

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSE MANUEL DULANTO,

Plaintiff and Appellant,

v.

KNIGHTS OF COLUMBUS,

Defendant and Respondent.

B279341

B284429

(Los Angeles County
Super. Ct. No. BC568311)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Reversed and remanded with directions.

Jose Manuel Dulanto, in propria persona, for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton, Aaron A. Buckley and Kara Siegel for Defendant and Respondent Knights of Columbus.

Jose Manuel Dulanto sued his former employer, the Knights of Columbus.¹ The Knights of Columbus obtained summary adjudication of Dulanto's first cause of action and prevailed on the remaining causes of action at trial. Dulanto appeals. We reverse the judgment with respect to the first cause of action, and also reverse the post-judgment award of costs.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2014, Dulanto sued the Knights of Columbus, alleging that it had employed him to sell life insurance policies and that it had breached the employment contract; failed to pay regular and overtime wages; failed to compensate him for all hours he worked in violation of Labor Code sections 558 and 1198; failed to maintain records required by Labor Code section 226; and engaged in unfair business practices as defined by Business and Professions Code section 17200. Dulanto later amended his complaint to add two causes of action for unjust enrichment.

On March 24, 2016, the Knights of Columbus moved for summary judgment, or, in the alternative, summary adjudication. On June 7, 2016, the trial court granted summary adjudication of the first cause of action for breach of the employment contract but otherwise denied the motion.

While the motion for summary judgment was pending, on March 31, 2016, the Knights of Columbus terminated its contract with Dulanto.

¹ Dulanto also sued Steve Owens, a General Agent for the Knights of Columbus, but the trial court dismissed the action with prejudice as to Owens. Dulanto named Owens as a respondent in both appeals. We dismissed the appeals as to Owens on August 16, 2019.

Trial was scheduled for July 18, 2016. On July 14, Dulanto filed an ex parte application requesting a continuance of the trial date, leave to amend the first amended complaint, and discovery on the new causes of action. The trial court denied Dulanto's application.

At the commencement of trial on July 18, 2016, Dulanto asked the court to reconsider its ruling on his continuance request. The court declined to do so, stating, "This case was filed over a year and a half ago. The ex parte was filed two days, two court days before trial[,] on July 14th. I am not continuing the trial to allow the addition of almost another dozen causes of action. We will proceed with the trial this morning as previously scheduled." Later during trial, Dulanto orally moved to add a fraud cause of action to the first amended complaint. The court denied the motion.

Dulanto's causes of action for nonpayment of wages and failure to compensate for hours worked were tried by jury. The parties stipulated that Dulanto's cause of action for failure to maintain required records was derivative of these two claims and would therefore be determined by the jury's verdict. The jury returned a special verdict finding that Dulanto was an employee of Knights of Columbus and that he was an outside salesperson. As a result of this verdict, the court determined that the Knights of Columbus was not liable to Dulanto on the causes of action for nonpayment of wages, failure to compensate for hours worked, and failure to maintain required records.

After the jury delivered its verdict, the court considered Dulanto's equitable claims for unfair business practices and unjust enrichment. The court ruled that Dulanto had failed to show that the Knights of Columbus's business practices were

unfair or that the Knights of Columbus had been unjustly enriched. The court, therefore, entered judgment in favor of the Knights of Columbus on September 12, 2016.

Dulanto moved for a new trial, alleging irregularities in the court and jury proceedings; irregularity in the conduct of the adverse parties and their counsel; irregularity in the orders of the court; jury misconduct; accident or surprise; newly discovered evidence; insufficiency of the evidence; a verdict against the law; and errors of law. The court denied Dulanto's motion.

The Knights of Columbus submitted a memorandum of costs seeking a total of \$22,926.98. Upon Dulanto's motion to tax costs, the court taxed the costs in the amount of \$6,700.11 and allowed costs of \$16,226.87.

Dulanto appealed. His first appeal, filed after the judgment was entered and the motion for new trial was denied, is Case No. B279341. Dulanto's appeal from the ruling on the motion to tax costs is Case No. B284429.

DISCUSSION

I. Sufficiency of the Evidence

Dulanto argues that the evidence was insufficient to support the jury's finding that he was an outside salesperson. ““When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.” [Citations.]’ [Citation.] The judgment is presumed to be correct. [Citation.] And we presume that the record contains evidence to sustain every finding of fact. [Citation.] It is the appellant’s

burden to demonstrate that it does not.” (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) “That burden is a heavy one: “A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*. [Citation.]” [Citation.] “[W]hen an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.” [Citation.]” (*In re Marriage of Marshall* (2018) 23 Cal.App.5th 477, 487.)

Dulanto includes a statement of facts in his opening brief that consists of 19 facts he claims to have been undisputed. Some of these facts are supported with citations to his trial testimony or the testimony of another witness, but others lack citation or are supported by citations not to evidence presented at trial but to documents such as Dulanto’s new trial motion, his opposition to the motion for summary judgment, and exhibits supporting his motion for new trial. In his argument concerning the insufficiency of the evidence, Dulanto offers only one conclusory sentence, not supported by any citations to the record, describing what he again asserts are “[u]ndisputed material facts.” Dulanto has failed to meet his obligation to summarize all the evidence concerning whether he was an outside salesperson and therefore has not established that the evidence was insufficient to support the jury’s finding.

II. Unjust Enrichment and Unfair Business Practices

Dulanto asserts that the trial court erred in ruling in favor of the Knights of Columbus with respect to Dulanto's causes of action for unjust enrichment and unfair business practices. Dulanto has forfeited any claim of error as to these claims. "[I]t is appellant's burden to affirmatively show error. [Citation.] To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]' [Citation.] 'Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.' [Citation.] 'Hence, conclusory claims of error will fail.' [Citation.]" (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457.) Dulanto has provided no citations to legal authority in support of his conclusory arguments challenging the court's ruling; no citations to the record; and no meaningful legal analysis in support of his contentions. He therefore has forfeited any claim of error.

III. Alleged Failure to File Motion for Summary Judgment or Summary Adjudication

Dulanto argues on appeal that the court erred by ruling on the Knights of Columbus's motion for summary judgment or summary adjudication because the motion "does not exist in the Records of the Court." Dulanto argues that this "nullifies the whole process of Summary Judgment because the Court cannot decide [o]n a motion not filed or inexistent." Dulanto contends that the motion does not exist because it is not listed in the register of actions. The register of actions lists the memorandum of points and authorities in support of the motion for summary

judgment or summary adjudication, the separate statement of undisputed material facts, and supporting exhibits and declarations, but it does not list a notice of motion of summary judgment or summary adjudication.

Dulanto does not claim that he lacked timely notice of the motion; that he objected to the defective motion in the trial court; or that he was in any way prejudiced by the possibly missing notice of motion. He fully litigated the motion for summary judgment on its merits. He filed a full set of documents in opposition to the motion. The court's minute order from the summary judgment hearing indicates that the motion was argued in court by counsel. While no reporter's transcript from the hearing has been provided to this court, Dulanto does not dispute that his counsel appeared and argued against the motion for summary judgment. "It is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective.' [Citations.]" (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.)

IV. Summary Adjudication of Contract Claim

Dulanto argues that the court erred when it summarily adjudicated the first cause of action for breach of contract. Motions for summary adjudication are procedurally identical to motions for summary judgment. (Code Civ. Proc., § 437c, subd. (f)(2).) Summary adjudication is warranted only if the

motion completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. (Code Civ. Proc., 437c, subd. (f)(1).) The motion shall be granted “if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence” (Code Civ. Proc., § 437c, subd. (c).)

On review of a summary adjudication, “[w]e apply the same three-step analysis required of the trial court. ““First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. . . . [¶] Secondly, we determine whether the moving party’s showing has established facts which negate the opponent’s claim and justify a judgment in movant’s favor. . . . [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.” [Citations.]’ [Citation.]” (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503.)

The Knights of Columbus sought summary adjudication of the breach of contract claim on the ground that it did not breach the terms of the operative contract. In its memorandum of points and authorities in support of the motion, the Knights of Columbus characterized Dulanto’s allegations in the complaint as “contend[ing that] the [Knights of Columbus] breached the 2012 Agreement by failing to provide him training, a draw against

commissions, and a sufficient base of members to whom he could sell insurance.” The Knights of Columbus then argued, with citations to its separate statement of material facts and to its supporting evidence, that the contract did not obligate it to do any of those three things.

In support of its argument, the Knights of Columbus identified seven undisputed issues of material fact. The first three undisputed facts identified the parties’ contractual history, the operative contract, and the date of the operative contract. The fourth undisputed fact stated, “Dulanto contends the Order breached the 2012 Agreement by failing to provide him training, a draw against commissions, and a sufficient base of members to whom he could sell insurance.” In the final three undisputed facts, the Knights of Columbus asserted that the operative contract did not impose upon the Knights of Columbus “a duty or obligation to provide training to Dulanto”; “a duty or obligation to provide Dulanto a draw against his commissions”; or “a duty or obligation to provide Dulanto a minimum base of members to whom he could sell insurance.”

Dulanto’s breach of contract claim, however, contained more allegations than those addressed by the Knights of Columbus in its motion for summary adjudication. Dulanto alleged in his first amended complaint that the Knights of Columbus “promised, in some cases directly to Plaintiff, and at other times in promotional material distributed to members of the Order, that Plaintiff would be thoroughly trained, including receiving classes in Connecticut, and having his general agent accompany him for three months on sales calls, providing a draw while Plaintiff became familiar with the product, and that the Order was to provide him a base of at least 800 active members,

and to provide health insurance.” He alleged that the Knights of Columbus “breached the Agreement in that Plaintiff was never provided training in Connecticut, never had his general agent accompany him for three months on sales calls, was never provided a draw, was never provided councils with a base of 800 active members, had councils that he developed to a commercially reasonable point removed from him, approached prospective clients of Plaintiff’s and encouraging them to purchase through another prospective agent who was not even licensed, reassigned pending applications to other field agents, essentially robbing Plaintiff of his commission, and sending letters to Plaintiff’s clients demanding Social Security Numbers, although they and Plaintiff had been promised that they only required Taxpayer Identification Numbers.” Therefore, the Knights of Columbus failed to meet its initial burden of persuasion that there was no triable issue of material fact with respect to Dulanto’s breach of contract claim and that it was entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; Code Civ. Proc., § 437c, subd. (f)(1) [motion for summary adjudication shall be granted “only if it completely disposes of a cause of action”].) The court erred when it summarily adjudicated the first cause of action for breach of contract.

V. Denial of Leave to Amend Complaint

Two court days before trial, Dulanto requested a continuance to add approximately 12 new causes of action and seven additional defendants; he also sought to reopen discovery. The trial court denied his request.

We review the court’s ruling on a motion to amend a complaint for an abuse of discretion. (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242.) “Generally, “the trial

court has wide discretion in determining whether to allow the amendment, but the appropriate exercise of that discretion requires the trial court to consider a number of factors: ‘including the conduct of the moving party and the belated presentation of the amendment. [Citation.] . . . The law is well settled that a long deferred presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court’s denial of the amendment. [Citation.]’ [Citation.] ‘The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.’ [Citation.]” [Citation.]” (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 706-707.)

Dulanto supported his request for a continuance to amend the complaint with an affidavit in which he declared that his request was based “in part” on the positions taken by the Knights of Columbus in its motion for summary judgment. Dulanto advised the trial court that he wished to add causes of action for fraud, wrongful termination, “breach of the duty of care, discrimination, harassment, intentional infliction of emotional distress, spiritual and religious abuse, clergy economic abuse, violation of right of assembly, violation of equal pay and equal opportunity, and illegal interference with fraternity contract and due process, and breach of the contract of membership in the Knights of Columbus.” He acknowledged that “[s]ome of this may seem as though it was apparent from early in the case,” and attributed his delay in amending the complaint to being “paralyzed by religious fear,” “suffer[ing] spiritual and religious abuse,” and being “economically and religiously tied to the Knights of Columbus.” Dulanto does not appear to have

submitted a proposed second amended complaint to the trial court with his application.

The Knights of Columbus’s summary judgment moving papers were filed in March 2016, and Dulanto’s employment relationship was terminated in the same month. Dulanto, however, did not seek to amend the complaint until July 14, 2016, on the eve of trial. Given the imminence of trial when Dulanto made his request for a continuance, it was not an abuse of discretion for the court to refuse to halt the litigation to give Dulanto the opportunity to dramatically revise his complaint. However, to the extent that the new claims that Dulanto wished to assert were not within the scope of the action—such as the cause of action for wrongful termination that did not arise until shortly before trial—Dulanto remained able to litigate those claims in a separate action.²

VI. Motion to Tax Costs

In Case No. B284429, Dulanto appeals from the trial court’s ruling on his motion to tax costs. “[T]he award of costs necessarily falls with the judgment.” (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1027.) Consequently, the order awarding costs is reversed along with the partial reversal of the judgment.

² Dulanto did in fact file a new complaint alleging wrongful termination and 22 other causes of action against the Knights of Columbus, Owens, and a number of other individual defendants. That action was dismissed after successful demurrers, and Dulanto appealed (Case No. B288458). Our opinion in that appeal, in which we reverse the judgment in part and remand with instruction to give Dulanto leave to amend his complaint, is filed concurrently with this opinion.

DISPOSITION

In Case No. B279341, the judgment is reversed as to the first cause of action for breach of contract, and the matter is remanded for further proceedings. The order awarding costs appealed in Case No. B284429 is also reversed. Each party shall bear its own costs on appeal.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.