Filed 4/17/15 Olmstead v. Home Depot CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KRIS OLMSTEAD, Plaintiff and Appellant, v. HOME DEPOT U.S.A., INC., Defendant and Respondent.	B248296 (Los Angeles County Super. Ct. No. BC379382)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed.

Law Offices of Lisa L. Maki, Lisa L. Maki, and Christina M. Coleman, for Plaintiff and Appellant.

Akin Gump Strauss Hauer & Feld, Rex S. Heinke, Donna M. Mezias, and Liz K. Bertko, for Defendant and Respondent.

Plaintiff Kris Olmstead appeals from the summary judgment granted in favor of defendant Home Depot U.S.A., Inc. on Olmstead's complaint for various Labor Code violations. The trial court determined that the undisputed facts showed that Olmstead was not Home Depot's employee but rather was an employee of Cover-All, Inc., a Home Depot subcontractor. We affirm.

BACKGROUND

Cover-All was a flooring installation company that contracted with Home Depot to install flooring purchased by Home Depot's customers. Olmstead worked as an installer for Cover-All for approximately one and one-half years from 2006 to 2007.

In October 2007, Olmstead filed suit against Home Depot and Cover-All on behalf of a putative class of "all persons employed by the defendants . . . within the State of California . . . who worked installing flooring or carpeting pursuant to installation services sold by Home Depot and performed by Cover-All and its employees." The fourth amended complaint alleges causes of action under the Labor Code for failure to pay overtime, failure to provide meal and rest breaks, and failure to provide wage and hour statements, plus related claims including unfair competition.

Home Depot moved for summary judgment, arguing that it could not be liable on any of Olmstead's claims because it was not his (joint) employer within the meaning of the applicable Labor Code provisions. Olmstead opposed the motion, arguing that every one of the 95 purportedly undisputed facts on which Home Depot relied was disputed. Each party also filed objections to the opposing party's evidence.

In support of its motion, Home Depot contended that the following facts were undisputed: Cover-All was "an independent service provider for Home Depot." Among other things, the service provider agreement between Cover-All and Home Depot provided that: "Employees of Cover-All shall not be considered employees of Home Depot"; "Cover-All had full authority to hire, terminate, and supervise its employees, and was to determine and be solely responsible for the payment of wages, salaries, and benefits to its employees"; and "Cover-All was required to comply, at its expense, with all applicable wage and hour and other laws applicable to its employees[.]"

Olmstead "worked for Cover-All's Whittier, California service center for about 18 months in 2006 and 2007." He "was interviewed and hired by the manager of Cover-All's Whittier facility." Olmstead "received installation training from Josh Moore ('Moore'), a Cover-All employee, who trained [him] on various installation techniques for flooring, stairs, and other woodwork." Olmstead "did not receive installation training from Home Depot." He "never worked in a Home Depot store."

"Cover-All determined installers' wage rates, how they were paid, and whether they would receive pay increases or bonuses." "Home Depot did not pay [Olmstead]." "Home Depot paid Cover-All directly for installations performed for Home Depot."

Cover-All "decided how many installers would be used on an installation"; "assigned its installers to specific jobs"; and "performed day-to-day management and supervision of its installers." "[Its] Installer's Manual . . . set forth rules, procedures and specifications for installers."

Olmstead "considered Moore and Cover-All's Whittier Service Center Manager to be his supervisors." "Cover-All scheduled which installations [Olmstead] (with Moore) was assigned to work on." "Moore supervised and evaluated [Olmstead's] installation work." "Cover-All evaluated the work performance of its installers."

"Cover-All made its own decisions regarding raises and bonuses for installers." "Moore determined whether [Olmstead] would receive a pay increase." "Cover-All had the authority to terminate [Olmstead], including for poor performance."

Olmstead "routinely worked past 5:00 p.m., often worked on Sundays, and sometimes parked in a customer's driveway, all in violation of what he believed were Home Depot customer service guidelines." "Home Depot had no authority to discipline or discharge a Cover-All employee for disregarding Home Depot customer service guidelines."

"Cover-All required its installers to wear uniforms provided by Cover-All, with a Cover-All logo on the shirt, while on customer premises." "[Its] installers were required to wear a badge stating 'authorized service provider' of Home Depot." "Home Depot did not provide [Olmstead] with tools" or "with transportation."

"Home Depot required background checks for Cover-All installers who would be assigned to work in the homes of Home Depot customers." "If an installer did not clear the background check, Cover-All was free to hire that person to perform installations for other customers or in some other capacity."

"In approximately 7 percent of Cover-All installations in California for the period December 2006 through December 2008, Home Depot service managers conducted quality assurance visits to installations in progress." "During a quality assurance check, Home Depot service managers were directed to confirm that all of the installers on the job had current badges (indicating they had passed the background check) and that the customer was satisfied with the installation and Home Depot products." "Home Depot never made a quality assurance visit to any installation that [Olmstead] was working on."

"Cover-All made its own decisions whether to 'dock' the wages of installers when Home Depot issued chargebacks on Cover-All installations." "On the one occasion Cover-All 'docked' [Olmstead's] pay for damaging a customer's carpet[;] the decision was made by [Olmstead's] Cover-All supervisor, not by Home Depot."

As evidentiary support, Home Depot relied on: (1) the declaration of Mary May, its "Senior Compliance Manager for Home Services," to which the service provider agreement between Home Depot and Cover-All was attached as an exhibit; (2) the declaration of Machael Parrett, a Home Depot "District Service Manager" since 2006; and (3) a declaration of its counsel, Liz K. Bertko, to which excerpts from the depositions of Olmstead, Anthony Zarvou (Home Depot's national service director), and Zeev Golan (a Cover-All officer) were attached.

Olmstead filed opposition. In his separate statement of disputed facts and additional undisputed facts, Olmstead relied on excerpts from his deposition; his declaration; excerpts from Zeev Golan's deposition; Zeev Golan's declaration; the declaration of Irit Golan; the declaration of Ron Akins, Cover-All's director of human resources; and the declaration of Christina M. Coleman, Olmstead's attorney, to which were attached excerpts from Parrett's deposition, May's deposition, and Zarvou's deposition.

The court granted Home Depot's motion, concluding that the undisputed facts showed that Home Depot was not Olmstead's employer under the applicable statutes and wage orders. By separate orders, the court overruled all but one of Olmstead's objections to Home Depot's evidence and sustained all but two of Home Depot's objections to Olmstead's evidence.

The court entered judgment in favor of Home Depot on January 29, 2012. Olmstead timely appealed.

DISCUSSION

On appeal, Olmstead challenges the trial court's evidentiary rulings and the ruling on the summary judgment motion. Evidentiary rulings are reviewed for abuse of discretion. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317; see also *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122-1124 (conc. opn. of Turner, J.) [noting that "[e]very single Court of Appeal decision in the past one-half decade has applied the abuse of discretion standard of review in the summary judgment context to admissibility of evidence contentions," which "makes great sense," but also noting that the Supreme Court has not decided the issue].) Orders granting summary judgment are reviewed de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) We conclude that Olmstead has not carried his burden of demonstrating prejudicial error, and we accordingly affirm.

I. Evidentiary Rulings

Olmstead argues that Home Depot introduced excerpts of deposition transcripts without properly authenticating them. Olmstead acknowledges, however, that inclusion of the court reporters' signed certification pages is sufficient to authenticate the excerpts. (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 523.) Olmstead also concedes that although Home Depot did not include the certification pages with its moving papers, it submitted them in a "Notice of Errata" filed in response to Olmstead's opposition and objections. Although a party moving for summary judgment ordinarily cannot rely on additional evidence submitted with its reply papers, the rationale for that rule is that consideration of such evidence might violate the opposing party's due process right to

have "adequate notice of what facts it must rebut in order to prevail" (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316), and the court has discretion to consider such evidence in appropriate circumstances (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362). Olmstead does not argue that the court abused that discretion here, and we conclude that it did not. Olmstead had ample notice of the facts he needed to rebut in order to prevail.

Olmstead further argues that certain reports attached as exhibits to the declaration of Mary May, a Home Depot employee, are inadmissible hearsay because Home Depot did not make a sufficient showing that the reports fall within the business records exception to the hearsay rule. The reports in question purport to list all of the "quality assurance visits conducted by Home Depot district service managers . . . to flooring installations performed by Cover-All for Home Depot customers in California" during certain time periods, as well as all "flooring installations performed by Cover-All for Home Depot customers in California" during a certain time period. Assuming for the sake of argument that the trial court abused its discretion by admitting the reports, we conclude that their admission was not prejudicial, both because the trial court did not mention them anywhere in its 19-page ruling on Home Depot's summary judgment motion and because their omission from evidence would not change the result.[1]

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[1] Olmstead also argues that the copy of the "Service Provider Agreement" attached to May's declaration was not properly authenticated. May states in her declaration that from 2006 through 2009 she was "the Senior Compliance Manager for Home Services for Home Depot." The declaration describes the responsibilities of that position and states that, through her work in that position, May "was familiar with the records maintained by Home Depot regarding service provider installations and random quality assurance visits to such installations that are summarized below." Given the work experience described in May's declaration, we conclude that the trial court did not abuse its discretion by determining that May's declaration sufficiently authenticates the attached copy of the "Service Provider Agreement" between Home Depot and Cover-All. In any event, Olmstead has also failed to show that any abuse of discretion was prejudicial, because he has not argued that the copy of the "Service Provider Agreement" attached to May's declaration differs from the copy attached to the declaration of Zeev Golan, on which Olmstead relies.

Olmstead also argues that the trial court abused its discretion by granting Home Depot's request for judicial notice of rulings in favor Home Depot in similar previous litigation. Again, however, any abuse of discretion was not prejudicial, because the court did not rely on those rulings in granting Home Depot's summary judgment motion in this case. On the contrary, the court expressly stated that one of the prior rulings was "inapplicable" here. Olmstead offers no argument to the contrary.

In addition, Olmstead argues that some of the evidence introduced by Home Depot was not supported by a sufficient foundational showing of personal knowledge. In particular, Olmstead contends that Home Depot relied on statements in Parrett's declaration and in the depositions of Zarvou and Olmstead that were not supported by an adequate foundational showing of personal knowledge.

We deem the point forfeited as to the Zarvou and Olmstead depositions. Olmstead does not identify which statements from the Zarvou and Olmstead depositions were so clearly lacking a basis in the deponent's personal knowledge that the trial court's overruling of Olmstead's objection constituted an abuse of discretion, and Olmstead does not explain which of the admitted statements were prejudicial or explain why. In at least some instances, Olmstead's objections were frivolous and the admitted statements appear inconsequential—for example, when Zarvou was asked whether he had ever visited Cover-All's facilities in California ("I did") and, if so, how many times ("One or two"), Olmstead objected on the basis of lack of personal knowledge.

As for Parrett, her declaration states that she has worked for Home Depot as a "District Service Manager (formerly called a Zone Service Manager) in the Pac Central Region" since 2006. The declaration describes her training, duties, and experiences in that capacity. We have reviewed the declaration in its entirety and conclude that it was not an abuse of discretion to overrule Olmstead's personal knowledge objection. The declaration appears to be based entirely on Parrett's personal knowledge.

Finally, Olmstead argues that the trial court abused its discretion by sustaining Home Depot's objections to some of Olmstead's evidence. For example, Olmstead argues that portions of the declaration of Zeev Golan (a Cover-All officer) should not

have been excluded as inconsistent with Golan's deposition because (1) Golan signed the declaration months before his deposition was taken, and (2) Golan was not the party opposing summary judgment. Olmstead cites no authority for the first point, so we may disregard it. (*Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 ["We need not consider an argument for which no authority is furnished"].) And the rule favoring deposition testimony over inconsistent declarations applies to nonparty witnesses. (See *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.)

In a similar vein, Olmstead argues that statements in his own declaration that were excluded as inconsistent with his deposition testimony should have been admitted, because they merely clarified his deposition testimony but did not contradict it. We are not persuaded. In one instance, Olmstead was asked at his deposition, "Do you know who made the decision [to increase your pay]?" He answered, "Josh," a reference to Josh Moore, a Cover-All employee. He was then asked whether he knew if anyone besides Moore was involved in the decision, and he answered, "I don't know." In his declaration, Olmstead states, "I do not have, and have never had, personal knowledge of who actually made the decision about whether I would receive a pay increase while working at Cover-All. I can only state that it was Mr. Moore who advised me of the increase. I do not know, and have never known, whether Mr. Moore had authority to give me a raise, just that he is the one who told me when I got one." Assuming for the sake of argument that the exclusion of the statement in the declaration was an abuse of discretion, it was not prejudicial, because Olmstead does not contend that Home Depot made the decisions about increasing his pay. Similarly, assuming that it was an abuse of discretion to exclude Olmstead's statement in his declaration that he does not know who made the decision to dock his pay for damage to a customer's property because it contradicts his deposition testimony that Moore told him that he (Moore) made the decision, the exclusion was not prejudicial because Olmstead does not contend that Home Depot made the decision to dock his pay. And Olmstead's statement in his declaration that he does not know who provided his tools "except that some of them were provided by Mr.

Moore" contradicts his deposition testimony the he provided some of his own tools, so it was not an abuse of discretion to exclude it.

For all of the foregoing reasons, we reject Olmstead's challenges to the trial court's evidentiary rulings.

II. Summary Judgment Ruling

Olmstead contends Home Depot was his joint employer within the meaning of the applicable regulations. We are not persuaded.

A. Regulatory Definitions of "Employ" and "Employer"

The controlling case on the joint employer issue is *Martinez v. Combs* (2010) 49 Cal.4th 35 (*Martinez*). *Martinez* involved a claim for unpaid minimum wages (Lab. Code, § 1194) by seasonal agricultural workers (the plaintiffs) for Munoz & Sons (Munoz), a strawberry farmer, against Apio, Inc. (Apio) and Combs Distribution Co. (Combs), two produce merchants to whom Munoz sold the strawberries, based on a joint employer theory. The Court noted: "In actions under [Labor Code] section 1194 to recover unpaid minimum wages, the [Industrial Welfare Commission's (IWC)] wage orders do generally define the employment relationship, and thus who may be liable." (*Martinez, supra*, 49 Cal.4th at p. 52.)

Martinez concerned the definitions of "employ" and "employer" in IWC Wage Order No. 14 (agricultural occupations). "'Employ' means to engage, suffer, or permit to work." "'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, § 11140, subd. 2(C), (G).) Under Labor Code section 18, "'[p]erson' means any person, association, organization, partnership, business trust, limited liability company, or corporation." (*Martinez, supra*, 49 Cal.4th at p. 48, fn. 9.)

The *Martinez* Court explained that "employ" thus has "three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Martinez, supra*, 49 Cal.4th at p. 64; see also

ibid. ["the verb 'to engage' has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,' that is, to create a common law employment relationship"].) Correspondingly, an "employer" is a person who (1) exercises control over the wages, hours, or working conditions of the alleged employee; or (2) suffers or permits the alleged employee to work; or (3) has entered into a common law employment relationship with the alleged employee.

Home Depot is not subject to Wage Order No. 14, which was at issue in *Martinez*. Rather, Home Depot is subject to Wage Order No. 7 for the mercantile industry, which includes retailers and wholesalers of building materials. (Cal. Code Regs., tit. 8, § 11070, subd. 2(H).) Also, to the extent Home Depot is alleged to be a joint employer of Olmstead, the applicable wage order is Wage Order No. 16 for "on-site occupations of construction, including, but not limited to, work involving . . . renovation, remodeling[.]" (Cal. Code Regs., tit. 8, § 11160, subd. 1.) The definitions of "employ" and "employer" are materially identical in all three wage orders, however, so the analysis in *Martinez* is still controlling. (See Cal. Code Regs., tit. 8, §§ 11070, subd. 2(D) & (F) [Wage Order No. 7], 11140, subd. 2(C) & (G) [Wage Order No. 14], 11160, subd. 2(G) & (I) [Wage Order No. 16].)

B. Home Depot Was Not Olmstead's Joint Employer

Olmstead contends that there are material factual disputes as to whether Home Depot was his joint employer, because there is evidence that Home Depot (1) had the right to control and controlled his wages, hours, and working conditions, (2) suffered or permitted him to work, and (3) entered into a common law employment relationship with him. We disagree.

1. Control Over Wages, Hours, or Working Conditions

Olmstead contends Home Depot was his joint employer because Home Depot had the ability to control his wages, hours, and working conditions and exercised such control. We are not persuaded. The undisputed evidence established Home Depot did not have the power to and did not exercise control over Olmstead's wages, hours, and working conditions.

By contract Cover-All, not Home Depot, had the right to supervise or control the manner in which the work was performed by Olmstead. (Cf. *Martinez*, *supra*, 49 Cal.4th at p. 77 [the contracts at issue gave the alleged employer "no right to direct [the plaintiffs'] work"].) Home Depot had no authority to hire, terminate, or supervise Cover-All's employees; Home Depot had the right to request that a Cover-All employee who was objectionable to Home Depot not work at a Home Depot job site; and Cover-All agreed not to allow such employees to work at such sites. Cover-All also agreed that its employees had to pass a background check by a Home Depot agent; it agreed to comply with Home Depot's rules and regulations and policies of customer service and customer relations; and it agreed to reimburse Home Depot for any returns, refunds, or adjustments.

Contrary to Olmstead's contentions, Home Depot's ability to require Cover-All to take certain actions concerning its employer-employee relationship with its installers, including Olmstead, does not signify that Home Depot thereby had the ability, albeit indirectly, to control Olmstead's wages, hours, and working conditions.

Although the economics of Home Depot's contract with Cover-All might have affected what benefits Cover-All offered its employees and what rules the employees were required to follow, they remained exclusively Cover-All employees. Thus, Home Depot's rights to compel a Cover-All employee to pass a background check, wear a proper badge evidencing that he did, be groomed, and be on time, and to have that employee not assigned to or be removed from a Home Depot job site are not indicia of a joint employer relationship. The retention of some supervision and control does not transform Home Depot into a joint employer. Home Depot owns its business. Cover-All was Home Depot's independent contractor. "[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract[or]—including the right to inspect [citation], the right to stop the work [citation], the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent

contractor or the duties arising from that relationship." (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790; see *Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 432 [one primarily interested in work results is "ordinarily permitted to retain some interest in the manner in which the work is done without rendering himself subject to the peculiar liabilities . . . imposed by law upon an employer"].)

A corollary is that the owner does not become the employer of the independent contractor's employees simply by virtue of such a general power of supervision and control over the work results. We conclude that the power of a business owner to supervise and control the work results in furtherance of its entitlement to quality assurance does not transform an independent contractor's employee into an employee of the owner and thus render that owner a joint employer of the employee.

Home Depot therefore was entitled to determine how its business was to be conducted and ensure that its business was carried out according to its own standards and policies. Cover-All consented to Home Depot's business conditions and agreed to abide by its rules and regulations and policies of customer service and customer relations. That Cover-All required its employees to carry out its obligations does not signify that Home Depot exercised control over those employees' wages, hours, or working conditions and thereby became a joint employer.

Contrary to Olmstead's contentions, Home Depot did not have the power to hire or fire Cover-All's employees. Home Depot's requirements that Cover-All employees pass the requisite background check and wear the proper badges are simply indicia of Home Depot's exercise of quality control.[2] Noncompliance did not preclude Cover-All from

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[2] Olmstead argues that the use of the words "employment," "employer," and "employee" in the consent form for Home Depot's background check shows that Home Depot was his employer. Although the form does refer to employment, it does not say that Home Depot will be the applicant's employer—rather, it leaves the identity of the employer unstated. (The consent form also refers to an "employment application," but there is no evidence that Cover-All's installers ever submitted employment applications to Home Depot.)

hiring the employee or compel Cover-All to fire the employee. An employee barred from working at a Home Depot job site was not foreclosed from working at a different job site. We further conclude that the power of a business to charge back its independent contractor for unsatisfactory work of an employee for which the contractor docked the employee's wages is not an earmark of a joint employer status. Home Depot made a charge back to Cover-All for carpeting Olmstead had ruined at a Home Depot job site. Cover-All, not Home Depot, made the decision to dock Olmstead's pay for this charge back. That Cover-All would not have docked his pay if Home Depot had not made the charge back does not signify that Home Depot controlled Olmstead's wages.

2. Suffer or Permit to Work

Martinez rejected the suggestion that the defendants "suffered or permitted [the plaintiffs] to work because [they] knew plaintiffs were working, and because plaintiffs' work benefitted defendants." (*Martinez, supra,* 49 Cal.4th at p. 69.) The Court reasoned: "[T]he basis of liability is the defendant's knowledge of and failure to prevent the work from occurring." (*Id.* at p. 70, italics omitted.) The Court concluded that neither of the produce merchants "suffered or permitted plaintiffs to work because neither had the power to prevent plaintiffs from working." (*Ibid.*) "Munoz and his foremen [not the defendant] had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work." (*Ibid.*) Likewise here, Cover-All had those powers, not Home Depot.

3. Common Law Employment Relationship

Under *Martinez*, Home Depot would be Olmstead's employer within the meaning of the applicable wage orders if there were a common law employment relationship between Home Depot and Olmstead. (See *Martinez, supra*, 49 Cal.4th at p. 64.) "Under the common law, '"[t]he 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 result desired . . . ."' [Citations.]" (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531.)

On this issue, Olmstead relies on the same evidence and purported facts that he relied on in connection with *Martinez*'s first definition of employment, namely, exercising control over wages, hours, and working conditions. For the reasons given in Part II.B.1, *ante*, we are not persuaded. We conclude that the undisputed facts show that Home Depot lacked the requisite degree of control over the work performed by Olmstead and that there was therefore no common law employment relationship between Home Depot and Olmstead.

* * *

Cover-All was Olmstead's employer. As a matter of law, Home Depot was not Olmstead's joint employer under *Martinez*, because: (1) Home Depot did not exercise control over Olmstead's wages, hours, or working conditions; (2) Home Depot did not suffer or permit Olmstead to work; and (3) there was no common law employment relationship between Home Depot and Olmstead.[3]

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs of appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J. BENDIX, J.

[3] Olmstead also argues that Home Depot failed to negate various elements of his claims. We need not address that issue, because the trial court's joint employer determination is sufficient to dispose of all of Olmstead's claims.