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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ZENON JAKIEL, Plaintiff and Appellant, v. IMPRESA AEROSPACE, LLC, Defendant and Respondent.	B261175, B264508 (Los Angeles County Super. Ct. No. BC493586)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed in part and reversed in part.

Pick & Boydston and Brian D. Boydston for Plaintiff and Appellant.

Buchalter Nemer, Robert S. Cooper and Efrat M. Cogan for Defendant and Respondent.

INTRODUCTION

Plaintiff Zenon Jakiel (Jakiel) appeals from a judgment entered after the trial court granted defendant Impresa Aerospace, LLC's (Impresa) motion for summary judgment in case No. B261175. He also appeals from an order granting Impresa's motion for attorney's fees in case No. B264508. We affirm the grant of summary judgment but reverse as to the award of attorney's fees and remand with instructions.

FACTUAL BACKGROUND[1]

Jakiel was hired by Swift-Cor Aerospace, Inc. (Swift-Cor) in September 2005 to serve as its Eastern U.S./International Sales Manager of the Aerospace Division. Swift-Cor manufactured aerospace parts used in commercial aircraft, and its customers included both aircraft manufacturers and intermediate suppliers.

Jakiel's job was to procure long term agreements (LTAs) with Swift-Cor's customers. Under the LTAs, Swift-Cor would manufacture and supply parts to the customers over a period of time ranging from three to ten years.

Jakiel's employment agreement provided that he would receive a salary of $80,000 plus 3 percent commissions on sales for first-run production work obtained by his efforts from new or existing customers. After 24 months of employment, he would be switched to purely commission-based employment. He would

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[1] Our summary of the relevant facts is based on the undisputed evidence presented on the summary judgment motion, except where otherwise noted.

receive "5% on first-run work shipped within 24 month following the first delivery, declining at 1% per year for the following two years, to a minimum of 3% for the life of the contract."

Once Jakiel procured an LTA, he was entitled to commissions on the products manufactured and delivered under the LTA "for the life of the contract." No further action on his part was necessary to entitle him to a commission. The LTAs were predictable in that the customer committed to purchase a certain amount of product over a set time period for a fixed price; the only flexibility for the customer was that it could determine when to receive and pay for the product, which in turn would affect the amount of commission payable to Jakiel, whether 5, 4 or 3 percent. For this reason, Swift-Cor's president and chief executive officer, Sam Longo, referred to Jakiel's commission entitlements as "annuities."

Jakiel's employment agreement also provided that it was "an 'at-will' employment agreement." It further provided: "Upon any termination of this agreement, full commissions will be paid as due on all commissionable purchase orders accepted and entered by Swift-Cor prior to the termination date."

Swift-Cor began experiencing severe financial difficulties and eventually decided to sell off its assets in order to pay its liabilities. Jakiel became aware of this in early 2012. Jakiel presented evidence in opposition to summary judgment that no one told him to stop working; he was exhorted to and did continue working with the expectation that he would receive commissions based on his work.

In late March 2012, Longo told Jakiel that Swift-Cor had sold its assets to Impresa, including its LTAs. Longo said that Swift-Cor would not profit from the LTAs, so it would not have

the funds to pay Jakiel commissions on the LTAs. Jakiel never received notice of Swift-Cor's sale of its assets to Impresa under Uniform Commercial Code section 6104, the Bulk Sales Act.

On April 9, 2012, Swift-Cor terminated Jakiel's employment.

On April 13, 2012, Swift-Cor entered into an Asset Purchase Agreement with Impresa. As a contingency of closing the purchase, Swift-Cor paid Jakiel and other sales employees all outstanding commissions earned up to the point of closing. The Asset Purchase Agreement expressly provided that outstanding commissions were a retained liability of Swift-Cor, not a liability of Impresa. Jakiel admitted, and the trial court found it was undisputed, that Jakiel was paid the full commissions on all commissionable purchase orders accepted and entered by Swift-Cor prior to his termination date.

About the time Jakiel was terminated, he spoke briefly with Impresa's chief executive officer, Jim Dauw. Jakiel indicated to Dauw that he was not interested in employment with Impresa. Impresa never entered into an employment agreement with Jakiel. Neither Dauw nor any other representative of Impresa made any representations to Jakiel regarding continuing his sales efforts on behalf of Impresa.

Since Impresa purchased Swift-Cor's assets, it has not entered into any contracts which were procured due to Jakiel's sales activities. With respect to one customer previously procured by Jakiel, Goodrich Landing Gear, Impresa approved an extension of the contract, which was set to expire at the end of 2012, and Impresa subsequently manufactured and shipped products to the customer. Dauw knew Jakiel had been working on obtaining LTAs and specifically an extension of the LTA with

Goodrich Landing Gear while Impresa and Swift-Cor were negotiating and finalizing the Asset Purchase Agreement. Dauw knew Jakiel was a commissioned sales person, and Jakiel would not be continuing his employment in that capacity after the Asset Purchase Agreement closed. Dauw never told Jakiel "that there was no point to Jakiel continuing his work attempting to procure LTAs."

PROCEDURAL BACKGROUND

Jakiel filed this action against Impresa and Swift-Cor on October 9, 2012, alleging causes of action for breach of contract, interference with contract, interference with prospective economic advantage, fraud, and failure to pay wages.[2] The breach of contract cause of action against Impresa alleged that under Uniform Commercial Code section 6107, subdivision (a), of the Bulk Sales Act, Impresa owed Jakiel the same contractual duties and obligations that Swift-Cor owed him. Impresa allegedly breached those contractual duties and obligations by failing to pay Jakiel the commissions he was owed under the LTAs he procured.

The cause of action for interference with contract alleged Impresa interfered with Jakiel's employment agreement with Swift-Cor by purchasing Swift-Cor's assets, "thus denying Swift-Cor . . . the proceeds from the [LTAs] with which Swift-Cor could pay Jakiel's commissions on the [LTAs]." The cause of action for interference with prospective economic advantage alleged

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[2] Swift-Cor did not file an answer to the complaint and its default was entered.

Impresa's purchase of Swift-Cor's assets was done intentionally for the purpose of causing Swift-Cor to breach the employment agreement with Jakiel.

The fraud cause of action alleged that Dauw encouraged Jakiel to continue working on procuring LTAs despite knowing that Impresa was only going to purchase Swift-Cor's assets and not its liabilities, and after the purchase was completed, neither Impresa nor Swift-Cor was going to pay Jakiel commissions on the LTAs. Jakiel alleged neither Swift-Cor nor Impresa informed him that they did not intend to pay him for work after the sale was consummated. The cause of action for failure to pay wages alleged that Impresa failed to pay Jakiel the commissions he was owed in violation of Labor Code section 204. Jakiel also sought attorney's fees pursuant to Labor Code section 218.5.

Impresa moved for summary judgment. The trial court granted the motion, and judgment was entered on December 11, 2014. The trial court found the Bulk Sales Act inapplicable. It found no interference with contract or prospective economic advantage, in that the Asset Purchase Agreement was permitted under the Uniform Commercial Code. The court found no triable issue of fact on the fraud claim and no merit to the cause of action for failure to pay wages, which was derivative of the other causes of action. Jakiel timely filed his notice of appeal on January 6, 2015.

On February 11, 2015, Impresa filed a motion for attorney's fees under Labor Code section 218.5. It claimed that under the version of this statute in effect at the time Jakiel's lawsuit was filed, it was entitled to attorney's fees as the prevailing party. Impresa requested that the trial court award it all of the attorney's fees it incurred in defending the action.

On March 18, 2015, the trial court granted the motion. It found the prior version of Labor Code section 218.5 applied, because there was no language in the amended statute indicating that it was intended to apply retrospectively. Under the version in effect at the time the lawsuit was filed, which the court applied, Impresa was entitled to attorney's fees. The court also found that attorney's fees could not be "pro-rated" or allocated between work performed on Jakiel's Labor Code claim (to which the attorney's fee provision applied) and work performed on the other four causes of action, entitling Impresa to the entire amount requested, or $129,344.81. Jakiel filed a notice of appeal from the order.[3]

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[3] Notice of entry of the order awarding fees was served by mail by Impresa on March 24, 2015. Jakiel's notice of appeal was file-stamped May 27, 2015, 64 days later. On November 12, 2015, we issued an order to show cause stating that it appeared the notice of appeal was untimely and giving counsel the opportunity to show cause why this appeal should not be dismissed. Jakiel's counsel filed a response; Impresa's counsel did not. On December 17, 2015, we issued an order discharging the order to show cause and returning the case to active status. Jakiel's response to the OSC and accompanying declaration of counsel adequately establishes the timeliness of the filing of the notice of appeal. Jakiel's counsel transmitted the notice of appeal to the superior court by express mail on May 23, which means it would ordinarily have been received by the clerk's office on May 26. The fact that it was not file-stamped until the next day, May 27, does not deprive this court of jurisdiction in light of counsel's declaration setting forth sufficient facts to establish that the notice was received on May 26. (See Cal. Rules of Court, rule 8.25(b)(1); *Pacific Southwest Airlines v. Dowty-Rotol, Ltd.* (1983) 144 Cal.App.3d 491, 493; accord, *Montgomery Ward & Co., Inc. v. Imperial Casualty & Indemnity Co.* (2000) 81 Cal.App.4th

DISCUSSION

A. *Standard of Review*

Summary judgment is proper if there is no question of fact to be tried and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 420.) To be entitled to summary judgment, a moving defendant may show that one or more elements of each cause of action cannot be established or that there is a complete defense to each cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.)

Once the moving defendant has met this burden, the burden shifts to the plaintiff to show that a triable issue of fact exists as to a cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) "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*, at p. 850, fn. omitted; *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 574.)

On appeal, we exercise our independent judgment in determining whether there are any triable issues of material fact

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356, 372, fn. 19 [proof by declaration that notice of appeal stamped filed on February 18 was actually received in superior court mail room on February 17]; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) § 3:134.)

and whether the moving party is entitled to judgment as a matter of law. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Travelers Property Casualty Co. of America v. Superior Court*, *supra*, 215 Cal.App.4th at p. 574.)

B. *Breach of Contract and the Bulk Sales Act*

It is undisputed that there was no contract between Jakiel and Impresa. The parties agree that Jakiel's claim for breach of contract hinges upon the applicability of the notice provisions of the Bulk Sales Act.

Under the Bulk Sales Act, a "'[b]ulk sale'" includes "a sale not in the ordinary course of the seller's business of more than half the seller's inventory and equipment, as measured by value on the date of the bulk-sale agreement." (Cal. U. Com. Code, § 6102, subd. (a)(3)(ii).) The act requires the buyer to "[g]ive notice of the bulk sale in accordance with Section 6105" of the Uniform Commercial Code. (*Id*., § 6104, subd. (b).)

Section 6107, subdivision (a), of the Uniform Commercial Code provides that with certain exceptions not applicable here, "a buyer who fails to comply with the requirements of Section 6104 with respect to a claimant is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied." Subdivision (g) of this section provides that "[n]o action may be brought under subdivision (a) by or on behalf of a claimant whose claim is unliquidated or contingent." (Cal. U. Com. Code, § 6107, subd. (g).) A "'claimant'" is defined in part as "a person holding a claim incurred in the seller's business other than any of the following: [¶] . . . An unsecured and unmatured claim for employment compensation and benefits, including commissions

and vacation, severance, and sick-leave pay. . . ." (Cal. U. Com. Code, § 6102, subd. (a)(5)(i).)

In finding that the Bulk Sales Act did not apply, the court first noted that Jakiel did not "address the argument that his claims are for 'commissions.' There is no triable issue of fact on that point. [Jakiel] is not a 'claimant' under the Bulk Sales Act pursuant to [Uniform Commercial Code] section 6102[, subdivision (a)](5), as his claim for damages is based on unpaid commissions."

The court then addressed the question whether the Bulk Sales Act was inapplicable because Jakiel's claims were "'unliquidated or contingent'" within the meaning of subdivision (g) of section 6107 of the Uniform Commercial Code. The court concluded that even though the LTAs contained long term commitments as to customer purchases, the amount and timing of the customers' purchase orders determined the actual amount of commissions due, and Jakiel "was unable to state a specific amount of damages in his complaint." Therefore, the court concluded, his claim was "both unliquidated and contingent as a matter of law."

As he did below, Jakiel focuses on the "unliquidated or contingent" aspect of the trial court's ruling. In order for the Uniform Commercial Code section 6107, subdivision (a), to apply, however, both aspects must be present: Jakiel must be a claimant, and his claim must not be unliquidated or contingent.

Under the terms of his employment agreement, Jakiel received declining commissions (from 5 to 3 percent) based on when, during the course of any given LTA, the buyer received and paid for the product. The testimony of his expert, Donald Jones, basically conceded this point; while the customer is obligated to

purchase a given number of parts over the life of the contract, the customer retains flexibility to determine when parts will be delivered and when it will pay for the parts. Thus, with respect to each LTA, at the date of separation, there remained unfulfilled obligations by Swift-Cor to provide parts as specified in the LTA, for which it would receive payments at the time those parts were actually delivered. There is no factual dispute that Jakiel's claim to commissions based on these unfilled portions of the LTAs was unsecured.

The evidence is also undisputed that the claim for commissions was unmatured at the date of separation. Jakiel conceded that all commissions due for parts booked and entered by Swift-Cor as of his termination date were paid to him. His entitlement to commissions based on future unshipped parts, however, was not yet mature, and would not become a matured claim until the purchase orders were booked and entered, which could take place at any time over the life of the LTA. (See *In re SNTL Corp.* (9th Cir.BAP 2007) 380 B.R. 204 [discussing distinction between unmatured and matured claims in the context of bankruptcy proceedings]; *Apex Leasing Co., Inc. v. Litke* (1916) 159 N.Y.S. 707 [173 A.D. 323], aff'd (1919) 225 N.Y. 625 [121 N.E. 853] [construing New York Bulk Sales Act's similar provisions excluding future contingent claims to bar a claimant from seeking relief under the Act for future unpaid rents].) Given these undisputed facts, the amount of commissions sought under his employment agreement cannot be deemed secured or matured, the twin requirements for a person to qualify as a claimant under the Bulk Sales Act.[4]

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[4] Because Jakiel does not qualify as a claimant under the Bulk Sales Act, we need not address whether he also did not

C. *Interference with Contract and Prospective Economic Advantage*

Ordinarily, the elements of a cause of action for interference with a contractual relationship are: "(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1148; accord, *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.) The elements of a cause of action for interference with prospective economic advantage are the same, but in addition, the plaintiff must plead and prove that the "defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A. Inc.* (1995) 11 Cal.4th 376, 393.)

As to Jakiel's causes of action for interference with contract and with prospective economic advantage, the trial court found "[t]here is no contention that Swift-C[o]r made a fraudulent conveyance of its assets to [Impresa]. There is no evidence that Impresa did not pay a fair price for the assets it purchased. [¶] Rather, the essence of the claims for interference with contract and prospective economic advantage is that Impresa could not purchase the assets of Swift-C[o]r without assuming an obligation to pay commissions, if any, to which Jakiel may have

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qualify under the Act because his claims were unliquidated and contingent, as the trial court found.

been entitled, had the asset purchase not occurred. Viewed another way, the contention is that Impresa and Swift-Cor were not free to enter into an agreement whereby Swift-Cor could retain the obligation to pay any future commissions due to Jakiel. The theory is that the purchase, in and of itself, was tortious. Under the Uniform Commercial Code sections cited above, however, it is clear that a purchaser of assets may avoid payment of debts of the seller. Jakiel has cited no authority to convince the [c]ourt that Impresa was obligated to assume the obligation, if any, to pay continued commissions to Jakiel."

On appeal, Jakiel argues that Impresa's purchase of the business, knowing that there existed an employment agreement between Swift-Cor and Jakiel, constitutes interference with the contractual relationship between Swift-Cor and Jakiel. Jakiel contends that each element of the tort of intentional interference with contract, prospective or otherwise, was established by undisputed facts: 1) there was a written contract; 2) Impresa knew of the contract; 3) Impresa conducted an "'assets only'" purchase because it "did not want to pay commissions," knowing Swift-Cor would not pay commissions: and 4) Jakiel was damaged as he did not receive commissions.

We agree with the trial court that Jakiel's causes of action for interference with contract and prospective business relations fail as a matter of law. Jakiel conceded at oral argument that there is no evidence that Impresa paid less than full value for the purchase of the assets or that it was a fraudulent transfer. There also is no evidence that Impresa was an alter-ego of Swift-Cor. Given that Impresa paid fair value for the assets, including the LTAs negotiated by Jakiel at issue here, Impresa cannot have interfered with Swift-Cor's contractual obligations to Jakiel.

With the proceeds from the sale Swift-Cor remained able to meet its contractual obligations, if any, to Jakiel. That Swift-Cor may ultimately have not been able to pay all of its creditors, Jakiel included, or that Swift-Cor chose to pay other creditors before Jakiel, does not turn the act of purchasing the assets into tortious interference with Jakiel's contractual relations with his former employer. Jakiel cites to no law or principle which prohibited Impresa from negotiating and executing an assets only purchase of Swift-Cor. As we will discuss below, Impresa also cannot be held liable to Jakiel for fraud or violation of the Labor Code. There being no evidence of "some wrongfulness apart from the impact of [Impresa's] conduct on" Jakiel's prospective economic advantage, Impresa cannot be held liable for interference with prospective economic advantage. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 56.)

D. *Fraud*

Jakiel acknowledges that Impresa made no affirmative misrepresentations to him. Instead, Jakiel argues that his fraud cause of action was based on "[t]he suppression of that which is true, by one having knowledge or belief of the fact" (Civ. Code, § 1572, subd. 3). "By failing to tell Jakiel to not bother pursuing additional LTA's because Impresa would not pay him any commissions therefor[], Impresa omitted 'that which [was] true, by one having knowledge or belief of the fact.' As a result, it matters not that Impresa made no representation to Jakiel; it can be held to answer for fraud based upon its omission of a material fact."

"The elements of a claim for fraudulent concealment require the plaintiff to show that: '(1) the defendant . . . concealed

or suppressed a material fact, (2) the defendant [was] under a duty to disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citation.] The duty to disclose may be established where there is a confidential relationship between the parties, [the] defendant has made a representation which was likely to mislead due to the nondisclosure, there is active concealment of undisclosed matters, or one party has sole knowledge of or access to material facts and knows such facts are not known to or discoverable by the other party. [Citation.]" (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1130; accord, *Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 735, 738.)

Jakiel failed to identify any facts establishing that Impresa had a duty to disclose to him that it would not be retaining him as a commissioned salesperson or paying him commissions on previously obtained LTAs after it concluded its purchase of Swift-Cor's assets. Absent a duty to disclose, Impresa's nondisclosure of facts does not constitute fraudulent concealment. Moreover, Jakiel's claim that he was duped into continuing to pursue LTAs during the period that Swift-Cor was negotiating a deal with Impresa fails as a matter of law, since he was already contractually obligated to use his best efforts to perform his job for Swift-Cor. Jakiel's theory that he was, in effect, tricked into performing a preexisting contractual obligation, i.e., to continue to do his job at Swift-Cor, does not support a claim for fraud, as it

negates the necessary element of damages. (See, e.g., *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1185; see also *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 55-56.)

E. *Labor Code Section 204*

Labor Code section 204 governs payment of wages by an employer. Jakiel makes no argument with respect to his cause of action for violation of this section. Consequently, any claim of error as to this cause of action is forfeited. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125; see also *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 56.)

F. *Attorney's Fees*

Former Labor Code section 218.5, subdivision (a), provided that "[i]n any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." In 2013, the Legislature added the following sentence to the statute: "However, if the prevailing party in the court action is not an employee, attorney's fees and costs shall be awarded pursuant to this section only if the court finds that the employee brought the court action in bad faith." (Stats. 2013, ch. 142, § 1.)

The amendment became operative after the filing of the complaint but prior to judgment. The trial court concluded that the amendment did not apply retroactively, because there was no evidence of a legislative intent to make it retroactive. Accordingly, the court found Impresa to be entitled to recover all

of the attorney's fees Impresa incurred in defending this action, in the amount of $129,344.81.

Jakiel argues, as he did below, that "the amended [Labor Code s]ection 218.5 need not be applied 'retroactively' to give effect to the [L]egislature's policy decision to shield employees from an adverse attorneys fee award because an entitlement to attorneys fees only arises once a prevailing party establishes the same by winning the subject case. Logically, the law governing an attorneys fee award must be that present when the case is adjudicated and the award is sought. Until that happens, any right to attorneys fees remains effectively 'unliquidated.'"

The question of whether the amendment to Labor Code section 218.5 should be applied to cases pending at the time of its effective date was considered at length by the Court of Appeal in *USS-Posco Industries v. Case* (2016) 244 Cal.App.4th 197 (*USS-Posco Industries*). After conducting an extensive review of federal and California case law—and noting key differences between their two approaches to prospective versus retrospective application of changes to fee and cost statutes—the court concluded Labor Code section 218.5 must be given retrospective application. The court summarized the wealth of authority supporting this conclusion, commencing with the two California Supreme Court decisions which had applied newly enacted attorney fees and cost statutes to cases pending at the time the new statutes took effect: *Stockton Theaters, Inc. v. Palermo* (1956) 47 Cal.2d 469 [Code Civ. Proc., § 1035 adding recoverable costs on appeal applied to pending cases] (*Palermo*) and *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 931-932 [Code Civ. Proc., § 1021.5's "'private attorney

general'" attorney fee provisions applied to pending cases] (*Woodland Hills*).

As explained in *USS-Posco Industries,* "[f]or decades, the Courts of Appeal have cited *Palermo*, *Woodland Hills*, or both, for the proposition that they 'authoritatively held' that in the absence of express legislative intent to the contrary, 'a new statute authorizing an award of attorney fees' or a statute increasing or decreasing litigation costs, including attorneys' fees applies to actions pending at the time of enactment. (*California Housing Finance Agency v. E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508, 1512-1513 [44 Cal.Rptr.2d 591] [Health & Saf. Code, § 51205, amended during trial to provide for an award of attorney fees and costs to the prevailing party, applied.]; *American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1056-1057 [117 Cal.Rptr.2d 685] [most recent version of Code Civ. Proc., § 998, amended during appeal, governed award of expert fees in case]; *Heritage Engineering Construction, Inc. v. City of Industry* (1998) 65 Cal.App.4th 1435, 1439 [77 Cal.Rptr.2d 459] [applying the then-current version of Code Civ. Proc., § 998 to the case, which was pending on appeal when the 1997 amendment took effect]; *Mir v. Charter Suburban Hospital* (1994) 27 Cal.App.4th 1471, 1477–1478 [33 Cal.Rptr.2d 243] [Bus. & Prof. Code, § 809.9, which took effect after trial court judgment became final, allowed for award of fees incurred both before and after effective date of statute]; *ARA Living Centers - Pacific, Inc. v. Superior Court* (1993) 18 Cal.App.4th 1556, 1562 [23 Cal.Rptr.2d 224] [Welf. & Inst. Code, § 15657, amended during trial court proceedings to allow fees in elder abuse cases, applied]; *Wood*[*v. McGovern* (1985)] 167 Cal.App.3d 772, 774-776 [Code Civ. Proc., § 1021.4, allowing fees

against defendant who is convicted of a felony for the conduct giving rise to the civil suit, applies to suits pending when it became effective].)" (*USS-Posco Industries*, *supra*, 244 Cal.App.4th at pp. 220-221.)

Only where retroactive application of a fee statute is clearly prohibited by the language of the new statute or would work a clear injustice by imposing new and unforeseen liabilities on a party do courts decline to give it retroactive effect. (See *Woodland Hills*, *supra*, 23 Cal.3d at p. 931; *Andreini & Co. v. MacCorkle Ins. Service, Inc.* (2013) 219 Cal.App.4th 1396.)

Here there is no express statement of legislative intent in Labor Code section 218.5, or in its legislative history. The new statute does not impose a new burden on either party; rather it removes a burden from one party except in the special circumstance where bad faith conduct is shown. A long line of cases originating with *Palermo* had interpreted similar fee provisions to require retroactive effect. Since we must assume the Legislature was aware of this case law and the retrospective effect ordinarily given to statutes governing prevailing party fees (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7), we also must conclude the Legislature intended Labor Code section 218.5, subdivision (a), to be given retrospective effect. We therefore join *USS-Posco Industries* to hold the amendments to Labor Code section 218.5, subdivision (a), requiring a finding of bad faith before fees may be imposed against a non-prevailing employee, apply retrospectively to all cases pending at the time of its effective date.

Because the trial court did not apply the correct version of the statute, we reverse the order awarding Impresa its attorney's fees and remand to the trial court for the court to consider, upon

a new and timely fee motion, whether Impresa can establish the action was brought and maintained in bad faith within the meaning of amended Labor Code section 218.5, subdivision (a).

DISPOSITION

The judgment in case No. B261175 is affirmed. The order awarding attorney's fees in case No. B264508 is reversed and the matter is remanded for further proceedings in accordance with this opinion. Both parties are to bear their own costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.