

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Design Basics, LLC,

Case No. 3:15CV666

Plaintiff

v.

ORDER

Forrester Wehrle Homes, Inc., et al.,

Defendants

This is a copyright-infringement case in which the plaintiff, Design Basics, LLC (DB), alleges that the defendants – Forrester Wehrle Homes, Inc.; Forrester Wehrle Development, Ltd.; and their principals Jeffrey, Joseph, and Richard Wehrle (collectively, FWH) – infringed DB’s copyrights in a series of architectural plans.

DB alleges that FWH copied its plans and/or used them without permission to build single-family homes in Northwest Ohio and Southeast Michigan. It also brings related claims under the Digital Millennium Copyright Act.

Now that I have ruled on the parties’ motions for summary judgment, and with the parties having failed to resolve the case via private mediation, the case is ready for trial on the issues not adjudicated in the summary judgment orders.

Due to my unavailability to preside over a jury trial of the length (between ten and forty trial days) currently anticipated by the parties, this case will be, upon my adjudication of the parties’ motions in limine (Docs. 153, 154, 158, 159, 160), reassigned to the Honorable Jack Zouhary for all further proceedings. (Doc. 172).

This order sets forth my rulings on those motions.

Discussion

A. Testimony of Carl Cuzzo

The defendants first move to exclude the lay opinions of DB's "senior designer" Carl Cuzzo and the pedagogical devices that he prepared. (Doc. 153). Their motion (*id.*, PageID 1554) challenges the admissibility of Cuzzo's opinions that:

- Each of DB's architectural plans "demonstrate[s] a 'modicum of creativity.'" (Doc. 89-7, PageID 3666-67 at ¶7).
- Based on Cuzzo's comparison of each of FWH's plans to the DB plan that it allegedly infringed, the parties' plans are "substantially similar" so as to support an inference of unlawful copying. (*Id.*, PageID 3667 at ¶10).
- Each FWH plan contains many design similarities as the corresponding DB plan. (*Id.*, PageID 3667 at ¶11).
- Defense expert Richard Kraly's opinion that the defendants' plans are not substantially similar to DB's plans contains many "discrepancies." (*Id.*, PageID 3667 at ¶12).

Defendants argue that these opinions "rely on specialized knowledge and constitute impermissible lay witness testimony." (Doc. 153, PageID 6653). They also argue that the opinions will not be helpful to the jury. Instead, the defendants claim, the opinions are "helpful to DB only because they dictate the outcome of the . . . substantial similarity analysis." (*Id.*, PageID 6658).

FWH also seeks exclusion of Exhibits C and D to Cuzzo's declaration.

The former comprises three exhibits that Cuzzo prepared.

Exhibit C-1, titled "Plan Elevations," offers a visual comparison of the exterior frontages of each DB plan and the FWH plan that allegedly infringes it. (Doc. 89-3). Exhibit C-2, styled "Side-by-Side Layouts," depicts the blueprint of each DB plan adjacent to the blueprint of the

allegedly infringing FWH plan. (Doc. 89–4). Exhibit C-3, “Plan Overlays,” depicts the blueprint for each DB plan laid on top of the allegedly infringing FWH plan, thereby permitting the fact-finder to observe how similar (or not) the parties’ plans are.

Exhibit D, in turn, is a list of purported similarities that Cuozzo detected between DB’s plans and FWH’s allegedly infringing plans. (Doc. 89–6).

DB responds that Cuozzo may testify about “DB’s design process, the creation of the 17 [works] at issue, how DB discovered Defendants’ Accused Works, how he reviewed the Accused Works, and what prompted him to believe that they were copied from DB’s Copyrighted Works[.]” (Doc. 171, PageID 7150).

It also contends that I should allow Cuozzo to “explain in detail” to the jury “what makes each [DB] plan ‘original’” and what “features present” in the defendants’ plans are “nearly identical” to DB’s designs, “have no functional purpose[.]” and thus “evidence copying.” (*Id.*). DB emphasizes that Cuozzo bases his opinions on the knowledge and experience he gained working for DB, rather than on any specialized or technical knowledge that might implicate Evidence Rule 702.

Regarding the pedagogical devices, DB argues that they are admissible because they “serve only to augment the visual comparison [of the allegedly infringing and infringed works] for the jury’s consideration.” (*Id.*, PageID 7153).

1. Admissibility of Opinion Evidence

“A witness may testify based on opinion, as opposed to testifying to facts of which he has direct knowledge, under two circumstances: as a lay person under Rule 701 or as an expert under Rule 702.” *U.S. v. Freeman*, 730 F.3d 590, 595 (6th Cir. 2013).

“Such lay opinion testimony is permitted under Rule 701 because it has the effect of describing something that the jurors could not otherwise experience for themselves by drawing upon the witness’s sensory and experiential observations that were made as a first-hand witness to a particular event.” *Id.* (internal quotation marks omitted). To ensure that lay testimony serves the “objective of putting the trier of fact in possession of an accurate reproduction of the event,” *id.*, Rule 701 instructs that:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness’s perception; (b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

“If a witness’s testimony fails to meet any one of the three foundational requirements, it is not admissible.” *Freeman, supra*, 730 F.3d at 596.

2. Analysis

I will grant the defendants’ motion in part and deny it in part.

First, to the extent that Cuozzo proposes to testify about DB’s design processes, how DB created the seventeen architectural plans at issue, and how Cuozzo came to learn about FWH and their designs, such testimony is not inadmissible under Rules 701 and 702.¹

DB has represented, without contradiction from the defendants, that Cuozzo has worked for DB for more than thirty years, and that “he has personally observed and taken part in the creation of these designs[.]” (Doc. 171, PageID 7150). His experience provides an adequate

¹ Whether the defendants challenge this testimony on some other basis will raise issues for Judge Zouhary to resolve.

foundation for Cuozzo to testify about the areas outlined above. *U.S. v. White*, 492 F.3d 380, 403 (6th Cir. 2007).

Second, to the extent that Cuozzo intends to opine on the supposed “originality” of DB’s architectural works, or the creativity inherent in them, he may testify only that DB and/or its agents and employees created the plans at issue.

As I explained at the summary-judgment stage, “[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Design Basics, LLC v. Forrester Wehrle Homes, Inc.*, 302 F. Supp. 3d 933, 941 (N.D. Ohio 2018).

For that reason, Cuozzo – who participated in the creation of some or all of the DB works at issue – may testify that DB and its employees, on their own, created those plans. But Cuozzo may not opine that the works are “original” in the sense that they possess “some minimal degree of creativity.”

Whether Cuozzo, a lay witness, believes that the designs are original (and therefore entitled to copyright protection) is irrelevant and not helpful to the jury. Rather, the jury will be able to decide, based on the testimony it hears and its review of the architectural plans, whether DB’s works possess a minimal degree of creativity. *See Freeman, supra*, 730 F.3d at 597.

Third, and for largely the same reasons, Cuozzo may not opine that DB’s works and FWH’s works are substantially similar.

“To generate an inference of copying, the copyright owner must show “(1) access to the allegedly-infringed work by the [infringer] and (2) a substantial similarity between the two

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