]istrict courts in this circuit have defined 'substantial justification' as 'justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with this disclosure request.'" *Keiser v. Borough of Carlisle*, No. 15-450, 2017 U.S. Dist. LEXIS 148483, at *8-9 (M.D. Pa. Sep. 13, 2017) (quoting *Tolerico*, 205 F.R.D. at 175). Even assuming Mr. Denenberg is a fact witness, Defendants have no provided no justification at all why he went unlisted for almost twelve months. Regardless, there can be no serious argument as to whether they were required to disclose him.

Moreover, their failure is far from harmless. Defendants' late addition will cause innumerable delays in this matter, forcing Plaintiff to not only depose this witness, but also conduct document discovery into his communications and practice, and list additional witnesses, including an expert, to rebut his testimony. That is, instead of preparing for trial, Plaintiffs will be forced to resort to "last-minute scrambling," creating substantial prejudice to them. *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 721 (3d Cir. 1997) (affirming finding of prejudice); *see also Nicholas*, 227 F.3d at 148 (affirming finding of harm where "Defendants

aver that they will have to develop additional rebuttal evidence . . . and prepare witness testimony including possible expert witness testimony"). Accordingly, the only question remaining is whether the sanction of exclusion in particular is the appropriate remedy.

c. Defendants' Failure Warrants Exclusion

In order to determine whether exclusion is appropriate, rather than a remedy such as monetary sanctions, *see* Fed. R. Civ. P. 37(c)(1), courts examine five factors:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified or the excluded evidence would have been offered; (2) the ability of that party to cure the prejudice; (3) the extent to which allowing such witnesses or evidence would disrupt the orderly and efficient trial of the case or of other cases in the court; (4) any bad faith or willfulness in failing to comply with the court's order; and (5) the importance of the excluded evidence.

ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 298 (3d Cir. 2012) (internal quotation marks omitted). While the third factor is a Court-specific consideration, the remaining four favor striking the witness.

First, Plaintiffs are facially prejudiced by the testimony of an expert who has produced no report, preventing them from so much as filing a *Daubert* challenge, let alone adequately preparing for trial. But even were he to provide a report, or even were he actually a fact witness, Plaintiffs will be prejudiced by the admission of Mr. Denenberg at this late hour.

Under the law of this Circuit, "the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy is sufficiently prejudicial." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 222 (3d Cir. 2003). Moreover, prejudice "include[s] the burden that a party must bear when forced to file motions in response to the strategic discovery tactics of an adversary," such as motions to exclude. *Id.* at 223. That is, Plaintiffs are prejudiced if "trying to respond to Defendants' new expert reports will prevent Plaintiffs from properly preparing and responding to motions in limine," as well as diverting their time spent "preparing documents

required by this Court's Trial Order," and from preparing "exhibit and witness lists, voir dire, and jury instructions." *Perez v. Great Wolf Lodge of the Poconos LLC*, No. 12-1322, 2017 U.S. Dist. LEXIS 19251, at *14 (M.D. Pa. Feb. 9, 2017) (excluding witnesses). All that is present here, as the due dates for pretrial memos, voir dire, and jury instructions are fast approaching.

But there is more, for Plaintiffs would not only have to scramble, they would have to conduct additional discovery. Plaintiffs will be forced to develop evidence, make document requests, depose Mr. Denenberg, likely seek leave to redepose Levy, and prepare heretofore unnecessary rebuttal witnesses, including an expert witness. This, too, is sufficiently prejudicial to warrant exclusion. *See Nicholas*, 227 at 148 (affirming finding of harm where "Defendants aver that they will have to develop additional rebuttal evidence . . . and prepare witness testimony including possible expert witness testimony"); *Konstantopoulos*, 112 F.3d at 721; *Allen v. Parkland Sch. Dist.*, 230 F. App'x 189, 195 (3d Cir. 2007) (affirming finding of prejudice when party would have been forced to expend time and resources on new depositions). All of this, from writing reports and conducting investigations, to hiring rebuttal experts and filing *Daubert* challenges, would likely delay this matter by months.

Nor is such prejudice curable. While Defendants have offered to have Mr. Denenberg deposed, this will cause the precise "last-minute scrambling" by Plaintiffs that has caused courts to exclude witnesses, as well as the concomitant "valuable tactical advantage" for Defendants. *Konstantopoulos*, 112 F.3d 710 at 721. The only way to "cure"— more delays and expense—is itself prejudicial to parties who filed this matter sixteen months ago, and are entitled to a trial.

And while Plaintiffs ascribe no bad faith on the part of counsel, Defendants' conduct was at minimum willful, openly disregarding the Rules, along with case management and scheduling orders. *See Coal. to Save Our Children*, 90 F.3d at 775-76 (excluding evidence after party

ignored two scheduling order deadlines). None of this is merely a "slight deviation from pre-trial notice requirements." *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 792 (3d Cir. 1994). Instead it is an ongoing, months long deviation which will cause Plaintiffs to stop trial preparation in its tracks. And this is not the first time. As this Court knows, two months after the close of discovery, Defendants re-opened discovery for a late disclosed witness: their own attorney, never explaining why only after the close of discovery it became apparent that they would need to conduct such a deposition. Regardless, there is no conceivable scenario where at *that point* they did not know that Mr. Denenberg was also an undisclosed fact witness. Yet they said nothing. In other words, the Court is "faced with a pattern of filings that constituted a flagrant violation of pre-trial orders," and exclusion is justified. *In re TMI Litig.*, 193 F.3d 613, 722 (3d Cir. 1999).

The final factor also supports excluding Mr. Denenberg: his testimony is unnecessary and would prejudice the jury with information not critical to Defendants' defense. *See Perez*, 2017 U.S. Dist. LEXIS 19251, at *22-24. Defendants seek to use Mr. Denenberg to "testify concerning the standard procedures utilized by attorneys" in Philadelphia Landlord-Tenant Court. Ex. A at 1. They have not explained how such testimony would be probative, at least as to Defendants' liability. But the answer is that it would not. As Plaintiffs briefed more extensively in their motion for summary judgment, Defendants are being sued because they are debt collectors, pursuant to federal law. The FDCPA does not require intent for liability, and it does not consider whether the debt collector was acting in compliance with industry standards. Instead, it "is a strict liability statute to the extent it imposes liability without proof of an intentional violation" by a debt collector. *Allen v. LaSalle Bank*, 629 F.3d 364, 368 (3d Cir. 2011). And whether the law is violated comes from the perspective of the least sophisticated

consumer, *Brown v. Card Serv. Ctr.*, 464 F.3d 450, 454 (3d Cir. 2006), not through examining whether other debt collectors make the same error.[1] Mr. Denenberg's expert testimony about what other Philadelphia landlord lawyers did at the time does not prove or disprove this case.

Finally, making matters worse, Defendants themselves prevented discovery *into their own past practices*, let alone those of other collection lawyers. In discovery, Plaintiffs propounded eight separate interrogatories about Mr. Levy's conduct in Landlord-Tenant Court, including how often he had filed evictions like this one, with no Certificate of Rental Suitability or Housing License for the period in which he was suing. *See* Defs.' Response to Pls.' Interrogatories, Ex. I, ECF No. 31-6. Defendants objected each time, responding that they would produce only "documents related to Plaintiffs." *Id*. They may not, after shielding much of Levy's practice from scrutiny, seek to use testimony of other collection lawyers to save him.

V. CONCLUSION

Plaintiffs' motion to exclude Mr. Denenberg should be granted.

[1] The exception for the intent requirement is the statute's good faith error affirmative defense. But there, too, the practices of Mr. Levy's fellow attorneys are irrelevant. "FDCPA violations forgivable under § 1692k(c) must result from 'clerical or factual mistakes,' *not mistakes of law*." *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 394 (3d Cir. 2017) (emphasis added). That defense considers the error— filing for rent for periods where Levy's clients had no license, no certificate, or otherwise were not entitled to rent—and whether Mr. Levy's procedures were reasonably tailored attempts to stop those errors. *Id.* That other attorneys filed actions that violated the law in the same way that Levy did—in good faith or bad—does not absolve him of liability under the FDCPA.

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Respectfully submitted,

/s/ Cary L. Flitter

Cary L. Flitter (Bar No. 35047)
Andrew M. Milz (Bar No. 207715)
FLITTER MILZ, P.C.
450 N. Narberth Ave, Suite 101
Narberth, PA 19072
(610) 822-0782
cflitter@consumerslaw.com

/s/ Daniel Urevick-Ackelsberg

Mary M. McKenzie (Bar No. 47434)
Daniel Urevick-Ackelsberg (Bar No. 307758)
George A. Donnelly (Bar No. 321317)
PUBLIC INTEREST LAW CENTER
1709 Benjamin Franklin Parkway, 2nd Floor
Philadelphia, PA 19103
(267) 546-1316
dackelsberg@pubintlaw.org