Filed 3/21/19 Moffett v. St. Vincent de Paul Society of Contra Costa County CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WILLIE MOFFETT, Plaintiff and Appellant, v. ST. VINCENT DE PAUL SOCIETY OF CONTRA COSTA COUNTY et. al., Defendants and Respondents.	A150707 (Contra Costa County Super. Ct. No. C1500549) **ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]**

THE COURT:

Appellant's March 15, 2019 petition for rehearing is denied. It is ordered that the unpublished opinion filed March 1, 2019, is modified as follows:

On page 8, at the end of section II, after the last sentence, the section is amended to add the following footnote 2: "The trial court also granted the motion for summary adjudication of Moffett's first cause of action for intentional infliction of emotional distress. In his opening brief, Moffett does not challenge the court's ruling on the first cause of action. Therefore, we need not consider it."

This modification effects no change in the judgment.

Dated: _____ _____, P. J.

Filed 3/1/19 Moffett v. St. Vincent de Paul Society of Contra Costa County CA1/5 (unmodified opinion)

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Willie Moffett appeals the trial court's entry of judgment in favor of the St. Vincent de Paul Society of Contra Costa County (SVDP), Melanie Anguay, Ron Weston, Ann Clark and Ron Costanzo (collectively, Defendants). Moffett asserted claims against Defendants for harassment, race discrimination, and retaliation in violation of the Fair Employment and Housing Act (FEHA). The court granted Defendants' motion for summary judgment because Moffett filed his lawsuit over one year after the California Department of Fair Employment and Housing (DFEH) issued Moffett's first right-to-sue notice, and uncontroverted evidence established the DFEH generated a complete, second right-to-sue letter on August 31, 2016, long after Moffett filed suit. We affirm.

FACTUAL AND PROCEDURAL HISTORY

We summarize the facts relevant to the issues on appeal. We provide additional factual and procedural details in the discussion of Moffett's specific claims.

A. *Moffett's DFEH Complaint and His First Right-To-Sue Notice*

On September 25, 2013, Moffett filed an administrative complaint with the DFEH, alleging conduct between 2010 and 2013 that amounted to retaliation, harassment and discrimination by his employer. The DFEH sent the charge to the Equal Employment Opportunity Commission (EEOC) "for dual filing purposes." On March 24, 2014, Moffett requested to withdraw his DFEH complaint because he intended to file a private lawsuit. On March 27, 2014, the DFEH issued a "Notice of Case Closure and Right to Sue." This first right-to-sue notice informed Moffett that his "civil action must be filed within one year from the date of this letter." The EEOC sent Moffett a right-to-sue letter on July 11, 2014, indicating he had 90 days to file suit.

B. *Moffett's Lawsuit*

On March 30, 2015, Moffett filed his complaint against Defendants. Moffett's first amended complaint is file-stamped May 27, 2015. Both the original and the amended complaint allege that, in March 2015, Moffett filed "another DFEH charge" based on "continuing harassment and to capture the events that occurred since filing his initial joint filings. . . . Moffett received his right to sue from the DFEH with respect to all of the allegations alleged herein in March 2015."

In discovery, SVDP requested production of all right-to-sue letters issued to Moffett by the DFEH or the EEOC. SVDP also requested production of the DFEH right-to-sue letter Moffett received in March 2015, as alleged in paragraph 34 of Moffett's first amended complaint. Moffett produced the DFEH's March 27, 2014 right-to-sue notice, and the EEOC's July 11, 2014 right-to-sue notice.

C. *The Summary Judgment Proceedings*

Defendants moved for summary judgment arguing that Moffett's FEHA causes of action were time-barred because the DFEH issued Moffett a right-to-sue letter on March 27, 2014, but his lawsuit was filed more than one year later on March 30, 2015. Moffett opposed the motion. Moffett's attorney, Na'il Benjamin, filed a declaration (the Benjamin Declaration) stating that "[o]n or before March 27, 2015, I filed a continuing violation complaint with the DFEH alleging new facts that occurred after September 25,

2013. That complaint included prior and current facts and allegations regarding discrimination, harassment and retaliation 'relating back' and continuing from 2012. I requested and received an immediate right to sue, then filed Mr. Moffett's lawsuit three days later. (Exhibit A)." The attached "Notice of Case Closure and Right to Sue" letter was not dated, was unsigned, and it did not refer to Moffett by name.

In reply, Defendants objected to the Benjamin Declaration on the ground that he could not authenticate the incomplete DFEH right-to-sue letter he claimed he received on March 27, 2015. The court agreed with Defendants. In its tentative ruling issued August 31, 2016, the court indicated it was inclined to grant the motion for summary judgment "unless [Moffett] can submit satisfactory proof that he filed a second DFEH complaint on March 27, 2015 [and] he received a dated right-to-sue letter regarding that complaint. The doc[ument]s attached in Exh[ibit] A to the Benjamin Declaration [and] the Benjamin Decl[aration] itself are not satisfactory proof of those facts. Thus, [Moffett] has failed to raise a triable issue of fact regarding whether . . . the DFEH actually issued a second right-to-sue letter."

At the first hearing on the motion for summary judgment, the court continued it because Moffett "provide[d] what he purports is the right to sue letter that the court noted was needed. A new declaration is requested from [Moffett] regarding the letter he provide[d]." In an amended declaration, Benjamin averred that, on March 27, 2015, he "used the DFEH electronic system which allows parties, including counsel for parties, to file a Complaint for Discrimination online and request an immediate right to sue. [¶] . . . [¶] At that time, the DFEH's electronic filing system continued to freeze and at times it would not proceed to the next screen. . . . [¶] After reading the Court's tentative ruling, I contacted the DFEH electronically and requested a copy of Mr. Moffett's March 27, 2015 right to sue notice as a public records request. I then called the DFEH and spoke with a representative and explained the urgent need for Exhibit A. . . . [¶] This representative then emailed Exhibit A to me . . . ."

Unlike the right-to-sue notice attached to the first Benjamin Declaration, this one was dated March 27, 2015, and it included Moffett's name. In response to this new

evidence, Defendants applied for an extension of time to conduct discovery. The court granted the request, and continued the hearing by about two months.

In their supplemental reply papers, Defendants contended the right-to-sue letter, dated March 27, 2015, and attached to the amended Benjamin Declaration, was actually created by the DFEH on August 31, 2016, the day before the initial hearing on Defendants' motion for summary judgment. This claim was based on documents Defendants subpoenaed from the DFEH, and depositions of DFEH representatives. Moffett's counsel did not attend the depositions. Based on this new evidence, Defendants objected to statements in the amended Benjamin Declaration, including the claim the DFEH issued Moffett a second right-to-sue on March 27, 2015.

The day before the continued hearing, the court issued a tentative ruling continuing the matter once again, and providing Moffett an opportunity "to file a good faith response, if he has any, to the Supplemental Reply Papers filed by [D]efendants[.]" Moffett filed no response. The court issued a tentative ruling granting the motion for summary judgment. The court ruled it was undisputed that Moffett "failed to file suit within one year of the date of his initial right-to-sue letter and never completed the process of filing a second DFEH complaint or received a second right-to-sue letter on March 27, 2015 or at any time before he filed suit on March 30, 2015." The court sustained Defendants' evidentiary objections to Moffett's attorney's claims that the DFEH issued a second right-to-sue notice on March 27, 2015.

At the final hearing on the motion for summary judgment, Moffett's counsel stated he was not aware of his opportunity to respond to Defendants' supplemental reply papers, and he sought to submit what he referred to as "a certified document from the DFEH from a public records request showing their right-to-sue with the March 27, 2015 date on it." The court refused to accept it. After considering the arguments of counsel, the court stated it would "re-review . . . things again to make sure I've got it right." When the court reconvened just over an hour later, it affirmed its tentative ruling, finding it "clear that [Moffett] did not have a timely second right-to-sue letter."

On February 14, 2017, the court entered judgment in favor of Defendants and against Moffett. Moffett appeals.

DISCUSSION

I.

Governing Law and Standard of Review

Summary judgment is proper when no triable issue exists as to any material fact, and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)[1] A defendant moving for summary judgment meets its burden by showing one or more elements of the cause of action cannot be established or by showing a complete defense to the cause of action. The burden then shifts to the plaintiff to show that a triable issue of material fact exists as to the cause of action or defense. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) We review a decision on a summary judgment motion de novo, viewing the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) We consider "all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

II.

No Error in the Ruling that Moffett's FEHA Causes of Action Were Untimely

On appeal, Moffett contends the court "erroneously weighed the evidence," improperly determined that the testimony of Moffett's counsel was not credible, refused to view the facts in the light most favorable to Moffett, and should have determined there were material fact questions as to whether the DFEH issued Moffett a second right-to-sue notice on March 27, 2015. We disagree.

A. *The FEHA's One-year Statute of Limitations*

Before filing a civil action asserting claims under the FEHA, a claimant must first exhaust administrative remedies by filing a complaint with the DFEH. (*McDonald v.*

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[1] All undesignated statutory references are to the Code of Civil Procedure.

Antelope Valley Community College Dist. (2008) 45 Cal.4th 88, 106 (*McDonald*); Gov. Code, § 12960, subd. (b).) The DFEH investigates complaints and decides whether to bring a civil action. (Gov. Code, §§ 12963, 12965, subd. (a).) "If a civil action is not brought by the department within 150 days after the filing of a complaint . . . , the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. This notice shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person . . . [or] employer . . . named in the verified complaint within one year from the date of that notice." (Gov. Code, § 12965, subd. (b).) This one-year limitations period begins to run from the date the DFEH issues the right-to-sue notice, not from the date the claimant receives it. (*Hall v. Goodwill Industries of Southern California* (2011) 193 Cal.App.4th 718, 721, 726.)

In addition, "[a]ny person claiming to be aggrieved by an employment practice made unlawful by the FEHA may forgo having the department investigate a complaint and instead obtain an immediate right-to-sue notice. A right-to-sue notice issued by the department shall state that the aggrieved party may bring a civil action against the person or entity named in the complaint within one year from the date of the notice." (Cal. Code Regs., tit. 2, § 10005(a).) "An immediate right-to-sue notice may be obtained by submitting a right-to-sue complaint via the department's automated right-to-sue system accessible on the department's Web site at www.dfeh.ca.gov, U.S. mail, electronic mail, facsimile, or in person." (*Id*., § 10005(c).)

B. *Moffett Forfeits His Challenge to Evidentiary Rulings and Uncontroverted Evidence Shows the DFEH Created the Second Right-to-Sue Notice on August 31, 2016*

When ruling on a motion for summary judgment, the court considers all evidence *except* those matters as to which objections were made and sustained. (§ 437c, subd. (c); *Guz v. Bechtel National, Inc*., *supra*, 24 Cal.4th at p. 334.) "[W]here the plaintiff does not challenge the ruling sustaining the evidentiary objections, any issue with regard to

the correctness of that ruling is deemed waived." (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1197.) On appeal, "we exclude this evidence from our review of the summary judgment motion." (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1181.)

Here, the court sustained evidentiary objections to Moffett's counsel's claims that the DFEH issued him a right-to-sue notice on March 27, 2015, and to the incomplete copy of the right-to-sue notice attached to the first Benjamin Declaration. Moffett's opening brief does not challenge these rulings. For the first time in his reply brief, Moffett contends the court wrongly excluded evidence. Moffett's argument is forfeited. (*In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 693 ["Basic notions of fairness dictate that we decline to entertain arguments that a party has chosen to withhold until the filing of its reply brief, because this deprives the respondent of the opportunity to address them on appeal."].)

In the portions of his amended declaration that were not excluded, Benjamin averred that after reading the court's tentative ruling on August 31, 2016, he called the DFEH "and explained the urgent need for Exhibit A." The representative emailed exhibit A to Moffett's counsel. Exhibit A includes a right-to-sue notice dated "March 27, 2015," and identifies Moffett as the complainant.

However, depositions of DFEH representatives revealed that when Moffett's counsel contacted the DFEH on August 31, 2016, a DFEH employee filled in a field or fields that were missing information, and then emailed the completed document to Moffett's counsel. In other words, the right-to-sue letter dated "March 27, 2015" was a new document actually completed and sent to Moffett's counsel on August 31, 2016. A deposition of the DFEH's help desk supervisor confirmed that the right-to-sue letter attached to the amended Benjamin Declaration, dated March 27, 2015, was created by a DFEH employee on August 31, 2016.

By coming forward with this deposition evidence, Defendants met their burden of showing there was a complete defense to Moffett's FEHA causes of action, and they shifted the burden to Moffett to show a triable issue of material fact. (§ 437c, subd.

(p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.) By failing to respond when given the right to do so, Moffett did not meet his burden. In other words, Moffett did not contest the evidence showing that he "failed to file suit within one year of the date of his initial right-to-sue letter and never completed the process of filing a second DFEH complaint or received a second right-to-sue letter on March 27, 2015 or at any time before he filed suit on March 30, 2015."

III.

Principles of Equitable Tolling Do Not Apply

Moffett contends that "principles of equity" require that we deem timely his "second DFEH complaint and ensuing right-to-sue notice." Preliminary, we reject Defendants' contention that this argument is waived. Moffett argued below that principles of equitable tolling apply. Hence, the issue is not waived or forfeited on appeal. Considered on its merits, we reject Moffett's argument.

A. *Equitable Tolling of the FEHA Statute of Limitations*

The FEHA's one-year statute of limitations can be equitably tolled during the pendency of an investigation by the EEOC. (*Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1097.) Similarly, the FEHA's requirement that a DFEH complaint must be filed within one year from the date of the alleged unlawful practice may be equitably tolled during the pursuit of internal administrative remedies. (*McDonald*, s*upra*, 45 Cal.4th at pp. 106–111.) Equitable tolling requires a showing of " 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.' " (*Id.* at p. 102.)

B. *No Evidence Moffett Relied on DFEH Representations*

Moffett argues the FEHA one-year statute of limitations should be equitably tolled because on the last day of the limitations period, March 27, 2015, his counsel attempted to receive, and believed he had received, a second right-to-sue notice. One problem for this argument is that the court sustained Defendants' objections to Moffett's counsel's statements that he received an immediate right-to-sue notice on March 27, 2015, and to the incomplete, undated right-to-sue notice attached to the first Benjamin Declaration.

As explained *ante*, Moffett fails to challenge those evidentiary rulings, so we cannot consider this evidence.

Moreover, depositions of DFEH representatives revealed that the right-to-sue notice attached to the amended Benjamin Declaration was first created on August 31, 2016, after a DFEH employee filled in missing information. Moffett cannot rely on a right-to-sue letter finalized by the DFEH and sent to Moffett's counsel over one year after Moffett filed suit.

Moffett argues he acted reasonably and in good faith in filing his civil complaint on March 30, 2015 because "although he was represented by counsel, [he] relied on the representations [of] the DFEH that he obtained a proper right-to-sue notice on March 27, 2015." We are not persuaded. There is no evidence that Moffett's counsel spoke with the DFEH until August 31, 2016, the day before the initial summary judgment hearing. While Moffett's counsel avers he experienced problems with the DFEH's electronic filing system on March 27, 2015, there is no evidence he attempted to communicate with DFEH representatives at that time, instead waiting until after he reviewed the court's first tentative ruling.

DFEH records indicate draft DFEH complaints were created between March 29, 2015 and March 31, 2015. But precisely when Moffett's counsel experienced problems with the online system does not create a triable issue of fact because there is no dispute that the process of applying for the second right-to-sue notice was not finalized until August 31, 2016. Moffett fails to show good faith and reasonable conduct sufficient to toll the statute of limitations. (*McDonald*, *supra*, 45 Cal.4th at p. 102.)

IV.

No Error in the Summary Judgment Procedures

Moffett argues the trial court made "prejudicial procedural errors": (1) by failing to allow Moffett "the opportunity to cure the defect of not opposing [Defendants'] Supplemental Reply Brief"; (2) by "making Plaintiff's Opposition to Defendants' Supplemental Reply Brief optional"; and (3) by "extending Plaintiff the option to reply via tentative ruling only." These arguments are meritless.

A. *The Summary Judgment Proceedings*

When Defendants moved for summary judgment on May 25, 2016, the motion was originally scheduled to be heard on September 1, 2016. One day before the scheduled hearing, the court issued a tentative ruling granting the motion, and excluding the incomplete, undated right-to-sue notice attached to the Benjamin Declaration. At the hearing, Moffett's counsel provided "what he purports is the right to sue letter that the court noted was needed." The court requested a new declaration regarding the letter, provided Defendants an opportunity to respond to it, and continued the hearing by three weeks to September 22, 2016.

Based on the amended Benjamin Declaration, Defendants applied for an extension of time to conduct discovery, which the court granted, and the court continued the hearing on the motion to November 17, 2016. Defendants' supplemental reply papers included evidentiary objections to the amended Benjamin Declaration. The day before the November 17, 2016 hearing, the court continued it to December 8, 2016, to provide Moffett an opportunity to respond. Moffett filed no response. Based on the evidence showing the second right-to-sue notice was first created on August 31, 2016, the court issued a tentative ruling granting the motion.

At the December 8, 2016 hearing, Moffett's counsel attempted to hand the court what he referred to as "a certified document from the DFEH from a public records request showing their right-to-sue with the March 27, 2015 date on it." The court refused to accept it, noting Moffett already had an opportunity to respond to Defendants' supplemental reply papers. The court stated: "You don't wait until the day of the hearing and spring it on people which is what you did previously anyway, which got us into this very weird situation." After hearing argument from the parties, the court stated it would "re-review . . . things again to make sure I've got it right." When the court went back on the record just over an hour later, Moffett's counsel was no longer in the court's hallway and could not be located, so the court proceeded without him. The court stated it had "re-reviewed the depositions. This time I read them in their entirety. And based on

the evidence that is presently before me, I am affirming the tentative ruling, and . . . it is clear that Plaintiff did not have a timely second right-to-sue letter."

B. *No Procedural Errors*

A court's decision not to consider evidence presented for the first time at the summary judgment hearing is reviewed for an abuse of discretion. (*Wall Street Network, Ltd. v. New York Times Co, supra*, 164 Cal.App.4th at pp. 1190–1191.) Relying on *Kojababian v. Genuine Home Loans, Inc.* (2009) 174 Cal.App.4th 408, Moffett argues the court "erred by granting summary judgment without affording Plaintiff the opportunity to cure his failure to file an opposition to Defendants' Supplemental Reply Brief and present evidence refuting Defendants' evidence." But in *Kojababian*, the Court of Appeal held the trial court did *not* abuse its discretion in granting a motion for summary judgment, concluding the plaintiff's failure to file a separate statement "was not the result of a procedural mistake, but rather was based upon a lack of admissible evidence in opposition to the motion." (*Id*. at p. 419.) Similarly here, there was no admissible evidence to challenge Defendants' evidence that the DFEH right-to-sue notice with the "March 27, 2015" date was actually created on August 31, 2016. Thus, *Kojababian* undermines Moffett's case.

Moffett contends that, at the December 8, 2016 hearing, his attorney had "in hand" a "certified document showing that the DFEH itself maintains that March 27, 2015 is the date it issued Plaintiff a right-to-sue notice." Moffett attaches this document to his opening appellate brief as "Exhibit 1." We cannot consider it. Attachments to briefs are limited to: (1) copies of exhibits or other materials that were part of the record, and (2) copies of laws that are not readily accessible. (Cal. Rules of Court, rule 8.204(d).) An appellate court does not consider evidence from outside the record. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

Next, Moffett argues the "trial court's reliance on local rules regarding tentative rulings ran afoul of [the] statutory summary judgment procedure." Moffett focuses on the court's tentative ruling dated November 16, 2016, which provided Moffett an opportunity to respond to Defendants' supplemental reply papers, and which continued

the hearing on the motion. According to Moffett, this "tepid permissive request for optional briefing runs afoul of the notice and briefing requirements provided for by the California Code of Civil Procedure section 437c."

This argument is spurious, indeed, frivolous. Moffett cites no specific statutory provision that requires the trial court to notify his counsel of its tentative ruling. In support of his argument, Moffett relies upon an unpublished case. We cannot consider it. (Cal. Rules of Court, rule 8.1115(a).) We also reject Moffett's equally frivolous claims that "allowing Defendants to conduct further discovery and file additional briefing" somehow "triggered the statutory notice and summary judgment briefing requirements anew," or that he was prejudiced by the court's refusal to accept new evidence at the December 8, 2016 hearing. There is no triable issue of material fact that the DFEH created the second right-to-sue notice on August 31, 2016.

V.

No Evidence of an EEOC Investigation

Moffett's final argument is that the statute of limitations was tolled "during the pendency of the EEOC investigation of his claim." We are not persuaded.

"When a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, [and] the investigation of the charge is deferred by the DFEH to the EEOC under a work-sharing agreement, and the DFEH issues a right-to-sue letter upon deferral, then the one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received." (*Downs v. Department of Water & Power*, *supra*, 58 Cal.App.4th at p. 1102.) Relying on *Downs*, Moffett claims "the DFEH issued the initial right to sue notice on March 27, 2014, and the EEOC conducted its investigation using the fruits of the DFEH investigation and issued its right-to-sue notice on July 11, 2014. Even though the EEOC investigation occurred after the DFEH investigation, Plaintiff still had to wait for the EEOC investigation to conclude to know what would result from the EEOC investigation."

Here, there is no evidence the EEOC conducted an investigation of Moffett's claims. When Moffett averred that the EEOC "continued to investigate the complaint until July 11, 2014," the Defendants objected, and the court sustained the objection. Moffett does not challenge this evidentiary ruling; accordingly, we will not consider Moffett's claim. (*Wall Street Network, Ltd. v. New York Times Co*, *supra*, 164 Cal.App.4th at p. 1181.) Moreover, when Moffett filed his March 24, 2014 request to withdraw his DFEH complaint, he expressly acknowledged this request would also apply to his EEOC case. The court did not err in determining the time to file Moffett's lawsuit was not tolled between March and July 2014.

DISPOSITION

We affirm. Defendants are entitled to costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

Jones, P.J.

WE CONCUR:

Simons, J.

Burns, J.

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