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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TASHAY LENZY, Plaintiff and Appellant, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B308069 (Los Angeles County Super. Ct. No. BC650652)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elaine W. Mandel, Judge. Affirmed.

Schwimer Weinstein, Michael E. Schwimer, and Mitchell E. Rosensweig for Plaintiff and Appellant.

Stone Dean, Gregory E. Stone, Amy W. Lewis, and Kori Macksoud for Defendant and Respondent.

Tashay Lenzy (plaintiff) was injured when an elevator door malfunctioned at the grocery store where she worked as a coffee barista. She obtained a workers' compensation settlement and at the same time brought this civil action against Ralphs Grocery Company (Ralphs). The trial court granted Ralphs' motion for summary judgment, finding plaintiff's negligence action was barred by the workers' compensation exclusive remedy rule. We consider whether a triable issue of fact exists as to whether the rule should apply, which in large part turns on whether there is a dispute about whether Ralphs or its parent, The Kroger Company (Kroger), was plaintiff's employer.

I. BACKGROUND

Plaintiff worked as a barista at a Ralphs grocery store in Los Angeles, California. In September 2016, she fell and injured her knee when she was struck by the door of a service elevator in the store. About a month later, she filed an application for adjudication of her workers' compensation claim with the Workers' Compensation Appeals Board in which she listed "Ralphs" as her employer and indicated the company was insured.

Plaintiff ultimately settled her workers' compensation claim for a lump sum payment of $50,000. The compromise and release identified Kroger as plaintiff's employer. The order approving the compromise and release identified the defendant as "The Kroger Company, dba Ralphs Grocery Co."

While plaintiff's workers' compensation claim was still pending, she commenced this action for general negligence against Ralphs and Thyssenkrupp Elevator Corporation (Thyssenkrupp). Ralphs moved for summary judgment on the

ground that plaintiff's claim against it was barred by the workers' compensation exclusive remedy rule. That rule is just what it sounds like: "Where an employee is injured in the course and scope of his or her employment, workers' compensation is generally the exclusive remedy of the employee and his or her dependents against the employer." (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 279, citing Lab. Code,[1] §§ 3600, subd. (a), 3602.)

Anticipating plaintiff's contention that she was employed by Kroger, not Ralphs—and therefore that her claims against Ralphs were not subject to the exclusive remedy rule—Ralphs submitted the following evidence in the trial court: Ralphs' responses to plaintiff's requests for production of documents, including several unauthenticated documents ostensibly related to plaintiff's employment; a declaration by Kroger's corporate counsel, Nathan Brown (Brown), stating among other things that Kroger has no employees at the store where plaintiff was injured and its subsidiary Ralphs is responsible for the store's "day to day operations"; and interrogatory responses in which plaintiff identified Ralphs as her employer. Ralphs also argued plaintiff was judicially estopped from denying the employment relationship based on her identification of Ralphs as her employer in her application for adjudication of her workers' compensation claim.

Plaintiff objected to unauthenticated documents included in Ralphs' discovery responses, as well as certain statements in Brown's declaration as lacking foundation. She also submitted a

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[1] Undesignated statutory references that follow are to the Labor Code.

declaration averring she was mistaken when she identified Ralphs as her employer in discovery responses. In addition, plaintiff submitted other evidence that she thought tended to show she was employed by Kroger, including: the compromise and release she signed to settle her workers' compensation claim, which was drafted by Kroger's attorneys and identified Kroger as her employer; a document in which she resigned her employment with Kroger and agreed not to seek re-employment with Kroger, also drafted by Kroger's attorneys; and two checks she received in payment of the workers' compensation settlement bearing the Kroger logo.[2] In addition to disputing the existence of an employment relationship between herself and Ralphs, plaintiff argued Ralphs could not avail itself of the exclusive remedy rule because it had not demonstrated it carried workers' compensation insurance or possessed a certificate of self-insurance.

The trial court denied plaintiff's evidentiary objections and granted Ralphs' motion for summary judgment. The trial court reasoned that "Kroger didn't hire [plaintiff] or employ her, she's working at the Ralphs. They are not separate legal entities for this purpose. They are both considered to be her employer, and they are both [protected by the workers' compensation exclusive remedy rule] because they were her employer and because she availed herself of the workers' comp system and because it was adjudicated . . . that she was entitled to comp benefits."

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[2] One of the checks, drawn on a Bank of America account, bears logos used by Kroger and the third-party claims administrator that was also named in the workers' compensation order approving the compromise and release. The other check, drawn on a U.S. Bank account, bears the Kroger logo and includes a stub that refers to "Ralphs Grocery Company."

II. DISCUSSION

Plaintiff contends Ralphs did not carry its initial burden to establish two facts required for summary judgment based on the workers' compensation exclusive remedy rule: (1) that Ralphs (not just Kroger) was plaintiff's employer, and (2) that Ralphs (not just Kroger) carried workers' compensation insurance or possessed a certificate of self-insurance. As we summarize and then explain, our review of the record reveals no material dispute of fact requiring trial on either issue.

Plaintiff's own statements indicating she was employed by Ralphs, plus Brown's statements regarding Kroger's lack of involvement in managing the store, are sufficient to satisfy Ralphs' initial burden as to the first element and shift the burden to plaintiff to raise a triable issue of fact. Plaintiff's suggestion that Kroger's involvement in the resolution of her workers' compensation claim raises doubts as to the identity of her employer misses the mark because the exclusive remedy rule applies even if she was an employee of both Ralphs and its parent company. As to insurance, Ralphs' initial summary judgment burden was satisfied by plaintiff's statement that Ralphs was insured in her application for adjudication of her workers' compensation claim and the order approving her workers' compensation settlement that identified the defendant as Kroger doing business as Ralphs.

A. Applicable Law and Standard of Review

Under California's Workers' Compensation Act (§ 3200 et seq.), and subject to exceptions not applicable here, workers' compensation is the exclusive remedy "against an employer for

any injury sustained by his or her employees arising out of and in the course of the employment" where certain "conditions of compensation" are satisfied.[3] (§§ 3600, subd. (a), 3602, subd. (a) ["Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is . . . the sole and exclusive remedy of the employee or his or her dependents against the employer"].) "[T]he legal theory supporting such exclusive remedy provisions is a presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16; accord, *King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1046-1047 (*King*).) This "compensation bargain" does not apply—and the exclusive remedy rule does not bar a negligence action—where there is no employment relationship between the plaintiff and the defendant (§§ 3600, subd. (a), 3602, subd. (a)) or where the defendant does not possess the required insurance or certificate of self-insurance (§§ 3700, 3706).

The exclusive remedy rule is an affirmative defense to an action at law. (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 (*Doney*); *Reynaud v. Technicolor Creative Services USA, Inc.* (2020) 46 Cal.App.5th 1007, 1020.) A defendant asserting this defense as the basis for summary judgment has the initial burden to show that undisputed facts support each element of the

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[3] The "conditions of compensation" include, by way of illustration, that the employee was acting within the course of their employment at the time of the injury (§ 3600, subd. (a)(2)) and the injury was not intentionally self-inflicted (§ 3600, subd. (a)(5)).

defense. (*Melendrez v. Ameron Internat. Corp.* (2015) 240 Cal.App.4th 632, 638.) "'If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does "the burden shift[ ] to plaintiff to show an issue of fact concerning at least one element of the defense." [Citation.]' [Citation.]" (*Ibid.*)

"'We review the trial court's [summary judgment] decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.' [Citation.]" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.)

B. Evidentiary Issues

Preliminarily, plaintiff contends the trial court abused its discretion in overruling objections to certain unauthenticated documents and to Brown's declaration. "According to the weight of authority, appellate courts 'review the trial court's evidentiary rulings on summary judgment for abuse of discretion.' [Citations.]" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.)

1. Unauthenticated documents

In support of its summary judgment motion, Ralphs filed a declaration by its litigation counsel that attached, among other things, Ralphs's verified responses to plaintiff's requests for production of documents. These include what appears to be a pay stub and what Ralphs (in its discovery responses) describes as plaintiff's personnel file.[4] The attorney declaration does not

[4] Documents in the personnel file include a job application, acknowledgments of various store policies, a dispute resolution

describe the documents, and the verifications do not represent that all facts stated in the discovery responses are within the personal knowledge of the signing party.

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Plaintiff did not admit the genuineness of these documents, and Ralphs produced no evidence as to their provenance. But the trial court did not cite these documents in granting Ralphs's motion for summary judgment, and they are immaterial to our analysis as well. We therefore see no need to further discuss the correctness of the trial court's evidentiary ruling on this score.

2. Brown's declaration

Brown is corporate counsel for Kroger, which acquired Ralphs as a subsidiary in 2003. Brown stated, among other things, that "[Ralphs] was the entity having ownership, management, control, possession or other interest in the day to day operations" of the store where plaintiff worked, Kroger had no "possession or other interest in the day to day operations" of the store, and Kroger did not "hire or employ [plaintiff] at any time while she was employed at [Ralphs]." The trial court overruled plaintiff's objections that Brown's statements lacked foundation and included improper legal conclusions.

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agreement, a trainee evaluation form, and a notice that plaintiff's leave of absence had expired. Some of the documents appear to bear plaintiff's signature.

A declaration filed in support of a motion for summary judgment "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d); see also Evid. Code, § 702, subd. (a) [a non-expert's testimony "concerning a particular matter is inadmissible unless he has personal knowledge of the matter"].)

Plaintiff is correct that Brown's declaration provides no basis to infer that he had personal knowledge of Ralphs's interest in the store at which plaintiff worked. The declaration, however, does sufficiently establish that Brown, as in-house counsel for Kroger, had personal knowledge of Kroger's relationship to Ralphs, Kroger's lack of involvement in the day-to-day operations of the store, and the fact that Kroger did not hire plaintiff. We therefore do consider these statements in assessing whether Ralphs employed plaintiff.

C. Plaintiff Failed to Raise a Triable Issue of Fact as to Whether She Was Employed by Ralphs

"While the workers' compensation remedy bars suit against an 'employer' [citations], the statute expressly preserves the right of employees to sue third parties: 'The claim of an employee . . . for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer' (*id.* § 3852)." (*King*, *supra*, 5 Cal.5th at 1055; accord, *Gigax v. Ralston Purina Co.* (1982) 136 Cal.App.3d 591, 598 ["[T]he Labor Code does not purport to alter the correlative rights and

liabilities of persons who do not occupy the reciprocal statuses of employer or employee"].)

Because the Workers' Compensation Act "intends comprehensive coverage of injuries in employment," it defines "'employment' broadly in terms of 'service to an employer' and . . . include[es] a general presumption that any person 'in service to another' is a covered 'employee.' (§§ 3351, 5705, subd. (a) . . . .)" (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 (*Borello*); see also § 3357 ["Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee"].) In determining whether an employment relationship exists for purposes of the Workers' Compensation Act, courts analyze the factors identified in *Borello*, including, chiefly, the right to control the manner and means of accomplishing the result desired, as well as several "secondary factors."[5] (*Angelotti*, *supra*, 192 Cal.App.4th at 1404.)

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[5] Secondary factors include the right to discharge at will, without cause (which is "strong evidence in support of an employment relationship") (*Angelotti v. The Walt Disney Co.* (2011), 192 Cal.App.4th 1394, 1404 (*Angelotti*)); whether the person performing services is engaged in a distinct occupation or business; whether the work is usually done under the direction of the principal or by a specialist without supervision; the skill required to perform the work; whether the principal or the worker supplies the instrumentalities, tools, and place of work; the duration of the work; whether the worker has an opportunity for profit or loss depending on his or her managerial skill; whether payment is by time or by the job; whether the work is a part of the regular business of the principal; and whether the

"'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' [Citation.]" (*Borello*, *supra*, at 351.)

An employee may have more than one employer for purposes of the Workers' Compensation Act—each of which is responsible for securing workers' compensation and each of which is protected by the exclusive remedy rule—but the *Borello* right-of-control test must be satisfied as to both. (*Angelotti*, *supra*, 192 Cal.App.4th at 1403-1404.)

Plaintiff repeatedly acknowledged an employment relationship with Ralphs—first in her application for adjudication of her workers' compensation claim and again in response to Thyssenkrupp's interrogatories. (See *Borello*, *supra*, 48 Cal.3d at 351 [secondary factors include "whether or not the parties believe they are creating the relationship of employer-employee"].) She reversed course, however, in opposition to Ralphs' motion for summary judgment and contended she "learned . . . [her] legal employer was The Kroger Company dba Ralphs." We do not believe this later epiphany defeats the significance of her earlier expressed belief that she was employed by Ralphs when she was working in the store, when she sought workers' compensation benefits, and when she commenced this action.

In addition, Plaintiff's statements are far from the only evidence that she was employed by Ralphs. Although we disregard Brown's affirmative statements about what role Ralphs

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parties believe they are creating an employment relationship. (*Borello*, *supra*, at 350-351, 355.)

had in operating the store, his admissible statements about Kroger's *lack* of such a role in the store support an inference that Ralphs had the right of control with respect to plaintiff's work—if only by process of elimination. In other words, Brown's declaration demonstrates Kroger did not hire plaintiff and did not participate in the day-to-day operations of the store where plaintiff worked, which by necessary inference would include plaintiff's training, scheduling, work assignments, and discipline.

Plaintiff contends Ralphs' initial showing that it was her employer is nonetheless undermined by Kroger's involvement in the settlement of her workers' compensation claim.[6] Plaintiff suggests this evidence of an employment relationship with Kroger is probative of the lack of an employment relationship with Ralphs. As we have already discussed, however, plaintiff's relationship with Kroger is independent of her relationship with Ralphs. Kroger employees are not necessarily Ralphs employees (take Brown, for example), but Kroger employees may also be Ralphs employees. Nothing in the compromise and release and related documents indicates any entity but Ralphs managed the day-to-day operations of the store at which plaintiff worked.

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[6] As discussed earlier, Kroger drafted the compromise and release that named Kroger as plaintiff's employer and Kroger required plaintiff to sign an agreement resigning from and promising not to seek re-employment with Kroger.

D. Plaintiff Failed to Raise a Triable Issue of Fact as to Whether Ralphs Complied with the Workers' Compensation Act

Section 3700 requires that every employer shall "secure the payment of compensation" either by carrying workers' compensation insurance or by obtaining a certificate of self-insurance. (§ 3700, subds. (a)-(b); *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 985 [holding the relevant statutory language "is mandatory and exhaustive"].) Section 3706 states the exclusive remedy rule does not apply if an employer fails to comply with section 3700.

Our Supreme Court in *Doney* held that "[b]ecause an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the [act] is a bar to the employee's ordinary remedy' [citation], . . . the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' [citation] in accordance with the provisions of the [Workers' Compensation Act]."[7] (*Doney*, *supra*, 23 Cal.3d at 98, fn. 8.) Here, it is undisputed that plaintiff received $50,000 in compensation for her injury. The Workers Compensation Appeals Board approved this settlement in an order that named the defendant as Kroger doing business

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[7] The plaintiff-employee bears the burden of pleading and proving the employer has not secured the payment of compensation under section 3700 only if he or she seeks "to invoke the presumption of negligence [against an uninsured employer] contained in section 3708." (*Doney*, *supra*, 23 Cal.3d at 352, fn. 11.)

as Ralphs. Plaintiff's application for adjudication of her workers' compensation claim indicated Ralphs was insured. All this was sufficient to satisfy Ralphs's initial burden of demonstrating its compliance with section 3700.

Plaintiff cites no evidence to undermine this showing, but faults Ralphs for not submitting additional evidence that it was insured or possessed a certificate of self-insurance. Although Ralphs' rejoinder that it was "de facto insured" is not entirely clear, the merits of this response are of no consequence because plaintiff did not raise a triable issue of fact.

DISPOSITION

The judgment is affirmed. Ralphs shall recover its costs on appeal.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.