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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

RUBEN GARIBAY GONZALEZ, Plaintiff and Appellant, v. PETER D. NOTT, as Trustee, etc., et al., Defendants and Respondents.	B275630 (Los Angeles County Super. Ct. No. BC535790)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed in part, reversed in part.

The Simon Law Group, Brad M. Simon; Williams Iagmin, and Jon R. Williams for Plaintiff and Appellant Ruben Garibay Gonzalez.

Latham & Watkins, Marvin S. Putnam, and Robert J. Ellison for Defendants and Respondents Peter D. Nott, as Trustee, etc., Niesja Sharp, and Efren Gonzalez.

Veatch Carlson and John E. Stobart for Defendant and Respondent Stephen G. Ujlaki, as Trustee, etc.

Plaintiff and appellant Ruben Garibay Gonzalez challenges the trial court's grant of summary judgment in favor of defendants and respondents Peter D. Nott, Stephen G. Ujlaki,[1] Niesja Sharp, and Efren Gonzalez.[2] Defendants hired plaintiff Gonzalez to perform tree trimming work, during the course of which he fell and suffered back injuries. Gonzalez contends that because he was not licensed to work as a tree trimmer, he was conclusively presumed to be defendants' employee pursuant to Labor Code section 2750.5, and defendants may be subject to liability for his injuries as his employer. We conclude that Ujlaki is not liable to Gonzalez because the portion of the contract involving Ujlaki's property was for an aggregate price of less than $500; accordingly, the contract was exempt from the licensure requirement. (See Bus. & Prof. Code, § 7048.) With respect to the other defendants, however, Gonzalez has submitted enough evidence to establish a triable issue of material fact as to whether the value of the contract was $500 or more. Accordingly, we affirm the trial court's judgment with respect to Ujlaki and reverse with respect to the other defendants.

FACTS AND PROCEEDINGS BELOW

Nott and Ujlaki are owners of adjoining apartment complexes in Venice. Sharp and her husband are the owners of Sharp Property Management, which manages Nott's Venice property and other apartment buildings Nott owns. Efren is a landscaper and gardener who spends the majority of his time

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[1] Nott and Ujlaki were sued in their capacities as trustees of their respective trusts.

[2] We refer to Efren Gonzalez (Efren) by his first name to distinguish him from plaintiff Ruben Gonzalez (Gonzalez). No disrespect is intended.

working on Nott's properties. Efren is not licensed as a tree trimmer.

In December 2012, Nott and Ujlaki decided to have a palm tree located on the boundary between their properties trimmed. Ujlaki obtained a quote of $1,100 to have the work done, but Nott felt that price was too high, so he asked Efren to find a lower-priced alternative. Efren quoted a price of $800 for the tree trimming, which Sharp sent to Nott in an email. Nott testified that he believed the $800 price was too high, and that it should be possible to have the work done at a lower price if the tree-trimmer limited himself to removing dead fronds while leaving the living fronds in place. Ujlaki, Nott, and Efren all testified that Efren ultimately agreed to remove dead fronds from the tree and cart away the debris for a flat fee of $400. In an email to Sharp, Nott proposed that Ujlaki pay the full cost of the tree-trimming directly to Efren, and that Nott would then pay Ujlaki his share. Sharp agreed with this proposal. Ujlaki ultimately sent Efren a check for $400 for the tree trimming.

Efren occasionally does tree-trimming work himself, but he did not believe he had the skills to trim the palm tree, which is at least 35 feet tall. Consequently, he asked the owner of a nursery to refer a tree trimmer to him. The nursery owner testified that he recommended that Efren hire a tree service, but Efren declined because it would be too expensive. Eventually, the nursery owner referred Gonzalez, who is not licensed as a tree trimmer. Efren did not ask whether Gonzalez was licensed, and Gonzalez never told Efren that he was licensed.

Efren drove Gonzalez to several of Nott's properties and showed him trees that needed trimming. According to Gonzalez, Efren offered to pay him $200 per day to trim those trees, with an expectation that the work would take about 10 to 15 days to finish. According to Efren, the assignment was for only the single palm

tree on the boundary between Nott and Ujlaki's properties, with the possibility of additional work if the first tree trimming went well.

On January 8, 2013, Efren picked up Gonzalez from Gonzalez's home and drove him to the Venice property. Gonzalez believed he could finish trimming the palm tree within a few hours, and that once he finished, Efren would likely drive him to another one of Nott's properties to continue trimming the trees there. Efren helped Gonzalez put a ladder against the tree, and Gonzalez climbed to a height of 30-40 feet off the ground. While he was working, some of the palm fronds gave way, and Gonzalez fell to the ground, injuring his back.

Gonzalez filed a complaint alleging negligence and premises liability. He claimed that because defendants had hired him as an unlicensed contractor to perform work for which the Business and Professions Code requires a license, he was by definition an employee of defendants. Defendants moved for summary judgment, which the trial court granted. The trial court determined that under the ordinary tests for distinguishing contractors from employees, it was clear that Gonzalez was an independent contractor. Consequently, the only way defendants could be liable for Gonzalez's injuries was by operation of Labor Code section 2750.5, which deems an unlicensed contractor an employee if the value of the contract under which he is hired is $500 or more. The trial court found that Gonzalez had failed to introduce evidence to show that the value of the contract was $500 or more, and that consequently, defendants could not be liable for Gonzalez's injuries.

DISCUSSION

Gonzalez contends that the tree-trimming work for which defendants hired him required him to be licensed as a tree trimmer, and that because he was unlicensed, he is conclusively presumed to be an employee under the Labor Code. He argues that in granting summary judgment against him, the trial court improperly resolved disputed issues of material facts regarding the terms under which defendants hired him. We disagree with Gonzalez regarding defendant Ujlaki, but we otherwise agree and reverse the trial court's judgment. An unlicensed tree trimmer who works under a contract valued at $500 or more is by definition an employee, regardless of whether the terms of the work suggest that the tree-trimmer was in fact an independent contractor. (See Lab. Code, § 2750.5; Bus. & Prof. Code, §§ 7026.1, 7048.) Although we agree with the trial court that Gonzalez failed to present sufficient evidence to show that the contract to trim the palm tree was above the $500 threshold, he did present sufficient evidence to establish a triable issue regarding whether Efren hired him for two weeks of tree-trimming work. If the work trimming the palm tree was only one part of a larger contract, then the full value of the contract was greater than $500.

A. Standard of Review

Summary judgment is proper when all the papers submitted on the motion show there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears an initial burden of showing that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense to that cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th

at p. 849.) If the defendant meets this burden, the plaintiff has the burden to demonstrate one or more triable issues of material fact as to the cause of action or defense. (*Ibid.*) A triable issue of material fact exists "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." (*Id.* at p. 850.)

In reviewing summary judgment, "[w]e review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

B. Analysis

" 'Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work.' (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 . . . .) The same rule applies when the independent contractor, rather than his or her employee, is injured." (*Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1214.) The justification for this rule is that an independent contractor controls the manner in which he works, "including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party *vicariously* liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work." (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 522.)

Gonzalez acknowledges that he held himself out to defendants as an independent contractor. He argues that he was nevertheless not an independent contractor under California law because he was not licensed as a tree trimmer. Gonzalez's argument relies on

Labor Code section 2750.5, which establishes rules for determining whether a worker performing services for which a license is required is an employee or an independent contractor. To prove that a worker is an independent contractor requires showing that the worker controls the manner of performing the work, that the worker is customarily engaged in an independently established business, and that the independent contractor status is bona fide and not a subterfuge. (*Ibid.*) Labor Code section 2750.5 goes on to state that, in addition to these factors, "any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with [s]ection 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license *as a condition of having independent contractor status*." (Lab. Code, § 2750.5, subd. (c), italics added.) Courts have interpreted this last statement to mean that a worker "lacking the requisite license may not be an independent contractor." (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 15.) Or, in other words, "the presumption that the person who employs the unlicensed contractor is the employer is conclusive." (*Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 233.)

Tree trimming is an occupation for which the Business and Professions Code requires licensure: Section 7028 of Business and Professions Code forbids engaging in business as a contractor without a license, and Business and Professions Code section 7026.1, subdivision (a)(4) provides that "[a]ny person not otherwise exempt by this chapter, who performs tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying" is a contractor. There is, however, a relevant exemption to the license requirement. A contractor need not be licensed in order to perform "any work or operation on one undertaking or project by one or more contracts, the aggregate contract price which for labor,

materials, and all other items, is less than five hundred dollars ($500), that work or operations being considered of casual, minor, or inconsequential nature." (Bus. & Prof. Code, § 7048.)

It is undisputed that Ujlaki and Nott hired Efren to trim trees, that Efren in turn hired Gonzalez, and that neither Efren nor Gonzalez was licensed as a tree trimmer.[3] Gonzalez does not contend on appeal that he was defendants' employee under the tests ordinarily used to distinguish between contractors and employees. (See Lab. Code, § 2750.5, subds. (a)-(c).) Thus, the only question for us to decide is whether Gonzalez presented sufficient evidence to establish a triable question as to whether the contract price for the tree trimming in this case was $500 or more.[4] The trial court answered that question in the negative, and it accordingly granted summary judgment in favor of defendants. Although we agree with the trial court that the evidence firmly

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[3] Because Efren was himself unlicensed, Ujlaki and Nott may not escape liability by claiming that they were unaware that Efren hired Gonzalez. Even if this was true, Ujlaki and Nott would still have hired an unlicensed tree trimmer in Efren.

[4] Gonzalez also contends that his tree-trimming work does not fit within the Business and Professions Code section 7048 exemption because he held himself out as a contractor by advertising his services at a nursery. The exemption for projects worth less than $500 "does not apply to a person who advertises or puts out any sign or card or other device which might indicate to the public that he or she is a contractor or that he or she is qualified to engage in the business of a contractor." (Bus. & Prof. Code, § 7048.) We agree with defendants that Gonzalez may not raise this question for the first time on this appeal. (See *Cafferkey v. City and County of San Francisco* (2015) 236 Cal.App.4th 858, 872–873.) The issue of whether Gonzalez advertised himself as a contractor involves a question of fact, and because Gonzalez failed to raise it before the trial court, defendants had no reason to develop the record on this matter.

establishes that the contract price for trimming the palm tree was no more than $400, there is conflicting evidence regarding whether the tree-trimming contract encompassed only the single palm tree, or whether it also included up to three weeks of additional work on Nott's other properties. Accordingly, we hold that the trial court was correct in granting summary judgment in favor of Ujlaki, whose only connection with Gonzalez was the trimming of the single palm tree, but we reverse the trial court with respect to the other defendants, who were involved with the alleged contract to trim the other trees as well.

Business and Professions Code section 7048, which creates the $500 exemption, states that the "exemption does not apply in any case wherein the work of construction is only a part of a larger or major operation." Thus, there exists a question of fact as to whether the work was part of a larger project or only for the trimming of the one palm tree. (See *Barry v. Contractors State License Board* (1948) 85 Cal.App.2d 600, 604–605 [for purposes of the exemption, the relevant price is the amount paid to the contractor for the project, not the amount the contractor pays to each subcontractor].)

Gonzalez has failed to submit evidence on which a reasonable trier of fact could conclude that the contract price for trimming the palm tree was $500 or more. All of the defendants testified that Ujlaki and Nott agreed to pay Efren $400 for the tree trimming. In an email Nott sent to Sharp prior to Gonzalez's injury, Nott complained that when the same tree was trimmed several years earlier, Ujlaki failed to reimburse him for Ujlaki's share of the costs. Consequently, Nott stated, "This time he can front the money and I will pay him half. [¶] . . . I do not want to have Efren [trim the tree] thinking I am going to pay him when it is going to have to be [Ujlaki] that pays him and then collects half from me." Sharp replied, "How about I get the money from [Ujlaki] in advance paid

to Efren . . . and we don['t] start until his advance payment is in our hands?" Nott then replied, "OK." Ujlaki sent Efren a check for $400 for the tree-trimming.

Gonzalez cites evidence that, he claims, shows that the contract price was higher. He notes that Ujlaki first obtained an estimate of $1,100, and that Efren later gave an estimate of $800. But there is no evidence that Nott ever accepted these higher estimates, and indeed, Nott explicitly rejected the $1,100 estimate as too high. Gonzalez also cites the fact that Nott paid Efren more than $5,000 for tree trimming work, but there is no basis for concluding that any portion of this payment went to pay for the trimming of the palm tree.

"To avoid summary judgment, admissible evidence presented to the trial court, not merely claims or theories, must reveal a triable, material factual issue." (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) Gonzalez has failed to meet that standard with respect to the contract price for trimming the palm tree. Thus, we agree with the trial court that Gonzalez has failed to produce sufficient evidence under which a reasonable trier of fact could conclude that the value of the contract for trimming the palm tree was $500 or more. This is enough to affirm the trial court's grant of summary judgment in favor of Ujlaki, whose only connection with Gonzalez was with regard to the single palm tree.

It is not enough, however, to dispose of the case with regard to the other defendants. Both Gonzalez and Efren testified that prior to the accident, Efren drove Gonzalez around to several other properties that Nott owned, with the idea that Gonzalez would trim trees on those properties as well. Gonzalez testified that he reached an agreement with Efren to trim trees on all those properties, over a period expected to last 10 to 15 days, at a price of $200 per day. Efren testified that he contracted with Gonzalez only to trim the

single palm tree, and that if it went well, he would also hire Gonzalez to trim trees on other properties.

Defendants contend that this disagreement regarding the terms of trimming the other trees on Nott's property does not create a triable issue of material fact. They cite testimony from Gonzalez that "there wasn't any agreement" between him and Efren, and that Gonzalez "didn't know" about doing work other than the palm tree. This is a distortion of Gonzalez's testimony. In context, it is clear that Gonzalez was saying merely that he was uncertain about the amount of work to be done on the first day of the job. He believed he would be able to finish the palm tree within a few hours and then move on to other properties, but he had not discussed with Efren whether that would be the case. This does not contradict Gonzalez's testimony that he believed Efren had hired him to trim trees on Nott's properties for approximately 10 to 15 days.

Defendants also argue that Gonzalez's testimony regarding the terms of his agreement with Efren was too vague and uncertain to support a finding that there was a contract between them for more than $500. We disagree. According to Gonzalez, Efren drove him around to various sites and showed him the trees that needed trimming. The parties then agreed that Gonzalez would trim those trees in exchange for $200 per day. Although there was no promise of an exact duration for the work, Gonzalez claimed that Efren estimated the work would require approximately 10 to 15 days to complete. This was enough detail with which a reasonable trier of fact could find that Efren had hired Gonzalez for a contract price of $500 or more. Indeed, if Efren was willing to hire Gonzalez for $200 per day for at least 10 days, it is not unreasonable to infer that Nott expected to pay Efren more than $500.

If Gonzalez and Efren did form a contract under which Gonzalez agreed to trim all of Nott's trees over a period of several days, then at least arguably the trimming of the palm tree was

"only a part of a larger or major operation" with a contract price of more than $500. (Bus. & Prof. Code, § 7048.) Because we "liberally construe the evidence in support of the party opposing summary judgment and resolv[e] doubts concerning the evidence in favor of that party" (*State of California v. Allstate Ins. Co.*, *supra*, 45 Cal.4th at pp. 1017-1018), we must reverse the judgment of the trial court with respect to the defendants other than Ujlaki.

DISPOSITION

The trial court's order is affirmed with respect to defendant Ujlaki and reversed with respect to the remaining defendants. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.