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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

DALE BUROW et al., Plaintiffs and Respondents, v. JTL DEVELEOPMENT CORPORATION et al., Defendants and Appellants.	2d Civil No. B232529 (Super. Ct. No. SC045035 C/W SC 045315) (Ventura County)

Appellants JTL Development Corporation (JTL) and Highland Development Company, LLC (Highland) appeal from a post-judgment order awarding cost-of-proof sanctions to respondents Dale and Colleen Burow (the Burows) and Charles and Laurie Ball (the Balls) in the amount of $235,800. (Code Civ. Proc., § 2033.420.) We affirm.

PROCEDURAL BACKGROUND

This appeal stems from a residential construction defect case. After four years of litigation and a 15-day bench trial, the trial court held JTL and Highland strictly liable for damage suffered by homeowners, the Burows and the Balls, whose homes JTL and Highland built on unstable and improperly compacted soil. Highland was the developer and JTL was the general contractor. The judgment awarded $700,000 to the Burows and $700,000 to the Balls, reduced for comparative negligence by 25 percent and

15 percent, respectively. We affirmed the judgment in a previous opinion. (Case No. B227256, Jan. 9, 2012.)

The Requests for Admission

Before trial, Dale Burows, Charles Ball, and Laurie Ball each propounded identical sets of requests for admission to JTL and Highland. Requests 14, 19, 20, and 22 asked JTL and Highland to admit (14) that they "approved grading plans" for the Burows' and Balls' properties; (19) "had knowledge that the [properties] contained improperly compacted fill"; (20) "had knowledge that the [properties were] not properly prepared for structures"; and (22) "did not provide Plaintiffs with a complete soils report" prepared by Gorian & Associates before the plaintiffs purchased their homes. JTL and Highland served identical responses in which they raised objections and denied request numbers 14, 19, 20 and 22, among others.[1]

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[1] Request: "14. Admit that JTL [and Highland] approved grading plans for the SUBJECT PROPERTY, during relevant times."

Response: "14. Responding party objects to this request for admission on the ground that it is vague and ambiguous in reference to the phrase "during relevant times." Without in any manner waiving the foregoing objection, responding party denies this request for admission."

Request: "19. Admit that JTL [and Highland] had knowledge that the SUBJECT PROPERTY contained improperly compacted fill."

Response: "19. Responding party objects to this request for admission on the grounds that it assumes facts not in evidence, i.e. that the **SUBJECT PROPERTY** contains improperly compacted fill. Without in any manner waiving the foregoing objections, responding party denies this request for admission."

Request: "20. Admit that JTL [and Highland] had knowledge that the SUBJECT PROPERTY was not properly prepared for structures."

Response: "20. Responding party object to this request on the grounds that this request for admission assumes facts not in evidence, i.e., that the **SUBJECT PROERTY** was not properly prepared for structures. Responding party further objects to this request on the grounds that it is vague and ambiguous in reference to the terms "properly prepared for structures" and "structures." Without in any manner waiving the foregoing objections, responding party denies this request for admission."

Request: "22. Admit that JTL [and Highland] did not provide Plaintiffs with a complete soils report of the SUBJECT PROPERTY prepared by Defendant GORIAN & ASSOCIATES, INC., prior to the time Plaintiffs purchased the SUBJECT PROPERTY."

Trial

The Burows' and Balls' complaints were consolidated for trial. The trial court found that JTL and Highland knew about significant sub-surface stability problems on their properties before they sold the homes. JTL initially partnered with Griffin Homes to develop the property. Griffin "backed out" with respect to 14 of the 29 lots after a geotechnical engineering firm, Gorian & Associates, conducted a subsurface soils study and reported that those 14 lots could not be developed. The trial court found that, "[a]t the conclusion of this study, Griffin determined that of the 29 lots that could be developed from the Highland Tract, because of significant sub-surface soil stability problems, 14 of the 29 lots, in its opinion, were too risky for residential development. Consequently, Taylor dissolved his partnership with Griffin regarding these 14 lots." Robert Taylor, president of JTL, knew of Gorian's report.

JTL eventually developed the lots with Joe Lynch, acting as Highland Development Company. Lynn McKernery of Gorian testified that he met with Lynch and discussed the sub-surface soil stability problems on tract 4521, the tract on which the Burows and Balls homes were later built. McKerney said Lynch was aware of Gorian's initial study and "wasn't pleased" about it. Gorian recommended that Highland remove and re-compact the entire tract to a depth of 25 feet. Instead, JTL and Highland limited remediation to the building pad areas. The trial court wrote that, "Mr. McKerney testified that Mr. Taylor [president of JTL] instructed [Gorian] not to prepare any written reports regarding Gorian's conclusion that there were serious sub-surface problems under the 14 lots."

In its statement of decision, the trial court found that "Mr. McKerney informed Mr. Taylor that [Gorian] recommended that before the tract was to be built out, each of the lots would have to be **completely** excavated and remediated in order to avoid

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Response: "22. Responding party objects to this request on the grounds that this request for admission is vague and ambiguous in regard to its reference to the term 'complete soils report' as it cannot be ascertained what document(s) to which propounding party is referring. Based upon the following objection, responding party denies the request for admission."

settlement problems." The court found that, to avoid expense, "Highland decided not to follow its expert's advice and proceeded to build out the project by only partially excavating and remediating the lots in the tract." The court found that "[w]hen the project was completed, Highland put pressure on Gorian to modify its report regarding the amount of anticipated settlement so as not to make the purchasers alarmed about settlement. Responding to this pressure, Gorian changed its opinion regarding settlement so as not to cause any concerns about settlement, even among the real estate brokers and agents that sold the property." The court also found that "none of the promotional materials used by the Defendants to induce prospective buyers, such as Plaintiffs, to buy these tract houses, provided any effective warnings regarding the risk of settlement on these residential premises." Lynch acknowledged at trial that the purchase agreements did not include a soil disclosure or a copy of Gorian's report.

Motion for Cost-of-Proof Sanctions

After judgment, the Burrows and the Balls moved for an award of $582,587.45 in attorneys' fees and costs incurred proving the truth of requests for admission number 14, 19, 20 and 22, and others. The notice of motion stated that it was brought by "plaintiffs." It attached one copy of six identical sets of requests for admissions propounded by Dale Burow, Charles Ball, and Laurie Ball upon JTL and Highland. It also attached one copy of JTL and Highland's identical responses.

In opposition, JTL and Highland argued that only Dale Burows, whose requests were attached to the motion, could recover fees. They also argued that fees were not recoverable because the subjects of the requests were not proved and were not significant and because there was a reasonable basis for denying the requests. In support of the opposition, Lynch declared that he always believed the soils under the Burows and Balls homes were properly compacted. He declared that JTL and Highland relied on Gorian's advice and did not "act as geotechnical engineers and approve the grading or compaction." He declared his continuing belief that JTL and Highland did not do or omit to do anything that caused damage to respondents. Lynch also declared on information

and belief that Birdie Francis gave the Burows a copy of Gorian's 1997 rough grading compaction test report and a site specific letter before escrow closed on their property.

In their reply brief, counsel for the Burows and the Balls clarified that the motion was brought on behalf of all plaintiffs based on the six identical sets of requests for admissions. They provided a declaration of counsel with copies of all six sets and the six corresponding responses. The court continued the hearing for twelve days on its own motion.

The court granted the motion and awarded each of the four plaintiffs 25 percent of $235,800, with Highland and JTL each liable for 50 percent of that sum. The court found that requests 14, 19, 20, and 22 "directly related to central and substantial issues in the case and that each of said defendants denied said requests without having reasonable grounds to believe that they would prevail on these matters at trial." The court found that "none of the objections that said defendants made to these Requests . . . were sustained" and that JTL and Highland, "failed to establish that there was any good reason(s) for their respective failures to admit" the requests.

DISCUSSION

Timeliness

The appeal is timely. JTL and Highland filed their notice of appeal on April 19, 2011, within 180 days of entry of the order and entry of the amended judgment on January 14 and February 28, 2011. They filed the notice within 60 days of respondent's service of entry of notice of the amended judgment on March 4, 2011. (Cal. Rules of Court, rule 8.104(a)(2) & (3).) The 60 day period running from service by the clerk of notice of entry of judgment does not apply because the record does not contain proof of service by the clerk of notice of entry of judgment. (Rule 8.104(a)(1).)

The Costs-of-Proof Award

If a party fails to admit the truth of a matter when requested to do so, and the requesting party thereafter proves its truth, the court shall order the responding party to pay the costs and fees incurred by the requesting party to prove the matter, unless it finds, (1) that an objection to the admission was sustained or a response to the request

was waived; (2) the admission sought was of no substantial importance; (3) the party failing to make the admission had reasonable ground to believe that the party would prevail on the matter; or (4) there was other good reason for the failure to admit the request. (Code Civ. Proc., § 2033.420, subds (a) & (b); *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) We review the trial court's ruling for abuse of discretion. (*Miller v. American Greetings Corp*. (2008) 161 Cal.App.4th 1055, 1066.)

The trial court did not abuse its discretion when it decided that JTL and Highland had denied requests 14, 19, 20 and 22 and that respondents thereafter proved the truth. We reject JTL and Highland's contention that a motion to compel was required. JTL and Highland objected to the requests, and then completely denied each of them. An objection followed by a complete denial is equivalent to an unequivocal denial and no motion to compel is required to preserve the right to cost-of-proof sanctions. (*American Federation of State, County & Municipal Employees v. Metropolitan Water Dist.* (2005) 126 Cal.App.4th 247, 267. The response in *American Federation*, was similar to the responses here. The responding party posed objections and stated, "Without waiving these objections, Local 1902 responds as follows: Deny." (*Ibid.*) JTL and Highland posed objections and stated, "Without in any manner waiving the foregoing objection, responding party denies this request for admission," and "Based upon the following objection, responding party denies the request for admission." Their response was unlike the response in *Wymberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, where objections were followed by a partial denial and the trial court denied cost-of-proof sanctions. The responding party in *Wymberly* posed objections and stated, "To the extent defendant can respond, defendant denies that the extent of future medical care, including replacement of prosthetic implants is reasonable and necessary." (*Id.* at p. 636.) Here, JTL and Highland completely denied the responses and no motion to compel was required.

The Burows and the Balls proved each of the four requested matters by overwhelming evidence at trial, credited by the trier of fact in its statement of decision. These matters were of "substantial importance" because they controlled disposition of the

case and trial would have been shortened by their admission. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.)

An award of costs under section 2033.420 is improper if the party who denied the request for admission held a reasonably entertained good faith belief it would prevail on the issue at trial. (*Miller v. American Greetings Corp., supra,* 161 Cal.App.4th at p. 1066.) Joe Lynch declared that he always believed the soil on the Burows' and Balls' lots was properly compacted, and that JTL and Highland relied on Gorian when it denied the requests. But the trial court necessarily discredited Lynch's assertions when it found that JTL and Highland knew the soil was improperly compacted before it sold the property to the Burows and the Balls, and that JTL and Highland did not warn these purchasers of the sub-surface soil problems. Moreover, "if a party denies a request for admission (of substantial importance) in circumstances where the party lacked personal knowledge but had available sources of information and failed to make a reasonable investigation to ascertain the facts, such failure will justify an award of expenses." (*Brooks v. American Broadcasting Co., supra,* 179 Cal.App.3d at p. 510.) The record supports the trial court's finding that Lynch knew of Gorian's recommendation and concerns when he responded to the requests and had no reasonable basis for denying them.

We reject JTL and Highland's contention that only Dale Burrows was entitled to an award. The notice of motion fairly appraised JTL and Highland that all "plaintiffs" moved for expenses based on the requests for admissions that "plaintiffs" propounded. Any ambiguity was created by counsel's decision to attach only one of six identical sets of discovery requests, a reasonable effort toward economy. No genuine confusion resulted. The opposition addressed the subject matter of all six sets. Lynch's declaration discussed both properties. The reply papers clarified any ambiguity, and the continuance of the hearing afforded JTL and Highland a reasonable opportunity to respond.

The court did not abuse its discretion when it determined that the Burows and the Balls incurred $235,800 in proving the matters denied in requests numbers 14,

19, 20 and 22. The record demonstrates that this case was vigorously litigated for three years after the requests were denied. The subject of the requests were central to discovery and proof at trial. Counsel declared that the Burows and Balls incurred about $860,000 in attorneys' fees in this action, $685,397 of which they incurred after JTL and Highland denied the requests for admission. He provided detailed billing records in support. He estimated that 85 percent of that work was performed to prove the truth of the matters denied by JTL and Highland in response to requests numbers 14, 15, 19, 20, 21, and 22 because they were the core of the liability case. Accordingly, respondents requested 85 percent of $685,397. The court did not abuse its discretion when it awarded about one-third of that amount.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Frederick H. Bysshe, Judge

Superior Court County of Ventura

McCarthy & Kroes, R. Chris Kroes and Gary S. Grubacich, for Plaintiffs and Respondents.

Braden, Hinchcliffe & Hawley, Everett Hinchcliffe and J. Stacie Johnson for Defendants and Appellants.