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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PEDRAM SOLEIMANI,

Plaintiff and Appellant,

v.

SHERBANK AZIZI DENTAL, INC.,

Defendant and Respondent.

B278844

(Los Angeles County
Super. Ct. No.
BS155999)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark A. Borenstein, Judge. Affirmed.

Biletsky Rosenberger, Elliot A. Rosenberger for Plaintiff and Appellant.

Leonard, Dicker & Schreiber, Richard C. Leonard for Defendant and Respondent.

I. INTRODUCTION

This is an appeal from a judgment following a de novo review of an award by the Labor Commissioner pursuant to Labor Code¹ section 98.2. Plaintiff Pedram Soleimani contends he was an employee of defendant Sherbank Aziza Dental, Inc. for purposes of the Labor Code. Defendant contends plaintiff was an independent contractor. Following trial, the court applied the employment factors set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), and concluded plaintiff was an independent contractor. We affirm.

II. BACKGROUND

Plaintiff filed a claim under section 98 with the Labor Commissioner for unpaid wages, liquidated damages, and waiting time penalties. Following a Berman hearing², plaintiff prevailed against defendant before the Labor Commissioner. Defendant then appealed for a de novo trial in the Superior Court under section 98.2, and posted an undertaking.

Trial was held from June 29 through July 1, 2016. On August 31, 2016, the court issued its tentative statement of decision, which it adopted as its statement of decision after

¹ Further statutory references are to the Labor Code.

² The hearing's name is a reference to the sponsor of the legislation. (*Cuadra v. Millan* (1998) 17 Cal.4th 855, 858, disapproved on other grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4.)

overruling plaintiff's objections. After weighing the *Borello* factors, the trial court determined that plaintiff was an independent contractor.

III. DISCUSSION

A. *Standard of Review*

The trial court's decision following a de novo hearing under section 98.2 is subject to a conventional appeal. (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 357.) The trial court's decision is treated as if it were a new trial, and the decision of the Labor Commissioner is given no weight. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116.) "The determination of employee or independent-contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences If the evidence is undisputed, the question becomes one of law" (*Borello, supra*, 48 Cal.3d at p. 349; *Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1404.)

B. *Borello Factors*

In *Borello*, our Supreme Court identified several factors that are relevant for determining whether a person is an employee or an independent contractor under common law. (*Borello, supra*, 48 Cal.3d at pp. 350-351, 355.) "The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the desired result. [Citations.] A

secondary factor also constituting strong evidence in support of an employment relationship is the right to discharge at will without cause. [Citations.]” (*Angelotti v. The Walt Disney Co.*, *supra*, 192 Cal.App.4th at p. 1404, citing *Borello*, *supra*, 48 Cal.3d at p. 350, and *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175, 177.) Other secondary factors to be considered “include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.” (*Borello*, *supra*, 48 Cal.3d at p. 351; see also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531-532.)

Our Supreme Court also identified five other factors stemming from the Fair Labor Standards Act: “(1) the alleged employee’s opportunity for profit or loss depending on his managerial skill; (2) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer’s business.” (*Borello*, *supra*, 48 Cal.3d at p. 355, citing *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979)

603 F.2d 748, 754.) “Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ [Citation.] (Fn. omitted.)” (*Borello, supra*, 48 Cal.3d at p. 351.)

C. Trial Court Did Not Err in Concluding Plaintiff was an Independent Contractor

Plaintiff does not dispute that the trial court considered the correct factors under *Borello*, but contends that it misapplied those factors to the undisputed evidence in this case. According to plaintiff, the court erred as a matter of law when it concluded that plaintiff was an independent contractor. Plaintiff therefore asserts the appropriate standard of review here is *de novo*. We disagree.

Although plaintiff contends the facts are undisputed, he cites a number of facts in support of his appeal that appear to have been in dispute before the trial court or for which there is no record support. “[A]ppellate courts have no authority to simply second-guess the conclusion reached by the fact finder; instead, the substantive ‘determination (employee or independent contractor) is one of fact and thus must be affirmed if supported by substantial evidence.’ [Citation.]” (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 78; see *Secci v. United Independent Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 854 [existence of agency is generally question of fact and affirmed if supported by substantial evidence].) The appropriate standard of review here is substantial evidence.

Moreover, as the party asserting error, it is plaintiff’s burden to supply an adequate record; yet plaintiff has not

provided a reporter's transcript or other adequate substitute, such as a settled or agreed statement, of the section 98.2 hearing. "All intendments and presumptions are made to support the judgment on matters as to which the record is silent. [Citation.] We presume the trial court followed applicable law. [Citation.]" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956; *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.)

Applying the presumption above, we find substantial evidence supports the trial court's conclusion that plaintiff was an independent contractor. As found by the trial court, plaintiff obtained his own dental license and had his own malpractice insurance. Plaintiff signed an independent contractor agreement. Plaintiff's pay checks had no tax deductions for employee-related taxes. Plaintiff was not supervised at the dental office. Plaintiff received no training at defendant's office. Plaintiff decided how long to spend with a patient, what professional services needed to be performed, and how that work was to be done. Plaintiff received no vacation time, holiday pay, or sick leave. Plaintiff had earned incentive compensation based on the volume of work he performed. Given these findings, on this record we do not find the trial court committed reversible error.

IV. DISPOSITION

The judgment is affirmed. Defendant Sherbank Azizi Dental, Inc. is entitled to recover its appellate costs from plaintiff Pedram Soleimani.

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KIM, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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