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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RAFAEL RAMIREZ,

Plaintiff and Appellant,

v.

ESTHER WONG et al.,

Defendants and Respondents.

A135598

(San Francisco City & County
Super. Ct. No. CGC-11-514286)

Plaintiff Rafael Ramirez filed a claim with the Labor Commission (Commission) for unpaid wages allegedly owed him by defendants Esther Wong et al. The Commission denied the claim and plaintiff appealed to the superior court. After a bench trial, the court found plaintiff was not an employee of defendants' but was an independent contractor, and awarded him \$1,195.14 for the reasonable value of his services. Plaintiff primarily contends the trial court abused its discretion by allowing the independent contractor defense at a late stage in the proceedings, and there is insufficient evidence he was an independent contractor. We disagree and affirm.

I. FACTS

This matter was tried to the court for four days. Each side called three witnesses. We take the facts from the trial court's statement of decision. We quote the trial court's findings when appropriate.

Plaintiff testified he was introduced to defendants Esther, Sylvia, and Eugene Wong sometime in 2001 by Carmen and Howard Dowell, for whom plaintiff had worked

and provided transportation for Howard Dowell to and from his medical appointments. When he met defendants they owned a three-unit rental property on 26th Street in San Francisco, as well as property on Central Avenue in San Francisco where defendants lived in separate apartments. The Dowells rented a garage at defendants' 26th Street property, and let plaintiff store personal items there for free until August 2009.

Plaintiff testified he and defendant Sylvia Wong (Sylvia) entered into a verbal agreement in September 2003, under which plaintiff was to be Sylvia's personal driver and do handyman work at defendants' San Francisco properties. According to plaintiff, he and Sylvia agreed he would be paid "\$70 per day for seven days a week." The trial court found: "Sylvia had no recollection of this meeting nor is there any testimony from Esther or Eugene that there ever was such a meeting. [Plaintiff] presented no contemporaneous written record of such an agreement nor was there any evidence that Defendant [presumably, Sylvia] ever paid Plaintiff pursuant to such an agreement or that Plaintiff ever billed Defendants under such an agreement."

Plaintiff testified he was never paid for his sweeping and maintenance work between 2003 and 2009. He claimed he had orally asked for payment in 2004, 2005 and 2007, but there was no collaborating evidence of such requests. Neither was there "any evidence presented as to why [plaintiff] would continue to work for [defendants] pursuant to this alleged agreement despite never having been paid for his work."

Between 2003 and 2009, plaintiff provided transportation for Sylvia, driving her to her writing class, medical appointments and other errands three to four times a week for \$30 per trip and occasional meals.

In 2005, Sylvia and Esther Wong bought property at 85 Bruce Street from an acquaintance of plaintiff's. Plaintiff testified he preformed various services at the 26th Street, 145 Central, and 85 Bruce Street properties between 2003 and 2009. He claimed these services involved sweeping, minor maintenance, painting over graffiti, and hiring contractors.

Plaintiff testified the Dowells accused him of stealing a sewing machine from their 26th Street garage where plaintiff stored his belongings. He denied the theft. Carmen

Dowell directed defendants to change the locks on the garage in August 2009. This caused a serious rift between plaintiff and defendants on the one hand, and plaintiff and the Dowells on the other.

Plaintiff introduced into evidence a document drafted by a friend of his and signed by Sylvia in September 2009. This document supposedly memorialized the 2003 verbal agreement. Sylvia had no recollection of signing the document. Her attorney stipulated the document bore her signature.

Sylvia testified she occasionally asked plaintiff to drive her, but did not ask him to manage or help in any way with the Wong properties. She would call plaintiff about three times a week and ask that he pick her up and drive her to her appointments. She paid him about \$30 per trip. Although plaintiff volunteered to hire contractors to do work on the Wong properties, she did not request that plaintiff do any other work on the properties and was not aware of it. She and plaintiff had no business relationship and were only friends.

Defendants introduced evidence that Sylvia had an extensive history of mental illness. Since 2003, she had been treated for depression, schizoaffective disorder, obsessive compulsive disorder and psychosis. At about the same time she signed the purported employment agreement, she had been released from a mental hospital on a “cocktail of medications.” As a result of this evidence, the trial court found the purported September 2009 employment agreement to be invalid.

Plaintiff filed a complaint with the Commission against defendants, claiming unpaid wages for three years in the amount of almost \$170,000. The Commission ruled plaintiff was not an employee and was not entitled to unpaid wages. Plaintiff then appealed to the superior court, which led to the trial we have discussed above. The gravamen of plaintiff’s claim against the Wongs was that he was their employee pursuant to the purported written contract of employment, and that he was entitled to wages, overtime pay, and waiting time penalties.

After trial, the court issued a tentative statement of decision finding plaintiff was in fact an employee of defendants’, awarding him \$2,842.23 in unpaid wages. In the

tentative statement of decision, the trial court addressed the theory that plaintiff may have been an independent contractor rather than an employee, and stated it was willing to “entertain and consider” additional offers of proof regarding the independent contractor theory.

Plaintiff responded to the tentative statement of decision, providing additional evidence and argument pertinent to the independent contractor theory, particularly with regard to Sylvia’s degree of control over his driving duties.

The court later issued its proposed statement of decision in which it reversed its tentative conclusion that plaintiff was an employee, and found he was an independent contractor. The proposed statement of decision awarded plaintiff \$1,195.14 for the reasonable value of his services. The trial court considered plaintiff’s arguments that he was not an independent contractor, and gave plaintiff 15 days to file any objections to the proposed statement of decision. Plaintiff filed no objections and the proposed statement of decision became the final statement of decision. The court entered judgment for plaintiff against defendants for \$1,195.14.

II. DISCUSSION

Plaintiff first contends the trial court abused its discretion by allowing the independent contractor defense to be raised at a late stage of the proceedings. We disagree. The record shows plaintiff had ample opportunity to respond to the suggestion he was an independent contractor and not an employee. That issue was litigated below and plaintiff had more than enough opportunity to reject the characterization of himself as an independent contractor. Moreover, a tentative statement of decision—which, in this case, ruled plaintiff was an employee—is not binding on the trial court and can be modified or altered as the court sees fit. (Cal. Rules of Court, rule 3.1590(b); *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1284.) Plaintiff was not sandbagged by any unfairness in the proceedings below.

Plaintiff next contends there is insufficient evidence he was an independent contractor. Plaintiff argues this issue as if we reviewed the case de novo or were sitting as a trier of fact. Under the applicable rules of substantial evidence review, which we

need not repeat here, the trial court's finding is supported by substantial evidence. To determine whether a worker is an employee or an independent contractor, a court looks to various factors such as the degree of control the purported employer has over the work performed, the worker's investment in equipment or materials, the permanence of the working relationship, and whether the services rendered are an integral part of the employer's business. (See, e.g., *Donovan v. Sureway Cleaners* (9th Cir. 1981) 656 F.2d 1368, 1370; *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350–351.) The facts of this case show substantial evidence plaintiff was not an employee of Sylvia's, but an independent contractor. For instance, she did not control the manner in which he performed his work, there is no showing he substantially invested in equipment or materials, and plaintiff's services were not an integral part of Sylvia's business—which was not a business of managing or maintaining properties.

Plaintiff was simply a handyman who performed services from time to time. The trial court properly found no employment relationship existed between plaintiff and Sylvia. According to her testimony, he was essentially a family friend who occasionally drove her around, and for those trips she paid him.

Plaintiff briefly contests the trial court's ruling the alleged September 2009 employment contract was invalid. We see no error. Sylvia had a history of mental illness and had been recently discharged from a hospital. We cannot disturb the trial court's ruling.

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.*

We concur:

Margulies, Acting P.J.

Banke, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.