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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ASPLUNDH TREE EXPERT
COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ADAM MARTINEZ et al.,

Real Parties in Interest.

G047396

(Super. Ct. No. 30-2010-00406671)

ORDER MODIFYING OPINION
AND DENYING PETITION FOR
REHEARING; NO CHANGE IN
JUDGMENT

It is ordered that the opinion filed herein on February 5, 2014, be modified as follows:

At the end of the third sentence in the last full paragraph on page 6 of the opinion, the citation is changed from “(Code Civ. Proc., § 581, subd. (b).)” to “(Code Civ. Proc., § 585, subd. (b).)”

The petition for rehearing is DENIED.

There is no change in the judgment.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.

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(Super. Ct. No. 30-2010-00406671)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Petition granted.

Ivie, McNeill & Wyatt, Byron M. Purcell and Sylvia Chiu for petitioner.

Hall & Bailey and Donald R. Hall for real party in interest Adam Martinez.

* * *

THE COURT:*

Background

In May 2010, Adam Martinez (Martinez) was measuring the height of trees on a property in Villa Park using a metal tent pole and a ladder. The trees were located underneath high voltage electrical power lines owned by Southern California Edison (Edison). During the measuring process, Martinez suffered an electric shock and sustained serious injuries.

Martinez filed a complaint against Edison and Does 1 through 50 for negligence, including design, installation, operation and/or maintenance of the power lines, including the lack of visibility of the power lines and inadequate warnings. The prayer was for general and special damages against Edison. The case was assigned to Judge Luis A. Rodriguez. About one year later, Martinez named Asplundh Tree Expert Company (Asplundh) as Doe 1. Asplundh filed an answer to the complaint consisting of a general denial.

In January 2012, Asplundh filed a motion for summary judgment of the complaint, noticing a hearing date of April 19, 2012. On March 16, 2012, Martinez filed a motion for leave to file a first amended complaint. The proposed first amended complaint added the allegation that at the time of the accident the Public Utilities Commission mandated the installation and maintenance of a “High Voltage” sign on the cross arm of the utility pole holding the transmission line that injured Martinez, and that Edison had known the sign was missing or broken for over six years when the accident occurred. The proposed first amended complaint also added a prayer for punitive damages against Edison. Although Doe I remained in the caption and the body of the first amended complaint, the pleading did not name Asplundh specifically in the caption, body, or prayer.

* Before Moore, Acting P.J., Aronson, J., and Thompson, J.

The motion for leave to file the amended complaint was heard and granted on April 12, 2012. Asplundh attended the hearing and asked for clarification because the amended pleading did not name it as a defendant and its motion for summary judgment was scheduled to be heard in one week. “I think it would be helpful moving forward from a mediation standpoint for Asplundh to know whether they’re in or out of the case and for Edison and plaintiff to know as well.” The court replied, “I think that’s correct and that will be addressed next week, but that should not have any impact on what is being proposed . . . today.”

Asplundh’s motion for summary judgment was heard on April 19, 2012. In his opposition to the motion, Martinez presented evidence that Asplundh had contracted during the last ten years “to provide line clearing maintenance for all of Edison’s electrical distribution facilities in California.” The trial court found there were triable issues of fact regarding the extent of Asplundh’s responsibility and denied the motion.

On July 3, 2012, after receiving Martinez’s notice of an expert deposition, Asplundh sent a letter to Martinez objecting to the notice of deposition “on the basis that Asplundh is no longer a party to the lawsuit based on the [first amended complaint].” Asplundh claimed that Martinez’s omission of it in the first amended complaint operated as a dismissal. “If Plaintiff intends to name Asplundh as a defendant in the above-referenced lawsuit, we request that Plaintiff file a proper pleading identifying Asplundh as a defendant and the specific allegations against it.”

Martinez filed an ex parte request for an order to enter Asplundh’s default and/or to strike its answer to the complaint. Judge Rodriguez’s courtroom was dark, so the ex parte was heard by Judge Robert J. Moss. He ordered Asplundh to file an answer to the first amended complaint in three days. Instead, Asplundh filed a demurrer and motion to strike the punitive damages.

The demurrer and motion to strike was heard by Judge Rodriguez. Judge Rodriguez was upset that Asplundh had not answered the first amended complaint as

ordered by Judge Moss. Asplundh responded it was merely seeking clarification as to “who we are and what our role is in this case.” Counsel explained there are three issues in the case: line clearance, signage, and punitive damages. “[A]re we a part of punitive damages, yes or no; are we a part of the signage issue, yes or no.” After some comments from Edison’s counsel, Asplundh explained that it just wanted Martinez to stipulate that the punitive damages and the signage issue did not involve Asplundh. “[A]s [Edison’s counsel] indicated, there is no factual basis or any basis or claim that the signage or the punitive damages are against Asplundh. [¶] We just want to have it clarified so we don’t have to go into motions and argue this.” Martinez refused to stipulate, stating, “In their papers they freely admit to the court that what their end game is to make a statute of limitations argument and that’s the set up.”

Judge Rodriguez ultimately overruled the demurrer and denied the motion to strike because he determined they were moot. He found there was an answer to the complaint on file and Asplundh was not a party to the first amended complaint. He told Martinez he could move to strike the answer and take Asplundh’s default. The next day, Martinez settled with Edison. He then filed a motion to strike the answer to the complaint and enter default against Asplundh on the first amended complaint, which Judge Rodriguez granted. The order stated, “The matter was heard and argued including Asplundh’s refusal to withdraw the demurrer and motion to strike which had been filed contrary to Judge Moss’s order” The answer to the complaint was stricken and Asplundh’s default was entered on the first amended complaint.

Asplundh filed this petition for writ of mandate seeking to overturn the order entering its default to the first amended complaint. We stayed the default prove-up hearing and notified the parties we were considering issuing a peremptory writ in the first instance. Martinez filed an informal response to the petition. We issued an opinion granting Asplundh’s petition and issuing a peremptory writ in the first instance. Subsequently, we granted Martinez’s petition for rehearing to consider whether Asplundh

remained a party to the first amended complaint because Doe I remained in its caption and body.

Discussion

We agree with Martinez that Asplundh remained a party to the first amended complaint. In *Contract Engineers, Inc. v. California-Doran Heat Treating Co.* (1968) 258 Cal.App.2d 546, the action against California-Doran Heat Treating Co. (Cal-Doran) accrued on June 11, 1959. The complaint was filed March 21, 1962, naming a fictitious defendant as Doe 1 Corporation. Thereafter, a first amended complaint was filed without changing the identity of Doe 1 Corporation. In December 1962, one of the defendants filed a cross-complaint against Cal-Doran, and the plaintiff then served the first amended complaint on it as Doe I Corporation. In November 1964, plaintiff filed a second amended complaint to correct defects raised by a demurrer filed by three other defendants; the second amended complaint did not name Cal-Doran in the caption or in the body of the complaint. In April 1965, plaintiff filed a third amended complaint, in which, for the first time, the caption named Cal-Doran as one of the defendants (but also retained Doe 1 in the caption). The body of the complaint correctly identified Cal-Doran as having been served with the first amended complaint as Doe 1 Corporation, and included a negligence count substantially the same as the negligence count in each of the earlier complaints.

Cal-Doran demurred to the third amended complaint on the ground of the statute of limitations, claiming when plaintiff filed its second amended complaint without naming Cal-Doran by its true name, plaintiff voluntarily discontinued the action as to that defendant, so that the third amended complaint became a new action. The demurrer was sustained and the action against Cal-Doran was dismissed.

The appellate court reversed, pointing out that the second amended complaint did not show the true name of Cal-Doran, but did include Doe 1 Corporation as a defendant and did allege a cause of action against that defendant, just as the prior

pleading had done. “Plaintiff’s persistence in charging this defendant by a fictitious name cannot be regarded as a dismissal of anyone, nor can it be regarded as an irregularity so serious as to call for a forfeiture of plaintiff’s case. The allegation that the true name was unknown, carried forward by rote from the earlier pleading, was no longer true, but no one was misled by it.” (*Contract Engineers, Inc. v. California-Doran Heat Treating Co.*, *supra*, 258 Cal.App.2d at p. 550.)

Here, Martinez retained Doe 1 as a defendant in the caption of the first amended complaint, and he included all Doe defendants in the general agency allegation. As in *Contract Engineers*, the omission of Asplundh cannot be regarded as a dismissal, nor did it mislead anyone. As Martinez points out, Asplundh appeared and litigated the case, and sought to clarify its status after the first amended complaint was filed. Under these circumstances, Asplundh remained a party to the first amended complaint.

The trial court’s striking of Asplundh’s answer to the original complaint had no effect because the original complaint and Asplundh’s answer to it was superseded by the first amended complaint. (*Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215.) And the trial court erred when it entered Asplundh’s default on the first amended complaint. The default was not proper for failure to answer because Asplundh had filed a responsive pleading in the form of a demurrer and motion to strike. (Code Civ. Proc., § 581, subd. (b).) Neither was it proper as a sanction for “deliberate and egregious misconduct [that made] any sanction other than dismissal inadequate to ensure a fair trial” (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 740.) If the trial court entered Asplundh’s default as a sanction, we find it was an abuse of discretion.

The court notified the parties that it was considering the issuance of a peremptory writ in the first instance. We read and considered the petition, the preliminary opposition and their respective exhibits, and the petition for rehearing and answer. Because no procedural purpose would be served by an order to show cause and

oral argument, we will issue a peremptory writ of mandate in the first instance. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1251; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

Disposition

Let a peremptory writ of mandate issue directing the trial court to vacate its order entering Asplundh's default to the first amended complaint and enter a new order setting a hearing on the merits of the demurrer and motion to strike. In the interest of justice, each party shall bear his or its own costs of this proceeding.