Filed 5/14/18 Smith v. Farmers Group, Inc. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GLENN SMITH, Plaintiff and Appellant, v. FARMERS GROUP, INC. et al., Defendants and Respondents.	B266242 Los Angeles County Super. Ct. No. BC512079

APPEAL from a judgment of the Superior Court of Los Angeles County, Dalila C. Lyons, Judge. Affirmed.

The Anfanger Law Office and Nancy Anfanger for Plaintiff and Appellant.

Locke Lord, Stephen A. Tuggy; Greines, Martin, Stein & Richland, Robert A. Olson and Gary J. Wax for Defendants and Respondents.

INTRODUCTION

Plaintiff Glenn Smith (plaintiff) sued defendants Farmers Group, Inc., Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (collectively, defendants) for various claims, most of which were dependent on the existence of an employer-employee relationship. The trial court granted summary adjudication in defendants' favor on nine causes of action, finding that plaintiff was an independent contractor—not an employee—and plaintiff's written agreement expressly precluded oral modifications. After plaintiff dismissed the remaining causes of action, the court entered judgment for defendants.

Plaintiff contends the proceedings below were riddled with procedural errors, collateral estoppel precludes defendants from asserting he was an independent contractor, and the court erred by summarily adjudicating his employment and contract claims. Due to the numerous deficiencies in plaintiff's opening brief and arguments on appeal, we conclude he failed to carry his burden to affirmatively demonstrate error. We also conclude defendants were not collaterally estopped from asserting plaintiff's independent-contractor status and plaintiff's other contentions lack merit. We therefore affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND[1]

On May 1, 1976, plaintiff signed a District Manager's Appointment Agreement (DMAA) with the following five defendants: Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (collectively, Farmers). As District Manager of District 65, plaintiff agreed to recruit and train insurance agents for Farmers. Plaintiff received "overwrite" or commission payments based on business produced by the agents in his district, calculated as a percentage of premiums received. The overwrite percentages paid to district managers, including plaintiff, differed based on the type and number of insurance policies sold. The more insurance policies sold by agents in District 65, the more overwrite or commission payments plaintiff would receive. The ability to recruit and train agents to sell insurance, and to hire and motivate staff, were within plaintiff's control and discretion.

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

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1 In his opening brief, plaintiff provides only facts favorable to his position. He also does not identify the 15 causes of action in his operative pleading, or the causes of action to which demurrers were sustained with leave to amend. We therefore glean the relevant facts and procedural background from our review of the record.

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 [Farmers] 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 [Farmers] on 30 days written notice." The DMAA also provided that plaintiff was to "conform to all [of Farmers'] ... operating principles and standards," and that he was to maintain "adequate records," including "monthly profit and loss statement[s]." Further, the DMAA superseded all prior agreements, "written or otherwise," and no change, alteration or modification could be made "except ... by an agreement in writing" signed by plaintiff and an authorized representative for Farmers. Related agreements, also signed by plaintiff, expressly stated he was being retained as an independent contractor.

Plaintiff had the sole discretion concerning his working hours and when and where to take his lunch. He had no set number of vacations days or a set time to take vacation and sick days. Plaintiff leased and paid for his own office, hired his own employees, controlled how they performed their duties, set the hours for their work, and determined how to pay them. He paid his employees with checks written by him and provided them with IRS W-2 forms. Farmers reported plaintiff's compensation on IRS 1099 forms.

In 2011, Farmers terminated the DMAA and gave plaintiff the required 30-days' notice. As provided by the DMAA, Farmers paid plaintiff a total of $1,531,918.92 in "contract value" after terminating that agreement. During the DMAA's 35-year

duration, plaintiff never informed Farmers he was anything other than an independent contractor.

In June 2013, plaintiff filed this lawsuit against Farmers and a sixth defendant, Farmers Group, Inc. (FGI).[2] The operative first amended complaint, filed in October 2013, asserted claims for (1) wrongful termination in violation of public policy; (2) age discrimination (Gov. Code, § 12920 et seq.); (3) retaliation; (4) failure to prevent discrimination, harassment, and/or retaliation; (5) failure to pay wages (Lab. Code, § 200 et seq.); (6) failure to indemnify (Lab. Code, § 2802); (7) withholding of part of wage (Lab. Code, § 221); (8) failure to provide an accurate, itemized wage statement and maintain accurate records, or permit inspection and copying of records (Lab. Code, § 226); (9) breach of contract; (10) violation of the Unruh Civil Rights Act (Civ. Code, § 51); (11) violation of the Unruh Civil Rights Act (Civ. Code, § 51.5 et seq.); (12) breach of the implied covenant of good faith and fair dealing; (13) harassment (Gov. Code, § 12940 et seq.); (14) aiding and abetting the other defendants in committing unlawful acts; and (15) unfair business practices (Bus. & Prof. Code, § 17200 et seq.). All of the causes of action, except for the 14th cause of action, were brought against all six defendants. The 14th cause of action for aiding and abetting was brought only against FGI. The pleading recounts that plaintiff was misclassified as an independent contractor from May 1976 until defendants unilaterally and improperly ended their relationship with him in July 2011. In January 2014, the trial court sustained defendants' demurrer to the 10th, 11th, and 12th causes of action with leave to amend.

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[2] We refer to Farmers and FGI collectively as "defendants."

In September 2014, Farmers and FGI filed separate motions for summary judgment, or in the alternative, summary adjudication. Defendants argued that plaintiff's status as an independent contractor defeated the first through eighth and 13th causes of action. The ninth cause of action failed because the purported oral modifications to the DMAA were barred by the written agreement and there was no evidence of breach. The 15th cause of action failed because it was derivative of the other defective causes of action. In its motion, FGI also argued it could not be held liable for aiding and abetting as alleged in the 14th cause of action.

Plaintiff opposed the motions, filed hundreds of evidentiary objections, and requested judicial notice of the jury's special verdict finding in *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302 (*Davis*), which was then on appeal. After hearing arguments in March 2015, the trial court overruled all of plaintiff's evidentiary objections and denied his request for judicial notice. Although the court denied defendants' motions for summary judgment and their requests for summary adjudication of the 13th and 15th causes of action, it summarily adjudicated the remaining causes of action in defendants' favor.

Thereafter, plaintiff dismissed the 13th and 15th causes of action and the court entered judgment for defendants on May 28, 2015. Defendants gave notice of entry of judgment on June 17, 2015, and plaintiff timely appealed from the judgment on August 14, 2015. On November 6, 2015, the court granted in part and denied in part plaintiff's motion to tax costs.

DISCUSSION

Although plaintiff purports to raise 10 issues on appeal, most are forfeited. As to those issues adequately presented on appeal, we are not persuaded by plaintiff's arguments.

1. Standard of Review

Summary judgment or summary adjudication is properly granted if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 641; *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1290 [motions for summary adjudication are procedurally identical to motions for summary judgment].) A defendant meets his burden by showing that one or more essential elements of the plaintiff's cause of action cannot be established, or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) On appeal following the grant of summary adjudication, we review the record de novo. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.) We liberally construe the evidence in support of the party opposing the motion and resolve doubts concerning the evidence in favor of that party. (*Ibid.*) We review evidentiary rulings in summary adjudication proceedings for abuse of discretion. (See *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335.)

2. Plaintiff has failed to establish error.

Our determination of the merits of this appeal is controlled by plaintiff's material noncompliance with rules of appellate practice and procedure. Accordingly, we will set forth some of the fundamental principles that guide our consideration of the issues.

The most fundamental rule of appellate review is that the judgment challenged on appeal is presumed to be correct, and "it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) " 'All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

To meet his burden on an appeal from a grant of summary adjudication, plaintiff, as the appellant, must "direct the court to evidence that supports his arguments." (See *Hodjat v. State Farm Mutual Automobile Ins. Co.* (2012) 211 Cal.App.4th 1, 10.) "Moreover, an appellant is required to not only cite to valid legal authority, but also explain how it applies in his case. [Citation.] It is not the court's duty to attempt to resurrect an appellant's case or comb through the record for evidentiary items to create a disputed issue of material fact." (*Ibid.*) Quite simply, "an appellate court cannot be expected to search through a voluminous record to discover evidence on a point raised by appellant when his brief makes no reference to the pages where the evidence on the point can be found in the record. [Citation.] [¶] These rules are not merely so-called technical rules of procedure. They are designed (1) to facilitate the disposition of litigation before the appellate courts, and (2) to save appellants from unnecessary expense in taking appeals, preparing records and printing briefs." (*Metzenbaum v. Metzenbaum* (1950) 96 Cal.App.2d 197, 199.) An appellant who fails to pinpoint evidence in the record indicating the existence of triable issues of fact will be deemed to have waived or forfeited any claim the lower court

erred in granting summary adjudication. (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115–1116 (*Guthrey*).)

Finally, an appellant has the burden not only to show error but also to show prejudice from that error. (Cal. Const., art. VI, § 13.) If an appellant fails to satisfy that burden, his argument will be rejected on appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) "[W]e cannot presume prejudice and will not reverse the judgment in the absence of an affirmative showing there was a miscarriage of justice. [Citations.] Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial. [Citations.]" (*Ibid*.)

As we discuss below, plaintiff's noncompliance with rules of appellate practice and procedure may be generally categorized as involving his failure to (1) include proper citations to the record in his appellate briefs and (2) adequately develop legal arguments in those briefs.[3]

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[3] Plaintiff's briefs also contain a number of remarks disparaging the trial court. In his opening brief, his counsel asserts the court "clearly had an agenda," plaintiff was "left believing that only the rich get justice in this court," "[i]t could not be clearer that the trial court had decided the outcome of the case before litigation ensued," and the judge "had no understanding of the particular law or facts of the case[] (as she came from criminal court)[]." And in his reply brief, counsel asserts the court "did not care at all about justice or due process. It had a clear agenda and that was that." Such remarks are inappropriate, have no place in appellate practice, and do nothing to advance plaintiff's case. Additionally, the record reflects the court took care to ensure all of the parties were afforded the opportunity for full and fair discovery, and to be heard. For example, due to plaintiff's indigence, the court ordered defendants to advance all of the costs for the discovery referees. We remind counsel to make sure she "has the facts right before venturing into such dangerous territory because it is

2.1. Citations to the Record

"Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—*must be supported by a citation to the record*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 9:36, p. 9-12, citing Cal. Rules of Court, rule 8.204(a)(1)(C).)

Plaintiff's briefs, especially his opening brief, are replete with alleged facts presented in the argument sections upon which he bases his claims that the trial court erred. But he often either fails to cite to the 7,245-page appellate record or provides record citations that do not support the facts in the briefs. For example, in his opening brief, plaintiff contends that defendants "were and are collaterally estopped" from asserting he was an independent contractor because "[t]he Smith and Davis plaintiffs had a full opportunity to present their case for misclassification" in the underlying trial in *Davis*, and defendants' counsel "had an opportunity to fully examine Mr. Davis and Mr. Smith about the misclassification issue." Plaintiff also attempts to distinguish *Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138 (*Beaumont-Jacques*) because "[t]he new District Managers worked under a MAPS program, (minimal acceptable performance), wherein [plaintiff] didn't." And in support of his due process argument, plaintiff contends he did not get the same disc given to the discovery referee. He provides no citations to the record to support any of these factual assertions.

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contemptuous for an attorney to make the unsupported assertion that the judge was 'act[ing] out of bias toward a party.' [Citation.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.)

Further, many of plaintiff's citations to the record do not support the facts asserted in his briefs. For instance, he asserts "[t]he trial court refused to engage in any oral argument," "remained silent and did not engage in any way, nor respond to counsel's arguments and instead stared at the back of the courtroom, while [plaintiff's] counsel was speaking. ... As such [plaintiff] was unable to ascertain on what basis any of the evidentiary objections was overruled, even though he tried to engage the court to respond in vain." In fact, the record shows the trial court asked plaintiff's counsel if she had any further arguments after listening to her arguments on the merits. After plaintiff's counsel responded, the court invited her to make additional arguments but she declined.

He also states that William Davis, the plaintiff in *Davis*, was found by a jury to have been misclassified as an independent contractor "when he was really Farmers['] employee for nearly 30 years, and also that Farmers discriminated against him based on his age, in firing him." But the portions of the record plaintiff cites—his request for judicial notice of the jury verdict from phase one in *Davis* and an unpublished federal district court case from Ohio—make no mention of Davis's termination, age, or length of employment with Farmers. And although plaintiff cites paragraph 26 of his declaration to support his contention that he and Davis had the same bosses and "virtually" identical contracts, that paragraph only states that Jeff Ellis was plaintiff's Division Marketing Manager and required him to attend the University of Farmers.

As another example, plaintiff asserts "[t]he clerk also made [plaintiff's] counsel appear in court on the religious holiday of Rosh Hashanah, among a list of other prejudicial interventions,

the trial court permitted." Again, the cited record, a September 25, 2014 minute order tentatively denying sanctions and a motion to suppress deposition transcripts and continuing the hearing on the motion to September 30, 2014 based on the parties' stipulation, does not include any mention of a forced appearance or a religious holiday.

More importantly for our purposes, plaintiff has consistently failed to pinpoint evidence in the record by a citation to a page number where the matter appears as required by rule 8.204(a)(1)(C) of the California Rules of Court. (["Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."]; see also *Guthrey*, *supra*, 63 Cal.App.4th at pp. 1115–1116.) Instead, plaintiff cites to exhibit tab numbers in the 34-volume record without providing any page citations. As one example, on page 7 of his opening brief, plaintiff provides a string of record citations to numerous exhibit tabs and documents, but at least one of the referenced documents is hundreds of pages. The difficulty presented by plaintiff's failure to cite to page numbers in the record is heightened in this case where the record appendix spans 34 volumes with more than 7,000 pages. (See *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745 [" 'We are a busy court which "cannot be expected to search through a voluminous record to discover evidence on a point raised by [a party] when his brief makes no reference to the pages where the evidence on the point can be found in the record." ' " .) We also note that plaintiff's opening brief repeatedly, and improperly, attempts to incorporate by reference evidence and arguments contained in documents filed in the trial court. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 294, fn. 20.) Equally

unhelpful to us are the string of record citations in the briefs with no analysis as to how they support the claims of error.

2.2. Undeveloped and Omitted Legal Arguments

Plaintiff makes a number of general assertions regarding his position that the court erred. By way of example, in his opening brief he challenges the court's summary adjudication of his statutory Labor Code causes of action. But nowhere in his briefs does he address the specific Labor Code statutes that are the basis for those claims. Indeed, the briefs do not so much as cite to those statutes—Labor Code sections 200, 2802, 221, and 226—much less discuss their elements or why the court erred in summarily adjudicating those specific causes of action. To be sure, plaintiff contends that *Martinez v. Combs* (2010) 49 Cal.4th 35 is "directly on point" and the "trial court opted to dismiss it on its own accord[.]" *Martinez*, however, involved unpaid minimum or overtime wages under Labor Code section 1194 and the wage order applicable to agricultural occupations. (*Martinez*, at p. 49.) In any event, *Martinez* noted that, although the wage order definition is not entirely synonymous with the common law definition of employment, the common law rule plays an important role. (*Id.* at p. 65.) And even if *Martinez* is, as plaintiff urges, "directly on point," his opening brief does not explain *how* it applies to his Labor Code claims. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 523 ["Conclusory assertions of error are ineffective in raising issues on appeal."]; *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 291 [reviewing court will not consider arguments contained in documents filed in the trial court and incorporated by reference].)

Likewise, plaintiff fails to discuss his specific claims for wrongful termination, age discrimination, retaliation, and failure to prevent discrimination, harassment, or retaliation. And he fails to pinpoint evidence in the record indicating the existence of triable issues of fact as to those claims.[4] In addition, although plaintiff's opening brief contains pages of citations and quotes from legal authorities concerning the misclassification of employees, he fails to apply that law to the facts of this case in any coherent manner. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 [issue that is not supported by pertinent or cognizable legal argument may be deemed abandoned].)

Significantly, plaintiff's opening brief does not cite any legal authority to support his contentions that the court abused its discretion in its costs, discovery, and evidentiary rulings, and that he was prejudiced by those rulings.[5] Nor does he cite any

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[4] Plaintiff also complains that FGI's separate statement was defective and should have been stricken. He does not, however, explain how the purported defects in the separate statement impaired his ability to marshal evidence to show that material facts were in dispute. We also note that the trial court's power to deny summary adjudication on the basis of a defective separate statement is discretionary, not mandatory. (See *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.)

[5] Plaintiff provided legal authority to support one argument, the court erred in allowing FGI's attorney to authenticate the DMAA. But "[t]here are, of course, innumerable ways in which a document may be authenticated by circumstantial evidence." (*McAllister v. George* (1977) 73 Cal.App.3d 258, 263.) And here, FGI's attorney attended plaintiff's deposition where the DMAA was marked as an exhibit. In any event, plaintiff has not shown prejudice—he attached the DMAA to his complaint, the DMAA formed the basis for his breach of contract claim, and his complaint and the attached DMAA were referenced in

legal authority to support his assertions that defendants were required to cite the other party's evidence in their moving papers or that the court erred in summarily adjudicating the 14th cause of action for aiding and abetting in favor of FGI. (See *Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867 ["an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived"].)

In short, plaintiff's failure to comply with rules of appellate practice and procedure entitles this court to treat as forfeited assertions for which a specific citation to the record was required but not made, or where no legal citation or analysis was provided. It is not our function to painstakingly comb the lower court record to determine whether all or any of plaintiff's factual assertions find support in that record, or to develop plaintiff's legal arguments for him. Inasmuch as his arguments on appeal necessarily depend upon factual evidence that has not been properly supported by citations to the record, we deem those arguments forfeited and affirm the lower court judgment on this ground alone. We nonetheless address several of plaintiff's arguments to the extent we can distill specific contentions that are stated with relevant authority and citations.

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defendants' separate statement. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1211 [party seeking summary judgment can rely on admissions of material fact made in the opposing party's pleadings].)

3. Defendants were not collaterally estopped from litigating the issue of plaintiff's employment status.

Plaintiff argues the judgment should be reversed because the "misclassification issue has already been litigated and resolved as to [plaintiff's] employment status" in *Davis*. In that case, William Davis, who had been the district manager of District 84, also asserted he had been misclassified as an independent contractor instead of an employee. (*Davis*, *supra*, 245 Cal.App.4th at pp. 1309–1311.) Although the jury found, by special verdict in the first phase of a bifurcated proceeding, that Davis was an employee, the resulting judgment was wholly in favor of the defendants. (*Id.* at p. 1319.) After Davis appealed, Division Four of this court affirmed the judgment regarding wrongful termination but reversed the directed verdict on Davis's wage claim for improper deductions. (*Id.* at pp. 1331, 1338.) According to plaintiff, defendants "were and are collaterally estopped" from asserting that plaintiff was an independent contractor because the jury in *Davis* found that a different individual—William Davis—was defendants' employee. We disagree.

Collateral estoppel " 'precludes relitigation of issues argued and decided in prior proceedings.' " (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511 (*Hernandez*).) The doctrine applies if five elements are met: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; (4) the decision in the former proceeding was final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

(*Ibid.*) The party asserting collateral estoppel bears the burden of establishing all of these elements. (See *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*).) For purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding. (*Hernandez*, *supra*, at p. 511.)

Assuming the jury's special verdict finding in *Davis* that William Davis was Farmers' employee has some bearing on plaintiff's employment classification, plaintiff has not shown the finding was final for purposes of collateral estoppel. Indeed, as noted, the trial in *Davis* was bifurcated to allow the jury first to determine whether Davis was an employee or independent contractor—i.e., the jury's finding was interlocutory. (*Davis*, *supra*, 245 Cal.App.4th at pp. 1312–1313.) And the appellate opinion in *Davis* was not filed until March 28, 2016, ten months *after* judgment was entered in this case. Since a judgment is not final for purposes of collateral estoppel while it is still open to direct attack, e.g., by appeal, the jury's finding in *Davis* did not bar defendants from asserting that plaintiff was an independent contractor before judgment was entered in this case.[6] (*National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 Cal.App.3d 1718, 1726.)

Given that the jury's finding in *Davis* was not final for purposes of collateral estoppel, it is not surprising that plaintiff did not raise this argument in his written opposition to

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[6] In fact, according to plaintiff, final judgment was not entered in *Davis* until February 2017—i.e., after defendants filed their respondents' brief in this appeal.

defendants' motions for summary adjudication.[7] This omission is fatal, however, because the failure to raise a point below constitutes forfeiture of the point on appeal. (See *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1182.) "This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant." (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28 [plaintiff precluded from raising new argument on appeal that was not discussed in opposition to motion for summary judgment].) We could, therefore, disregard plaintiff's collateral estoppel argument on this basis alone.

Even if we could entertain plaintiff's collateral estoppel argument for the first time on appeal, plaintiff has not shown that the factual issue sought to be precluded from relitigation—his status as an independent contractor—is identical to that decided in *Davis*. "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [Citation.]" (*Lucido*, *supra*, 51 Cal.3d at p. 342.) Here, plaintiff has not satisfied the requirement because he does not reference any specific evidence in his opposition separate statement showing that defendants asserted the same degree of control over Davis and plaintiff, or that Davis's and plaintiff's

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[7] Plaintiff did request judicial notice of the jury's verdict in phase one of the *Davis* case, and the court denied that request. Plaintiff, however, fails to provide any legal authority to support an argument that the court erred in denying his request. (See *Landry, supra*, 39 Cal.App.4th at pp. 699–700.)

agreements with Farmers are identical. In fact, the only specific record evidence cited by plaintiff is a single paragraph in his declaration where he asserts that Jeff Ellis supervised plaintiff's work and required him to attend the University of Farmers for training, and defendants' general denial to the operative pleading. We also note that plaintiff signed the DMAA in 1976, and Davis entered into his agreement in 1983.

Nor has plaintiff established what factors or evidence the *Davis* jury considered before finding that Davis was an employee. To the extent plaintiff invites us to comb through defendants' 334-page appendix in support of their summary adjudication motions to find other evidence supporting the identical issue requirement, we decline the invitation. (See *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205 ["It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations."]; *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839, 846 ["We look askance at this practice of stating what purport to be facts—and not unimportant facts—without support in the record. This is a violation of the rules ... with the consequence that such assertions will, at a minimum, be disregarded."].)

To summarize, plaintiff did not show the jury's special verdict finding in *Davis* was final for purposes of collateral estoppel before judgment was entered in this case. And although some of the background facts in *Davis* are similar to facts here, the first prerequisite for collateral estoppel, i.e., the issue in both proceedings is identical, has not been established on appeal. (See

Diocese of San Joaquin v. Gunner (2016) 246 Cal.App.4th 254, 265.) We therefore reject plaintiff's collateral estoppel argument.[8]

4. Plaintiff's Undisclosed Principal Argument

Next, plaintiff contends the court erred in summarily adjudicating his breach of contract claim as to FGI based on its liability as an undisclosed principal under the DMAA. Under this theory, "[w]here a contract is made by an agent acting on behalf of an undisclosed principal, a third party, upon discovering the facts of the agency, may sue the undisclosed principal." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 606; see also 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 158 ["If the principal is undisclosed, i.e., if an agent acting for his principal makes a contract in his or her own name either orally or in writing, the result will ordinarily be that either the principal or the agent may be held liable on it by the third party. [Citations.]"].)

In support of this theory, plaintiff appears to argue that the five signatory companies (Farmers) entered into the DMAA, with FGI acting as the undisclosed principal to that agreement. Although plaintiff points us to several paragraphs in his declaration to support this theory, they do not. At best, this evidence establishes that plaintiff interacted with FGI employees while he worked as a district manager—not that Farmers acted on behalf of FGI when Farmers entered into the DMAA in 1976. (See *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382 ["Where the signature as agent and not as a principal appears on the face of

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[8] In light of our holding, we deny as moot defendants' January 11, 2017 request for judicial notice.

the contract, the principal is liable and not the agent."].) Here, the DMAA is clear that the contracting parties are plaintiff and Farmers. And defendants established FGI was Farmers' authorized agent—not principal—and acted for or on Farmers' behalf when dealing with plaintiff and other district managers. Even if FGI is an undisclosed principal under the DMAA, plaintiff has not shown prejudice because he does not explain how FGI breached that agreement. Thus, plaintiff's undisclosed principal argument is meritless.

5. The Breach of Contract Claim

Finally, plaintiff contends the court erred in summarily adjudicating his breach of contract claim by finding the DMAA was an integrated document.

First, as previously noted, the DMAA superseded all prior agreements, "written or otherwise," and no change, alteration or modification could be made "except ... by an agreement in writing" signed by plaintiff and an authorized representative of Farmers. This express mandate therefore foreclosed modification of the DMAA by subsequent oral agreements, and plaintiff has not directed us to any specific evidence he sought to bring to the court's attention establishing the DMAA was subsequently modified or amended in writing.[9] (See Civ. Code §1698, subd. (c) ["Unless the contract otherwise expressly provides, a contract in

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[9] Plaintiff's contention that the DMAA was orally modified to provide him with an insurance agency upon termination would therefore contravene the terms of the written agreement. The cited evidence also does not support plaintiff's assertion that he *continued* working as District Manager *because* of a subsequent oral promise.

writing may be modified by an oral agreement supported by new consideration."].)

Second, to the extent plaintiff contends the DMAA was modified by the "700-plus page employment manual," " 'regulations, operating principals [*sic*] and standards of the companies,' " or various " 'schedules' " that "are part of the contract put [*sic*] not included in the four corners of the document," he has not explained how the DMAA, as amended by those documents, was breached by defendants. Nor has plaintiff met his burden on appeal of showing the DMAA contained ambiguous terms, or that he was prevented from advancing evidence that would have clarified those terms.

For these reasons, plaintiff has not shown the court erred in summarily adjudicating his breach of contract cause of action.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

GOODMAN, 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.