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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BRIAN STEPP,

Plaintiff and Appellant,

v.

FARMERS GROUP, INC., et al.,

Defendant and Respondent.

B234562

(Los Angeles County
Super. Ct. No. BC422817)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Meuser Law Group and Mark P. Meuser for Plaintiff and Appellant.

Seyfarth Shaw, George E. Preonas, Dean A. Martoccia and Candace S. Bertoldi for Defendants and Respondents.

Brian Stepp sued Farmers Group, Inc. and Farmers Insurance Exchange (Farmers), alleging violations of California's wage and hour laws. Farmers moved for summary judgment and the trial court granted the motion on June 21, 2011. Stepp filed a timely appeal, and we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Farmers provides insurance to consumers throughout California. Farmers sells insurance policies, contracts with agents who sell and service insurance policies, and employs claims representatives to handle claims made on the policies.

Farmers' Circle of Dependability (COD) program gives Farmers' insureds the option to have physical damage to their automobiles repaired by one of the approximately 373 auto body repair facilities in the COD program. These facilities are approved by Farmers and meet Farmers' standards, and are intended to provide Farmers' customers with outstanding service and high quality repairs.

Overseeing the COD program facilities are Farmers' Auto Physical Damage Direct Repair Facility Consultants (COD consultants), who ensure that their assigned COD program shops perform to Farmers' expectations. COD consultants report to their regional COD program supervisors, and (among other duties) recommend the addition or removal of facilities from the COD program. Before the implementation of the COD consultant position in April 2007, the COD program facilities were overseen by Auto Physical Damage Direct Repair Facility Coordinators (COD coordinators), who, like COD consultants, interacted directly with COD facilities. COD consultants were offered the opportunity to become COD consultants if they passed a written test and an interview.

Farmers employed Stepp from August 21, 2006 through June 11, 2009. From August 2006 to April 2007, Stepp worked as a COD coordinator, and in April 2007, Stepp became a COD consultant. Farmers terminated Stepp on June 11, 2009, for violating ethical guidelines: Stepp accepted a large sum of money from an auto body shop that was interested in becoming a COD program facility.

On September 29, 2009, Stepp filed this lawsuit against Farmers on behalf of himself and all others similarly situated, alleging that Farmers violated California laws by

improperly classifying its COD coordinators and, later, its COD consultants as exempt administrative employees, and by failing to pay overtime, provide meal and rest periods, maintain time records, pay compensation due at the time of termination, and by violating unfair competition laws. Stepp filed a motion for class certification on September 20, 2010. The trial court denied Stepp's motion by an order filed December 10, 2010. This court has affirmed the denial of class certification, concluding that substantial evidence supported the trial court's conclusion that individualized issues predominated as to the classification of COD coordinators and consultants as exempt administrative employees. (*Stepp v. Farmers Group, Inc.* (Dec. 21, 2011, B320565) [nonpub. opn.])

Farmers filed a motion for summary judgment on or about January 25, 2011, on the basis that undisputed facts established that Stepp was an exempt administrative employee. Farmers argued that Stepp's prior deposition testimony established that he was an administrative employee and therefore exempt from the wage and hour laws. As exhibits, Farmers included the declaration of Farmers Special Projects Manager Scott LeBlanc, who formerly held the position of national manager of the COD program, and portions of the transcript of Stepp's July 9, 2010 deposition.

Stepp opposed the motion, attaching as exhibits the COD field coordinator guidelines and the COD repair facility guidelines, Stepp's April 3, 2011 declaration in opposition to the summary judgment motion, and selections from Stepp's deposition. The opposition's statement of facts relied entirely on Stepp's declaration.

Farmers replied, arguing that Stepp's declaration contradicting his deposition testimony did not establish a triable issue of fact. The trial court heard oral argument on April 18, 2011. The court stated: "the admissions in [Stepp's] deposition are sufficient to shift the burden of proof to [Stepp]," and "[Stepp's] effort to raise a triable issue of fact is largely comprised of testimony inconsistent with the deposition testimony. . . . [Y]ou can't raise a triable issue of fact by putting in a declaration that contradicts your

deposition testimony.”¹ The trial court filed an order that same date concluding that no triable issues of fact existed, and “[f]or the duration of his employment with [Farmers], Plaintiff was an exempt employee as a matter of law, and Defendants therefore are entitled to summary judgment.” Judgment was filed on June 21, 2011. Stepp filed a timely notice of appeal.

DISCUSSION

“Because plaintiff[] appealed from the trial court’s order granting defendants summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action.” (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) “In performing our de novo review, we employ a three-step analysis. ‘First, we identify the issues raised by the pleadings. Second, we determine whether the movant established entitlement to summary judgment, that is, whether the movant showed the opponent could not prevail on any theory raised by the pleadings. Third, *if the movant has met its burden*, we consider whether the opposition raised triable issues of fact.’ [Citations.] To shift the burden, the defendant must conclusively negate a necessary element of the plaintiff’s case or demonstrate there is no triable issue of material fact requiring a trial. [Citation.] If the evidence does not support judgment in the defendant’s favor, we must reverse summary judgment without considering the plaintiff’s opposing evidence.” (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1462–1463.) We view the evidence in the light most favorable to Stepp as the nonmoving party, strictly scrutinizing Farmers’ evidence “in order to resolve any evidentiary doubts or ambiguities in plaintiff[’s] favor.” (*Weiner v. Southcoast Childcare Centers, Inc.*, at p. 1142.)

¹ The trial court also found that declarations by others which Stepp submitted with his opposition were inadmissible as irrelevant. Stepp does not challenge this ruling on appeal, although he cites in his brief to those inadmissible declarations.

Labor Code section 1171 et seq. and the regulations (wage orders) promulgated by the Industrial Welfare Commission (IWC)² contain California law regarding wages, hours, and working conditions. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1009.) These laws entitle a California worker to overtime compensation and meal and rest breaks, unless the worker is properly classified as falling within an exemption category. (*Id.* at p. 1010.) The IWC promulgated Wage Order No. 4–2001, applicable to all persons employed in professional, technical, clerical, mechanical, and similar occupations. Wage Order No. 4-2001 appears in the California Code of Regulations, title 8, section 11040 (hereafter section 11040). (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 177 (*Harris*); see § 11040.) The wage order specifies that its provisions governing minimum wages, overtime wages, and other employment conditions do not apply to employees falling within exemptions for persons employed in administrative, executive, or professional capacities, as defined in the wage order. As relevant here, the administrative exemption applies to any employee: “(a) Whose duties and responsibilities involve . . . [¶] . . . [¶] (I) The performance of office or non-manual work directly related to management policies or general business operations of his/her employer or his employer's customers; . . . [¶] . . . [¶] (b) Who customarily and regularly exercises discretion and independent judgment; and . . . [¶] . . . [¶] (e) Who executes under only general supervision special assignments and tasks; and [¶] (f) Who is primarily engaged in duties that meet the test of the exemption. . . . Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the

² “The Legislature defunded the IWC in 2004, but its wage orders remain in effect.” (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1002, fn. 7.)

job, shall be considered in determining whether the employee satisfies this requirement.”³
(§ 11040, subd. 1(A)(1).)

Stepp’s complaint alleged that Farmers improperly treated him as an exempt employee. Farmers’ motion for summary judgment relied on Stepp’s own deposition testimony to establish that he was an exempt administrative employee. To establish that Stepp “perform[ed] . . . office or non-manual work directly related to management policies or general business operations of his/her employer or his employer’s customers” (§ 11040, subd. 1(A)(2)(a)(1)), Farmers’ statement of undisputed material facts relied on the LeBlanc declaration for the propositions that the COD consultants: managed Farmers’ day-to-day relationships with the COD facilities; exercised independent judgment and discretion in overseeing the COD facilities to achieve top-level results for Farmers’ customers; were responsible for recognizing opportunities, anticipating problems, and creating solutions and plans for the COD facilities’ “diverse challenges;” decided how best to guide the COD facilities in their work and participated directly in adjusting complex or unusual claims; monitored and evaluated COD facility performance and train staff; counseled COD facilities on best practices and created individualized improvement plans; and made recommendations to COD regional supervisors to add or remove COD facilities. Farmers relied on Stepp’s deposition testimony to establish that his primary responsibility “was ‘to make certain that the repair facilities were obtaining the prescribed results for Farmers, and if they weren’t, to detect and determine how to achieve those results’”; that his relationship with the COD facilities was a “partnership”; and that making sure the COD facilities were efficient and complying with standards was important to Farmers’ business operations.

To establish that Stepp “customarily and regularly exercise[d] discretion and independent judgment” (§ 11040, subd. 1(A)(2)(b)), Farmers again pointed to Stepp’s deposition testimony that he made daily decisions important to Farmers without

³ There is no dispute that Stepp earned a monthly salary equivalent to no less than two times the state minimum wage for full-time employment, as required by section 11040, subdivision 1(A)(2)(g).

supervision; that he identified best practices and created individualized plans to improve COD facility performance; that he evaluated COD facility performance to determine which facilities to focus upon and independently implemented performance improvement plans; determined which agents and COD facilities he would visit; developed strategies to address customer dissatisfaction issues; examined ways to improve the results of customer service phone surveys; led his COD facilities to improve performance results; marketed to auto repair facilities he deemed suitable candidates for the COD program; made recommendations to COD facilities on personnel decisions; collaborated with COD Consultants to come up with remedy plans for underperforming facilities; managed Farmers' daily relationship with COD facilities; recommended which COD facilities should be put on probation or removed from the COD program; managed and prioritized his own work flow; was required to "think outside the box"; solved problems without specific direction from his supervisors; prioritized and managed work flow without supervisory oversight; created and implemented a spreadsheet management system to track and improve pervasive file quality issues at his COD facilities; developed a plan to improve cycle time at his facilities; was Farmers' primary contact for his COD facilities, and resolved most issues without supervisor involvement. Stepp testified at his deposition that more than pushing papers across a desk, his job was "about achieving the results that the company is looking for. [¶] . . . [¶] . . . Thinking outside the box." Stepp's supervisor did not care about how he got results as long as he got them, and he was "almost required" to be independent, and "use [my] judgment, experience, expertise to help the facility achieve the results for Farmers."

To show that Stepp executed his duties "under only general supervision" (§ 11040, subd. 1(A)(2)(e)), Farmers cited Stepp's deposition testimony that he had "the autonomy to operate within a certain set of guidelines but without a, you know, constant manager present looking over where you are at, and the responsibility that the job entails in terms of generating results that are going to show performance for the company." Stepp's supervisors "only got involved if there was a consistent pattern of poor performance," either from the COD consultants or their facilities. "The job almost requires"

independence, and Stepp routinely solved problems, came up with solutions, and interacted with COD facilities without interference from supervisors.

To show that Stepp was primarily engaged in exempt work, (§ 11040, subd. 1(A)(2)(f)), Farmers referenced his deposition testimony that “the duty of the field claims consultant was to make certain that the repair facilities were obtaining the prescribed results for Farmers, and if they weren’t[,] to detect and determine how to achieve those results.” “Wage Order . . . 4-2001 define[s] ‘primarily’ as ‘more than one-half the employee’s work time.’ (Regs., § 11040, subd. 2(N).) Thus, in order to be covered by the administrative exemption . . . , employees must spend over one-half of their work time doing work that fits the test of the exemption.” (*Harris, supra*, 53 Ca.4th at p. 178, fn. 3.)

This evidence met Farmer’s burden to show that Stepp primarily performed tasks requiring him to exercise discretion and independent judgment, as required for the administrative exemption, and served to shift the burden to Stepp to raise triable issues of fact.

To contradict Farmers’ evidence, Stepp relied in the trial court, and on this appeal, on a declaration he filed with the opposition to Farmers’ summary judgment motion. Stepp’s declaration stated that he was an “inspector” of the COD facilities, and spent 70 percent of his time “inspecting estimates and approving or modifying these estimates, and/or inspecting vehicles.” His primary duty was to review claims on his computer. Stepp’s declaration also stated that when he did make recommendations regarding COD facilities, he could not submit any action plan to a facility without the approval of an immediate supervisor, and he had no management authority within Farmers’ business operations and no personal effect on Farmers’ policies.

We agree with the trial court that Stepp’s “characterization of the 70 percent is . . . an effort to basically contradict his deposition testimony”⁴ that his job involved

⁴ Stepp argues that the trial court determined that he spent 30 percent of his time in exempt duties, but this mischaracterizes the record at the summary judgment hearing. The court clearly stated that the 30 percent figure in Stepp’s declaration was inconsistent

administrative work rather than mere inspection. “A party cannot evade summary judgment by submitting a declaration contradicting his own prior deposition testimony. [Citations.]” (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1120; *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21–22.) Stepp does not acknowledge this, citing widely to his declaration (and to the evidence the trial court found inadmissible) in his brief on appeal, and never directly addressing whether his deposition testimony is contradictory. Instead, he states simply that his “deposition and declaration both reveal that his job duties were repetitive, recurrent and mundanely routine,” without citing to his deposition for support for that description. That omission is for good reason, as his deposition contradicts that statement.

Stepp also argues that his declaration shows that he was merely a production worker. Even if his declaration were sufficient to create a material issue of fact on this point, however, the California Supreme Court has expressly disavowed the “administrative/production worker dichotomy . . . which has been effectively superseded in this context by the more specific and detailed statutory regulatory enactments.” (*Harris, supra*, 53 Cal.4th at p. 188.)

Stepp contends that he could not implement an action plan for a COD facility without direct approval and oversight from his supervisor. As provided in the federal regulations specifically cited in the wage orders as applying to define exempt duties under California law (see *Harris, supra*, 53 Cal.4th at pp. 179–180), however, “[T]he fact that an employee’s decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment” (29 C.F.R. § 541.207, subd. (e)(1).)

We have independently reviewed the evidence. Stepp’s deposition testimony establishes that his work as a COD Consultant qualified for the administrative exemption

with his “global” and “encompassing” statements in his deposition, and that the court would not consider the inconsistent declaration.

under section 11040, subdivision (1) (A). Farmers met its burden to show that Stepp could not prevail on his complaint. Because Stepp may not disavow his deposition testimony with his later, contradictory declaration, Stepp failed to raise triable issues of fact in opposition. The trial court did not err in granting summary judgment.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.