

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION TWO

LISA MITCHELL,

Plaintiff and Appellant,

v.

SYUFY ENTERPRISES, L.P.,

Defendant and Respondent.

A133175

(Alameda County
Super. Ct. No. VG10509098)

I. INTRODUCTION

Appellant Mitchell sued respondent Syufy Enterprises, L.P., for assisting appellant's former husband, Marvin Pilc, to evade his responsibility to pay child support in violation of Civil Code section 1714.41 (section 1714.41). Respondent, who engaged Pilc to render services as an independent contractor on various occasions between 2007 and 2009, obtained summary judgment on the ground that there was insufficient evidence to establish the statutory requirement that respondent knew or should have known that Pilc owed child support to appellant. We affirm the judgment.

II. STATUTORY FRAMEWORK

Section 1714.41 was enacted in 2006 and became effective January 1, 2007.¹ This statute reads as follows:

“(a) Any person or business entity that knowingly assists a child support obligor who has an unpaid child support obligation to escape, evade, or avoid paying court-

¹ See Government Code section 9600, subdivision (a).

ordered or court-approved child support shall be liable for three times the value of the assistance provided, such as the fair market value of the assets transferred or hidden, or the amount of the wages or other compensation paid to the child support obligor but not reported. The maximum liability imposed by this section shall not exceed the entire child support obligation due. Any funds or assets collected pursuant to this section shall be paid to the child support obligee, and shall not reduce the amount of the unpaid child support obligation. Upon the satisfaction of the unpaid child support obligation, this section shall not apply.

“(b) For purposes of this section, actions taken to knowingly assist a child support obligor to escape, evade, or avoid paying court-ordered or court-approved child support include, but are not limited to, any of the following actions taken when the individual or entity knew or should have known of the child support obligation:

“(1) Hiring or employing the child support obligor as an employee in a trade or business and failing to timely file a report of new employees with the California New Employee Registry maintained by the Employment Development Department [(EDD)].

“(2) Engaging the child support obligor as a service provider and failing to timely file a report with the Employment Development Department as required by Section 1088.8 of the Unemployment Insurance Code.

“(3) When engaged in a trade or business, paying wages or other forms of compensation for services rendered by a child support obligor that are not reported to the Employment Development Department as required, including, but not limited to, payment in cash or via barter or trade.”

In a recent decision by our colleagues in Division Four of this district, Presiding Justice Ruvolo made these pertinent observations about the background and purpose of this statute:

“The language of the child support evasion statutes demonstrates that they are aimed at such targets as employers who hire child support obligors without reporting their employment to the appropriate government authorities (Civ. Code, § 1714.41, subd. (b)(1)); individuals who procure goods or services from child support obligors by means

of untraceable barter or cash transactions (Civ. Code, § 1714.41, subd. (b)(2), (b)(3)); and persons such as friends, relatives, and notaries public who assist child support obligors in attempting to conceal their assets by transferring legal title to them (Civ. Code, § 1714.4, subd. (b)). [¶] Indeed, the final Assembly report on the bill that enacted the child support evasion statutes indicates that the Legislature’s primary focus was on the ‘underground economy,’ i.e., income from employment that is not reported to the appropriate government authorities. [Citations.] Similarly, the final Senate Floor Analysis of the bill stated that: ‘*“The purpose of AB 2440 is to encourage individuals and businesses to not engage in the underground economy while getting thousands of children and parents the child support money that these families are owed.”*’ [Citations.]” (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 488-489 (*Cabral*), italics added.)

III. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Child Support Obligation*

In April 1997, the Marin County Superior Court ordered appellant’s former husband, Marvin Pilc, to pay \$955 a month for the support of their two minor children. Seven years later, the Contra Costa County Superior Court determined that the unpaid child support due from Pilc to appellant was over \$125,000.

B. *The Relationship Between Respondent and Pilc*

Respondent is a privately-owned company headquartered in Marin County and, among its various enterprises, owns and operates Tri-Valley Golf Center in that county. Sometime in 2007, respondent “engaged Marvin Pilc as a non-employee independent contractor to perform, among other things, general maintenance, repair, painting and landscaping services on its various properties.” According to the record provided us, most of this work was apparently done in Marin County, but some on respondent’s properties in other Bay Area counties. The work included such matters as: “Fence work. Some netting repair. Some palm tree maintenance” and “general maintenance cleanup.”

For these various and occasional outdoor contracting jobs he performed for respondent, Pilc never had an overall written contract. Rather, as the executive overseeing him testified: “[F]or example, if a fence was broken, I would ask him for a

bid and, you know, then decide whether I'd want him to do it or not." Those bids were both written and oral.

The various maintenance projects undertaken by Pilc for respondent earned him about \$11,000 in 2007, \$15,000 in 2008, and a little over \$18,000 in the first three months of 2009.

For one or two of the projects that Pilc undertook in 2007, he was paid in cash from a "petty cash" fund of respondent. On other occasions, payments for Pilc's services were made to a variety of entities, such as "M&M.net," and "M&M.net Marvin Pilc," and "M&M.net Margot Pilc."

Respondent was required to file a DE-542 form (Report of Independent Contractors) with the California Employment Development Department (EDD) regarding services rendered by Marvin Pilc in 2007, 2008 and 2009. Respondent did not file the required DE-542 form in any of these years.

On March 26, 2009, respondent received a subpoena duces tecum from an attorney representing appellant in her Contra Costa County child-support litigation against Pilc. In response to it, respondent provided various documents relating to its contracts with and payments to Pilc. Appellant also served respondent with a writ of execution, seeking to collect any monies owing to Pilc by respondent. Because of these services and actions, respondent thereafter withheld payments of monies owed to Pilc and successfully defended Pilc's subsequent small claims court action against it for some of those allegedly-due payments.

C. *The Present Action*

On April 12, 2010, appellant sued respondent in Alameda County Superior Court. In her complaint, appellant alleged that, in August 2009, she discovered that respondent had paid to Pilc, a "child support obligor," monies for his services in violation of section 1714.41, subdivision (b)(1) and (2) and/or (3), and that this conduct of respondent was "knowingly done." She thus asked, pursuant to the provisions of that statute, for treble damages to be paid her by respondent.

Extensive discovery was thereafter undertaken. In the course of that discovery, appellant admitted that “prior to March 2009” respondent “Syufy did not know of Mr. Pile’s child support obligations.” She added to this admission, however, that respondent “should have known.”

On December 22, 2010, respondent moved for summary judgment. The principal basis for its motion was that appellant could not produce admissible evidence that respondent “knew or should have known” of Pile’s child support obligations at the time it engaged and paid him for his services, and then failed to file the necessary EDD reports.

Appellant opposed this motion, arguing in essence that, although there may not have been actual knowledge by respondent of Pile’s delinquent child support obligations, respondent “should have known” of such because, principally, of what she termed “red flags” that should have put respondent on notice that Pile was delinquent in the payment of child support. The “red flags” cited by appellant in her opposition to the motion for summary judgment were, principally, Pile’s request for cash payments, his “shifting of payments to a family company,” and discrepancies in tax identification numbers used by him. She also argued that respondent “would have known” that Pile had child support obligations had it filed the requisite documents with the EDD.

Respondent replied to these papers by contending that any “would have known” standard went beyond that authorized by section 1714.41, and that the alleged “red flags” were insufficient to show that respondent “should have known” of Pile’s delinquencies.

A hearing on respondent’s motion for summary judgment took place on April 19, 2011, before the Honorable Yvonne Gonzalez Rogers. After oral argument by both sides, the trial court took the motion under submission.

On June 3, 2011, Judge Rogers issued an order granting respondent summary judgment. The court concluded that “no reasonable jury could find that Syufy ‘knew or should have known’ of [appellant’s] ex-husband’s child support obligations when it engaged his services as an independent contractor.” This conclusion was supported by two distinct sets of findings.

First, the court found that undisputed evidence established that respondent did not have actual knowledge of Pilc's child support obligations until March 2009 when appellant served her subpoena for production of documents in connection with her child support action against Pilc, and, at that point, respondent "withheld Pilc's wages and later successfully defended a small claims court action brought by him for non-payment of wages."

Second, the court found that there was insufficient evidence to support a finding that, prior to March 2009, respondent should have known that Pilc had failed to satisfy his child support obligations. In this regard, the court rejected appellant's legal theory that an employer "should have known" what it "would have known" had it filed requisite reports with the EDD.

A judgment in favor of respondent was filed on July 19, 2011. Appellant filed a timely notice of appeal on September 9, 2011.

IV. DISCUSSION

A. *Our Standard of Review*

There is no dispute concerning our standard of review; it is clearly *de novo*. (See, e.g., *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335; 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 262.)

In reviewing a grant of summary judgment, we of course follow the law as laid down by our Supreme Court. That court has recently written on this subject: "[S]ummary judgment law in this state no longer requires a plaintiff moving for summary judgment to disprove any defense asserted by the defendant as well as prove each element of his own cause of action. In this particular, it now accords with federal law. All that the plaintiff need do is to 'prove[] each element of the cause of action.' [Citation.] [¶] Neither does summary judgment law in this state any longer require a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. In this particular too, it now accords with federal law. All that the defendant need do is to 'show[] that one or more elements of the cause of action . . .

cannot be established' by the plaintiff. [Citation.] In other words, all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action--for example, that the plaintiff cannot prove element X.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853; fn. omitted (*Aguilar*); see also, to the same effect, *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486-487.)

B. *Issues Presented*

As reflected in our summary of the statutory framework, section 1714.41 provides that a person or business entity that “knowingly assists a child support obligor” to avoid paying a child support obligation is liable for three times the value of the assistance provided up to a maximum liability of the entire support obligation that is due. (§ 1714.41, subd. (a).) A person or entity provides knowing assistance within the meaning of this statute if it has taken certain actions which assist the child support obligor in its illegal endeavor when it “knew or should have known” of the child support obligation. (§ 1714.41, subd. (b).) Examples of actions that assist a child support obligor which are delineated in the statute include failing to file EDD forms relating to the engagement of and/or payment to an independent contractor. (*Ibid.*)

In the present case, undisputed evidence establishes that respondent failed to file required EDD forms reporting that it engaged Pilc and paid him for his services during the period that he had unpaid child support obligations. However, there is also undisputed evidence that respondent did not have actual knowledge of Pilc’s outstanding support obligations until March 2009, when appellant served her subpoena duces tecum on respondent in connection with her separate action against her former husband. Thus, the sole basis upon which appellant seeks to hold respondent liable under section 1714.41 is for taking actions which assisted Pilc in evading his support obligations when it “should have known of the child support obligation.” (§ 1714.41, subd. (b).)

Appellant advances two distinct theories in an effort to establish that there is a triable issue of material fact as to whether respondent should have known about Pilc’s outstanding child support obligation: (1) respondent “would” have known about Pilc’s child support obligation had respondent filed the required EDD forms; and (2) the nature

and forms of payment that Pilc sought from respondent should have put respondent on notice that Pilc had a child support obligation that he was attempting to evade. We will separately address these two theories.

C. Appellant’s “Would Have Known” Theory is Legally Unsound

Appellant argues that, if respondent had filed the required EDD form when it retained Pilc’s services in 2007, then respondent “would” have known of the child support obligation because it would have been notified of that obligation by the Department of Social Services.² We reject this argument because it is inconsistent with the express language of section 1714.41 which provides that failure to file a required EDD form constitutes knowing assistance *only if* that failure occurs when the person or entity “knew or should have known of the child support obligation.” (§ 1714.41, subd. (b).)

In this regard, we agree with the trial court that accepting appellant’s theory would, in essence, graft a strict liability standard onto this statute. As Judge Rogers explained in her cogent summary judgment order: “Under plaintiff’s theory, employers would always be held liable for payments after their first failure to file the requisite reports. Nothing in the language of the statute compels such a reading. The ‘knew or should have known’ requirement specifically prefaces ‘the child support obligations.’”

² To support the factual component of this argument, appellant has filed a motion requesting that this court take judicial notice of a February 23, 2005 “policy letter” from an acting deputy director of the California Department of Child Support Services that appellant contends is available to the general public. We decline to take judicial notice of this document because (1) appellant has failed to establish that this document, which her counsel downloaded from the internet, is a proper subject of judicial notice (Evid. Code, § 452); (2) this document was not presented to the trial court (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-236); and (3) this document is not factually relevant in light of our rejection of appellant’s legal theory. (See *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057,1063, overruled on another ground by *In Re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

The balance of the material included in appellant’s motion for judicial notice is either redundant of evidence already before us or not sufficiently relevant to an issue on appeal. Therefore, appellant’s motion for judicial notice is denied.

The reference to the filing requirement follows thereafter. Moreover, the statute uses the word ‘and,’ not ‘by,’ in joining the requirements that the employer both hire and fail to report. The penalty for failing to report is not automatic payment to the child support obligee but a modest fine.”

As the trial court also correctly observed, section 1088.8 of the Unemployment Insurance Code imposes a penalty for failing to file a timely report with the EDD in connection with the engagement of a service provider and that penalty is a modest fine, not automatic payment of a child support obligation. Had the Legislature intended to alter or add to that penalty when it enacted section 1714.41, a statute which expressly refers to Unemployment Insurance Code section 1088.8, it would have said so. Instead, it drafted a statute which clearly and expressly states that failure to file a required EDD form constitutes knowing assistance only “when the individual or entity knew or should have known of the child support obligation.” (§ 1714.41, subd. (b).)

Characterizing her case as presenting an issue “of first impression,” appellant urges us to broadly construe the “knew or should have known” language in section 1714.41. She contends that such a broad construction will further the legislative intent that she gleans from her selective review of the legislative history of this statute. However, as we have already demonstrated, we need not look for guidance in the legislative history because appellant’s “would have known” theory directly conflicts with the express language of this statute.

Furthermore, because of its treble damage provision, section 1714.41 is clearly a civil penalty statute. That fact is reinforced by the statute’s use of the terms “knowingly assists” and “knowingly assist” in both subdivisions (a) and (b) and the “knew or should have known” phrase in the latter subdivision. A statute imposing penalties, as this one clearly does, must be “strictly construed.” (See *No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 29; *Drewry v. Welch* (1965) 236 Cal.App.2d 159, 173; *Ghera v. Sugar Pine Lumber Co.* (1964) 224 Cal.App.2d 88, 92.) In view, therefore, of the clear “civil penalty” nature of section 1714.41, we agree with the trial court that applying a “would have known” standard to that statute would be inappropriate.

D. *The Forms of Respondent's Payments*

Appellant's second theory is that respondent "should" have known about Marvin Pilc's child support obligation when it failed to timely file the required EDD forms because the form of payment that Pilc requested for work performed between 2007 and 2009 was highly suspicious. Specifically, appellant relies on evidence that (1) at Pilc's request, respondent made two of its 2007 payments to Pilc in cash; and (2) again at Pilc's request, respondent issued payments to variously named entities, with more than one tax payer identification number and that one such company was, apparently, owned or controlled by Pilc's mother.

Regarding the two 2007 cash payments to Pilc, appellant contends respondent's payments "violated its own internal policies" and that "cash payments are one of the evasive strategies that the statute is designed to thwart." But there is no evidence in the record that these cash payments were unlawful. Furthermore, the two cash payments were relatively minor in amount (\$2,000 or so) and were reported to the IRS on respondent's form 1099. This fact suggests rather strongly that respondent was not engaging in any sort of "cover up" regarding its employment of Pilc.

Similarly, although respondent made payments to Pilc via checks to differently-named entities, we find no evidence that those payments were improper. The entity, named "M&M.net," may have been, per respondent's discovery responses, "a small business entity owned or controlled by a mother and son." Indeed, in his deposition, Pilc specifically stated that such was the case. However, the fact that, at Pilc's request, the payee and/or taxpayer identification numbers on some of the checks sent him or on the 1099 forms was different during the 2007-2009 period does not, in our opinion, raise a triable issue as to any improper activities being knowingly undertaken by respondent *regarding Pilc's child support obligations*. Indeed, we have found no evidence in this record that respondent was even aware that Pilc had children prior to March 2009.

Particularly considering the purpose and effect of section 1714.41, we agree with the trial court that applying it in the present circumstances would be inappropriate. As the *Cabral* court noted, the purpose of that statute—and clearly the reason it imposed a

treble-damage penalty for its violation—was to thwart “the ‘underground economy,’ i.e., income from employment that is not reported to the appropriate government authorities.” (*Cabral, supra*, 177 Cal.App.4th at pp. 488-489.) And appellant agrees with this characterization: in her brief to us, she notes that the author of that legislation “[f]ashion[ed] his bill as ‘The Underground Economy and Child Support Protection Act’ ” and that it was intended to address the problem of “ ‘when an employer and an employee are working together by being paid in both check and cash to avoid paying taxes and child support.’ ”

The pertinent facts show that there clearly was nothing remotely resembling an “underground economy” in the brief (2007 to March 2009) part-time contracting relationship between Pilc and respondent. By pertinent facts we include, in particular, these: (1) Pilc was not an employee of respondent, but an independent contractor; (2) he was first retained by respondent in 2007 and worked for them on various and sundry outdoor maintenance projects for a relatively brief time, i.e., until early 2009; (3) that ended when, on March 26, 2009, respondent was served with a subpoena for documents by appellant’s attorneys; (4) even as to the two 2007 relatively small payments in cash by respondent to Pilc, the former filed the necessary IRS forms; (5) there was no showing made by appellant that anyone at Syufy knew of Pilc’s child support obligations or, for that matter, that he even had any children; (6) similarly, there was no showing that there was any sort of “underground” relationship (see *Cabral, supra*, 177 Cal.App.4th at pp. 488-489) between Pilc and any officer or employee of respondent that might have triggered an effort to pay Pilc for his occasional maintenance services in a manner that would have helped him avoid his delinquent child support obligations; and (7) finally, the lack of any collusion between Pilc and respondent was and is demonstrated by their ensuing small claims court litigation (won by respondent) over the wages respondent withheld from Pilc after the March 26, 2009, subpoena was served on it.

As our Supreme Court stated in *Aguilar*: “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard

of proof.” (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) The court reiterated this rule a few pages later: “[I]f the court determines that all of the evidence presented by the plaintiff, and all of the inferences drawn therefrom, show and imply unlawful [conduct] *only as likely* as permissible [conduct] or even *less likely*, it must then grant the defendants’ motion for summary judgment, even apart from any evidence presented by the defendants or any inferences drawn therefrom, because a reasonable trier of fact could not find for the plaintiff. Under such circumstances, the unlawful [conduct] issue is not triable—that is, it may not be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, but must be taken from the trier of fact and resolved by the court itself in the defendants’ favor and against the plaintiff.” (*Id.* at p. 857; see also regarding the application of our summary judgment statutes this court’s decision in *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 100-102.)

The record before the trial court, and before us on appeal, does not contain evidence from which a jury could properly find that respondent *knew or should have known* that Pilc was receiving payments from it for his various maintenance projects while he was also not making his required child support payments. Therefore, we agree with the trial court that there are no disputed issues of material fact regarding whether respondent Syufy violated what is clearly a civil penalty statute.

V. DISPOSITION

The judgment is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.