Filed 2/22/17 Kendrix v. State of Calif. Dept. of Developmental Services 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

WAYNE KENDRIX, Plaintiff and Appellant, v. STATE OF CALIFORNIA DEPARTMENT OF DEVELOPMENTAL SERVICES, et al., Defendants and Respondents.	B259165 (Los Angeles County Super. Ct. No. KC062474)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Dismissed in part, and affirmed in part.

Wayne Kendrix, in pro. per., for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Chris A. Knudsen, Senior Assistant Attorney General, Gary S. Balekjian, Supervising Deputy Attorney General, for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Wayne Kendrix appeals from a judgment entered against him, and in favor of defendants and respondents State of California Department of Developmental Services (DDS) and Ibrahim Aly (Aly), following trial. Plaintiff contends the trial court erred by: (1) precluding him from using against Aly at trial a statement Aly's attorneys had made in their trial brief; (2) denying his motion for a new trial; and (3) imposing monetary sanctions against his trial counsel.[1] We dismiss the appeal challenging the order imposing monetary sanctions against plaintiff's counsel for lack of standing, and we otherwise affirm the judgment.

BACKGROUND

Plaintiff was employed at DDS' Lanterman Developmental Center (Lanterman) as a communications dispatch supervisor. Lanterman was a state hospital that provided medical treatment, 24 hours a day, seven days a week, to individuals with developmental or intellectual disabilities residing at the facility.

Because Lanterman operated around the clock, plaintiff was responsible for supervising the communications department 24 hours a day, seven days a week. Plaintiff supervised six dispatchers and was responsible for scheduling these employees and himself to ensure continuous coverage. Plaintiff was required to act as a dispatcher in a relief capacity as needed. It was typical of his working conditions for plaintiff to work irregular hours. From 1998 to 2008, and September 2010 to January 2011, defendant Aly was plaintiff's direct supervisor.

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[1] Plaintiff represents himself in this appeal, but he was represented by counsel in the proceedings before the trial court.

Plaintiff filed a lawsuit against DDS, Aly, and another DDS employee Cheryl Bright,[2] asserting, pursuant to Government Code section 12940, various causes of action arising from purported discrimination and harassment "because of (1) religion, (2) medical condition and/or disability, and/or (3) race." One purported example of the defendants' discrimination and harassment was forcing plaintiff to work while he was ill during Christmastime in December 2010.

Plaintiff's case ultimately proceeded to trial with respect to plaintiff's claims of religious discrimination and harassment by DDS and Aly. Prior to trial, Aly's counsel submitted two trial briefs on his behalf. The first trial brief contained the statement that "Aly required [plaintiff] to work on December 22 and 25, 2010 because there were staff shortages in the Communications Department." The second trial brief stated that plaintiff voluntarily worked on December 22 and 25, 2010, and that "Aly did not force [plaintiff] to work any shift . . . ."[3]

At trial, plaintiff called Aly as a witness and attempted to introduce a statement from one of Aly's trial briefs, but the trial

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[2] Prior to trial, plaintiff dismissed his sole claim against Bright. She is not a party to this appeal.

[3] Plaintiff filed a motion to augment the record on appeal with four exhibits: exhibit 1 - a portion of the May 22, 2014, reporter's transcript; exhibit 2 - a portion of the May 23, 2014, reporter's transcript; exhibit 3 - Aly's second trial brief, dated September 17, 2013; and exhibit 4 - plaintiff's declaration, dated April 18, 2016. We grant the motion as to exhibits 1-3, but deny it as to exhibit 4, which was never before the trial court because it was created long after plaintiff filed his notice of appeal in 2014.

court did not permit plaintiff to do so. The following exchange occurred:

"[PLAINTIFF'S COUNSEL]: Is it your contention in this lawsuit that on December 22nd, 2010, [plaintiff] volunteered to work the vacant shift?

"[ALY]: Yes.

[¶] . . . [¶]

"[PLAINTIFF'S COUNSEL]: How about for December 25th, 2010? Is it your contention that [plaintiff] volunteered to cover the open shift?

"[ALY]: Yes.

"[PLAINTIFF'S COUNSEL]: I'm looking at your trial brief in this matter—

"[DEFENDANTS' COUNSEL]: Your Honor, I—

"[PLAINTIFF'S COUNSEL]: —specifically at—

"[DEEFENDANTS' COUNSEL]: Objection—

"[PLAINTIFF'S COUNSEL]: —page 7.[4]

"[DEFENDANTS' COUNSEL]: Use of the trial brief.

"COURT: Objection is sustained.

"[PLAINTIFF'S COUNSEL]: We have an admission here. It's a prior inconsistent statement.

"COURT: It's the trial brief prepared by counsel?

"[PLAINTIFF'S COUNSEL]: Yes, but it's an adoptive admission indicating—

"COURT: No.

"[PLAINTIFF'S COUNSEL]: —that he required

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4 Page 7 of Aly's first trial brief contains the statement, "Aly required Plaintiff to work on December 22 and 25, 2010 because there were staff shortages those nights."

"COURT: No, don't . . . do not make an offer of proof in front of the jury. I warned you about that before.

"[PLAINTIFF'S COUNSEL]: I apologize, but . . .

"COURT: You're not to use a trial brief.

"[PLAINTIFFF'S COUNSEL]: Fine."

Following trial, the jury returned verdicts in favor of the defendants, finding specifically that DDS did not take adverse employment action against plaintiff and that Aly did not subject plaintiff to unwanted harassing conduct because of his religion.

Thereafter, plaintiff filed a motion for a new trial, which the trial court denied. This appeal followed.

DISCUSSION

I. The Trial Court's Evidentiary Ruling

Plaintiff contends the trial court erred by prohibiting him from introducing at trial or using for impeachment a statement from one of Aly's trial briefs. We review the trial court's evidentiary ruling for abuse of discretion. (*People v. Chism* (2014) 58 Cal.4th 1266, 1291 [evidentiary rulings].) Under the abuse of discretion standard, "'a trial Court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) We find no abuse of discretion here.

Specifically, plaintiff argues that "ALY's prior inconsistent statement contained in his pleadings that ALY had forced [plaintiff] to work on Christmas against [plaintiff]'s will, should

have been allowed into the record for ALY to have been confronted with it." The problem with this argument is that the statement from the "pleading" at issue—Aly's trial brief—was a statement made by Aly's attorneys in a document they prepared and filed to assist the trial judge with presiding over the trial. It has long been recognized that "[s]tatements of counsel in argument (or otherwise) are not evidence and, unless in the form of a stipulation or admission, are not binding on the client." (*Haynes v. Hunt* (1962) 208 Cal.App.2d 331, 335 (*Haynes*).) Accordingly, it was not arbitrary, capricious, or patently absurd for the trial court to conclude that a statement from the trial brief should not be deemed a statement by Aly to be used against Aly. (Cf. *People v. Castille* (2003) 108 Cal.App.4th 469, 479 [a party admission "is only admissible against the party who actually made it"].)

In so holding, we disagree with plaintiff's contention that *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397 (*Staples*) compels a contrary result. In *Staples*, *supra*, 189 Cal.App.3d at page 1412, the court held that an unverified cross-complaint could be used to impeach a party, because "[i]t is presumed that even an unverified pleading is filed with the consent of the client and should be regarded as an admission" by the client. *Staples*, however, merely applied the rule from a line of cases holding that facts set forth in a pleading may be used as judicial admissions against the pleader because "[a] pleader cannot blow hot and cold as to the facts positively stated" in his own pleading. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746 (*Myers*).) That rule makes sense, because "pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the Court." (Code Civ. Proc., § 420.) In civil

actions, "pleadings" are defined as "complaints, demurrers, answers, and cross-complaints." (Code Civ. Proc., § 422.10.)

But "[n]ot every document filed by a party constitutes a pleading from which a judicial admission may be extracted." *Myers, supra,* 178 Cal.App.4th at p. 746. For example, neither a summary judgment motion nor its accompanying statement of undisputed facts constitutes a "pleading" for this purpose. (*Id.* at 747.) This is so because "[m]otions for summary judgment do not serve the same purpose as pleadings in setting forth factual allegations. To the contrary, motions for summary judgment by defendants seek to show that they are entitled to dismissal as a matter of law." (*Ibid.*) Likewise, the trial brief prepared by Aly's counsel was submitted for the trial court's benefit to give an overview of the case, argue for the applicable law and jury instructions, and outline counsel's expectations as to what the evidence would prove at trial. (See Toothman & Danner, 1 Trial Practice Checklists (March 2016 Update) § 8.22; Wegner, et al., Cal. Prac. Guide Civ. Trials & Ev. Ch. 1-H (Sept. 2016 Update) § 1:331-1:334.) The rule in *Staples, supra,* 189 Cal.App.3d 1397, simply does not apply to the statements by Aly's counsel in a trial brief.

In addition, assuming *arguendo* the trial court erred, we find any such error was harmless. Notably, the trial court did not preclude plaintiff from introducing other evidence that Aly required plaintiff to work on December 22 or 25—all of which plaintiff was able to use to support his contention that Aly falsely testified that plaintiff had agreed to work on those days. In this regard, plaintiff himself testified: "I was forced to work with chest pains," "[Aly] called me and said [I had] to work," "[Aly] told me work or—convert [to Islam] or work," and "[Aly told me] if I

didn't work, I would be fired for insubordination." Given plaintiff's ample opportunity to offer evidence to contradict Aly's trial testimony regarding why plaintiff worked on December 22 and 25, we find harmless any purported error in precluding plaintiff from using a statement from Aly's trial brief for that same purpose.

II. Plaintiff's Motion for New Trial

Plaintiff contends the trial court erred by failing to grant his motion for new trial. Specifically, plaintiff asserts the trial court erred by denying his new trial motion "on the grounds that [plaintiff] was supposedly not prejudiced by not being able to cross-examine ALY about the prior inconsistent statement by ALY and that judicial estoppel was not applicable."

Code of Civil Procedure, section 657, subdivision (1) provides that a new trial may be granted where the substantial rights of a party have been materially affected by an "[i]rregularity in the proceedings of the court . . . or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." We review a trial court's decision to deny a motion for new trial for abuse of discretion. (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452.) We do not find the trial court abused its discretion in denying plaintiff's motion.

A. Purported Prior Inconsistent Statement

In his new trial motion, plaintiff argued the trial court erroneously prohibited him from using at trial a prior statement from a DDS court filing to contradict testimony that he voluntarily worked on December 22 and 25. Specifically, plaintiff

argued: "In the subject lawsuit, [plaintiff] contends that as a matter of unlawful discrimination and/or harassment on the basis of religion, [plaintiff], inter alia, was forced to work, when he did not have to, on Christmas day, 2010. The DDS factually contended and admitted in this lawsuit at summary judgment that indeed [plaintiff] was so compelled to so work. However, at trial, the DDS and its witnesses changed their factual contention, contending at trial that [plaintiff] volunteered to so work." Thus, according to plaintiff, the trial court "wrongfully exclud[ed] the prior inconsistent statement of the DDS, which is contained in that prior pleading of the DDS." Appended to plaintiff's new trial motion was a page from DDS's memorandum of points and authorities submitted in support of its motion for summary judgment, which contained a three-sentence argument section bearing the following heading: "Aly Required Plaintiff to Work on December 22 and 25, 2010 Because There Were Staff Shortages on Those Nights."[5]

Curiously, plaintiff did not actually seek to introduce at trial the purportedly inconsistent statement from DDS's motion for summary judgment. Instead, as discussed above, plaintiff attempted to use a similar statement from Aly's trial brief ("Aly required Plaintiff to work on December 22 and 25, 2010 because there were staff shortages those nights") while Aly testified at trial.[6] Plaintiff is not entitled to a new trial on the ground that

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[5] The record on appeal does not contain DDS's memorandum of points and authorities in support of its motion for summary judgment. We have only been provided with the one-page excerpt that was made an exhibit to plaintiff's motion for new trial.

[6] In his "affidavit/declaration" submitted in support of the motion for new trial, plaintiff's trial counsel inaccurately

the trial court supposedly prohibited him from introducing into evidence a statement he never actually sought to use. (Cf. *Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 221 [a defendant who failed to oppose motion to exclude evidence forfeited ability to argue in motion for new trial and on appeal that the evidence was improperly excluded].) On this basis alone, we may affirm the trial court's denial of plaintiff's new trial motion. (See *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 479 ["We can . . . decide a matter on grounds different than that invoked by the trial court"].)

Nonetheless, the trial court denied plaintiff's new trial motion after finding that a statement pulled from a party's summary judgment motion could not be attributable to and used against the party as a prior inconsistent statement. We agree. As discussed above, statements of counsel made in a motion for summary judgment or in a trial brief are neither evidence that binds the client (see *Haynes, supra,* 208 Cal.App.2d at p. 335) nor judicial admissions in a "pleading" that may be used against the party (see *Myers, supra,* 178 Cal.App.4th at pp. 746-747).[7]

Accordingly, we find no abuse of discretion in the trial court's decision to deny plaintiff's motion for a new trial on the basis that plaintiff was precluded from introducing at trial

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contended he sought to impeach Aly using the statement from the summary judgment motion. This is flatly contradicted by the reporter's transcript.

[7] Plaintiff's contention suffers from a further flaw in that, even if the statement in DDS's summary judgment motion were attributed to DDS, he provides no justification for concluding that purported statements of DDS should be used at trial *against co-defendant Aly*.

purported prior inconsistent statements made by the defendants' counsel in pre-trial filings.

B. Judicial Estoppel

The doctrine of judicial estoppel may be invoked to prevent a party from asserting claims inconsistent with claims that party previously asserted with success. In other words, "a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory . . . ." (*New Hampshire v. Maine* (2001) 532 U.S. 742, 749.) Judicial estoppel is an equitable doctrine the court may invoke in its discretion to protect the integrity of the judicial process and to "prevent[] parties from 'playing "fast and loose with the courts."'" (*Id.* at p. 750.)

In his motion for new trial, plaintiff asserted his theory of judicial estoppel as the basis for a new trial as follows: "In the case at bar, when ALY . . . testified that [plaintiff] had volunteered to work on Christmas 2010, which is in complete contradiction to the DDS's prior inconsistent statement that ALY had forced [plaintiff] to work that day, respectfully, the [trial court] was entirely lame as to enforcing that policy of Judicial Estoppel." In denying plaintiff's motion, the trial court found that "judicial estoppel is not applicable" to the circumstances presented.

On appeal, plaintiff provides no discussion or argument in his opening brief as to how the trial court erred in denying his motion for a new trial due to the trial court's purported failure to apply the doctrine of judicial estoppel. We thus deem this ground

waived.[8] (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 509 [contentions made without cogent legal argument and citations to authority may be treated as waived]; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 [same].)

Even if plaintiff had not waived the contention, we find the doctrine of judicial estoppel wholly inapplicable here. Judicial estoppel applies only when the following elements are established: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Here, there is no indication that the trial court ever adopted the position or accepted as true the statement in DDS's summary judgment motion that Aly required plaintiff to work on December 22 and 25. Further, that statement or position appears not to have inured to defendants' benefit, as both DDS's and Aly's motions for summary judgment and/or

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[8] For the first time in his reply brief, plaintiff briefly discusses his judicial estoppel argument by listing the required elements for it to apply and then stating that "each of the elements is indeed established." That is insufficient to save it from waiver. "Our review "'is limited to issues which have been adequately raised and supported in [appellant's opening] brief.' [Citations.]' [Citations.]" (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 290, fn. 2.; see also *People v. Tully* (2012) 54 Cal.4th 952, 1075 ["It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party"]; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

summary adjudication on plaintiff's discrimination and harassment claims were denied by the trial court.

We therefore find no abuse of discretion in the trial court's denial of plaintiff's motion for new trial based on the trial court's purported failure to apply the doctrine of judicial estoppel.

III. Monetary Sanctions against Plaintiff's Trial Counsel

Plaintiff seeks to overturn the $1,500 monetary sanction imposed against his trial counsel, Martin B. Reiner, for failure to comply with orders of the trial court concerning mandatory settlement proceedings. We dismiss this claim because plaintiff lacks standing to challenge it.

A. Relevant Background

Before trial, on December 13, 2013, the trial court issued an order assigning the case to a CRASH Settlement Program Mandatory Settlement Conference (MSC). The trial court ordered plaintiff's counsel to give written notice of that order to all counsel of record.

On January 3, 2014, the trial court issued another order scheduling the MSC for January 30, 2014. That order explicitly required "[l]ead trial counsel" for all parties to appear personally at the MSC and to lodge and serve a settlement conference statement prior to the scheduled MSC. The order warned the parties that failure to attend the MSC without prior permission of the trial court for good cause shown may result in sanctions. The January 3 order also directed plaintiff to give notice of that order to all counsel of record.

On February 21, 2014, defendants moved for monetary sanctions against Reiner on the ground that Reiner did not serve

either of the MSC orders, did not submit a settlement conference statement, did not appear at the MSC on January 30, 2014, and failed to notify the trial court or counsel that he would not attend the MSC. According to the motion, a trial judge and two third-party mediators were present at the MSC, as were both defendants and their counsel. By contrast, plaintiff arrived more than two hours late, and, in lieu of lead trial counsel, an attorney appeared for plaintiff who did not represent he would be lead trial counsel; was not familiar with the law, facts, and past settlement efforts in the matter; and did not have full settlement authority.

After holding a hearing, on March 19, 2014, the trial court granted defendants' motion, in part, and imposed $1,500 in monetary sanctions against Reiner.

B. Plaintiff Lacks Standing

Plaintiff does not have standing to appeal an order assessing monetary sanctions against his counsel, who is not a party to this appeal.[9]

Code of Civil Procedure section 904.1, subdivision (b) states that "[s]anction orders . . . of five thousand dollars ($5,000) or less against . . . an attorney for a party may be reviewed on an appeal by *that party* after entry of final judgment in the main action . . . ." "[T]he term 'that party' [contained] in section 904.1,

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[9] Reiner never filed a notice of appeal. Instead, approximately 18 months after plaintiff filed his notice of appeal, Reiner filed a "Motion to Intervene as an Additional Appellant," which defendants opposed as procedurally improper. We denied that motion. Approximately three months later, plaintiff filed a "Motion to Amend the Notice of Appeal" to add Reiner as an appellant, which we denied.

subdivision (b) generally refers to the party *against whom sanctions were imposed*, and not necessarily the party to the underlying action. [Citation.]" (*Evllsizor v. Sweeney* (2014) 230 Cal.App.4th 1304, 1310.)

Code of Civil Procedure section 902 requires that appeals be brought by a party who is legally "aggrieved" by the appealable judgment or order. Under section 902, to be sufficiently "aggrieved" to have standing to appeal, a person's rights or interests must be injuriously affected by the judgment or order, and those rights or interests must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment or order. (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 977.)

Plaintiff is not an "aggrieved" party with respect to the trial court's order imposing monetary sanctions on his attorney. (*In Re Marriage of Knowles* (2009) 178 Cal.App.4th 35, 38, fn. 1 ["When a sanctions ruling is imposed only upon a party's attorney, the attorney is the aggrieved party with the right to appeal"].) Therefore, plaintiff does not have standing to appeal an order assessing monetary sanctions against his counsel alone. (*Laborde v. Aronson* (2001) 92 Cal.App.4th 459, 465, overruled on other grounds in *Musaelian v. Adams* (2009) 45 Cal.4th 512, 520; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42.) Accordingly, plaintiff's appeal from the order imposing sanctions against his attorney is dismissed.

DISPOSITION

We dismiss plaintiff's appeal challenging the order imposing monetary sanctions against his trial counsel, and we otherwise affirm the judgment. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIN, J.*

We concur:

TURNER, P. J.

BAKER, J.

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