

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNIEK, INC.,

Plaintiff,

v.

DOLLAR GENERAL CORPORATION,

Defendant.

ORDER

06-C-0311-C

A final pretrial conference was held in this case on June 21, 2007, before United States District Judge Barbara B. Crabb. Plaintiff Uniek, Inc. appeared by Mark Leitner and Melissa Blair. Also present was Olivia Kelley. Defendant Dollar General Corporation appeared by Jeff Morgan, Kendall Harrison and Bryan Cahill. Also present was Robert Stephenson.

Counsel predicted that the case would take 4-5 days to try. They understand that trial days will begin at 9:00 a.m. and will run until 5:30 p.m, with at least an hour for lunch, a short break in the morning and another in the afternoon.

Counsel agreed that the witnesses would be sequestered. They are either familiar with the court's visual presentation system or will make arrangements with the clerk for

instruction on the system.

No later than noon on the Friday before trial, plaintiff's counsel will advise defendant's counsel of the witnesses plaintiff will be calling on Monday and the order in which they will be called. Counsel should give similar advice at the end of each trial day; defendant's counsel shall have the same responsibility in advance of defendant's case. Also, no later than noon on the Friday before trial, counsel shall meet to agree on any exhibits that either side wishes to use in opening statements. Any disputes over the use of exhibits are to be raised with the court before the start of opening statements.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court with copies of documentary evidence before the start of the first day of trial.

Counsel agreed to the voir dire questions in the form distributed to them at the conference with the exception of Question No. 14. I have reworded the question slightly to respond to defendant's objection. The jury will consist of eight jurors to be selected from a qualified panel of fourteen. Each side will exercise three peremptory challenges against the panel. Before counsel give their opening statements, the court will give the jury the

introductory instructions on the way in which the trial will proceed and their responsibilities during the trial.

Counsel discussed the form of the verdict and the instructions on liability. Final decisions on the instructions and form of verdict will be made at the instruction conference that will be held at the close of the liability phase of the trial.

The following rulings were made on the parties' motions in limine.

1. Plaintiff's motion to admit testimony of defendant's former employees, Easton, Bolek, Mazza and Smith is DENIED, insofar as plaintiff wants a general ruling holding all of their testimony admissible; however, statements by employees are not inadmissible simply because they are hearsay. They may come in under the exceptions to the hearsay rule for statements of defendant's agent if they are otherwise admissible.

So that I may review the deposition designations in advance of trial, counsel are to file them with the court no later than noon on July 6, 2007. Counsel agreed to work together to identify those portions that are in dispute.

2. Plaintiff's motion to admit Bolek's affidavit is DENIED. Affidavits are not admissible in evidence, although they can be used in questioning the witness who gave the affidavit to refresh the witness's memory and to cross-examine him with evidence of a prior contradictory statement.

3. Plaintiff's motion to admit documents as summaries is DENIED unless plaintiff

makes available to defendant the evidence on which the summaries are based.

4. Plaintiff's motion to admit undisputed facts is DENIED. The parties are not bound by the facts that I found in deciding the motion for summary judgment.

5. Plaintiff's motion to admit documents as business records under Fed. R. Evid. 803(6) is DENIED as it relates to emails and the summary of the meeting with defendant. However, the sales forecasts attached to the emails may be admissible if plaintiff can show that they were prepared in the ordinary course of business.

6. Plaintiff's motion to admit testimony of plaintiff's employees regarding industry practices is DENIED until and unless plaintiff can persuade me that the employees it will be calling have enough personal knowledge to give an opinion about industry standards and practices.

7. Defendant's motion to limit the promissory estoppel claim to the period January 30, 2006 to March 31, 2006 is GRANTED as to the March 31 cut-off. It will be up to the jury to determine when the period began.

8. Defendant's motion to admit evidence of its settlement offer in which it allegedly gave plaintiff "the opportunity to sell most, if not all, of its excess inventory of picture frames" is DENIED. Plaintiff should not have to be put in a spot in which it is accused of failing to mitigate its damages if it refuses to settle with defendant. That would be contrary to rule that settlement offers are not be used in evidence.

9. Defendant's motion to prohibit plaintiff's damages experts from giving opinions not contained in their expert reports is DENIED. The expert should be allowed to adjust his conclusions in light of the summary judgment order unless defendant can show that he made his calculations in such a way that it is not possible to determine how the damages for each year could be calculated separately.

10. Defendant's motion to prohibit plaintiff from using oral communications to establish the existence of a 2006 contract is DENIED as moot.

11. Defendant's motion to exclude evidence relating to defendant's new supplier, Harbortown, is GRANTED insofar as the evidence relates to why defendant switched from plaintiff to Harbortown. However, evidence about Harbortown's sales and other matters may be relevant during the damages phase.

12. A ruling on defendant's motion to preclude plaintiff from presenting evidence on lost profits is RESERVED until the damages phase of trial.

Entered this 21st day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge