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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

BESTHINES MARIA HALE,

Plaintiff and Appellant,

v.

RAYMOND CERVANTEZ,

Defendant and Respondent.

B268572

(Los Angeles County
Super. Ct. No. BC493384)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Besthines Maria Davis, in pro. per., for Plaintiff and Appellant.

McGuire Woods, Michael D. Mandel and Brian D. Fahy for
Defendant and Respondent.

In this action for unlawful discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.),¹ plaintiff Besthines Maria Hale (also known as Bethines Maria Davis)² appeals from the judgment in favor of her former supervisor, defendant Raymond Cervantez. The court granted Cervantez's motion for summary judgment, which was unopposed, based on the doctrine of collateral estoppel. On appeal, Davis contends the court erroneously permitted her trial attorneys to withdraw from the case, and that summary judgment was improper. We disagree, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Davis began working for Bank of America, N.A. (Bank),³ in 1984. After an internal investigation by the Bank showed that Davis had filed false reports, she admitted the allegation and was terminated in December 2009. At the time, Davis was a senior personal banker, and Cervantez was her supervisor.

¹ The complaint also alleged a cause of action for intentional infliction of emotional distress.

² Plaintiff filed the complaint using the surname Hale, but filed the notice of appeal and opening brief using the surname Davis. We refer to plaintiff as Davis.

³ The Bank was erroneously sued as Bank of America.

Davis filed the present action against the Bank and Cervantez in October 2012. The Bank was served with the summons and complaint in October 2012, and Cervantes was served two years later, in October 2014.

In May 2013, Davis, who had been representing herself, filed a notice of substitution of counsel naming Chijioke O. Ikonte as her trial counsel. Later that year, Ikonte named Kenechi R. Agu as his associate counsel.

Upon completing discovery, the Bank moved for summary judgment in July 2014. After Cervantez answered the complaint in November 2014, he sought to join in the Bank's summary judgment motion. His request for joinder was denied due to his failure to file a separate statement of undisputed material facts.

The Bank's evidence regarding its nondiscriminatory reasons for terminating Davis showed that:

- Davis received a verbal warning in May 2008 that she had failed to meet her sales performance goals. Davis did not dispute the warning.
- In May 2009, Davis received a written warning that she had not met her sales goals for five consecutive quarters. No dispute was raised by Davis as to this warning.
- The Bank's Investigative Services (IS) division investigated Davis in late 2009 for possible abuse of the "Refer-A-Friend" program. The program was designed to provide monetary incentives to customers who referred new clients to the Bank.
- On December 3, 2009, Davis admitted to IS investigator Greg Conyers that she had submitted false reports under the Refer-A-Friend program. This led Conyers to recommend that Davis be terminated for violating the

Bank's code of ethics. His recommendation was adopted by Consumer Market Manager Gohar Tumanian and Consumer Market Executive Maria Anderson, who decided to terminate Davis for violating the Bank's code of ethics. The termination decision was approved by the Bank's human resources department.

- Cervantez, who was on vacation at the time, played no role in the decision to terminate Davis.

As to the alleged incidents of harassment, discrimination, and retaliation, the Bank contended the evidence failed to show that Davis had been subjected to adverse employment actions because of her national origin, age, sex, race, or color:

- In the Spring of 2009, Davis requested new business cards from Cervantez. Davis received the new cards, but not as quickly as she had wanted.
- Davis was not required to have a notary license for her job. When Davis told Cervantez that her notary license was about to expire, he told her to contact an administrative employee to determine how to renew her license.
- Due to staffing problems, Cervantez denied Davis's vacation request during the first quarter of 2009. Later, when staffing needs changed, Cervantez granted Davis's vacation request.
- After confirming with the Bank's benefits department that Davis was allowed five weeks of vacation, Cervantez allowed her to take a fifth week of vacation.
- During the second quarter of 2009, Cervantez gave Davis a written warning for taking unauthorized time off.
- After the presidential election, Cervantez told Davis he knew she had voted for President Obama.

- In late 2009, Cervantez asked Davis if she would be bringing fried chicken to an employee potluck.
- Cervantez knew that Davis's family owned land in Alabama. Cervantez made comments like "where did you people get land from" and "how did your people end up getting land."

Davis's Motion for Continuance

Davis sought to continue the Bank's summary judgment hearing in order to pursue mediation. The court rescheduled the hearing to October 6, 2014, and again to January 16, 2015.

Withdrawal of Davis's Attorneys

In December 2014, after the mediation failed, Agu and Ikonte filed separate motions to withdraw as counsel for Davis. Davis did not file written opposition to either motion.

The court granted Agu's motion to be relieved as counsel on December 2, 2014. On December 12, 2014, five days before the next withdrawal motion was to be heard, Ikonte filed a voluntary substitution of attorney signed by Davis. Because of the stipulation by Davis, Ikonte's motion was taken off calendar as moot.

Davis did not retain new counsel, and sought to continue all motion dates for 90 days.⁴ The court granted her request and continued the Bank's summary judgment hearing to April 24, 2015.

⁴ On January 6, 2015, Ikonte and Agu filed a notice of lien for costs and attorney fees incurred in this case.

Summary Judgment for the Bank

On April 17, 2015, the Bank gave notice that no opposition had been filed against its summary judgment motion. The court granted the Bank's motion for summary judgment at the April 24, 2015 hearing. Also on that date, the court denied Davis's request for a stay of the action, and directed the Bank to prepare a proposed order and judgment.

In its written summary judgment order dated May 27, 2015, the court found that the Bank had presented legitimate, non-discriminatory reasons for Davis's termination and alleged adverse employment actions, which shifted the burden of proof to Davis. Because Davis did not present any evidence to show that the Bank's stated reasons were pretextual, she failed to carry her burden of proof. As to the alleged incidents of unlawful harassment, the court found that the alleged conduct "was not 'severe or pervasive' enough to constitute harassment as a matter of law, was not objectively offensive as a matter of law, and did not alter or change the terms and conditions of Plaintiff's employment."

As to plaintiff's cause of action for intentional infliction of emotional distress, the court found no evidence of extreme or outrageous conduct, of acts committed with reckless disregard of the probability of causing severe emotional distress, or of severe emotional distress. In addition, the court found the emotional distress claim was preempted by the Workers' Compensation Act.

Based on the summary judgment ruling, the court entered judgment for the Bank on May 27, 2015. The Bank served notice of entry of judgment on June 3, 2015, thus triggering the 60-day period to appeal from the judgment. (Cal. Rules of Court, rule 8.104(a)(1)(B).)

Cervantez's Summary Judgment Motion

At Cervantez's request, the court continued the trial date and scheduled a hearing on Cervantez's motion for summary judgment. In his motion, Cervantez relied on the same evidence that had been submitted by the Bank.⁵ In addition, Cervantez argued the action was barred under the doctrines of res judicata and collateral estoppel, citing the court's previous summary judgment ruling for the Bank.

Davis did not oppose Cervantez's summary judgment motion. At the April 24, 2015 hearing, the court found there was no triable issue of material fact and that Cervantez was entitled to judgment as a matter of law. It granted Cervantez's request to take judicial notice of its previous summary judgment ruling and judgment in favor of the Bank, and concluded that Davis was barred from relitigating the same claims against Cervantez.

In its October 7, 2015 written order, the court stated: "Under the doctrine of collateral estoppel, summary judgment for [Cervantez] is appropriate given that Plaintiff's causes of action

⁵ Like the Bank, Cervantez argued that Davis was incapable of proving "she was discriminated against and harassed based upon her race, national origin, color, gender, and age, and that the Bank retaliated against her for making a complaint. [I]t is undisputed that the Bank terminated Plaintiff because she had violated its Code of Ethics by abusing the 'Refer-A-Friend' program. It is also undisputed that her former manager, Cervantez, the person she alleges discriminated against her and harassed her, was not in any way involved in the decision to terminate her. As for all of the other allegations that Plaintiff has made, none of them rises to the level of an 'adverse employment action,' actionable harassment, or intentional infliction of emotional distress."

for harassment, intentional infliction of emotional distress, and punitive damages were actually and necessarily litigated on the merits in Bank of America, N.A.'s ('Bank of America') prior motion for summary judgment, which resolved identical claims by Plaintiff against Bank of America. The Court granted Bank of America's motion for summary judgment on April 24, 2015, Plaintiff did not appeal, and that judgment is final. The same evidence is at issue in the instant motion filed by Defendant. Plaintiff did not oppose Defendant's Motion or present any argument why collateral estoppel does not apply. Accordingly, [Cervantez's] Motion is GRANTED."

Based on its summary judgment ruling, the court entered judgment for Cervantez on October 7, 2015. The judgment allowed Cervantez "to recover his costs and attorneys' fees against Plaintiff in an amount as determined by the Court, and as permitted by applicable law."

Notice of Appeal

On November 24, 2015, Davis filed a notice of appeal from: (1) the May 27, 2015 judgment in favor of the Bank; (2) the October 7, 2015 judgment in favor of Cervantez; (3) "[a]ll orders granting [the Bank's] and Cervantez's motions for sanctions, costs and attorney's fees," and (4) "[a]ll other adverse rulings taken against Plaintiff in this action." We dismissed the appeal from the judgment in favor of the Bank as untimely on October 24, 2017.

DISCUSSION

I

Davis contends the court erroneously allowed Agu and Ikonte to withdraw as her trial counsel at a critical stage in the proceedings, thus violating her right to due process.

First, we turn to the jurisdictional challenge raised by Cervantez. He contends the withdrawal orders are not listed in the notice of appeal and, therefore, the orders are not reviewable on appeal. (See *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43 [“each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal” [Citation.]”]; accord, *Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1171.) We conclude the jurisdictional challenge lacks merit because the withdrawal orders are not separately appealable under Code of Civil Procedure section 904.1. The withdrawal orders are interlocutory rulings that may be reviewed by petition for writ of mandate, or, as here, on appeal from a final judgment. (Code Civ. Proc., § 906; see *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 240.)

Cervantez alternatively argues the issue was forfeited as a result of Davis’s failure to object below. (See *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412 [“[g]enerally, failure to raise an issue or argument in the trial court waives the point on appeal”].) The record supports his contention that no objection was raised below. Davis did not file written opposition to either withdrawal motion, and ultimately signed a voluntary substitution of counsel form as to Ikonte, which rendered his motion to withdraw moot.

Regardless of any forfeiture, Davis must overcome the presumption on appeal that the court properly exercised its

discretion. (See *Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1133; *Espejo v. Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 378 [presumption that trial court properly applied law and acted within discretion must be overcome by affirmative showing on appeal].) Several factors make her task particularly difficult, including the lack of a due process right to counsel in most civil cases. (See *People v. \$30,000 U.S. Currency* (1995) 35 Cal.App.4th 936, 942 [right to counsel exists only where litigant's physical liberty at stake].) Another is the granting of multiple continuances below, which provided ample time to retain new counsel.

Following the withdrawal of Davis's attorneys in December 2014, the court continued the Bank's summary judgment hearing to April 2015. Davis did not retain new counsel during that period, nor request a further continuance of the Bank's summary judgment motion. On appeal, Davis argues that she lacked financial resources to hire new attorneys, and that the filing of a lien by her former counsel had rendered it difficult to obtain new counsel. However, Davis provides no authority that these are valid grounds for reversal, and we do not find that her right to due process was violated. In a civil case, state and federal due process "guarantees the right of a party to appear by counsel retained at his own expense. [Citations.]" (*Kim v. Orellana* (1983) 145 Cal.App.3d 1024, 1027), and Davis's financial inability to retain new counsel is not a valid basis for reversal.

II

Apart from her challenge to the attorney withdrawal orders, which we rejected, Davis raises no arguable issues

regarding the summary judgment ruling. We therefore affirm the summary judgment and judgment for Cervantes.

III

Cervantez seeks appellate attorney fees as sanctions for filing a frivolous appeal. (Code Civ. Proc., § 907.) However, a request for sanctions must be accompanied by a supporting declaration in compliance with California Rules of Court, rule 8.276(b)(1). (See *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 858–859.) Because Cervantez has not provided a declaration in compliance with this rule, his request for sanctions is denied.

IV

Cervantez requests statutory attorney fees and costs on appeal under FEHA (Gov. Code, § 12965, subd. (b)). A prevailing defendant's right to fees and costs under FEHA involves factual issues that must be determined in the first instance by the trial court. (See *Robert v. Stanford University* (2014) 224 Cal.App.4th 67, 70 [defendant's right to attorney fees and costs under FEHA must be determined by trial court; among factors to be considered is plaintiff's ability to pay].) In light of these unresolved factual issues, the trial court is directed to determine Cervantez's right to appellate costs and attorney fees under FEHA.

DISPOSITION

The judgment is affirmed. As the prevailing party, Cervantez is entitled to his costs on appeal under rule 8.278 of the California Rules of Court. As to his request for appellate costs and attorney fees under FEHA, we direct the trial court to

determine his right to recover appellate costs and fees under Government Code section 12965, subdivision (b). (See *Robert v. Stanford University, supra*, 224 Cal.App.4th at p. 70.)

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.