1 of 1 DOCUMENT

BEVERLY HILLS RENT A CAR, INC., Defendant, Cross-complainant and Appellant, v. SHAHNAM DAVANI, Defendant, Cross-defendant and Respondent.

B172098

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

2005 Cal. App. Unpub. LEXIS 7260

August 11, 2005, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from orders of the Superior Court of Los Angeles County, No. SC070766. Linda K. Lefkowitz, Judge.

DISPOSITION: Reversed and remanded.

COUNSEL: Del Tondo & Thomas, Douglas J. Del Tondo and Bryan M. Thomas for Defendant, Cross-complainant and Appellant.

Ropers, Majeski, Kohn & Bentley, Marta B. Arriandiaga and Michael T. Ohira for Defendant, Cross-defendant and Respondent.

JUDGES: ASHMANN-GERST, J.; BOREN, P.J., DOI TODD, J. concurred.

OPINION BY: ASHMANN

OPINION

Beverly Hills Rent A Car, Inc. (BHRAC) appeals from two trial court orders denying its posttrial motions for attorney fees pursuant to *California Code of Civil Procedure sections 1021.6* and *2033, subdivision (o)*. [1]

1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[*2] **FACTUAL AND PROCEDURAL BACKGROUND**

A. Underlying Accident

BHRAC is a small car rental company specializing in the rental of high-end luxury and exotic vehicles in the Los Angeles and Orange County areas. On February 17, 2001, respondent Shahnam Davani (Davani) rented a 1999 yellow convertible Ferrari Spider F355 from BHRAC for a one-to-two day rental at its standard rental rate of $ 1,200 per day. That afternoon, Davani and his passenger, Shila Amiri (Amiri), were driving along Sunset Boulevard when Davani lost control of the vehicle. The Ferrari struck and damaged a Department of Water and Power (DWP) utility pole. The vehicle was a total loss.

B. Amiri's Lawsuit and BHRAC's Cross-Complaint

As a result of her bodily injuries suffered in the collision, Amiri filed a personal injury complaint against Davani, as the driver, and BHRAC, as the Ferrari owner (the Amiri action).

BHRAC filed a cross-complaint against Davani,

alleging causes of action for breach of rental contract, negligence (property and loss of use damages), and subrogation and indemnification. The cross-complaint specifically sought loss of use damages as well as indemnity. With respect [*3] to its indemnity claim, BHRAC alleged that it was entitled to a complete defense pursuant to *section 1021.6*, that Davani had failed to defend BHRAC, and that, as a result, BHRAC was demanding indemnification and attorney fees pursuant to *section 1021.6* and *Vehicle Code section 17153*.

C. BHRAC's Loss of Use Damage Claim and Discovery Requests

Immediately after the accident, Davani's insurance carrier, Farmers Insurance (Farmers), accepted liability and declared the Ferrari a total loss, with a fair market value of $ 184,436.26. However, BHRAC alleged that Farmers delayed 55 days before paying BHRAC the actual cash value of the Ferrari so that BHRAC could purchase a replacement vehicle. Because of this delay, BHRAC alleged that it suffered extensive loss of use damages.

Accordingly, as part of its preparation for trial, BHRAC served Davani with a set of requests for admission (RFAs). RFA No. 5 asked Davani to admit that $ 1,200 was the fair market rental value of the Ferrari on the date of loss. On January 14, 2003, Davani responded: "Information available to this responding party is insufficient to either admit or deny, therefore this responding party [*4] must deny at this time."

Within days of receiving Davani's denial of RFA No. 5, BHRAC served a follow-up set of special interrogatories upon Davani seeking, in part, the reasons why Davani contended that the daily fair market rental value of the Ferrari was not the $ 1,200 he paid. Davani responded that the fair market value was "significantly less" because the Ferrari "was defective in that the air-bag did not properly deploy; the vehicle was not tuned properly and sputtered at high rpm; the vehicle had cracked leather seats; the vehicle had panels that did not match the shade of yellow; and the vehicle had a [worn] out interior." Davani's responses also indicated that he intended to designate an expert witness on the issue of fair market rental value.

In fact, just days prior to serving his responses to BHRAC's special interrogatories, Davani had served his designation of expert witnesses, identifying Jeffrey B. Wheeler and Edward Fatzinger as his defense experts on the air bag issue. Furthermore, he designated Aaron Ruskin as the defense expert on the fair rental value of the Ferrari.

D. Bench Trial and Judgment for BHRAC

On May 8, 2003, a bench trial was held on BHRAC's [*5] cross-complaint. [2] Prior to trial, Davani admitted liability. Thus, the only issue for trial was damages. BHRAC sought (1) loss of use damages; (2) $ 7,356.76 for repairs to the DWP utility pole, under its indemnification cause of action; and (3) a finding of no fault pursuant to *section 1021.6* necessary for the recovery of BHRAC's Amiri action defense costs.

2 Several weeks prior to trial, Davani and Amiri agreed to binding arbitration, and Amiri did not pursue her claims against BHRAC.

At the outset of trial, BHRAC's counsel explained that it was seeking a finding of "no fault" for purposes of *section 1021.6*. After hearing BHRAC's counsel's comments, the trial court indicated that it would consider the issue at the conclusion of the case. Then, in response to BHRAC's counsel's statement that the issue should be resolved in a posttrial motion, the trial court agreed to defer the issue. BHRAC's trial brief confirmed that BHRAC sought "a special finding that it was *without fault* in causing Plaintiff AMIRI's [*6] injuries" in connection with its claim for attorney fees pursuant to *section 1021.6*.

The case then proceeded to trial. Given that BHRAC sought loss of use damages, it presented evidence proving that the fair market daily rental rate of the Ferrari was $ 1,200. It also presented a letter from DWP regarding the damages to the utility pole.

Then, just prior to resting its case-in-chief, BHRAC repeated the status of the issues regarding its claim for attorney fees pursuant to *section 1021.6*: "You said the issues under 1021.6 and whether there was no fault is reserved -- because we do have some exhibits we would offer on proving that we had no fault in the Amiri incident. So we have agreed to put those issues over to a 1021.6 motion." To which the trial court responded, "very well."

After BHRAC rested, Davani introduced no evidence to rebut the $ 1,200 per day rental value. Not only did he

not call his designated expert witness on the Ferrari's fair market rental value, but he also did not offer testimony from his air bag experts or otherwise present any evidence regarding the allegedly defective air bag.

On May 19, 2003, the trial court issued its tentative decision, finding in favor [*7] of BHRAC on the loss of use issue and awarding BHRAC $ 46,800 in loss of use damages (39 days at $ 1,200 per day). It also separately awarded BHRAC $ 7,356.76 "due to the City of Los Angeles Department of Water and Power (DWP) for damage to its property and billed to [BHRAC]." BHRAC was ordered "to seek costs and any applicable attorney fees by separate memorandum and/or evidentiary hearing." The trial court then made its tentative decision its final ruling, signed it, and entered judgment in the amount of $ 54,156.76, plus interest.

E. BHRAC's Posttrial Motion for Attorney Fees (*§ 2033, subd. (o)*)

On September 25, 2003, BHRAC filed a motion for attorney fees pursuant to *section 2033, subdivision (o)* (2033 Motion). BHRAC asserted that it was entitled to attorney fees incurred in having to prove the fair market rental value of the Ferrari, a key issue in the case that BHRAC attempted to settle before trial by serving RFA No. 5. Because Davani denied RFA No. 5, claimed a defective air bag and designated two experts on the issue, BHRAC argued that it was forced to spend considerable time and effort on proving the fair market rental value of the vehicle. Ultimately, Davani [*8] never challenged BHRAC's evidence regarding the $ 1,200 daily rental rate, and the trial court found in BHRAC's favor. Accordingly, BHRAC claimed that it was entitled to attorney fees.

On October 16, 2003, applying a discretionary standard, the trial court denied BHRAC's 2033 Motion. In so ruling, the trial court dismissed BHRAC's argument that it was forced to prove the fair market rental value of the vehicle and defeat Davani's challenge based upon an allegedly defective air bag. The trial court commented: "The issue before the court involved, as I said, two major issues: [P] One, the number of days it took to repair the car; and, two -- primarily a legal issue -- the extent to which a commercial rental entity could recover loss of use that includes its profits for the time lost."

F. BHRAC's Posttrial Motion for Attorney Fees and Expenses (*§ 1021.6*)

Concurrent with the 2033 Motion, BHRAC also filed a motion for attorney fees and expenses pursuant to *section 1021.6* (1021.6 Motion). BHRAC argued that all of the requirements of *section 1021.6* had been met, namely (1) it was required to defend the Amiri action that was based solely on Davani's negligence, (2) BHRAC tendered [*9] its defense to Davani and his insurer, (3) Davani refused BHRAC's defense tender, and (4) the trial court found at the trial on the cross-complaint that BHRAC was entitled to recover all of its damages. Accordingly, all BHRAC sought was an explicit finding that BHRAC was without fault so that it could recover its costs and attorney fees incurred in defending the Amiri action.

Following oral argument, the trial court denied BHRAC's 1021.6 Motion on the grounds that nothing in the record established that BHRAC had prevailed on an implied indemnity claim. As a separate grounds for denying the motion, the trial court relied upon *Insurance Code section 11580.9, subdivision (b).*

G. BHRAC's Appeal

On December 5, 2003, BHRAC timely filed its notice of appeal challenging the trial court's orders denying its 2033 Motion and its 1021.6 Motion.

DISCUSSION

I. *1021.6 Motion*

A. Standard of Review

Given the permissive language set forth in *section 1021.6*, we review an order denying a motion pursuant to *section 1021.6* for abuse of discretion. (*Schnabel v. Superior Court (1994) 30 Cal.App.4th 758, 762-763.*)

B. [*10] The Trial Court Abused Its Discretion in Denying BHRAC's 1021.6 Motion

Section 1021.6 provides: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or

provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict."

"*Section 1021.6* does not establish the criteria for an implied indemnity. It presupposes the existence of 'a claim for implied indemnity' on which the party seeking attorney's fees has prevailed." (*Watson v. Department of Transportation (1998) 68 Cal.App.4th 885, 890.*) [*11] According to Davani, BHRAC could not prevail on its 1021.6 Motion because its cross-complaint did not state a claim for implied indemnity. We disagree.

Liberally construed (§ 452), BHRAC's cross-complaint sets forth a claim for implied indemnity. BHRAC specifically alleged that if it were "found in some manner responsible to [Amiri] or to anyone else as a result of the incidents and occurrences described in [the Amiri action complaint, BHRAC's] liability would be based solely upon a derivative form of liability not resulting from any conduct of [BHRAC], but only from an obligation imposed upon [it] by law under *Veh. Code, § 17150* [et seq.]. Therefore, [BHRAC] would be entitled to complete indemnity from [Davani]." Further, the cross-complaint specifically seeks indemnification and attorney fees pursuant to *section 1021.6*.

Having stated a claim for implied indemnity, BHRAC sought to prove it, principally by obtaining a finding of "no fault," as required by *section 1021.6*. The appellate record establishes that whether BHRAC was entitled to a finding of "no fault" and attorney fees pursuant to *section 1021.6* was reserved for after trial.

The [*12] colloquy between counsel and the trial court demonstrates that all parties understood that the issue of no fault would be resolved posttrial in connection with BHRAC's 1021.6 Motion. BHRAC's counsel and the trial court so agreed at the onset of the trial and BHRAC's counsel confirmed that the issue would be resolved posttrial before it rested its case-in-chief. Consistent therewith, the trial court ruling indicates that BHRAC could seek "attorney fees by separate memorandum and/or evidentiary hearing." BHRAC's 1021.6 Motion reiterates the trial court and parties' agreement to postpone the issue until after trial. Even Davani conceded in his opposition to BHRAC's 1021.6 Motion that the trial court had not yet made a finding of implied indemnity necessary for a recovery of attorney fees as that issue would be resolved "by motion following the entry of judgment, and may require an evidentiary hearing."

Nevertheless, at the posttrial hearing, the trial court denied BHRAC's 1021.6 Motion in part on the grounds that BHRAC had not prevailed on its implied indemnity claim. This ruling constitutes error. In light of the parties and trial court's agreement that the finding of "no fault" would [*13] be reserved for a posttrial motion and/or evidentiary hearing, BHRAC was sandbagged by the trial court's ultimate denial of its 1021.6 Motion for failure to obtain the requisite finding prior to entry of judgment.

BHRAC also challenges the trial court's reliance upon *Insurance Code section 11580.9, subdivision (b)*. Regardless of whether BHRAC's due process rights were violated as a result of the trial court's reliance upon this statute, we conclude that the trial court's reliance upon it was misplaced. *Insurance Code section 11580.9, subdivision (b)* provides: "Where two or more policies apply to the same loss, and one policy affords coverage to a named insured engaged in the business of renting or leasing motor vehicles without operators, it shall be conclusively presumed that the insurance afforded by that policy to a person other than the named insured or his or her agent or employee, shall be excess over and not concurrent with, any other valid and collectible insurance applicable to the same loss covering the person as a named insured or as an additional insured under a policy with limits at least equal to the financial responsibility [*14] requirements specified in *Section 16056 of the Vehicle Code*. The presumption provided by this subdivision shall apply only if, at the time of the loss, the involved motor vehicle either: [P] (1) Qualifies as a 'commercial vehicle.' For purposes of this subdivision, 'commercial vehicle' means a type of vehicle subject to registration or identification under the laws of this state and is one of the following: [P] (A) Used or maintained for the transportation of persons for hire, compensation, or profit. [P] (B) Designed, used, or maintained primarily for the transportation of property. [P] (2) Has been leased for a term of six months or longer."

As BHRAC correctly argues, and as Davani does not dispute in his respondent's brief, subdivision (b) of *Insurance Code section 11580.9* does not apply to the instant case. With respect to subdivision (b)(1), the

Ferrari does not qualify as a "commercial vehicle." There is no evidence that the vehicle was rented to transport "persons for hire, compensation, or profit" and we highly doubt that the convertible Ferrari was "designed, used, or maintained primarily for the transportation of [*15] property." (See also *Government Employees Ins. Co. v. Carrier Ins. Co. (1975) 45 Cal. App. 3d 223, 228, 119 Cal. Rptr. 116.*) With respect to subdivision (b)(2), Davani did not rent the Ferrari for six months or longer; the rental agreement plainly indicates that the lease was a one-to-two day lease.

Given that (1) the issue of "no fault" was reserved for a posttrial motion and/or evidentiary hearing, and (2) *Insurance Code section 11580.9, subdivision (b)* does not preclude BHRAC's claim for attorney fees, we reverse the trial court's order denying BHRAC's 1021.6 Motion and remand the matter for a hearing to determine whether BHRAC was without fault and entitled to attorney fees. In so ruling, we express no opinion as to whether BHRAC already proved that it was without fault in the Amiri action. [3]

> 3 The parties dispute whether BHRAC's success on its claim for damages to the DWP utility pole constitutes negligence damages or indemnity. We need not resolve that issue. Upon remand, in determining whether BHRAC was "without fault" in the Amiri action, the trial court may consider whether BHRAC's award of $ 7,356.76 due and paid to DWP constitutes negligence damages (as urged by Davani) or indemnification (as argued by BHRAC).

[*16] II. *2033 Motion*

A. Standard of Review

"'The determination of whether a party is entitled to expenses under *section 2033, subdivision (o)* is within the sound discretion of the trial court.' [Citation.] More specifically, '*section 2033, subdivision (o)* clearly vests in the trial judge the authority to determine whether the party propounding the admission thereafter proved the truth of the matter which was denied.' [Citation.] An abuse of discretion occurs only where it is shown that the trial court exceeded the bounds of reason. [Citation.] It is a deferential standard of review that requires us to uphold the trial court's determination, even if we disagree with it, so long as it is reasonable." (*Stull v. Sparrow (2001) 92 Cal.App.4th 860, 864.*)

B. The Trial Court Abused Its Discretion in Denying BHRAC's 2033 Motion

Section 2033, subdivision (o), provides, in relevant part: "If a party fails to admit . . . the truth of any matter when requested to do so under this section, 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 [*17] 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 that (1) an objection to the request was sustained or a response to it was waived under subdivision (*l*), (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, or (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. [Citation.] The basis for imposing sanctions . . . is directly related to that purpose. Unlike other discovery sanctions, an award of expenses . . . 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' [citations] 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, 224 Cal. Rptr. 838*, [*18] criticized on another point in *Stull v. Sparrow, supra, 92 Cal.App.4th at pp. 866-867.*)

Applying *section 2033, subdivision (o)*'s plain language and these legal principles, we conclude that the trial court erred in denying BHRAC's 2033 Motion. On December 3, 2002, BHRAC served Davani with RFA No. 5, asking him to admit that the fair market rental value of the Ferrari was $ 1,200, the amount he paid to rent the vehicle. While Davani admitted that he paid $ 1,200 per day to rent the vehicle, he denied for lack of information that the Ferrari's reasonable daily rental value was $ 1,200. At trial, BHRAC convincingly proved that the fair market rental value of the vehicle was $ 1,200 per day, exactly what BHRAC asked Davani to admit. In fact, the trial court wholeheartedly adopted BHRAC's

claim and awarded BHRAC $ 1,200 per day in loss of use damages. Accordingly, the trial court should have followed the mandatory language of *section 2033, subdivision (o)*, and granted BHRAC's 2033 Motion, unless one of the four statutory exceptions applied. We easily conclude that no exception applied.

First, the parties do not present any evidence or argument that Davani objected [*19] to RFA No. 5 and that the objection was sustained. (*§ 2033, subd. (o).*)

Second, the fair market rental value of the Ferrari was an issue of "substantial importance." (*§ 2033, subd. (o).*) "An issue is of 'substantial importance' if it has 'at least some direct relationship to one of the central issues in the case, i.e., an issue which, if not proven, would have altered the results in the case.'" (*Wimberly v. Derby Cycle Corp. (1997) 56 Cal.App.4th 618, 634.*) "Proof of rental value is essential to recovery of loss of use of an automobile." (*Dube v. Kelley Kar Co. (1959) 171 Cal. App. 2d 862, 866.*) Absent BHRAC proving the fair market daily rental of the Ferrari, it could not have prevailed on its loss of use damage claim. It follows that the fair market rental value of the Ferrari was one of the key issues in this case.

Third, there is no evidence that Davani had any reasonable basis for believing that he would prevail on this matter. (*§ 2033, subd. (o).*) Following his denial of RFA No. 5, Davani served his response to BHRAC's contention interrogatories in which he explained the purported basis for his denial: among other things, the [*20] Ferrari's air bag was defective, thereby substantially reducing the daily rental value of the vehicle. In fact, just days before he served his responses to the special interrogatories, Davani designated three experts, two as experts on air bags and one on the fair rental value of the Ferrari. Despite all these measures, Davani utterly failed to litigate the alleged air bag defect and/or the fair market rental value of the Ferrari. His complete failure to offer any evidence is compelling indicia of a lack of reasonable grounds to believe that the original denial of RFA No. 5 was justified. (*Wimberly v. Derby Cycle Corp., supra, 56 Cal.App.4th at pp. 636-637.*)

Finally, there is no evidence or argument that Davani had any other good reason to deny RFA No. 5. (*§ 2033, subd. (o).*) Accordingly, we reverse the trial court's order denying BHRAC's 2033 Motion and remand the matter for a determination of costs and attorney fees in accord with this opinion. [4] (*Wimberly v. Derby Cycle Corp., supra, 56 Cal.App.4th at p. 638.*)

4 To the extent the parties dispute the costs and fees incurred by BHRAC in connection with proving the fair market rental value of the Ferrari, that issue should be resolved by the trial court when it considers the amount of attorney fees due BHRAC.

[*21] **DISPOSITION**

The orders denying BHRAC's 1021.6 Motion and 2033 Motion are reversed. The matter is remanded for (1) a hearing on BHRAC's 1021.6 Motion to determine whether it was without fault and entitled to attorney fees and, if so, the amount thereof; and (2) a determination of the amount of attorney fees and costs due BHRAC in connection with its 2033 Motion. BHRAC to recover costs on appeal.

ASHMANN-GERST, J.

We concur:

BOREN, P.J.

DOI TODD, J.