

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT LIPKOWITZ,

Plaintiff and Appellant,

v.

RITE AID CORPORATION,

Defendant and Respondent.

D051488

(Super. Ct. No. GIC866624)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey B. Barton, Judge. Affirmed.

Robert Lipkowitz, acting in propria persona, appeals from a summary judgment in his fraud action against his former employer, Rite Aid Corporation (Rite Aid). He contends the trial court erroneously granted the motion because a triable issue of fact existed as to the falsity of certain statements. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Lipkowitz worked for Rite Aid as a pharmacist from January 2000 until his resignation on March 3, 2007. He worked 144 hours biweekly at Rite Aid's Chula Vista

store from 2000 to 2005, under the supervision of three consecutive Pharmacy Development managers, Deb Polito, Tammy Brookman and Alan Sanford. When Sanford became Lipkowitz's manager in July 2004, he knew that Polito and Brookman had allowed Lipkowitz to work 144 hours biweekly and believed he could also do so.

While working in Chula Vista, Lipkowitz asked Sanford whether Rite Aid would consider keeping its El Centro pharmacy open during the graveyard hours so he could transfer there. In response to his request, Sanford told Lipkowitz that Rite Aid could open the El Centro pharmacy during the graveyard hours to allow the transfer. Sanford also told Lipkowitz that if he transferred to El Centro, Rite Aid would allow him to work 144 hours biweekly there, as he had in Chula Vista, for at least three years. Sanford offered to pay Lipkowitz a base hourly rate of \$53 per hour, give him four weeks of paid vacation a year, an annual bonus of \$10,000 for at least three years and reimburse him \$2,000 in travel expenses if he transferred to El Centro. Sanford told Lipkowitz that if he worked 144 hours biweekly at a base hourly rate of \$53 in El Centro, he would earn about \$242,500 annually.

Lipkowitz transferred to the El Centro store in May 2005 and worked 144 hours biweekly for about 11 months. In March 2006, a senior vice president for Rite Aid noticed Lipkowitz's earnings in reviewing reports and informed Sanford that Lipkowitz's hours needed to be reduced to 108 biweekly as required by law. After April 3, 2006, Rite Aid only allowed Lipkowitz to work the maximum hours legally allowed, 108 hours biweekly.

Lipkowitz resigned his employment in March 2007 and filed this action asserting claims for fraud in the inducement, negligent misrepresentation and violation of Labor Code section 970. (All undesignated statutory references are to the Labor Code.) Rite Aid moved

for summary judgment or in the alternative, summary adjudication of all causes of action, arguing: (1) illegality prevented the court from awarding any relief on the complaint; (2) Lipkowitz could not prove that it misrepresented any facts; and (3) Lipkowitz suffered no damages based on any alleged misrepresentations. The trial court granted the motion and Lipkowitz appeals from the subsequent judgment.

DISCUSSION

I. *Standard of Review*

Summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision granting summary judgment de novo (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*)), applying the same three-step analysis required of the trial court. (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1431-1432.) After identifying the issues framed by the pleadings, we determine whether the moving party has established facts justifying judgment in its favor. (*Id.* at p. 1432.) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2).)

If the moving party has carried its initial burden, we then decide whether the opposing party has demonstrated the existence of a triable, material fact issue. (*Bono v. Clark, supra*, 103 Cal.App.4th at p. 1432.) We must strictly construe the moving party's evidence and liberally construe the opposing party's evidence (*Binder v. Aetna Life Ins.*

Co. (1999) 75 Cal.App.4th 832, 838-839) and we may not weigh the evidence or conflicting inferences. (*Aguilar, supra*, 25 Cal.4th at p. 856; Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

II. *Analysis*

We begin with a consideration of the issues framed by the pleadings. Lipkowitz alleged in his first cause of action for fraud in the inducement that he agreed to move to El Centro based on Rite Aid's false promise that he would earn \$53 per hour and work sufficient overtime to enable him to earn about \$242,500 a year. His second and third causes of action for negligent misrepresentation and violation of section 970, incorporated these allegations and asserted that Rite Aid falsely represented that it would permit him to work at an hourly rate or the number of hours necessary to earn the promised amount of \$242,500 per year and that the legal restriction on the number of hours worked was irrelevant.

Rite Aid argued that illegality prevented the trial court from awarding Lipkowitz any relief. We agree.

To protect the public health (§ 855), the Labor Commissioner must enforce statutory provisions prohibiting a pharmacist from working more than 108 hours biweekly. (§§ 851, 856.) A person in violation of this restriction is guilty of a misdemeanor. (§ 853.) It is well settled that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out and that courts will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. (*Yoo v. Jho* (2007)

147 Cal.App.4th 1249, 1255.) Any possible injustice to the parties is outweighed by the importance of deterring illegal conduct. (*Ibid.*)

Here, Lipkowitz's entire complaint is founded upon enforcing Rite Aid's promise to allow him to work 144 hours biweekly at the rate of \$53 per hour so that he could earn \$242,500 per year. Lipkowitz admitted during his deposition that he needed to work 144 hours biweekly to earn \$242,500 per year and that Sanford never promised him that amount if he worked fewer hours. Rite Aid, however, could not legally allow Lipkowitz to work 144 hours biweekly, nor could Lipkowitz have legally worked that number of hours. (See *Lewis v. Ferrari* (1939) 34 Cal.App.2d Supp. 767, 775-775 [employee, who voluntarily agreed with employer to work overtime in violation of statute limiting hours of work was in pari delicto with the employer and not entitled to recover extra pay for overtime worked].) Accordingly, Rite Aid met its burden of showing a complete defense to all the causes of action (Code Civ. Proc., § 437c, subs. (o)(2), (p)(2)) and the trial court properly entered judgment in its favor.

In his declaration and separate statement of facts, Lipkowitz tried to avoid summary judgment by presenting evidence that Rite Aid had also promised he could work the graveyard shift in El Centro and would have administrative assistance during his shift, but that Rite Aid reassigned his assistants in January 2007 and told him in March 2007 that he would have to work during the day. However, the pleadings define the issues in a summary judgment motion (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663) and Lipkowitz's complaint does not contain these factual allegations. Lipkowitz's failure to plead these theories precludes his reliance on them to

defeat Rite Aid's motion. (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343.)

DISPOSITION

The judgment is affirmed. Rite Aid is awarded its costs on appeal.

McINTYRE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.