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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARY GASKIN et al.,

Plaintiffs and Appellants,

v.

DEBRA WEGMAN,

Defendant and Respondent.

B234124

(Los Angeles County Super. Ct.
No. PC042255)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Affirmed in part and reversed in part.

Timothy D. McGonigle Professional Corporation and Timothy D. McGonigle for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole, Mark Schaeffer and Lucy H. Mekhael for Defendant and Respondent.

Plaintiffs and appellants Mary and Donald Gaskin filed an action for attorney malpractice and breach of fiduciary duty against defendant and respondent Debra Wegman. The trial court granted summary judgment for Wegman on September 17, 2010, and judgment was entered on October 13, 2010.¹ Wegman moved, pursuant to Code of Civil Procedure section 2033.420,² for an award of costs and attorney fees incurred in proving issues denied by the Gaskins in response to requests for admission (RFA). The court granted Wegman's motion and ordered the Gaskins to pay costs of \$9,841 and attorney fees of \$121,000. The Gaskins appeal from the order, challenging the award of attorney fees.

We hold the trial court did not abuse its discretion in ruling that Wegman was entitled to an award of attorney fees under section 2033.420. However, the court erred in awarding reasonable fees rather than limiting the award to the amount of fees incurred by Wegman. We therefore remand the cause to the trial court for a hearing to determine the amount of attorney fees Wegman incurred in proving the matters denied in the RFA's.

Background

The Gaskins and other landowners were represented by Wegman in the underlying superior court action against a builder for damage caused by earth movement due to nearby excavation. The underlying action was settled by all parties, including the Gaskins, but a dispute arose between the Gaskins and Wegman regarding their share of their recovery. Approximately \$180,000 from the recovery was held in trust to satisfy the claim of the Gaskins. The Gaskins took no steps to resolve the issue through mediation but instead filed the instant action alleging legal malpractice and breach of fiduciary duty.

¹ This court affirmed the summary judgment in a nonpublished opinion (*Gaskin v. Wegman* (Mar. 20, 2012, B230252) [nonpub. opn.]).

² All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

The trial court granted summary judgment in favor of Wegman on the ground that the Gaskins could not show the necessary elements of causation and damages in the “trial within a trial” approach of legal malpractice actions. The court rejected as irrelevant the Gaskins’ contentions that Wegman violated her duties to them, as they did not establish a material disputed fact on the issues of causation and damages.

The Motion for Costs and Attorney Fees Pursuant to Section 2033.420

Wegman filed a motion for reasonable attorney fees in the amount of \$219,992 for the expense of proving the truth of matters denied by the Gaskins pursuant to section 2033.420. Wegman argued she was required to prove the facts supporting the following six RFA’s, which had been denied by the Gaskins, in order to obtain summary judgment:

RFA No. 3—no act or omission of Wegman caused the Gaskins damage; RFA No. 4—the Gaskins claimed damages were not caused by Wegman’s actions in the underlying case; RFA No. 5—there was no evidence the conduct of Wegman in the underlying action was the proximate cause of the alleged damage to the Gaskins’ home; RFA No. 17—Affiliated Professional Services (APS) did not render any opinion with respect to the cause of the alleged damage to the Gaskins’ home; RFA No. 18—the report prepared by APS contained no findings or conclusions as to the cause of any alleged damage to the Gaskins’ home; and RFA No. 21—Wegman advised the Gaskins to consult with independent counsel of their choosing regarding their dispute with respect to the allocation and distribution of the net global settlement funds in the underlying action.

The Gaskins’ Opposition to the Motion and the Reply

The Gaskins opposed the motion on various grounds. They argued they had admitted 11 of 21 RFA’s, dealing with the same issues Wegman contends she was required to prove. The Gaskins reasonably believed they would prevail at trial, and any

unreasonable failure to admit the six RFA's was of no substantial importance as Wegman was not required to spend any significant amount of time proving the truth of the matters denied.

The Gaskins also provided a detailed explanation for each of the denials. They further argued they had presented multiple theories of causation, and accordingly, their denials were made with a good faith belief they would prevail at trial. The Gaskins urged the trial court to deny the request for attorney fees because the case was resolved by summary judgment, before a trial, and they had no opportunity to rescind their denials and admit the facts.

Finally, the Gaskins argued that Wegman's request for \$220,000 was excessive because it was based on "reasonable" attorney fees, but under section 2033.420, she was only entitled to fees actually incurred.

Wegman filed a reply, arguing the Gaskins' opposition to the motion focused on the wrong issues of duty and breach, just as they had done in opposing summary judgment, when the issue presented was causation. Wegman disputed the reasonableness of the denials and maintained that the denials related to issues of substantial importance. The Gaskins had the opportunity to withdraw their denials of the RFA's before the summary judgment motion, but they did not do so. Finally, Wegman argued section 2033.420 allows for an award of reasonable attorney fees and it is not limited to fees actually incurred.

Argument and Ruling of the Trial Court

On February 1, 2011, the trial court heard argument on Wegman's motion for costs and attorney fees in connection with proving issues denied by appellants in the RFA's. The court required additional documentation of the fees and costs. On March 11, 2011, a further hearing was held, after which the court adopted its tentative decision as the ruling, awarding Wegman attorney fees of \$121,000.

DISCUSSION

The Gaskins first argue the trial court abused its discretion in awarding attorney fees under section 2033.420,³ because they either reasonably denied the six RFA's or they were not substantially important. They next contend the amount awarded was arbitrary and capricious, because it was not based on the amount of attorney fees actually incurred, as required by the plain language of section 2033.420. Finally, the Gaskins argue that the award of \$121,000 was excessive by any reasonable measure.

Section 2033.420

Section 2033.420 provides as follows: “(a) If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees. [¶] (b) The court shall make this order unless it finds any of the following: [¶] (1) An objection to the request was sustained or a response to it was waived under Section 2033.290. [¶] (2) The admission sought was of no substantial importance. [¶] (3) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter. [¶] (4) There was other good reason for the failure to admit.”

“The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. (*Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 429.) The basis for imposing sanctions under

³ The predecessors to section 2033.420 are former sections 2034, subdivision (c) and 2033, subdivision (o).

section 2034, subdivision (c) is directly related to that purpose. Unlike other discovery sanctions, an award of expenses pursuant to section 2034, subdivision (c), is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission where the admission sought was “‘of substantial importance’ (§ 2034, subd. (c); *Hillman v. Stults* (1968) 263 Cal.App.2d 848, 884) such that trial would have been expedited or shortened if the request had been admitted.” (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509.)

Standard of Review

“Whether reasonable expenses incurred are recoverable pursuant to section 2033, subdivision (o), following entry of summary judgment is a question of law reviewed de novo on appeal.” (*Barnett v. Penske Truck Leasing Co.* (2001) 90 Cal.App.4th 494, 497.) In construing a statute, we seek to determine and give effect to the intent of the Legislature, first examining the words of the statutory language, which are generally the most reliable indication of legislative intent. (*People v. King* (2006) 38 Cal.4th 617, 622; *People v. Braxton* (2004) 34 Cal.4th 798, 810.) If the meaning of a statute is clear and unambiguous, there is no need for judicial construction. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047; *Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 620.) If the statutory language is susceptible to more than one meaning, court may consider extrinsic aids, such as the statute’s purpose, its goals, any legislative history, public policy, and the statutory scheme. (*People v. King, supra*, at p. 622.)

“The determination of whether ‘there were no good reasons for the denial,’ whether the requested admission was ‘of substantial importance,’ and the amount of expenses to be awarded, if any, are all within the sound discretion of the trial court. (*Haseltine v. Haseltine* (1962) 203 Cal.App.2d 48, 60.) By contrast, if the trial court exercises its discretion and determines that the requirements of the statute exist, reasonable expenses *must* be awarded. ([Former] § 2034, subd. (c).) On appeal, the trial

court’s decision will not be reversed unless the appellant demonstrates that the lower court abused its discretion.” (*Brooks v. American Broadcasting Co.*, *supra*, 179 Cal.App.3d at p. 508.)

“A request for admission has ‘substantial importance when the matter requested for admission [is] central to disposition of the case. (*Brooks v. American Broadcasting Co.*[, *supra*,] 179 Cal.App.3d [at p.] 509 [interpreting former . . . section 2034].) [¶] In evaluating whether a ‘good reason’ exists for denying a request to admit, ‘a court may properly consider whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial.’ (*Brooks v. American Broadcasting Co.*, *supra*, 179 Cal.App.3d at p. 511 [interpreting former . . . section 2034].)” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.)

“Under ‘the doctrine of implied findings . . . the appellate court is required to infer that the trial court made all factual findings necessary to support the order or judgment. [Citations.]’ (*Laabs v. City of Victorville*[, *supra*,] 163 Cal.App.4th [at pp.] 1271–1272.)” (*Ron Burns Construction Co., Inc. v. Moore* (2010) 184 Cal.App.4th 1406, 1415.)

The Issues of Reasonable Grounds to Deny and Substantial Importance

To the extent the Gaskins continue to assert that summary judgment was improperly granted because disputed issues of material fact exist regarding breach of duty by Wegman, which justified their denial of the six RFA’s, we disagree. Our resolution of the appeal from the judgment entered following summary judgment conclusively establishes that the issue of breach of duty was not material to the summary judgment motion.

As noted above, we review the trial court’s ruling on the issues of whether there was good reason to deny an RFA and the substantial importance of the issue under the deferential abuse of discretion standard. Our review reveals no abuse of discretion.

RFA Nos. 3 and 4 requested the Gaskins to admit that Wegman did not cause them damage, which they denied. Wegman was therefore put to the expense of establishing, for purposes of summary judgment, that she did not cause damage to the Gaskins. She accomplished this through depositions of the Gaskins, both of whom testified they signed the settlement agreement, and understood its terms and conditions and their right to speak with independent counsel. The Gaskins' depositions also established they had no expert, at the time of deposition, to demonstrate that their home was within the zone of influence of the earth movement. They had no witnesses to testify that there damages were in excess of the amount segregated from the settlement to satisfy their claim. Thus, the Gaskins' depositions established they could not show they were damaged by Wegman's conduct. The trial court could conclude, in light of this evidence, that the Gaskins had no reasonable basis to deny RFA Nos. 3 and 4. Any contention that this subject was not of substantial importance is without merit. Causation and damages are elements of the Gaskins' causes of action for legal malpractice and breach of fiduciary duty.

We reach the same conclusion regarding RFA No. 5, that the Gaskins had no evidence the defendants in the underlying action caused damage to the Gaskins. Once again, the Gaskins signed the settlement agreement and they testified in deposition that they had no expert witness to establish causation. At the time of their depositions they had no expert witnesses to testify that the defendants caused them any damages. Although the Gaskins argue they had a reasonable basis to deny the request, because of damage to their home, the trial court could reasonably determine that although there might be problems with the Gaskins' home, they had no evidence it was caused by land movement as opposed to other building defects. Because this issue was directly relevant to damages and causation, the very issues upon which summary judgment was granted, it was of substantial importance in the action.

The Gaskins had no reasonable basis to deny RFA Nos. 17 and 18 regarding whether APS rendered an opinion or prepared a report on the cause of damage to the Gaskins' home. The APS report was clear and unambiguous that it did not address or provide an opinion on the issue of causation. Wegman advised the Gaskins of the

limitations of the APS report and that other experts were unwilling to testify to causation. The report was limited to an estimate of damages and cost of repairs. The trial court did not abuse its discretion in ruling the Gaskins had no reasonable basis to deny these RFA's and that they were of substantial importance to the action against Wegman.

Finally, there was no reasonable ground for the Gaskins to deny RFA No. 21, seeking an admission that Wegman advised them to consult with an independent attorney regarding the settlement. Mr. Gaskin testified in deposition that he received a letter from Wegman advising the Gaskins to consult with an independent attorney of their choosing in connection with the dispute over allocation and distribution of the settlement proceeds. Wegman's conduct was at the heart of this action, and her recommendation to the Gaskins to seek independent counsel was of substantial importance to the litigation.

The Amount of Attorney Fees Awarded

The parties dispute the interpretation of section 2033.420. The Gaskins argue the statute allows only for recovery of *attorney fees incurred* in proving the truth of RFA's that were denied. Wegman takes the opposite view, contending the statute allows for an award of *reasonable attorney fees*, regardless of the amount paid by the party. We agree the plain language of the statute supports the argument of the Gaskins, and therefore we reverse the award and remand for further proceedings.

The wording of section 2033.420 demonstrates that an attorney fee award is limited to the amount of attorney fees incurred. Under section 2033.420, subdivision (a), "the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the *reasonable expenses incurred* in making that proof, including reasonable attorney's fees." (Emphasis added.) The phrase "reasonable expenses incurred" modifies all the expenses, including attorney fees. This interpretation is consistent with the Legislative purpose of reimbursing "reasonable expenses incurred by a party in proving the truth of a requested admission" that was of substantial importance. (*Brooks v. American Broadcasting Co.*, *supra*, 179 Cal.App.3d at p. 509.)

Wegman's interpretation of section 2033.420 turns the award into a penalty, which is not the purpose of the statute. (*Ibid.*)

In this case, Wegman argued, and the trial court ruled, that Wegman was entitled to *reasonable attorney fees* for proving the facts to rebut the Gaskins' denial of certain RFA's. The award of attorney fees should have been limited to those incurred by Wegman in proving the denied RFA's. Wegman must present proof of the amount of fees incurred in order to justify an award. Remand is necessary to accomplish that purpose. Because we reverse that portion of the award fixing the amount of attorney fees, we need not discuss the Gaskins' argument that the award was excessive as a matter of law.

DISPOSITION

The trial court's ruling that Debra Wegman is entitled to attorney fees under section 2033.420 is affirmed. The portion of the order fixing the amount of attorney fees awarded is reversed and remanded to the trial court for a determination of attorney fees incurred by Wegman. The parties shall bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.