

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010430

10/10/2012

HONORABLE MICHAEL J. HERROD

CLERK OF THE COURT
M. Sahli
Deputy

FIRST FINANCIAL BANK N A HAMILTON
OHIO

RICHARD H HEROLD JR.

v.

J G W M, L L C, et al.

DANIEL L KLOBERDANZ

COLIN F CAMPBELL

MINUTE ENTRY

The Court has before it, following oral argument, Plaintiff's Motion in Limine to Exclude Evidence of Damages from Breach of the Duty of Good Faith and Fair Dealing and Motion to Reconsider Denial of Summary Judgment on Affirmative Defense No. 3 and Count Four of Counterclaim, Defendant Albert Spector's Response to Motion in Limine to Exclude Evidence of Damages Arising from an Alleged Breach of Good Faith and Fair Dealing Obligations.

The Court also has before it Plaintiff's Motion to Strike and Exclude Defendant Spector's Sixth Supplemental Disclosure Statement, Defendant Albert Spector's Response To Motion to Strike and Exclude Defendant Spector's Sixth Supplemental Disclosure Statement, and Plaintiff's Reply in Support of Motion to Strike and Exclude Defendant Spector's Sixth Supplemental Disclosure Statement.

The Court has not ordered a Response to the Motion to Reconsider, and to the extent it has not already so ordered,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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IT IS ORDERED denying the Motion for Reconsideration.

As to the Motion to Exclude Evidence of Damages from Breach of the Duty of Good Faith and Fair Dealing, Plaintiff argues that Defendant has not disclosed a damage calculation for this alleged breach, despite multiple opportunities to do so in written disclosure and at deposition. Defendant Spector argues that no calculation was available until the appraisal of Mr. Martori for the Fair Market Value determination was available. Defendant does not argue that Mr. Martori expresses an opinion concerning the breach of duty of good faith and fair dealing, but that until that valuation was known, the factors needed to calculate the damages were not available.

As to the Motion to Strike, Plaintiff's argument is similar in that Plaintiff argues that the Sixth Supplemental Disclosure Statement should be stricken because it was disseminated after discovery cut-off. Essentially Plaintiff re-argues the same argument as set forth in the Motion in Limine that Defendant Spector should be precluded from presenting evidence concerning damages from the breach of good faith and fair dealing, and that any disclosure after the discovery cut-off deadline should be stricken.

In analyzing the Motion to Strike, the primary factor in the Court's consideration is whether Plaintiff is prejudiced. No trial date has been set. Mr. Martori's expert report was not available to the parties until somewhat late in the disclosure process. The Court is not convinced that Plaintiff is prejudiced. The Court is convinced from Defendant Spector's oral argument that the damage theory is drawn from disparate data based on a timeline of events, and not on any single piece of evidence or expert report. The determination of damages is a fact issue to be determined on the merits, not an issue to be decided on a procedural motion when there is little prejudice.

As to the Motion in Limine, the Court does not believe that excluding the evidence is the proper remedy for this situation. The ultimate calculation of claimed damages for breach of the duty of good faith and fair dealing were not ascertainable until Mr. Martori's report became available. The failure to disclose a calculation before that time does not appear to have been willful, but because of a lack of data. Therefore,

IT IS ORDERED denying the Motion in Limine to Exclude Evidence of Damages from Breach of the Duty of Good Faith and Fair Dealing.

IT IS FURTHER ORDERED denying the Motion to Strike and Exclude Defendant Spector's Sixth Supplemental Disclosure Statement.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010430

10/10/2012

IT IS FURTHER ORDERED that Defendant Spector shall serve a final Supplemental Rule 26.1 Disclosure Statement fully disclosing Defendant Spector's damage theory and calculation for the alleged breach of the duty of good faith and fair dealing.

IT IS FURTHER ORDERED that Plaintiff may seek leave of the Court to engage in additional discovery based on the final Supplemental Rule 26.1 Disclosure served by Defendant Spector.

The Court notes that, depending on the nature of discovery requested, if any, the Court may consider other sanctions against Defendant Spector such as costs of further discovery.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.