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**J.P. Carey Enterprises ORDER GRANTING DEFENDANT
CUENTAS'S MOTION TO STRIKE**

Kelly Lee Ellerbee
Fulton County Superior Court Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

J.P. CAREY ENTERPRISES, INC.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	FILE NO. 2018CV314324
v.	:	
	:	
CUENTAS, INC. f/k/a NEXT GROUP	:	
HOLDINGS, INC.,	:	Business Case Division 3
	:	
Defendant.	:	
	:	

ORDER GRANTING DEFENDANT CUENTAS'S MOTION TO STRIKE

This matter comes before the Court on Defendant Cuentas's Motion to Strike Plaintiff JP Carey's Late Expert Affidavit of John F. Coyle, filed May 5, 2020 ("Motion"). Having reviewed the record and considered the arguments and submissions of counsel, the Court enters the following order.

1. STANDARD OF REVIEW

The present dispute concerns whether late-disclosed expert evidence should be excluded. Trial courts hearing civil matters generally "possess broad discretion . . . to control the sequence and timing of discovery, see O.C.G.A. § 9-11-26(d), and to establish pretrial procedure, see O.C.G.A. § 9-11-16(a)(5)." (Citation and punctuation omitted.) Rivera v. Washington, 298 Ga. 770, 777-778 (2016). However, while a trial court has wide latitude to enter scheduling orders, when

enforcing such orders, “a trial court can abuse its discretion by imposing a sanction that is too harsh under the circumstances of the case.” Lee v. Smith, 307 Ga. 815, 821 (2020). Lee establishes four factors for a trial court to consider when evaluating if to exclude a late-identified witness. They are:

- (1) the explanation for the failure to disclose the witness,
- (2) the importance of the testimony,
- (3) the prejudice to the opposing party if the witness is allowed to testify, and
- (4) whether a less harsh remedy than the exclusion of the witness would be sufficient to ameliorate the prejudice and vindicate the trial court’s authority.

Id. at 824. Lee reasoned analyzing these factors would allow a trial court “to properly balance the circumstances surrounding a party’s failure to comply” with court-imposed deadlines against a “trial court’s need to fashion an appropriate remedy” for such non-compliance. Id. Here, the parties agree that Lee sets forth the governing authority for this Motion.

2. BACKGROUND

Plaintiff JP Carey Enterprises, Inc. (“JP Carey”) filed this action in the Fulton County Superior Court on December 14, 2018 seeking to recover on a convertible promissory note (“Note”) from Defendant Cuentas, Inc. f/k/a Next Group Holdings, Inc. (“Cuentas”).¹ During discovery, Cuentas propounded interrogatories expressly

¹ JP Carey originally initiated this action in Florida on December 20, 2017, and it was subsequently dismissed in October of 2018. (Motion. Ex. 1). In Paragraph 14 of the Note, the parties selected Fulton County as the forum for resolving disputes related to the Note.

requesting JP Carey to identify any expert it intended to call and specify certain information regarding that expert's opinion. On September 25, 2019, JP Carey responded "[i]t has not yet selected a testifying expert witness. [JP Carey] will amend its response as required by Georgia law." (Motion, Ex. 2, Interrogatory Response Nos. 10-11). Pursuant to the initial Scheduling Order, all fact and expert discovery ended on October 15, 2019. (Scheduling Order, entered June 21, 2019). At the joint request of the parties, the Scheduling Order was amended to extend document production and depositions through November 22, 2019 and the deadline to file Daubert and dispositive motions through January 24, 2020. (Order Modifying Scheduling Order, entered November 15, 2019).

On January 24, 2020, the parties filed cross motions for summary judgment. As part of its motion for summary judgment, Cuentas argued the Note's remedial provisions were legally unenforceable. On January 31, 2020, JP Carey first contacted Professor John F. Coyle, a professor at the University of North Carolina School of Law, who has authored several academic articles on convertible notes like the one at issue. (Response, p. 4; Coyle Affidavit, ¶¶ 2-3). JP Carey formally retained Professor Coyle on February 24, 2020. (Response, p. 4). He executed his 58-paragraph expert affidavit ("Affidavit") on March 2, 2020. However, JP Carey did not promptly supplement its discovery responses to identify Professor Coyle.

Cuentas first learned of his identification and opinion on April 27, 2020 when JP Carey attached the Affidavit to its Motion for Leave to File Reply Brief.

On the morning of May 5, 2020, Cuentas filed the present Motion seeking to strike the Affidavit based upon the belated identification of the expert. JP Carey asserts that it did supplement its interrogatory responses regarding Professor Coyle's retention as an expert, but does not supply the date on which the supplementation was made. (Response, p. 4). The Court assumes it was done shortly after this Motion was filed, as reflected in a Rule 5.2 Certificate of Service, filed on the afternoon of May 5, 2020. This matter was transferred to the Business Case Division on June 23, 2020. An order permitting JP Carey to file its reply brief in further support of its motion for summary judgment was entered on June 26, 2020; however, the issue regarding this Motion to strike the Affidavit was reserved.

3. LEGAL CONCLUSIONS

As to the first factor of the Lee analysis, the explanation for the late identification, JP Carey claims it always considered the case to be a basic dispute regarding breach of a note. It asserts the need for expert evidence, "did not fully crystallize" until January 24, 2020 when Cuentas sought summary judgment, arguing the Note's remedial provisions were unenforceable under Georgia's liquidated damages law. (Response, p. 6). However, JP Carey vaguely acknowledges it earlier learned of this unenforceability argument during settlement

negotiations with Cuentas that occurred at some prior, unspecified time. (JP Carey's Response, fn. 1). Further, JP Carey retained Professor Coyle on February 24, 2020. His lengthy Affidavit was prepared and then executed within a week. However, JP Carey did not inform Cuentas of this expert witness or his opinion for the following eight weeks, until April 27, 2020 when JP Carey filed a pleading on the record.² Reviewing this chronology, the Court finds JP Carey's explanation for delay in disclosing Professor Coyle is unsatisfactory. Indeed, the delay suggests it may have been the result of litigation tactics, motivated by the desire to surprise Cuentas with this expert witness and/or delay resolution of the pending summary judgment motions.

The second factor of the Lee analysis focuses on the import of the evidence offered by the late-identified witness. Longstanding Georgia law establishes a three-part test for determining whether a contract provision allows for recoverable liquidated damages or unenforceable penalty damages. Southeastern Land Fund, Inc. v. Real Estate World, Inc., 237 Ga. 227, 230 (1976) see also West Asset Mgmt. Inc. v. NW Parkway, LLC, 336 Ga. App. 775 (2016). The Affidavit mainly

² The Court rejects any suggestion the Covid 19 pandemic may have caused this delay. (Response, pp. 5-6). As outlined above, JP Carey was working with Professor Coyle throughout February 2020 and retained him at the end of that month. His lengthy Affidavit was executed on March 2, 2020. This Court entered an Order Declaring a Judicial Emergency on March 13, 2020. The Georgia Supreme Court entered its initial Order Declaring Statewide Judicial Emergency on March 14, 2020. Thus, the Court finds that JP Carey was aware of its expert's identity for approximately three weeks and his specific opinion for approximately two weeks before these emergency orders were entered or either of their deadline tolling provisions took effect.

addresses the third part of the test, whether the Note's damage provisions contain "a reasonable effort to pre-estimate damages." (Coyle Aff. ¶¶ 6, 16, 58). Professor Coyle's Affidavit also offers legal opinions that the second requirement of the test has been met. (Coyle Aff., ¶¶ 6, 16, 34-35, 40, 49, 50, 55, 58). The Court would not consider his legal opinions as part of its summary judgment analysis.³ The remainder of the Affidavit does contain some useful background distinguishing convertible notes from more standard promissory notes; however, the Court agrees with Cuentas that much of the Affidavit offers legal argument "dressed up" in the guise of expert testimony. (Motion, p. 5). Professor Coyle's final opinion that the Note contains a reasonable pre-estimate of damages is buttressed by "a review of the relevant academic literature" and specific cites to several scholarly articles. (Coyle Aff., ¶¶ 36-39). As for the background information and legal survey contained within the Affidavit, the Court finds it could be presented ably by a lawyer through pleadings and argument, without the need for expert testimony. Therefore, the Court determines that the information found in the Affidavit, while useful, is not of significant import.

³ In reviewing the denial of a motion for summary judgment, the Georgia Court of Appeals found it necessary to clarify the scope of its review of an expert affidavit. "To be clear, we do not rely on the expert's testimony to the extent that the expert offers conclusions as to the legal questions raised by the case but merely to the extent that the expert offers opinions" on industry standards. Miller v. Turner Broadcasting System, Inc., 339 Ga. App. 638, fn. 9 (2016). This Court now offers a similar clarification.

The third factor of the Lee analysis requires the Court to consider the prejudice to the opposing party if the late-identified witness were allowed to testify. JP Carey proposes to remedy any prejudice by allowing Cuentas to take the deposition of Professor Coyle, but this solution creates a cascade of new deadlines seeking merely to even the playing field established by the Court's prior scheduling orders. After taking Professor Coyle's deposition, Cuentas would need the opportunity to identify its own expert that JP Carey would then need to depose. This would necessitate a new deadline for the parties to file Daubert motions. Also, the opportunity for additional briefing on the pending summary judgment motions would likely be required. Additionally, allowing this late-identified witness would not only expand the litigation and further delay consideration of the motions for summary judgment, it would be fundamentally prejudicial for the Defendant to re-calculate its defenses and litigation strategy after it has already filed its motion for summary judgment.

In considering the final factor of the Lee analysis, the Court is not convinced that a "less harsh remedy than the exclusion of the witness would be sufficient to ameliorate the prejudice and vindicate the trial court's authority." Lee at 824. Based upon the trial court's determination that this expert evidence is more in the nature of legal argument, capable of being presented by a lawyer without the need for expert testimony, and the unsatisfactory reasons offered for the delayed disclosure, the

Court does not find the end result of excluding the late-identified expert to be unnecessarily harsh.

Moreover, this particular record reflects vindication of the Court's scheduling authority is a worthy objective.⁴ JP Carey learned of the enforceability issue during settlement discussions and has not been forthright as to precisely when those discussions occurred. Thus, the Court is not convinced that JP Carey was surprised by the defense when it was raised in Cuentas's motion for summary judgment. Additionally, JP Carey has not offered a wholly satisfactory explanation for its delay in identifying Professor Coyle. The Court does not want to encourage gamesmanship in the discovery and motions phase of a complex business case. One party, through oversight or choice, should not be allowed to consider the other party's best argument completely outlined in a motion for summary judgment, then scramble to offer a response that will necessarily spark a whole new set of discovery and briefing deadlines for both parties. This approach not only serves to unnecessarily prolong the litigation and increase legal expense, it hamstring the compliant opposing party at a late stage in the case where the prejudice is difficult to remedy.

⁴ The Court further notes in light of the Covid 19 pandemic and the corresponding judicial emergency orders, this Court expects to be facing a tremendous backlog of cases, both civil and criminal. With this pressing problem, the need for attorneys to be attentive to and respectful of the Court's scheduling deadlines cannot be overemphasized. This consideration also plays into the Court's analysis with regard to the third and fourth Lee factors.

For all of the above-stated reasons, it is hereby ordered that the Motion is **GRANTED**, the Affidavit is **STRICKEN**, and Cuentas's request for attorney's fees is **RESERVED**.

SO ORDERED this 2nd day of September, 2020.


The Honorable Kelly Lee Ellerbe, Judge
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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