Golden Triangle #3, LLC v. RMP-Mallard Pointe, LLC, 2024 NCBC Order 26.

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 13580

GOLDEN TRIANGLE #3, LLC,

Plaintiff and Counterclaim Defendant,

v.

RMP-MALLARD POINTE, LLC, and MALLARD CREEK ASSOCIATES #1, LLC,

Defendants and Counterclaim Plaintiffs,

and

RMP-MALLARD POINTE, LLC,

Third-Party Plaintiff,

v.

LEVINE PROPERTIES, INC.,

Third-Party Defendant.

ORDER ON DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EVIDENCE OF LOST PROFITS

1. **THIS MATTER** is before the Court on RMP-Mallard Pointe, LLC ("RMP") and Mallard Creek Associates #1, LLC's ("MCA") (together, "Defendants") Motion *in Limine* to Exclude Evidence of Lost Profits (the "Motion"), (ECF No. 140).[1]

[1] Defendants originally filed the Motion as a Motion in the Alternative to their Motion for Summary Judgment, (ECF No. 62).

2. Having considered the Motion, the Parties' submissions submitted in support of and in opposition to the Motion, the arguments of counsel, and other appropriate matters of record, the Court hereby **DENIES** the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The factual and procedural background of the case is recited in detail in *Golden Triangle #3, LLC v. RMP-Mallard Pointe, LLC*, 2022 NCBC LEXIS 88 (N.C. Super. Ct. Aug. 2, 2022).

4. Plaintiff Golden Triangle #3, LLC ("Golden Triangle") seeks damages arising out of Defendants' alleged breaches of contract. In support of its claims, Golden Triangle designated two experts: David M. Knoble ("Knoble") and Damon Bidencope ("Bidencope"). (*See* Golden Triangle #3, LLC and Levine Properties, Inc.'s Designation of Expert Witnesses ["Pl.'s Designation"] ECF No. 63.29.)

5. Knoble is a certified public accountant ("CPA") and "is expected to testify about [Golden Triangle's] past and future damages." (Pl.'s Designation 3.) Specifically, "Knoble will opine that there is sufficient information from the proformas to determine what the after-tax cash flow would have been for the completed project, given certain reasonable and customary financial assumptions." (Pl.'s Designation 3.) Knoble testified that he "was asked to calculate what would have happened if the project had gone according to the anticipated plans of the parties, using the numbers that they provided the banks to obtain financing, and using an agreement that stipulated certain items that could be used related to cost

and revenue and operation." (Excerpts from Nov. 19, 2020 Dep. of David Knoble ["Knoble 2020 Dep."] 47:9-15, ECF No. 63.30.)

6. Bidencope, an appraiser, "is expected to testify about the value of the intended project, including the executed Harris Teeter lease, the executed Novant lease, and the value of the multi-family component." (Pl.'s Designation 2.)

7. Defendants seek an order (1) excluding all evidence of lost profits, contending they are inherently speculative; and (2) excluding the opinions of Knoble and Bidencope under North Carolina Rule of Evidence 702 (the "Rule(s)"). (*See generally*, Motion.)

8. The Motion has been fully briefed, and arguments of counsel were heard by the Court on 7 March 2024. (*See* Am. Not. of Hrg., ECF No. 149.) The Motion is now ripe for disposition.

II. LEGAL STANDARD

9. A motion *in limine* seeks a "pretrial determination of the admissibility of evidence proposed to be introduced at trial." *Evans v. Family Inns of Am., Inc.*, 141 N.C. App. 520, 523 (2000) (cleaned up). Importantly, "[r]ulings on these motions are merely preliminary and thus, subject to change during the course of trial, depending on the actual evidence offered at trial." *Id.*

10. "As with any evidence, [expert] testimony must meet the minimum standard for logical relevance" under Rule 40l. *State v. McGrady*, 368 N.C. 880, 889 (2016). Additionally, "[e]xpert testimony is governed by North Carolina Rule of Evidence 702, which is now virtually identical to its federal counterpart and follows

the *Daubert* standard for admitting expert testimony."[2] *Crescent Univ. City Venture, LLC v. AP Atl., Inc.*, 2022 NCBC LEXIS 9, at **5-6 (N.C. Super. Ct. Feb. 8, 2022) (quoting *Insight Health Corp. v. Marquis Diagnostic Imaging of N.C., LLC*, 2017 NCBC LEXIS 14, at *39 (N.C. Super. Ct. Feb. 24, 2017)). "In other words, North Carolina trial courts now perform the same 'gatekeeping role' that federal district courts have long performed. *Id.* at **6 (quoting *Kerry Bodenhamer Farms, LLC v. Nature's Pearl Corp.*, 2018 NCBC LEXIS 239, at *4 (N.C. Super. Ct. Dec. 27, 2018)). In applying the *Daubert* standard, North Carolina courts may seek guidance from federal case law. *McGrady*, 368 N.C. at 888.

11. Rule 702(a) sets out a three-part test: "(1) expert testimony must be based on specialized knowledge that will assist the trier of fact, (2) the expert must be qualified by knowledge, skill, experience, training, or education, and (3) the testimony must be reliable." *Insight Health Corp.*, 2017 NCBC LEXIS 14, at *39 (citations and quotation marks omitted).

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[2] North Carolina Rule of Evidence 702 provides in pertinent part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.R. Evid. 702(a).

12. An expert's testimony is reliable if: (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. N.C.R. Evid. 702(a)(1)-(3). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony." *McGrady*, 368 N.C. at 890.

13. When evaluating the admissibility of an expert's testimony, the focus of the trial court's inquiry "must be solely on [the] principles and methodology" used by the expert, "not . . . the conclusions that they generate." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993). Further, "the principles and methods [used by the expert] must be capable of generating testable hypotheses that are then subjected to the real world crucible of experimentation, falsification/validation, and replication." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 376 (2015) (citations and internal quotation marks omitted). "In addition, . . . the trial court must assess 'whether [the] reasoning or methodology properly can be applied to the facts in issue.'" *State v. Babich*, 252 N.C. App. 165, 168 (2017) (quoting *Daubert*, 509 U.S. at 593). "The Supreme Court in *Daubert* referred to this as the 'fit' test." *Id.* (citation omitted).

14. Expert testimony regarding damages must be "based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olvetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547-48 (1987). Absolute, mathematical precision is not required, but courts will not award damages "based upon hypothetical or speculative forecasts of losses." *Iron Steamer, Ltd. v.*

Trinity Rest., Inc., 110 N.C. App. 843, 847 (1993); *see also Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 87 N.C. App. 438, 446 (1987) ("Absolute certainty . . . is not required, but both the cause and the amount of loss must be shown with reasonable certainty."); *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 561 (1977) ("[E]vidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion.").

15. "Damages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders, Inc.*, 87 N.C. App. at 446. However, as with other forms of damages, the calculation of lost profits must be made with reasonable certainty. *Byrd's Lawn & Landscaping, Inc. v. Smith*, 142 N.C. App. 371, 377 (2001) ("With respect to damages for lost profits, our courts have refused to permit recovery based upon speculative forecasts, requiring proof that absent the wrong, profits would have been realized in an amount provable with reasonable certainty."); *Gouger & Veno, Inc. v. Diamondhead Corp.*, 29 N.C. App. 366, 368 (1976) (Lost profits may be recovered only when they "can be ascertained and measured with reasonable certainty[.]").

16. Ultimately, "[t]he decision to either grant or deny a motion *in limine* is within the sound discretion of the trial court." *State v. Fritsch,* 351 N.C. 373, 383 (2000).

III. ANALYSIS

A. Lost Profits

17. Defendants first contend that lost profits are inherently speculative because Plaintiff's evidence is: (1) not based upon a history of profits; (b) based upon hypothetical forecasts subject to multiple variables; and (3) based upon contingent circumstances not supported by the record. (Defs.' Br. Supp. of Mot. to Exclude Evidence of Lost Profits ["Defs.' Br. Supp."] 12-15, ECF No. 63.)[3]

18. Where the parties have no track record in the business, there is an increased risk that evidence of lost profits may be speculative. *Pharmanetics, Inc. v. Aventis Pharms., Inc.*, 2005 U.S. Dist. LEXIS 45768, at *35-36 (E.D.N.C. 2005) (finding evidence of lost profits to be speculative partly because plaintiff had no prior profits and was dependent on novel technology); *McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 411-12 (1996) (finding evidence of lost profits to be speculative where plaintiff "had virtually no experience owning and operating a jewelry store."). This is not such a case. As Plaintiff acknowledges, both parties have significant experience in the commercial real estate industry in the Charlotte area, and there is nothing novel about a mixed-use development. (Golden Triangle #3, LLC's Mem. of Law. in Opp. to Defs.' Mot. to Exclude Evidence of Lost Profits ["Pl.'s Br. Opp."] 12, ECF No. 85; Dep. of David Miller ["Miller Dep."] 14:5-6,

[3] At oral argument, Defendants' counsel argued, for the first time, that Golden Triangle cannot recover lost profits because Carmel Providence, LLC is the real party in interest. The Court concludes that the lost profits analysis stems from an alleged breach of the Option Agreement to which Golden Triangle is a party. Accordingly, Golden Triangle is a real party in interest.

ECF No. 85.3 ("A significant amount of [RMP's] history has been the development of retail.").) The fact that this particular development has yet to be built does not mean that lost profits cannot be calculated with reasonable certainty. *McNamara*, 121 N.C. App. at 408 (refusing to adopt a *per se* "New Business Rule" precluding lost profits and citing *Olivetti*, 319 N.C. at 545-46).

19. During a hearing on the Motion, counsel for Defendants argued that lost profits are speculative because a bid from Swinerton, a construction company, indicated that the Project the parties sought to build was not feasible given the costs they projected. However, as with any future event, there is the potential for variation between a party's early assumptions and later reality. Plaintiff's experts base their opinions on Plaintiff's position with respect to those variables and contingencies. The position is reasonable, although that does not make it bullet proof on cross-examination. Nevertheless, the real estate at issue is located in a high-traffic commercially desirable area of Charlotte; the parties' rezoning plan was successfully obtained without difficulty, (Jt. Stip. of Undisputed Facts ¶¶ 27-29, ECF No. 107); the parties were able to attract the attention of Harris Teeter and Novant as would-be tenants in the early planning stages, (*see* Novant Lease, ECF No. 63.3; Harris Teeter Lease, ECF No. 63.11); and at least one neighboring apartment complex has been successful, (Aff. of Courtney Duffy Schnee, ECF No. 122.2). These factors weigh in favor of a successful Project. When the Project would have reached stabilization and just how successful it would have been are issues for the jury.

20. Accordingly, the Court concludes that Plaintiff's damages in the form of lost profits from the Project are not impermissibly speculative.

B. Expert Testimony

21. Defendants next contend that the testimony of Knoble and Bidencope is irrelevant and "will not be helpful to the trier of fact because . . . both opinions are only estimates of certain components of a damages analysis." According to Defendants, the experts' methodology is suspect because "both attempt to estimate the value of the Project 'but for' some alleged harmful act by Defendants but ignore the costs that would have been incurred to achieve that value." (Defs.' Br. Supp. 17.) Defendants conclude that the experts' opinions "will do nothing more than confuse the jury by leading it to believe it has heard a complete analysis of damages." (Defs.' Br. Supp. 17.)

22. Focusing first on the testimony of David Knoble, CPA ("Knoble"), Defendants argue that he misused the American Institute of Certified Public Accountants' ("AICPA") "Before and After" method to estimate damages by calculating only the profits that would have been realized but for the alleged breach and not subtracting from that amount the profits that could be realized despite the alleged breach. They argue that Knoble "stopped his analysis halfway through and made no efforts to complete the second half" contrary to AICPA guidelines, rendering his entire opinion unreliable. (Defs.' Br. Supp. 18-19.)

23. Plaintiff responds that Knoble did not use the AICPA "Before and After" method referenced by Defendants. (Pl.'s Br. Opp. 16.) Instead, he was "engaged to

take the information that was provided . . . provide a calculation, based on those numbers, of the stream of cash flows anticipated as if the project had gone according to the anticipated timeline of the parties, and then provide a present value of those stream of cash flows." (Pl.'s Br. Opp. 5.) Therefore, Knoble "(i) calculated anticipated revenue; (ii) deducted project costs; (iii) determined depreciation; (iv) determined how the lending debt would be paid; (v) determined net operating income; (vi) converted net operating income to free cash available to the owners; and (vii) determined an interest rate and a tax rate, then took a present value of that stream [of] cash flows to the present." (Pl.'s Br. Opp. 5-6.) Plaintiff argues that the AICPA guideline is a practice aid, and that the AICPA recognizes other methods for determining lost profits. (Pl.s' Br. Opp. 17.)

24. The Court concludes that Knoble's opinion is admissible. The fact that he did not offset his lost profits damage calculation by profits actually earned or that might have been realized despite the alleged breach goes to the weight of his testimony rather than its admissibility.[4]

25. Defendants attack the reliability of both Knoble's and Bidencope's opinions because the experts relied on a pro-forma prepared by the parties to obtain financing instead of conducting independent research. (Defs.' Br. Supp. 20-22.) Without independent analysis of the inputs, Defendants argue, the methodology used

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[4] The Court observes, however, that Defendants did not plead the affirmative defense of failure to mitigate, so they will not be permitted to introduce evidence to support such an offset. *See Clark v. Bichsel*, 239 N.C. App. 13, 17 (2015) ("Failure to mitigate damages is an affirmative defense."); *Robinson v. Powell*, 348 N.C. 562, 566 (1998) ("Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof.").

by Knoble was "nothing more than an exercise in arithmetic based on inherently unreliable values." (Defs.' Br. Supp. 21.)

26. As for Bidencope, Defendants also criticize his use of numbers from one of several pro-formas, allegedly without knowing that other pro-formas existed. They further argue that Bidencope used market reports that were either "outdated or contradicted the assumptions in the Pro-Forma." (Defs.' Br. Supp. 22.)

27. Plaintiff responds that Knoble's calculations were based on "10-12 pages worth of spreadsheets" underlying the numbers on the pro-forma. (Pl.'s Br. Opp. 6.) His analysis on revenue streams was based on the Harris Teeter and Novant leases, the construction budget, and the pro-forma both Messrs. Levine and Miller developed to present to the banks for financing. (Pl.'s Br. Opp. 10.) According to Plaintiff, Knoble also relied on publicly available market information, as well as his own education and knowledge about the project's location. (Pl.'s Designation 3.)

28. Plaintiff admits that both Knoble and Bidencope "relied on the facts and figures prepared and agreed upon by the Parties." (Pl.s' Br. Opp. 14.) But Plaintiff contends that, because the numbers were determined by the parties themselves, they were reliable for the experts' purposes, and independent verification of the numbers was beyond the scope of the experts' work. (Pl.'s Br. Opp. 18-19.)

29. The Court concludes that the argument advanced does not require exclusion of the experts' testimony. "Experts may rely on data and other information supplied by third parties even if the data were prepared for litigation by an interested party. Unless the expert's opinion is too speculative, it should not be rejected as

unreliable merely because the expert relied on the reports of others." *Pope*, 240 N.C. App. at 374 (cleaned up).

30. Moreover, subsection (a)(1) of Rule 702 "calls for a quantitative rather than qualitative analysis." *See* Fed. R. Evid. 702, Advisory Committee Notes on the 2000 Amendments. That is, the "requirement that expert opinions be supported by 'sufficient facts or data' means 'that the expert considered sufficient data to employ the methodology[.]'" *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 808 (7th Cir. 2013) (quoting *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 766 (7th Cir. 2013)); *see also United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Col. 2008) ("[T]he inquiry examines only whether the witness obtained the amount of data that the methodology itself demands.").

31. "In other words, th[is] Court does not examine whether the facts obtained by the witness are themselves reliable -- whether the facts used are qualitatively reliable is a question of the *weight* to be given the opinion by the factfinder, not the *admissibility* of the opinion." *Crabbe*, 556 F. Supp. 2d at 1223 (emphasis in original); *see also Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d 908, 934 (W.D. Wis. 2007) ("As a general rule, questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." (quoting *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1119 (N.D. Ill. 2005))); *Insight Health Corp.*, 2017 NCBC LEXIS 14, at *48-49 (emphasizing that a challenge to an expert's understanding of a fact goes to the testimony's weight rather than its reliability).

32. Here, it was not unreasonable for these experts to use figures from a pro-forma prepared in support of a request for financing, not litigation, by the parties—each of whom is experienced in the Charlotte commercial real estate market. Whether the numbers are accurate is a subject that can be explored on cross-examination. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1138-39 (3d Cir. 1983) ("Where there is a logical basis for an expert's opinion testimony, the credibility and weight of that testimony is to be determined by the jury, not the trial judge."); *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility").

IV. CONCLUSION

33. **WHEREFORE**, the Court, in the exercise of its discretion, hereby **DENIES** the Motion.

IT IS SO ORDERED, this 15th day of March, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases