Filed 5/10/18 Lepe v. Luft Enterprises CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUAN LEPE et al., Plaintiffs and Respondents, v. LUFT ENTERPRISES et al., Defendants and Appellants.	E067382 (Super.Ct.No. CIVDS1407292) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed as modified.

Briggs Law Corporation, Cory J. Briggs and Anthony N. Kim, for Defendants and Appellants.

No appearance for Plaintiffs and Respondents.

Plaintiffs and respondents Juan Luis Lepe, Virgilio Flores-Juarez, and Berna Vargas (collectively referred to as plaintiffs) initiated this action against their former employer, alleging unpaid overtime wages, failure to provide meal and rest periods, and other Labor Code violations and unfair business practices, from May 2010 through May

2014. The trial court entered judgment in favor of plaintiffs and against defendants and appellants Luft Enterprises, a California Corporation, doing business as Inn-Decor (the Company) and Otmar Luft (collectively, defendants). Defendants challenge the judgment, contending (1) they may not be compelled, as a matter of law, to pay past wages allegedly due because plaintiffs were not legally authorized to work in the United States; (2) there is insufficient evidence that defendants issued inaccurate wage statements; (3) the trial court erroneously granted plaintiffs' attorney's fees motion; and (4) the trial court abused its discretion in awarding certain costs. We find merit in defendants' challenge to the award of costs; otherwise, we affirm.

I. PROCEDURAL BACKGROUND AND FACTS

A court trial was held on October 13, 2015. Each of the plaintiffs testified; however, Luft did not. According to the testimony, the Company manufactures furniture for businesses such as restaurants and casinos. Plaintiffs worked 10 or more hours per day without an afternoon or second meal break. The Company failed to pay overtime wages or provide meal and rest periods. Prior to May 2010, defendants were aware that plaintiffs were not authorized to work in the United States due to their immigration status.

On November 4, 2015, the trial court entered judgment in favor of plaintiffs in the total amount of $140,016 (Lepe—$59,776; Flores-Juarez— $59,776; and Vargas—$20,464) and against all defendants jointly and severally. Plaintiffs were also awarded their attorney's fees and costs.

II. DISCUSSION

A. Plaintiffs' Unauthorized Work Status Does Not Bar Their Right to Past Wages.

Defendants contend they may not be "held liable for the wages sought because, according to Plaintiffs, Defendants learned that Plaintiffs were not authorized to work in the United States due to their immigration status prior to May 2010, which is the agreed-upon claim period in this case." In support of their contention, defendants rely on the holding in *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 414, 424-425 (*Salas*). We find such reliance to be misplaced.

In *Salas*, the plaintiff sued his former employer under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) alleging defendant employer failed to reasonably accommodate his physical disability and refused to rehire him in retaliation for filing a worker's compensation claim. (*Salas*, *supra*, 59 Cal.4th at p. 414.) After the complaint was filed, the defendant learned that the plaintiff may have used another man's Social Security number in order to gain employment. (*Ibid*.) Defendant successfully moved for summary judgment. (*Id*. at pp. 417.) Affirming the judgment, the appellate court "reasoned that the doctrine of after-acquired evidence barred plaintiff's causes of action because he had misrepresented to defendant employer his eligibility under federal law to work in the United States. It also held that plaintiff's claims were subject to the doctrine of unclean hands because he had falsely used another person's Social Security number in seeking employment with defendant, he was

disqualified under federal law from working in the United States, and his conduct exposed defendant to penalties under federal law." (*Id.* at p. 418.)

The California Supreme Court granted review and reversed, holding that the federal Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 et seq.) did not preempt application of the antidiscrimination provisions of California's FEHA to workers who are unauthorized aliens, but that "federal preemption does bar an award of lost pay damages under the FEHA for any period of time *after* an employer's discovery of the employee's ineligibility under federal law to work in the United States." (*Salas*, *supra*, 59 Cal.4th at p. 418, fn. omitted.) In reaching this holding, the *Salas* court noted that its "preemption analysis for the postdiscovery period is limited to employers who discover the plaintiff employee's unauthorized status *after* the employee has been discharged or not rehired. . . . Because imposing full liability for lost wages would provide a disincentive for such immigration law violations, thereby furthering the goals of federal immigration law, in these situations arguably federal law would not preempt lost wages remedies for violations of state laws like California's FEHA." (*Id.* at p. 424, fn. 3, original italics.) However, the *Salas* court added: "Not addressed here is a situation in which an employer has *knowingly* hired or continued to employ an unauthorized alien in violation of federal immigration law (see 8 U.S.C. § 1324a (a)(1)-(2))." (*Ibid.*, original italics.)

Here, defendants concede knowledge of plaintiffs' unauthorized work status during the "agreed-upon claim period in this case." On cross-examination, defendants elicited plaintiffs' testimony that Luft said they would not get overtime pay because "if

we go by law you shouldn't be working here." Since defendants were aware of plaintiffs' unauthorized work status during the time of their employment, defendants actively joined in the violation of federal immigration law. Under this circumstance, the *Salas* court holding does not apply, and plaintiffs are not barred from recovering their lost wages.

B. The Evidence Shows Defendants Issued Inaccurate Wage Statements.

Defendants contend the evidence fails to show they issued inaccurate wage statements. We disagree.

By law, the employer is obligated to keep accurate records of all hours worked, including overtime and meal periods. (Lab. Code, §§ 226, subd. (a) [Employer must provide a wage statement to the employee "semimonthly or at the time of each payment of wages," and furnish the statement "either as a detachable part of the check . . . paying the employee's wages, or separately if wages are paid by personal check or cash . . . ."]; Lab. Code, § 1174, subd. (d); see *Morgan v. United Retail Inc*. (2010) 186 Cal.App.4th 1136, 1143.) When an employer knowingly and intentionally fails to comply with subdivision (a) of Labor Code section 226, the employee is entitled to recover actual damages "not to exceed an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees." (Lab. Code, § 226, subd. (e)(1).)

"[W]here the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages. [Citations.]" (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) Here, plaintiffs

did not offer their pay stubs into evidence. Rather, the parties stipulated that plaintiffs' pay stubs record "the regular hours worked, but do not record any overtime hours worked." This stipulation, combined with plaintiffs' testimony regarding the hours they worked (which included overtime), provides sufficient evidence supporting the award of $12,000 in penalties for inaccurate wage statements.

C. Plaintiffs' Attorney's Fees Motion Was Properly Granted.

Defendants assert the award of attorney's fees should be reversed because the motion was not filed within the required time period, and the trial court erred in granting the motion prior to entry of the judgment. They further challenge the amount of fees awarded. We conclude the award of fees was proper.

1. Further Background Information.

On November 4, 2015, the trial court rendered judgment in favor of plaintiffs, awarding them damages, including attorney's fees and costs against all defendants jointly and severally. On November 20, 2015, plaintiffs served notice of the court's ruling.

On June 13, 2016, plaintiffs filed their motion for attorney's fees and memorandum of costs. They sought attorney's fees in the amount of $66,656.25 (which includes a multiplier of 1.5) and costs in the amount of $3,411.37. On August 9, 2016, the trial court found that judgment had not been submitted and ordered plaintiffs' counsel to submit the judgment; the matter was taken under submission.

On August 26, 2016, the court granted plaintiffs' motion for attorney's fees and costs and ordered plaintiffs to prepare the order and judgment including attorney's fees. Judgment was entered on October 24, 2016. Plaintiffs were awarded the total sum of

$227,176.87, including $179,328 in damages; $44,437.50 in attorney's fees; and $3,411.37 in costs.

2. Plaintiffs' Motion for Attorney's Fees and Costs Was Timely.

Defendants contend the award of attorney's fees and costs should be reversed, because plaintiffs prematurely filed their motion and it was granted prior to entry of the judgment.

When authorized by statute, fees are proper as an item of costs under Code of Civil Procedure section 1033.5, subdivision (a)(10)(B). The procedure for claiming fees is set forth in California Rules of Court, rule 3.1702(b)(1),[1] which provides that a motion for attorney's fees incurred before entry of judgment must be made within the time to file a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case. Under rule 8.104(a), "[u]nless a statute or rules 8.108, 8.702, or 8.712 provide otherwise, a notice of appeal *must be filed on or before the earliest of*: [¶] (1)(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment." (Rule 8.104(a)(1)(A)-(C), italics added.)

[1] Further "rule" references are to the California Rules of Court.

Because plaintiffs filed their motion for attorney fees and costs before the trial court entered judgment, their motion was filed prematurely, prior to the entry of judgment. At the time plaintiffs filed their motion for attorney's fees, rule 8.104(d) stated: "(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment. [¶] (2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." (Rule 8.104(d)(1)-(2).) Because the time frame set forth in rule 8.104 governs the filing of a motion for attorney's fees as costs under rule 3.1702(b)(1), a request for fees incurred before rendition of the judgment in the trial may be timely even if it is filed prematurely prior to the entry of judgment. "'Such a premature [motion] is to be liberally construed in favor of its sufficiency and treated as filed in accordance with rule 2(c) [now rule 8.104(d)], particularly where the opposing party is neither misled nor prejudiced by the premature filing.' [Citation.]" (*Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal.App.4th 1077, 1086 [like notices of appeal, attorney's fees motions filed before entry of judgment are premature, though they may be considered if the opposing party has not been prejudiced].)

3. The Trial Court Did Not Abuse Its Discretion with Respect to the Amount of the Attorney's Fees Awarded to Plaintiffs.

Defendants contend the amount of attorney's fees awarded to plaintiffs is unreasonable because they failed to present any evidence that their attorney's hourly rate is reasonable. We disagree.

After considering the parties' briefs and the evidence submitted therewith, the trial court awarded plaintiffs $44,437.50 in attorney's fees—$22,218.75 less than the sum of $66,656.25, the amount plaintiffs requested. We review a trial court's determination of reasonable attorney's fees under the abuse of discretion standard: "[T]here is no question our review must be highly deferential to the views of the trial court. [Citation.] As our high court has repeatedly stated, '"'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong"—meaning that it abused its discretion.'"' [Citations.]" (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777.)

"In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) With these principles in mind, we address defendants' arguments in turn.

Defendants initially challenge the award as excessive because the trial lasted less than one hour, only one 2.5-hour deposition was taken, and plaintiffs propounded 18 sets of duplicative discovery. However, having failed to point to specific items they are challenging and provide sufficient argument and citations to the evidence, defendants have failed to meet their burden. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn., supra,* 163 Cal.App.4th at p. 564.)

Alternatively, defendants claim that plaintiffs' attorney's hourly rate is unreasonable. Plaintiffs' attorney charged an hourly rate of $450. In support of this hourly rate, plaintiffs offered their attorney's declaration, a detailed breakdown of the work performed, and a copy of a "2008 National Law Journal survey of national hourly rates." Defendants claim a more reasonable hourly rate is $275 to $300. They argue that plaintiffs' attorney's declaration is "utterly deficient" and the reliance on an article from the National Law Journal purporting to justify counsel's hourly rate lacks foundation and is hearsay. Defendants offered the same challenge in the trial court, presenting the declarations of three attorneys who opined that $66,000 was an excessive amount for this case, and who declared a more reasonable hourly rate would be $300 or less.

According to the minute order, the trial court awarded attorney's fees in the amount of $44,437.50 ($300 per hour times 98.75 hours, multiplied by 1.5). The court agreed with defendants' assertion that the hourly rate was excessive and reduced it by $150; however, it awarded the 1.5 multiplier sought by plaintiffs. Again, the trial judge assesses the value of legal services. The amount of a fee awarded will not be "set aside on appeal absent a showing that it is manifestly excessive in the circumstances. [Citation.] Such a showing has not been made in this case." (*Children's Hospital & Medical Center v. Bontá*, *supra*, 97 Cal.App.4th at p. 782.)

D. Plaintiffs' Award of Costs Must Be Modified.

Plaintiffs sought reimbursement for models, blowups, and photocopies of exhibits in the amount of $1,670 and "other" costs in the amount of $386.77. They did not specify what models, blowups, or photocopies were used; however, they itemized and

described their "other" costs in an attachment.[2] Over defendants' objection, the trial court awarded plaintiffs these costs. Defendants challenge the trial court's decision. As to the award of costs for postage, United Parcel Service (UPS), and copying the amended summons, we find merit in defendants' challenge. Otherwise, we reject it.

Code of Civil Procedure[3] section 1033.5 lists specific costs that are authorized and specific costs that are disallowed. The section also provides that any item not authorized or disallowed (i.e., not specifically listed) "may be allowed or denied in the court's discretion." (§ 1033.5, subd. (c)(4).) "Whether a cost is statutorily authorized is a question of law we review de novo." (*Naser v. Lakeridge Athletic Club* (2014) 227 Cal.App.4th 571, 576.) We review a trial court's decision as to whether particular items of authorized costs were recoverable by the prevailing party for abuse of discretion. (*Ibid.*) A court does not abuse its discretion in awarding a cost if that cost is "reasonable

---

[2] The "other" costs were identified as follows:
"05/21/14 UPS, File Complaint, San Bernardino Superior Court $7.00
"06/24/14 UPS, P.discovery request (Agent) $7.00
"06/24/14 UPS, San Bernardino Superior Court, Amended Complaint $7.00
"07/16/14 SBSC, Copy of Amended Summons $1.00
"09/17/14 UPS, OC Vargas Discovery Request $6.68
"10/0l/14 UPS, Verification to Berna Vargas $6.68
"10/07/14 UPS, OC p.discovery responses $6.68
"11/13/14 Trial Setting Conference 11/17/14 Court Call $86.00
"06/29/15 UPS, OC p.supplemental discover requests $6.96
"08/14/15 UPS to OC Trial Documents $6.96
"08/14/15 First Legal SameDayFile Trial Documents $76.20
"11/30/15 First Legal SameDayFile Closing Arguments $93.6l
"US POSTAGE $75.00"

[3] Further statutory references are to the Code of Civil Procedure unless otherwise indicated.

in amount" and is "reasonably necessary to the conduct of the litigation rather than merely convenient." (§ 1033.5, subds. (c)(2)-(3).)

Defendants challenge the costs of obtaining models, blowups, or photocopies of exhibits on the grounds "there were no models, blowups, or exhibits used at trial." These costs are specifically allowed. (§ 1033.5, subd. (a)(13).) Although they were not used at trial, trial preparation begins long before the actual trial, and the parties do not know what stipulations will be reached to make certain evidence superfluous. Under section 1033.5, subdivision (c)(4), the court had discretion to award these costs. We find the court's decision to award them was reasonable.

Defendants challenge the other costs (UPS services, copy of the amended summons, and court calls), arguing they are not allowed under section 1033.5, subdivision (b)(3). This subdivision excludes "[p]ostage, telephone, and photocopying charges," but the fee paid to "Court Call" is a fee for making a telephonic court appearance. It is not a fee for the use of a telephone. Section 1033.5 does not expressly prohibit Court Call appearance fees, or "First Legal SameDayFil[ing]," and thus, the court had discretion to award them. (§ 1033.5, subd. (c)(4); *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 776 [fees for courier and messenger services and filing documents were reasonable and properly awarded].) We find the court reasonably awarded these costs because the amount is reasonable and the Court Call appearances were necessary to conduct the litigation. However, the postage and UPS fees, along with the copy of the amended summons, are expressly excluded (§ 1033.5, subd. (b)(3)) and

should have been taxed. Those fees total $130.96. We will order the judgment modified to reflect an award of costs in the amount of $3,279.41 ($3,411.37 minus $130.96).

III. DISPOSITION

The judgment is modified to reflect an award of costs in the amount of $3,279.41. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.[4]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.

[4] Although plaintiffs have, for the most part, prevailed on the merits in this appeal, they did so despite failing to file a respondent's brief. We therefore decline to award their costs. (Rule 8.278, subd. (a)(5).)