Filed 12/15/17 Terrazaz v. Unlimited Baking Ingredients CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

AURELIO TERRAZAZ et al., Plaintiffs and Appellants, v. UNLIMITED BAKING INGREDIENTS et al., Defendants and Respondents.	B278856 (Los Angeles County Super. Ct. No. BC600863)

APPEAL from a judgment of the Superior Court of Los Angeles County. Suzanne Bruguera, Judge. Reversed.

Law Offices of Jack D. Josephson, Jack D. Josephson, Joseph S. Socher for Plaintiffs and Appellants.

No appearance for Defendants and Respondents.

Aurelio Terrazaz and Enrique Ocampos Ortiz (collectively, Appellants) appeal from a judgment dismissing defendant Celia Rodriguez (Rodriguez) as a defendant in their wage and hour lawsuit charging her and Unlimited Baking Ingredients, Inc. (UBI) with multiple violations of the Labor Code and of Business and Professions Code section 17200. The trial court sustained Rodriguez's general and special demurrers to all causes of action of Appellants' first amended complaint (FAC) without leave to amend and entered judgment terminating her personal involvement in the litigation. We reverse the judgment.

BACKGROUND[1]

On November 10, 2015, Appellants filed a complaint against UBI and Rodriguez in the Los Angeles Superior Court, alleging Labor Code violations for: (1) failure to pay wages; (2) failure to provide meal and rest periods; (3) failure to pay overtime wages; (4) failure to pay minimum wages for all hours worked; (5) failure to pay wages due upon termination; (6) failure to issue accurate itemized wage statements; and (7) unlawful and unfair business practices.

Following the trial court order sustaining Rodriguez's demurrer to the original complaint with leave to amend, Appellants filed their FAC, alleging the same claims for relief and containing the following factual allegations. UBI is a "food manufacturing supply company" organized under the laws of the state of Arizona, with "additional corporate offices" in Los Angeles,

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1 In reviewing on appeal a judgment sustaining a demurrer without leave to amend, the material facts of the extant complaint are taken as true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

California. As a company engaged in the transportation industry, UBI is subject to IWC Wage Order No. 9-2001 (Cal. Code Regs., tit. 8, § 11090).[2]

UBI and Rodriguez employed Aurelio Terrazaz "from about November 2013 to March 2015" and employed Enrique Ocampos Ortiz "from about April 2014 to about February 2015," each in a nonexempt position.[3] Appellants were each paid "a weekly salary of $500" but no hourly wage, "with no overtime considerations and no consideration whether wages compensated for all hours worked." They worked as drivers, loaders and unloaders, often for 16 hours per day. They were "specifically instructed by managers and owners that the workday was not complete until all deliveries had been made." It was "typical" for Terrazaz to work "approximately 96 hours" during a six-day workweek and for Ortiz to work "approximately 100 to 106 hours per week." Defendants kept no records of hours worked and paid Appellants with "personal checks" without an accompanying wage statement. Respondents also did not allow either "full 30 minute [rest] break[s] or 10 minute rest breaks." Rodriguez herself directed the work of Appellants, and

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[2] Industrial Wage Orders are issued by the Industrial Welfare Commission (IWC), in which the Legislature vested authority over wages and the general welfare of employees pursuant to article XIV, section 1 of the California Constitution. This constitutional provision establishes the Legislature's authority to vest in the IWC "legislative, executive, and judicial powers." IWC Wage Orders have the force of law equal to that of statutes enacted through the legislative process. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 55 (*Martinez*).)

[3] State law requires that employers provide minimum or specified benefits to their employees unless the employer establishes that the employee is exempt from requirements set out in statutes or the applicable wage order from that industry. Such employees are commonly referred to as nonexempt employees. (See *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 816; *Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal.App.4th 260, 263.)

threatened them with disciplinary action and with withholding their pay if they did not comply with her directions.

The FAC contained revised allegations of alter ego; now alleging that Rodriguez did not respect the separate corporate identity of UBI, commingled corporate funds with her personal accounts, and converted property held in the name of the corporation to her personal use. They alleged that Rodriguez "acted as joint employer of Appellants by controlling, ordering and requiring" Appellants to perform certain job activities and that she "used her own money . . . to pay . . . [Appellants] for hotel, gas . . . travel" and "similar job related incidental costs." UBI was a "mere shell and sham without capital, assets, stock or stockholders" which defendants used "as a device to avoid individual personal liability and/or for the purposes of substituting a financially insolvent corporation in the place of [individual] Defendants." UBI had never authorized or issued any shares and was inadequately capitalized. "Defendants . . . caused assets of the corporation to be transferred to them without adequate consideration, and withdrew funds from the corporation's bank accounts for their personal use." "Defendants are . . . the alter ego of [UBI] and there exists . . . a unity of interest and ownership between such defendants such that any separateness has ceased to exist."

In her general demurrer (Code Civ. Proc., § 430.10, subd. (e)) to the seven causes of action of the FAC, Rodriguez asserted that neither Appellants' Labor Code violation allegations nor the Business and Professions Code violations were actionable against her because the alter ego allegations were insufficient. In her special demurrer for uncertainty (Code Civ. Proc., § 430.10, subd. (f)), she asserted that the FAC is uncertain as to

her liability for the acts or omissions alleged against UBI and that the allegations based on the several statutory claims lacked sufficient details.

On September 12, 2016, the trial court sustained Rodriguez's demurrers to the FAC without leave to amend and dismissed her as a defendant.[4] On October 20, 2016, the court entered judgment in favor of Rodriguez.[5]

Appellants filed this timely appeal.

CONTENTIONS

Appellants contend the trial court erred because the FAC pled sufficient facts that Rodriguez was an alter ego of UBI, making her jointly liable with it for the wrongs alleged in the FAC. Appellants also contend they were jointly employed by Rodriguez and UBI and that she is therefore liable for the wages and other payments (collectively, wages) due under the Labor Code and the applicable Wage Order.

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[4] The trial court did not state any reasons for its rulings. While this omission is contrary to the requirement of Code of Civil Procedure section 472d (first paragraph), there is no indication that Appellants made any request for specificity, thus waiving that requirement. (Code Civ. Proc., § 472d (second paragraph).)

[5] According to the limited record presented in this appeal, the action against UBI remains pending in the trial court.

DISCUSSION[6]

I. Standard of Review

We review de novo a trial court's sustaining a general demurrer to determine whether the operative complaint states a cause of action under any legal theory. (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 828.) The appellate court does not, however, assume the truth of contentions, deductions or conclusions of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.] On the other hand, any particular count which is well pleaded will not be affected by defects in a separate cause of action, so long as inconsistent or antagonistic facts are not pled." (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 21; accord, *Barquis v. Merchants Collection*

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[6] Rodriguez has not filed a respondent's brief notwithstanding being notified in accordance with California Rules of Court, rule 8.220)(a)(2). When a respondent fails to file a respondent's brief, we decide the appeal on the record, the opening brief of the appellant and any oral argument by the appellant. (*Ibid.*; *In re Bryce C.* (1995) 12 Cal.4th 226, 232-233 [interpreting prior codification of applicable rule]; *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010, fn. 8.) The burden remains appellant's to establish reversible error by the trial court. (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn.1; *Miles v. Speidel* (1989) 211 Cal.App.3d 879, 881.)

Assn. (1972) 7 Cal.3d 94, 103 [trial court errs in sustaining a demurrer when the plaintiff has stated a cause of action under any possible legal theory].)[7]

A general demurrer tests whether the complaint states facts sufficient to constitute a cause of action. (Code Civ. Proc., 430.10, subd. (e).) To meet this standard, the complaint must contain a statement of facts which establishes the elements of a cause of action, assuming the material allegations to be true. (*Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075.)

A special demurrer for uncertainty addresses whether the claimed facts are alleged sufficiently so that their allegation is not "left to surmise." (*Philbrook v. Randall* (1924) 195 Cal. 95, 103; *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.) However, ambiguities that are within the defendant's knowledge or that can be resolved through discovery are not appropriate for demurrer. (See *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 616; *A.F. Arnold & Co. v. Pacific Professional Ins., Inc.* (1972) 27 Cal.App.3d 710, 718.))

II. Application

We address the appeal from the trial court's single-sentence ruling sustaining without leave to amend Rodriguez's demurrers to all causes of action of the FAC with the understanding that the trial court accepted Rodriguez's arguments that, as an "employee" of UBI, both that status and

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[7] Appellants have not suggested any amendments that may remedy alleged defects in their FAC; they confine their arguments to those explaining why, in their view, the trial court erred.

the "shield" provided by UBI's corporate existence, protected her from liability.[8]

A. The Alter Ego Allegations

The allegations of the FAC sufficiently state a claim that Rodriguez was liable as the alter ego of UBI with respect to each of Appellants' causes of action. "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations.] A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetuate a fraud, circumvent a statute, *or accomplish some other wrongful or inequitable purpose*, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538, italics added.) "[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (*Mesler v. Bragg Management*

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[8] In her memorandum of points and authorities in support of her demurrers in the trial court, Rodriguez asserted that the same defects similarly affected all of Appellants' claims for relief, that, with respect to each of their claims, Appellants did not properly allege alter ego liability and Rodriguez cannot be liable as a joint employer.

We address her principal contentions in a similar "global" manner. If Rodriguez may be liable on either of these theories, the trial court's ruling must be reversed, even if there be merit in her other claims of legal deficiency. (*Longshore v. County of Ventura, supra,* 25 Cal.3d at p. 21; *Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at p.103; *Buss v. J.O. Martin Co.* (1966) 241 Cal.App.2d 123, 133-134; *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733-734.)

Co. (1985) 39 Cal.3d 290, 301.) Before a corporation's obligations can be recognized as those of a particular person, the requisite unity of interest and inequitable result must be shown. (*Arnold v. Browne* (1972) 27 Cal.App.3d 386, 394, overruled on other grounds in *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.) At this stage in this case, we look at the FAC to assess whether it contains sufficient allegations of these elements. (See *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 411.)

Appellants alleged Rodriguez and UBI had a "unity of interest and ownership . . . such that any separateness has ceased to exist" and that UBI was "so inadequately capitalized that[] its capitalization was illusory and trifling." In support of these claims, Appellants alleged Rodriguez commingled corporate funds with her own accounts, converted corporate property for her own use, and paid for Appellants' "job related incidental costs" with her personal funds, all as illustrations of the unity of interests between Rodriguez and UBI and of Rodriguez's disregard for the separateness required between personal and corporate forms. Appellants also alleged that UBI had not been properly formed or capitalized. Thus, it was a mere shell, the corporate existence of which was not to be acknowledged or respected in determining the liability of its principal. Appellants further alleged that, based on Rodriguez's effective control of UBI, "it would not offend the interest of justice[]" to consider Rodriguez and UBI to be alter egos "for the purposes of liability and judgment in this action."

We observe that "the remedial purposes of the wage and hour laws require they '"'not [be] construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished.'"'" (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087, quoting *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.2d

690, 702.) Six of the seven causes of action alleged are based on violations of the Labor Code, a series of statutes intended to protect workers from exploitation by their employer and protect the public welfare.[9] A finding of alter ego liability furthers the public policy interests expressed in the provisions of the Labor Code alleged to have been violated. The common "thread" of these allegations in this case is Rodriguez's personal embroilment in the employer-employee relationship, e.g., her personal control of every aspect of the work assignments of Appellants that allegedly resulted in violations of each of the enumerated statutes. Considering the allegations of the FAC and the purposes of the Labor Code statutes at issue together with the allegations that UBI was inadequately capitalized and not properly formed, we conclude that Appellants sufficiently alleged that an inequitable result would ensue from respecting the separate existence of UBI.

Although Rodriguez argued below that Appellants had failed to allege specific facts to support their alter ego allegations, at this stage of the pleadings, Appellants were only required to allege "'ultimate rather than evidentiary facts.' [Citation.]." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 236, citing *Doe v. City of Los Angeles* (2007) 42

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[9] The several causes of action alleged in the FAC were: First Cause of Action: failure to pay all wages (Lab. Code, §§ 201, 202, 218, 218.5, 1194, 1194.2); Second Cause of Action: failure to provide meal and rest periods (Lab. Code, §§ 226.7(a), 512); Third Cause of Action: failure to pay overtime wages (Lab. Code, §§ 510, 218.5, 1194); Fourth Cause of Action: failure to pay minimum wages (Lab. Code, §§ 1194, 1194.2); Fifth Cause of Action: failure to pay wages due upon termination; waiting time penalties (Lab. Code, 201, 202, 203); Sixth Cause of Action: failure to issue accurate itemized wage statements (Lab. Code, §§ 226 et seq.) and Seventh Cause of Action: unlawful/unfair business practice (Bus. & Prof. Code, § 17200). The allegations in the seventh cause of action are based on the violations alleged in the first six; thus, its viability is established by our conclusion with respect to those claims.

Cal.4th 531, 550.) Moreover, "'less particularity [of pleading] is required where the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff,' which certainly is the case in this dominant employer—subservient employee circumstance. [Citation.]" (*Ibid.*, citing *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 474.)

Giving the FAC a "reasonable interpretation" as we must (*Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110, 116, citing *Blank v. Kirwan, supra,* 39 Cal.3d at p. 318), Appellants sufficiently alleged unity of interest and that injustice would result if the corporate form were to be respected notwithstanding the fundamental defects in organizing the entity as well as the extensive personal conduct of Rodriguez.

Thus, Appellants sufficiently pled alter ego liability, and the trial court erred in sustaining the general demurrer to the FAC based on Rodriguez's contrary contention. (*Barquis v. Merchants Collection Assn., supra,* 7 Cal.3d at p. 103 [it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under a possible legal theory]; accord, *Blank v. Kirwan, supra*, 39 Cal.3d at p. 318.)

Rodriguez also demurred for uncertainty, arguing that it could not be determined from the complaint "in what capacity she was liable." To the extent Rodriguez is arguing that the FAC does not sufficiently allege why she is liable as the alter ego of UBI, she fails to give the FAC a "plain reading." It is not "left to surmise" (*Philbrook v. Randall, supra*, 195 Cal. at p. 103; *Ankeny v. Lockheed Missiles & Space Co.*, *supra*, 88 Cal.App.3d at p. 537) that Appellants' theory of liability as to Rodriguez is that she controlled all aspects of their employment by UBI, and that, de facto, she was their

employer. To the extent there are any uncertainties in these allegations, they would be resolved by facts within her knowledge or through discovery, making them inappropriate for special demurrer. (*Khoury v. Maly's of California, Inc., supra*, 14 Cal.App.4th at p. 616.) To the extent Rodriguez contends she cannot be a joint employer, she errs for reasons next discussed.

B. The Joint Employer Allegations

Appellants challenge the trial court's ruling that Rodriguez was not their joint employer with UBI, contending that either or both the common law definition of the term "employer," and the definition of that term set out in the applicable IWC Wage Order, compel reversal of the trial court's ruling sustaining the demurrer.

Appellants' "joint employer" allegations are based on their factual claims that Rodriguez controlled virtually every aspect of their employment, including the hours they worked, their compensation, and any reimbursement for their travel expenses while working. They support their claims of her personal and pervasive embroilment in their employment relationship with UBI with the allegation that she personally ordered them to work in excess of the maximum number of hours permitted—daily and weekly, and paid them for their work and their travel and other expenses, from her personal funds, disregarding the separateness of the undercapitalized and defectively established corporation, UBI.

In *Martinez, supra,* 49 Cal.4th 35, our Supreme Court established that liability as the employer may extend beyond the ostensible corporate employer; based on the facts of the particular case, an employee may have more than a single employer. (*Id.* at pp. 59, 67, 76.) Limiting its earlier decision of *Reynolds v. Bement* (2005) 36 Cal.4th 1075 to its facts, our Supreme Court held that the common law definition of "employer" must be

reconsidered and that, when a wage order has been promulgated by the IWC, the definition of the term "employer" in the Wage Order for the particular industry must be applied. (*Martinez*, at. p. 62.) Only persons who act solely as an agent for an employer may avoid liability as an employer. (*Id.* at p. 66, citing *Reynolds* at p. 1086.)[10]

The conclusion we reach is closely related to the *Martinez* court's holding that when an employee sues to recover unpaid wages, he or she "actually and necessarily sues to enforce the wage order." (*Martinez, supra*, 49 Cal.4th at p. 57.)

The IWC wage order at issue in this case is Order No. 9-2001 (Cal. Code of Regs., tit. 8, § 11090). This Order defines the term "employer" as follows: " (F) 'Employer' means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, § 11090, subd. (2)(F).)[11]

Other courts have reached similar conclusions. In *Castaneda v. Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015, 1019, Division Six of this District reasoned: "An entity that controls the business enterprise may be an

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[10] This construction of liability as employer (i.e., as joint employer) is confirmed by the several Labor Code provisions that allow for personal liability for wages and related benefits on the part of corporate owners, officers, directors and shareholders for violations of that code. (E.g., Lab. Code, §§ 350, 558, 1197.1) An additional example is Labor Code section 558.1, which was enacted after the events at issue in this case.

[11] Labor Code section 18 defines person as follows: "'Person' means any person, association, organization, partnership, business trust, limited liability company, or corporation."

The definition of "employer" in the subject wage order is identical to that contained in the wage order at issue in *Martinez* (49 Cal.4th at p. 64), confirming that reference to that case in deciding this one is apt.

employer even if it did not 'directly hire, fire or supervise' the employees," citing *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 950. In *Casteneda,* the court reversed a grant of summary judgment on the basis that an issue of fact existed as to whether the employer's parent company may be an additional employer of the employee plaintiffs. Division Six reasoned: "The broad definition of an employer includes ""any person . . . who directly *or indirectly, or through an agent or any other person,* employs *or exercises control* over the wages, hours, or working conditions of [an employee]."" (*Guerrero v. Superior Court* [, *supra,*] 213 Cal.App.4th [at p.] 950, italics added.) Our Supreme Court said it also includes "[a] proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work *by failing to prevent it, while having the power to do so*." (*Martinez, supra,* 49 Cal.4th at p. 69, italics added.)

"An entity that controls the business enterprise may be an employer even if it did not 'directly hire, fire or supervise' the employees. (*Guerrero v. Superior Court, supra,* 213 Cal.App.4th at p. 950.) Multiple entities may be employers where they 'control different aspects of the employment relationship.' (*Martinez* [ ]*, supra,* 49 Cal.4th at p. 76.) 'This occurs, for example, when one entity (such as a temporary employment agency) hires and pays a worker, and another entity supervises the work.' (*Ibid*.) '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" . . . .' (*Ibid.*) '[C]ontrol over how services are performed is an important, perhaps even the principal, test for the existence of an employment relationship.' (*Ibid*.)" (*Castenada, supra*, 229 Cal.App.4th at p. 1019.)

The factual allegations in the FAC are consistent with this case authority. The trial court's ruling that Rodriguez could not be a joint employer of Appellants was erroneous as a matter of law.

C. The Seventh Cause of Action

Appellants' seventh cause of action alleges violations of Business and Professions Code section 17200 based on the Labor Code violations alleged in the first through sixth claims for relief. Rodriguez also challenged this claim for relief for "lack of the requisite particularity," referencing her arguments on the first six claims. However, a complaint sufficiently pleads a violation of this section based on "borrowing" of another statute when it alleges facts indicating the predicate statute has been violated. (*People v. McKale* (1979) 25 Cal.3d 626, 635; see *Khoury v. Maly's of California, Inc. supra*, 14 Cal.App4th at p. 619.)

We have indicated above that the requisite allegations are sufficiently pled; the addition of those claims as violations of Business and Professions Code section 17200, based on those allegations, is also sufficient to withstand demurrer.[12]

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[12] We also observe in connection with the alleged violations of Business and Professions Code section 17200 that there is an additional basis upon which Rodriguez may be held personally liable. Thus, a defendant who directly and actively participates in an unfair business practice can be liable personally under section 17200 independent of the joint employer theory of liability for injunctive relief and restitution as provided in section 17206. (Bus. & Prof. Code, § 17206; *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.)

DISPOSITION

The October 20, 2016 judgment is reversed. Appellants are awarded their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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