NON-PARTY AT FAULT NOTICE REQUIRES FACTS EXPLAINING WHY NON-PARTY IS LIABLE; RULE 68 SANCTIONS INCLUDE NON-TESTIFYING EXPERT FEES

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Scottsdale Ins. Co. v. Cendejas
Ct. Appeals, Div. One, March 3, 2009

Authored by the JSH Appellate Team

Anthony Cendejas was sawing into a wall of a home when he caused a spark and resulting fire. Scottsdale, the homeowner's insurance company, sued Cendejas and his insurer for reimbursement of money paid to the homeowner for the damage. Defendants in turn named the contractor who built the house as a non-party at fault. The notice stated the contractor might be at fault "to the extent that" it performed "any" work that might have caused or contributed to the fire. It also named (a) "any subcontractor" retained by the original contractor who performed "any work" on the property in a way that caused or contributed to the fire, and (b) the Mohave County Building Inspector for failing to determine "an inappropriately installed building component" to the extent the component caused or contributed to the fire.

Several months later, one of Defendants' experts testified that the home's insulation had been installed backwards, which accelerated the fire's development. If the insulation had been installed properly, the fire would have been much more contained. Plaintiff moved to strike Defendants' Rule 26(b) notice because it did not state facts showing how the non-parties caused or contributed to the fire, and failed to disclose the improper installation defense. The court granted the motion to strike, and precluded Defendants from introducing evidence about the installation because it would point to a non-party at fault who was not in the case. The court granted Plaintiff's motion for summary judgment, and awarded Scottsdale damages, Rule 68 expert witness fees, and prejudgment interest from the date of Scottsdale's demand letter to Cendejas' insurer.

The court of appeals ruled the Rule 26(b) non-party at fault notice insufficient because it did not state facts explaining why the contractor was liable, failed to state facts allowing Plaintiff to deduce that Defendants intended to name an insulation installer, and failed to state the theory that the improper insulation installment caused a minor fire to result in far more damage than it otherwise would. The court also held that (1) A.R.S. § 12-2506, providing that a party can only be liable for his own fault, does not supersede Rule 26(b)'s pleading requirement; (2) Plaintiff had no duty to investigate possible claims/ theories against the named nonparties upon receiving the inadequate notice; (3) the trial court did not abuse its discretion in striking the notice, as opposed to a less drastic sanction; and (4) the trial court did not abuse its discretion in precluding evidence of improper installation because of Defendants' failure to comply with Rule 26(b).

The court also held that because the cost of the homeowner's damages were ascertainable by "accepted standards," they were liquidated. However, the demand letter sent to Cendejas' insurer, though stating a specific (total) amount, "provided no explanation of the damages and thus omitted any information or supporting data that would have enabled [insurer] to determine the amount owed." Thus prejudgment interest did not begin accruing on the demand letter date.

Finally, the court held that Rule 68 does not restrict the award of expert witness fees to those who testify. "Reasonable expert witness fees" incurred after the offer was made includes expenses for an expert that was not designated as a trial expert in the disclosure statement. Since the expert provided some services after Scottsdale made the Rule 68 offer, fees were properly awarded for those services.