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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VIRTIC E. BROWN,

Plaintiff and Appellant,

v.

MISSION FILMWORKS, LLC, et al.,

Defendants and Respondents.

B239005

(Los Angeles County
Super. Ct. No. BC449876)

APPEAL from the judgment of the Superior Court of Los Angeles County.
Gregory W. Alarcon, Judge. Affirmed.

Law Offices of Richard L. Albert and Richard L. Albert for Plaintiff and
Appellant.

Michael Reino for Defendants and Respondents Mission Filmworks, LLC, and Jay
Kamen.

* * * * *

Plaintiff and appellant Virtic E. Brown appeals from a judgment, following a court trial, entered in favor of defendants and respondents Mission Filmworks, LLC, and Jay Kamen. Plaintiff's primary contention on appeal is that the trial court erred in concluding plaintiff was an independent contractor, and not an employee entitled to unpaid wages. We conclude substantial evidence supports the trial court's decision and affirm.

BACKGROUND

Plaintiff and defendant Kamen became friends sometime around 2005. They both work in the entertainment industry. Plaintiff worked full-time for the Academy of Motion Picture Arts and Sciences (Academy), handling mostly press-related matters. In addition to her job at the Academy, plaintiff has produced four films: two features, a documentary and one short film.

Defendant Kamen worked full-time as a staff film editor at Sony Pictures. Sometime in 2007, he wrote a screenplay for a short film that was somewhat autobiographical. Defendant planned to direct the film, which he envisioned as a musical. Defendant also wrote a song, around which the musical score for the film would be based. The film was to be called Not Your Time (hereafter Picture). Defendant wanted the Picture to be a "showcase" of his abilities as a writer and director that he could use to seek jobs in those fields.

Plaintiff encouraged defendant Kamen to make the Picture. After attending a screening of one of the films plaintiff produced, defendant Kamen asked her to produce the Picture. Plaintiff was interested in producing the Picture because she normally did not produce short films and this one was going to be a musical. She believed it would offer a "different avenue" to showcase her abilities as a producer. Defendant Kamen and plaintiff agreed to work together on the project. They orally agreed that plaintiff would receive a producer's credit and two percent of any profits from distribution of the Picture. There was no written contract.

Sometime in early 2008, defendant emailed plaintiff a copy of the screenplay and asked her to review it. Plaintiff read the screenplay and gave defendant some feedback.

Plaintiff provided editing suggestions and feedback on several versions of the screenplay until it was in final form.

In addition to being the writer and director, defendant Kamen was the executive producer, solely responsible for financing the Picture. In May 2009, Kamen formed Mission Filmworks, LLC, for the purpose of producing the Picture. Kamen was the sole member of Mission Filmworks, and his home address was the address of record for the entity. Plaintiff was a signatory on the bank account set up for Mission Filmworks and was given a company credit card. It was undisputed plaintiff was the producer of the Picture until she was relieved of her duties in September 2009 by defendant Kamen.

Principal photography on the Picture was scheduled to begin on September 14, 2009. The Friday before, a meeting was held with defendant, plaintiff, and several other individuals. A dispute arose concerning plaintiff's failure to secure the commitment of a noted actor to play one of the key roles. The dispute resulted in a last-minute effort to find a replacement so that filming could begin as scheduled and cost overruns could be avoided. Several other serious issues arose regarding plaintiff's work, and defendant Kamen eventually told plaintiff she was relieved of her duties. He told plaintiff she should not come on the set, but she could continue to handle the books from her home. However, after further concerns arose about costs and the budget, the books were picked up from plaintiff's residence around September 18, 2009. Plaintiff had no further involvement with the Picture.

After two weeks of filming, the Picture was completed and went into post-production. The Picture was shown in several small screenings. Defendant credited plaintiff as an associate producer of the Picture. Plaintiff was not given a "produced-by" credit in any promotional or other materials about the Picture.

In December 2009, plaintiff filed an administrative complaint with the Labor Commissioner, seeking unpaid minimum wages for the hours she spent working on the Picture, reimbursement of expenses, waiting-time penalties and interest. After an evidentiary hearing, the Labor Commissioner issued a decision on November 9, 2010,

denying plaintiff's claim. The decision included a determination the evidence showed plaintiff was an independent contractor while working on the Picture.

Plaintiff timely appealed and filed this action in the superior court, stating causes of action for unpaid wages and reimbursement of expenses under the Labor Code, breach of oral contract, and quantum meruit. The case proceeded to a court trial in September 2011.

Plaintiff testified to the work she performed on the Picture before her dismissal. She explained that after initially helping defendant Kamen refine the screenplay, she also kept the books and paid the bills. Early on, plaintiff did research in preparation for hiring the cast and crew, including watching several films defendant Kamen asked her to review with styles similar to what he wanted to achieve. Plaintiff made suggestions for cast and crew (over 60 individuals were eventually involved in making the Picture), initiated contacts and set up meetings, confirmed availability and scheduling, and ultimately negotiated with the agents to set the terms of engagement and have contracts signed. During this process, defendant Kamen, who was worried about keeping costs down, often asked plaintiff to renegotiate for better terms, and plaintiff did so. Plaintiff worked on the budget, and worked with the different departments (e.g., the art department/set design) in determining their individual budgets. Plaintiff also scouted locations that defendant asked her to find and secure, and worked on obtaining the necessary location permits. She negotiated with vendors to obtain equipment (e.g., lighting, cameras). Plaintiff worked with defendant Kamen to prepare the shooting schedules and create "the board" (the daily calendar for the production). She also took photographs of the set for later use in press and publicity releases.

Plaintiff said she did a lot of her work from home but sometimes worked at defendant Kamen's house or at his office at Sony Pictures. She used her own cell phone and her own computer. The hierarchy of authority for the production was that the cast and crew members reported to their respective department heads, who then reported to plaintiff, and plaintiff reported to Kamen as the director and executive producer.

Plaintiff testified she was upset about being told not to come to the set, but she continued to handle the books from home once filming started. She said she continued to do her job from home until Reggie Joseph, the production attorney, came to her home and picked up the books and records. She admitted she made a mistake in booking the caterers, but otherwise said she did her job correctly.

Plaintiff testified the work she performed consisted of traditional duties in developing and producing a film. She was not given an itemized list specifying her duties, as the duties of a producer are known as a matter of custom in the industry. Plaintiff conceded that a short film ordinarily is not expected to make a profit, and that she agreed, in part, to work on the Picture because of her friendship with defendant Kamen. Plaintiff also admitted there was never any agreement with defendants for her to work for an hourly wage, and that Kamen never asked her to keep track of her time or to fill out any kind of time card.

Defendant Kamen also testified. He explained that as director and executive producer of the Picture, he made the key decisions about how the Picture was made, including such things as deciding on a full orchestra for the score, and giving final approval on casting, costuming, props and locations. Kamen wanted the Picture to be a polished film of a “certain caliber” as there would be no point in making it as a showcase of his talents if it was not a quality production. He called the Picture a “labor of love,” with many friends agreeing to work on it for free.

Defendant said the Picture was never intended to make money. Defendant was worried about the cost of making it, given the high production values. He testified that plaintiff repeatedly told him she could produce the Picture and keep costs down, she had good contacts at the Academy to fill certain positions, and she did not want “a penny” from him, until he broke even. She only wanted her producer’s credit and two percent of net profits.

Defendant Kamen expected plaintiff, as the producer, to be the problem solver and organizer for the Picture. He never gave her a list of duties; he expected her to know what to do based on her experience. Kamen explained that plaintiff failed to do her job in

a number of crucial ways, jeopardizing the whole production, including failing to finalize a complete budget; ordering the wrong trucks such that equipment could not be picked up and used efficiently at locations; failing to obtain proper Workers' Compensation insurance; double-booking two caterers, costing defendants \$8,000 in excess of the catering budget; failing to book an actor for a key role, causing a last-minute scramble to replace him; losing one of the main locations for shooting, forcing defendant to use his own home to shoot some scenes; and failing to get legal clearance for the use of certain film posters as props. Defendant Kamen said it was he who told plaintiff she was relieved of her producer's duties and should not return to the set.

Defendant explained that he decided to give plaintiff the associate producer's credit, despite her inadequate performance, because she had been a close friend and had done some work on the Picture. However, he did not give her the produced-by credit because she did not fulfill her duties as producer. Defendant testified he considered "pull[ing] the plug" on the whole production because of plaintiff's errors, until he met with Reggie Joseph (production attorney), Marjorie Mann (line producer), and Dawn Bridgewater (first assistant director), who agreed to take over the producing responsibilities. They helped him complete the Picture and were therefore credited as the producers, along with James Honore at Sony Pictures, who provided defendant with stages and equipment for free.

After hearing argument from counsel, the court took the case under submission, issuing its statement of decision on November 7, 2011. Plaintiff filed objections to the decision and also moved for a new trial. The court denied plaintiff's motion and entered judgment in favor of defendants Kamen and Mission Filmworks. This appeal followed.

DISCUSSION

The crux of plaintiff's arguments on appeal is that the trial court erred in concluding she was an independent contractor. Plaintiff contends the trial court applied the wrong burden of proof, and also failed to give conclusive effect to an admission made by defendants during discovery. Plaintiff's arguments lack merit.

The determination whether one is an employee or an independent contractor is “one of fact and thus must be affirmed if supported by substantial evidence.” (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 11 (*Estrada*); see also *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349 (*Borello*)). When the evidence is undisputed, the question becomes one of law. (*Ibid.*) While there were some undisputed facts, the determination of plaintiff’s status, central to her claims, required the resolution of disputed evidence and inferences, and therefore the trial court’s finding must be upheld if supported by substantial evidence. We conclude that it is.

Plaintiff’s first cause of action sought recovery of unpaid wages (the minimum wage of \$8 per hour), reimbursement of expenses, and waiting time penalties under the Labor Code. (See Lab. Code, §§ 201, 203, 2802.) Plaintiff’s entitlement to relief on her statutory claims was dependent on whether she qualified as an employee within the meaning of the statutory scheme. The common law test defining employment applies. (See *Estrada, supra*, 154 Cal.App.4th at p. 10 [Labor Code does not define “employee” for purposes of § 2082, therefore common law definition applies]; see also *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087.)

“The essence of the [common law] test is the ‘control of details’—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work—but there are a number of additional factors in the modern equation, including (1) whether the worker is engaged in a distinct occupation or business, (2) whether, considering the kind of occupation and locality, the work is usually done under the principal’s direction or by a specialist without supervision, (3) the skill required, (4) whether the principal or worker supplies the instrumentalities, tools, and place of work, (5) the length of time for which the services are to be performed, (6) the method of payment, whether by time or by job, (7) whether the work is part of the principal’s regular business, and (8) whether the parties believe they are creating an employer-employee relationship.” (*Estrada, supra*, 154 Cal.App.4th at p. 10; accord,

Borello, supra, 48 Cal.3d at pp. 350-351; *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 299-300.)

The Supreme Court cautioned that, in applying the test, “ ‘the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ [Citation.]” (*Borello, supra*, 48 Cal.3d at p. 351.) “Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.” (*Id.* at p. 354.)

The evidence was overwhelming that plaintiff acted in the capacity of an independent contractor in performing her producer duties, up through the point of her dismissal in September 2009 at the start of principal photography of the Picture. With the exception of the right to terminate, the evidence as to all of the other factors weighed in favor of an independent contractor relationship. Plaintiff had a full-time job at the Academy, and her work producing the Picture was on her own time and was not her sole occupation. The role of a producer on a film, as the head organizer in charge of the production, is not the type of job that is normally supervised, but rather is performed by professionals experienced in the special skills needed to complete the job. Defendants did not supply plaintiff with any tools or equipment to complete her duties. The services provided by plaintiff were not to be performed over a long period of time, but were for a special project. Plaintiff was not to be paid wages by the hour, or at all, but was only to receive the possibility of a percentage of any profits received from distribution of the Picture. The work performed by plaintiff was not a regular part of defendants’ business. And, plaintiff and defendants did not act or conduct themselves in any way reflective of an intent to form an employee-employer relationship.

It is true that defendant had the right to terminate their relationship, as did plaintiff. However, the right to discharge, in and of itself, is not dispositive of the nature of the relationship. (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 589 [a termination at-will provision in an independent contractor agreement does not automatically transform relationship into one of employer-employee].)

The elements of the common law test are set forth in CACI No. 3704. At the start of trial, counsel for plaintiff conceded the factors in CACI No. 3704 should be deemed the controlling law governing the court's analysis of plaintiff and defendants' relationship. Nevertheless, plaintiff continues to overstate the significance of the element of control. A principal's control over the agent's work is an important, if not a primary, consideration. However, the control element, if applied rigidly and without consideration of the other factors, "is often of little use in evaluating the infinite variety of service arrangements." (*Borello, supra*, 48 Cal.3d at p. 350.) The trial court properly considered the evidence relevant to all of the elements of the test in rendering its decision.

Plaintiff erroneously contends the question of her employment status was one of law. Plaintiff propounded pretrial requests for admissions of fact on defendant Kamen pursuant to Code of Civil Procedure section 2033.010 et seq. Request No. 25 stated: "Admit that YOU had the right to control [*sic*] manner and means [*sic*] the Picture was PRODUCED." The term "produced" was defined as: "to develop or prepare a motion picture for physical filming or video recording regardless of the recording medium, negotiate rental deals for or procure equipment used in the course of such filming, and to provide some or all of the services customarily performed by a 'Producer' on motion pictures in the motion picture production industry in Los Angeles, California."

Defendant Kamen responded to plaintiff's request for admission No. 25 with an unqualified admission. Plaintiff argues this admission, received in evidence during trial, conclusively established as a matter of law that she was an employee of defendants and not an independent contractor. We disagree.

" 'Although admissions are dispositive in most cases, *a trial court retains discretion to determine their scope and effect*. An admission of a fact may be misleading. In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence.' [Citation.] Further, '[t]he court must have discretion to admit evidence to elucidate and explain an admission, because the admission of a fact does not always

reflect the party's reasonable understanding of that fact.' [Citation.]" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1273, italics added, quoting *Fredericks v. Kontos Industries, Inc.* (1987) 189 Cal.App.3d 272, 277, 278.)

We find no abuse of discretion by the trial court in finding the request for admission to be ambiguous. (See *Milton v. Montgomery Ward & Co., Inc.* (1973) 33 Cal.App.3d 133, 138.) It was undisputed defendant Kamen was the executive producer of the Picture, solely responsible for its financing. Kamen therefore had the right to control the production in terms of approving all costs and budget for each element of the production. Defendant Kamen was also the director, and the Picture was being made as a showcase of his talents. Defendant therefore had the right to control the development of the Picture as to the cast and all major creative elements. The request for admission was reasonably read and understood to apply to these rights of control over development and production of the Picture, and not to any right to control the details of how plaintiff performed her job. The overbroad and generalized definition given to the word "produced" in plaintiff's request does not clarify the ambiguity. The evidence received from defendant Kamen and plaintiff as to how they worked together supported and explained the admission by defendant as applying to his rights of overall creative and financial control.

This is entirely distinct from the right to control the specific manner of how plaintiff was to accomplish her tasks as producer of the Picture. Plaintiff's own testimony belies her claim that defendant exercised direct control over how she functioned as producer. For instance, plaintiff testified that in hiring cast members, she suggested possible actors and discussed them with defendant, arranged meetings, and then defendant made the final hiring decisions. Plaintiff testified defendant "direct[ed]" her to offer certain terms, but plaintiff was responsible for negotiating with the agent or individual and worked directly with Reggie Joseph, the production lawyer, in editing the contract terms and provisions. There was no evidence defendant specified how she was to negotiate or accomplish these responsibilities, or any of her other duties as producer.

Unlike the farm laborers in *Borello* who performed simple manual labor, plaintiff's job as producer was not the type of job "which can be performed in only one correct way." (*Borello, supra*, 48 Cal.3d at p. 356.) The ability of plaintiff to perform her role as producer depended on plaintiff's individual expertise and skill in performing such work in the past, and accomplishing a certain result desired by defendant as the director. Defendant had the right to control the outcome (e.g., hiring a specific individual for a role), but there was no material evidence defendant controlled the manner in which plaintiff performed the specific elements of her job in achieving the outcome.

Plaintiff also argues the trial court did not correctly apply the evidentiary presumption set forth at Labor Code section 3357, which provides: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Plaintiff argues she was not given the benefit of this presumption, citing one sentence in the statement of decision in which the trial court stated: "Plaintiff's burden of proof was not met on any factor to be considered to establish an employer-employee relationship."

Plaintiff's argument is not persuasive. First, the presumption is set forth in Division 4 of the Labor Code regarding Workers' Compensation and Insurance, and Labor Code section 3350 provides that the definitions set forth therein apply to that "division." Plaintiff's case does not concern the workers' compensation statutes set forth in Division 4, but rather the statutes set forth in Division 2 of the Labor Code.

Even if the presumption set forth at Labor Code section 3357 applied to plaintiff's claim for unpaid wages and reimbursement of expenses under Labor Code sections 201 and 2802, plaintiff has failed to show the court erred. Even if she was entitled to the presumption, plaintiff had to offer evidence to prove her first cause of action that she performed work for defendants, defendants owed her wages under the terms of the employment, and the amount of unpaid wages. (See CACI No. 2700.) Yet plaintiff's own testimony explaining the nature of her role as producer established she was acting as an independent contractor, and not as an employee. Indeed, plaintiff offered no *material* evidence she was an employee. The trial court's statement is reasonably read to reflect

this fact and not that the court failed to give plaintiff the benefit of the rebuttable presumption, assuming it applied.

The trial court's decision against plaintiff on her second cause of action for breach of oral contract is also supported by substantial evidence. Defendant Kamen provided extensive testimony as to the failings or errors made by plaintiff in producing the Picture that ultimately led to plaintiff being relieved of her duties as producer. Plaintiff offers no argument for why, in the face of such evidence, she is legally entitled to the produced-by credit. Moreover, no evidence was presented that the Picture has earned any profit from which plaintiff's two percent could be paid and therefore no showing of any breach by defendant as to that part of the oral agreement. (See *Sunniland Fruit, Inc. v. Verni* (1991) 233 Cal.App.3d 892, 899 [agreement limiting payment from specific fund or source is condition precedent to payment and no obligation to pay arises if the fund or source "does not materialize"].)

Plaintiff's third cause of action for quantum meruit fails for the same reasons. "Although a court of equity may employ broad powers in the application of equitable remedies, it cannot create new rights under the guise of doing equity. [Citation.] Nor will equity lend its aid to accomplish by indirection what the law forbids to be done directly. [Citation.] Equity follows the law and when the law determines the rights of the respective parties, a court of equity is without power to decree relief which the law denies." (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 134.)

Finally, plaintiff's request for judicial notice, submitted without the motion required by California Rules of Court, rule 8.252, is denied. We note for the record that the wage order submitted by plaintiff for judicial notice was not germane to our decision. Defendants' motion for sanctions against plaintiff for filing a frivolous appeal is also denied. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651 [sanctions should be imposed only for most egregious conduct where appeal prosecuted for improper purpose or where appeal "indisputably has no merit" so as to avoid chilling effect on assertion of litigants' appellate rights].)

DISPOSITION

The judgment is affirmed. Defendants and respondents Jay Kamen and Mission Filmworks, LLC, shall recover their costs on appeal.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.