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AHS Residential, LLC., Order on Defendants' Motion to Exclude Opinions of Plaintiff's Expert Witness Ian Ratner and Plaintiff AHS Residential LLC's Motion to Limit the Testimony

Kelly L. Ellerbe
Judge, Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

AHS RESIDENTIAL, LLC, Plaintiff, v. ASSEMBLY ATLANTA, LLC f/k/a PEARL RAILROAD ASSEMBLY YARD, LLC, JOHN H. GIPSON, JR., THE GIPSON COMPANY, and DORAVILLE SIXTY, LLC, Defendants.	)	Civil Action File No. 2021CV352466

ORDER ON DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF PLAINTIFF'S EXPERT WITNESS IAN RATNER AND PLAINTIFF AHS RESIDENTIAL, LLC'S MOTION TO LIMIT THE TESTIMONY OF ERIC SUSSMAN

This matter comes before the Court on Assembly Atlanta, LLC f/k/a Pearl Railroad Assembly Yard, LLC's, John H. Gipson, Jr.'s, The Gipson Company's and Doraville Sixty, LLC's ("D60's") (collectively the "Defendants")[1] Motion to Exclude Opinions of Plaintiff's Expert Witness Ian Ratner, filed May 20, 2022

[1] In its Order on Motions for Summary Judgment, entered contemporaneously herewith, D60 was granted summary judgment on all claims. Consequently, as to D60, these motions, which address the admissibility of certain evidence on damages, are moot.

("Ratner Motion") and Plaintiff AHS Residential, LLC's Motion to Limit the Testimony of Eric Sussman, filed May 20, 2022 ("Sussman Motion").

These two motions seek to exclude the opinion evidence offered by Plaintiff's damages expert Ian Ratner and limit the opinion evidence of Defendants' damages rebuttal expert Eric Sussman. Having reviewed the record, considered the submissions of counsel, and heard argument during a November 1, 2022 hearing, the Court enters the following order.[2]

1. BACKGROUND

In its Order on Motions for Summary Judgment, entered contemporaneously herewith, the Court provides a comprehensive review of the facts underlying this

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[2] With regard to the Ratner Motion:

- AHS filed its brief in opposition together with a supporting Appendix of Exhibits 1-11 ("AHS's Ratner Appx.") on June 21, 2022.
- Defendants filed their reply brief in support of the Ratner Motion on July 21, 2022.
- Defendants filed their Appendix of Exhibits (1-17) on June 21, 2022 and an Appendix of Exhibits (18-26) for their reply brief on July 21, 2022 (collectively "Defs.' Ratner Appx.")

With regard to the Sussman Motion:

- In support of its Sussman Motion, AHS filed Exhibits 1-13 on May 20, 2022.
- AHS filed Defendants filed their brief in opposition to the Sussman Motion together with a Joint Appendix of Exhibits (1-17) for Defendants' Response in Opposition to the Sussman Motion ("Defs.' Sussman Appx.") on June 21, 2022.
- AHS filed its reply in support of the Sussman Motion on July 21, 2022.

All parties were allowed to manually file unredacted portions of certain aforementioned pleadings and evidence under seal. (See AHS Not. of Filing under Seal, filed May 27, 2022 (AHS's brief and certain exhibits offered in support of the Sussman Motion); Defs.' Not. of Filing Conf. Docs. under Seal, filed May 27, 2022 (Defendants' brief and certain exhibits offered in support of the Ratner Motion); AHS's Notices of Filing under Seal, filed Nov. 4, 2022 (AHS's brief and certain exhibits offered in opposition to the Ratner Motion and AHS's reply brief in support of its Sussman Motion); Defs.' Not. of Manually Filing Materials under Seal, filed Nov. 4, 2022 (Defs.' brief and exhibits offered in opposition to the Sussman Motion).)

The reports outlining Ratner's opinion ("Ratner Report") and Sussman's opinion ("Sussman Report") are found at Exhibits 1 and 2, respectively to AHS's Sussman Motion.

dispute which it incorporates herein. However, some additional background is necessary to understand the issues raised by the Ratner Motion and the Sussman Motion.

1.1 AHS History

AHS was founded in 2012 and developed its initial projects in Florida. (AHS Ratner Appx. Ex. 4 (Fernandez Aff.) ¶¶ 4, 16.) In 2018, it made the decision to expand into other markets and first began considering the Atlanta area. (AHS SMF ¶ 5; Defs.' Resp. to AHS SMF ¶ 5.) In late 2019, AHS and D60 began negotiating a transaction that would eventually lead to the May 2020 Purchase and Sale Agreement with D60 ("PSA"). (Id. ¶¶ 6-7; Defs.' Resp. to AHS SMF ¶¶ 6-7.)

In Ratner's Report, he noted in March of 2020 -- as AHS and D60 were negotiating the PSA -- AHS had completed five projects, had four projects under construction, and five projects in the development stage. (Ratner Rep. ¶ 38.) However, he further noted that since that time, AHS experienced tremendous growth exceeding its own projections. Specifically, Ratner stated, "[p]er its growth plan known has *Plan 5000*, AHS sought to construct 5,000 units per year by 2025. AHS was set to meet or exceed the *Plan 5000* by 2022, years ahead of schedule and thus has since raised its growth goals . . ." (Id. ¶ 39.) Evidence in the record confirms the growth AHS recently experienced. (AHS Ratner Appx. Ex. 2 (Lopes. Dep.) 103-106.) At the time of the briefing on these motions, AHS had "successfully completed

15 multi-family housing developments in the United States." (Id. Ex. 4 (Fernandez Aff. ¶ 16.) AHS has never failed to complete a project. (Id. Ex. 2 (Lopes Dep.) 113.)

1.2 AHS's Building Practices, Finances, and Decision-Making Process

AHS is a fully integrated apartment development company that develops, constructs and manages its apartment communities in-house. (Ratner Rep. ¶¶ 35, 40.) AHS uses the same concrete building core in all of its projects. While the exterior, decorative features of a building's façade may change – brick, stone, stucco -- the prefabricated core remains constant. (AHS Ratner Appx. Ex. 2 (Lopes Dep.) 62.) As AHS's CEO, Ernesto Lopes, testified, "[AHS] build[s] the same product over and over and over." (Defs. Ratner Appx. Ex. 6 (Lopes Dep.) 111.) Ratner noted, "this system yields uniformity of design, permitting and shorter construction cycles." (Ratner Rep. ¶ 43.)

With regard to AHS's investment decisions generally and specifically in regard to the Assembly Yards project, an AHS official has averred:

> [f]or each of its multi-family housing developments, AHS builds a financial model, referred to as a pro forma, projecting, among other things, the revenues, costs, and ultimate profits AHS expects to achieve on the property, including from operating revenue, refinancing, property management, and ultimately sale of the property.
>
> Following that practice, AHS built a pro forma for the Assembly Yards development, which reflected the projected revenues, costs, and expected profits from the project. These projected costs included the

> estimated costs of construction, which were based in part on AHS's construction costs from building multi-family housing developments in other locations.

(AHS Ratner Appx. Ex. 4 (Fernandez Aff.) ¶¶ 23-24.)

AHS uses two thresholds for making investment decisions on its developments: (1) a 7% yield on cost and (2) a 15% internal rate of return ("IRR"). (Defs.' Ratner Appx. Ex. 6 (Lopes Dep.) 120-121; Ex. 16 (Gonzalez Dep.) 215-216.)

1.3 Lotus Grove and AHS's other Projects after the Assembly Yards

Before entering into the PSA with D60, AHS was considering whether to pursue an opportunity at Lotus Grove, a development not far from the Assembly Yards. Lopes testified, with the money available "at that time, it didn't make sense for us – to build all these units at one time in one neighborhood," so AHS decided to pursue the Assembly Yards project rather than Lotus Grove. (Defs.' Ratner Appx. Ex. 6 (Lopes Dep.) 75.) After this dispute about the Assembly Yards project arose, AHS re-visited the opportunity. In 2022, it entered into a contract to develop multi-family housing at the Lotus Grove project. (AHS Ratner Appx. Ex. 4 (Fernandez Aff.) ¶ 20.) At the time of briefing on these motions, that contract had yet to close. (Id.)

Based on AHS's recent growth, Lopes testified the either/or decision about Lotus Grove and the Assembly Yards that existed around 2019 was no longer a concern. (Defs.' Ratner Appx. Ex. 6 (Lopes Dep.) 75.) He indicated AHS would

now be pursuing the opportunity at Lotus Grove even if the Assembly Yards project had not been halted. (Id.)

During his February 2022 deposition, Lopes was asked how much of the equity it had initially earmarked for the Assembly Yards deal had been diverted to other projects. (Defs.' Sussman Appx. Ex. 18 (Lopes Dep.) 329.) He responded, "[w]ell right now, it's probably all diverted to other deals. . . ." (Id.) He further testified that the diversion began after this litigation commenced, but it did not happen all at once. "It took us a while. We have to go out, look for new property, start buying new ones. We don't do that overnight . . . And even the ones I'm buying today, I'm only going to deliver it four years from now." (Id.)

2. EXPERT OPINIONS

To arrive at his opinion in this case, Ratner led a team that created "a comprehensive development model . . . to estimate costs, project revenues and calculate the overall profitability" of the multi-family housing development AHS planned to build on the Parcels. (Ratner Rep. ¶ 70.) The model "includes construction costs, financing assumptions, rental and absorption rates, and operating expense assumptions that forecast the profitability and cash flows from the Development." (Id.) This model, which uses a discounted cash flow ("DCF") methodology, includes analyses "customarily used in the real estate industry to evaluate developments of all types, including multi-family developments." (Id. ¶¶

70, 80.) Ratner and his team also validated the "reasonableness of the assumptions and projections" in this model through a variety of sources, such as their experience, market data, and contemporaneous models AHS built to project its profits for the project. (Id. ¶¶ 72, 78 and Appendix IV.)

Ratner ultimately opines that, assuming liability, on March 31, 2021, AHS incurred over $57 million in lost profits and almost $7.6 million in lost fee income from its inability to proceed with the Assembly Yards project. (Id. ¶¶ 92-93.) To reach those conclusions, Ratner discounted the future expected cash flows of the project to arrive at a net present value. (Id. ¶¶ 60–62.) To that end, Ratner selected a 6.5% discount rate, which was comparable to the 7% rate AHS used in its own model and which Ratner deemed appropriate based on a variety of factors and market data. (Id. ¶¶ 81–85.)

Defendants responded to Ratner's Report with a rebuttal report from Sussman. Like Ratner, Sussman employed a DCF valuation model for AHS's project at the Assembly Yards. (Sussman Rep. ¶ 52.) Like Ratner, he found this was the most appropriate way to consider potential damages. He opined, "the value of a real estate project is equal to the present value of the expected cash flows that will be generated by the project. The most widely used and commonly accepted way to compute the present value of expected cash flows is through a [DCF] valuation model." (Id.)

Among his other opinions, Sussman concluded that Ratner failed to properly consider other profitable projects where AHS did or could have redeployed the capital it planned to invest in the Assembly Yards and offset those mitigating profits in reaching his damage opinions. (Id. ¶¶ 4, 70-73.) Sussman further opined Ratner applied an unsupported discount rate which served to improperly inflate AHS's damages. (Id. ¶¶ 4, 85-94.) Sussman outlined the various factors upon which he criticizes the discount rate selected by Ratner and what led him to choose the higher discount rate of 15%. (Id.)

These motions followed.

3. STANDARD OF REVIEW

O.C.G.A. § 24-7-702 governs the admissibility of expert testimony. Under O.C.G.A. § 24-7-702(b), an expert may offer opinion testimony as to his "scientific, technical, or other specialized knowledge" if such opinions "will help the trier of fact to understand the evidence or to determine a fact in issue" and if: (a) the testimony is based upon sufficient facts or data; (b) the testimony is the product of reliable principles and methods, and (c) the expert has reliably applied the principles and methods to the facts of the case.[3]

[3] The Court notes the qualifications of Ratner and Sussman to offer an expert opinion in this dispute have not been challenged.

This test aligns with federal law, and the statute expressly permits a court to consider federal precedents. O.C.G.A. § 24-7-702(f).[4]

"As for relevance, the trial court must consider the 'fit' between the expert testimony and the issues in dispute." Scapa Dryer Fabrics, Inc. v. Knight, 299 Ga. 286, 290 (2016) (addressing expert testimony under former O.C.G.A. ¶ 24-9-67.1)

Questions as to the weight and credibility to be afforded otherwise admissible testimony is not within the purview of a trial court when considering a Daubert motion. In the recent matter of Fireman's Fund Ins. Co. v. Holder Const. Grp., 362 Ga. App. 367, 372 (2022), the Georgia Court of Appeals explained how expert opinion evidence should be assessed:

> it is not the role of the trial court to make ultimate conclusions as to the persuasiveness of the proffered evidence. Indeed, a trial court's gatekeeper role under Daubert is not intended to supplant the adversary system or the role of the jury. Quite the contrary, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. (citation and punctuation omitted.)

The party seeking to rely on expert testimony bears the burden of proving it complies with O.C.G.A. § 24-7-702. Butler v. Union Carbide Corp., 310 Ga. App.

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[4] O.C.G.A. § 24-7-702(f) states, "in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."

21, 26 (2011)(addressing expert testimony under former O.C.G.A. ¶ 24-9-67.1 and applying federal authorities construing Daubert).

A trial court's determinations under O.C.G.A. § 24-7-702 are reviewed for an abuse of discretion. Fireman's Fund Ins. Co. at 371.

4. ISSUES CONCERNING THE MITIGATION OF DAMAGES

Issues regarding damage mitigation appear in both of these Daubert motions.

4.1 Georgia Law on the Mitigation of Damages

Mitigation is an affirmative defense under Georgia law.[5] However, the designation of mitigation as an affirmative defense appears to be founded in caselaw as it is not among the affirmative defenses expressly enumerated in O.C.G.A. § 9-11-8(c). Here, Defendants have pled no mitigation defense. (D60 Ans. at Defenses; Assem. Atl. Defs.' Ans. to AHS's Sec. Am. Compl. at 26-29.)

While Georgia law imposes a duty upon an injured party to mitigate their damages, the burden falls upon the opposing party to prove how the damages could be lessened "and such proof must include sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated." (citation and punctuation omitted.) Moreland Auto Stop, Inc. v. TSC Leasing Corp., 216 Ga. App. 438, 440 (1995). In Alston & Bird, LLP v. Mellon Ventures, II, L.P., 307 Ga.

[5] See North Walhalla Props., LLC v. Kennestone Gates Condo. Assn., Inc., 358 Ga. App. 272, 276 (2021)(failure to mitigate damages is an affirmative defense); Sam Finley, Inc. v. Barnes, 147 Ga. App. 432, 432 (1978) ("defendant carries the burden to establish the existence of his affirmative defense[] of ...mitigation of damages.").

App. 640, 644 (2010), the Court of Appeals affirmed the grant of summary judgment against defendants' affirmative defense of mitigation of damages where defendant,

> failed to present any evidence that the [plaintiffs] did not mitigate their damages as far as practicable by the use of ordinary care and diligence; failed to present evidence of the amount by which the damages could have been mitigated; failed to present evidence that reasonable mitigatory options existed in fact and not merely in theory and failed to present evidence that [plaintiffs] could have avoided or lessened their damages without undue risk, burden or humiliation.

In this matter, pursuant to the Court's Third Amended Case Management Order, expert discovery deadlines were established based upon those issues "for which the party bears the burden of proof." (3rd CMO § 8.E.) Defendants apparently identified no expert witness to offer evidence on mitigation. Instead, Defendants and their rebuttal expert both contend AHS's expert did not adequately consider mitigation issues.

In a Daubert motion, the party seeking to rely on evidence bears the burden of demonstrating its admissibility. Butler at 26. Thus, Defendants' use of a Daubert motion to exclude Ratner's testimony, effectively shifts the burden of proof on this issue to Plaintiff. The burden-shifting question raised by Defendants' Daubert motion is only highlighted by the fact that Defendants did not raise mitigation as an affirmative defense and thereby put AHS on notice that it considered AHS's efforts at mitigation would be an issue. See generally Georgia Power Co. v. Brandreth Farms, LLC, No. A22A0165, n.15 (Ga. Ct. App., June 24, 2022) ("The purpose of

the requirement that affirmative defenses be pleaded is to prevent surprise and to give the opposing party fair notice of what he must meet as a defense.")[6]

In light of the foregoing, the Court finds the Defendants bear the burden of proving the mitigation defense, and the Court rejects Defendants' attempt to exclude Ratner's testimony based on his purported failure to consider mitigation.

4.2 AICPA Aid

In a footnote to Ratner's Report, he cites to an AICPA Forensic & Valuation Services Practice Aid Regarding Lost Profits ("AICPA Aid") introductory paragraph as recognizing lost profits as a form of compensatory damages and generally defining how they are measured. (Ratner Rep. n. 58.)[7] In rebutting Ratner's opinion, Sussman faulted Ratner for not following the AICPA Aid's directives regarding mitigating lost profit damages. (Defs.' Resp. to Sussman Mot. 9.) Before evaluating this argument, the Court finds an overview of the AICPA Aid's provisions on mitigation is illuminating.

In its introduction to a chapter on "Lost Profits as a Measure of Damages," the AICPA Aid offers a general statement that, "[l]lost profits damages are typically measured as but-for profits less actual and mitigating profits . . ." (AICPA Aid 19.)

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[6] When a party fails to raise an affirmative defense, Georgia Power Co. further states, "[i]it is generally held that the defense is waived, but if it is raised by motion, or by special plea in connection with the answer or by motion for summary judgment there is no waiver." Id. at n. 15.

[7] AICPA is an acronym for the Association of International Certified Public Accountants. The entire AICPA Aid is Exhibit 7 to AHS's Sussman Motion.

As part of that same chapter, the AICPA Aid outlines the first two steps for calculating these types of damages as: (1) calculating the "but-for profits" that would have been earned absent the wrongful conduct and (2) subtracting the actual profits earned. (Id. 20.) However, the AICPA Aid cautions, this second step "can be complicated by the issue of *mitigation* . . . which is an obligation that a plaintiff often has to maximize profits in the actual or impaired world," despite the defendant's alleged misconduct (emphasis in original). (Id. 20.) The AICPA Aid offers a short example which both parties noted in this briefing regarding a restaurant franchisee who, due to a defendant's alleged misconduct,

> was unable to open a restaurant in a specific location but could have opened a restaurant in another location (potentially after a delay or with lower profits), the actual or mitigating world may call for the assumption of [the franchisee] mitigating in a reasonable way (for example, opening an alternative restaurant.)

(Id.)

The AICPA Aid's Chapter 4 "Calculation of Lost Profits" outlines two general models for calculating lost profits.

> 1. Calculation of net incremental revenues lost, offset by net incremental costs avoided. In this model, the net incremental revenue that would have been realized **but for** the unlawful act is calculated and then reduced by related net incremental costs avoided . . . .
>
> 2. Calculation of but-for profits, net of actual or mitigating profits realized. In this model, the net profits that would have been achieved **but for** the unlawful act are calculated and then offset

> by the actual or mitigating profits (or increased by the actual losses) following the unlawful act . . . . (emphasis supplied.)

(Id. 24.)

In the chapter the AICPA Aid devotes to mitigation, it states, "[a]s a general matter, for the mitigation doctrine to be applied, the defendant must plead mitigation as an affirmative defense and successfully demonstrate that the plaintiff could have reduced damages by mitigation efforts." (Id. 69.)

5. ANALYSIS

5.1 Defendants' Motion to Exclude Opinion Testimony of Ratner

First, Defendants contend Ratner incorrectly applied the damages methodology he purported to use which Defendants claim is the aforementioned second model in the AICPA Aid. Second, they complain his opinion does not "fit" the legal framework for Georgia law on lost profits. Third, they argue Ratner ignored certain facts and did not base his opinions on sufficient facts or data, rendering his opinion unreliable.

5.1.1 Failure to Offset Lost Profits with Mitigating Profits

Defendants contend Ratner relied on the second model of the AICPA Aid in calculating AHS's lost profits. Defendants argue Ratner's opinion should be excluded based on his failure to correctly apply the second step of this model when he neglected to offset AHS's lost profit damages with any mitigating future profits.

See Smith v. CSX Transp., Inc., 343 Ga. App. 508, 513 ("An expert must do more than just state that [he] is applying a respected methodology; [he] must follow through with it.") (Defs.' Ratner Mot. 5-8; AICPA Aid 24.)

Defendants initially took issue with Ratner's failure to consider the mitigating profits AHS may earn from Lotus Grove. (Ratner Mot. 6-7.) They focused on evidence that AHS considered the projects at the Assembly Yards and Lotus Grove to be an "either/or" proposition. (Id.; Defs.' Ratner Appx. Ex. 6 (Lopes Dep.) 75-76.) In their reply brief, Defendants expand their argument. Defendants claim Ratner failed to consider profits at alternate projects where AHS re-directed the funds it previously earmarked for the Assembly Yards. (Defs. Reply ISO Ratner Mot. 9.)

Simply put, the Defendants raised no mitigation affirmative defense. For the reasons stated in section 4.1 above, and because the AICPA Aid expressly states, "[a]s a general matter, for the mitigation doctrine to be applied, the defendant must plead mitigation as an affirmative defense," the Court rejects Defendants' claim that Ratner failed to correctly apply the methodology he purportedly adopted. (D60 Ans. at Defenses; Assem. Atl. Defs.' Ans. to AHS's Sec. Am. Compl. at 26-29.)

5.1.2 Ratner's Testimony does not "Fit" with the Facts or the Framework of Georgia Damages Law

Defendants contend, based on a variety of defects, Ratner's opinions do not "fit" Georgia's framework for the recovery of lost profits. Scapa Dryer Fabrics at

290 (Ratner Mot. 8-12.) They claim that Georgia law, not just the AICPA Aid, requires a plaintiff to offset its claimed damages with profits it earned through alternate investments. (Id. 10-11.) This argument fails to consider the authority, referenced above, that Defendants bear the burden of proving both how and how much the injured party could have lessened their damages. Moreland Auto Shop at 440.

Further, as part of their "fit" argument, Defendants contend Ratner did not appropriately consider "how AHS, as a relatively new and inexperienced company" -- that "had only started to venture out of Florida" -- had the requisite "track record" necessary to seek lost profits. (Id. 9.) See EZ Green Assocs. V. Ga-Pacific Corp., 331 Ga. App. 183, 187-188 (2015) ("generally speaking, lost profits may be recovered by a business only if the business has a proven track record of profitability.") While AHS was a young company, it was not a complete novice. At the time of the alleged wrongdoing in March of 2021, AHS had completed 15 multi-family housing units. (AHS Ratner Appx. Ex. 4 (Fernandez Aff.) ¶ 22.)

Defendants also take issue with Ratner's assessment of the timetable by which various milestones of the Assembly Yards project would have occurred. Defendants contend Ratner assumes milestones that are inconsistent with and much faster than AHS's historical record. (Defs.' Ratner Mot. 11-12.) The only specific criticism Defendants raise about Ratner's timeline is that AHS would have acquired the Phase

I Parcel by August 31, 2021 and commenced construction two months later by October 31, 2021 which Defendants claim is unduly ambitious. (Id.) However, Ratner testified the long pre-construction period experienced with the PSA rendered this estimate a sound one.[8]

These arguments about AHS's track record and the speed with which AHS could have commenced construction at the Assembly Yards site take issue with the way in which Ratner chose to weigh certain facts which led him to make certain assumptions. These arguments do not address the reliability or admissibility of Ratner's opinion but instead they go to its credibility. Accordingly, these issues should be resolved by a jury.

5.1.3 Ratner's Failure to Consider Facts of Record

In addition to the above, Defendants also ask the Court to exclude Ratner's expert opinions for failure to consider certain other facts.

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[8] In responding to Defendants' suggestion he did not thoroughly compare and contrast AHS's other projects in setting this aspect of his timeline, Ratner responded,

> The question is, is it reasonable to assume that [AHS] would have started construction on October 31, 2021, and based on the amount of work that had been done prior to August 31, 2021, it's reasonable because you have, think about it, you have all of 2020, so you have 12 months, plus you have – you have 19 months of time between the time the [Letter of Intent] and the time of construction . . .
>
> The question is, is that a reasonable time for preconstruction work. . . . And in our opinion, based on the work that we've done and the experience of the team and their own track record, 19 months is more than enough time for preconstruction work.

(AHS Ratner Appx. Ex. 3 (Ratner Dep.) 104-105.)

First, Defendants argue Ratner ignored numerous open issues that existed at the time of the alleged breach – including many of the Closing Conditions AHS and D60 needed to resolve before the PSA could close. (Id. 12-16; see generally Ninth Amendment to the PSA, § 4.) These items encompassed environmental remediation, a site improvement agreement, and issues regarding boundary lines and legal descriptions. (Id.) Defendants argue Ratner's failure to properly consider obvious "roadblocks" cause his opinion to be unreliable. (Id. at 16.) However, Ratner credited the ability of the parties to work through the remaining issues. (AHS Ratner Appx. Ex. 3 (Ratner Dep.) 131.) Evidence in the record supports his assumption.[9] Again, the Court finds this dispute regarding the manner in which Ratner weighed and analyzed certain facts presents a jury question.

Finally, Defendants argue Ratner's opinion should be excluded based on his choice to use a 6.5% discount rate. (Defs.' Ratner Mot. 16-19; Ratner Rep. ¶ 85.) As Sussman testified, a discount rate generally takes "a set of future cash flows and put[s] them in today's dollars." (AHS Sussman Mot. Ex. 3 (Sussman Dep.) 57.)

Ratner's Report outlines the factors that let him to select the 6.5% rate which included various risk factors (entitlement, construction, lease up/absorption, and

[9] It is undisputed that AHS and D60 worked collaboratively for several months – on zoning matters, multiple amendments to the PSA, and environmental remediation efforts -- all with an eye toward closing the PSA. (AHS SMF ¶¶ 82, 91, 93; Defs.' Resp. to AHS SMF ¶¶ 82, 91, 93.) Perry testified that D60 and AHS, "were working together pretty effectively." (AHS Add. Appx. Ex. 2 (Perry Dep.) 150.) He believed D60's deal with AHS would have likely closed. (Id. 148, 150.)

stabilization), AHS's use of a 7% figure it described as a discount rate, and a market report prepared by PricewaterhouseCooper ("PwC"), the PwC Real Estate Investor Survey for the Fourth Quarter of 2021 (the "PwC Survey"). (Ratner Rep. ¶¶ 81-85.) As described by Ratner, the PwC Survey "provided geographic specificity for discount rates in the southeast region apartment market" which, for the relevant time period, ranged from 4% to 6%. (Id. ¶ 84.)

Defendants mount a multi-pronged argument as to why this rate does not "fit" the facts of this case. (Id. 17.) They assert Ratner ignored the 7% discount rate AHS itself used, relied on the PwC Survey for the 4th Quarter of 2021 which post-dated the breach, and inappropriately considered rates applicable to established apartment complexes as opposed to projects under development. (Id. 18-19.) The primary argument developed by Defendants concerns a definition of the discount rate found in the PwC Survey upon which Ratner partially based his opinion. (Id. 18.)[10]

[10] That particular PwC Survey equated the discount rate with IRR offering the following definition:

> DISCOUNT RATE (IRR)
> Internal rate of return in an all-cash transaction, based on annual year-end compounding.
> All-cash refers to either all cash or market financing; unleveraged return.

(Defs.' Ratner Appx. Ex. 14 at 107.) The record reflects confusion as to the precise meaning of this particular PwC definition. Ratner testified about his thoughts and assumptions about the definition. (Defs. Ratner Appx. Ex. 3 (Ratner Dep.) 224-228.) Defendants' own expert acknowledges these two measures are distinct. (AHS Sussman Mot. Ex. 3 (Sussman Dep.) 60-61.) AHS also recognizes these two metrics measure different things. (Defs.' Ratner Appx. Ex. 6 (Lopes Dep.) 120-121; Ex. 16 (Gonzalez Dep.) 215-216.)

The Court finds all the issues Defendants raise regarding Ratner's selection of a 6.5% discount rate do not render it inherently unreliable. Instead, they are factors to be weighed and considered by the jury in assessing the credibility of his opinion.

5.2 AHS's Motion to Limit the Testimony of Sussman

While AHS disagrees with all of Sussman's opinions, it only seeks to exclude: (1) his "causation" opinion regarding Ratner's failure to offset mitigating profits and (2) his opinion that 15% is the appropriate discount factor. (Sussman Mot. 8.)

5.2.1. Sussman's Opinion on Mitigating Profits

As Defendants have acknowledged, Sussman's opinion criticizes Ratner for failing to properly apply the AICPA Aid methodology by not offsetting AHS's damages with mitigating profits. (Sussman Rep. ¶ 4; Defs.' Resp. to Sussman Mot. 9.) As the Court determined above, based upon the AICPA Aid and the pleadings in the case, Ratner's opinion cannot be faulted for failing to consider mitigating profits because Defendants raised no mitigation affirmative defense. (AICPA Aid 69).

Further, Sussman's opinion about Ratner's failure to establish AHS's mitigating profits and offset them against AHS's damages cannot be reconciled with Georgia law that places the burden on Defendants to demonstrate both how and how much AHS could have mitigated its damages. Moreland Auto Stop, Inc., at 440.

For these reasons, the Court finds Sussman's opinion critiquing Ratner's opinion for failure to consider AHS's mitigating profits should be excluded.

5.2.2 Sussman's Use of a 15% Discount Rate

Sussman opines that the appropriate discount rate is 15% which results in a significant downward adjustment in the damages Ratner has calculated. (Sussman Rep. ¶¶ 88-95.) Sussman's report outlines the many factors upon which he based this selection of a rate and why he ultimately determined that AHS's projected cash flows should be thus discounted. (Id. ¶¶ 85-94.) As with Ratner, the Court does not find Sussman's selection of a discount rate to be inherently unreliable. Rather, the credibility of his selection is a question to be resolved by a jury.

6. CONCLUSION

In light of the foregoing, the Court **ORDERS:**

a. Defendants' Motion to Exclude the Opinions of Plaintiff's Expert Witness Ian Ratner is **DENIED**.

b. Plaintiff AHS Residential, LLC's Motion to Limit the Testimony of Eric Sussman is **GRANTED IN PART** to the extent Sussman's opinions on issues regarding Ratner's failure to consider AHS's mitigating profits is **EXCLUDED** and is **DENIED IN PART** as to the remainder of Sussman's challenged opinions.

SO ORDERED this 1st day of ~~November~~ December, 2022.

KELLY LEE ELLERBE, Judge
Superior Court of Fulton County
Metro Atlanta Business Case Division

AHS RESIDENTIAL, LLC v. ASSEMBLY ATLANTA, LLC f/k/a PEARL RAILROAD ASSEMBLY YARD, LLC, JOHN H. GIPSON, JR., THE GIPSON COMPANY, and DORAVILLE SIXTY, LLC,
Fulton County Superior Court Civil Action No. 2021CV35466
Order on Defendants' Motion to Exclude Opinions of Plaintiff's Expert Witness Ian Ratner and Plaintiff AHS Residential, LLC's Motion to Limit the Testimony of Eric Sussman

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