

Motions to Strike

LT Builders Group, LLC v. Blue Sky AvGroup, LLC, et al.,
Adversary No. 10-3246-rld
In re Aircraft Investor Resources, LLC, Case No. 09-38458-rld11

06/08/2011 RLD

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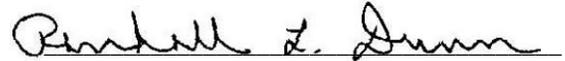
In conjunction with its Motion for Partial Summary Judgment ("Partial SJ Motion") (adv. proc. docket no. 41), Plaintiff LT Builders Group, LLC ("LTB") filed motions to strike certain declarations submitted by Defendants Blue Sky Avgroup, LLC and Johan Carl Brink (collectively, "Defendants") in support of their opposition to LTB's Partial SJ Motion. Specifically, LTB filed the following: (1) Motion to Strike Paragraph 18 of Declaration of Ashley Emerson ("LTB's Motion to Strike Paragraph 18 of Emerson Declaration") (adv. proc. docket no. 103); (2) Motion to Strike Declaration of David Hice ("LTB's Motion to Strike Hice Declaration") (adv. proc. docket no. 104); and (3) Motion to Strike Portions of Declaration of Richard Lucibella ("LTB's Motion to Strike Portions of Lucibella Declaration") (adv. proc. docket no. 105) (collectively, "LTB's Motions to Strike").

Defendants also filed a motion to strike the Declaration of Kenneth Eiler, the Supplemental Declaration of Christa A. Thornton-Smith and the Supplemental Declaration of Douglas King ("Defendants' Motion to Strike") (adv. proc. docket no. 111) submitted by LTB in support of its Partial SJ Motion.

On April 28, 2011, the bankruptcy court held a hearing on both LTB's Partial SJ Motion, LTB's Motions to Strike and Defendants' Motion to Strike. The bankruptcy court took all of the matters under advisement. The bankruptcy court advised LTB and Defendants that it would issue a memorandum opinion and an order on LTB's Motions to Strike and Defendants' Motion to Strike separately from its memorandum opinion and order on LTB's Partial SJ Motion.

Based on its review of the subject declarations, motions and supporting memoranda, as well as consideration of applicable legal authorities, the bankruptcy court denied Defendants' Motion to Strike, except as to paragraph 22 of the Supplemental Declaration of Douglas King, and LTB's Motion to Strike Hice Declaration. The bankruptcy court denied LTB's Motion to Strike Portions of Lucibella Declaration, as it pertains to paragraphs 6, 10, 12-17, 26, 35 and 38-42 and granted as it pertains to paragraphs 31-34, 37 and 43-44. The bankruptcy court granted LTB's Motion to Strike Paragraph 18 of Emerson Declaration.

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:)	
)	
Aircraft Investor Resources, LLC,)	
as consolidated with <i>In re Epic,</i>)	Bankruptcy Case
LLC (09-40041-rld7) and <i>In re</i>)	No. 09-38458-rld11
<i>Aircraft Completion Services, LLC</i>)	
(10-30185-rld7))	
)	
Debtor.)	
<hr/>		
LT Builders Group, LLC,)	Adv. No. 10-03246
)	
Plaintiff,)	
)	
v.)	MEMORANDUM OPINION
)	
Blue Sky AvGroup, LLC, a Florida)	
limited liability company, and)	
Johan Charl Brink, an individual,)	
)	
Defendants.)	
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Following the hearing ("Hearing") on plaintiff LT Builders Group, LLC's ("LT Builders") Motion for Partial Summary Judgment ("Summary Judgment Motion") on April 28, 2011, among the matters taken under advisement were: 1) LT Builders' Motion to Strike Portions of

1 Declaration of Richard Lucibella ("Lucibella Motion to Strike"); 2) LT
2 Builders' Motion to Strike Declaration of David Hice ("Hice Motion to
3 Strike"); 3) LT Builders Motion to Strike Paragraph 18 of Declaration of
4 Ashley Emerson ("Emerson Motion to Strike"); and 4) Defendants Blue Sky
5 Avgroup, LLC's ("Blue Sky") and Johan Charl Brink's ("Brink") Motion to
6 Strike Declaration of Kenneth Eiler and Supplemental Declarations of
7 Christa A. Thornton-Smith and Douglas King ("Defendants' Motion to
8 Strike).

9 Based upon my review of the subject declarations, motions and
10 supporting memoranda, as well as consideration of applicable legal
11 authorities, I have come to a decision on the various motions to strike.
12 This Memorandum Opinion sets forth the court's findings of fact and
13 conclusions of law under Federal Rule of Civil Procedure 52(a),
14 applicable with respect to these contested matters under Federal Rules of
15 Bankruptcy Procedure 7052 and 9014. I will start with my determinations
16 regarding the Defendants' Motion to Strike and will continue with
17 individual determinations regarding each of LT Builders' motions to
18 strike.

19 A) Defendants' Motion to Strike

20 Blue Sky and Brink argue generally that the Declaration of Ken
21 Eiler and the Supplemental Declarations of Christa A. Thornton-Smith and
22 Douglas King should be stricken because they were filed in conjunction
23 with the Reply to Defendants' Opposition to Motion for Partial Summary
24 Judgment, and to the extent they raised new evidence and/or information,
25 they improperly deprived Blue Sky and Brink of an opportunity to respond.
26 I will deny Defendants' Motion to Strike as it applies in general to the

1 three declarations for the following reasons.

2 First, following LT Builders' filing of the Summary Judgment
3 Motion and supporting documents, the defendants deposed Ms. Thornton-
4 Smith and used excerpts from her deposition and the exhibits to her
5 deposition as support for their opposition to the Summary Judgment
6 Motion. It was neither improper nor unfairly prejudicial nor unexpected
7 for LT Builders to include countering information in the Declarations of
8 Kenneth Eiler, Douglas King and Ms. Thornton-Smith filed in conjunction
9 with LT Builders' Reply.

10 In addition, there is nothing new or surprising in the subject
11 declarations based on the arguments and evidence advanced by LT Builders
12 originally in support of the Summary Judgment Motion. I do not find that
13 Blue Sky or Brink was unfairly prejudiced or surprised by the information
14 generally in the subject declarations. See Pacific Capital Bancorp, N.A.
15 v. East Airport Dev't, LLC (In re East Airport Dev't, LLC), 443 B.R. 823
16 (9th Cir. BAP 2011). There is a reason why the pleadings with respect to
17 a motion generally are limited to the motion and supporting papers, the
18 response and supporting papers, and the reply and supporting papers. If,
19 particularly in a case of this type, every time a new declaration or
20 affidavit was filed, it triggered a right to a surreply, the surreplies
21 could go on to infinity. Extending further opportunities to respond
22 should and must be limited to situations where a party has been unfairly
23 or improperly prejudiced by the submission of new evidence with a reply.
24 I find no such unfair or improper prejudice with respect to the
25 Declaration of Kenneth Eiler and the Supplemental Declarations of
26 Christa A. Thornton-Smith and Douglas King.

1 In the alternative, Blue Sky and Brink request that I strike
2 Paragraph 22 from the Supplemental Declaration of Douglas King as
3 offering legal conclusions. In its opposition to Defendants' Motion to
4 Strike, LT Builders does not object to my striking Paragraph 22 from
5 Mr. King's supplemental declaration with the exception of one factual
6 statement: "If Defendants are now permitted to assert late claims to
7 LTB's inventory and assets, LTB will dispute Defendants' ownership of
8 each and every item." I will grant the Defendants' Motion to Strike
9 Paragraph 22 from the Supplemental Declaration of Douglas King in its
10 entirety because it includes primarily legal conclusions, but as to the
11 factual statement at issue, I find that it does not have any conceivable
12 relevance to the matters I am called upon to decide in resolving the
13 Summary Judgment Motion.

14 As I stated at the Hearing, I tend to bend over backwards to
15 admit evidence that is opposed on relevance grounds so long as it has any
16 relevance at all to the matters I need to decide because I can consider
17 the relative weight of such evidence in making my decisions. In this
18 case, the explicit threat in the contested statement is based on what
19 Mr. King says LT Builders will do if I decide this adversary proceeding
20 in a certain way. Based on how this litigation has been conducted, with
21 plenty of scorched earth on both sides, I would have thought that threat
22 would have been implicit. In any event, I reiterate my conclusion that
23 Mr. King's factual statement in Paragraph 22 of his supplemental
24 declaration has no relevance whatsoever to my decision of the Summary
25 Judgment Motion.

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1 B) Hice Motion to Strike

2 LT Builders moves to strike the Declaration of David Hice on
3 the grounds that 1) its factual statements are irrelevant; 2) it is
4 inadmissible based on the parol evidence rule; and 3) it constitutes an
5 unqualified expert opinion. First, while the facts attested to in
6 Mr. Hice's declaration may have only limited relevance to my decision of
7 the Summary Judgment Motion, I find that they are relevant, and I can
8 assess their weight in determining whether a genuine issue of material
9 fact has been raised that would preclude entry of summary judgment. As
10 to the parol evidence rule, it comes from state law and applies generally
11 to disputes concerning whether interpretation evidence is admissible that
12 may vary the terms of an integrated contract. The Summary Judgment
13 Motion requires that I interpret the terms of orders that I have issued
14 in the Aircraft Investor Resources, LLC main case. The parol evidence
15 rule would apply in this instance, if at all, by analogy only, and I do
16 not find that it would preclude my consideration of the statements
17 contained in Mr. Hice's declaration. Finally, the statements in
18 Mr. Hice's declaration are based on his personal knowledge and experience
19 based on his connections with and employment by Aircraft Investor
20 Resources, LLC, and its affiliated entities. I do not find that the
21 David Hice Declaration includes unqualified expert opinions inadmissible
22 under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
23 Accordingly, I will deny the Hice Motion to Strike.

24 C) Emerson Motion to Strike

25 In the Emerson Motion to Strike, LT Builders moves to strike
26 paragraph 18 of the Declaration of Ashley Emerson on the grounds that 1)

1 it lacks foundation; 2) the statements included are not based on
2 Mr. Emerson's personal knowledge; and 3) the statements included appear
3 to be based on inadmissible hearsay. In Paragraph 18 of his declaration,
4 Mr. Emerson states that he has "become aware" of certain information,
5 without stating how, from whom and under what circumstances he became
6 aware of that information. He also states that he has "learned" about
7 the conduct of certain other builders without stating how, from whom or
8 under what circumstances he learned about such conduct. I find that LT
9 Builders' objections are well taken, and I will grant the Emerson Motion
10 to Strike.

11 D) Lucibella Motion to Strike

12 LT Builders moves to strike a number of paragraphs from the
13 Declaration of Richard Lucibella on a variety of grounds. I will deal
14 with the objections to particular paragraphs in the sequence discussed in
15 the Lucibella Motion to Strike.

16 LT Builders moves to strike Paragraphs 6, 10, 12-15 and 34 on
17 the basis of lack of relevance. To the contrary, Paragraphs 6, 10, and
18 12-15 are based on Mr. Lucibella's personal knowledge and provide useful
19 and relevant background information as to the disputes between the
20 parties. I will deny LT Builders' motion to strike as to Paragraphs 6,
21 10, and 12-15 of Mr. Lucibella's declaration. I will grant LT Builders'
22 motion to strike Paragraph 34, but on grounds other than relevance, as
23 discussed infra.

24 LT Builders moves to strike Paragraphs 16-17, 35, and 37-44
25 based on the parol evidence rule. As I stated previously, I find the
26 parol evidence rule of limited application in relation to the Summary

1 Judgment Motion, as it applies, if at all, only by analogy. In
2 Paragraphs 16-17, 35, and 38-42, Mr. Lucibella makes statements based
3 either on personal knowledge or on his interpretation of the inventory
4 order entered by this court, reflecting his understanding of matters
5 relevant to the issues raised in this adversary proceeding. Since I am
6 called upon to interpret the subject inventory order in deciding the
7 Summary Judgment Motion, Mr. Lucibella's interpretations are relevant and
8 not precluded by the parol evidence rule, or as improper opinion
9 testimony, for that matter. Accordingly, I will deny LT Builders' motion
10 to strike as to Paragraphs 16-17, 35, and 38-42. I will grant LT
11 Builders' motion to strike as to Paragraphs 37, and 43-44, but on the
12 grounds that no adequate foundation has been laid for the statements
13 included in Paragraphs 37, and 43-44 to establish that they are based on
14 Mr. Lucibella's personal knowledge, and with respect to Paragraph 44, it
15 includes legal conclusions that Mr. Lucibella is not qualified to present
16 as evidence.

17 LT Builders moves to strike Paragraphs 10, 16-17, 26, and 37-44
18 as expert opinion where the appropriate foundation for expert opinion has
19 not been laid. I find nothing objectionable in Mr. Lucibella's lay
20 opinions set forth in Paragraphs 10, 16-17, 26, or 38-42. As previously
21 stated, I will grant the Lucibella Motion to Strike as to Paragraphs 37,
22 and 43-44, but with the exception of a portion of Paragraph 44, on
23 grounds other than improper opinion testimony.

24 LT Builders moves to strike the e-mails attached to
25 Mr. Lucibella's declaration as not complete and not authentic. I
26 conclude that Mr. Lucibella can properly authenticate e-mails from his

1 own e-mail records, and accordingly, I will deny the motion to strike the
2 subject e-mails.

3 Finally, LT Builders moves to strike Paragraphs 31-34, and 39
4 as not based on Mr. Lucibella's personal knowledge and/or hearsay, with
5 no proper foundation laid for their admission. Paragraphs 31-34 are all
6 based on the knowledge of Mr. Emerson. This is territory covered by
7 Mr. Emerson in his declaration. Therefore, I will grant LT Builders'
8 motion to strike Paragraphs 31-34. With regard to Mr. Lucibella's
9 independent personal knowledge, I find that LT Builders' objections are
10 well taken. Paragraph 39 reflects personal knowledge of Mr. Lucibella
11 that was shared in the deposition of Ms. Thornton-Smith. I will deny the
12 Lucibella Motion to Strike as it pertains to Paragraph 39.

13 Conclusion

14 Based on the foregoing findings and conclusions, a) I will deny
15 Defendants' Motion to Strike except as to paragraph 22 in the
16 Supplemental Declaration of Douglas King; b) I will deny the Hice Motion
17 to Strike; c) I will grant the Emerson Motion to Strike; and d) I will
18 deny the Lucibella Motion to Strike as it pertains to Paragraphs 6, 10,
19 12-17, 26, 35, and 38-42 of Mr. Lucibella's declaration, and I will grant
20 the Lucibella Motion to Strike as it pertains to Paragraphs 31-34, 37,
21 and 43-44. An order consistent with this Memorandum Opinion will be
22 entered contemporaneously.

23 ###

24 cc: Susan S. Ford
25 Timothy A. Solomon
26 Marjorie A. Elken
Lisa M. Schiller
Norman Malinski