Filed 5/17/17 Nicolosi v. Cooper CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

LINDA NICOLOSI, Plaintiff and Appellant, v. ANDREW L. COOPER, as Trustee, etc., Defendant and Respondent.	2d Civil No. B264459 (Super. Ct. No. 1456907) (Santa Barbara County)

Linda Nicolosi worked for George Cooper (George) as a live-in caregiver until his death on April 2, 2013. After George's death, Nicolosi filed a petition to contest the trust against Andrew Cooper (Andrew). Andrew is George's son and the trustee of the Cooper Trust. Among other claims, Nicolosi alleges that she is entitled to unpaid back wages. Following a court trial, the court awarded Nicolosi $80,933.75 in back wages and $64,000 in attorney fees. Nicolosi contends that she is entitled to more wages, more attorney fees, and prejudgment interest. We affirm.

BACKGROUND

Nicolosi began working for George as a cook in 2005. She agreed to work 25 hours per week at $20 per hour, for a total of $500 per week.

In 2009, Nicolosi moved into a guest house on George's ranch, where she lived rent-free. She assumed more duties including taking care of his animals, maintaining the ranch, driving George, and hiring other workers. George was mentally alert and capable of doing many physical tasks by himself until shortly before his death. Nicolosi's duties changed over time as his health declined and his needs changed.

George continued to pay Nicolosi $500 per week through the rest of her employment. There was no written agreement about her wage and hours, and no one kept records of her time. On a couple of occasions, Nicolosi raised concerns about whether her pay covered the additional hours she worked after moving to the ranch. George responded by assuring her that he would take care of her through his trust. On one occasion, he gave her a check for $10,000.

On August 12, 2013, Nicolosi filed a petition to contest the Cooper Trust. She challenged the removal of a $75,000 gift to her which had been included in a previous version of the trust. She also argued that she was entitled to payment in full of a mortgage on an Arizona residence that George helped her purchase. Lastly, she claimed she was entitled to $300,000 in back wages.

Before trial, Nicolosi withdrew her claims concerning the $75,000 gift and the mortgage. The parties proceeded to trial on the wage claim.

The trial court ruled in favor of Nicolosi, awarding her $80,933.75 for unpaid wages that accrued after August 13, 2010. The court found that Nicolosi worked 48-hour weeks and that 13 of those hours were to be paid at overtime rates. The court awarded Nicolosi $64,000 for attorney fees and denied prejudgment interest.

DISCUSSION

Back Wages

We review the trial court's factual determinations for substantial evidence. We view the record in the light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the court's findings. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) We defer to the trial court's determinations of credibility of the witnesses and the weight of the evidence. (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.)

Nicolosi contends there is no substantial evidence to support the trial court's finding that she worked 48 hours per week. She contends that because she was the only person with personal knowledge of her hours, the court erred when it rejected her testimony that she worked 65 hours per week. We disagree.

Nicolosi relies on cases in which the reviewing courts found substantial evidence to support findings that the plaintiffs worked the number of hours they claimed. (*Brewer v. Premier Golf Properties, LP* (2008) 168 Cal.App.4th 1243; *Bartholomew v. Heyman Properties* (1955) 132 Cal.App.2d Supp. 889.) The issue is not whether substantial evidence supports Nicolosi's claims, however, but whether substantial evidence supports the court's findings. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 545,

overruled on other grounds by *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

Substantial evidence supports the trial court's findings here. Several witnesses contradicted Nicolosi's claims, and the trial court could and did reject her testimony. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 67-68.) Andrew stated that he visited his father's ranch about once a week in 2010 and more frequently in later years. During those visits, he observed Nicolosi's activities on the ranch and discussed them with his father. Based on these observations, Andrew believed that her duties could be completed in 40 hours a week.

George's handyman, who worked on the ranch on Saturdays, stated that there were several occasions when George did not know Nicolosi's whereabouts and was unable to reach her. He also stated he observed Nicolosi inebriated at times. George's bookkeeper suspected that Nicolosi had an alcohol problem and recalled instances when Nicolosi was unable to wake up and take care of George. Nicolosi admitted to having a drinking problem up until October 2011. She said that if she was unable to get to work, she would ask someone to cover for her.

In addition, there were other individuals who took over some of Nicolosi's work duties. In 2009, George hired a housekeeper. By 2010, she was at the ranch three days a week, and her duties included some of the same tasks as Nicolosi's, such as cooking for George. In 2012, George hired an agency that provided 24-hour care at his home until his death.

There is also evidence that Nicolosi spent significant amounts of time developing her own business raising alpacas. Andrew observed that Nicolosi was often taking care of her alpacas when he visited the ranch. George's bookkeeper stated

that Nicolosi told her that a part of the reason for starting the business was because "working for George wasn't a 24/7 job" and that she had a lot of free time. For these and other reasons, the trial court determined that it "cannot credit [Nicolosi's] testimony fully for several reasons."

Nicolosi also argues she was entitled to compensation for "on-call" hours under *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833 (*Mendiola*). In *Mendiola*, our Supreme Court held that security guards were entitled to compensation for "on-call" hours. (*Id*. at p. 837.) But *Mendiola* is distinguishable. In determining whether on-call hours constituted compensable work hours, the court stated that "'[t]he level of the employer's control over its employees . . . is determinative' in resolving the issue. [Citation.]" (*Id*. at p. 840.) There, the security guards were required to work on-call hours under a written contract, were required to live in trailers on-site and away from their regular homes, had to respond immediately and in uniform when contacted, could not trade on-call responsibilities easily, and were subject to other restrictions. (*Id*. at p. 841.)

Here, the existence of an intercom system in Nicolosi's room does not establish that she was entitled to compensation for on-call hours. Unlike *Mendiola*, there are no circumstances suggesting that George exercised control over Nicolosi. She was never required to live on the property; rather, George offered a place to stay rent-free, which she accepted. The intercom was installed in the bedroom for emergency situations. There is no evidence that George used it regularly, nor is there evidence that Nicolosi was obligated to respond to calls.

Statute of Limitations

The trial court found that a three-year statute of limitations applied to the wage claims. (Code Civ. Proc., § 338, subd. (a).) Nicolosi argues that the statute of limitations should be four years under the Unfair Competition Law (UCL). (Bus. & Prof. Code, § 17208.) She also contends that Andrew should be equitably estopped from asserting a statute of limitations defense. We reject these claims.

An action under the UCL requires the existence of an "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code, § 17200.) Nicolosi argues that George's promise to include her in his trust constitutes an unlawful, unfair or fraudulent business act under the UCL. But the UCL applies to businesses, and its purpose is to protect consumers and competitors "by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) A UCL cause of action is not intended to be "'an all-purpose substitute for a tort or contract action.' [Citation.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1150.) The case authorities cited by Nicolosi do not support her claim that the UCL applies to her wage dispute here.

Nicolosi argues that Andrew should be equitably estopped from asserting the statute of limitations defense. But she failed to raise this claim in the trial court. She contends that she did so by referring to an "equitable tolling" argument in her posttrial brief. Equitable tolling and equitable estoppel, however, are distinct doctrines. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383 (*Lantzy*) [tolling concerns with the point at which the limitations period begins to run and may be suspended; whereas

equitable estoppel concerns when the limitations period has already run and a party is prevented from asserting the statute of limitations defense].) Arguments not raised below are forfeited. (*Estate of Westerman* (1968) 68 Cal.2d 267, 279.) In any event, the claim is without merit because there is insufficient evidence of wrongful conduct that induced her to delay filing of her suit. (See *Lantzy*, at p. 383.)

Attorney Fees

Nicolosi requested approximately $130,000 in attorney fees. The trial court awarded $64,000. Nicolosi contends the trial court erred in apportioning fees between Nicolosi's trust and wage claims. We disagree.

We review a trial court's calculation of attorney fees for abuse of discretion. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 315.) The trial court's award will be reversed only if its decision falls outside the bounds of reason and it is arbitrary, capricious or patently absurd. (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 615-616.)

Under the lodestar method, the trial court determines the fee award based on the hours reasonably spent multiplied by a reasonable hourly rate. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Where a plaintiff alleges multiple causes of action, the trial court may adjust the fee award to compensate for the time spent on only the successful legal theories. (*Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 249-250.)

The court based its calculations on detailed documentation provided by counsel, which included billing statements and a record of hours. The court explained that Nicolosi was not entitled to the full amount requested because a

"substantial component" of the requested fees pertained to time spent on the trust and mortgage claims. It determined that the "vast majority" of the hours incurred prior to the mandatory settlement conference were devoted to the trust and mortgage claims. The court reviewed time records before and after the settlement conference, "marking off the hours." It determined that 182 hours were spent on the wage claims, which were "more than I would have thought that would be necessary." The court then applied counsel's hourly rate of $350 to reach its award of $64,000. It cannot be said that the court exceeded the bounds of reason, or that its award is arbitrary, capricious or patently absurd. There is no abuse of discretion.

Prejudgment Interest

The trial court denied prejudgment interest because the damages for back wages were not readily ascertainable. Nicolosi contends the trial court abused its discretion by denying prejudgment interest. We disagree.

Civil Code section 3287, subdivision (a) provides: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereon from that day . . . ." This section looks to the certainty of damages, rather than the defendant's liability, in determining whether prejudgment interest is appropriate. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958 (*Wisper*).)

Prejudgment interest is not appropriate where damages "cannot be resolved except by verdict or judgment." (*Wisper*, *supra*, 49 Cal.App.4th at p. 960.) Prejudgment interest is generally only authorized where "there is essentially no

dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage." (*Esgro Central, Inc. v. General Ins. Co.* (1971) 20 Cal.App.3d 1054, 1060.)

Here, the damages could not be calculated with certainty. The parties disputed Nicolosi's hours, so damages could not be resolved until the conclusion of trial. The court ultimately had to "use its best judgment to figure out what seemed reasonable" based on the evidence. The trial court found that Nicolosi worked only a fraction of the hours claimed. Given the uncertainty in damages, the court did not abuse its discretion in denying prejudgment interest.[1]

DISPOSITION

The judgment is affirmed. Andrew shall recover costs on appeal.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

---

[1] Nicolosi also claims she was entitled to prejudgment interest under Labor Code section 218.6. She raises this argument for the first time on appeal. The issue is forfeited. (*Estate of Westerman*, *supra*, 68 Cal.2d at p. 279.)

Jed Beebe, Judge

Superior Court County of Santa Barbara

Law Offices of Frank G. Blundo, Jr., and Frank G. Blundo, Jr., for Plaintiff and Appellant.

Andre, Morris & Buttery and Gordon E. Bosserman, for Defendant and Respondent.