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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SHANE STIRLING,

Plaintiff and Appellant,

v.

FREMANTLEMEDIA
NORTH AMERICA, INC., et al.,

Defendants and Respondents.

B240841

(Los Angeles County
Super. Ct. No. BC442846)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Charles F. Palmer, Judge. Affirmed.

Shegerian & Associates and Carney R. Shegerian for Plaintiff and Appellant.

Drinker Biddle & Reath, Kate S. Gold, Pamela K. Graham and

Alexis N. Burgess for Defendants and Respondents.

Shane Stirling appeals a summary judgment in favor of Fremantle North America, Inc. (Fremantle), and The Price Is Right Productions, Inc. (TPIR Productions). She contends the evidence creates a triable issue of fact as to whether the defendants terminated her employment as a model on a television game show because of her prior pregnancy and the fact that she was a new mother, contrary to public policy. She also contends the summary adjudication of her counts for negligent hiring, retention and supervision and intentional infliction of emotional distress was error, and challenges the sustaining of the defendants' evidentiary objections. We conclude that Stirling has shown no prejudicial error and will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. Factual Background¹

Shane Stirling worked as a model on The Price Is Right, a television game show, beginning in September 2002. Fremantle was the show's owner, and TPIR Productions produced the show. Stirling was a member of a small pool of models who worked regularly on the show, from which three models typically were selected to appear in each broadcast. She had no written employment contract with Fremantle or TPIR Productions.

¹ Our recitation of facts relies in part on evidence presented by Stirling that was excluded by the trial court based on the defendants' evidentiary objections. We need not decide whether the sustaining of those objections was proper because we conclude that Stirling failed to create a triable issue even if we consider the disputed evidence, as discussed *post*.

Stirling informed her supervisors, Kathy Greco and Roger Dobkowitz, in December 2006 that she was pregnant and expressed a desire to continue working on the show during her pregnancy. Her supervisors seemed to her to be indifferent and noncommittal. So she spoke with the show's longtime host and executive producer, Bob Barker. He told her that the stage was a dangerous environment and was no place for a pregnant woman, and that she should go home to take care of her baby and return to modeling in the future. Greco told Stirling that she could work on the few shows on which she previously had been scheduled to work, but that she would not be scheduled to work on any additional shows during her pregnancy.

Stirling gave birth in July 2007. When she met with Greco in January 2008, Greco suggested that she should wait a little longer before returning to the show, which Stirling understood to mean that she should wait until she had returned to her pre-pregnancy weight. Stirling told Greco in February 2008 that she would be ready to return to the show in April 2008. She returned to the show for the first time after her pregnancy in May 2008 and worked on the show for a total of three weeks from May to October 2008.

Baker retired as the show's host and executive producer in June 2007. Drew Carey became the new host in August 2007, and Syd Vinnedge became the show's executive producer. Mike Richards became the show's co-executive producer in July 2008. The new executive producers introduced changes to the show, including a reduction in the pool of models, purportedly to foster a more comfortable and more appealing interaction between the models and the host. Greco informed five models,

including Stirling, in October 2008 that due to creative changes in the show they would no longer appear on the show. Of the five models who were not retained, only Stirling had become pregnant while working on the show. One of the five models who remained in the pool, Gwendolyn Osborne, had become pregnant after Stirling and had continued to work as a model on the show throughout her pregnancy.

2. Trial Court Proceedings

Stirling filed a complaint against Fremantle, TPIR Productions and others in August 2010 and filed a first amended complaint in March 2011. The trial court sustained a general demurrer to three counts without leave to amend. Stirling filed a seconded amended complaint in June 2011 alleging that the defendants forced her into an early pregnancy leave, did not allow her to return to work until 10 months after she gave birth and abruptly terminated her employment five months later.

Stirling alleges counts against the defendants for (1) wrongful discharge in violation of public policy, based on the public policy against pregnancy discrimination; (2) negligent hiring, retention and supervision of employees who allegedly discriminated against and harassed her; and (3) intentional infliction of emotional distress.

Fremantle and TPIR Productions jointly moved for summary judgment or summary adjudication of each count alleged in the complaint. They argued that Stirling could not establish a prima facie case of wrongful discharge in violation of public policy based on pregnancy discrimination because she was neither pregnant nor experiencing the effects of pregnancy at the time of the alleged termination of her employment, and

she was not replaced by a nonpregnant employee. They also argued that a change in the creative direction of the show to accommodate the new host was a legitimate business reason for not retaining Stirling in the model pool. They argued further that Stirling was a freelance model rather than an employee and that her count for wrongful discharge should be construed as a count for wrongful failure to hire and failed to state a valid cause of action.

The defendants argued with respect to the second count that there was no evidence that Stirling's supervisors discriminated against her based on her pregnancy or that the defendants had a reason to know that her supervisors were unfit for the job. They argued with respect to the third count that Stirling failed to allege extreme and outrageous conduct as necessary to establish intentional infliction of emotional distress. The defendants filed declarations, deposition excerpts and other evidence in support of their motion.

Stirling opposed the motion and filed declarations and excerpts from depositions of models and others who worked on the show. Stirling's own declaration described Barker's comments to her described above. Brandi Cochran, a model on the show, testified that a makeup artist told her after learning of Stirling's pregnancy that Barker "didn't find pregnant 'women sexy.'" Greco testified in her deposition that Barker "didn't feel that it was aesthetically good for the show or it was not safe for her to be on the set because we've had accidents on the set before." Barbara Bloom testified in her deposition that someone told her that Barker did not like pregnant women on the show.

Stirling filed objections to 12 items of evidence presented by the defendants, objecting to each item of evidence on multiple grounds. The defendants filed objections to 85 items of evidence presented by Stirling, also objecting to each item of evidence on multiple grounds.

The trial court granted the motion for summary judgment in favor of both defendants. The court concluded that Stirling failed to establish a prima facie case of wrongful discharge in violation of public policy based on pregnancy discrimination because she failed to show that she was pregnant or experiencing the effects of pregnancy at the time of her alleged discharge in October 2008. The court also stated that the statute of limitations barred her claim to the extent that it was based on alleged discriminatory acts occurring before the birth of her child in July 2007. The court stated further that the defendants presented evidence of a legitimate, nondiscriminatory reason for the alleged discharge and that Stirling failed to present evidence creating a triable issue of fact as to that showing.

The trial court concluded with respect to the second count that Stirling failed to present evidence that any decisionmaker employed by the defendants was prone to discriminate or harass or that the defendants should have known that any decisionmaker employed by the defendants had such a tendency. The court therefore concluded that summary adjudication of the count for negligent hiring, retention and supervision was appropriate. The court concluded with respect to the third count that the conduct occurring within the limitations period was not so extreme and outrageous as to be beyond the bounds of human decency, as necessary to support a count for intentional

infliction of emotional distress. The court also sustained many of the defendants' evidentiary objections.

The court entered a judgment in favor of Fremantle and TPIR Productions on March 7, 2012. Stirling timely appealed the judgment.

CONTENTIONS

Stirling contends (1) public policy prohibits employment discrimination based on pregnancy and maternity; (2) the evidence supports her claim that her pregnancy and motherhood were motivating reasons for her discharge and that the defendants' proffered reason was only a pretext; (3) evidence that the defendants disliked pregnant models shows that discriminatory, harassing conduct toward pregnant models was foreseeable and supports her count for negligent hiring, retention and supervision; (4) the defendants' conduct was extreme and outrageous and can support liability for intentional infliction of emotional distress and punitive damages; and (5) all of the evidence submitted in opposition to the summary judgment motion should be considered on appeal because the trial court failed to separately rule on each of the multiple grounds asserted for each objection and because there were no valid grounds for sustaining the objections.

DISCUSSION

1. Standard of Review

A court may grant a summary judgment only if there is no triable issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must

show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).) The defendant can satisfy its burden by presenting evidence that negates an element of the cause of action or evidence that the plaintiff does not possess and cannot reasonably expect to obtain evidence needed to establish an essential element. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 (*Miller*).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller, supra*, 36 Cal.4th at p. 460.) A different standard of review applies to the court's evidentiary rulings in connection with the motion, which we review for abuse of discretion. (*Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 113.) Even if the grounds entitling the moving party to a summary judgment were not asserted in the trial court, we must affirm if the parties have had an adequate opportunity to address those grounds on appeal. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 754; *Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; see Gov. Code, § 68081; Code Civ. Proc., § 437c, subd. (m)(2).)

2. *Summary Judgment Was Proper as to Each Count*

a. *Wrongful Discharge in Violation of Public Policy*

An employer's right to discharge an at-will employee for any reason or no reason at all (Lab. Code, § 2922) is limited by the common law rule that an employer may not discharge an employee for a reason that contravenes a fundamental public policy.

(*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 887; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094, overruled on another point in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.) An actual or constructive discharge in violation of public policy gives rise to a tort cause of action commonly known as wrongful discharge in violation of public policy, tortious discharge, or a *Tameny* claim (after *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167). (*Stevenson, supra*, at pp. 887-888.) The primary purpose of making such conduct actionable in tort is to promote and protect fundamental public policies that would be threatened or undermined by the conduct. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1077 [“a legitimate *Tameny* claim is designed to protect a public interest”]; *Gantt, supra*, at pp. 1093-1095; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 665-668.)

To establish a tort cause of action for wrongful discharge in violation of public policy, a plaintiff must plead and prove that (1) the plaintiff was employed by the defendant; (2) the defendant discharged the plaintiff; (3) the defendant did so for a reason that contravenes public policy; and (4) the plaintiff suffered harm as a result. (*Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623, 641.) A public policy must satisfy four requirements to support such a cause of action: “First, the

policy must be supported by either constitutional or statutory provisions. Second, the policy must be ‘public’ in the sense that it ‘inures to the benefit of the public’ rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be ‘fundamental’ and ‘substantial.’ [Fn. omitted.]” (*Stevenson v. Superior Court, supra*, 16 Cal.4th at pp. 889-890.)

Richards stated in a declaration filed in support of the defendants’ summary judgment motion that he believed that Carey’s interaction with the models on the show would appear more comfortable and would be more appealing to the audience if Carey were more familiar with the models. Richards declared that he suggested that Carey’s unique abilities as an improvisational comedian and ensemble actor could best be showcased in a more informal environment where the models were part of an ensemble rather than only the presenters of prizes, as they had been when Barker was host. Richards and Vinnedge both declared that Vinnedge agreed with those suggestions and that they therefore decided to reduce the model pool from approximately 10 to five models and to increase the amount of interaction between Carey, the models and contestants on the show. Richards, Vinnedge and Greco all declared that they selected the models to retain based on their modeling skills, personality and appearance, and that they did not consider or discuss Stirling’s prior pregnancy or leave of absence in making the decision.

Stirling argued in opposition to the summary judgment motion that comments made by Barker, or attributed to him, and comments made by others after she

announced her pregnancy showed that the decisionmakers considered a pregnant model to be undesirable and that her pregnancy was a motivating reason for her discharge. She argues on appeal that those same comments show that her pregnancy and motherhood were motivating reasons for her discharge in October 2008. We disagree.

We believe that the evidence of comments made by or attributed to Barker and comments made by others regarding the perceived undesirability of a pregnant model on the show could not reasonably support a finding that the reasons given for Stirling's alleged discharge were false. Stirling was not pregnant at the time of the decision to remove her from the model pool in October 2008, having given birth 15 months earlier, and she does not allege that she continued to experience the effects of pregnancy at that time.² The comments made during her pregnancy do not suggest that either Barker, who was no longer a decisionmaker on the show at the time of Stirling's alleged discharge, or the decisionmakers at the time of the decision regarded pregnancy as an indelible stain that would forever mar her beauty and make her undesirable as a model. In our view, there is no reason to believe that those comments influenced the decision in October 2008 after Stirling had returned to the show. We therefore conclude as a matter of law that the evidence provides no reasonable basis for a trier of fact to conclude that the reasons given for the decision to remove Stirling from the model pool were false or

² Stirling does not allege that she was or appeared to be overweight in October 2008 as a result of her prior pregnancy. We therefore need not decide whether such weight gain would or would not have been a legitimate, nondiscriminatory reason for terminating her alleged employment as a model on the show. In light of our conclusion that Stirling failed to create a triable issue of fact as to the defendants' alleged discriminatory animus, we need not decide whether Stirling was an employee.

that Stirling's prior pregnancy or her maternity was a motivating reason for the decision.³

b. *Negligent Hiring, Retention and Supervision of Employees*

Stirling contends there are triable issues of fact as to the defendants' liability for negligent hiring, retention and supervision. Consistent with our discussion above, we conclude that there is no evidence that the defendants knew or should have known that individuals working on the show were likely to discriminate against or harass Stirling and no evidence that such discrimination or harassment actually occurred. We therefore conclude that Stirling failed to create a triable issue of material fact and that the summary adjudication of this count was proper.

c. *Intentional Infliction of Emotional Distress*

Liability for intentional infliction of emotional distress requires a showing of extreme and outrageous behavior beyond all bounds of decency. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on another point in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) The conduct must have been committed with the intention of causing, or reckless disregard of the probability of causing, emotional distress, and the plaintiff must have suffered severe emotional distress as a result.

³ Stirling also argues on appeal that the evidence shows that the defendants retaliated against her for complaining that she wished to continue to work as a model on the show despite her pregnancy. Stirling does not allege a count for retaliation in her complaint and did not seek leave to amend her complaint to allege such a count. She cannot create a triable issue of material fact as to a count that is not alleged in her complaint. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.) We therefore conclude that she has shown no error on these grounds.

(*Agarwal, supra*, at p. 946.) A two-year statute of limitations applies. (Code Civ. Proc., § 335.1; *Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1450.)

Stirling alleges that she suffered emotional distress as a result of the defendants' refusal to allow her to appear on the show during her pregnancy and banishment from social activities during that time, the alleged derogatory comments made concerning her pregnancy and her alleged discharge in October 2008. Of this conduct, only her alleged discharge in October 2008 occurred within two years before the complaint was filed in August 2010. We conclude that neither the facts alleged in Stirling's complaint concerning the events in October 2008 nor the evidence presented in opposition to the summary judgment motion can satisfy the requirement of extreme and outrageous conduct beyond all bounds of decency. We therefore conclude that Stirling failed to create a triable issue of material fact and that the summary adjudication of this count, including the claim for punitive damages, was proper.

3. *Stirling Has Shown No Prejudicial Error in the Sustaining of Evidentiary Objections*

Stirling contends the trial court erred by failing to separately rule on each of the multiple grounds asserted for each objection, and there were no valid grounds for sustaining the objections. We need not decide whether the trial court erred in these regards because, having considered all of the evidence presented in opposition to the motion, we conclude that Stirling failed to create a triable issue of fact. Any error in the sustaining of evidentiary objections therefore was nonprejudicial.

DISPOSITION

The judgment is affirmed. The defendants shall recover their costs on appeal.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.