UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

AURORA OIL & GAS CORPORATION,

Debtor.
_____/

Case No. DT 09-08254
Chapter 11
Hon. Scott W. Dales

FRONTIER ENERGY, LLC,

Plaintiff,

v.

AURORA ENERGY, LTD,

Defendant.
_____/

Consolidated Adversary Pro. No. 09-80518
LEAD CASE

ORDER REGARDING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

This adversary proceeding promises to resolve most of the disputes between the Plaintiff Frontier Energy, LLC ("Frontier" or "Plaintiff") and the Defendant Aurora Energy, Ltd. ("Aurora"),[1] arising out of, or otherwise related to, a lawsuit that Frontier filed against Aurora in Michigan's Charlevoix County Circuit Court (the "State Court Action"). The State Court Action, which predates Aurora's Chapter 11 bankruptcy proceeding, is essentially a dispute

[1] The Defendant is now known as NorthStar Energy LLC, but the court will continue to refer to the company as "Aurora" to reflect the prepetition identity.

about royalty payments under two oil and gas contracts between the parties, referred to as the "Hudson Agreement" and the "Corwith Agreement."[2]

While the State Court Action was pending, Aurora filed a voluntary petition for relief with this court under Chapter 11, automatically staying the action. In its bankruptcy case, Aurora objected to Frontier's claim related to the Agreements (DN 432) and filed a motion to estimate Frontier's claim (DN 482) in connection with Aurora's plan confirmation. In addition, shortly before the confirmation hearing, Aurora removed the State Court Action to the bankruptcy court under 28 U.S.C. § 1452, commencing the above-captioned adversary proceeding. Aurora also filed a complaint to avoid Frontier's supposed security interest as a preference because it was perfected within ninety days before the petition date.[3] For its part, also in contemplation of Aurora's plan confirmation, Frontier filed a motion for an order declaring that the Agreements are subject to 11 U.S.C. § 365, a determination that could, among other things, give Frontier the right to insist on full and immediate cure of prepetition defaults.

The parties commendably agreed that their dispute should not delay confirmation, and that they were willing to resolve their differences in this adversary proceeding. The court eventually confirmed Aurora's Chapter 11 plan and later entered a pretrial order in the adversary proceeding, which consolidated the various claims for decision. Aurora now moves for partial summary judgment dismissing the claims related to the Corwith Agreement (DN 73, the "Motion"). For the following reasons, the court will deny the Motion.

Summary judgment in an adversary proceeding is governed by Rule 56, as incorporated under Rule 7056. In considering a motion for summary judgment, the court will grant the

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[2] For convenience, and without expressing any determination on the nature of the parties' contracts, the court will refer to the Hudson Agreement and the Corwith Agreement collectively as the "Agreements."

[3] Frontier no longer contends that it holds a secured claim and the preference issues and priority issues involving the Debtor's other creditors have been resolved by stipulation and order.

motion only where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). Specifically, the motion will be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists where a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmovant cannot avoid summary judgment by relying on the allegations of the pleadings, but must come forward with specific evidence showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In considering a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in their favor." *Swekel v. City of River Rouge*, 119 F.3d 1259, 1261 (6th Cir. 1997) (quoting *Anderson*, 477 U.S. at 255). The court looks to the applicable substantive law in evaluating the materiality of a factual issue. *Anderson*, 477 U.S. at 248.

Here, Aurora's Motion is premised on its argument that in order to prevail at trial, Frontier must prove its damages, and in order to prove damages, Frontier must offer expert testimony. Because Frontier has not designated an expert witness with respect to the Corwith Agreement, Aurora argues that Frontier cannot prevail on the essential damage element of its case, and therefore all factual disputes regarding any default under the Corwith Agreement are immaterial.

Expert testimony is opinion testimony based on specialized knowledge not common to a layperson. Some causes of action necessarily depend upon expert testimony, while others do not. Certainly, where a claim requires highly technical proofs, expert testimony may be required. *See, e.g.*, *Simpson v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 957 F. Supp. 136, 138 (N.D. Ill.

1997) (discussing the need for expert testimony in considering causation in design defect claim); *KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398, 426-27 (2007) (stating that expert testimony may be helpful in a motion for summary judgment in a patent infringement suit). On the other hand, where the facts at issue are "sufficiently obvious as to lie within common knowledge," a plaintiff can prove its case without resorting to expert testimony. *In re Dow Corning Corp.*, 211 B.R. 545, 586 (Bankr. E.D. Mich. 1997) (quoting *Fitzgerald v. Manning*, 679 F.2d 341, 350 (4th Cir. 1982)). There is no general rule that requires expert testimony. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848 (10th Cir. 1979) (quoting 2 Wigmore on Evidence, §§ 555-56 (3rd ed.)). Rather, expert testimony is only admissible if it is helpful to the fact-finder in considering complex issues. *See* Fed R. Evid. 702. Even in a fairly technical case, if the nonmovant presents other evidence that a reasonable jury would find sufficient to rule in favor of the nonmovant at trial, expert testimony is not required. *See Gass v. Marriott Hotel Services, Inc.*, 558 F.3d 419, 432 (6th Cir. 2009) (denying defendant hotel's motion for summary judgment on lack of expert testimony in tort claim based on exposure to pesticides where the plaintiff presented other evidence that could lead a reasonable jury to rule for the plaintiff).

In this case, Aurora premises its motion for summary judgment on the complex accounting it argues would be needed to show damages for the Plaintiff's breach of contract claim. Although the question is a close one, the court is not persuaded that summary judgment is appropriate in this case. The case may present complex legal issues, but once the court construes the Corwith Agreement, particularly Section 4 of the Oil and Gas Lease, (Case No. 09-08254, DN 511, Exh. 37), the damage calculation will not necessarily or invariably require expert

testimony (though such testimony would have certainly been helpful).[4] Drawing inferences in favor of Frontier (the non-moving party), the court assumes Frontier will offer documentary evidence (largely obtained from Aurora through discovery), regarding the volume of product produced under the Corwith Agreement and the various expenses that, depending upon the court's construction of the contract, may or may not affect the royalty calculation. The court infers in Frontier's favor, again as Rule 56 instructs, that it will be able to calculate the damages without the aid of an expert. If the court is unable to do so without the assistance of an expert, then Frontier will have failed in its proofs. The court today, however, says only that it is not persuaded to foreclose Frontier from attempting to establish its damages at trial.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 73) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order Regarding Defendant's Motion for Partial Summary Judgment pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Timothy A. Fusco, Esq., Marc N. Swanson, Esq., Kevin Lippman, Esq., David R. Whitfield, Esq., Stephen B. Grow, Esq., and Charles N. Ash, Jr., Esq.

END OF ORDER

[4] The court agrees with Aurora that the declaration of Kathie Piper (DN 94-10) uses language evocative of expert testimony, and that Ms. Piper will not be permitted to testify as an expert witness at trial, given the parties' pretrial agreement limiting expert witnesses.

IT IS SO ORDERED.

Scott W. Dales
United States Bankruptcy Judge

Dated: June 04, 2010