Filed 3/22/17 Hao v. Millbrae Paradise LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WEI HAO et al., Plaintiffs and Appellants, v. MILLBRAE PARADISE LLC et al., Defendants and Respondents.	B265132 (Los Angeles County Super. Ct. No. GC048146)

APPEAL from a judgment of the Superior Court of Los Angeles County, John P. Doyle, Judge. Reversed with directions.

Pierry Law Firm and Joseph P. Pierry; Law Offices of Shin P. Yang, Shin P. Yang and Frank Carleo for Plaintiffs and Appellants.

Tron & Tron, Terry L. Tron and Lanny M. Tron for Defendants and Respondents.

I. INTRODUCTION

Plaintiffs, Wei Hao and Faxue Gong, appeal from a summary judgment. Plaintiffs sued defendants, L.F. George Properties Corporation, George Lam, and Millbrae Paradise, LLC for: Labor Code violations; a violation of Business and Professions Code section 17200; wrongful termination; false imprisonment; negligent hiring; negligence; and intentional and negligent emotional distress infliction. Defendants moved for summary judgment or, as to each individual cause of action, summary adjudication of issues. Defendants argued: the Labor Code causes of action had no merit because there was no evidence they were plaintiffs' employers; there was no evidence to support the false imprisonment claims; and plaintiffs' tort claims were barred because they filed worker's compensation claims. Defendants contended worker's compensation was plaintiffs' exclusive remedy for the tort claims. Defendants' summary judgment motion was granted in its entirety.

Plaintiffs raise three arguments. First, plaintiffs contend the trial court erred by denying their motion for mandatory relief under Code of Civil Procedure[1] section 473, subdivision (b). Second, plaintiffs contend the trial court erred by denying a continuance of the summary judgment motion hearing. Third, plaintiffs contend there were triable issues of material fact that required the summary judgment motion be denied.

---

[1] Further statutory references are to the Code of Civil Procedure unless otherwise noted.

As we shall explain, we reverse the order granting summary judgment. But we will order that summary adjudication be entered in defendants' favor as to the first through ninth causes of action. We conclude as to the first eight causes of action there is no triable controversy as to whether defendants were plaintiffs' employers. For the ninth cause of action, there is no evidence plaintiffs were ever falsely imprisoned by defendants. But as to the tenth through thirteenth causes of action, we order the summary adjudication motion be denied. We conclude there is a triable issue as to whether workers' compensation is plaintiffs' exclusive remedy for their tort claims in the tenth through thirteenth causes of action.

II. BACKGROUND

A. Factual History

Millbrae Paradise, LLC is the owner and developer of a condominium project in Millbrae, California (the Millbrae project). L.F. George Properties Corporation is a property investment and management company. L.F. George Construction Corporation was the on-site construction company for the Millbrae project and the general contractor. L.F. George Construction Corporation is not a party to this action. Mr. Lam is the owner of Millbrae Paradise, LLC and L.F. George Properties Corporation. WMG Contractor Warehouse was a sub-contractor on the Millbrae project. WMG Contractor Warehouse is not a party to this appeal.

In July 2009, WMG Contractor Warehouse and another company entered into a standard general contractor/sub-contractor contract with L.F. George Construction and Millbrae Paradise, LLC. William Zhai, doing business as WMG Contractor Warehouse, signed the contract on his company's behalf. Mr. Zhai is not a party to this appeal. Mr. Lam signed the contract on behalf of L.F. George Construction and Millbrae Paradise, LLC.

Mr. Zhai had represented that he held a valid contractor's license. Mr. Zhai made this representation to Mr. Lam. Mr. Lam's business practice was to verify contractor's licenses prior to contracting with sub-contractors. Mr. Zhai obtained his contractor's license in 2006 or 2007. Mr. Zhai's construction license remained in effect at all times relevant to this litigation.

WMG Contractor Warehouse was to supply and install the marble countertops for the Millbrae project. WMG Contractor Warehouse entered into a substantially similar general contractor/sub-contractor agreement on March 22, 2010 regarding additional work on the Millbrae project. WMG Contractor Warehouse hired Weifeng Zhao to install the marble countertops in the kitchens and bathrooms for the Millbrae project. WMG Contractor Warehouse had earlier entered into an independent contractor relationship with Mr. Zhao that is memorialized in a written contract.

Mr. Zhao had first come to Mr. Zhai looking for work in 2007. The contract between Mr. Zhao and WMG Contractor Warehouse governed his work on the Millbrae project. Mr. Zhao provided Mr. Zhai with a business card that listed a contractor's license number.

During the time period at issue in this action, March 2010 through August 2010, WMG Contractor Warehouse maintained comprehensive general liability and worker's compensation insurance. It was Mr. Zhao's responsibility to hire any additional laborers needed to do the work on the Millbrae project. Mr. Zhao hired Mr. Hao to work at the Millbrae project.

Mr. Zhao transported Mr. Hao from Southern California to San Jose to work on the Millbrae project. Mr. Hao began working on the Millbrae project on or around March 5, 2010. Mr. Gong arrived to San Jose by bus and began working on the Millbrae project on or about April 1, 2010. Mr. Zhao arranged for plaintiffs' living arrangements while they worked on the Millbrae project.

Plaintiffs lived in an apartment in San Jose. They paid Mr. Zhao $7 a day to live there, which he deducted from plaintiffs' wages. Mr. Zhao drove plaintiffs to and from work each day. Mr. Zhao determined when plaintiffs would start work. Mr. Zhao acted as a foreperson and supervised the marble cutting workers, which included plaintiffs. Mr. Hao was paid $70 per day for his work. Mr. Gong was paid $80 per day for his work.

Mr. Gong was injured on May 17, 2010, when he cut his thigh with an electric saw while working on the Millbrae project. Mr. Gong observed Mr. Zhao opening a new saw and removing the safety guard from it. Mr. Gong admitted he used the saw many times to cut marble before he was injured. Mr. Gong described the injury as a pure accident. Mr. Zhao assisted Mr. Gong immediately after the accident. No bandage, towel or wrapping was put on Mr. Gong's leg. Mr. Zhao drove Mr. Gong to a medical facility. They went to the facility in Mr. Zhao's car. Mr. Gong received stitches for his injury and was released. Mr.

Zhao then drove Mr. Gong to the apartment. Approximately two weeks after the injury, Mr. Zhao drove Mr. Gong to a clinic. There, a doctor removed the stitches. Mr. Gong asserted one stitch was not removed.

Three weeks after injuring himself, Mr. Gong decided to return to work. Mr. Gong remained at the apartment during the three weeks. Mr. Gong was free to leave if he wanted. Mr. Gong was still paid $80 per day during these three weeks. After returning to work, Mr. Gong continued to work for one or two months. After this time, Mr. Zhao then told Mr. Gong it was time to leave. Mr. Gong was never told he was fired.

On April 21, 2010, Mr. Hao injured himself at the Millbrae project. Mr. Hao was helping Mr. Zhao unpack marble slabs from a crate. Mr. Hao was following Mr. Zhao's instructions while unloading the marble. Mr. Hao was to hold the marble up while Mr. Zhao removed the nails and nylon strips holding the crate together. During the unloading process, the marble fell onto Mr. Hao and knocked him to the ground. Mr. Hao asserted he suffered injuries to his ankle, low back, neck and a cut on his palm. Mr. Zhao and another worker pulled Mr. Hao from under the marble to Mr. Zhao's car. Mr. Hao was taken back to the apartment, not for any medical care. Mr. Hao remained in bed until the next day. A person only identified as Bruce was the owner of the apartment. Bruce brought some white granules to the apartment. The white granules were used by Mr. Hao to soak his foot to reduce swelling.

Mr. Hao remained at the apartment for approximately three weeks. Mr. Hao was told not to leave the apartment by Mr. Zhao. Mr. Hao also did not leave the apartment because he was also concerned he would get lost. He returned to work approximately the second week of May 2010. Mr. Hao continued to work for approximately three months until the end of August 2010. Mr. Zhao told Mr. Hao that he was not needed anymore. Mr. Hao does not assert he was owed money for his time off, only for his last month of work.

Both plaintiffs filed workers' compensation claims in 2012 regarding their injuries. Mr. Hao identified LF George Construction Corporation and WMG Contractor Warehouse as his employer. Mr. Gong identified WMG Contractor Warehouse as his employer.

B. Procedural History

1. Initial complaint, dismissal of fictitiously named defendants, default and default judgment and appeal

On September 28, 2011, plaintiffs filed their complaint against defendants, WMG Contractor Warehouse, Weifeng Zhao and the fictitiously named defendants. As noted, WMG Contractor Warehouse and Mr. Zhao are not a party to this appeal. Plaintiffs requested entry of default against all defendants. The superior court clerk entered default against Millbrae Paradise, LLC, erroneously named as "Milbree Paradise LLC," and Mr. Lam on December 27, 2011. The superior court clerk entered default against L.F. George Properties Corporation on March 9, 2012.

Plaintiffs also requested entry of a default judgment against defendants and Mr. Zhao. The clerk of the court issued a notice of rejection, which stated, "MUST DISMISS THE DOES." On March 21, 2012, plaintiffs requested to dismiss all fictitiously named defendants without prejudice. The clerk of the court dismissed the fictitiously named defendants accordingly.

On April 23, 2012, plaintiffs requested and received a default judgment against defendants and Mr. Zhao. Defendants applied ex parte to set aside the default judgments. Mr. Zhao did not move to vacate the default judgment and has never appeared in this action. On June 13, 20 and 29, 2012, the trial court granted defendants' applications and vacated the defaults and default judgments against them. Plaintiffs appealed from the June 13 and 20, 2012 orders. In an unpublished decision, we affirmed the June 13 and 20, 2012 orders vacating the defaults and default judgments. (*Hao v. WMG Contractor Warehouse* (Sept. 23, 2013, B242085) [nonpub. opn.].)

2. Plaintiffs' attempts to amend their pleadings

On June 18, 2012, plaintiffs filed an amendment to their complaint. Plaintiffs attempted to identify defendant Doe 1 as L.F. George Construction Corporation. L.F. George Construction Corporation then moved for dismissal. L.F. George Construction Corporation cited plaintiffs' prior voluntary dismissal of all fictitiously named defendants from the action. Counsel for L.F. George Construction Corporation also noted plaintiffs failed to obtain leave of court to amend their complaint. The trial court granted L.F. George Construction Corporation's dismissal motion on February 15, 2013.

3. Second amended complaint

On May 16, 2013, plaintiffs filed their second amended complaint which is the operative pleading. Plaintiffs named as defendants, WMG Contractor Warehouse, Mr. Zhao, and defendants in this appeal. Plaintiffs allege the following causes of action. Plaintiffs first through sixth causes of action are for Labor Code violations: unpaid wages; unpaid overtime; unpaid waiting time penalties; failure to provide meal periods; failure to provide rest periods; and failure to furnish timely and accurate wage statements. Plaintiffs' seventh cause of action is for violation of Business and Professions Code section 17200. Plaintiffs' eighth cause of action is for wrongful termination in violation of public policy, namely termination because of their injuries.

Plaintiffs' ninth cause of action is for false imprisonment. Plaintiffs allege they were not permitted to leave the apartment after their injuries. Plaintiffs' tenth cause of action is for negligent hiring of Mr. Zhao. Plaintiffs' eleventh cause of action is for negligence regarding the construction site. Plaintiffs' twelfth and thirteenth causes of action are for intentional and negligent infliction of emotional distress respectively. The tenth through thirteenth causes of action all cited to plaintiffs' injuries at work as their alleged harm.

4. Motion for relief from the order dismissing the fictitiously named defendants

On December 20, 2013, plaintiffs moved for mandatory relief under section 473 to set aside the dismissal of the fictitiously named defendants. Plaintiffs also requested that they be permitted to file their amended complaint to include L.F. George Construction Corporation as a defendant. The trial court denied the motion. The trial court noted plaintiffs had voluntarily dismissed the fictitiously named defendants. The trial court also found the motion was untimely under section 473, subdivision (b).

5. Admissions request, special interrogatory and production demand motions

Following several ex parte applications by the parties to extend deadlines, the trial court set the summary judgment deadline for September 5, 2014. On July 31, 2014, plaintiffs filed an ex parte application to shorten the time to bring motions against Millbrae Paradise, LLC to compel further responses to admissions requests, special interrogatories, and production demands. Plaintiffs also requested a continuance of the summary judgment hearing date. The trial court granted plaintiffs' July 31, 2014 ex parte application and scheduled the admissions request, special interrogatory and production demand motions to be heard on August 22, 2014. The trial court also continued the summary judgment hearing date to September 26, 2014, pursuant to section 437c, subdivision (h). Plaintiffs filed

motions to compel further responses to their admissions requests, special interrogatories, and production demands.

On August 22, 2014, the trial court heard the admission request, special interrogatory and production demand motions. Plaintiffs have provided no reporter's transcript or a suitable substitute of these proceedings. There was a tentative ruling issued. The tentative ruling indicated Millbrae Paradise, LLC had submitted inadequate responses to several respects. The parties do not dispute the tentative ruling was never adopted. The trial court did not rule on the admissions request, special interrogatory and production demand motions until the September 26, 2014 summary judgment hearing.

6. Summary judgment and adjudication and admissions request, special interrogatory and production demand motions

Defendants moved for summary judgment on May 30, 2014. Regarding the first through eighth causes of action, defendants asserted there was no evidence they were plaintiffs' employers. Defendants contended the ninth cause of action for false imprisonment had no merit because plaintiffs could not establish they were deprived of their freedom to leave the apartment. Regarding the tenth through thirteenth causes of action, defendants contended plaintiffs' exclusive remedy was workers' compensation. WMG Contractor Warehouse filed its own summary judgment motion on June 3, 2014. Plaintiffs filed their opposition on September 15, 2014. Plaintiffs asserted there were triable issues of fact as to whether: defendants were employers; Mr. Zhao was defendants' agent or employee; defendants retained control over plaintiffs' work; defendants negligently hired Mr.

Zhao; Mr. Lam exerted control over plaintiffs' work; defendants violated the Labor Code provisions as alleged in the second amended complaint; defendants wrongfully terminated plaintiffs; and defendants committed false imprisonment through Mr. Zhao.

On September 26, 2014, the trial court heard the summary judgment and adjudication motion. The trial court indicated in its tentative ruling that it would grant defendants' summary judgment motion. Regarding the first through eighth causes of action, the trial court ruled plaintiffs could not establish an employer-employee relationship. As to the false imprisonment claim, the trial court ruled plaintiffs failed to raise evidence they were physically restrained or confined. The trial court also concluded the tenth through thirteenth causes of action had no merit because it was undisputed plaintiffs had filed workers' compensation claims regarding their injuries. The trial court found workers' compensation was the exclusive remedy for the tort claims involving plaintiffs' injuries. The trial court indicated it would deny WMG Contractor Warehouse's summary judgment motion. The trial court adopted its tentative ruling on September 26, 2014. The trial court also deemed plaintiffs' motions to compel responses to the admissions request, special interrogatories and production demands moot.

Plaintiffs later filed a dismissal request as to WMG Contractor Warehouse following a settlement. Judgment was entered in favor of defendants and against plaintiffs on April 22, 2015.

III. DISCUSSION

A. Overview

Plaintiffs raise three arguments. Plaintiffs contend the trial court erred by not granting their motion for relief under section 473, subdivision (b). Plaintiffs contend the trial court erred by not continuing the summary judgment motion and adjudication hearing. Plaintiffs finally assert there were numerous issues of material fact that required resolution by a jury.

B. Motion for Mandatory Relief

Plaintiffs assert the trial court erred by not granting mandatory relief from the February 15, 2013 order. As mentioned, the trial court's February 15, 2013 order dismissed L.F. George Construction Corporation as a defendant. Section 473, subdivision (b) provides in part: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." In *Zamora v. Clayborn Contracting Group, Inc.* (2002)

28 Cal.4th 249, 257, our Supreme Court explained, "The purpose of this provision 'was to alleviate the hardship on parties who lose their day in court due solely to an inexcusable failure to act on the part of their attorneys.'" (Accord, *Henderson v. Pacific Gas & Electric Co.* (2010) 187 Cal.App.4th 215, 226.) The applicability of the mandatory relief provision of section 473, subdivision (b) is a question of law subject to de novo review. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1418; *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) But we review a default order or dismissal for substantial evidence when an appeal involves factual determinations that affect a party's entitlement to mandatory relief. (*Huh v. Wang*, *supra*, 158 Cal.App.4th at p. 1418; *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 928.) The mandatory relief provision of section 473, subdivision (b) only extends to vacating: a default which will result in the entry of a default judgment; a default judgment; or an entered dismissal. (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 258; *Leader v. Health Industries of America, Inc., supra*, 89 Cal.App.4th at p. 615.)

Here, plaintiffs moved for mandatory relief under section 473, subdivision (b) from the trial court's February 15, 2013 order. Plaintiffs filed their section 473, subdivision (b) motion on December 20, 2013. As noted, there is a six month deadline from the challenged dismissal for mandatory relief under section 473, subdivision (b). Plaintiffs' motion for mandatory relief is thus untimely. (See *Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 42; *Sugasawara v. Newland* (1994) 27 Cal.App.4th 294, 297.)

Plaintiffs rely on a case discussing section 576, *Gilmore v. Lick Fish & Poultry, Inc.* (1968) 265 Cal.App.2d 106, 110. Section 576 provides that any pleading or pretrial conference order may be amended. (See *Rainer v. Buena Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, 254, fn. 17.) *Gilmore* does not discuss the mandatory relief provisions of section 473, subdivision (b). Additionally, plaintiffs never asserted before the trial court that section 576 applied. Plaintiffs thus have forfeited any arguments concerning section 576 on appeal. (*In re Marriage of King* (2000) 80 Cal.App.4th 92, 117 and fn. 17; see *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Plaintiffs have failed to dispute that their motion for mandatory relief is untimely under section 473, subdivision (b).

Additionally, plaintiffs *voluntarily dismissed* the fictitiously named defendants from the action. Voluntary dismissal is not a dismissal for purposes of mandatory relief under section 473, subdivision (b). (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 30, fn. 5; *Nacimiento Regional Water Management Advisory Com. v. Monterey County Water Resources Agency* (2004) 122 Cal.App.4th 961, 967; *Huens v. Tatum* (1997) 52 Cal.App.4th 259, 264, disapproved on another point by *Zamora v. Clayborn Contracting Group, Inc., supra*, 28 Cal.4th at p. 256.) The trial court correctly denied the untimely motion for relief from the voluntary dismissal of the fictitiously named defendants. We need not decide the parties' remaining arguments concerning the merits of the section 473, subdivision (b) motion for relief from the dismissal of the fictitiously named defendants.

C. Continuance of the Summary Judgment Deadline and Admissions Request, Special Interrogatory and Production Demand Motions

Plaintiffs assert the trial court erred by refusing to continue the summary judgment motion hearing. Section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due." We review a trial court's ruling on a continuance motion under section 437c, subdivision (h) for an abuse of discretion. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100.)

Plaintiffs contend they made a continuance section 437c, subdivision (h) request on September 15, 2014, citing their counsel's declaration. Plaintiffs' counsel's declaration, however, was filed on September 26, 2014, the summary judgment hearing date. Plaintiffs' continuance motion under section 437c, subdivision (h) was untimely because it was due on or before the opposition response to the motion was due. (*Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353-1354; see

Chavez v. 24 Hour Fitness USA, Inc. (2015) 238 Cal.App.4th 632, 644.)

Plaintiffs alternatively contend that their continuance motion was based on section 437c, subdivision (i) because they had already received a continuance under section 437c, subdivision (h). Section 437c, subdivision (i) provides in pertinent part, "If, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication." Plaintiffs rely on the trial court's August 22, 2014 tentative ruling as evidence that defendants unreasonably failed to respond to admission requests, answer the special interrogatories and produce documents. The Courts of Appeal have held: "[A] trial court's tentative ruling is not binding on the court; the court's final order supersedes the tentative ruling. [Citations.]" (*Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300; accord, *Magno v. College Network, Inc.* (2016) 1 Cal.App.5th 277, 285, fn. 2.) The tentative ruling does not demonstrate that the trial court found defendants unreasonably failed to allow discovery to be conducted.

Additionally, there is no reporter's transcript of the August 22, 2014 hearing of the admissions request, special interrogatory and production demand motions. Plaintiffs fail to provide any adequate substitute such as a settled or agreed statement of the August 22, 2014 admissions request, special interrogatory and production demand motions hearing. In numerous situations, appellate courts have refused to reach the merits of an

appellant's claim because no reporter's transcript of a pertinent proceeding or a suitable substitute was provided. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 273-274 [transfer order]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [attorney fee motion hearing]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575 (lead opn. of Grodin, J.) [new trial motion hearing]; *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [hearing to determine whether counsel was waived and the minor consented to informal adjudication]; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 185-188 [appeal solely on partial clerk's transcript]; *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1672 [transcript of judge's ruling on an instruction request]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [trial transcript when attorneys fees sought]; *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [surcharge hearing]; *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657 [nonsuit motion where trial transcript not provided]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 [monetary sanctions hearing]; *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1076-1077 [legal issue arising during preliminary injunction hearing]; *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532-1533 [reporter's transcript fails to reflect content of special instructions]; *Buckhart v. San Francisco Residential Rent Stabilization and Arbitration Bd.* (1988) 197 Cal.App.3d 1032, 1036 [hearing on Code Civ. Proc. § 1094.5 petition]; *Sui v. Landi* (1985) 163 Cal.App.3d 383, 385-386 [motion to dissolve preliminary injunction hearing]; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 711-712 [demurrer hearing]; *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 71-73 [transcript of argument to jury]; *Ehman v. Moore* (1963) 221 Cal.App.2d 460,

462-463 [failure to secure reporter's transcript or settled statement as to offers of proof].) These courts have refused to reach the merits of an appellant's claim absent a reporter's transcript or a suitable substitute because error is never presumed. (*Null v. City of Los Angeles*, *supra*, 206 Cal.App.3d at p. 1532; *Rossiter v. Benoit*, *supra*, 88 Cal.App.3d at p. 712.)

An appellant must affirmatively establish error by an adequate record. (*Foust v. San Jose Construction Co., Inc., supra*, 198 Cal.App.4th at p. 187; *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; *Park Place Estates Homeowners Assn. v. Naber* (1994) 29 Cal.App.4th 427, 433; *Null v. City of Los Angeles*, *supra*, 206 Cal.App.3d at p. 1532.) In other words, it is an appellant's burden to provide an adequate record on appeal. (*Ballard v. Uribe*, *supra*, 41 Cal.3d at pp. 574-575; *Foust v. San Jose Construction Co., Inc.*, *supra*, 198 Cal.App.4th at p. 187; *Null v. City of Los Angeles*, *supra*, 206 Cal.App.3d at pp. 1532–1533.) Plaintiffs have failed to provide an adequate record on appeal that establishes the trial court abused its discretion in refusing to continue the summary judgment motion hearing. We have no transcript of the August 22, 2014 hearing on the motion to compel. The August 22, 2014 ruling served as a material predicate of the trial court's refusal to continue the summary judgment motion hearing. We now turn to the merits of defendants' summary judgment motion.

D. Summary Judgment Motion

1. Legal Standard

In *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851, our Supreme Court described a party's burden on summary judgment motions as follows: "[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact 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 . . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact . . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (Fns. omitted; see *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 877-878.)

We review an order granting summary judgment de novo. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65, 67-68.) The trial court's stated reasons for granting summary judgment are not binding because we review

its ruling not its rationale. (*Coral Construction, Inc. v. City and County of San Francisco, supra,* 50 Cal.4th at p. 336; *Continental Ins. Co. v. Columbus Line, Inc.* (2003) 107 Cal.App.4th 1190, 1196.) In addition, a summary judgment motion is directed to the issues framed by the pleadings. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled on a different point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.) These are the only issues a motion for summary judgment must address. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249-1250; *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353, 364.)

2. First through third causes of action

a. overview

The first cause of action is for unpaid wages. The second cause of action is for unpaid overtime. The third cause of action is for unpaid waiting time penalties. Labor Code section 2699 provides in pertinent part: "(a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . for a violation of this code, may, as an alternative, be covered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees . . . . [¶] . . . [¶] (c) For purposes of this part, 'aggrieved employee' means a person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." Thus an essential

element of the Labor Code claims is the existence of an employment relationship.

The definition of employment, for purposes of the Labor Code wage statutes, is governed by our Supreme Court's opinion in *Martinez v. Combs* (2010) 49 Cal.4th 35, 57-60 (*Martinez*). In *Martinez*, our Supreme Court examined a grant of a defense summary judgment motion against seasonal workers seeking unpaid minimum wages under Labor Code section 1194. (*Martinez, supra*, 49 Cal.4th at p. 42.) Our Supreme Court addressed Industrial Welfare Commission Wage Order No. 14, codified under California Code of Regulations, title 8, section 11140, which regulated "Agricultural Occupations." (*Id.* at p. 68.) *Martinez* establishes that a wage order governing a subject industry defines the employment relationship and who may be held liable for unpaid wages for Labor Code section 1194 actions. (*Id.* at p. 64.) Our Supreme Court held: "To employ . . . under the [Industrial Welfare Commission's] definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Ibid.*; see also *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1429 [applying *Martinez* in context of Wage Order No. 12 and motion picture industry].)

The Industrial Welfare Commission adopted regulations governing wage, hours, and working conditions for "Construction, Drilling, Logging and Mining Industries." (Cal. Code. Regs., tit. 8, § 11160.) California Code of Regulations, title 8, section 11160 applies in this context. Both California Code of Regulations, title 8, section 11140 and section 11160 use the same definitions for

"employer," "employee," and "employ." (Compare Cal. Code Regs., tit. 8, § 11140, subd. (2)(C), (F), (G) with Cal. Code Regs., tit. 8, § 11160, subd. 2(G), (H), (I).) *Martinez* thus governs the definition of employment for the Labor Code wage statutes at issue here. (*Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1431.) We will examine each of the definitions of employment as defined in *Martinez*.

b. exercise control over hours, wages or working conditions

Defendants assert there is no evidence they exercised control over plaintiffs' hours, wages or working conditions. Defendants rely on plaintiffs' deposition testimony that Mr. Zhao hired plaintiffs and arranged and supervised their work, tasks and wages. Defendants relied in part on Mr. Hao's deposition testimony. That testimony indicated Mr. Hao was hired, paid, taken to and from work, told when to stop working, and informed when the lunch break would begin by Mr. Zhao. Also, defendants relied in part upon Mr. Gong's deposition testimony. That testimony indicated Mr. Gong was taken to and from work, told when to have lunch, and when to stop work by Mr. Zhao. Mr. Lam declared neither he nor anyone representing defendants: set plaintiffs' pay rate; calculated any tax withholding; submitted any reports to government agencies concerning plaintiffs' pay; or issued any paychecks to plaintiffs. Defendants have met their initial burden of production. (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

As the burden has shifted, plaintiffs must produce specific facts showing the existence of a triable controversy as to the existence of an employment relationship. Once the defendant shifts the burden of production, section 437c, subdivision (p)(2) describes the plaintiff's obligation to avoid summary judgment or adjudication, "The plaintiff . . . shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . ." In other words, where the opposition only presents speculation in lieu of specific facts, summary judgment should be entered if the burden of production has shifted. (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 864; *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.)

Plaintiffs assert there is a triable controversy as to whether Mr. Lam controlled their work. Plaintiffs presented no testimony from Mr. Gong that any work was supervised by Mr. Lam. Plaintiffs rely in part on Mr. Hao's deposition testimony concurring interactions with Mr. Lam. For example, Mr. Hao was told on three occasions he could not take a break. This direction came from Mr. Lam. And, Mr. Hao identified several occasions where instructions concerning the work on the project were issued by Mr. Lam on behalf of defendants. On five occasions, Mr. Lam told Mr. Hao to "hurry up" as a deadline was approaching and to insure "good quality." Mr. Hao was also told by Mr. Lam to remove some adhesive on a countertop. In the context of our case, these sporadic interactions are insufficient to create a triable controversy whether Mr. Lam had exercise of control over plaintiffs' working conditions. Our Supreme Court held: "Supervision of the work, in the specific sense of exercising control over how services are performed, is properly viewed as

one of the 'working conditions' mentioned in the wage order. To read the wage order in this way makes it consistent with other areas of the law, in which control over how services are performed is an important, perhaps even the principal, test for the existence of an employment relationship. [Citations.]" (*Martinez*, *supra*, 49 Cal.4th at p. 76; *Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019.)

But Mr. Hao's testimony, liberally constructed, shows sporadic and attenuated directions given by Mr. Lam. Both Mr. Hao and Mr. Gong worked for over one-half year on the project. And plaintiff's never dispute the accuracy of defendant's evidence or the contractual arrangements entered into by Mr. Lam, Mr. Zhao and Mr. Zhai. Plaintiffs have not raised a triable issue of material fact showing defendants exercised control over hours, wages or working conditions.

c. suffer or permit to work

The definition of "to suffer or permit to work" comes from early 20th-century statutes prohibiting child labor. (*Martinez*, *supra*, 49 Cal.4th at p. 69; *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1434.) As asserted by defendants, there is no evidence that this definition applies. There is no evidence that defendants had the power to cause or prevent plaintiffs from working. (*Martinez*, *supra*, 49 Cal.4th at p. 70; *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1434.) Plaintiffs do not contest this.

d. common law employment relationship

We apply the following test for the common law employment relationship: "The essence of the test is the 'control of details'—that is, whether the principal has the right to control the manner and means by which the worker accomplishes the work— but there are a number of additional factors in the modern equation, including: (1) whether the worker is engaged in a distinct occupation or business; (2) whether, considering the kind of occupation and locality, the work is usually done under the alleged employer's direction or without supervision; (3) the skill required; (4) whether the alleged employer or worker supplies the instrumentalities, tools, and place of work; (5) the length of time the services are to be performed; (6) the method of payment, whether by time or by job; (7) whether the work is part of the alleged employer's regular business; and (8) whether the parties believe they are creating an employer-employee relationship." (*Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10, citing *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350-351; *Futrell v. Payday California, Inc.*, *supra*, 190 Cal.App.4th at p. 1434.)

Defendants assert there is no evidence of a common law employer-employee relationship. Defendants rely on Mr. Gong and Mr. Hao's deposition testimony as referenced above as well as Mr. Lam's declaration. Defendants have met their initial burden of persuasion.

Plaintiffs argued there is a triable issue of material fact demonstrating an employer-employee relationship. However, plaintiffs have not demonstrated this with citation to sufficient supporting documents. As noted previously, Mr. Hao's deposition testimony does not demonstrate Mr. Lam controlled: the details of how plaintiffs were to accomplish their work; how long plaintiffs worked each day; when plaintiffs were hired or fired; or how plaintiffs were paid. Plaintiffs have not raised a triable issue of material fact indicating a common law employment relationship exists between plaintiffs and defendants. Mr. Lam's interactions with Mr. Hao were brief and attenuated when considered with the duration of the plaintiffs' work on the project.

e. unlicensed contractor theory

Defendants also assert Labor Code section 2750.5 does not apply here. Labor Code section 2750.5 provides in pertinent part, "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor." The Court of Appeal has held: "'Labor Code section 2750.5 operates to conclusively determine that a general contractor is the employer of not only its unlicensed subcontractors but also those employed by the unlicensed subcontractors.' [Citations.]" (*Hunt Building Corp. v. Bernick* (2000) 79 Cal.App.4th 213, 220; accord, *Sanders Construction Co., Inc. v. Cerda* (2009) 175 Cal.App.4th 430, 434-435.)

Defendants rely upon Mr. Zhai's deposition. Mr. Zhai testified that: Mr. Zhao worked for WMG Contractor Warehouse for over two years prior to the Millbrae project; Mr. Zhao and WMG Contractor Warehouse had an independent contractor agreement which governed the Millbrae project work; and Mr. Zhao received regular paychecks and a 1099 tax form from WMG Contractor Warehouse. Mr. Lam denied defendants were involved in any way with WMG Contractor Warehouse hiring Mr. Zhao. Defendants have met their initial burden of persuasion. (§ 437c, subd. (p)(2).)

Plaintiffs assert Mr. Lam paid Mr. Zhao directly. Plaintiffs cite deposition testimony from Mr. Zhai in support of this assertion. However, we cannot find this particular testimony in the appellate record. Documents and facts not presented before the trial court are not part of the record and generally not considered on appeal. (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366, fn. 8; *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

Plaintiffs also contend defendants were general contractors on the project. Plaintiffs cite to no document in support of this contention. Plaintiffs did not dispute L.F. George Construction Corporation was the general contractor. As noted, L.F. George Construction Corporation is not a party to this action. Additionally, plaintiffs did not dispute that WMG Contractor Warehouse hired Mr. Zhao. Defendants are entitled to judgment as a matter of law for the first through third causes of action.

3. Fourth Through Sixth Causes of Action

The fourth cause of action is for failure to provide meal periods. The fifth cause of action is for failure to provide rest periods. The sixth cause of action is for failure to provide timely and accurate wage statements. Plaintiffs' fourth through sixth causes of action do not involve Labor Code wage statutes. However, an employer-employee relationship is also a necessary element for these causes of action. (See Labor Code, §§ 226, subd. (a), 226.7, 512.) Because these statutes do not define employment, we apply the common law definition. (*Metropolitan Water Dist. of Southern Cal. v. Superior Court* (2004) 32 Cal.4th 491, 500; *Holmgren v. Los Angeles* (2008) 159 Cal.App.4th 593, 604.) We previously discussed the common law definition of the employer-employee relationship above. We have also discussed the statutory definition of an employer. Defendants' arguments concerning common law and statutory employer-employee relationship apply to the fourth through sixth causes of action. Defendants satisfied their burden of persuasion. As discussed above, plaintiffs have failed to demonstrate the existence of a triable controversy concerning the existence of an employer-employee relationship. Defendants are entitled to judgment as a matter of law for the fourth through sixth causes of action.

4. Seventh and Eighth Causes of Action

The seventh cause of action is for violation of Business and Professions Code section 17200 for the Labor Code violations. As previously indicated, plaintiffs failed to raise a triable issue as to the existence of an employer-employee relationship for their Labor Code causes of action. Because the predicate Labor Code violations failed, there is no triable issue of material fact for the seventh cause of action. (See *Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1142; *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) Defendants were entitled to judgment as a matter of law for the seventh cause of action.

The eighth cause of action is for wrongful termination in violation of public policy. However, wrongful termination in violation of public policy also requires the existence of an employer-employee relationship. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 900; *Goonewardene v. ADP, LLC* (2016) 5 Cal.App.5th 154, 171.) As we have explained, there is no triable issue as to the existence of an employer-employee relationship.

5. Ninth Cause of Action

The ninth cause of action is for false imprisonment. Our Supreme Court held: "[T]he tort [of false imprisonment] consists of the "'nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.'" [Citation.] That length of time can be as brief as 15 minutes. [Citation.] Restraint may be effectuated by means of physical force [citation], threats of force or of arrest [citation], confinement by physical barriers [citation], or by means of any other form of unreasonable duress. [Citation.]" (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715; *Jon Davler, Inc. v. Arch Insurance Co.* (2014) 229 Cal.App.4th 1025, 1034.)

Defendants contend plaintiffs were never subjected to any threats, restrained physically or locked into the apartment. Mr. Gong testified that the apartment doors were unlocked and he was free to leave. Mr. Hao testified he stayed because he was afraid he would get lost if he left the apartment. Mr. Lam declared he had no knowledge of where plaintiffs lived. Defendants have met their initial burden of persuasion. Plaintiffs raised no evidence contradicting the defense showing. Defendants are entitled to judgment as a matter of law for the ninth cause of action.

6. Tenth Through Thirteenth Causes of Action

Plaintiffs' tenth cause of action is for negligent hiring of Mr. Zhao. Plaintiffs' eleventh cause of action is for negligence concerning the construction site. Plaintiffs' twelfth and thirteenth causes of action are for intentional and negligent of emotional distress infliction respectively. Plaintiffs rely on their workplace injuries as their harm. Defendants argue plaintiffs pursued worker's compensation claims for their workplace injuries. Thus, defendants argue plaintiffs are barred from recovering on their tort causes of action for the same injuries. This is defendants' sole argument in their summary judgment motion for the tenth through thirteenth causes of action. We requested the parties to provide supplemental briefing concerning Labor Code section 3852.

Labor Code section 3852 provides in pertinent part, "The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer." (*Charles J. Vacanti, M.D., Inc.* v. *State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 813; *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 6.) Additionally, Labor Code section 3602, subdivision (a) provides in pertinent part: "Where the conditions of [worker's] compensation . . . concur, the right to recover compensation is [with exceptions not applicable here] the sole and exclusive remedy of the employee or his or her dependents against the employer." In other words, Labor Code sections 3602, subdivision (a) and 3852 provide that worker's compensation is the exclusive remedy for an employee's workplace injury claims against *an employer*. A plaintiff who

recovers workers' compensation from an employer can pursue common law tort actions against third parties for independent acts of negligence. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 697; *Waste Management Inc. v. Superior Court* (2004) 119 Cal.App.4th 105, 109-110.) As argued by defendants and as we concluded above, there is no triable issue of material fact indicating defendants were plaintiffs' employers. Thus, worker's compensation does not bar plaintiffs' tort causes of action. Based on the arguments raised in the trial court, defendants were not entitled to judgment on the tenth through thirteenth cause of action.

Defendants assert new legal arguments in their supplemental letter brief citing *Privette v. Superior Court*, *supra*, 5 Cal.4th at page 702, and *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 209. Because these arguments were not presented below in any form, we decline to consider them now. (See *California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22 ["'[T]he appellate court may affirm a summary judgment on any correct legal theory, as long as the parties had an adequate opportunity to address the theory in the trial court . . . '"]; accord, *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 403; *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495, 509; *Angelotti v. Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1402.) The parties are free to raise these arguments before the trial court.

IV. DISPOSITION

The summary judgment is reversed. Upon remittitur issuance, an order granting summary adjudication is to be entered in defendants' favor as to the first through ninth causes of action. As to the tenth through thirteenth causes of action, the summary adjudication motion is to be denied. The parties are to bear their own appellate costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

KRIEGLER, J.

BAKER, J.