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IT IS SO ORDERED.

Dated: December 3, 2024



Mina Nami Khorrami
Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: :
 :
Mark Lynn Anthony, : Case No. 23-52661
 : Chapter 13
 : Judge Nami Khorrami
Debtor. :

OPINION AND ORDER DENYING DEBTOR MARK L. ANTHONY'S MOTION IN LIMINE REGARDING PROPOSED EXPERT WITNESS (DOC. 178)

Before the Court is the *Debtor Mark L. Anthony's Motion in Limine Regarding Proposed Expert Witness* (the "Motion") (Doc. 178), together with the *State of Ohio, Ohio EPA's Response to Debtor Mark L. Anthony's Motion in Limine Regarding Proposed Expert Testimony* (Doc. 178) (the "Objection") (Doc. 197).

For the reasons that follow, the Motion is DENIED.

I. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. A proceeding to confirm a chapter 13 plan, including the resolution of evidentiary issues raised in connection with confirmation, is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L) and (O) and 28 U.S.C. § 1334(b). Venue properly lies in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Background

Mark Lynn Anthony (the “Debtor”) filed a voluntary petition for relief under chapter 13 on August 4, 2023 (the “Petition Date”). On October 9, 2024, the Debtor filed his *Fourth Amended Chapter 13 Plan* (the “Plan”) (Doc. 175). Confirmation of the Plan will be considered at a confirmation hearing to be set at a pretrial conference on December 12, 2024. One of the Debtor’s creditors is the State of Ohio Environmental Protection Agency (the “Ohio EPA”), which holds an unsecured claim against the Debtor. The Ohio EPA filed an objection to confirmation of the Plan and intends to offer expert testimony at the confirmation hearing from Courtney Beckett (hereinafter “Ms. Beckett”) in support of that objection. Ms. Beckett is a forensic accountant in the Environmental Enforcement Section of the Ohio Attorney General’s Office.¹

The Beckett Affidavit establishes that Ms. Beckett earned a Bachelor of Science degree with a major in accounting from the Fisher College of Business at the Ohio State University in 2006. In January 2014 she was licensed as a Certified Public Accountant by the Accountancy Board of Ohio after she passed a four-part exam covering Auditing and Attestation, Business

¹ The record before the Court on the Motion consists of an expert report prepared by Ms. Beckett (the “Beckett Report”) dated August 20, 2024, which the Debtor appended to the Motion. Motion, Ex. 1. In addition, the Ohio EPA attached an Affidavit from Ms. Beckett (the “Beckett Affidavit”) as Exhibit A to the Objection.

Environment and Concepts, Financial Accounting and Reporting, and Regulation. Beckett Aff. 1. To maintain her license, she is required to complete at least 120 continuing professional education credits every three years. *Id.* In 2018, Ms. Beckett became a Certified Fraud Examiner, which is a designation awarded by the Association of Certified Fraud Examiners, and which also required passing a four-part exam. *Id.* She has fifteen years of experience in financial analysis with the State of Ohio, including significant work as a forensic accountant from April 2012 to December 2015 and from January 2020 to the present. *Id.* In her various roles with the Office of the Ohio Attorney General, Ms. Beckett has performed financial analysis in over two hundred cases. *Id.*

Ms. Beckett intends to testify that, based upon the documents that have been made available to her, she is not able to verify the Debtor's current income and is not able to determine whether he has the ability to fund the Plan. Beckett Report 3.

III. Arguments of the Parties

In the Motion, the Debtor seeks to exclude the anticipated testimony of Ms. Beckett at the hearing on the confirmation of the Plan. According to the Debtor, Ms. Beckett is not qualified to testify in this case as an expert witness regarding the Debtor's ability to fund the Plan, which is one element the Debtor is required to establish in order to obtain confirmation. The Debtor maintains that Ms. Beckett has no meaningful experience in the bankruptcy field and otherwise lacks the qualifications to offer expert testimony, and that, as an employee of the State of Ohio, Ms. Beckett has an inherent bias against the Debtor and is not independent. Finally, the Debtor argues that, so far, he has made thirteen plan payments, and that this payment record demonstrates feasibility such that Ms. Beckett has nothing useful to add on the subject.

In response, the Ohio EPA insists that Ms. Beckett's education, licensure, certifications, and experience qualify her to offer expert testimony, and that Ms. Beckett's testimony will be

helpful to the Court and reliable. Finally, Ohio EPA argues that the Debtor's objections at most relate to the proper weight to be given to Ms. Beckett's testimony but do not warrant excluding her testimony entirely.

IV. Standards Governing Motions in Limine

A motion in limine is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561 (6th Cir. 2013) (quoting *Luce v. U.S.*, 469 U.S. 38, 41 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984)). The burden rests upon the moving party to demonstrate that the evidence sought to be excluded is clearly inadmissible, and unless that high standard is met, evidentiary rulings should be deferred until trial so the trial court can review and assess the evidence in context. *Hobart Corp. v. Dayton Power & Light Co.*, 2020 WL 614041, at *2 (S.D. Ohio Feb. 10, 2020) (citing *Ind. Ins. Co. v. GE*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004); *Tera II LLC v. Rice Drilling D, LLC*, 2024 WL 665667, at *1 (S.D. Ohio Feb. 16, 2024)).

The basic requirements for expert testimony are set forth in Rule 702 of the Federal Rules of Evidence (hereinafter the "Evidence Rules") and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 46 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Evidence Rule 702 places the burden on the proponent of expert testimony to establish four prerequisites for admission of that testimony:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

The first question the Court must address is when it must evaluate the expert's testimony under Evidence Rule 702. The confirmation hearing in this case will proceed without a jury as a

bench trial before the Court. Although this fact does not eliminate the requirements of Evidence Rule 702, it impacts the manner in which the Court analyzes those requirements. *Hobart Corp.*, 2020 WL 614041, at *2. Trial courts are to act as gatekeepers to keep unreliable evidence from misleading the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008). But the “‘gatekeeper’ doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial.” *Deal v. Hamilton Cty. Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004). Where there is no jury, courts often find that the most efficient and effective procedure is to hear all the evidence and then determine what, if any, weight to give expert witness testimony. *Hobart Corp.*, 2020 WL 614041, at *2; *Ne. Ohio Coal. for the Homeless v. Husted*, 2016 WL 1047130, at *3-4 (S.D. Ohio Mar. 16, 2016) (“the Court – acting as the finder of fact in this bench trial – can and will determine what weight to give Professor Timberlake’s testimony and reports in due time. But excluding his testimony or reports altogether simply makes no sense at this juncture.”); *see also Estate of Stuller v. United States*, 811 F.3d 890, 894-95 n.3 (7th Cir. 2016) (holding that district court did not err by postponing *Daubert* ruling until after bench trial).

Applying these principles, the Court will defer its analysis under Evidence Rule 702 until after it has heard all the evidence at the confirmation hearing. The Court will, however, consider the Debtor’s arguments to determine if he has established that Ms. Beckett’s testimony is clearly inadmissible. The Court finds that the Debtor has not established that Ms. Beckett’s testimony is clearly inadmissible for the following reasons.

V. Analysis

Ms. Beckett’s testimony is proffered on the question of whether Debtor can establish feasibility under 11 U.S.C. § 1325(a)(6): that “the debtor will be able to make all payments under the plan and to comply with the plan.” Beckett Report 3. When it evaluates this issue, the Court

must determine whether the Debtor has shown a reasonable likelihood of successfully performing the plan. *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D.N.J. 2008). The Debtor asserts three challenges to Ms. Beckett's testimony on this issue.

The Debtor first asserts that Ms. Beckett lacks the qualifications to provide expert testimony. Ms. Beckett is a certified public accountant, has nearly a decade of experience as a forensic accountant, and over fifteen years of experience performing financial analysis. A forensic accountant need not have experience in a particular industry to be admitted as an expert. *Wechsler v. Hunt Health Sys.*, 381 F. Supp. 2d 135, 144 (S.D.N.Y. 2003); *In re Laurel Valley Oil Co.*, 2015 Bankr. LEXIS 2470, at *17-18 (Bankr. N.D. Ohio July 28, 2015). Reviewing a debtor's financial documents and determining whether that debtor has the ability to fund a proposed chapter 13 plan appears to be within Ms. Beckett's training and experience.

Next, the Debtor asserts that because Ms. Beckett is testifying on behalf of her employer, she is biased. However, "bias in an expert witness's opinion is usually a credibility issue for the jury, not a basis for the Court to exclude the opinion as unreliable." *Peters v. DCL Med. Labs. LLC*, 305 F. Supp. 3d 799, 812 (S.D. Ohio 2018) (citing *Adams v. Lab Corp. of Am.*, 760 F.3d 1322, 1332-33 (11th Cir. 2014)); *see also In re Ohio Execution Protocol Litig.*, 2019 WL 3821787, at *4 (S.D. Ohio Aug. 15, 2019) (same). Therefore, it is up to this Court to determine the independence of Ms. Beckett and her credibility at the hearing on the confirmation of the plan.

Finally, the Debtor asserts that he has made thirteen plan payments and suggests that Ms. Beckett has nothing further to add to that fact. The Court interprets this argument to be that those payments establish feasibility as a matter of law, so that Ms. Beckett's testimony is not relevant. Feasibility under 11 U.S.C. § 1325(a)(6) is a fact question. *In re Lewis*, 459 B.R. 281, 290 (N.D. Ill. 2011). It is not governed by *per se* rules and must be determined on a case-by-case basis given

all the evidence. *In re Gutierrez*, 633 B.R. 768, 801 (Bankr. S.D. Tex. 2021) (citing COLLIER ON BANKRUPTCY ¶ 1325.07 (Richard Levin & Henry J. Sommer eds., 16th ed.)). Furthermore, because this argument would require that the Court find that the plan payments establish feasibility as a matter of law, the Court notes that it has already ruled in this case that an evidentiary motion is not an appropriate vehicle to request a finding that an issue is established as a matter of law. *In re Anthony*, 659 B.R. 879, 884 (Bankr. S.D. Ohio 2024).

VI. Conclusion

None of the three arguments asserted in the Motion meet the high standard of showing that Ms. Beckett's testimony is clearly inadmissible. For the foregoing reasons, the Motion is hereby DENIED. Ms. Beckett will be permitted to testify at the confirmation hearing. The Court will consider the admissibility and weight of her testimony after hearing all the evidence presented at the confirmation hearing.

IT IS SO ORDERED.

Copies to: Default List