ELLEN NEVINS, Plaintiff-Appellant,
v.
TOLL BROTHERS, INC.,
and ESTATES AT RIVERS EDGE, LP, Defendants-Respondents.
DOCKET NO. A-0946-10T1
SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Submitted June 7, 2011
Decided July 5, 2011
NOT FOR PUBLICATION WITHOUT THEAPPROVAL OF THE APPELLATE DIVISION

Before Judges Messano and Waugh.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1102-01.

Seelig & Rednor, L.L.P., attorneys for appellant (Jack L. Seelig, on the briefs).

Bisgaier Hoff, LLC, attorneys for respondents (James A. Kozachek and Jeffrey K. Newman, on the brief).

PER CURIAM

Plaintiff Ellen Nevins appeals the order of the Law Division dismissing her breach of contract claim against defendants Toll Brothers, Inc., and Estates at Rivers Edge, LP. We reverse.

I.

We discern the following facts and procedural history from the record on appeal.

In July 1995, Nevins contracted with defendants for the purchase of a custom-built home at a development in Belle Mead known as the Estates at Rivers Edge. She closed on the property in June 1997.

Following the closing, Nevins was not satisfied with the quality of the construction, so she submitted a punch list of items for repair. Because she was not satisfied with defendants' response to her request, Nevins filed a seven-count complaint in July 2001, seeking damages based upon her allegation that there were numerous construction defects.[1]

Following a period of discovery, defendants filed a motion for summary judgment, which was opposed. In August 2004, the motion judge dismissed three of the claims, but denied the motion as to remaining claims.

The case was called for trial in September 2004. The parties entered into settlement, but the terms of the settlement were not reduced to writing until August 1, 2005. The settlement provided for the appointment of a neutral expert who would oversee repairs to the house.

On June 13, 2008, Nevins' attorney wrote to the judge, stating that Nevins was unwilling to continue with the settlement because of disagreements between the parties and requesting that the case be listed for trial. In July 2008, defendants filed a motion to enforce the settlement or, in the alternative, to have it declared "null and void." In August 2008, the motion judge entered an order enforcing the settlement and setting forth provisions for its implementation.

For reasons not reflected in the record, the settlement agreement was vacated in April 2009. At that time, the case came under case management by a single judge. Nevins was ordered to provide an expert report and to allow defendants' expert to inspect her home. Nevins had difficulty retaining an expert. In July 2009, defendants filed a motion to preclude the filing of any further expert reports. Apparently because Nevins had finally retained a new expert, the motion was denied.

Defendants filed a motion for partial summary judgment in August 2009. On September 18, the managing judge granted the motion. She dismissed all claims except the one for breach of the Builder's Limited Warranty contained in the contract of sale.

A case management conference was held on September 9, 2009. The managing judge ordered Nevins to submit her expert's report by October 13, 2009. The judge also ordered that all depositions be completed by November 13.

Nevins did not provide an expert report by the October 13 deadline, but instead asked for additional time for preparation of the report and completion of deposition. Defendants wrote to the managing judge to oppose the request, stating that they intended to file a motion to "bar[] the submission of any new expert evidence" by Nevins. On October 16, the judge denied Nevins' request for an extension of discovery to January 2010, and required submission of the report no later than October 22. After the report was submitted on time, the judge granted a further extension for the completion of depositions.

Nevins submitted the report of J. Anthony Dowling. According to his resume, Dowling had forty-five years of experience in commercial construction, doing project estimation and engineering work. His resume did not, however, indicate the extent of his residential construction experience. Dowling's overall conclusion was that "the house wa[s] of such poor quality . . . [that his] recommendation [wa]s to demolish it and rebuild it." He estimated the cost of repairs to be "far more than the original cost of the house, and not significantly less than the $850,000 [he] estimate[d] it would cost to rebuild it in entirety."

Dowling's report consisted of two parts: a list of construction defects and a summary of the costs associated with remediation. The defects included: "large cracks" throughout the basement and foundational walls causing water leakage and rodent problems; leaks in the roof; unstable stairwells; malfunctioning septic tanks; improper electrical wiring; and various heating and plumbing problems. The second section provided a handwritten estimation of the costs. Dowling concluded that virtually every part of the home required immediate attention.

Defendants deposed Dowling on December 10, 2009. Dowling testified that he used the report of an engineering firm as the basis of his report, but asserted that he checked the report by making his own observations. Dowling characterized his "role" as to "review [the engineering]

report, examine it, concur with it or disagree with it and cost it," rather than to "analyze the structure, conduct calculations, [or] do any engineering work."

With respect to his cost estimates, the following colloquy took place:

[Defense Counsel]: Is it fair to say if you don't have supporting documents to show how you came up with [your] . . . figure[s] that other individuals based upon their own experience, time in the industry, time specifically in a residential construction industry to come up with a number that differs from yours, would that be realistic?

Dowling: That's realistic, but they should be in the ballpark.
. . . .
[Defense Counsel]: . . . I'm asking you what you base[] [your calculations] upon, what experience . . . ?
Dowling: My gut feeling.
[Defense Counsel]: Gut feeling?
Dowling: Yes.
[Defense Counsel]: You're going to go with the gut feeling?
Dowling: I know what things cost.
[Defense Counsel]: What percentage of your entries in this cost estimate are based on your gut feeling as opposed to specific numbers . . . ?
Dowling: 90 percent of it.
[Defense Counsel]: 90 percent of it is gut feeling?
Dowling: Yes, or feeling for costs.
[Defense Counsel]: Feeling for costs?
Dowling: Yes.
[Defense Counsel]: So that means only about ten percent of it would be based upon hard numbers that you obtained that would be specific to this application or specific to [Nevins'] location or her particular project?
Dowling: Yes.

. . . .
[Defense Counsel]: . . . I'm asking you what you did in this particular instance for this cost estimate that you prepared for this report . . . but this cost estimate is based upon gut feeling, not actual numbers, research, because as you told me before, that would take weeks, months, years?
. . . .
Dowling: Fair to say.

Dowling conceded that he had "very little" experience in "cost estimates" for a "single family home" such as Nevins'. He estimated that twenty percent of his cost-based estimation involved residential property, with the remainder involving commercial property.

After Dowling's deposition was complete, defendants made a motion to bar others from rendering expert reports or testifying as experts, and to "preclude . . . Dowling from testifying as an expert witness" or "relying upon" his own report. On August 10, 2010, the managing judge granted the motion with respect to other experts, but denied it as to Dowling. However, the denial was without prejudice.

On September 17, defendants filed another motion seeking to bar Dowling's testimony and to dismiss the complaint on the basis that Nevins' claim could not be proven without expert

testimony. Nevins opposed the motion. On October 15, the parties appeared before a new judge to argue the motion.

After hearing oral argument, the judge granted defendants' motion and dismissed the complaint. With respect to qualifications, the judge recognized that Dowling possessed the "basic credentials to qualify as an expert." However, he found that Dowling's report constituted a "net opinion." Although he noted that experts are permitted to "incorporate portions of other reports in [their] report if [they have] a proper factual basis to do so," the judge found that Dowling's report was a net opinion because an expert's conclusions "must be based on more than gut feelings." The judge dismissed Nevins' case, finding that she could not prove her case without expert testimony.

This appeal followed.

II.

On appeal, Nevins argues that the motion judge erred in precluding Dowling's testimony because his opinion was not a true net opinion. Defendants argue that the judge correctly excluded Dowling as an expert.

The judge correctly determined that Nevins would not be able to prove her case without an expert witness. He also correctly determined that Dowling possessed the "basic credentials to qualify," and that experts were allowed to

"incorporate portions of other reports in [their] report if [they have] a proper factual basis to do so." Consequently, the question for resolution on this appeal is whether the judge was correct in his conclusion that Dowling's expert report amounted to a net opinion because he relied on his "gut feeling" concerning costs.

The decision to allow an expert to testify is within the trial judge's discretion, and will be overturned on appeal only if the judge's decision amounts to a mistaken exercise of that discretion. See Riley v. Keenan, 406 N.J. Super. 281, 295 (App. Div.), certif. denied, 200 N.J. 207 (2009).

N.J.R.E. 703 requires that an expert's opinion must be based upon "facts or data . . . perceived by or made known to the expert at or before the hearing." "The net opinion rule is a prohibition against speculative testimony." Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997), certif. denied, 154 N.J. 607 (1998). "Under this doctrine, expert testimony is excluded if it is based merely on unfounded speculation and unquantified possibilities." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div.), certif. denied, 122 N.J. 333 (1990).

N.J.R.E. 703 requires an expert "to give the why and wherefore" of his or her opinion rather than a mere conclusion. Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). Therefore, experts "must be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the

methodology are scientifically reliable." Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992). An expert's conclusion is inadmissible as a net opinion when it is a bare conclusion unsupported by factual evidence. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981); see also Johnson v. Salem Corp. , 97 N.J. 78, 91 (1984) ("'The weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.'" (citation omitted)).

We conclude from our reading of the record that the managing judge had denied the motion so that the issue of Dowling's testimony could be determined at trial. In the interim, however, Dowling was excluded based upon the cross-examination-style interrogation from his deposition, without having had the opportunity to present his direct testimony at trial or in the context of a Rule 104 hearing. Our review of the record leads us to the conclusion that the motion judge should not have excluded his testimony in advance of trial without having heard Dowling's direct testimony.

Dowling's report is far from a model of how an expert's opinion in a construction case should be presented. In addition, it is obvious from Dowling's deposition that he is not a professional expert witness accustomed to testifying in court. That there is much fodder for cross-examination in Dowling's deposition, however, goes more to his credibility rather than to the admissibility of his opinion.

Both defendants and the motion judge keyed in on Dowling's deposition response that ninety percent of his cost estimates were based on "gut feeling." However, he subsequently sought to substitute "knowledge of cost" and "feel for costs." Dowling is by training and profession a construction cost estimator. In Correa v. Maggiore, 196 N.J. Super. 273, 282 (App. Div. 1984), we upheld the admission of testimony based on a contractor's estimate, noting that "[p]roviding estimates constituted a part of his every-day business."

Defendants also criticized Dowling's use of the report of one or more prior experts as the framework for his report. The non-testifying experts' reports would constitute hearsay. N.J.R.E. 801(c). N.J.R.E. 703 does not provide an independent basis for the admission of otherwise inadmissible hearsay. Agha v. Feiner, 198 N.J. 50, 63-64 (2009); Day v. Lorenc, 296 N.J. Super. 262, 267 (App. Div. 1996). Nonetheless, hearsay statements relied upon by an expert are ordinarily admissible for the limited purpose of apprising the jury of the basis of the expert's opinion, provided they are of a type reasonably relied upon by experts in the field. Agha, supra, 198 N.J. at 62; In re Civil Commitment of J.M.B., 395 N.J. Super. 69, 93 (App. Div. 2007), aff'd, 197 N.J. 563 (2009), cert. denied, ____ U.S. ___, 130 S. Ct. 509, 175 L. Ed. 2d 361 (2009). "[A]n expert may testify as to the opinion of a non-testifying expert on which the testifying expert relied in reaching his or her conclusion." Macaluso v. Pleskin, 329 N.J. Super. 346, 355 (App. Div.), certif. denied, 165 N.J. 138 (2000). And, "[a]n expert can legitimately use hearsay evidence to confirm an opinion reached by independent means." J.M.B., supra, 395 N.J. Super, at 93.

Nevertheless, N.J.R.E. 703 "should not be used as a subterfuge to allow an expert to bolster [his or her] expert testimony by reference to other opinions of experts not testifying." Biunno, Current N.J. Rules of Evidence, comment 7 on N.J.R.E. 703 (2011). Expert testimony should not be used as "'a vehicle for the wholesale [introduction] of otherwise inadmissible evidence.'" Agha, supra, 198 N.J. at 63 (quoting State v. Vandeweaghe, 351 N.J. Super. 467, 480-81 (App.

Div. 2002), aff'd, 177 N.J. 229 (2003)) (internal quotation marks omitted). And, "[a]n expert witness should not be allowed to relate the opinions of a non[-]testifying expert merely because those opinions are congruent with the ones he has reached." Krohn v. N.J. Full Ins. Underwriters Ass'n, 316 N.J. Super. 477, 486 (App. Div. 1998), certif. denied, 158 N.J. 74 (1999).

Dowling specifically testified at his deposition that he used the prior report of an engineering firm as a baseline for his report. But, when asked whether "for each item that's there, did you independently examine it," he responded: "Independently examined it, yes." Based on that testimony, we do not see a basis for pretrial exclusion of Dowling's testimony.

The trial judge can best determine how to apply Agha, supra, 198 N.J. 50, in the context of actual testimony. At trial, the judge and parties should also consider our holding in Correa, supra, 196 N.J. Super, at 285, that a cost of repairs approach may be inappropriate when they exceed the contract price or the probable market value of the property.

In summary, we conclude that the motion judge erred when he excluded Dowling as an expert, especially on a pretrial motion without having heard his direct testimony or held a Rule 104 hearing first. Our review of the present record leads us to the conclusion that Dowling's opinion was not necessarily a true

"net opinion," given his level of expertise in estimating construction costs. Whether it is a convincing opinion is a question for the jury. Consequently, we reverse and remand for trial.

Reversed.

Notes:

[1.] The complaint is not contained in either side's appendix.
