Filed 8/2/17 Ybay v. Rsui Group CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THANE YBAY, Plaintiff and Appellant, v. RSUI GROUP INC., et al., Defendants and Respondents.	B265265 Los Angeles County Super. Ct. No. BC486287

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael B. Harwin, Judge. Affirmed.

Law Offices of Jonathan J. Delshad and Jonathan J. Delshad for Plaintiff and Appellant.

Gordon & Rees, Stephanie P. Alexander and Matthew G. Kleiner for Defendants and Respondents.

INTRODUCTION

Plaintiff Thane Ybay (plaintiff) appeals from the judgment entered in favor of his former employer, RSUI Group, Inc. and RSUI Indemnity Company (collectively, RSUI). After RSUI terminated plaintiff's employment, he sued RSUI under the Fair Employment and Housing Act (Gov. Code, § 12960 et seq.) (FEHA) alleging disability discrimination, failure to provide a reasonable accommodation, and failure to engage in an interactive process.

Plaintiff appealed from the judgment, the denial of his motion for judgment notwithstanding the verdict, and a post-judgment order regarding his motion to tax costs. We subsequently consolidated the appeals for all purposes. We lack jurisdiction to consider plaintiff's appeal from the judgment because plaintiff's notice of appeal was untimely. We also lack jurisdiction to consider plaintiff's appeal from the challenged post-judgment order because it is not an appealable order within the meaning of Code of Civil Procedure section 904.1.[1] With respect to plaintiff's timely appeal from the denial of his motion for JNOV, we conclude substantial evidence supports the jury's verdict. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

1. Plaintiff's employment with RSUI

In 1992, plaintiff started working at RSUI in the excess casualty underwriting department. Initially, plaintiff worked as

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[1] Further undesignated section references are to the Code of Civil Procedure.

a technical assistant to underwriter Sheril Tyre. Plaintiff received positive performance reviews and was promoted to the position of underwriting assistant and then to associate underwriter. At some point during 2003 or 2004, plaintiff began taking a prescription drug, Xanax, on an "as needed" basis. Tyre was aware plaintiff had a bottle of the medication but did not know why or how often he took it.

2. Plaintiff's documented work performance issues

In late 2006 and early 2007, Tyre began to notice plaintiff was having work performance problems. She noticed during this time that plaintiff was spending a great deal of time socializing at work, which contributed to his inability to complete his work. Tyre repeatedly told plaintiff to sit at his desk and do his work. She also noticed that plaintiff had difficulty focusing on his work and often made little progress. Although Tyre asked plaintiff whether he was having any problems, he assured her he was fine.

Plaintiff's poor performance came to a head in April 2007. After Tyre returned to the office following a vacation, she discovered a major loss in her policy renewals due to plaintiff's failure to do his job while she was out of the office. The excess casualty department head, Mary Cronin, later told plaintiff he was socializing too much at work and, as a result, was not getting his work done in a timely manner.

Ultimately, Tyre became so frustrated with plaintiff that she asked Cronin to remove plaintiff from her team. In 2008, plaintiff was reassigned to work with underwriters Tom Lee and Marty Newlin. Newlin and Lee repeatedly complained to Cronin that plaintiff was not getting his work done in a timely fashion. Like Tyre, Newlin observed plaintiff was often absent from his desk. Cronin met with plaintiff regularly and advised him that

Newlin and Lee were not happy with his work. In early 2009, Newlin recommended that Cronin fire plaintiff due to his poor job performance. Instead, however, Cronin opted to demote plaintiff from associate underwriter to underwriting assistant.

Plaintiff was unhappy about the demotion and met with Cronin and Dwayne Augustus, the human resources manager in the office. Augustus later offered plaintiff the opportunity to transfer to a different department where he might be more successful, but plaintiff declined.

In December 2009, due mainly to the fact that Newlin and Lee were still dissatisfied with plaintiff's work, Cronin reassigned plaintiff to work with underwriter Michelle Downie. Cronin told plaintiff that this new assignment was his last chance to improve his performance. Downie was also unhappy with plaintiff's work, and she complained to Cronin about his performance more than 20 times over the next year and a half.

Throughout this period, Cronin and plaintiff's supervisors told him on more than 50 occasions that he needed to listen to directions and prioritize his workload. Cronin offered plaintiff assistance to learn the company's new software system and sent plaintiff to a seminar to help him understand how to prioritize his work and be more productive. At one point, Cronin even reduced his responsibilities, with the hope that plaintiff could complete his remaining work in a timely fashion.

3. Plaintiff's performance improvement plan

Plaintiff's problems continued and, in August 2011, Cronin placed plaintiff on a performance improvement plan. Plaintiff understood that if he did not improve his work performance during the course of the plan, his employment could be terminated. As part of the plan, plaintiff met frequently

(sometimes daily) with Cronin, Augustus and Downie. In an effort to help plaintiff improve his productivity, Cronin and/or Downie would meet with plaintiff at the beginning of the week and give him a list of tasks he was required to complete during the coming week. At the end of each week, they would meet again to assess plaintiff's work. Halfway through the plan, Cronin met with plaintiff to advise him that he was not meeting his goals.

4. Plaintiff's meetings with senior human resources staff

The day after plaintiff was placed on the performance improvement plan, plaintiff met with Kathy Aberson, the senior vice president of administration for RSUI.[2] Plaintiff knew Aberson because she hired him in 1992. Aberson observed that plaintiff was upset, and he told her he did not want to lose his job but was unsure how he could help his situation. Aberson suggested plaintiff speak with Tyre, as the two were close friends and plaintiff had worked for Tyre for many years.

The following day, plaintiff met with Aberson again. He told Aberson that he wondered whether medication he was taking might be impacting his work and had decided to see a physician. Aberson supported the plan and provided him with the phone number for the employee assistance program, which could provide him with counseling.

Aberson documented her conversations with plaintiff in a memo which she sent to Sheree Knowles, RSUI's vice president of

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[2] Although Aberson then worked in RSUI's headquarters in Atlanta, she was in California and visited plaintiff's workplace on a routine trip.

human resources, in late September 2011.[3] Aberson received no further information and had no additional involvement in plaintiff's situation after sending the memo.

5. Plaintiff's doctor visits

Plaintiff eventually saw a psychiatrist, Dr. Alan Schneider. Dr. Schneider's records did not indicate that he recommended or requested a leave of absence from work for plaintiff, and did not indicate that Dr. Schneider diagnosed him as mentally disabled.

Plaintiff later saw a psychologist, Dr. Hanna Abner-Kohan. She first saw plaintiff in mid-October 2011 and diagnosed him with a moderate degree of major depressive disorder. Dr. Abner-Kohan did not tell plaintiff he was mentally disabled prior to his employment termination, and her records reflect she did not diagnose him as mentally disabled prior to his employment termination.

Plaintiff did not tell anyone at RSUI what either doctor told him and did not provide Augustus, or anyone else at RSUI, with a doctor's note or assessment regarding any disability. Plaintiff never told anyone at RSUI that he had been diagnosed with a mental illness, was mentally disabled, was taking medication that impacted his work performance, or that he needed an accommodation. When plaintiff was at the office, he was always well-dressed, social and appeared to be happy.

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[3] Many of the statements contained in the memo were contradicted by the trial testimony of plaintiff and Tyre. Aberson acknowledged she may have been mistaken in some of her recollections, and admitted she drafted the memo at least three weeks after the meetings with plaintiff took place.

6. Plaintiff's employment termination

RSUI terminated plaintiff's employment on November 18, 2011, because he was unable to complete his work in a timely manner and because he failed to perform his tasks as directed by his supervising underwriters. By the time of his termination, plaintiff had worked for four different underwriters, each of whom said they could not work with plaintiff.

RSUI never offered plaintiff a reasonable accommodation or engaged in an interactive process regarding a disability at any time during his employment.

7. The complaint, trial, and post-trial proceedings

Plaintiff filed the operative first amended complaint on August 11, 2014. Plaintiff generally asserted that during the course of his employment, he was diagnosed with mental disabilities including anxiety, depression, and somatization, for which he was being medicated and treated by a physician. As pertinent here, plaintiff asserted three causes of action relating to his alleged disability: disparate treatment (Gov. Code, § 12940, subd. (a)), failure to provide reasonable accommodation (Gov. Code, § 12940, subd. (m)), and failure to engage in an interactive process (Gov. Code, § 12940, subd. (o)). The case was tried before a jury in February 2015, and the jury found in favor of RSUI. In its special verdict, the jury found RSUI was plaintiff's employer, and plaintiff had a mental disability that limited him in performing the essential functions of his job with RSUI. However, the jury also found RSUI did not know plaintiff had a mental disability.

The court entered judgment on the jury's verdict on March 11, 2015. Counsel for RSUI served notice of entry of the

judgment on March 19, 2015. Plaintiff subsequently filed a notice of intent and motion for new trial on March 24, 2015. Plaintiff also filed a notice of intent and motion for judgment notwithstanding the verdict (JNOV) on April 3, 2015. Both motions were valid and timely filed. (§§ 629, subd. (b), & 659, subd. (a)(2).) The court heard plaintiff's post-trial motions on May 12, 2015. On June 2, 2015, the court entered orders denying the motion for new trial and the motion for JNOV.

On March 27, 2015, RSUI filed a memorandum of costs seeking costs in the amount of $160,541.30. The largest category, which comprised more than $108,000 of the costs requested by RSUI, related to expert witness fees. Plaintiff filed a motion to tax costs on May 14, 2015. Plaintiff argued RSUI was not entitled to recover fees and costs under FEHA and, in any event, RSUI's settlement offer was defective and as such did not entitle RSUI to recover its costs and fees under section 998. On July 21, 2015, the court held a hearing on the motion to tax costs. According to the court's minute order, the court found RSUI's settlement offer was valid and then "[took] the matter under submission as to the costs."

8. Plaintiff's appeals

On June 26, 2015, plaintiff filed a notice of appeal challenging the judgment entered on March 11, 2015 and the order denying JNOV entered June 2, 2015.

On August 5, 2015, plaintiff filed a second notice of appeal, this time challenging the court's July 21, 2015 minute order. The notice of appeal designates the order appealed as follows: "7/21/2015 – Tax Costs hearing date order not yet entered." We consolidated the appeals for all purposes on March 3, 2016.

DISCUSSION

1. A timely and valid notice of appeal is required to confer jurisdiction on the Court of Appeal.

" 'It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.' [Citations.]" (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) " 'The primary statutory basis for appealability in civil matters is limited to the judgments and orders described in section 904.1 of the Code of Civil Procedure, which essentially codifies the "one final judgment rule" and provides that only final judgments are appealable. The one final judgment rule is based on the theory that piecemeal appeals are oppressive and costly, and that optimal appellate review is achieved by allowing appeals only after the entire action is resolved in the trial court. Ordinarily, there can be only one final judgment in an action and that judgment must dispose of all the causes of action pending between the parties. [Citation.]' [Citation.]" (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1365-1366.)

We "must raise the issue [of appealability] on [our] own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126.) Plainly, "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal." (*Ibid.*; see also *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 ["A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or

(2) an appealable judgment"].) Strict compliance with section 904.1 is required.[4]

2. Plaintiff's appeal from the judgment is untimely.

On June 26, 2015, plaintiff filed a notice of appeal from the judgment after a jury verdict, which is appealable under section 904.1(a)(1). To the extent the notice of appeal challenges the judgment, it is untimely.

The deadlines to file a notice of appeal are set forth in the California Rules of Court.[5]

Rule 8.104(a)(1) provides, in pertinent part:

"Unless a statute, rule 8.108, or rule 8.702 provides otherwise, a notice of appeal must be filed on or before the earliest of:

"[¶] . . . [¶]

"(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled, 'Notice of Entry' of judgment or a filed endorsed copy of the judgment, accompanied by proof of service . . . ."

Here, RSUI served plaintiff with notice of entry of judgment on March 19, 2015. Accordingly, unless an exception applies, plaintiff's notice of appeal from the judgment was due 60 days later, on May 18, 2015. Plaintiff filed the notice of appeal challenging the judgment on June 26, 2015.

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[4] We requested and received supplemental letter briefs from the parties regarding appealability. (Gov. Code, § 68081.)

[5] All further rule citations are to the California Rules of Court.

As plaintiff correctly points out, the filing of valid post-trial motions operates to extend the time to appeal. Rule 8.108(b) provides, for example:

"If any party serves and files a valid notice of intention to move for a new trial, the following extensions of time apply:

(1) If the motion for a new trial is denied, the time to appeal from the judgment is extended for all parties until the earliest of:

(A) 30 days after the superior court clerk or a party serves an order denying the motion or a notice of entry of that order;

(B) 30 days after denial of the motion by operation of law; or

(C) 180 days after entry of judgment."

Rule 8.108(d) provides similar extensions of time where a valid motion for JNOV is filed. Accordingly, because plaintiff filed valid motions for new trial and JNOV, rule 8.108 extends plaintiff's time to file his notice of appeal.

If rule 8.108(b)(1)(A) applies, plaintiff's notice of appeal is timely. Although the record does not reflect whether the clerk or a party served plaintiff with copies of the orders denying his post-trial motions, plaintiff filed his notice of appeal on June 26, 2015. Because June 26 is less than 30 days after the court entered those orders on June 2, plaintiff plainly filed his notice of appeal within the 30-day time period provided by rule 8.108(b)(1)(A). However, consistent with rule 8.108(b), we must determine whether an earlier deadline might apply. After considering the timing of the court's ruling on the motions for new trial and JNOV, we conclude that rule 8.108(b)(1)(B) provides the operative extension in this case.

The trial court's jurisdiction to rule on a motion for new trial is governed by section 660, which provides, in pertinent part:

"Except as otherwise provided in Section 12a of this code, the power of the court to rule on a motion for a new trial shall expire 60 days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to Section 664.5 or 60 days from and after service on the moving party by any party of written notice of the entry of the judgment, whichever is earlier, or if such notice has not theretofore been given, then 60 days after filing of the first notice of intention to move for a new trial. If such motion is not determined within said period of 60 days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court."

Section 629, subdivision (b), provides that "[t]he power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial. If a motion for judgment notwithstanding the verdict is not determined before that date, the effect shall be a denial of that motion without further order of the court."

Here, as noted, RSUI served plaintiff with notice of entry of judgment on March 19, 2015. Thus, the court's jurisdiction to rule on plaintiff's post-trial motions continued for 60 days, until May 18, 2015.[6] Because the court did not enter its order denying the motion for new trial and the motion for JNOV until June 2,

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[6] The court orally denied plaintiff's post-trial motions at the conclusion of the May 12, 2015 hearing. The parties did not, however, waive notice of the court's ruling.

2015, the motions were denied by operation of law on May 18, 2015. Under rule 8.108(b)(1)(B), then, plaintiff was required to file his notice of appeal from the judgment within 30 days, no later than June 17, 2015. (See *Millsap v. Hooper* (1949) 34 Cal.2d 192, 194 ["The 30 day period of extension [provided by rule 8.108] must . . . be calculated from the date of denial of the motion by operation of law, and if notice of appeal was filed after the expiration of that period, the appeal must be dismissed"].) Here, plaintiff did not file his notice of appeal from the judgment until June 26, 2015, and it is therefore untimely.

In a letter brief submitted at our request, plaintiff asserts section 1013[7] operated here to extend the court's jurisdiction to rule on post-trial motions beyond the 60 days provided in section 660. More particularly, he contends "no binding precedent on this court [determines] whether the language in [section] 1013 applies to 'any right or duty to act' as the statute plainly states, or if the statute applies to 'any right or duty [*of the person served by mail*] to act' as some other California district courts [*sic*] have suggested . . . ." We disagree. (See *Kahn v. Smith* (1943) 23 Cal.2d 12, 15, overruled in part on another point by *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 371 [holding extension provided by section 1013 does not extend trial court's

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[7] Section 1013 concerns the service of notices and the filing and service of other papers by mail, and provides, in pertinent part: "Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California, ..." (§ 1013, subd. (a).)

jurisdiction to rule on a motion for new trial].) "Where the precise question has been before the courts as to whether or not the provisions of section 1013 of the Code of Civil Procedure extended the 60-day period within which the court must rule upon a motion for a new trial where notice of entry of judgment was served by mail, it was held that section 1013 was not applicable to extend such period." (*Meskell v. Culver City Unified School Dist.* (1970) 12 Cal.App.3d 815, 823 [citing *Kahn v. Smith, supra*]; accord *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc.* (2000) 85 Cal.App.4th 1042, 1048 (*Westrec*).) We decline plaintiff's invitation to depart from this well-established precedent. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Our recent opinion in *Kahn v. The Dewey Group* (2015) 240 Cal.App.4th 227 (*Kahn*), to which plaintiff directs our attention, does not compel—or even suggest—a different result. In that case, we considered whether section 1010.6, a provision similar to section 1013 addressing electronic service, operated to extend the 15-day time to file a memorandum of costs provided by rule 3.1700(a)(1)[8] for the party serving (as opposed to the party being served with) notice of entry of judgment. (*Id.* at pp. 234-235.) We acknowledged that *Westrec, supra*, concluded section 1013 does not extend a trial court's time to rule on a motion for new trial. (*Id.* at pp. 235-236.) Addressing whether section 1010.6 operated to extend a party's time to file a cost memorandum—as opposed to the court's jurisdiction to rule on a motion for new trial—we

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[8] Rule 3.1700(a)(1) provides in relevant part: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after . . . the date of service of written notice of entry of judgment or dismissal . . . ."

then stated, "*Westrec* does not control our analysis in this case. Whatever the Legislature may have intended when it enacted section 1013–an issue we do not reach–the question before us is section 1010.6, not section 1013." (*Id*. at p. 236.) Inasmuch as we explicitly distinguished *Westrec* and the statute at issue here, we find our opinion in *Kahn* inapposite.

In sum, plaintiff failed to perfect a timely appeal from the judgment. We therefore lack jurisdiction to consider plaintiff's arguments regarding instructional error and the special verdict form.

3. The post-trial order regarding the validity of RSUI's settlement offer is not an appealable order.

As noted, plaintiff filed a second notice of appeal on August 5, 2015, purporting to challenge a minute order issued by the court on July 21, 2015, in connection with the hearing on the motion to tax costs. According to the minute order, on that day the court held a hearing on plaintiff's motion to tax costs, found RSUI's settlement offer was valid, and took "the matter under submission as to the costs."[9]

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[9] In light of the court's explicit reservation of the costs issue, as well as the absence of any other relevant evidence in the appellate record, we reject plaintiff's assertions that "[t]he trial court issued an order denying Appellant's motion to tax costs at the hearing," and "the motion to tax costs was denied." Further, in our request for supplemental briefing we directed plaintiff to augment the record to include a copy of the court's subsequent order regarding the motion to tax costs and he has not done so. We also invited briefing on the impact of the court's subsequent order on the pending appeal. In response, plaintiff stated he "is not aware of any ruling or final order on the amount of the costs."

Section 904.1, subdivision (a)(2), provides that an appeal may be taken "[f]rom an order made after a judgment made appealable by paragraph (1) [i.e., a final judgment]." "Despite the inclusive language of Code of Civil Procedure section 904.1, subdivision (b), not every postjudgment order that follows a final appealable judgment is appealable. To be appealable, a postjudgment order must satisfy two additional requirements." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651 (*Lakin*); *In re Marriage of Olson* (2015) 238 Cal.App.4th 1458, 1462.) "The first requirement . . . is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment." (*Lakin*, at p. 651.) This requirement is plainly satisfied in this case, as the validity of RSUI's settlement offer was not at issue in plaintiff's disability discrimination case. "The second requirement . . . is that 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' " (*Id*. at pp. 651-652.) This requirement is plainly lacking because the court's July 21, 2015 order did not affect the judgment, as it did not resolve the cost issue in its entirety.

Accordingly, the July 21, 2015 order is not appealable and we lack jurisdiction to consider plaintiff's arguments regarding the validity of the settlement offer.

4. The denial of the motion for judgment notwithstanding the verdict was proper.

Finally, plaintiff contends the court erred in denying his motion for judgment notwithstanding the verdict. Although plaintiff's notice of appeal is arguably defective, we construe the notice of appeal in favor of its sufficiency and address the merits of plaintiff's challenge. On that point, we conclude the jury's

verdict is supported by substantial evidence and therefore affirm the judgment.

4.1. Plaintiff perfected an appeal from the denial of the motion for judgment notwithstanding the verdict.

A direct appeal may be taken from an order denying a motion for judgment notwithstanding the verdict. (§ 904.1, subd. (a)(4); *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

With respect to our jurisdiction to review this challenge, we note that the notice of appeal filed June 26, 2015, purports to appeal from the court's June 2, 2015 order denying plaintiff's motion for JNOV. As explained *ante*, however, the June 2, 2015 order is void because the court failed to rule on the motion for JNOV within the jurisdictional time frame set forth in sections 629 and 660.[10] (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101 ["The time limits of section 660 are mandatory and jurisdictional, and an order made after the 60-day period purporting to rule on a motion for new trial is in excess of the court's jurisdiction and

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[10] Our Supreme Court has "long held that even a void judgment or order is appealable if that judgment or order is otherwise appealable." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 200; see also *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366; *Ewing v. Richvale Land Co.* (1917) 176 Cal. 152, 154.) In some instances, the proper procedure is to reverse a void order rather than dismiss the appeal from the order. (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 133, fn. 8; *Ruiz v. Ruiz* (1980) 104 Cal.App.3d 374, 379, fn. 5; *Avery v. Associated Seed Growers, Inc.* (1963) 211 Cal.App.2d 613, 630.) We need not do so here, however, because the June 2, 2015 order denying JNOV does not affect the judgment and a reversal of that order would be without effect.

void"]; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64 [same].) That is not the end of our inquiry, however.

Plaintiff's motion for JNOV was denied by operation of law on May 18, 2015. Rule 8.108(d)(2) states, "Unless extended by (g)(2), the time to appeal from an order denying a motion for judgment notwithstanding the verdict is governed by rule 8.104." Rule 8.104, in turn, provides 60 days from the date of service of the notice of entry of an appealable order, or 180 days if no notice of entry is served, in which to file a notice of appeal. (Rule 8.104(a)(1)(A)-(C).) Plaintiff's notice of appeal, which was filed on June 26, 2015, was therefore timely, as it was well within each of the potentially applicable time periods set forth in rule 8.104(a), as calculated with reference to the date the motion was denied by operation of law.

Nevertheless, on its face, the notice of appeal identifies the June 2, 2015 order denying the motion for JNOV, rather than the denial of the motion by operation of law on May 18, 2015. We conclude this defect is not fatal to the appeal. Rule 8.100(a)(2) provides that a "notice of appeal must be liberally construed," and this rule has been interpreted to mean a notice of appeal is sufficient if "it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced." (*Luz v. Lopes* (1960) 55 Cal.2d 54, 59; *Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251.) Here, the notice of appeal clearly indicated the subject of the appeal was the order entered on June 2, 2015, and the only potentially appealable order entered on that date was the court's order denying the motion for JNOV. Further, it appears RSUI was not misled, inasmuch as

plaintiff's opening brief challenged the denial of the motion for JNOV and RSUI responded to plaintiff's arguments on the merits and, importantly, did not raise any issue regarding appealability. Consequently, and in deference to the policy favoring review on the merits, we conclude the notice of appeal was sufficient, even though it misstated the date the motion for JNOV was denied.

4.2. The jury's verdict is supported by substantial evidence.

Plaintiff contends the court erred in denying his motion for judgment notwithstanding the verdict. We disagree.

4.2.1. Standard of review

" 'A motion for JNOV may be granted only when there is no substantial evidence to support the verdict, viewing the evidence in the light most favorable to the party securing the verdict. [Citation.] "If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." [Citations.] The court resolves all conflicts in the evidence and draws all reasonable inferences in favor of the verdict. [Citation.] "As in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." [Citation.]' " (*Hartt v. County of Los Angeles* (2011) 197 Cal.App.4th 1391, 1401-1402.)

4.2.2. To prevail on each of his three claims, plaintiff was required to prove RSUI knew he was disabled.

As noted, plaintiff asserted three causes of action under FEHA relating to his alleged disability: disparate treatment (Gov. Code, § 12940, subd. (a)), failure to provide reasonable

accommodation (Gov. Code, § 12940, subd. (m)), and failure to engage in an interactive process (Gov. Code, § 12940, subd. (o)). With respect to each of the three claims, plaintiff was required to prove RSUI acted with discriminatory intent based upon knowledge of plaintiff's alleged disability.

"To establish a prima facie case for disparate treatment discrimination, plaintiff must show (1) he suffers from a disability, (2) he is otherwise qualified to do his job, (3) he suffered an adverse employment action, and (4) the employer harbored discriminatory intent. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 342 [' "[T]he plaintiff must prove the ultimate fact that the defendant engaged in intentional discrimination" ']; [Citations.].) 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer.' (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236; [citation]; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1145 ['An employee cannot make out a prima facie case of discrimination based on pregnancy under FEHA in the absence of evidence the employer knew the employee was pregnant']; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70 [' "Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity" '].)" (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1246-1247 (*Avila*).)

Proof that the employer knew of the alleged disability is also required to prevail on claims that the employer failed to offer a reasonable accommodation (Gov. Code, § 12940, subd. (m) [requiring employer to accommodate "the *known* . . . mental disability of an . . . employee"], emphasis added; *Avila, supra*, 165

Cal.App.4th at p. 1252 [noting that the duty of an employer to accommodate an employee's disability does not arise until the employer is aware of the disability]), and failed to engage in the interactive process (Gov. Code, § 12940, subd. (n) [requiring process in response to employee request to accommodate a *known* disability]; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013 [" 'Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, . . . the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations' "]).

To establish knowledge on the part of the employer, an employee need not submit direct evidence but may rely on circumstantial evidence. However, " '[w]hile knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." [Citations.]' [Citation.]" (*Avila, supra*, 165 Cal.App.4th 1237, 1248, final brackets added.)

4.2.3. The evidence and reasonable inferences drawn from it support the jury's conclusion that RSUI did not know plaintiff had a mental disability.

As noted *ante*, the jury found plaintiff had a mental disability that limited his ability to perform the essential functions of his job but concluded RSUI was unaware of plaintiff's disability. Substantial evidence supports the jury's finding.

Initially, we note that every person who testified at trial, *including plaintiff*, stated plaintiff never disclosed to anyone at RSUI that he suffered from depression or had a mental disability. Plaintiff also conceded he never requested any accommodation during his employment with RSUI. And although plaintiff saw a psychiatrist and a psychologist shortly before RSUI terminated his employment, plaintiff never shared the results of his medical consultations with anyone at RSUI. Moreover, although plaintiff's doctors concluded he was depressed, neither of the doctors diagnosed him as having a mental disability.

Notwithstanding this evidence, plaintiff contends "[t]here is undisputed evidence to support the fact that key HR personnel had notice of [plaintiff]'s mental disability but failed to accommodate it." We disagree.

Primarily, plaintiff directs our attention to the memo written by Aberson following her meetings with plaintiff in August 2011, which he contends shows that Aberson and Knowles knew plaintiff had a mental disability. As already noted, however, many of the statements in Aberson's memo—including those relied upon by plaintiff here—were contradicted by other evidence presented during the trial. For example, suggesting that Aberson knew plaintiff had a mental disability, plaintiff points to Aberson's statement in her memo indicating "[Tyre] confided to me that she knew [plaintiff] was on Zoloft for depression and that she made a comment to him regarding the possible impact the medication may be having on his performance." But during Tyre's testimony, she denied knowing plaintiff was taking medication and further stated she did not tell Aberson or plaintiff that she observed a drop in plaintiff's work performance around the time he began taking Xanax. Further,

the information in the memo was incorrect, as plaintiff confirmed he had never taken Zoloft. The jury, in its role as factfinder, evidently credited Tyre's testimony rather than Aberson's memo—evidence which even Aberson acknowledged was possibly inaccurate.

In our role as the reviewing court, " ' "[w]e resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87, final brackets added.) We therefore decline plaintiff's invitation to supplant the jury's verdict by crediting conflicting evidence favoring plaintiff.

DISPOSITION

The judgment is affirmed in accordance with the views expressed in this opinion. RSUI to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), 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.