COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

KAREN L. ENGEL, et al.,	:	CV-2022-00979
Plaintiffs,	:	
vs.	:	
	:	CIVIL ACTION
P. STONE, INC.,	:	
Defendant.	:	Motion in Limine

OPINION & ORDER

This matter came before the Court on October 15, 2024, for oral argument on Plaintiffs' Motion in Limine (filed September 18, 2024). For the reasons more fully set forth below, that Motion is denied.

I. BACKGROUND

On October 4, 2022, Plaintiffs filed a Complaint to the court term and number set forth above seeking money damages for an alleged breach of the terms of an attached Agreement of Lease, as modified by a First Addendum and Second Addendum, both also attached. On November 4, 2022, Defendant filed an Answer with Counterclaim, asserting Unjust Enrichment. The Answer admits that the parties (and their predecessors) have been parties to the alleged agreement for nearly fifty (50) years. Thus, it is fairly obvious that the Counterclaim is not properly labeled unjust enrichment. Because the Counterclaim asserts that Defendant has mistakenly overpaid Plaintiffs under the written agreement over a period of many years, it appears that Defendant is actually asserting a setoff for Equitable Recoupment.

On May 24, 2024, Plaintiffs filed a Motion for Partial Summary Judgment. Plaintiffs claim that Defendant's admission that it did not provide monthly weigh slips and its admission that it did not make monthly royalty payments, provide a basis for partial summary judgment. With regard to the weight slip issue, Plaintiffs invite the Court to ignore the fact that neither the First Addendum nor the Second Addendum to the Lease of November 9, 1976, make any mention of weigh slips. With regard to the monthly royalty issue, Plaintiffs invite the Court to ignore the Counterclaim. The Court declined both invitations, and denied the Motion.

On September 18, 2024, Plaintiffs filed a Motion in Limine, contending that Defendant intended to offer evidence of "Blast Yields" and/or "Blasting Report" for the calculation of "alleged overpayment of royalty paid to the Plaintiffs" and/or for the calculation of

"appropriate amount of royalty due the Plaintiffs under the terms of the Agreement of Lease and/or the Addendums." Plaintiff's Motion in Limine at ¶ 19. Plaintiffs argue that the lease and/or the addenda did not permit "the calculation of Royalty based upon 'Blast Yields' or 'Blasting Report.'" *Id.* at ¶ 20. Rather, the basis of that calculation was the weight of the stone sold from the Premises. *Id.* at ¶ 21. Plaintiffs further note that "Blast Yields" and/or "Blasting Records" do not indicate the quantity of stone sold, and no expert report has been provided by the Defendant regarding the use of "Blasting Records." *Id.* at ¶¶ 23-30. Therefore, Plaintiffs argue that, under Rules of Evidence 401 and 402, these aforementioned "Blasting Records," etc., are not relevant and are thus inadmissible at trial. *Id.* at ¶¶ 35-36.

In Defendant's Response to the Motion in Limine (filed October 8, 2024), Defendant contends that "the current version of the lease" does not specify the particular fashion in which the weight must be measured, and that the "version of the lease" that specified the weigh slip requirement was "modified by mutual agreement of the parties…." Defendant's Response at ¶ 20. Furthermore, Defendant contends, among other things, that while it might not be typical to measure royalties based on "blast yields," the blasting expert "did not deny that the calculations…were reasonably accurate…," and that the opinion of the blasting expert was provided via deposition. *Id.* at ¶¶ 23-30.

II. FINDINGS OF FACT

Rule 1035.5 of the Pennsylvania Rules of Civil Procedure requires that the Court "shall thereupon make an order specifying the facts that are without controversy." It appears to this Court that the uncontested facts include the following, which are set forth herein as Findings of Fact:

1. Karen L. Engel, Suzanne K. Welshans, Eric A. Welshans, Stephanie J. Wolfanger, Danette McPherson, Melinda Kershner, Shaun Welshans, and Lyle Welshans, Jr., (hereinafter collectively "Plaintiffs") are the current owners of the subsurface of land situate in Limestone Township, Lycoming County, Pennsylvania, bounded and described in the Deed attached to the Complaint as Exhibit "B" (hereinafter the "Premises").
2. P. Stone, Inc. (hereinafter "Defendant") is a Pennsylvania corporation having offices at 1430, Route 880 Highway, Jersey Shore, Pennsylvania 17740. Defendant, P. Stone, Inc., is in the business of mining for and selling crushed limestone.
3. On November 9th, 1976, Harold H. Welshans and Florence L. Welshans, as Lessors, entered into an "Agreement of Lease" with Defendant, a copy which is attached to the Complaint as Exhibit "A" (hereinafter the "Original Lease").
4. The Original Lease provides that Lessee may enter upon the Premises for the purpose of mining limestone, and permits the Lessee to operate a quarry business.
5. The Original Lease provides that Lessee is required to pay Lessors monthly rental payments in the form of a royalty to be paid to the Lessors, calculated on each ton of rock mined and removed from the leased premises.
6. Section 2 of the Original Lease provides for a ten (10) year initial term, and provides Lessee with the option for one ten (10) year extension period.
7. Section 3 of the Original Lease provides terms regarding the timing of royalty payment that payment will be made "no later than the tenth (10th) day of the second following month for all rock removed from the leased premises during the preceding calendar month." The Section also requires that each royalty payment shall be accompanied by "copies of said weigh slips or an itemized list of the weights indicated thereby."

8. Section 3 of the Original Lease requires payment of royalty "for each ton of material extracted from Lessors' land" and contains a schedule of payments, including the following:
    a. 7 cents per ton for the first year.
    b. 10 cents per ton for years two through five.
    c. 15 cents per ton for years six through ten.
    d. 20 cents per ton for years eleven through twenty.
9. After the death of Harold H. Welshans, his widow, Florence L. Welshans entered into a "First Addendum to Lease Agreement" (hereinafter the "First Addendum") with Defendant, dated January 16, 1986, a copy of which is attached to the Complaint as Exhibit "C."
10. The First Addendum materially modified some of the terms of the Original Lease.
11. The First Addendum provided at Section 1(a) regarding "Term and Extension of Lease" that Lessee will have the option to extend "for three ten-year period in addition to those already provided." Section 1 (b) states that the Lease as amended will be deemed to have commenced on November 15, 1976, and will terminate no later than November 14, 2026.
12. The First Addendum materially altered the timing and form of royalty payment. Royalties are to be paid per ton for "merchantable and mineable limestone on a raw material basis for all limestone mined, removed, sold and shipped" from the Premises.
13. Subsection 2(d) of the First Addendum provided that "[r]ental shall be computed monthly at the time when rentals are due by determining the number of tons shipped for the month. Limestone tonnages shall be ascertained by a system of weights and measures generally accepted in the limestone industry."
14. Section 2 of the First Addendum contains a schedule of payments, including the following:
    a. 15 cents per ton for the period up to and including November 14, 1986.
    b. 20 cents per ton for the period November 15, 1986 through November 14, 1996.

c. **After November 14, 1996, royalties are to be computed through application of a formula which the Court regards as totally inscrutable.** The language is as follows: "a percentage of the market price for each ton of limestone mined, quarried, removed, sold and shipped from the Leased Premises in each month. Said percentage for this period shall be equal to 20 cents divided by the selling price on November 14, 1996."

15. The First Addendum is silent on the issue of weigh slips or other documents on the issue of how to establish tonnages at the time of payment of royalties.
16. Subsection 2(e) of the First Addendum requires Lessee to pay a minimum rental of $15,000.00 each lease year, calculated at the end of each lease year. Oddly, any payment at the end of the lease year on account of the "minimum rental" provision is credited against monthly rentals due from Lessee during the following lease year. This "credit" expires at the termination of the lease, such that any uncredited portion "shall be the property of Lessor."
17. Section 4 of the First Addendum appears to incorporate any provision of the Original Lease "where not inconsistent herewith." It is not entirely clear which provisions of the Original Lease could reasonably be considered as "not inconsistent herewith." By way of example, it is not clear to the Court whether the deletion of Lessee's obligation under the Original Lease to provide "copies of said weigh slips or an itemized list of the weights indicated thereby" was intended as a termination of that obligation, or intended as a continuation of that requirement under the language of Section 4.
18. Florence L. Welshans entered into a "Second Addendum to Lease Agreement" (hereinafter the "Second Addendum") with Defendant, dated March 17, 1992, a copy of which is attached to the Complaint as Exhibit "D."
19. The Second Addendum materially modified some of the terms of the First Addendum.
20. Section 1(a) of the Second Addendum permits Lessee to "extend said lease period for an additional term of four (4) ten (10) year periods in addition to those already provided." Section 1(b) states that the Lease as amended will be deemed to have commenced on November 15, 1976, and will terminate no later than November 14, 2036.

21. Despite the contrary language in Section 1(a) of the Second Addendum, it appears from Section 1(b) that the intended additional extension was only one additional ten-year period, extending the terms through November 14, 2036.
22. Section 2 of the Second Addendum regarding "Rentals" is materially different than the corresponding Section in the First Addendum, and much clearer. Section 2 repeats the language that royalties are to be paid per ton for "merchantable and mineable limestone on a raw material basis for all limestone mined, removed, sold and shipped" from the Premises.
23. The Second Addendum does not contain the provision from the First Addendum requiring payment of minimum royalty.
24. Section 2 of the Second Addendum contains a clear schedule of payments, including the following:
    a. 20 cents per ton for the period November 15, 1986 through November 14, 1996.
    b. 25 cents per ton for the period November 15, 1996 through November 14, 2006.
    c. 30 cents per ton for the period November 15, 2006 through November 14, 2016.
    d. 35 cents per ton for the period November 15, 2016 through November 14, 2026.
    e. 40 cents per ton for the period November 15, 2026 through November 14, 2036.
25. Section 3 of the Second Addendum appears to incorporate any provision of the Original Lease and the First Addendum "where not inconsistent herewith." It is not entirely clear which provisions of the Original Lease could reasonably be considered as "not inconsistent herewith." To the extent that the First Addendum had the effect of terminating Lessee's obligation under the Original Lease to provide "copies of said weigh slips or an itemized list of the weights indicated thereby," that obligation was not resurrected in the Second Addendum.

26. Florence L. Welshans passed away on January 25, 2005. Her interest in the Premises and in the Original Lease, as amended, was transferred, in equal parts, to Plaintiffs. Thus, Plaintiffs are now the "Lessors."
27. Defendant regularly exercised its option to renew the Original Lease, as amended, for each renewal period. As a result, the current term of the Lease is in effect until March 17, 2026.
28. Defendant continues to occupy and mine the Premises for its limestone quarry business, and maintains operational control of its limestone quarry and mining operation located on the Premises. In that operation, Defendant mines limestone from the Premises and either sells the limestone or stores it in stockpiles.
29. In connection with its quarry operation, Defendant weighs each truck load of stone leaving the Premises on certified scales situate at the Premise, and sells that stone to its customers for a price determined by the scale weight.
30. As a result of its process of weighing the stones leaving the Premises, Defendant generates a weigh slip that indicates the customer's name, the type of stone sold, the sales price, the date of the sale, and the total weight of the stone sold.
31. Defendant paid monthly royalties and provided monthly weigh slips to either Plaintiffs processor, or Plaintiffs, without interruption until May 17, 2021.
32. On May 17th, 2021, Attorney Scott T. Williams, as counsel to Defendant, sent a letter bearing that date to Plaintiffs (hereinafter the "Notice Letter"). In the Notice Letter, Williams advised Plaintiffs that Defendant intended to withhold future payments on the Original Lease, as amended, based upon Defendant's contention that Defendant had already overpaid Plaintiffs.
33. After the Notice letter, Defendant made two (2) payments to Plaintiffs in the amount of $15,000 each (totaling $30,000), under the mistaken belief that minimum royalty payments were required. In fact, Defendant's obligation to make such payments terminated effective with the Second Addendum on March 17, 1992.
34. Since the date of the Notice letter, Defendant has not made monthly royalty payments and has not provided Plaintiffs with weigh slips.

III. QUESTION PRESENTED

WHETHER THE COURT SHOULD MAKE A PRETRIAL DETERMINATION THAT DEFENDANT'S PROPOSED TESTIMONY REGARDING "BLASTING RECORDS," "BLASTING YIELDS," AND/OR THE "BLASTING REPORTS," ARE INADMISSIBLE AS A MATTER OF LAW.

IV. BRIEF ANSWER

THE COURT WILL NOT MAKE A PRETRIAL DETERMINATION THAT DEFENDANT'S PROPOSED TESTIMONY REGARDING "BLASTING RECORDS," "BLASTING YIELDS," AND/OR THE "BLASTING REPORTS," ARE INADMISSIBLE AS A MATTER OF LAW, BUT MAY REVISIT THE ISSUE, UPON TIMELY OBJECTION, IN THE CONTEXT OF PLAINTIFFS' TRIAL TESTIMONY AND IN THE CONTEXT OF THE DETAIL CONTAINED WITHIN DEFENDANT'S OFFER OF PROOF AT TRIAL.

V. DISCUSSION

Exclusion of expert witness testimony for failure to comply with discovery deadlines is generally a matter within the discretion of the trial court, *Green Const. Co. v. Dep't of Transp.*, 643 A.2d 1129 (Pa. Commw. Ct. 1994), "[h]owever, preclusion of such testimony is a drastic sanction that should not be applied unless the facts of the case make this measure absolutely necessary." *Williams v. Se. Pennsylvania Transp. Auth.*, 741 A.2d 848, 855 (Pa. Commw. Ct. 1999).

As for Plaintiffs' challenge to the relevance of Defendant's proposed testimony, Rule 401 of the Pennsylvania Rules of Evidence provides that if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action[,]" then the evidence is relevant. Pa.R.E. 401 (commenting further that "[w]hether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case" and that "[t]he relevance of proposed evidence may be dependent on evidence not yet of record. Under Pa.R.E. 104(b), the court may admit the proposed evidence on the condition that the evidence supporting its relevance

be introduced later."). Rule 402 of the Pennsylvania Rules of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible." Pa.R.E. 402.

On a trial court's determination of relevance, our Superior Court opined the following:

> [U]nder the Rules of Evidence, courts of common pleas enjoy broad discretion to determine whether evidence is relevant and whether its admission outweighs the risk of confusing the jury. *See* Pa.R.E. 401 and Pa.R.E. 403 (stating, "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.") Merely because an appellate court might have deemed evidence to be relevant in the first instance does not mean that a trial court abused its discretion by failing to admit that evidence.

Hutchinson v. Verstraeten, 304 A.3d 1268, 1274 (Pa. Super. Ct. 2023); *see generally Com. v. Drumheller*, 808 A.2d 893, 904 (Pa. 2002)("Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value. Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.")(quoting *Com. v. Stallworth*, 781 A.2d 110, 117-118 (Pa. 2001)).

Regarding the admission of evidence, our appellate courts have routinely observed the following:

> [F]or evidence to be admissible, it must be competent and relevant. Evidence is competent if it is material to the issue to be determined at trial. Evidence is relevant if it tends to prove or disprove a material fact. Relevant evidence is admissible if its probative value outweighs its prejudicial impact. The trial court's rulings regarding the relevancy of evidence will not be overturned absent an abuse of discretion. *American Future Systems, Inc. v. BBB*, 872 A.2d 1202, 1212 (Pa.Super.2005), *affirmed*, 592 Pa. 66, 923 A.2d 389 (2007) (internal citations omitted).
>
> Pursuant to Rule of Evidence 402, relevant evidence is generally admissible, and irrelevant evidence is inadmissible. Further, relevant evidence may be excluded if its probative value is outweighed by its potential for unfair prejudice, defined as a tendency to suggest decision on an improper basis

> or to diver[t] the jury's attention away from its duty of weighing the evidence impartially. *Stalsitz v. Allentown Hosp.*, 814 A.2d 766, 779 (Pa.Super.2002), *appeal denied*, 578 Pa. 717, 854 A.2d 968 (2004) (internal citations and quotation marks omitted) (citing Pa.R.E. 402, 403). Nevertheless, a court sitting as trier of fact is presumed to disregard inadmissible evidence and consider only relevant and competent evidence. *Commonwealth v. Moss*, 852 A.2d 374 (Pa.Super.2004); *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa.Super.2003), *appeal denied*, 577 Pa. 695, 845 A.2d 817 (2004). Moreover, "[O]n issues of credibility and weight of the evidence, we defer to the findings of the trial judge who has had the opportunity to observe the proceedings and demeanor of the witnesses." *Moyer, supra* at 962 (citing *Billhime v. Billhime*, 869 A.2d 1031, 1036 (Pa.Super.2005)).

Conroy v. Rosenwald, 940 A.2d 409, 417-18 (Pa. Super. Ct. 2007); *cf.* 808 A.2d at 905 (noting that "[a]lthough evidence of (prior occurrences) which is too remote is not properly admissible ... it is generally true that remoteness of the prior instances of hostility and strained relations affects the **weight** of that evidence and **not its admissibility.**")(emphasis in original)(citations omitted); *Rauch v. Scholl*, 68 Pa. 234 (1871).

In *Rauch v. Scholl,* the plaintiff—who owned quarries—agreed to furnish stone to the defendant at $1.75 per yard. 68 Pa. at 234. The defendants, however, contended that the price was $2 per yard. *Id.* The plaintiff brought an action of assumpsit in the Court of Common Pleas of Lehigh County—the claims were for non-assumpsit and set-off. *Id.* The defendants sought to introduce evidence of "the value of stone in the ground in this quarry in 1866[,]" at which time the plaintiff objected on the basis of relevance. *Id.* The trial court admitted the evidence, and, on appeal, our Supreme Court affirmed, reasoning as follows:

> The only assignment of error is, that the court admitted evidence to show what the value of the stone was in the ground unquarried. This evidence was objected to as irrelevant. If it had any bearing upon the matter in controversy it was admissible. Now, surely if the stone in the quarry was only worth fifteen cents, and its value at the bridge was two dollars more, it went very far to show that the services of the defendants were worth that much to the plaintiff. He argues that he was entitled to the benefit of the contract he had made, and that it would not be just to deprive him of that advantage and transfer it to the defendants, and that this would be the consequence of admitting this evidence. But surely it is not an

> unfair presumption that he was to receive no more than the market value of the stone under his contract at the bridge, and if in point of fact it was more, it was incumbent on him to rebut this evidence by showing it. When in a court of errors a judgment is asked to be reversed on the ground merely of the admission of irrelevant testimony, it ought to appear clearly that such evidence tended to draw away the minds of the jurors from the point in issue, to excite prejudice or to mislead them: 1 Grreenl. on Ev. § 52. We do not see that any such effect could have been produced in this case.

68 Pa. at 235.

With regard to the proposed evidence on blast yields, the gravamen of Plaintiffs' argument appears to be that the evidence is simply not very persuasive. While the weight of the proposed evidence is subject to serious debate, the questions of weight and admissibility are materially different. *Cf.* 808 A.2d at 905 (noting that "[a]lthough evidence of (prior occurrences) which is too remote is not properly admissible ... it is generally true that remoteness of the prior instances of hostility and strained relations affects the **weight** of that evidence and **not its admissibility**.")(emphasis in original)(citations omitted); 68 Pa. at 235. In other words, if these blast reports and records "[l]ogically **tend[]** to establish a material fact in the case, **tend[]** to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact[,]" then the Court is disinclined to deny the admission of such evidence on the basis of relevance. 808 A.2d at 904 (quoting *Com. v. Stallworth*, 781 A.2d 110, 117-118 (Pa. 2001))(emphasis added). Further, in order to avoid prejudice to either party, the Court will permit Defendant to introduce expert testimony regarding the blasting reports and records, but will liberally provide the Plaintiffs with an opportunity to respond. 741 A.2d at 855.

ORDER

AND NOW, this 25th day of October 2024, for the above-stated reasons, Plaintiffs' Motion in Limine, filed September 18, 2024, is denied, without prejudice to the Plaintiffs to timely raise the same objections at the trial of this matter.

By the Court,

William P. Carlucci, Judge

WPC/aml

cc: Michael A. Dinges, Esquire
Blake Marks, Esquire
Court Administrator