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Draft Your RFAs With Costs of Proof and Settlement in Mind

Tim Kowal *May 13, 2022*

Most attorneys have heard that you can get attorney fees if your opponent denies a request to admit a fact and you go on to prove that fact at trial. These are called "costs of proof" fees. You probably assumed this was more trouble than it was worth.

But what if I told you that you could recover nearly $239,000 in fees this way? Now it seems worth a shot, doesn't it?

That's what the defendants got in *Spahn v. Richards* (2021) 72 Cal.App.5th 208 as costs-of-proof fees. The defendant homebuilder asked the plaintiff developers to admit the parties had no agreement obligating the defendant to build the home. The existence of a contract was rather the whole case, so the plaintiffs denied the RFA. That seems hardly surprising: the plaintiff might just have dismissed the whole lawsuit before admitting that the premise for the lawsuit was false. The defendants then filed an unsuccessful motion for summary judgment. At trial the defendants moved for a directed verdict, but the court denied that as well (calling it a close call). The jury then returned a defense verdict.

The trial court then granted the defendant's motion for costs-of-proof fees in the amount of more than $239,000.

And the Court of Appeal affirmed.

Costs-of-proof fees

Under Code of Civil Procedure section 2033.420, if "the requesting party proves the truth of an RFA previously denied by the other party, the requesting party may move the court for an order requiring the other party pay the reasonable expenses incurred in making that proof, including reasonable attorney fees." (*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 690.)

Pursuant to section 2033.420, subdivision (b), "the trial court shall order the party denying the RFA to pay the costs of proof unless: (1) an objection was sustained to the request or a response was waived; (2) the admission sought was of no substantial importance; (3) there was reasonable ground to believe the party refusing to admit the matter would prevail on the matter; or (4) there was other good reason for the failure to admit." (*Doe*, *supra*, 37 Cal.App.5th at p. 690.) The party seeking to benefit from an exception listed in section 2033.420, subdivision (b) "'bears the burden to establish the exception.'" (*Samsky v. State Farm Mutual Automobile Ins. Co.* (2019) 37 Cal.App.5th 517, 523.)

A "good reason" may include "a reasonably entertained good faith belief" that the party will prevail on the issue. (*Doe*, supra, 37 Cal.App.5th at p. 690.) But the belief

"must be grounded in the evidence; it cannot be based merely on 'hope or a roll of the dice'" or on the fact that the parties "'hotly contest'" the issue. (*Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 116.) A party's reliance on "self-serving testimony" may be insufficient to establish a reasonable refusal to admit a request for admission. (*Doe*, at p. 691.)

Here, the court concluded the trial court did not abuse its discretion in concluding the plaintiffs had no reasonably-entertained good faith belief that they would establish a contract. True, the defendant homebuilder had submitted a contractor qualification request, and had solicited bids from subcontractors, and had stated he would investigate increasing his insurance coverage for the project. But the defendant had not actually submitted a written bid, and there was never an agreement or any specific discussion about the costs – which would vary from around $500,000 to over $1 million. On this basis, the trial court could conclude the plaintiffs did not reasonably deny the RFAs demanding admission that there was no contract.

Unsuccessful motions for summary judgment and directed verdict did not bar award

The court rejected the plaintiffs' argument that the trial court's denial of the defendant's motions for summary judgment and directed verdict barred a costs-of-proof award. This would create a per se rule, and the court declined to fashion a per se rule. More strikingly, the court noted that those motions also give the trial judge no discretion to weigh evidence or determine credibility. The court does have this ability in a costs-of-proof motion. And this suggests that litigants also have a duty to not only to determine their cases are supported by evidence, but to evaluate whether the fact-finder is likely to find that evidence credible. In a footnote, the court confirms that, as other courts have held, "the inquiry on a costs of proof motion is not "whether the litigant had some minimum quantum of evidence to support its denial (*i.e.*, 'probable cause')," citing *Orange County Water Dist. v. The Arnold Engineering Co.* (2018) 31 Cal.App.5th 96, 119, and *Samsky v. State Farm Mutual Automobile Ins. Co.* (2019) 37 Cal.App.5th 517, 526.

Comment: The court did not address one important thing. Recall that the RFA here went to the ultimate legal issue in the case. Not a concrete fact, but the ultimate fact to be deduced from all the evidence. I had never envisioned costs-of-proof fees to encompass substantially all of the case. But that seems to be the upshot here. And it

is a lower standard than for Code of Civil Procedure section 128.5 or 128.7 sanctions, and certainly lower than for malicious prosecution.

Takeaway: While parties are permitted to request admissions on ultimate issues, I have never found that a fruitful exercise because all you get is a denial and then a nonspecific narrative in the accompanying form interrogatory 17.1, regurgitating the responding party's entire theory of the case. But after *Spahn*, I am going to strongly consider taking all the CACI elements of every cause of action and defense in the case and turning them into RFAs to my opponent. And then reminding my opponent in every negotiation and settlement conference in the case that if they fall rather short on the more unlikely elements of their case, they will be facing a substantial costs-of-proof motion after they lose.

This article was originally published on the website of Thomas Vogele & Associates, APC.

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