

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

MINUTE ORDER

DATE: 03/25/2024

TIME: 11:06:00 AM

DEPT:

JUDICIAL OFFICER PRESIDING: Carolyn Caietti

CLERK: Anthony Shirley

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2018-00062910-CU-FR-CTL** CASE INIT.DATE: 12/13/2018

CASE TITLE: **Lutteroth vs Paula [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Fraud

APPEARANCES

The Court, having taken the above-entitled matter under submission on 03/22/2024 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Cross-Defendant Arturo Rodriguez' Motion for Attorney Fees for Failure to Admit Truth of Matters Pursuant to C.C.P. Section 2033.420 Costs of Proof is **GRANTED**.

Cross-Defendants Gabriela Lutteroth and Carlos Lutteroth's Motion for Attorney Fees for Failure to Admit Truth of Matters Pursuant to C.C.P. Section 2033.420 Costs of Proof is **GRANTED IN PART AND DENIED IN PART**.

Background

As relevant to these motions, Cross-Complainants Edward Paula and Paula Development, Inc. (PDI) alleged in its Cross-Complaint that Gabriela Lutteroth, Carlos Lutteroth and Arturo Rodriguez committed slander per se.

The Court refers to Gabriela Lutteroth and Carlos Lutteroth by their first names to avoid confusion and intends no disrespect.

As to Gabriela, Paula's Cross-Complaint alleged on September 26, 2018, Gabriela said, "Edward Paula is a defrauder and stole money from me." (Cross-Complaint (XC), at ¶ 35.) After trial, the Court issued a Statement of Decision (SOD), determining: the evidence presented failed to establish with the requisite precision and clarity that Gabriela made any actionable defamatory statement, the "people who allegedly heard the statements were never deposed and did not testify at trial," there was no evidence of any actual statements made, Paula failed to meet his burden of proof, even if such statements were made, Paula failed to provide sufficient evidence it had any damaging impact on his business, and the statements, if made, were substantially true. (SOD, at p. 22.) The Court entered judgment in favor of Gabriela. It is also noted the Court provided an oral ruling on June 9, 2023 (after presiding over 11 days of trial for Phase 1) and October 12, 2023 (after presiding over 4 days of trial for Phase 2) providing the

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Court's impressions of the evidence including witness credibility and exhibits as well as ruling on the complaint and cross complaint. The XC was contested; none of the parties admitted to liability.

As to Carlos, Paula's Cross-Complaint alleged in October 2017, Carlos said, "I lost one million dollars as a result of Edward Paula's fraudulent conduct." (XC, at ¶ 51.) After trial, the Court determined: Paula failed to meet his burden, failed to introduce evidence to prove such statements were made or, if made, were precise enough to constitute defamation, that such statements, if made, would be substantially true and failed to provide evidence of damages. (SOD, at p. 24.) The Court entered judgment in favor of Carlos.

As to Arturo Rodriguez, Paula's Cross-Complaint alleged in October 2017, Arturo Rodriguez said, "Edward Paula is a crook and a thief." After trial, the Court determined: Paula failed to present sufficient evidence to prove Rodriguez made any statements about Paula that can be considered defamatory; to the extent evidence showed Rodriguez made any negative statements about Paula, such statements were substantially true given the Court's decision Defendants defrauded Plaintiffs in connection with the Gate 14 construction project, Paula forging Rodriguez's name on a \$1.3M construction loan without his knowledge or authorization and falsely representing to the community that Rodriguez was the general contractor on several of his projects; and that there was no evidence of damages. (SOD, at p. 23-24.) The Court entered judgment in favor of Rodriguez.

Statement of the Law

C.C.P. Section 2033.420 states:

- 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
- The court shall make this order unless it finds any of the following:
 - An objection to the request was sustained or a response to it was waived under Section 2033.290.
 - The admission sought was of no substantial importance.
 - The party failing to make the admission had reasonable ground to believe that party would prevail on the matter.
 - There was other good reason for the failure to admit.

The party seeking to benefit from an exception in C.C.P. section 2033.420(b) bears the burden to establish the exception. (*Spahn v. Richards* (2021) 72 Cal.App.5th 208, 216.) Pertinent to this motion is the third exception of when the party failing to make the admission had reasonable ground to believe that the party would prevail on the matter. In assessing where there were reasonable grounds to believe it could prevail on the issue, the question is not whether the responding party "had some minimum quantum of evidence to support its denial," but whether "the litigant had a reasonable, good faith belief he or she would prevail on the issue at trial." (*Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 119.) "Consideration of this question requires not only an assessment of the substantiality of the evidence for and against the issue known or available to the party, but also the credibility of that evidence, the likelihood that it would be admissible at trial and persuasive to the trier of fact, the relationship of the issue to other issues anticipated to be part of trial (including the issue's importance), the party's efforts to investigate the issue and obtain further evidence, and the overall state of discovery at the time of the denials and thereafter." (*Ibid.*)

Rodriguez' Motion

In this motion, Rodriguez seeks costs of proof of \$381,990.

Rodriguez Proved the Truth of the Matter Paula Denied

During discovery, Rodriguez issued a Request for Admission (RFA) to Edward Paula, stating: "Admit that [Rodriguez] did not defame [Paula]." After stating objections, Paula responded: "Deny, Mr. Rodriguez told people in the community that 'Edward Paula was a crook and a thief,' or the substantial equivalent, to the detriment of Responding Party's reputation in the community." As discussed above, the Court found Rodriguez did not defame Paula.

Rodriguez met his initial burden that he proved at trial the truth of facts which, in discovery, Paula refused to admit, namely that Rodriguez did not defame Paula. Paula's argument that Rodriguez did not show he proved facts at trial in this motion is illogical and contrary to the Court's rulings. The Court found Paula failed to present sufficient evidence to prove Rodriguez made any statements and, if any were made, they were true and entered judgment in favor of Rodriguez on the third cause of action. Rodriguez disproved Paula's allegation of defamation and the actual truth of the matter.

The Exceptions Do Not Apply

Paula relies on the third exception discussed above. First, Paula argues the request was served at the inception of litigation. (ROA 1 - Complaint filed December 13, 2018; ROA 44 – XC filed October 25, 2019.) He further argues when the denial was made, no discovery had occurred as to the XC and depositions had not been scheduled or conducted. In doing so, Paula relies on *Pappas v. Chang* (2022) 75 Cal.App.5th 975, 992 (affirming order denying costs of proof at trial because admissions were served "very early in the case" and essentially asked the plaintiff to admit she could not prevail at trial.) Not only does Paula not offer any argument as to how *Pappas* is applicable, it readily appears distinguishable. Unlike in *Pappas* where the admissions were served "very early in the case," the admissions here were served two years after the cross-complaint was filed, after the anti-SLAPP discovery stay, and after the remittitur issued on February 19, 2021. (ROA 199.) At the time Paula responded, he, minimally, had Rodriguez' discovery responses, declarations from Fausto Bahena and Juan Ibarra (who Rodriguez maintains had inconsistent stories) and Bahena's deposition. Paula reasons he also had not yet taken the depositions of the Lutteroths and Rodriguez, but the Court agrees with Rodriguez that it is unclear how their depositions would have provided him with evidence that would have resulted in him admitting Rodriguez had not defamed him.

Next, Paula argues he had a reasonable ground to believe he would prevail on the matter, citing to five witnesses: Rodriguez, Victor Reynoso, Ramon Davila, Fausto Bahena and Juan Ibarra. He acknowledges Davila did not ultimately testify at trial. As to Reynoso, Bahena and Ibarra's testimony, Paula does not provide any explanation (nor supporting declaration) of any assessment of the substantiality of the evidence for and against the issue known or available to the party, the credibility of that evidence, the likelihood that it would be admissible at trial and persuasive to the trier of fact, the relationship of the issue to other issues anticipated to be part of trial (including the issue's importance), the party's efforts to investigate the issue and obtain further evidence, and the overall state of discovery at the time of the denials and thereafter. (*Orange County Water Dist.*, supra, 31 Cal.App.5th at p. 119.) Paula cites to "R.O.A. No. 1046, ¶ 6" which is a declaration from Rodriguez' counsel and a paragraph about not accepting an offer to compromise. It is unclear how this relates to the analysis.

Moreover, Paula's reliance on *Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1066 is misplaced as that case had to do with an unsettled area of law on respondeat superior liability and mobile offices inside an employee's car. Comparably here, Paula does not argue any unsettled area of law.

Again, the opposition does not include any declaration explaining how Paula had a "reasonable ground to believe" he would prevail on the matter. (ROA 1084; *Orange County Water Dist.*, supra, 31 Cal.App.5th at p. 116 ["A party's reasonable belief must be grounded in the evidence"].) At the hearing, Paula raised the denied motion for summary judgment. Even if denial of a motion for summary judgment precludes a C.C.P. section 2033.420 fee award (which Paula does not provide any case law that this alone does so), Paula still does not provide evidence that it was the denied motion for summary judgment that gave him the reasonable ground to believe he would prevail. Rather, as argued by Rodriguez' at the hearing, the two motions hold different standards and the reasonable ground standard requires an assessment of the "substantiality of the evidence." One trial court ruling is not a sufficient assessment of the evidence.

Paula also does not address Rodriguez' facts that Paula took money from the Lutteroths, forged Rodriguez' name on a \$1.3 million construction loan and sent messages on the day he filed the XC, saying his reasons for suing Rodriguez were to "cost him" with hopes "he goes through the stress we're going through..." (Khosroabadi Decl., at Ex. 2, referencing admitted trial exhibits 808-016 – 808-017.)

Taken as a whole, and particularly the lack of evidence supporting the exception, the Court is not convinced Paula had reasonable ground to believe that party would prevail on the matter.

Thus, Paula has not met its burden to show an exception applies requiring the Court to make the order for reasonable expenses, including attorney fees. However, as the RFA was only issued to Edward Paula, C.C.P. section 2033.420 only applies to Edward Paula and not Paula Development, Inc.

Amount of Attorney Fees Sought

As for the amount of attorney fees sought, Rodriguez sufficiently provides the foundation for his attorneys' hourly rates (Attorney Khosroabadi – \$300/over 20 years of experience; Attorney Collinsworth - \$300/30 years of experience) and services provided to prove up the fact Rodriguez did not defame Paula. The time entries are limited to time spent in an effort to prove the denied fact and was a direct result of Paula's refusal to admit RFA No. 3.

In opposition, Paula asks the Court to reduce the hourly rate in light of Rodriguez' counsel purported incivility, which the Court will not do. The Court does not find any evidence of their incivility by Attorneys Khosroabadi and Collinsworth. It was Paula's counsel who was sanctioned for misuse of the discovery process (ROA 114); sanctioned under C.C.P. section 425.16(c)(1) (which was upheld on appeal – ROA 114 & 199) and nearly sanctioned under C.C.P. section 128.5 with admonishments to stop "unfounded personal attacks on Plaintiff's counsel." (ROA 903 – Minute Order dated July 10, 2023.) It is evident Paula's counsel's incivility forced Rodriguez to incur attorney fees. Paula does not otherwise take issue with any of the services charged. The Court will award the full amount of sanctions sought of \$381,990.

Conclusion

For these reasons, the motion is **GRANTED**.

Gabriela and Carlos Lutteroth's Motion

In this motion, Gabriela and Carlos seek costs of proof of \$134,098.

The Lutteroths Proved the Truth of the Matter Paula/PDI Denied as to the XC Only

Gabriela and Carlos met their initial burden that they proved at trial the truth of facts which, in discovery, Paula refused to admit as related to the XC. Gabriela's RFA Nos. 13 and 14 and Carlos' RFA Nos. 1-2 plainly address the XC's allegations regarding the specific statements made and that Defendants did not miss out on business opportunities. (Ex. XC, at ¶¶ 35, 40, 51, 56.) As discussed above, the Court found Gabriela and Carlos did not defame Paula and Paula/PDI failed to provide sufficient evidence it had any damaging impact on the business.

However, the Court declines to award costs on the RFAs related to Gabriela and Carlos' claims on their Second Amended Complaint, i.e., Gabriela's RFAs Nos. 13, 14, 16 and 13 identified on pages 9-10 of the moving memorandum. What Defendants were asked to admit does not mirror the findings by the Court. For example, No. 13 concerns assistance with a construction loan and the Court's finding concerns gap funding and Paula/PDI's agreement to oversee and manage the development of the Coronado properties. No. 14 concerns whether Paula/PDI assisted Gabriela with Construction Loan Draw Requests from BBVA Compass and the Court's findings concern Focus. No 16. concerns whether Paula/PDI ordered inspections by BBVA Compass and the Court's findings concern tracking the supervision line items. Finally, No. 13 concerns Paula Financial Services, Inc.'s receipt of \$284,000 from Focus and the Court's finding concerns that Paula/PDI acted against Plaintiffs' interests. Based on what is presented, the Court cannot determine Gabriela and Carlos proved the truth of the RFA previously denied.

Thus, the Court will consider the exceptions addressed to Gabriela's RFA Nos. 13 and 14 and Carlos' RFA Nos. 1-2 on the XC.

The Exceptions Do Not Apply

Paula/PDI again rely on the third exception discussed above and that they reasonably believed they would prevail at trial. In their opposition, Paula/PDI identify several witnesses who purportedly heard the Lutteroths' statements such as Angel Arambulo, Armando Bloch, Eduardo Posada, Bill Blackwell, Lourdes Valdez, Daniel Swasbrook, Arturo Rodriguez and Francis Contreras. The opposition also cites to their Evidence in Opposition to Rodriguez and the Lutteroths' Motions for Summary Judgment. (ROA 256 & 262.) Although the cites do not specifically refer to Exhibit A of ROA 256 and 262, which is Paula's declaration, the Court reviewed the declaration and the paragraphs referenced in the opposition.

Paragraphs 19-21 of Paula's Declaration do not identify any witnesses who heard any statements. Paragraphs 24 and 25 contain several layers of hearsay. The remaining paragraphs reference Angel Arambulo, Bill Blackwell, Francis Contreras and Daniel Swasbrook. But again, Paula/PDI do not provide any explanation (nor supporting declaration) of any assessment of the substantiality of the evidence for and against the issue known or available to the party, the credibility of that evidence, the likelihood that it would be admissible at trial and persuasive to the trier of fact, the relationship of the issue to other issues anticipated to be part of trial (including the issue's importance), the party's efforts to investigate the issue and obtain further evidence, and the overall state of discovery at the time of the denials and thereafter. (*Orange County Water Dist.*, supra, 31 Cal.App.5th at p. 119; see also, *Smith, Smith & Kring*

v. Superior Court (1997) 60 Cal.App.4th 573, 578 ["matters set forth in the unverified 'Statement of Facts' and in memoranda of points and authorities are not evidence"]; *J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 343 ["it is elementary statements of the attorneys are not evidence"].) Notably, as maintained by the Lutteroths, Paula did not present any witnesses to testify the Lutteroths made any defamatory statements against him or that he suffered any damages. Pertinent to this motion, Paula/PDI do not make any attempt to reconcile how he had witnesses to prove the statements were made, but then did not at trial.

The other citations are similarly devoid of the required analysis. The citation to "5/2 T.T., 138:26-141:10" is not provided and the Lutteroths maintain in reply that this is actually Paula's testimony at trial; not any admission by Gabriela of statements she made. ROA 856 is an ex parte application and not evidence before the Court. ROA 808 is a notice of intent to play a video deposition at trial. There is no record for ROA 631.

For the reasons discussed above, *Pappas*, supra, is distinguishable. This discovery was not issued at the inception of the case, but rather, two years after the XC's filing.

To the extent Paula claims it was the denied motion for summary judgment that gave a reasonable belief he would prevail, the claim and the required assessment is not included in his supporting declaration and there is no evidence to support it.

Thus, Paula has not met its burden to show an exception applies to the RFAs related to the XC, requiring the Court to make the order for reasonable expenses, including attorney fees.

Amount of Attorney Fees

As for the amount of attorney fees sought, the Lutteroths sufficiently provide the foundation for their attorney's hourly rates (Attorney Brand - \$420-500/over 32 years of experience) and services provided to prove up the facts the Lutteroths did not defame Paula/PDI. Exhibit 25 reflects time entries limited to time spent in an effort to prove the denied facts and was a direct result of Paula/PDI's refusal to admit Gabriela's RFA Nos. 13 and 14 and Carlos' RFA Nos. 1-2.

In opposition, Paula/PDI argue, "as to the RFAs relating to the Cross-Complaint, there are no costs that bear a relationship to these RFAs as the costs incurred were for the preparation of trial to pursue Plaintiffs' S.A.C." This argument makes no sense. Further, Paula/PDI ask that the Lutteroths' counsel's rate be adjusted to consider "incivility," which, again, the Court will not do. The Court does not find any evidence of incivility by Attorney Brand. The Court will award \$64,160 for the fees incurred to prove the matters at issue in the XC. (Exhibit 25.)

Conclusion

For these reasons, the motion is **GRANTED IN PART AND DENIED IN PART**.

Concluding Orders

Cross-Complainant Edward Paula is ordered to pay cost of proof sanctions to Cross-Defendant Arturo Rodriguez in the amount of \$381,990.

Cross-Complainants Edward Paula and Paul Development, Inc. is ordered to pay cost of proof sanctions to Cross-Defendants Gabriela Lutteroth and Carlos Lutteroth in the amount of \$64,160.

This minute order will be the Court's final ruling.

The Clerk of the Court is ordered to serve notice of the Court's final ruling.

IT IS SO ORDERED.

Carolyn M. Caietti

Judge Carolyn Caietti