Filed 7/25/17 Sterling v. Montgomery CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KENNETH W. STERLING, Plaintiff and Respondent, v. JOHN F. MONTGOMERY, et al., Defendants and Appellants.	2d Civ. No. B267038 (Super. Ct. No. 56-2009-00364059-CU-FR-VTA) (Ventura County)

The James M. and Frieda E. Montgomery Foundation (the Foundation) and members of the Montgomery family appeal from the judgment, entered after a court trial, finding that James F. Montgomery[1] committed fraud and other torts when he

[1] The names of the individual Montgomery family members and entities involved in this matter are very similar, leading to some confusion in the record. Our understanding is as follows: James F. Montgomery (hereafter, "Jim" or "Jim Montgomery") founded Banco Buenaventura and established a charitable foundation which he named after his parents, James M.

convinced respondent Kenneth Sterling to invest in a bank he was attempting to open for business. Appellants contend (1) the trial court erred when it excluded all but one of their witnesses; (2) the fraud judgment is not supported by substantial evidence because Jim Montgomery's representations to Sterling were true; (3) the causes of action for conversion and common counts should be reversed because Sterling had no ownership interest in the money transferred from the Bank to the Foundation; (4) the punitive damages award must be reversed because it violates public policy and is not supported by substantial evidence; and (5) there is no legal basis for the award of attorney's fees and that the trial court allowed cost items prohibited by statute.

We conclude the trial court erred when it awarded respondent attorney's fees and allowed certain costs. We will remand the cause to permit the trial court to determine whether respondent is entitled to recover attorney's fees and other costs of proof pursuant to Code of Civil Procedure section 2033.420.[2] We further direct the trial court to vacate its order granting in part appellants' Motion to Tax Costs and to enter a new order taxing

---

Montgomery and Frieda E. Montgomery (the "Foundation"). He also had four sons: Jeff, Andrew, Michael, and John G. Montgomery. Jim died prior to trial. At that time, his assets were transferred to the James F. Montgomery Irrevocable Trust (the "Trust"), which was then substituted as a party to the litigation. Andrew Montgomery is its trustee. John G. Montgomery is the personal representative of Jim's estate and, in that capacity, is a party to this action. In what appears to be a singularly pernicious and frustrating typographical error, John G. Montgomery is erroneously referred to in pleadings and other documents as John F. Montgomery.

[2] All statutory references are to the Code of Civil Procedure, unless otherwise stated.

costs in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed.

Facts

Jim Montgomery attempted to open a new bank, Banco Buenaventura (Bank), in Ventura County. In October 2008, Jim Montgomery asked respondent Kenneth Sterling, a bank employee and family friend, to invest an additional $100,000 in the Bank. He told Sterling the Bank needed the additional money to meet regulators' capitalization requirements and would be unable to commence operations without it. Sterling invested $100,000 as requested. After Sterling made his investment and before the Bank opened for business, Jim Montgomery instructed the Bank to transfer $100,000 to his family's charitable foundation. The Bank opened but failed after less than one year of operations. All of the initial investors, including Sterling, lost their investments.

Sterling sued Jim Montgomery and the Foundation, alleging causes of action for fraud, negligent misrepresentation, conversion, fraudulent conveyance and common count. It was Sterling's theory that Jim Montgomery induced him to invest additional money in the Bank by intentionally misrepresenting the Bank's need for that money.

After a court trial, the trial court entered judgment in favor of Sterling. The trial court awarded Sterling compensatory damages of $100,000, pre-judgment interest of $70,048.40, exemplary damages of $165,000, $260,000 in attorney's fees and $24,145.79 in costs.

Procedural History

This matter was tried over four days in October 2014. Respondent testified himself and called Andrew Montgomery, one

of Jim Montgomery's sons, as a witness. He also relied on the deposition testimony of Diana Sherwood, the Bank's Chief Financial Officer, and Deborah Johnson, the former personal assistant to Jim Montgomery. Respondent rested after two trial days, on Wednesday, October 22, 2104. Appellants had no witnesses in the courtroom ready to testify. Instead, appellants' counsel represented to the trial court, "that I can have our witnesses here next Wednesday and Thursday and we can put our case at rest in two days." Respondent's counsel objected to the delay.

The trial court also expressed its concern regarding the length of the requested continuance. "It is a very catastrophic consequence to the defense case if I say, [T]his is the date and time for trial; if you don't have any witnesses, you rest. [¶] I try not to conduct myself that way, but I have an obligation, gentlemen, to be a good steward of the use of my courtroom. [¶] And I should do my best to diligently move this case to closure in a reasonable way and take up the next case. That's my obligation." The trial court also noted that, while it might be an abuse of discretion to deny a continuance for an afternoon or a single day, "to say no, we will wait until the middle of next week, I think that is a different problem. [¶] I think you see the qualitative difference." Eventually, the trial court decided to recess for the day and take up the issue again the next day.

On Thursday morning, the parties discussed the admissibility of the Sherwood and Johnson deposition transcripts and appellants made a motion for nonsuit. After the noon recess, the trial court denied the motion. Appellants' counsel represented to the court that his witnesses could be in court on Monday morning and that the defense could complete its case in

two days. After additional argument, the trial court concluded, "I need you to find your witnesses and get them here tomorrow."

Respondent's trial counsel informed the court that he would make a motion to exclude the witnesses appellants intended to call because appellants did not identify those witnesses in their responses to interrogatories. The trial court indicated it would allow appellants to make a record on that issue and again advised them to have witnesses present the next day.

The next day, Friday, John G. Montgomery, Jim's son and the personal representative of his estate, testified for appellants. His testimony concluded before noon. Respondent moved to exclude the other witnesses identified by appellants on the ground that they were not identified in appellants' responses to interrogatories. Specifically, respondent propounded form interrogatories that asked appellants to identify witnesses with knowledge of the facts alleged in the pleadings and witnesses with knowledge of the facts supporting their responses to requests for admission. In each case, appellants responded they had no knowledge of any witnesses.

Appellants' counsel protested that respondents were well aware of each proposed witness because the witnesses were officers or directors of the Bank. Respondent's counsel agreed that he recognized the names of the proposed witnesses, but argued he had not been aware that appellants believed these people had knowledge of facts relevant to the issues at trial. The trial court granted respondent's motion to exclude appellants' remaining witnesses on the ground that the witnesses were not disclosed in appellants' discovery responses.

The parties submitted written closing arguments. In January 2015, the trial court issued a tentative ruling in favor of

respondent. Following a trial on damages issues, the trial court awarded respondent compensatory damages of $100,000, punitive damages of $165,000, $260,000 in attorney's fees, and costs of $24,145.79.

Discussion

Denial of Continuance.

Appellants contend the trial court abused its discretion when it denied their request for a continuance of the trial until their witnesses could be present to testify. We review the order for abuse of discretion and find none.

As we have repeatedly explained, '"'"The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision." [Fn. omitted.]' [Citations.] 'The appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason.' [Citations.] [¶] A '. . . showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice . . .' [Citation.] '"A judgment or order of the lower court is *presumed*

correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citations.]' [Citation.]" (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448–1449.)

The trial court did not abuse its discretion when it denied appellants' requested continuance. On a Wednesday afternoon, appellants' counsel requested a continuance until the next Wednesday or Thursday – a lapse of at least three full trial days – because all of appellants' proposed witnesses were out of town. But two of the proposed witnesses lived nearby, in Los Angeles County, and appellants still could not secure their presence for the next trial day. After the trial court spent one afternoon, another full trial day, and most of a morning session entertaining argument on this and other issues, appellants still had only one of four witnesses available to testify. It was not irrational for the trial court to conclude from these circumstances that appellants were unprepared or unable to proceed with the trial. The trial court did not abuse its discretion when it declined to delay the matter still further, to permit appellants' witnesses to appear at their convenience.

Exclusion of Witnesses.

Appellants also contend the trial court abused its discretion when it excluded their remaining witnesses from testifying. Once again, we disagree.

We review the trial court's order excluding evidence for abuse of discretion. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332 (*Goffney*).) "[E]xclusion of a party's witness for that party's failure to identify the witness in discovery is

appropriate only if the omission was willful or a violation of a court order compelling a response. [Citations.]" (*Mitchell v. Superior Court* (2015) 243 Cal.App.4th 269, 272.) Evidence may not be excluded based solely on the failure to supplement or amend an interrogatory answer, if that answer was truthful when originally served. (*Goffney*, *supra*, at p. 332.) Instead, in the absence of an order compelling a response or further response to an interrogatory, the party moving to exclude evidence has the burden to establish "the answer given by the responding party was willfully false, i.e., *intentionally not true*." (*Id.* at p. 334.)

Here, the trial court reviewed appellants' responses to interrogatories and concluded that they identified only one person with knowledge of the claims and defenses alleged in the pleadings. That person was Jim Montgomery, who died prior to trial. Appellants' witness list for trial included Jeff and Andrew Montgomery, Terry Quinn, the Foundation's board chair, and two former executives of the failed Bank. Each of these witnesses would have been well known to appellants and their trial counsel when they prepared their answers to respondents' interrogatories. Appellants never contended in the trial court they were unaware, when they answered the interrogatories, that these witnesses had knowledge relating to the respondent's claims. To the contrary, their argument against the motion to exclude was that the witnesses were also well known to respondent, who should have known (despite appellants' interrogatory answers to the contrary) they would have knowledge of respondent's claims. The trial court did not abuse its discretion when it inferred from these circumstances that appellants' interrogatory responses were willfully false. The

order excluding the testimony of appellants' proposed witnesses was, therefore, also not an abuse of discretion.

Substantial Evidence.

Appellants contend the judgment is not supported by substantial evidence because Jim Montgomery's representation to respondent was true, because respondent received consideration for his investment and because respondent had no claim to the Bank's assets. We are not persuaded.

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. [Citation.]" (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) Negligent misrepresentation requires proof of the same elements, except that it "does not require scienter or intent to defraud. [Citation.] It encompasses '[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true' [citation], and '[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true' [citations].)" (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174.)

The trial court factually found that respondent invested $100,000 in the Bank in reliance on representations made to him by Jim Montgomery. Jim Montgomery represented the Bank needed the additional funds in order to begin operations. This representation was false because the Bank was able to commence operations despite the fact that the money

respondent invested was almost immediately transferred from the Bank to the Foundation. Jim Montgomery falsely represented that the $100,000 was essential to the Bank's opening. Respondent's reliance on Jim Montgomery's representations was justifiable because he was more familiar with the financial condition of the Bank, had more banking experience than respondent and was a trusted friend of respondent's. After their meeting, respondent invested an additional $100,000 in the Bank. About three weeks later, Jim Montgomery directed that $100,000 be transferred from the Bank to the Foundation.

These findings of fact are supported by substantial evidence, including respondent's testimony, the deposition testimony of Diana Sherwood and Deborah Johnson, documentary evidence, and inferences reasonably drawn from this evidence. Respondent testified that Jim Montgomery made the representations at a meeting with respondent and Diana Sherwood. Ms. Sherwood corroborated respondent's account of the meeting, and agreed that the Bank did not, in fact, require the additional funds to commence operations. Respondent transferred $100,000 to the Bank on October 23, 2008. The Bank transferred $100,000 to the Foundation nearly one month later, on November 18, 2008. A letter from the Bank initiating the $100,000 transfer to the Foundation contains a handwritten notation that the funds are related to respondent and his children. The Bank opened for business after this transfer occurred. Given this evidence, the trial court could reasonably drew the inference that Jim Montgomery knowingly misrepresented the Bank's need for additional investment and that he did so with the intent to defraud respondent.

Appellants further contend there is no substantial evidence tracing respondent's $100,000 to the funds that were transferred from the Bank to the Foundation. Again, we disagree. The trial court could reasonably draw the inference that respondent's funds were used for the transfer to the Foundation. There was substantial evidence that Jim Montgomery told respondent and Sherwood their funds were required to permit the Bank to begin operations because the Bank had no other sources of new investment. The transfer from the Bank to the Foundation occurred 26 days later. There was no evidence the Bank received other, new funds during that time. The trial court could reasonably infer that the funds used for the transfer came from respondent's investment.

Moreover, respondent's complaint was that Jim Montgomery induced him to make an additional investment in the Bank by lying to him about the need for that investment. The transfer to the Foundation is evidence that his statement was false, because the Bank opened after the amount of respondent's investment was transferred to another entity. These facts provide substantial evidentiary support for the fraud judgment, regardless of whether the funds transferred to the Foundation could be traced to respondent.

Appellants contend there is no substantial evidence Jim Montgomery's misrepresentation caused respondent any harm. The trial court could reasonably have found that respondent invested $100,000 in the Bank because he relied on Jim Montgomery's misrepresentation. Respondent testified that he would not have made the investment if Jim Montgomery had not made the misrepresentation. That testimony is substantial

evidence supporting the trial court's factual finding of damage to respondent.

Conversion, Common Counts & Fraudulent Conveyance.

The judgment finds in favor of respondent on his causes of action for fraud, negligent misrepresentation, conversion, common count and fraudulent conveyance. It awards respondent compensatory and punitive damages without tying the damages award to any single cause of action or differentiating between them. We have concluded that the judgment on respondent's cause of action for fraud is supported by substantial evidence. Consequently, it is unnecessary for us to consider appellants' contentions relating to the remaining causes of action. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 427.)

Punitive Damages.

The trial court awarded respondent $165,000 in punitive damages against the Foundation only. Appellants contend the award should be reversed because it violates public policy and has no evidentiary support. We are not persuaded.

First, as we have already explained, the trial court's finding that Jim Montgomery committed fraud is supported by substantial evidence. "Fraud alone is an adequate ground for awarding punitive damages . . . . [Citations.]" (*Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484; see also *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 996; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 135.)

Second, the punitive damages award against the Foundaiton does not violate public policy. Appellants contend the award can have no deterrent effect on the Foundation because

Jim Montgomery, the corporate director responsible for its wrongdoing, has died. But punitive damages are intended to punish past wrongdoing, as well as to deter future torts. "'Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.' [Citations.]" (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046.) In addition, punitive damages are properly assessed against a corporate entity where the wrongdoing was "performed by an "'agent . . . employed *in a managerial capacity* and . . . *acting in the scope of employment,*'" or ratified or approved by a "'managerial agent'" of the organization. [Citations.]" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723.)

Jim Montgomery, then Chairman of the Foundation Board, was unquestionably a managing agent of the Foundation. Diana Sherwood, the Chief Financial Officer of the Bank, testified that she wired $100,000 from the Bank to the Foundation only after Jim Montgomery personally called her and instructed her to do so. Sherwood understood the Foundation would use the money to buy Bank stock, but did not know whether it actually did so.

The Foundation Board exercised no oversight of Jim Montgomery. Every member of the Board was also a member of the Montgomery family. The Board met annually, to review donations being made by the Foundation and its investment activities. Board members did not inquire about or review other deposits made into the Foundation's accounts, nor did the Board review the Foundation's ledgers or general accounting. In

general, board members trusted Foundation officers to do their jobs. John G. Montgomery, Jim's son, testified he was not aware that $100,000 had been transferred from the Bank to the Foundation and was never asked to approve it. Andrew Montgomery, John's brother, confirmed the Board did not discuss the transfer until respondent's lawsuit was filed, almost four years after the transfer occurred.

According to Andrew, the Foundation agreed to act as a "safety net" for the Bank and Jim Montgomery, by agreeing to invest in the Bank "whatever capital was needed in order to make sure that the bank had enough capital." Montgomery later clarified the Foundation had agreed only to invest up to $1 million in the Bank, to help it meet its capitalization requirements. It eventually invested $500,000 in the Bank and lost that investment.

In sum, Jim Montgomery defrauded Sterling of $100,000 by misrepresenting the Bank's need for those funds. Jim then used his position as a managing agent of both the Bank and the Foundation to cause the Bank to transfer the $100,000 from the Bank to the Foundation. The remaining members of the Foundation Board exercised no oversight of Jim and took no action to discover the transfer or inquire about the Foundation's ultimate use of those funds. This constitutes substantial evidence supporting the award of punitive damages against the Foundation. (*Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576.)

Attorney Fees.

The trial court awarded respondent attorney's fees of $260,000 after concluding that the Subscription Agreement he signed to invest in Bank stock contained an attorney's fee clause

made reciprocal by Civil Code section 1717. Appellants contend the trial court erred as a matter of law, because the Subscription Agreement does not contain a contractual attorney's fee clause and because there is no other basis for a fee award. Respondent appears to concede the Subscription Agreement does not support the fee award, but contends he is entitled to recover his attorney's fees as cost of proof sanctions for appellants' untimely and unreasonable responses to requests for admission. (§ 2033.420.)

We review de novo the trial court's determination that respondent is entitled to an award of attorney fees under the Subscription Agreement. "An order granting or denying an award of attorney fees is generally reviewed under an abuse of discretion standard of review; however, the '"determination of whether the criteria for an award of attorney fees and costs have been met is a question of law."' [Citations.]" (*Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.)

Federal securities regulations limited investment in the Bank to individuals with high net worth, who purchased the investment for their own account and who could afford the total loss of their investment. Individuals seeking to purchase stock in the Bank were required to represent that they met these and other investment criteria. The Subscription Agreement contains respondent's representations that he met the relevant investment criteria.

Respondent also agreed, "I recognize that the sale of the shares of [Bank] stock to me will be based upon my statements, representations and warranties set forth hereinabove. I hereby agree to defend, to indemnify, and to hold harmless the [Bank] and each officer, director or shareholder thereof from and against any and all loss, damage, liability or

expense, including reasonable attorneys' fees and costs which they or any of them incur or become liable for by reason of, or in any way connected with, any misrepresentation, whether negligent or intentional, made by me in this Subscription Agreement, any breach of my warranties, or my failure to perform any of my covenants or agreements set forth in the Subscription Agreement, or arising out of any sale or distribution by me of any Shares in violation of applicable securities laws."

The trial court erred when it concluded that this paragraph of the Subscription Agreement provided the basis for an award of attorney's fees to respondent. It is an indemnity clause, not an attorney's fee clause. The reciprocity provision of Civil Code section 1717 does not apply. (*Myers Building Industries*, *Ltd. v. Interface Technology*, *Inc.* (1993) 13 Cal.App.4th 949, 973 (*Myers*).) "Generally, the inclusion of attorney fees as an item of loss in a third party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract which is required to trigger section 1717. [Citations.] 'A clause which contains the words "indemnify" and "hold harmless" is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons. [Citation.] Indemnification agreements ordinarily relate to third party claims. [Citation.]' [Citation.]" (*Carr Business Enterprises*, *Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20 (*Carr*).)

The contractual provision at issue here requires the prospective shareholder "to defend, to indemnify, and to hold harmless" the Bank "from and against any and all loss, damage, liability or expense" incurred by the Bank "by reason of, or in any

way connected with, any misrepresentation . . . made by me [the prospective shareholder] in this Subscription Agreement, any breach of my warranties, or my failure to perform any of my covenants or agreements set forth in the Subscription Agreement, or arising out of any sale or distribution by me of any Shares in violation of applicable securities laws." The provision does not refer to disputes between the Bank and the prospective shareholder or to an action to enforce the terms of the Subscription Agreement between the parties. It does not limit payment of attorney's fees to the prevailing party. Instead, the indemnity provision refers to claims made against the Bank by third parties, relating to the Bank's sale of securities to the prospective shareholder under the Subscription Agreement, and it requires the prospective shareholder to pay the Bank's costs of defense, regardless of whether the Bank prevails on the claim. (*Carr*, *supra*, 166 Cal.App.4th at p. 23.) Consequently, the provision requiring indemnification of the Bank's defense costs is not made reciprocal by Civil Code section 1717. (*Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1344-1345; *Myers*, *supra*, 13 Cal.App.4th at pp. 971–973.)

The trial court cited an incorrect legal basis for the attorney fee award. Respondent, however, also sought to recover attorney's fees on an alternate theory: that he was entitled to recover his costs of proof, including attorney's fees, after appellants failed to admit facts in response to requests for admission. (§ 2033.420.) The trial court did not address this contention in its order granting respondent's motion for attorney's fees. Respondent urges us to affirm the fee award under this theory. Although we will affirm a trial court order if it is correct on any theory (*In re Conservatorship of McQueen* (2014)

59 Cal.4th 602, 612), an order awarding fees under section 2033.420 requires findings of fact that have not been made. As a consequence, we will remand the matter to permit the trial court to make those findings and determine whether fees and other costs of proof should be awarded under section 2033.420.

Costs

Appellants contend respondent is not entitled to recover his costs of proof because he never obtained an order deeming the factual matters admitted, or an order compelling further responses to the requests for admission. We are not persuaded. Section 2033.420 does not require an order compelling a further response, or an order deeming facts admitted before the trial court may award costs of proof. Moreover, appellants ignored their discovery obligations by failing to serve responses under oath to the requests for admission. (§ 2033.210, subd. (a).) They should not be rewarded for this failure with immunity from cost of proof sanctions.

Responses to requests for admission must be made under oath. (§ 2033.210, subd. (a).) Section 2033.280 provides, "If a party to whom requests for admission are directed fails to serve a timely response . . . , [¶] [t]he requesting party may move for an order that . . . the truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction . . . ." (§ 2033.280, subd. (b).) There is no requirement that the parties meet and confer before this motion is filed; there is no deadline for filing the motion and no objections are waived if a motion is not filed.[3]

---

[3] By contrast, a motion to compel further responses to requests for admission must be filed within 45 days after service

A separate statute governs the recovery of costs of proof. This statute does not condition the award on an order deeming facts admitted or compelling a further response. Instead, section 2033.420 provides, "If a party fails to admit . . . the truth of any matter when requested to do so . . . , and if the party requesting that admission thereafter proves . . . 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." (§ 2033.420, subd. (a).) Costs of proof must be awarded unless the trial court finds that an objection to the request for admission was sustained, the admission was "of no substantial importance[,]" the responding party "had reasonable ground to believe that that party would prevail on the matter[,]" or "There was other good reason for the failure to admit." (§ 2033.420, subd. (b).)

Here, appellants never served a response under oath to the requests for admission as required by section 2033.210, subdivision (a). This is the equivalent of having served no response at all. Respondent could have filed a motion to deem admitted the factual matters referred to in the requests. (§ 2033.280.) He chose, instead, to try the case and then move to recover his costs of proof under section 2033.420.

The trial court made no findings on respondent's motion to recover costs of proof. Among other things, section

---

of the initial verified response. (§ 2033.290, subd. (c).) If a motion to compel further responses is not timely filed, "the requesting party waives any right to compel further response to the requests for admission." (*Ibid.*)

2033.420 requires the trial court to find that respondent proved the truth of any matter not admitted in response to requests for admission, that none of the exceptions noted in subdivision (b) of the statute apply, and that respondent incurred the amounts claimed in order to prove the facts at issue. (*Grace v. Mansourian* (2015) 240 Cal.App.4th 523, 529-530.) None of these findings have been made by the trial court. We will therefore remand the matter, to permit the trial court to consider respondent's request for costs of proof and to make findings of fact related to that request.

Motion to Tax Costs.

Respondent initially sought $366,010.29 in costs, including attorney fees of $341,864.50. Appellants moved to tax costs. The trial court found "that reasonable attorneys fees for this litigation to be $260,000. Accordingly, the Court strikes $81,864.50 of the requested attorney's fees from the plaintiff's memorandum of costs. In all other respects the defendant's motion to tax costs is denied." Appellants contend the trial court failed to strike an additional $17,437.47 in "miscellaneous" costs that are expressly disallowed by statute. We agree. Consequently, we will reverse the order on appellants' motion to tax costs and direct the trial court to enter a new order striking the costs detailed below.

Section 1033.5, subdivision (a) details items which are allowable as costs in a civil action. Subdivision (b) of the statute lists items which "are not allowable as costs, except when expressly authorized by law[.]" (§ 1033.5, subd. (b).) Subdivision (c)(4) provides, "Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion." (§ 1033.5, subd. (c)(4).) All costs allowed "shall be

reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation[,]" and all costs shall be "reasonable in amount." (§ 1033.5, subds. (c)(2), (c)(3).) "Whether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion. [Citation.] However, because the right to costs is governed strictly by statute [citation] a court has no discretion to award costs not statutorily authorized. [Citations.]" (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 (*Ladas*).)

Appellants contend the trial court abused its discretion when it awarded costs for items that are not allowable as costs under section 1033.5, subdivision (b). The trial court allowed costs of $520 for postage, $3,089.95 for copies, $272.50 for faxes and $477 for telephonic court appearances. Each of these items is "not allowable" under section 1033.5, subdivision (b)(3). The trial court erred when it awarded these costs. (*Ladas*, *supra*, 19 Cal.App.4th at pp. 775-776.)

The trial court also erred when it awarded $588.50 for counsel's travel between Santa Barbara and Ventura. The only travel costs that are allowed are those incurred in traveling to depositions. (*Ladas*, *supra*, 19 Cal.App.4th at p. 775.)

Finally, the trial court erred when it awarded $12,489.52 in costs for "Westlaw." Costs incurred for legal research are not allowable because section 1033.5, subdivision

(b)(2) "precludes recovery of investigation expenses and attorney fees are not compensable as costs in the absence of an agreement of the parties or statutory authority. [Citation.] Fees for legal research, computer or otherwise, may not be recovered under section 1033.5." (*Ladas*, *supra*, 19 Cal.App.4th at p. 776.) On remand, the trial court shall vacate its order granting appellants' motion to tax costs and enter a new order taxing the "miscellaneous" costs identified above.

Conclusion

The trial court's November 9, 2015 order granting in part respondent's Motion for Order Determining Prevailing Party and for Award of Attorney's Fees and granting in part appellants' Motion to Tax Costs is vacated. The cause is remanded to permit the trial court to determine whether respondent is entitled to recover attorney's fees and other costs of proof pursuant to section 2033.420. We further direct the trial court to enter a new order taxing costs in accordance with the views expressed in this opinion. In all other respects, the judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Kent Kellegrew, Judge

Superior Court County of Ventura

Law Offices of Herb Fox and Herb Fox for Defendants and Appellants.

Law Offices of Michael P. Ring & Assoc., Michael P. Ring and Iris L. M. Ring, for Plaintiff and Respondent.