Filed 6/24/15 Hwang v. Beverly Hills Properties 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

KUMJI HWANG, Plaintiff and Appellant, v. BEVERLY HILLS PROPERTIES, Defendant and Respondent.	B253748 (Los Angeles County Super. Ct. No. BC471852)

APPEAL from a judgment of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Henry M. Lee, Law Corporation, Henry M. Lee, Michelle P. Tran and Grace K. Kim, for Plaintiff and Appellant.

Klinedinst PC, G. Dale Britton, Greg A. Garbacz and Jeffrey R. Groendal; Douglas L. Walton, for Defendant and Respondent.

Plaintiff and appellant Kumji Hwang (Hwang) appeals a judgment following a grant of summary judgment in favor of her former employer, defendant and respondent Beverly Hills Properties (BHP).

The essential issue presented is whether Hwang's lawsuit against BHP is barred by a general release that she signed.

We conclude Hwang failed to raise a triable issue of material fact with respect to the validity of the release and affirm the judgment in favor of BHP.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On or about March 26, 2003, BHP hired Hwang as the resident manager of an apartment building located at 344 South Manhattan Place in Los Angeles (the property). On that date, she signed a document acknowledging that her employment with BHP was "at will." Hwang's compensation package included occupancy of Apartment 29 at the property. Hwang also agreed in writing that in the event BHP notified her for any reason that she was no longer the manager at the property, she would vacate Apartment 29 within 14 days.

On May 2, 2011, BHP terminated Hwang from her position as resident manager. On the same day, BHP gave Hwang a final paycheck in the sum of $253.09 for all benefits BHP believed were owed to her. Hwang later cashed that check.

At the time of the termination, BHP also offered Hwang 30 days to vacate Apartment 29 instead of the agreed 14 days, plus $100, in exchange for Hwang's general release of any and all claims against BHP. Hwang negotiated a higher amount. "Hwang requested, and BHP agree[d], that BHP would pay Hwang the sum of $400 instead of $100 in exchange for Hwang signing a General Release of claims against BHP."

On May 3, 2011, one day after Hwang met with BHP's representatives, she signed the general release in favor of BHP. BHP, in turn, gave Hwang a $400 check, which she cashed.

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[1] This factual summary is derived from the undisputed facts as set forth in the moving and opposing separate statements.

Two weeks later, on May 18, 2011, Hwang's attorney, Henry M. Lee, sent BHP a letter attempting to " 'rescind, revoke, and cancel' " the general release. However, neither Hwang nor her attorney ever attempted to return the $400 paid to Hwang for executing the general release, nor did Hwang vacate the apartment at the time she purported to give notice of rescission.

Hwang remained in Apartment 29 beyond the 14 days provided in the employment agreement, and also beyond the 30 days specified in the release. On June 29, 2011, BHP filed an unlawful detainer action against Hwang. On September 28, 2011, the parties entered into a stipulated judgment for possession of Apartment 29, and Hwang vacated the apartment on October 1, 2011, nearly five months after her termination date.

1. *Pleadings.*

a. *Complaint and answer*.

On October 27, 2011, Hwang filed suit against BHP for (1) violation of Business and Professions Code section 17200, (2) failure to pay statutory minimum wage, (3) failure to pay overtime wages, (4) failure to pay meal period wages, (5) failure to pay rest period wages, (6) Labor Code section 203 penalties, and (7) Labor Code section 226 penalties. The gravamen of the action is that Hwang was a nonexempt employee during the preceding four years, and her actual duties, such as showing and renting apartments and contacting repairmen, were nonexempt. Hwang alleged BHP owed her $125,519.60 for unpaid wages, overtime, and penalties.

BHP answered with a general denial and also pled numerous affirmative defenses, including that all of Hwang's causes of action were barred by the general release.

b. *BHP's cross-complaint.*

BHP filed a cross-complaint against Hwang for breach of written contract, alleging Hwang breached the May 3, 2011 release agreement by failing to vacate her apartment at the end of the 30-day period specified in the release.

2. *Summary judgment proceedings*.

a. *BHP's moving papers*.

On February 24, 2012, BHP filed a motion for summary judgment on Hwang's complaint based on BHP's affirmative defense of the general release. BHP asserted Hwang's causes of action were barred as a matter of law because Hwang, for valuable consideration, signed a general release in favor of BHP wherein she released and waived any and all causes of action against BHP.[2] Here, Hwang received all wages that BHP conceded were due, she released all claims "known or unknown" and she accepted enhanced severance benefits of $400, plus additional time to remain in her apartment, in exchange for the general release. BHP asserted Hwang could not dispute that she signed the release and she could not "argue that she did not know what she was signing."

BHP further argued that Hwang never effectively sought to rescind the general release that she signed -- she never offered to return the $400 consideration paid to her by BHP in exchange for executing the release, nor did she vacate Apartment 29 within the 14 days to which she agreed when she was hired. Instead she did not vacate until she was sued for unlawful detainer about five months after her termination. Also, her complaint did not include a cause of action for rescission of the general release. Therefore, Hwang was bound by the release, and her attempt to avoid the release based on economic duress and other grounds should be rejected.

b. *Hwang's opposition*.

In opposition, Hwang argued, inter alia, that it is illegal for an employer to require an employee to sign a release of unpaid wages. Further, the release is voidable because

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[2] "A written release generally extinguishes any obligation covered by its terms, provided it has not been obtained by fraud, deception, misrepresentation, duress or undue influence. [Citation.] When a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents and estopped from saying that its provisions are contrary to his intentions or understanding. [Citation.]" (*Tarpy v. County of San Diego* (2003) 110 Cal.App.4th 267, 276 (*Tarpy*).)

(1) Hwang signed it based upon BHP's fraudulent representations amounting to duress, (2) she had no reasonable alternatives to signing the release, amounting to economic duress, and (3) she signed the release based upon BHP's undue influence and "overpersuasion."[3] She further contended that her failure to plead rescission in the complaint was not grounds for granting summary judgment.

Hwang's supporting declaration asserted: On May 2, 2011, she was led to a room where a panel of nine people confronted her regarding her termination and asked her to sign a general release. The next day, when she signed the release, she was desperate and felt she had no other alternative – she could either sign the release and have a roof over her head for another 30 days or not sign it and be broke and homeless.

Further, her native language is Korean and she is more comfortable communicating in Korean than in English.[4] She is from South Korea and has no real friends or family in Los Angeles who could help her financially or provide her with a place to stay. She was 60 years old at the time of termination. At that time, she had about $500 in her bank account, which was barely enough for food and insufficient for a security deposit on another apartment. At the May 2, 2011 meeting, when asked to sign the release, she asked to speak to her attorney; however, her "supervisor, Joy Sakoda, responded with a 'no' and everyone else on the panel became highly agitated [and] began to raise their voices at [Hwang]." She signed the general release because she felt she had

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[3] " '[U]ndue influence has been called overpersuasion. [Citation.]' [Citations.] In essence, undue influence consists of the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person. [Citation.]" (*Keithley v. Civil Service Bd*. (1970) 11 Cal.App.3d 443, 451.)

[4] We note the facts contained in this paragraph were not included in Hwang's responsive separate statement, although they were set forth in her opposing declaration. Ironically, it was Hwang who argued below that under the "golden rule" of summary adjudication, if evidence is not included in the moving or opposing parties' separate statements, it does not exist.

no choice. It would be difficult to obtain new employment given her age and language barrier. Further, she felt she could use the additional $400 to feed herself.

c. *BHP's reply papers*.

BHP presented a copy of the resume Hwang submitted to BHP at the time of her hiring, which indicated she was employed in the United States as early as 1990 and obtained a master's degree in Ohio in 1989. BHP also proffered a copy of Hwang's business card, which indicated she has a California real estate license. BHP argued, "This shows she was not the clueless, unsophisticated, immigrant, unskilled in the English language, that her Opposition attempts to make her out to be. At all times she knew what she was doing in agreeing to the release and to the consideration given for it."

BHP also emphasized that Hwang negotiated the settlement amount. It was undisputed that Hwang asked for $400 instead of the $100 that BHP initially offered to her.

d. *Trial court's ruling*.

On May 10, 2012, the summary judgment motion was heard and taken under submission. On August 7, 2012, the trial court granted BHP's motion, finding that the general release "is valid and enforceable and bars [Hwang's] causes of action." The trial court reasoned that although wage and hour claims cannot be waived prospectively, that is not what occurred here, and an employee may release a claim to past overtime wages as part of a settlement. The trial court further found Hwang failed to raise a triable issue to show the release was procured by duress, coercion, fraud, or undue influence. Although a consent that is not freely given may be rescinded, Hwang "did not sue for rescission." Therefore, the general release entitled BHP to summary judgment.

e. *Subsequent proceedings*.

On September 6, 2012, the trial court entered judgment in favor of BHP on Hwang's complaint. On September 7, 2012, Hwang filed a notice of appeal from the judgment. (No. B243938.) On January 16, 2013, this court dismissed that appeal on the ground that the unresolved cross-complaint meant there was not a final judgment.

On December 12, 2013, BHP dismissed its cross-complaint against Hwang, ending this litigation in the trial court. On January 9, 2014, Hwang filed a timely notice of appeal.

CONTENTIONS

Hwang contends: there are clearly triable issues of fact as to her state of mind at the time she signed the general release; she presented substantial evidence to raise a triable issue of fact with respect to duress and economic duress by BHP; the general release is voidable on the ground of undue influence; triable issues exist as to the validity of the release because it was given to Hwang in English, not her native language, and she was not advised of her ability to consult with counsel nor provided with the statutory cooling off period for employees over 40; and the trial court erred in weighing the evidence.

DISCUSSION

1. *Standard of appellate review.*

"We independently review an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 860.) We determine whether the court's ruling was correct, not its reasons or rationale. (*Salazar v. Southern Cal. Gas Co*. (1997) 54 Cal.App.4th 1370, 1376.) 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925.) We review for abuse of discretion any evidentiary ruling made in connection with the motion. [Citation.]" (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504-505.)

2. *No triable issues as to duress, economic duress or undue influence*.

a. *Hwang's burden in resisting summary judgment.*

Code of Civil Procedure section 437c states in relevant part at subdivision (p)(2): "(2) A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not

separately pleaded, cannot be established, *or that there is a complete defense to that cause of action*. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action *or a defense thereto*." (Italics added.)

Here, BHP presented the May 3, 2011 general release in support of its sixth affirmative defense, i.e., that Hwang's action was barred by the release. A "settlement agreement is presumptively valid, and the plaintiff remains bound by the bargain he made until he actually rescinds it." (*Myerchin v. Family Benefits, Inc*. (2008) 162 Cal.App.4th 1526, 1536.) Given BHP's showing in its moving papers, the burden then shifted to Hwang to show that a triable issue of material fact existed with respect to that affirmative defense.

Hwang contends the release is not dispositive because she raised triable issues of material fact below with respect to her claims that BHP obtained the general release by duress,[5] economic duress[6] and undue influence.[7] As explained, because Hwang failed to

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[5] "Duress generally exists whenever one is induced by the unlawful act of another to make a contract or perform some other act under circumstances that deprive him of the exercise of free will." (*Tarpy*, *supra*, 110 Cal.App.4th at p. 276; see Civ. Code, § 1569.)

[6] Courts " 'are reluctant to set aside settlements and will apply "economic duress" [to defeat a settlement agreement] only in limited circumstances and as a "last resort." [Citation.]' [Citation.] Required criteria that must be proven to invalidate a settlement agreement are: '(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. [Citation.]' " (*Perez v. Uline, Inc*. (2007) 157 Cal.App.4th 953, at pp. 959-960.) Economic duress "does not necessarily involve an unlawful act, but may arise from an act that is so coercive as to 'cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract.' " (*Tarpy*, *supra*, 110 Cal.App.4th at p. 277.)

[7] Undue influence arises, inter alia, "2. In taking an unfair advantage of another's weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.)

proceed with rescission, she cannot raise a triable issue with respect to the enforceability of the general release.

b. *General principles relating to rescission of release.*

Civil Code section 1689 states in relevant part: "(b) *A party to a contract may rescind the contract in the following cases*: [¶] (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, *or obtained through duress, menace, fraud, or undue influence,* exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party." (Italics added.)

Civil Code section 1691 provides: "Subject to Section 1693, to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind: (a) Give notice of rescission to the party as to whom he rescinds; and (b) *Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise,* unless the latter is unable or positively refuses to do so." (Italics added.)[8]

It is "well settled that 'a contract entered into by reason of . . . duress or economic compulsion may be rescinded by the injured party. However, it is axiomatic that in such an instance the entitled party must rescind the entire contract and may not retain the rights under it which he deems desirable and repudiate the remainder [citation].' [Citations.] The rationale underlying the rule is that retention of only the benefits constitutes unjust enrichment and binds the parties to terms not contemplated within the

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[8] Civil Code section 1693 provides: "When relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of rescission unless such delay has been substantially prejudicial to the other party. [¶] A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment."

agreement. [Citation.]" (*IMO Development Corp. v. Dow Corning Corp*. (1982) 135 Cal.App.3d 451, 458.)

Thus, as our Supreme Court has held, where a plaintiff has executed a full and complete release of all claims against a defendant, the plaintiff cannot "keep the money the [defendant] paid in the . . . settlement without rescinding the release, and then sue the same [defendant];" the plaintiff must rescind the release in order to sue. (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co*. (2010) 50 Cal.4th 913, 917 (*Village*).) In *Village*, an insured settled a disputed insurance claim with its first party insurer, executed a full and complete release of the claim, kept the money the insurer paid in the claim settlement without rescinding the release, and then sued the same insurer for allegedly fraudulently inducing the insured to settle the claim for less than it was worth under the policy. (*Ibid*.) Our Supreme Court held "that a release of a disputed claim, like the one here, does not permit a party to elect the remedy of a suit for damages when the release itself bars that option. Instead, the insured party to the release must follow the rules governing rescission of that release before suing the insurer for damages." (*Id*. at pp. 917-918, fn. omitted.)

In reaching its conclusion, *Village* reaffirmed two earlier California decisions, *Garcia v. California Truck Co*. (1920) 183 Cal. 767, and *Taylor v. Hopper* (1929) 207 Cal. 102, which held that a plaintiff cannot avoid an allegedly fraudulently induced contract of release unless the plaintiff rescinds the contract and restores the money received as consideration. (*Village, supra*, 50 Cal.4th at p. 931.)

Village reasoned, "[t]o allow Village Northridge to settle with State Farm and sign a release, keep the money, and then sue its insurer for alleged fraud without rescinding the release under our statutory scheme ([Civ. Code,] §§ 1688-1693) would violate the terms of the bargain and frustrate its purpose. It would also likely inhibit insurance companies' practice of using a release as a settlement device. . . . [O]ur . . . statutory scheme is clear. The Legislature has created a fair and equitable remedy to address the alleged fraud problem: rescission of the release, followed by suit. When restoration is

impossible because the settlement monies have been spent, the financially constrained parties can turn to [Civil Code] section 1693 to delay restoration until judgment, unless the defendants can show substantial prejudice. Our statutory scheme therefore effectively ensures that plaintiffs who may have been defrauded in the settlement process will be allowed access to the courts." (*Village, supra*, 50 Cal.4th at p. 931.)

We are also guided by *Myerchin, supra*, 162 Cal.App.4th 1526. There, the plaintiff entered into a written settlement agreement releasing his breach of contract claim against the defendant in exchange for payments totaling approximately $71,000. (*Id*. at p. 1530.) The plaintiff also agreed to dismiss the lawsuit within 10 days of executing the settlement agreement. (*Ibid*.) The defendant made the agreed-upon payments, but the plaintiff refused to dismiss the action. (*Ibid*.) The defendant then moved for summary judgment, contending the settlement agreement constituted a complete defense to the action. The defendant pointed out it had performed its obligations under the agreement while the plaintiff made no attempt to return the money he had been paid in consideration of the settlement, and further contended the plaintiff could not both retain the money and continue to pursue the litigation. (*Ibid*.)

The plaintiff opposed the summary judgment motion, arguing the settlement agreement was unenforceable on various grounds, including fraud, undue influence and duress. (*Myerchin, supra*, 162 Cal.App.4th at p. 1531.) The trial court granted summary judgment in favor of the defendant, and the Court of Appeal affirmed, "agree[ing] with the trial court's determination that [the plaintiff]'s failure to make any effort to actually rescind the agreement, specifically including any offer to refund the money he received in consideration of the settlement, preclude[d] his assertion that the agreement could not be relied upon to defeat his claim." (*Id*. at pp. 1529-1530.)[9]

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[9] *Myerchin* was disapproved of by *Village*, *supra*, 50 Cal.4th at page 929, footnote 6, "to the extent it ignores [Civil Code] section 1693's express grant of authority to courts to exercise their discretion in delaying restoration until judgment."

c. *Hwang cannot rescind the release because the undisputed evidence established she retained the entire benefit thereof.*

Hwang contends she should be relieved of the general release due to duress, economic duress, and undue influence. However, as we have said, as a prerequisite to suit, a plaintiff must restore, or offer to restore, benefits received under a release. Here, the evidence is undisputed that Hwang failed to do so. The undisputed evidence established that "[n]either Hwang [n]or attorney Lee ever attempted to return the $400 paid to her for execution of her General Release." (BHP's Undisputed Material Fact No. 15.)

Hwang purported to raise a triable issue with respect to Fact No. 15 by responding as follows: "Disputed. The $400 is not even enough to compensate Plaintiff for the unpaid wages due to her. Furthermore, the $400 could be offset by the unpaid wages due to Plaintiff." However, Hwang's argument she was entitled to apply the $400 toward unpaid wages she allegedly was owed does not raise a triable issue with respect to whether she restored, or offered the restore, the $400 she was paid for release of her claims.

The consideration for the release, in addition to the $400 payment, was the extension of the manager moveout date from 14 days, per the original agreement, to 30 days. Although Hwang's counsel purported to rescind the release, Hwang did not vacate the apartment. On May 18, 2011, fifteen days after Hwang signed the release, Hwang's attorney sent BHP a letter attempting to " 'rescind, revoke, and cancel' " the general release." (UMF No. 14.) However, Hwang did not vacate the apartment at that time. She remained in the apartment for 30 days and beyond. In fact, she did not move out until October 1, 2011, five months after BHP discharged her.

In response to these undisputed facts regarding Hwang's continued occupancy of the apartment, Hwang's responsive separate statement merely asserted, "Any monies owed for possession of the apartment should be offsetted by the unpaid wages owed by Defendant to Plaintiff."

We conclude that Hwang's retention of the benefits of the release precludes her from obtaining rescission of the release. Having retained the benefits of the release in their entirety instead of rescinding, Hwang cannot raise a triable issue with respect to duress, economic duress or undue influence. (*Village*, *supra*, 50 Cal.4th at p. 931; *Myerchin*, *supra*, 162 Cal.App.4th at pp. 1529-1530.) Therefore, Hwang's arguments that triable issues of material fact exist as to whether her consent to the release was freely given, whether she had any reasonable alternatives to signing the release, and whether BHP "exerted overpersuasion" on her, are unavailing.

d. *Although Hwang seeks to avoid the release, she did not plead a cause of action for rescission thereof.*

Leaving aside the fact that the undisputed evidence established that Hwang retained the entire benefit of the release and thus could not meet the prerequisites for rescission, Hwang did not even seek rescission in the court below.

Hwang contends triable issues exist with respect to BHP's affirmative defense because the release is "voidable" and "may be rescinded" due to duress, economic duress and undue influence. However, Hwang did not seek rescission below; she solely pled unfair business practices and various Labor Code violations. It is settled that "summary judgment cannot be denied on a ground not raised by the pleadings." (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663, italics omitted.) In granting summary judgment, the trial court properly recognized the absence of a claim for rescission of the release. Because Hwang did not sue for rescission of the release, that unpled theory could not serve as a basis for denying summary judgment.

3. *No merit to Hwang's challenge to validity of the release based on federal law*.

Hwang contends triable issues of fact exist as to the validity of the release because it was given to her in English, not her native language, and she was neither advised of her right to consult with counsel nor provided with the "statutory 'cooling off' period for

employees over 40." Hwang's argument is based on the requirements for a knowing and voluntary waiver set forth in 29 United States Code section 626(f).[10]

By way of background, "[a]dded as a collection of discrete amendments to the [federal] Age Discrimination in Employment Act ('ADEA') in 1990, the Older Workers Benefit Protection Act ('OWBPA'), Pub.L. No. 101-433 (codified at 29 U.S.C. §§ 621, 623, 626, & 630), imposes, in relevant part, mandatory requirements for waivers of ADEA rights and claims, *see* 29 U.S.C. § 626(f), to ensure that 'older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA,' . . . ('[The OWBPA] is designed to protect the rights and benefits of older workers. The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers.'). Under the OWBPA, '[a]n employee "may not waive" an ADEA claim unless the employer complies with the statute.' [Citation.] To this end, '[t]he OWBPA sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law . . . [and] creates a series of pre-requisites for knowing and voluntary waivers.' " (*Syverson v. International Business Machines Corp*. (9th Cir. 2007) 472 F.3d 1072, 1075-1076 (*Syverson*).)

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10 29 United States Code section 626(f) provides in relevant part: "(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—[¶] (A) the waiver is part of an agreement between the individual and the employer that is *written in a manner calculated to be understood by such individual*, or by the average individual eligible to participate; [¶] (B) the waiver specifically refers to rights or claims arising under this chapter; [¶] (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; [¶] (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; [¶] (E) *the individual is advised in writing to consult with an attorney prior to executing the agreement*; [¶] (F)(i) *the individual is given a period of at least 21 days within which to consider the agreement*; or [¶] . . . [¶] (G) *the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired*; . . . ." (Italics added.)

There are two fatal flaws in Hwang's OWBPA argument.

First, in opposing BHP's motion for summary judgment below, Hwang did not contend that OWBPA invalidates the release that she signed. This argument is being raised for the first time on appeal. " 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party. ' " (*North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 29.) This principle also applies to appellate review of summary judgment motions. (*Ibid*.) Therefore, Hwang's OWBPA argument is not properly before this court.

Further, and in any event, OWBPA, by its terms, is inapplicable. OWBPA imposes "mandatory requirements for waivers of ADEA rights and claims[.]" (*Syverson*, *supra*, 472 F.3d at p. 1076.) To reiterate, 29 United States Code section 626(f)(1) states: "An individual *may not waive any right or claim under this chapter* unless the waiver is knowing and voluntary." (Italics added.)

We recognize the broad general release that Hwang signed included a waiver of her rights under the ADEA. Nonetheless, Hwang did not sue BHP under the ADEA; Hwang sued for unfair business practices (Bus. & Prof. Code, § 17200) and various California Labor Code violations. Therefore, OWBPA has no application to this case. Accordingly, Hwang's contention the release is invalid because it did not comply with the requirements of 29 United States Code section 626(f) is meritless.

4. *Hwang's contention the trial court improperly weighed the evidence is unavailing.*

Finally, Hwang contends the trial court erred in weighing the evidence on summary judgment, instead of merely identifying the existence of triable issues. For example, Hwang argues that in addressing her contention that she is "nearly 60 years old from a foreign country with no knowledge of employment law," the trial court noted that Hwang is a California real estate licensee who negotiated the $400 payment.

As discussed, after examining the facts before the trial court on a summary judgment motion, our role is to independently determine their effect as a matter of law. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860; *California Aviation, Inc. v. Leeds* (1991) 233 Cal.App.3d 724, 730-731 (*Leeds*).) The "trial court's stated reasons for its ruling do not bind us. We review the ruling, not its rationale. [Citation.]" (*Leeds*, *supra*, at p. 731; accord, *Salazar v. Southern Cal. Gas Co.*, *supra*, 54 Cal.App.4th at p. 1376.)

Having concluded on our de novo review that the grant of summary judgment was proper, it is unnecessary to address Hwang's contention that the trial court improperly weighed the evidence in arriving at its decision.

DISPOSITION

The judgment is affirmed. BHP shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

KITCHING, J.

EGERTON, J.*

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