Filed 11/18/03 Martinez v. Combs CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MIGUEL MARTINEZ et al., Plaintiffs and Appellants, v. CORKY N. COMBS et al., Defendants and Respondents.	2d Civil No. B161773 (Super. Ct. No. CV001029) (San Luis Obispo County)

Miguel Martinez, Antonio Perez Cortes, Hilda Martinez, Otilio Cortes, Catarino Cortez and Asuncion Cruz (workers) appeal a judgment of dismissal after the court granted summary judgment on their causes of action for wages against Corky N. Combs, Larry D. Combs, Combs Distribution Co. (collectively Combs), Juan Ruiz, Jr., and Apio, Inc. (Apio).

We conclude, among other things, that the trial court properly granted summary judgment in favor of Combs, Apio and Ruiz because they did not exercise sufficient control over the workers and the agricultural operation to be joint employers. It properly dismissed the workers' sixth cause of action because they did not show that they were third party beneficiaries to a contract between Apio and Isidro Munoz. But

the court erred by dismissing the workers' seventh cause of action because there were triable issues of fact as to whether Combs' agent agreed to pay the workers' wages and whether they relied to their detriment on that promise. We reverse as to the seventh cause of action and affirm as to all remaining causes of action.

FACTS

The workers belonged to crews that grew and harvested strawberries for Isidro Munoz. Munoz signed contracts with Combs and Apio to sell the crops. He also harvested strawberries for two other companies, the Ramirez Brothers and Frozun. In 2000 Munoz's company grew strawberries on four ranches and he invested $500,000 in these operations.

Munoz testified in his deposition that his foremen supervised his workers and he decided which fields to pick. He trained the workers and provided the gloves and other equipment they would use. He purchased or leased the seeds, plastic, tools, tractors and other equipment to run the operations. He hired the workers, set their compensation rates and decided how many hours they should work. When Munoz became insolvent, he was unable to pay the workers.

Apio's Contract With Munoz

Apio and Munoz signed a "Farmer Agreement" which provided that Munoz was responsible for growing produce and Apio would sell it. It authorized Apio to advance money to Munoz and take a security interest in the crops. It prevented Munoz from selling or encumbering title to the crops without Apio's permission. It gave Apio a "full" and "undisputed . . . right of entry" onto Munoz's land with the right to inspect the crops "at any time." Apio decided whether Munoz's performance was adequate. If it was not, Apio had the right to "enter the fields and maintain the growing business operations[.]"

The agreement states Munoz is "an independent contractor" and people who work in his operations are his employees. The agreement's "Legal Compliance" provision states: "Farmer [Munoz] warrants that it will comply with all provisions of

federal, state and local laws applicable to its farming operations, including, without limitation, labor, health and safety, industrial hygiene, environmental protection, land use and hazardous substances, and that it possesses all required licenses, authorizations, and permits to operate the same."

Munoz said in his declaration that he did not understand the Farmer Agreement because it was in English and he speaks Spanish. Apio prepared it but did not translate it for him. He subleased the agricultural land from Apio and it provided him money so he could grow strawberries. He harvested and delivered strawberries exclusively to Apio. Apio staff supervised him. They told him what crop to pick and how to pack it. The crop had to be packed in boxes with Apio's label. Munoz relied on Apio to pay him and calculate how much it owed him. He and the workers delivered 40,000 boxes of strawberries to Apio in a 6-week period. Apio did not pay him, and he could not pay the workers.

Department of Labor Standards Enforcement

(DLSE) Investigation of Unpaid Wages

Paul Rodriguez, a DLSE investigator, contacted Tim Murphy, Apio's vice-president, about the unpaid wages. Murphy provided DLSE a list of the workers and said he was "'holding the money'" to pay them. He wrote checks, but Rodriguez determined that "the checks . . . did not cover all the wages owed[.]"

Combs' Contract With Munoz

Combs loaned Munoz $80,000 to harvest strawberries on a 40-acre field. Combs and Munoz signed a contract which gave Combs exclusive title to the crops produced on that field for the year 2000 "or until [the] loan is paid off." Munoz said Ruiz, Combs' field representative, supervised the "quality of the produce." During April and May of 2000, Ruiz came to the field on a daily basis. He told Munoz "how much to pick, which fruit to pack, which fruit to discard, and how to pack the fruit[.]"

Ruiz's Promise to Pay the Workers

The workers' declarations stated that they stopped working on May 27, 2000, because Munoz had not paid them. They returned to work because Ruiz told them he "guaranteed" that they "would be paid." He said "his boss," Combs, had checks for Munoz which were sufficient to pay "all" the workers. They believed Ruiz because they saw him "checking the strawberries virtually every day[.]" Otilio Cortes's declaration said he worked until June 24, 2000, but was not paid "for work completed between May 22 and June 24."

Larry Combs said in his deposition that Ruiz worked for him as a "field representative." Combs paid for business cards which identified him as working in that capacity.

Ruiz testified he was employed by Combs from September 1999 through August 2000. He later testified he was not employed by Combs during that period. He said he was doing "business" with 100 other "farmers or ranchers."

In granting summary judgment, the trial court found that Apio and Combs were not the workers' employers within the meaning of Industrial Welfare Commission (IWC) wage order No. 14; Combs did not agree to pay their wages; and the workers were not third party beneficiaries to the Apio-Munoz contract.

DISCUSSION

I. *Exercising Control of Wages, Hours or Working Conditions*

The workers contend the trial court erred because there were triable issues of fact about whether Combs, Ruiz and Apio were joint employers. They argue there were reasonable inferences that they exercised "control over wages, hours or working conditions" within the meaning of IWC wage order No. 14. We disagree.

"'[A] summary judgment is a drastic measure which deprives the losing party of [a] trial on the merits.'" (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) We review an order granting summary judgment de novo to decide whether there is a triable issue of fact. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.)

We review all the evidence and "'all' of the 'inferences' reasonably drawn therefrom . . . in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.)

IWC wage order No. 14 defines an employer as "any person . . . who directly or indirectly, or through an agent or any other person . . . *exercises control over the wages, hours or working conditions of any person*." (Cal. Code Regs., tit. 8, § 11140, subd. 2(G), italics added.) These regulations are remedial and must be liberally construed. (*Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575, 592.) IWC regulations ("wage orders") often "parallel language within" the federal Fair Labor Standards Act of 1938 (FLSA), 29 United States Code section 201 et seq. (*Morillion*, at p. 586.)

There is no California case law interpreting this wage order. We may look to FLSA cases for guidance where they are consistent with the remedial purposes of California law. (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 354-355.) "'Federal law does not control unless it is more beneficial to employees than state law.'" (*Morillion v. Royal Packing Co.*, *supra*, 22 Cal.4th at p. 594.)

A.) *FLSA Employer Definitions*

FLSA is a remedial statute which allows workers to sue for unpaid wages. (29 U.S.C. §§ 201-219; *Torres-Lopez v. May* (9th Cir. 1997) 111 F.3d 633, 638.) It defines an employer broadly and includes "'any person acting directly or indirectly in the interest of an employer in relation to an employee[.]'" (*Bureerong v. Uvawas* (1996 C.D. Cal.) 922 F. Supp. 1450, 1470; 29 U.S.C. § 203(d).) "Regulations promulgated under the FLSA recognized that an employee may have more than one employer . . . ." (*Torres-Lopez*, at p. 638.) "When more than one entity is an employer . . . the entities are termed 'joint employers.'" (*Ibid*.)

Under FLSA, individuals or entities that hire and fire the workers are employers. But others who do not have direct contact with the workers may also be

joint employers depending on the amount of their control over, or their financial investment in, the business. (*Bureerong v. Uvawas*, *supra*, 922 F. Supp. at p. 1468.)

Federal courts consider a number of factors to determine who is an employer or joint employer under FLSA. These include "'whether the alleged employer (1) had the power to hire and fire employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, . . . (4) maintained employment records [and (5)] whether the workers' service is 'an integral part of the alleged employer's business.'" (*Bureerong v. Uvawas*, *supra*, 922 F.Supp. at pp. 1467-1468; see also *Donovan v. Sureway Cleaners* (9th Cir. 1981) 656 F.2d 1368, 1370.) "These factors 'provide a useful framework for analysis,' but are neither exclusive nor conclusive." (*Bureerong*, at p. 1468.)

Courts must "construe the provisions of the FLSA expansively and look to the economic realities of the relationship between the parties." (*Bureerong v. Uvawas*, *supra*, 922 F. Supp. at p. 1468.) Courts have found that individuals or investors who exert financial control over an employer may be joint employers under FLSA. (*Donovan v. Sabine Irrigation Co., Inc.* (5th Cir 1983) 695 F.2d 190, 194-195; *Dole v. Simpson* (S.D. Ind. 1991) 784 F. Supp. 538, 546.)

B.) *California Definitions of Employer For Other Remedial Statutes*

California courts have also broadly interpreted the term "employer" under a variety of remedial statutes enacted to protect employees. In the agricultural setting, they have neither adopted a multifactor test nor limited the definition of employer to the terms of written agreements. (*S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, *supra*, 48 Cal.3d at p. 354; *Rivcom v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 768.) "Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Borello*, at p. 354.) The courts consider such factors as the third party's interest in the agricultural operation or its control over it. (***Id***., at p. 355.)

C.) *Apio's Control*

The workers contend that Munoz's declaration states Apio exercised substantial control over the harvest. They argue that it leased the lands and sub-leased them to Munoz and that the workers used boxes with Apio labels and packed strawberries in cartons that Apio provided. Munoz's declaration says Apio staff controlled how many "boxes to pick, which fruit to pack, which fruit to discard, and how to pack the fruit[.]"

But a crop marketing company may send its employees to supervise aspects of the harvest for quality control purposes. That does not make it a joint employer. (***Aimable v. Long and Scott Farms*** (11th Cir. 1994) 20 F.3d 434, 441.) Here the workers did not show that the supervision was so extensive that it amounted to control. (***Ibid***.) It only occurred a couple hours a day during the part of the season when the crops were packed and harvested.

Apio did not control the number of workers, the hiring or firing of specific individuals, or the selection of the crews. It therefore lacked sufficient control over the workforce to be classified as a joint employer. (***Aimable v. Long and Scott Farms, supra***, 20 F.3d at p. 440.) Munoz had the exclusive control over the workforce, the tools used by the workers, the power to hire and fire and to set wage rates and hours of work. He trained his workers, selected his crews and employed foremen to supervise them on a full time basis.

The workers contend that the Farmer Agreement gave Apio the option to run Munoz's harvesting operations. But that only applied if Munoz's performance was deficient, and Apio did not exercise that option.

The workers argue that Apio had the financial control over Munoz's business which determined whether they would be paid. They claim that Munoz had a small operation and became insolvent. But Munoz had a substantial business. He provided harvesting services for four companies and received $500,000 to run these operations on four ranches. Apio loaned Munoz money, but it did not own the land and was not an owner, a partner or an investor in Munoz's business. The reasonable

inference is that the reason the workers were not paid is because Munoz mismanaged his substantial resources.

The workers contend when Rodriguez pursued their wage claims Apio wrote checks to cover some of the unpaid wages. But such a gratuitous payment under these circumstances was not an admission of joint employer status. The Farmer Agreement says Munoz is an independent contractor and the workers are his employees, not Apio's. The workers note that Munoz could not read that agreement. But his testimony shows that he fully understood the business relationship he had with Apio and voluntarily entered into "arm's length" business transactions. The workers did not meet their burden to show a reasonable inference that Apio had sufficient control to be classified as a joint employer.

D.) *Combs' and Ruiz's Control*

The workers contend that Combs supplied the revenue to operate the 40-acre business. They argue it owned the crops produced in that field and all the future crops until Munoz repaid the $80,000 that Combs loaned him. But Combs did not own the land or lease it. It had an interest in the crops, but was neither an owner nor an investor in Munoz's business. Munoz supplied the tools, hired and paid the workers, selected the crews and set their hours and compensation rates. He provided training and hired foremen to supervise his workers. Combs did not have control over these areas.

Ruiz, on behalf of Combs, performed quality control inspections of the harvesting, packing and crop selection. But that occurred only during a part of the season. This activity was not extensive enough to make either Ruiz or Combs joint employers. (***Aimable v. Long and Scott Farms, supra***, 20 F.3d at pp. 440-441.) Ruiz did not have the power to fire the workers, set their hours or assign crews. He did not provide their tools and did not perform the functions of a foreman. His purpose was to protect the quality of the crop. Munoz trained the workers and employed foremen to

supervise them. The workers did not meet their burden to show a reasonable inference that Combs or Ruiz were joint employers.

II. *The Suffer or Permit to Work Standard*

The workers contend that Apio, Combs and Ruiz met IWC wage order No. 14's alternative definition of employer as one who engages, *suffers or permits* others to work. (Cal. Code Regs., tit. 8, § 11140, subd. (2)(C).). They argue: 1) that the original IWC wage orders which used this phrase arose out of child labor cases in the early part of the twentieth century, 2) that California has continued to use this *suffer or permit to work* language in current wage orders involving adult workers, 3) that we must interpret this standard using California law, 4) that neither FLSA nor its economic reality test applies, and 5) that under the suffer or permit to work standard, APIO, Combs and Ruiz are liable for the unpaid wages because they did business with Munoz and knew or should have known that he was not paying his workers. We disagree.

This is not a child labor case, and the workers cite no California authority to support their strict liability theory. As Apio correctly notes, other states which have the "suffer or permit to work" standard apply an economic reality test and look to the control of the purported joint employer over the business or the employees. (***Laborers' Intern. Union of North America v. Case Farms, Inc.*** (1997) 127 N.C.App. 312, 314 [488 S.E.2d 632, 634]; ***Garcia v. American Furniture Co.*** (1984) 101 N.M. 785, 789 [689 P.2d 934, 938].) We find these cases to be persuasive. The trial court did not err.

III. *Combs' Liability for Ruiz's Oral Promise to Pay Wages*

The workers contend the court erred because their evidence supported reasonable inferences that Ruiz was Combs' agent who promised to pay their wages and they reasonably and detrimentally relied on that, making Combs liable. We agree.

A principal is liable for the acts of an agent who has "actual" authority to act for the principal or "ostensible" authority. (*Yanchor v. Kagan* (1971) 22

Cal.App.3d 544, 549.) Ostensible authority exists where the principal by acts or inaction "allows a third person to believe the agent" possesses authority to bind the principal. (*Ibid*.) Principals are liable for the oral contracts or representations their "ostensible agents" make where third parties reasonably and detrimentally rely on them. (*Hartong v. Partake, Inc*. (1968) 266 Cal.App.2d 942, 960.)

Here the workers returned to work because Ruiz "guaranteed" they "would be paid" and he said "his boss," Combs, had checks for Munoz. Ruiz was a Combs "field representative" and the company paid for his business cards which identified him as a Combs agent. Munoz made all of his business transactions with Combs through Ruiz. Although Ruiz's testimony was inconsistent, in one part of his deposition he said he was a Combs employee. A trier of fact could reasonably infer that Ruiz was Combs' agent and the workers reasonably and detrimentally relied on his guarantee because they returned to work and were not paid.

IV. *Workers as Third Party Beneficiaries of Apio's Contract With Munoz*

The workers contend there was a triable issue of fact as to whether they were third party beneficiaries to the Apio Farmer Agreement. They argue that the court erred by dismissing their sixth cause of action. We disagree.

"'A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. [Citation.]'" (*Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1458.) "'The fact that . . . the contract, if carried out . . . would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement.'" (*Ibid*.) "'Whether a third party is an intended beneficiary or merely an incidental beneficiary'" depends on "'a reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]'" (*Ibid*.)

The workers contend the contract's "Legal Compliance" provision was intended for their benefit to guarantee that their wages were paid. But Murphy said Apio "did not make the Farmer Agreement" with Munoz "to expressly benefit any [of

Munoz's employees.]" Moreover, the compliance provision is broad. It required Munoz to comply with "all provisions of federal, state and local laws applicable to its farming operations," land use, permits and "all required licenses." There was also an indemnity provision where Munoz agreed to hold Apio harmless from liability. A reasonable inference is that Apio intended to protect itself from litigation stemming from Munoz's activities and the workers were only incidental beneficiaries. The workers did not meet their burden to present evidence showing it was "more likely than" not that Murphy was wrong. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 857.)

The portion of the judgment which dismissed the seventh cause of action is reversed. In all other respects, the judgment is affirmed. Costs to appellants.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.

E. Jeffrey Burke, Judge

Superior Court County of San Luis Obispo

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