Filed 8/9/12 McCollough v. Hillside Baptist Church CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES McCOLLOUGH, Cross-complainant and Appellant, v. HILLSIDE BAPTIST CHURCH OF PUENTE CALIFORNIA, Cross-defendant and Respondent.	B230618 (Los Angeles County Super. Ct. No. KC056424)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Meeka, Judge. Affirmed.

Orloff & Associates and Paul Orloff for Cross-complainant and Appellant.

No appearance for Cross-defendant and Respondent.

James McCollough appeals from a judgment entered following a bench trial in which the court concluded that he was not entitled to recover unpaid wages for services he performed as the pastor of Hillside Baptist Church of Puente California (the church). McCollough was the pastor for nine years before he was terminated and sought to recover almost $200,000, calculating his pay by relying on a written compensation agreement the former pastor had with the church and seeking 128 months of unpaid wages. The court determined McCollough had no written contract, and his oral contract of $200 per week was modified after the church could no longer afford to pay him. We conclude McCollough's procedural and substantive challenges to the judgment do not warrant reversal. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The church has not submitted a brief in this court, and McCollough's brief tells only his side of the dispute between these parties.[1] The church sued McCollough and sought declaratory relief to determine the rights and responsibilities of the parties related to McCollough's employment and compensation. McCollough filed a cross-complaint for unpaid wages based upon the terms of an alleged employment contract, wrongful termination in violation of public policy, race discrimination, violation of Civil Code section 52.1 (interference with civil rights), promissory estoppel, and intentional infliction of emotional distress. The church did not answer the cross-complaint, and the church's default was entered.

On the first day of trial, the court suggested the parties try the complaint and the cross-complaint at the same time. Counsel did not object and trial commenced.

1. *McCollough Becomes Pastor of the Church*

In 1996 and 1997, McCullough began volunteering at the church as an associate pastor. McCullough also was a part-time missionary. He had a full-time job with the federal government working for the Department of Defense.

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[1] Because the church has not filed a respondent's brief, we decide the appeal on the record and on appellant's opening brief. (Cal. Rules of Court, rule 8.220(a)(2).)

In 2000, McCullough became pastor of the church. McCullough had been part of the search committee for a new pastor and was aware of the salary and benefits the former pastor had received. McCollough assumed that he would receive similar compensation, but he had no written compensation agreement.

A member and former treasurer of the church testified that McCollough was hired as a bi-vocational pastor, meaning he would maintain his full-time job and conduct three services, two on Sunday and a Wednesday night prayer meeting. The church agreed to pay McCollough $125 a week in 2000, then raised his pay to $200 a week. McCollough and his family also lived on the church property.

2. *The Church Suffers Financial Difficulties*

The church paid McCollough $200 a week until late 2004, when it could no longer afford to pay him. At the end of 2004, the church issued McCollough IOUs. McCollough testified that he decided not to ask for his pay until the church's financial situation improved, and he understood the church could not afford to pay his salary.

McCollough continued to conduct church services because he believed that "God had placed [him] there," and he had a "government job that was giving [him] income[.]" McCollough lived with his family on the church premises, and his wife acknowledged the family had no other place to live.

The church's financial difficulties resulted, in part, from the decline in membership. In 2003, there were 40 active members of the church, four years later, the membership had decreased to just 20, and by 2010 there were five members, not counting the McCollough family.

3. *McCollough is Terminated*

In May 2009, the seven remaining members of the church voted to terminate McCollough. Despite the vote, McCollough maintained that he was their pastor.

4. *The Trial Court's Decision on McCollough's Wage Claim*

On McCollough's cross-complaint, the court announced from the bench that the evidence established McCollough and the church entered into an oral contract in which

McCollough would be paid $200 a week.[2] When the church could no longer pay McCollough, the court concluded the parties modified the contract, and McCollough agreed to perform his services without pay in exchange for a place to live.

Neither party requested a statement of decision. (Code Civ. Proc., § 632.) The trial court entered judgment for McCollough on the complaint, and for the church on McCollough's cross-complaint. This timely appeal followed.

DISCUSSION

1. *McCollough Waived Any Challenge to the Church's Presentation of a Defense to his Wage Claim*

McCollough contends that the trial court erred in permitting the church to present a defense to his cross-complaint because the court had entered the church's default months before the commencement of trial. McCollough did not raise this issue in the trial court proceedings.

When a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) Additionally, an appellant waives or forfeits his right to attack error by expressly or implicitly agreeing at trial to a procedure objected to on appeal. (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.)

The record herein indisputably establishes that McCollough's counsel had an opportunity before trial commenced to object to the church's presentation of a defense to the cross-complaint. Before a single witness was called, the court suggested the parties agree to try the complaint and cross-complaint at the same time, as both parties sought a

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[2] As noted, McCollough's cross-complaint sought 128 months of unpaid wages. This claim appears to be based on a statutory violation because McCollough also sought attorney fees under the Labor Code. The three-year statute of limitations applies to statutory wage claims. (Code Civ. Proc., § 338, subd. (a).) A two-year limitations period applies if the wage claim is based upon an oral contract. (Code Civ. Proc., § 339, subd. (1).)

resolution of this employment dispute. McCullough's counsel did not remind the court that a default had been entered against the church.

McCollough also does not cite to any portion of the record showing that he raised an objection during trial to the church's presentation of a defense. During argument, for example, when the court asked the church to address the weakness of the cross-complaint, McCollough's counsel remained silent on the default issue raised here. Thus, the failure to raise this issue in the trial court bars this issue on appeal either under the doctrine of invited error or by way of forfeiture.

Even if the issue were not forfeited, the law favors a resolution on the merits. (See *Au-Yang v. Barton* (1999) 21 Cal.4th 958, 963.) Had the default been raised, we presume that the trial court would have set it aside to permit the parties to litigate the overlapping issues in the complaint and cross-complaint related to McCollough's employment.

McCollough also has failed to show prejudicial error. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.) We reject McCollough's contention that he was prejudiced because his default prove-up hearing would have been uncontested, permitting him to simply recover almost $200,000. We read the trial court's decision following the bench trial as a failure of proof on the cross-complaint, not that the church prevailed on its affirmative defense. Disregarding the church's witnesses, McCollough and his wife testified that he did not have a written compensation agreement. They assumed that he would receive the same compensation as the former pastor.

We also reject McCollough's contention that he suffered prejudice because he could not conduct discovery on his wage claim after the court entered the church's default. McCollough's claim for wages was based upon the previous pastor's compensation agreement, which McCollough introduced into evidence.

We recognize in default proceedings after a default is entered that there is no opposing party. But that does not mean that McCollough was entitled to a judgment of almost $200,000. The cases recognize that in default proceedings " 'it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through.' "

(*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 691.) From our review of the record, the court would have reached the same result had it conducted a default prove-up hearing under Code of Civil Procedure section 585, and not a bench trial.

2. *McCollough's Attack on the Judgment Lacks Merit*

McCollough contends the trial court's conclusion that he agreed to a salary of $200 violates California wage laws, and no substantial evidence exists to support the conclusion that he modified his wage agreement. We discuss each in turn.

a. *The Trial Court's Determination Regarding McCollough's Salary Does Not Violate the Minimum Wage Laws*

McCollough contends that his salary of $200 a week was below minimum wage. Although McCollough casts this issue as a legal one, this contention necessarily required the court to determine that he was an hourly employee and the hours that he worked. These are factual questions. In the absence of a statement of decision after a bench trial, we presume that the trial court made all findings necessary to support the judgment under any theory that was before the court. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 647-648.) This is merely a corollary of the general rules that judgment is presumed to be correct, all intendments and presumptions are indulged in favor of correctness, and the appellant bears the burden of providing an adequate record affirmatively proving error. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) " '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.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

McCollough's contention that he received less than minimum wage ignores the evidence presented at trial. The court concluded that McCollough was paid based upon

the terms of an oral contract, and not compensated based upon an hourly rate.[3] The church treasurer testified that McCollough received a salary to conduct three church services, two Sunday services and a Wednesday night prayer service. McCollough also testified that he had a full-time job with the Department of Defense. Even if he were an hourly employee, there was sufficient evidence from which the trial court could have concluded McCollough's salary for these limited services did not violate California's minimum wage laws.

We also reject McCollough's contention that the trial court refused to hear argument on the number of hours he worked. McCollough's citation to the record focuses on the court's comments during argument that McCollough failed to prove his damages. In any event, these comments do not impeach the court's final decision. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 203 ["We review the result, not the trial court's reasoning, and do not consider comments by the trial judge"]; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451 ["Because we review the correctness of the order, and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered"]; *Selfridge v. Carnation Co.* (1962) 200 Cal.App.2d 245, 249 ["oral opinions or statements of the court may not be considered to reverse or impeach the final decision of the court which is conclusively merged in its findings and judgment"].)

Without citation to the record, McCollough next contends that the trial court's decision erroneously placed the evidentiary burden on him to establish the hours worked. (See *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949, 961 [" '[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee.' "].) McCollough's failure to cite to the record waives this argument on appeal. (*Dietz v. Meisenheimer & Herron* (2009)

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[3] For this same reason, we reject McCollough's related argument that he was not paid overtime, which assumes he was an hourly, nonexempt employee. There also was sufficient evidence in the record to support the finding that McCollough worked part-time for the church.

177 Cal.App.4th 771, 799-801.) In any case, McCollough testified that he worked for the church 24 hours a day, but he also testified that he had a full-time job with the federal government and continued to volunteer as a missionary. The trial court heard and credited evidence that McCollough was a part-time pastor hired to conduct three services for the church. Moreover, McCollough's damages claim was not based upon the hours he worked, but based upon the salary paid to the former pastor, irrespective of the actual hours he worked. We conclude the trial court did not err.

b. *The Judgment is Supported by Substantial Evidence*

McCollough contends the trial court's judgment is contradictory because it concluded an oral contract existed to pay him $200 a week, but the court did not award damages. McCollough claims he should have been awarded his unpaid wages dating back to late 2004 when the church could no longer afford to pay him.

As we previously stated, even if McCollough were entitled to damages, based upon the court's conclusion that an oral contract existed between the parties, the statute of limitations is two years. (Code Civ. Proc., § 339, subd. (1).)

During the relevant statutory period, McCollough maintains he did not disavow his wages and expected to be compensated for his services. There is no conflict in the evidence that the church agreed to pay McCollough $200 a week, and that the church paid his salary until late 2004. Where the evidence conflicted is on whether that agreement changed in early 2005, when the church suffered financial difficulty.

The resolution of whether McCollough and the church modified their oral contract was a credibility issue on disputed facts, and we must defer to the trial court's findings when supported by substantial evidence. (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1417.) Substantial evidence consisted of McCollough's own testimony that he no longer expected to be paid. Both the church's witness and McCollough testified that given the church's financial condition, by late 2004 or early 2005, the church could not pay McCollough. McCollough told the church treasurer in late 2004 or early 2005, after the church paid him with IOUs, " 'I don't worry about the money' " because he had a full-time job with the government. McCollough did not walk

away from the church because he was doing God's work, and he and his family continued to live on the church premises.[4] When McCollough first associated with the church, he volunteered his services as an associate pastor in exchange for living rent-free on the church premises. Under the unique circumstances presented in this case, substantial evidence supports the trial court's conclusion that McCollough volunteered his services as a pastor after 2005. Thus, during the relevant statutory period, McCollough was not entitled to recover damages for unpaid wages.

[4] The court asked McCollough the following question: "If you are not getting any money each month and you have obligations with your seven children and your spouse, why didn't you just kind of throw up your hands? You sure would have a good reason to throw up your hands and say to the board that you are going to have to move on, because you just need money to take care of paying your bills and your obligations? So that is why I asked you: Why didn't you just quit?" McCollough responded: "I didn't quit because, one, I felt that God had placed me there. If it wasn't nothing but for punishment for not obeying him in the beginning; and second, he has given me a government job that was giving me income, and that was meeting my basic needs and even assisting there at the church, sir."

DISPOSITION

The judgment on McCollough's cross-complaint is affirmed. Since no respondent brief was filed, no costs are awarded on appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.