UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF DAVID DENENBERG

Rather than justifying their failure to disclose David Denenberg until months after the close of discovery, Defendants move the target in two key ways. First, dropping the pretense that their newly-disclosed witness would not give opinion testimony, they now argue he qualifies under Rule 701, which provides for "Opinion Testimony by Lay Witnesses." Fed. R. Evid. 701. Second, they use their response to *further expand their disclosure*, positing for the first time that he may testify regarding his "personal knowledge of the practices and procedures of" Defendants themselves. *See* ECF No. 47-2, Defs.' Br. at 5. They do so despite their refusal to produce documents in discovery regarding their own practices.

There is no "everyone did it" defense to the FDCPA. To the contrary, the FDCPA was designed to identify and eliminate these sorts of unfair industry practices. Yet Defendants' goal is clear: having a fellow collection attorney place a stamp of approval upon their illegal practices. This gambit is precluded by the Rules of Evidence and Civil Procedure, is anathema to the FDCPA, and should be rejected.

A. Defendants Fail to Meet their Burden to Substantially Justify their Last Minute Disclosure

Despite the fact that Defendants carry the responsibility of proving substantial justification for their failure to disclose their witness, *e.g.*, *Tolerico v. Home Depot*, 205 F.R.D. 169, 175 (M.D. Pa. 2002), they barely attempt any justification at all, positing without explanation that they learned of Denenberg's knowledge and his willingness to testify "shortly" before their disclosure on June 13, 2018. Then they go further, adding that Denenberg is familiar with Levy's own practices, such that he should be able to testify on those, as well. *See* Defs.' Br. at 5.

The slightest scratch at the surface of this argument reveals its weakness. Denenberg is an attorney of thirty years who "practices mainly" in Philadelphia Landlord-Tenant Court. *Id.* at 4. Levy is an attorney who files *thousands* of evictions per year in Philadelphia Landlord-Tenant Court, and "spends almost every weekday in landlord tenant court for two sessions per day." *See* Defs' Br. in Opp'n to Summ. J., ECF No. 35-3 at 2. In other words, they are colleagues. Yet Defendants provide no explanation how they conceivably could have suddenly discovered that their fellow collection lawyer has apparent knowledge of the practices of Philadelphia collection lawyers, or even of *Levy's* internal practices. Their burden is to prove justification for their failure to comply with the Rules. *Tolerico*, 205 F.R.D. at 175. They have failed to meet it.[1]

Next Defendants argue (without legal support) that their failure is harmless. It is not. Allowing Defendants to reopen discovery for a second time will set off the precise last-minute scrambling held as harmful by the Third Circuit, including the likelihood of impaneling an expert

[1] The qualifier that Defendants only recently learned Denenberg "was willing and available to testify on behalf of" them provides no support for their failure to comply. Denenberg's willingness has nothing to do with whether he possessed information that needed to be disclosed under Rule 26.

by Plaintiffs. *See Nicholas v. Pa. State Univ.*, 227 F.3d 133, 148 (3d Cir. 2000) (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").[2]

Finally, Defendants do not even try to square their refusal to produce documents into their past practices with their attempt to have Denenberg sanction the reasonableness of those very same practices. *See* ECF No. 44-1, Pls'. Memo. at 10. This, too, is fatal to their argument, for basic precepts of fairness in litigation mean that a party may not use a refusal to produce "as both a sword and a shield." *A.K. Stamping Co. v. Instrument Specialties Co.*, 106 F. Supp. 2d 627, 650 n.35 (D.N.J. 2000) (Greenaway, J.) ("[I]ts failure to provide the documents thus fully precludes the Court from considering this defense."). In other words, Defendants cannot thwart efforts to examine their practices and then cover that blank canvass with the color of a late-disclosed witness when they suddenly deem it helpful to their cause.

B. Under any Circumstances, Denenberg's Testimony is Irrelevant, and Cannot Qualify Under Rule 701

Defendants use their response to state for the first time that Denenberg will qualify under Rule 701. Yet even were the Court to find that Defendants were substantially justified in their failure to comply with the Rules, Denenberg's proposed testimony cannot qualify under Rule 701.

a. Only Witnesses Helpful to a Jury may Testify under Rule 701

A lay witness may only testify under Rule 701 if his opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to

[2] To the extent their failure is not substantially justified or harmless, Defendants also provide no mention of the factors identified repeatedly by the Third Circuit, *see, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 298 (3d Cir. 2012), conceding that exclusion is the appropriate sanction.

determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule [of Evidence] 702." Fed. R. Evid. 701. If the witness fails to meet any of the Rule's three prongs, he is excluded. Courts considering witnesses under Rule 701 must play a gatekeeper role similar to that for witnesses under Rule 702. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1201-03 (3d Cir. 1995).

"[T]he nub of Rule 701(b)'s requirement is to exclude testimony where the witness is no better suited than the jury to make the judgment at issue." *United States v. Fulton*, 837 F.3d 281, 293 (3d Cir. 2016) (internal quotation marks omitted). "Importantly, the rule is carefully designed to exclude lay opinion testimony that amounts to little more than choosing up sides, or that merely tells the jury what result to reach." *Id.* at 291 (internal quotation marks omitted).

b. Denenberg Fails the Second Prong of Rule 701

Defendants posit that Denenberg will testify regarding industry customs and practices of Philadelphia collection lawyers, in an apparent attempt to show that Levy's debt collection was no different than other collection attorneys. In doing so, they attempt to contravene the FDCPA itself, which was enacted in response to "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Its purpose is to eliminate those practices from the industry altogether. *Id.* § 1692(e). In furtherance of that goal, courts examine liability under the Act through the lens of strict liability, ignoring a debt collector's belief or intent. *See, e.g.*, *Gryzbowski v. I.C. Sys.*, 691 F. Supp. 2d 618, 624 (M.D. Pa. 2010) (holding that because "the FDCPA is a strict liability statute," "subjective belief is irrelevant"). In other words, whether Defendants acted like other debt collectors has no bearing on their liability under the Act. That they might be held liable for acts regularly perpetuated by many other debt collectors is a feature of the law, not a bug.

Recognizing this, Defendants posit that Denenberg will support their attempt to seek shelter in the law's bona fide error defense, 15 U.S.C. § 1692k(c). On this score, Denenberg's proposed testimony is "the antithesis of helpful—it [is] dead wrong and even misleading." *Fulton*, 837 F.3d at 292 (holding that District Court should have excluded witness under Rule 701).

A debt collector may escape liability under the FDCPA's affirmative defense if he proves: "(1) the alleged violation was unintentional, (2) the alleged violation resulted from a bona fide error, and (3) the bona fide error occurred despite procedures designed to avoid such errors." *Beck v. Maximus, Inc.*, 457 F.3d 291, 297-98 (3d Cir. 2006); 15 U.S.C. § 16 92k(c). The sort of mistakes contemplated by this defense are clerical or factual in nature, such as misplacing documents, inadvertently failing to read a letter, or mistakenly marking an envelope. *See, e.g.*, *Evans v. Portfolio Recovery Assocs., LLC*, 889 F.3d 337, 350 (7th Cir. 2018); *Dinaples v. MRS BPO, LLC*, No. 15-1435, 2017 U.S. Dist. LEXIS 192255, at *7 (W.D. Pa. Nov. 21, 2017). Errors in legal reasoning or in the understanding of the law's requirements, however, do not qualify. *See Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587 (2010); *Oliva v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 864 F.3d 492, 499 (7th Cir. 2017) (en banc) ("In essence, the [Supreme] Court read the Act as putting the risk of legal uncertainty on debt collectors, giving them incentives to stay well within legal boundaries.") (citing *Jerman*). Put simply, no matter the intent, "a mistake of law isn't a bona fide error." *Daubert v. NRA Grp., LLC*, 861 F.3d 382, 394 (3d Cir. 2017) (reversing District Court and instructing it to enter judgment for consumer).[3]

[3] This is for good reason. Allowing mistakes of law under the bona fide error defense would "give a competitive advantage to debt collectors who press the boundaries of lawful conduct, inviting a race to the bottom[,] driving more conservative collectors out of business and

It is clear where Denenberg falls in this rubric. He will not testify that Defendants lost documents, or confirm how Defendants' trained their staff, or testify that Defendants sued consumers only when their clients met Philadelphia's preconditions on the collection of rent.[4] Instead, Defendants seek to have him place a sheen of reasonableness on their actions by effectively "admit[ting] it was company—and indeed, industry—policy" to sue Philadelphians for rent they did not owe. *Dinaples*, 2017 U.S. Dist. LEXIS 192255, at *7 (granting summary judgment for consumer while rejecting assertion of bona fide error defense). This will not do, for the defense provides no shelter "where an alleged violation results from deliberate conduct based upon a mistake of law." *Id.* In other words, that other collection lawyers demanded money in the same fashion as Defendants does not bear on the bona fide error defense. *See Daubert*, 861 F.3d at 393-95 (holding that relying on decisions by district courts that conduct was permissible is still a mistake of law); *Oliva*, 864 F.3d at 500 ("The fact that different sets of lawyers, including those with judicial commissions, made a legal error does not make it less a legal error."). Allowing Denenberg to testify to the contrary will do nothing but mislead a jury.

Accordingly, even were this Court to find Defendants substantially justified in their failure to disclose Denenberg, his proposed testimony runs directly afoul of the FDCPA, and he therefore cannot qualify under Rule 701.[5]

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running directly contrary to the overall purpose of the Act." *Oliva*, 864 F.3d at 499 (internal quotation marks omitted).

[4] Even were he to testify about these clerical procedures, Denenberg would be in no better place than a jury to evaluate whether theoretical procedures were reasonably calculated to catch a clerical error in Defendants' offices, and thus would still fail to qualify. *Fulton*, 837 F.3d at 293.

[5] Nor is such testimony relevant under any Rule. *See* ECF No. 50, Pls.' Mot. in Limine.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of the brief was made on July 12, 2018, and served to counsel for Defendants via the electronic filing system.

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