Filed 11/8/12 Zentner v. Farmers Group CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JAMES R. ZENTNER, Plaintiff and Appellant, v. FARMERS GROUP, INC., et al. Defendants and Respondents.	B235767 (Los Angeles County Super. Ct. No. BC428199)

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry A. Green, Judge. Affirmed.

O'Leary Wood & Robbins, LLP, Gregory J. Wood, B. Douglas Robbins and Brandon Fernald for Plaintiff and Appellant.

Michelman & Robinson, LLP, Sanford L. Michelman, Mona Z. Hanna, Marc R. Jacobs and Robin James for Defendants and Respondents.

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James R. Zentner (plaintiff) sued Farmers Group, Inc., Farmers Insurance Exchange, Farmers Underwriters Association, Truck Insurance Exchange, Truck Underwriters Association, Fire Insurance Exchange, Fire Underwriters Association, Mid-Century Insurance Company, Farmers New World Life Insurance Company, and Farmers Insurance Group (collectively defendants or Farmers), advancing alternative theories that he was either an employee of Farmers, or a franchisee, that he was inadequately compensated, and his relationship with Farmers was wrongfully terminated. He sued the Farmers defendants for breach of contract, wrongful termination in violation of public policy, defamation, wrongful termination of franchise agreement, and violation of Business and Professions Code section 17200. A claim for interference with prospective business advantage was brought against Farmers Group, Inc., only. The trial court disposed of all of plaintiff's claims by summary judgment, concluding that plaintiff was an independent contractor and not an employee, and was not a franchisee.[1] Plaintiff appeals, contending there are triable issues of fact as to his employment status and whether he was a franchisee. He has waived any error regarding his other claims (breach of contract, defamation, and tortious interference) by failing to challenge the trial court's rulings on appeal. We affirm.

BACKGROUND

The following facts are undisputed: On May 1, 1981, plaintiff signed a District Manager's Appointment Agreement (DMAA) with defendants Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company. As District Manager, plaintiff agreed to recruit and train insurance agents for Farmers. Plaintiff received "overwrite" (commission) payments based on the amount of business generated by the agents he referred to Farmers.

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[1] Plaintiff also sued John Weaver, a Farmers executive, for defamation. Farmers and John Weaver moved separately for summary judgment. Because plaintiff does not challenge the trial court's ruling on Weaver's motion, we will not discuss it further.

The DMAA provided that plaintiff was an independent contractor. It specified that "[n]othing contained herein is intended or shall be construed to create the relationship of employer and employee. The time expended by the District Manager is solely within his/her discretion, and the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the District Manager. No control is to be exercised by the Companies over the time when, the place where, or the manner in which the District Manager shall operate in carrying out the objectives of the Agreement . . . ." The DMAA would terminate upon plaintiff's death, and "may be cancelled without cause by either the District Manager or the Companies on 30 days written notice." The DMAA also provided that plaintiff was to "conform to all . . . operating principles and standards" of Farmers, and that plaintiff was to maintain "adequate records," including "monthly profit and loss statement[s]."

Plaintiff had the sole discretion concerning his working hours, and when and where to take his lunch. He leased his own office, hired his own employees, controlled how they performed their duties, set the shifts and hours for their work, and determined how to pay them. Plaintiff paid his employees with W-2's that listed him as their employer. Plaintiff also implemented a training program for the agents he recruited, and had discretion about which of these agents to recommend to Farmers. Plaintiff incurred business expenses that he listed as deductions on his tax returns, such as advertising expenses, business supplies, and office expenses. Plaintiff also represented that he was self-employed on his tax returns.

Plaintiff did not pay any fee to enter into the DMAA. He did not sell insurance, and did not offer, distribute or sell any goods. The DMAA required plaintiff to "recruit for appointment and train as many agents acceptable to the Companies as may be required to produce sales in accordance with goals and objectives established by the Companies." Plaintiff was also required to execute a subsidy agreement for any agent selected by Farmers for appointment as a "career," or full-time, agent. Farmers would provide a subsidy loan to appointed agents, and the subsidy agreement required plaintiff to guarantee a portion of this loan if the agent failed to meet specified performance or

tenure requirements and failed to repay the loan. Plaintiff admitted that any loan subsidy repayments would be a business expense that he would deduct from his taxes as "[j]ust the cost of doing business."

In support of their summary judgment motion, defendants introduced evidence that when plaintiff signed the DMAA, he understood he would be an independent contractor and not an employee of Farmers, and that the parties intended plaintiff to be an independent contractor. Nevertheless, plaintiff testified that he was *either* "an employee or a franchisee" of Farmers. When asked whether he "ran [his] own business or . . . didn't," he responded, "I would say both." Plaintiff maintained that he ran his own business as District Manager, but was also an employee of Farmers.

In opposition, plaintiff did not dispute that the DMAA characterized him as an independent contractor. As to defendants' facts purporting to establish an independent contractor relationship, plaintiff agreed they were "undisputed" and offered no additional facts in his separate statement evidencing an employment relationship. His declaration, however, recited that Farmers "[d]irected . . . the time, place and manner by which I must perform my work as District Manager"; "[t]he time expended by me is not 'solely within my . . . discretion,' but at the direction of Farmers"; "Farmers directs my business plan each year dictating the number of new agents I musts add"; "[d]irect control is exercised by Farmers over the time when, the place where, or the manner in which I operate in carrying out the objectives of the [DMAA]"; "I was required to attend conferences"; and "I was required to attend meetings," among other purported indicia of control. None of this evidence was referenced in plaintiff's opposition separate statement.

Plaintiff's declaration also characterized many of his business expenses as franchise fees. Plaintiff was required to pay the costs to attend Farmers's conferences, pay to establish call centers to generate leads, and to buy leads from Farmers. Plaintiff promoted Farmers's products by offering trips, cash and gifts to agents at his own expense. He also attended mandatory meetings at his own expense. Plaintiff was required to repay Farmers for subsidy loans that Farmers provided to full-time agents. Plaintiff averred that he "did not sell insurance for Farmers. As District Manager, I

provided services for Farmers. My only job was to supervise agents, add agents and implement the policies of Farmers." Plaintiff did not object to any of defendants' evidence submitted in support of their motion.

With their reply brief, defendants interposed numerous objections to plaintiff's opposition evidence. The trial court sustained defendants' objections to the portions of plaintiff's declaration purporting to establish that he paid a franchise fee, on the basis that the declaration conflicted with his deposition testimony that he paid no fee to *enter* into the DMAA. However, plaintiff also testified that although he paid no fee at the time he entered the DMAA, he was required to pay fees associated with *maintaining* his status as District Manager.

The trial court granted defendants' motion for summary judgment in its entirety, concluding that plaintiff was an independent contractor and not an employee. The trial court concluded the DMAA established that plaintiff was an independent contractor, plaintiff understood he was an independent contractor, and plaintiff essentially ran his own business, because he leased his own office, hired his own employees, had discretion over his work hours, and made his own recommendations to Farmers about which agents to hire. The trial court also concluded that plaintiff was not a franchisee, because he testified at his deposition that he did not pay a fee to enter the DMAA. The trial court additionally concluded the fees paid to maintain his status as District Manager were ordinary business expenses and not franchise fees. Moreover, the trial court found that because plaintiff never offered or sold any goods, his business relationship with Farmers could not be deemed a franchise. This timely appeal followed.

DISCUSSION

"[T]he 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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at p. 850.) The party opposing summary judgment

"may not rely upon the mere allegations or denials of its pleadings," but rather "shall set forth the specific facts showing that a triable issue of material fact exists." (Code Civ. Proc., § 437c, subd. (p)(2).)

In opposing the motion, a party must "include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating whether the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed." (Code Civ. Proc., § 437, subd. (b)(3).) In deciding motions for summary judgment, courts disregard evidence that was not referenced in the separate statement. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1266-1267 (*Laabs*); Code Civ. Proc., § 437c, subd. (b)(3) ["Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion."].) A triable issue of material fact exists where "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." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

Where summary judgment has been granted, we review the trial court's ruling de novo. (*Aguilar*, *supra*, 25 Cal.4th at p. 860.) We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subds. (c).) We review the trial court's ruling on evidentiary objections under the abuse of discretion standard of review. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

1. Plaintiff Was an Independent Contractor

The question of whether plaintiff was an employee or independent contractor turns on the degree of control exercised by defendants. Although the "control test" is the most important consideration, there are other indicia of the nature of the relationship, such as

the right to discharge at will, and other factors, such as: " '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419, 426.) "The existence and degree of each factor of the . . . test for employment is a question of fact, while the legal conclusion to be drawn from those facts is a question of law. [Citation.] Even if one or two of the individual factors might suggest an employment relationship, summary judgment is nevertheless proper when . . . all the factors weighed and considered as a whole establish that [plaintiff] was an independent contractor and not an employee." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 590 (*Arnold*).)

In support of their motion for summary judgment, defendants introduced evidence that the parties agreed in the DMAA that plaintiff was an independent contractor and that Farmers exerted very little control over plaintiff's day-to-day operations. Plaintiff had the sole discretion concerning his work hours. He leased his own office space, hired his own employees, controlled how they performed their duties, set the shifts and hours for their work, and had the sole discretion on how to pay them. He paid his employees with W-2's that listed him as their employer. Plaintiff also implemented a training program for the agents he recruited and had discretion about which of these agents he would recommend to Farmers. Plaintiff incurred business expenses which he wrote off on his taxes, and represented that he was self-employed on his returns. All of these facts support a conclusion that plaintiff was an independent contractor rather than an employee.

Plaintiff did not dispute this evidence, and cited no competing proof evidencing an employer-employee relationship in his separate statement. On appeal, plaintiff now seeks to accomplish what he did not attempt to do in opposition to the motion for summary judgment. His opening brief lists numerous "facts" claimed to support his status as an employee that appeared nowhere in his opposition separate statement. The failure to reference this evidence in his opposition separate statement waives the issue on appeal. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-31; *Laabs, supra,* 163 Cal.App.4th at pp. 1266-1267; Code Civ. Proc., § 437c, subd. (b)(3).)

In any event, the evidence recited in his opening brief that was not cited in his separate statement fails to demonstrate a triable issue of material fact. That plaintiff was required to attend meetings, prepare progress reports, issue a business plan and such does not tip the scale in favor of an employment relationship. The degree of control exercised by defendants is only that of a contracting party seeking to have the services it contracted for delivered in an acceptable manner. Although another indicia of control is the right to terminate at will, and the DMAA could be "cancelled without cause" by either party, "a termination at-will clause . . . may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra*, 202 Cal.App.4th at p. 589.) This is especially true in light of other contract provisions requiring 30-days' notice of cancellation, and contemplating negotiations to buy out the District Manager's contract after cancellation. These contract terms do not evidence an intent to transform the parties' relationship into an employment relationship. (*Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1107.) As a matter of law, all of the factors taken together establish that plaintiff was an independent contractor. (*Arnold, supra,* 202 Cal.App.4th at p. 590.)

2. Plaintiff Was Not a Franchisee

Plaintiff takes the alternative position that if he was not an employee of Farmers, he was a franchisee. He contends he offered the service of recruiting agents for Farmers, as well as recruitment and training services to agents, and that he was required to pay

various expenses which should be construed as franchise fees. Under the Franchise Investment Law (Corp. Code, § 31000 et seq.), a franchise exists when: "A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and [¶] . . . The operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and [¶] . . . The franchisee is required to pay, directly or indirectly, a franchise fee" of at least $500 annually. (Corp. Code, § 31005, subd. (a)(1)-(3); Cal. Code Regs., tit. 10, § 310.011.)

The DMAA required plaintiff to recruit and train agents exclusively for Farmers. Plaintiff did not provide services to any "customer" other than Farmers. Plaintiff was not "granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by" Farmers. (Corp. Code, § 31005, subd. (a).) The Commissioner of the Department of Corporations has issued guidelines for determining whether a franchise exists. (See Cal. Dept. of Corporations, When Does An Agreement Constitute A "Franchise?" (Release 3-F (rev.) June 22, 1994) <http://www.corp.ca.gov/Commissioner/Releases/3-F.asp> (hereafter Guidelines).) Although it is for the court to interpret the Franchise Investment Law, the Commissioner's Guidelines are entitled to great weight. (*People v. Kline* (1980) 110 Cal.App.3d 587, 593.) The Commissioner has opined that "the franchisee must be granted the right to offer, sell, or distribute goods or services *to others rather than solely to the franchisor*." (Guidelines, italics added.) Plaintiff contends on appeal that he offered recruitment and training services to prospective *agents* as well. However, this theory was not advanced in opposition to the motion for summary judgment, or in the complaint, which alleged that "Plaintiff as District Manager provides services for Defendants." (See *Laabs, supra,* 163 Cal.App.4th at pp. 1256-1257 [factual issues presented in opposition to a motion for summary judgment should only be considered if the controlling pleading encompasses them].)

Moreover, there was no evidence that plaintiff paid a franchise fee. The Corporations Code defines a "franchise fee" as "any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including, but not limited to, any payment for goods and services." (Corp. Code, § 31011.) The goal of the Franchise Investment Law is to provide a "franchisee with the information necessary to make an intelligent decision" about whether to invest in a franchise. (Corp. Code, § 31001.) The law is intended "to protect franchise *investors*—i.e., those who 'pay for the right to enter into a business.' " (*Thueson v. U-Haul Internat., Inc*. (2006) 144 Cal.App.4th 664, 673 (*Thueson*).) Therefore, a franchise fee is an unrecoverable investment for the right to do business, rather than costs paid in the ordinary course of business. (*Id*. at pp. 672-673.)

In his deposition, plaintiff admitted that he paid no fee at the time he entered into the DMAA. Plaintiff's declaration, however, asserts that over the course of his relationship with Farmers, he was required to pay a number of expenses, which he characterizes as franchise fees, such as expenses to attend Farmers's conferences, the cost to establish call centers to generate leads, as well as the cost to buy leads for his agents from Farmers. He also was required to promote Farmers's products by offering trips, cash and gifts to agents, and was required to attend meetings at his own expense. Plaintiff also was required to enter into a separate contract for "career" or full-time agents he recommended to Farmers, where he agreed to partially guarantee subsidy loans that Farmers provided to agents, if the agents recruited by plaintiff did not remain with Farmers for a specified period of time, or if performance standards were not met, and if the agents failed to repay the loan. Plaintiff averred that "[he] was obligated to guarantee the loan and had to repay as much as 40% to 50% of the . . . [l]oan if the agent terminates prior to completion of a specified term. All these payments were automatically deducted from my monthly . . . payment. Each year in excess of $500 was deducted . . . ."

This evidence does not establish a triable issue of fact that plaintiff paid a franchise fee, rather than ordinary business expenses. Plaintiff risked no capital and made no unrecoverable investment in Farmers for the right to do business. (*Thueson*,

supra, 144 Cal.App.4th at p. 676.) Although plaintiff may have, by separate agreement, consented to *guarantee* portions of loans Farmers made to career agents, plaintiff's pay records do not reflect that he incurred this liability, and his declaration on this point is hopelessly vague and only recites the ultimate facts alleged in the complaint. (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 750-751.) All of the pay records provided show the "Subsidy" field as $0.00, reflecting that no subsidy deductions were made. What's more, this "fee" was not required to engage in business; it was entirely contingent upon a number of variables, including an agent's status as a "career agent," the term of service of the agent and the number of policies written, and whether the agent failed to repay the loan. This is more accurately viewed as a *potential* recruitment cost, rather than any franchise fee.

Finally, as to the remaining causes of action which were disposed of by summary judgment, plaintiff has waived any error by failing to contest the trial court's ruling on appeal. (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 ["Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived. [Citations.]"].)

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal

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GRIMES, J.

WE CONCUR:

RUBIN, ACTING P. J. SORTINO, J.*

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