Filed 5/25/12 Smith v. GNP-Crescendo Record Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SHERRY SABRINA SMITH, as Administrator, etc., Plaintiff and Respondent, v. GNP-CRESCENDO RECORD CO., INC., et al., Defendants and Appellants.	B235551 (Los Angeles County Super. Ct. No. BC439813)

APPEAL from an order of the Superior Court of Los Angeles County. Mel Red Recana, Judge. Affirmed.

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Phillips, Erlewine & Given, David M. Given, and Robyn Callahan for Defendants and Appellants.

Evan S. Cohen for Plaintiff and Respondent.

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This appeal arises from an action for rescission, declaratory relief, and restitution filed against GNP-Crescendo Record Co. (GNP) and Neil Music, Inc. (Neil) by Sherry Sabrina Smith as administrator of the estate of her deceased husband, Richard Elvern Marsh (who performed under the name Sky Saxon). Smith alleged that GNP and Neil failed to account and pay royalties to Marsh under contracts relating to his musical compositions and recordings. GNP and Neil prevailed on summary judgment, and Smith did not appeal from the judgment.

Following entry of judgment, defendants moved for an award of $49,031 in "costs of proof" on the basis of Smith's responses to requests for admission propounded by defendants early in the litigation. Smith opposed the motion, the trial court denied it, and defendants appealed from the denial.

An order denying a motion for costs of proof under Code of Civil Procedure section 2033.420 is reviewed for abuse of discretion.[1] (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864.) We review only the trial court's decision, not the court's reasoning, and we may affirm on the basis of any correct theory, regardless of whether the trial court relied on it. (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.)

Smith responded to the overwhelming majority of defendants' requests for admission by stating that she was unable to admit or deny the request. Those responses were "incomplete" within the meaning of section 2033.290, subdivision (a)(1). Defendants waived their right to compel further responses by failing to file a motion to compel. (§ 2033.290, subd. (c).) The trial court therefore did not abuse its discretion by finding that defendants were not entitled to a costs of proof award based on those requests. (§ 2033.420, subd. (b)(1) [no entitlement to costs of proof award if "a response to" the request for admission "was waived under Section 2033.290"]; see *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 636.)

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[1] All subsequent statutory references are to the Code of Civil Procedure.

As they did in the trial court, defendants contend that they are nonetheless entitled to a costs of proof award on the basis of Smith's responses to Neil's requests for admission numbers 16 through 20. Defendants accurately describe those requests as asking Smith to admit "the validity and effect of certain [r]elease [a]greements, namely[,] that they 'assigned' rights in and to certain musical compositions to Neil . . . ." In response to each of those five requests, Smith objected to the request and then, without waiving her objection, denied that the document in question "serves as an assignment of copyright, as characterized by defendant." In her opposition to defendants' motion for summary judgment, Smith argued, inter alia, that the purported assignment agreements were unenforceable because they were unconscionable, supporting her argument with evidence such as a declaration from a music industry expert. Although Smith's argument did not prevail, it was sufficient to give her a "reasonable ground to believe that [she] would prevail on the matter" within the meaning of § 2033.420, subdivision (b)(3). (See *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 510-511.) The trial court therefore did not abuse its discretion by finding that defendants were not entitled to a costs of proof award based on those five requests.

DISPOSITION

The order is affirmed. Respondent shall recover her costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.