

The one about the Judge, the forensic accountant, the Mexican marketing expert and the well-known psychic and astrologer

Bart Enterprises & others v Walter Mercado Salinas & Astromundo Inc., United States Court of Appeals, Eleventh Circuit, No. 09-15971

Summary

Taking a bold step into the unknown (or perhaps the mystical), in this edition of Expert Matters we depart from our usual practice of discussing the decisions of Australian Courts. *Mercado* is, to put it mildly, one of the more bizarre judgments we have come across dealing with expert evidence.

Background

The case was an appeal from the United States District Court for the Southern District of Florida.

It involved a contract dispute between Bart Enterprises International Inc. and Walter Mercado Salinas. Bart Enterprises was “in the business of producing and distributing entertainment programming,” and Mercado was “a well-known psychic and astrologer who provides psychic and astrological counselling to the public.”¹

In the 1995 contract, Mercado² assigned the rights in the “Walter Mercado” trademark to Bart, giving it the right to produce, market, and distribute his trademarked materials in exchange for regular payments to him. The contract also allowed Bart to re-assign its contractual rights, which it did to some extent to other entities in the “Bart Group”.

The parties amicably did business for eleven years. Mercado’s story is that trouble began when Bart fell behind on its payments to him, and as a result he attempted to terminate. The Bart Group’s story is that it was not in arrears, and Mercado breached the agreement by failing to attend scheduled appearances, failing to provide required materials, and improperly attempting to terminate the contract.

For more information about this article, please contact:



John Temple-Cole
Partner, Sydney

Tel: +61 2 8257 3077
jtemplecole@kordamentha.com

The Judges summed up the state of the relationship between the parties by quoting some song lyrics:

It may be true, as the song lyrics say, that:

“When the moon is in the Seventh House

And Jupiter aligns with Mars

Then peace will guide the planets

And love will steer the stars,”

But there was no peace and love between these parties after their contractual dispute arose.³

Bart’s complaint asserted in six counts that Mercado or Astromundo (his company) had breached his contract and tortiously interfered with the contracts that Bart Group had with two television stations, by directly entering into contracts with those stations. Mercado denied liability and filed counterclaims seeking, inter alia, a ruling that Bart Enterprises owed him fees and commissions and that he had the right to inspect “all of the accounting books and supporting documentation” to determine the amounts that he was owed, which was granted.

Had Mercado’s psychic powers been greater he might have foreseen that the parties’ relationship was star-crossed and his dealings with the entertainment company would end in a way that was anything but entertaining. Or maybe the problem was that Mercado could see only so far into the future, because things went pretty well for about eleven years.

This publication, and the information contained therein, is prepared by KordaMentha Forensic Partners and staff. It is of a general nature and is not intended to address the circumstances of any particular individual or entity. It does not constitute advice, legal or otherwise, and should not be relied on as such. Professional advice should be sought prior to actions being taken on any of the information. The authors note that much of the material presented was originally prepared by others and this publication provides a summary of that material and the personal opinions of the authors.

Limited liability under a scheme approved under Professional Standards Legislation.

First instance decisions and appeal

A jury in the district court found that Bart had not breached the parties' contract but that Mercado had breached it by: (1) improperly terminating it; (2) hiring another exclusive agent while the parties' contract was still in force; and (3) failing to perform after 22 November 2006. The jury also found that the Bart Group owed Mercado a fiduciary duty separate and apart from the parties' contract but that it had not breached that duty to Mercado.

In a second phase of the trial, the jury considered, *inter alia*, the question of damages for Mercado's breach of contract. It found that neither Bart nor its assignees had been damaged.

Unhappy that it was not awarded any damages for Mercado's breach, Bart appealed.

The Experts

One ground for appeal was Bart's contention that the district court abused its discretion by striking Bart's six proposed expert witnesses, who were offered as experts in the following:

- Intellectual property transactions under Puerto Rican law
- Forensic accounting and valuation
- The United States marketing industry
- International telecom, television, and SMS industry
- Mexican marketing and artist representation⁴, and
- A "responsive expert."

Testimony from those experts was not allowed because Bart failed to comply with the disclosures required under Federal Rule of Civil Procedure 26(a).⁵ Whilst broadly similar to those used by Australian Courts, it is worth noting that Rule 26(a) requires experts testifying in US Federal courts to also disclose:

- The witness's qualifications, *including* a list of all publications authored in the previous 10 years
- A list of all other cases in which, during the previous four years the witness testified as an expert at trial or by deposition
- A statement of the compensation to be paid for the study and testimony in the case.

Further, the relevant disclosures relating to each expert's evidence must be made "*at the times and in the sequence that the court orders.*" Failure to do so will mean that "*the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless.*"

Bart focused its arguments on the court's decision to strike the proposed testimony of its forensic accounting expert, Mr C, whose report it said was timely served on Mercado and that it "*complied with the spirit of*" and "*substantially complied with*" Rule 26.

The court had noted that Mr C's report was the only one of the Bart Group's experts whose "report" even arguably complied with the requirements of Rule 26(a). Problems

included that his report was not provided to Mercado until after close of business on the date ordered by the court. Even then, Bart did not provide a "report" of the type envisioned by Rule 26, but instead faxed a letter stating Mr C's services would be limited to:

- A. *Providing a net present value calculation of future damages claimed by Plaintiffs as of the date of the trial. I have included (attached[]) the formulas that he will be using for that function.*
- B. *Providing a calculation of pre-judgment interest on the monetary stream of claimed past damages.*
- C. *Rebuttal services with regard to any opinions, conclusions or applications of your damage/breach expert and/or claims or attacks upon the Plaintiffs[] damage calculations/claims.*

The faxed materials did include some "*formulas for calculating present value*" and an unsigned page titled "*damages report*" (\$14.7 million) but without explanation of how that amount was arrived at. Further, no CV was attached to the above, and there was no report stating, much less explaining, Mr C's opinions.

"There were a number of problems with the form and substance of the Bart Group's expert reports... The record shows that [the accounting expert] is the only one of the Bart Group's experts whose "report"—and we are being charitable in calling it that—even arguably complied with the requirements of Rule 26(a)."⁶

Bart argued that "*any non-compliance*" was "cured" when Mercado took Mr C's deposition, during which he disclosed that he had been retained only to rebut any report and trial testimony by Mercado's accounting expert. Those arguments were unsuccessful. As Mercado's counsel recounted:

[A]s of November 20th [court ordered deadline] ... there were no opinions, no memos, nothing. And through today, through this morning, when I took this gentleman's deposition, there was absolutely no report provided by him.

He provided this morning a draft of some document that he says he's working on, and that he intends to use, which is basically a summary of the numbers that were provided to him in one of the items that we attached to our motion [to strike] which is titled "damage report."

And he testified this morning that he took those numbers and put them in this rough draft that he's working on so that he can attempt to calculate, I think, from what he said, present value of those numbers. And that's as far as he has gotten with his draft of that report.

The court refused to grant any further waivers of the expert timetable. It conceded however to allow Mr C to be present in the courtroom during the testimony of Mercado's damages expert, and to advise counsel about cross-examination. Bart insisted that its failure to comply with the rule and the court's order about disclosure would not have harmed Mercado if Mr C had been allowed to testify because Mercado had deposed him before trial. As the court explained, however, Bart's defiance of the rule and order meant that Mercado "*had to depose [Mr C] without the benefit of a report containing his opinions or records supporting his testimony, which was not yet final.*"

The court reasoned that "*[c]learly, being unable to adequately prepare for a deposition constitutes harm*" to Mercado, and therefore denied the motion for a new trial.

Further accounting evidence

Bart also contended that it was entitled to a new trial on damages because the jury's verdict awarding no damages was contrary to the great weight of evidence at trial.

This argument centred on two exhibits that Bart introduced showing income and expense summaries from 2005 to 2008 for five of the corporate plaintiffs. It argued that these showed a "*precipitous drop*" from November 2006, which is the date that Mercado breached the parties' contract.

Even though Bart asserted that the evidence about the loss of income was "*uncontested*," it acknowledged that Mercado's accounting expert, Mr M, testified that in his view the documents showed that Bart had been operating at a net loss and suffered no damages as a result of Mercado's breach. Executives for Bart testified in favour of a contrary set of inferences.

The district court explained that the weight of the evidence was not contrary to the jury's finding that Mercado had not proximately caused any damages to the Bart Group because:

[T]he jury could have chosen not to accept the evidence [the Bart Group] presented as much of the damage evidence was prepared by [the Bart Group] for trial and [it] proffered few, if any, original documents in support of [its] damages claims.

On appeal it was therefore found that the district court did not abuse its discretion by refusing to grant the Bart Group a new trial on damages based on the sufficiency of the evidence.⁷

In a final (and ultimately fruitless) attempt to argue for a retrial on damages, Bart objected to a comment the judge made to the jury in phase II of the trial. After instructing the jury on the law, the court closed with these words: *On behalf of everyone, thank you so very much for your patience and your good humor and your attention. It has really been a pleasure working with you all. God speed and may you have the judgment of Solomon.* Whilst perhaps worth a read (if only for the sake of amusement), further coverage in this newsletter was thought to be unjustified.

Findings

As is probably clear, Bart's attempts to argue for a retrial were unsuccessful. In closing, it was noted:

Advancing the argument that the whole is greater than the sum of its parts, the Bart Group contends that all of the district court's "errors" add up to an abuse of discretion that justifies granting a new trial. Because we have determined that there were no errors constituting an abuse of discretion, there was no accumulation of error either.

And on a final (musical) note, it was noted:

*The Bart Group has not shown that any of the challenged rulings by the district court constituted an abuse of discretion. Nothing plus nothing is nothing, just as "nothing from nothing leaves nothing."*⁸

Significance

This case highlights the significant differences in the way that expert evidence is managed pursuant to Rule 26 and the relevant Australian court guidelines. We are uncertain as to how many Australian experts would have a complete list of "all articles authored in the last 10 years" readily available! The issue of whether the quantum of fees earned by an expert should be disclosed has been recently debated and rejected in Australia.⁹

A clear similarity, however, is that the expert must observe both the relevant court guidelines for expert evidence *and* any specific orders made for the delivery of that evidence, or risk the exclusion of their evidence. The expert must therefore ensure that they understand and comply with all of the orders that have been made in relation to their evidence.

Endnotes

1. Not being familiar with Mercado's talents, we undertook extensive research (on Wikipedia). His television career apparently began with a weekly astrology show on Puerto Rican television. His filmography includes three movies, including Finding Papi, where he plays the role of a fortune teller who reads the horoscopes of three women seeking to establish the fidelity of their boyfriend. Few details are provided of his specialist study, training or experience, which presumably would be problematic if he were ever called to act as an expert witness in Australian proceedings.
2. In October 2010, Mercado announced that he would now be referred to as "Shanti Ananda," a translation in Sanskrit of "peace happiness". He says a "being of light" imparted a spiritual revelation to him, which he refers to as his "authentic mystic name". In this article, we continue to refer to him as "Mercado".
3. The song lyrics were attributed to The 5th Dimension's "Aquarius / Let the Sunshine In", The Age of Aquarius (Soul City Records 1969). Readers may recall this from the soundtrack of *Forrest Gump*. We are unaware of song lyrics being quoted in any Australian judgements.
4. There are no clues in the judgment as to how the expertise of this expert was thought relevant to the issues.
5. <http://www.ilnd.uscourts.gov/LEGAL/frcpweb/frc00029.htm>
6. Refer to Appeal Judgement of Carnes, Kravitch and Silver, Circuit Judges dated 23 August 2011, page 14 and 15.
7. Other proceedings appear to be ongoing. According to our extensive Wikipedia research, Mercado subsequently lost a case brought against Bart, allowing Bart to continue using Mercado's name and likeness in future commercial projects. It is reported that, when asked about his legal case over the rights to his name he replied, "I worked for many years, and gave some releases without thinking much about human wickedness".
8. Attributed to Billy Preston, "Nothing from Nothing", On The Kids and Me (A&M Records 1974)
9. <http://www.alrc.gov.au/inquiries/federal-civil-justice-system>

Whatever the factual, accounting, financial or e-discovery issues that arise, KordaMentha Forensics' expertise and experience can bring clear thinking, objectivity and effective communication of ideas to help find the facts, understand the relevant issues and clarify the financial and other impacts in a cost-effective way.

For more information about our forensic services, please contact:

Melbourne

Owain Stone

Tel: +61 3 8623 3410
ostone@kordamentha.com

Robert Cockerell

Tel: +61 3 8623 3355
rcockerell@kordamentha.com

Brisbane

Brian Wood

Tel: +61 7 3225 4993
bwood@kordamentha.com

David Van Homrigh

Tel: +61 7 3225 4992
dvanhomrigh@kordamentha.com

Perth

Jarrod Baker

Tel: +61 8 9220 9330
jbaker@kordamentha.com

Sydney

Andrew Ross

Tel: +61 2 8257 3051
aross@kordamentha.com

John Temple-Cole

Tel: +61 2 8257 3077
jtemplecole@kordamentha.com

Richard Bennison

Tel: +61 2 8257 3040
rbennison@kordamentha.com

Nigel Carson

Tel: +61 2 8257 3080
ncarson@kordamentha.com

Andre Menezes

Tel: +61 2 8257 3023
amenezes@kordamentha.com

Singapore

Matthew Fleming

Tel: +65 6593 9363
mfleming@kordamentha.com