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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

PHAIROJ KAEWSAWANG et al., Plaintiffs and Appellants, v. SARA LEE FRESH, INC., et al., Defendants and Respondents.	B231778 (Los Angeles County Super. Ct. No. BC360109)

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

Arias Ozzello & Gignac, Mike Arias, Mikael H. Stahle, Denis M. Delja; Law Offices of George A. Kaufman, George A. Kaufman; Law Office of Jonathan Weiss and Jonathan Weiss for Plaintiffs and Appellants.

Paul Hastings, Donna M. Melby, Paul W. Cane, Jr., Elizabeth A. Brown and Paul Grossman for Defendants and Respondents.

Plaintiffs and appellants Phairoj Kaewsawang and Eddie Alsheikh appeal from an order denying their motion for class certification in an action against defendants and respondents Sara Lee Fresh, Inc., and Sara Lee Corporation (collectively Sara Lee), arising out of the classification of certain individuals as independent contractors. Plaintiffs contend that common questions of law and fact predominate as to whether the individuals who entered into certain distribution agreements with Sara Lee to transport and supply retail stores with Sara Lee products were independent contractors or employees. We conclude that the trial court did not abuse its discretion by finding that individual questions predominate. Therefore, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Complaint

Kaewsawang filed the original complaint on October 10, 2006. Kaewsawang and Alsheikh filed the operative amended complaint on May 15, 2008, including causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud and deceit, misrepresentation in the sale of a franchise, negligent misrepresentation, unlawful wage deductions, violations of the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.), unfair business practices in violation of Business and Professions Code section 17200 et seq., and violations of the Labor Code, including failure to pay overtime compensation, failure to provide meal and rest periods, failure to provide itemized statements, and failure to timely pay wages.

Motion for Class Certification

On November 2, 2009, the plaintiffs filed a motion for certification of a class of "[a]ll persons who, since March 17, 2002, are or were signatories to a Distribution Agreement with Sara Lee purporting to make those persons independent contractors with

regard to Sara Lee baked goods delivery routes located within California." The proposed class would be certified as to the causes of action for violations of the Labor Code, unlawful wage deductions, fraud and deceit, negligent misrepresentation, and unfair business practices.

To support their argument that the distributors are employees, not independent contractors, plaintiffs relied on the provisions of three versions of Sara Lee's distribution agreements, Sara Lee's written policies and procedures, and various retail stores' service policies. Each distribution agreement contained a substantially similar "best efforts" provision. The 2002 version of the distribution agreement provided as follows: "Distributor agrees to use his or her best effort to develop and maximize sales of Products to Outlets in the Sales Area. For purposes of this Agreement, 'best efforts' shall require, without limitation that Distributor: (i) service accounts at the times and the specific service days requested by Outlets in order to accommodate each Outlet's schedule; (ii) monitor each Outlet's sale of Products in order to keep each Outlet's shelves and racks stocked with an adequate and fresh supply of Products sufficient to meet reasonably anticipated demand by the Outlet's customers and avoid out-of-stock conditions, and to remove both Stale Products and Damaged Products from the Outlet's shelves; (iii) solicit new accounts in the Sales Area for the sale of Products in order to achieve the highest practicable distribution of Products in the Sales Area; (iv) distribute and sell Products in a manner that enhances the reputation and goodwill of the Marks; (v) conduct business in a professional and ethical manner and in compliance with Applicable law; (vi) fairly represent the quality and characteristics of Products in accordance with Company's sale policies; and (vii) faithfully discharge its obligations under this Agreement." Plaintiffs argued that the best efforts provision gave Sara Lee the right to control the manner and means of the distributors' operations.

Opposition to Motion for Class Certification

Sara Lee opposed the motion for class certification. Among other documents, Sara Lee submitted declarations from several distributors describing their operations. Mark Mackey operates his distributorship as a corporation that owns two routes. He decided to split one of the routes to maximize profits from sales. Jose Ramos declared that he operates as a corporation which owns four routes. He has split two of the routes and has four other individuals to assist with service of the routes. Harry Garabedian operates as a corporation which employs another individual and operates two routes. Although one route had been sold to a third party, the corporation reacquired it. Robert Quayle carefully saves on expenses, performs basic maintenance on his company's trucks, selects his own insurance, and occasionally uses the services of other individuals. Gary Miller owns a route through a corporation, uses the assistance of another individual every day, and hired a merchandising company. Ramon Viera declared that he operates through a corporation that owns two routes and employs another individual full time. He makes decisions about ordering and displays that increase his profits. Charbel Succar has a single route owned by a corporation, which he operates without any assistance, and his efforts have increased sales volume on the route by 40 percent. Kaewsawang also owns a single route that he operates without any assistance. Alsheikh owns four routes that he operates with assistance from nine individuals.

Trial Court Ruling

A hearing was held. On February 15, 2011, the trial court entered an order denying the motion for class certification. The court found that common questions did not predominate. It did not appear that class treatment would provide substantial benefits to the litigants or the court, because individual issues would predominate. In addition, the court concluded that plaintiffs were not adequate representatives of the class. Plaintiffs filed a timely notice of appeal.

DISCUSSION

Class Action Requirements and Standard of Review

Code of Civil Procedure section 382 authorizes class actions when "the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court[.]" The party requesting certification must establish "the existence of both an ascertainable class and a well-defined community of interest among the class members." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) A community of interest consists of: (1) questions of law or fact common to the class that predominate over the questions of individual class members; (2) class representatives with claims or defenses that are typical of the class; and (3) class representatives who can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104.)

"A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) Class members "must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment[.]" (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460.)

"We review the trial court's ruling for abuse of discretion." (*Sav-On, supra,* 34 Cal.4th at p. 326.) "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." (*Linder, supra,* 23 Cal.4th at p. 435.) "Our task is to determine whether the record contains substantial evidence to support the trial court's predominance finding. [Citation.] A valid pertinent reason will be sufficient to uphold the order. [Citation.] We will not reverse the trial court's ruling, if supported by substantial

evidence, unless improper criteria were used or erroneous legal assumptions were made. [Citation.]" (*Keller v. Tuesday Morning, Inc.* (2009) 179 Cal.App.4th 1389, 1397.)

"Our review is limited to the grounds stated, and we ignore any other grounds that might have supported the ruling. [Citation.] [¶] However, 'an order based upon improper criteria or incorrect assumptions calls for reversal "'even though there may be substantial evidence to support the court's order.'"' [Citation.] Accordingly, we examine the stated reasons for the order to determine whether the court relied on improper criteria to deny certification. [Citation.]" (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1422-1423.)

Commonality

Plaintiffs contend that common questions of law and fact predominate, because whether the drivers are employees or independent contractors is a common question that can be determined from the distribution agreements, as well as written policies and procedures. However, we find no abuse of discretion in the trial court's conclusion that diverse factual issues predominate over common questions in this case.

The main consideration in determining whether an individual is an employee or an independent contractor is the employer's right to control the manner and means by which the work is performed. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350 (*Borello*); *Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal.App.4th 1099, 1103.) "Under this rule, the right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1347 (*Ali*).)

Secondary factors to consider include: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or

by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Borello, supra,* 48 Cal.3d at p. 351.)

"'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,* 48 Cal.3d at p. 350, fn. omitted.) "'When one person is performing work in which another is beneficially interested, the latter is permitted to exercise a certain measure of control for a definite and restricted purpose without incurring the responsibilities or acquiring the immunities of a master, with respect to the person controlled. [Citations.] Even one who is interested primarily in the result to be accomplished by certain work is ordinarily permitted to retain some interest in the manner in which the work is done without rendering himself subject to the peculiar liabilities which are imposed by law upon an employer.' [Citations.]" (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 432 (*Millsap*).)

"In *Bohanon [v. James McClatchy Pub. Co.* (1936) 16 Cal.App.2d 188, 199], for example, a newspaper deliverer was deemed an independent contractor notwithstanding that the newspaper company defined his route; prohibited him from distributing any other newspaper or periodical within his designated territory; demanded that he deliver the papers at the earliest possible time; prohibited him from selling, assigning or transferring any part of his route to another; use his best efforts to increase circulation; or follow a number of other like directions or prohibitions." (*Millsap*, *supra*, 227 Cal.App.3d at p. 432.)

In *Ali*, *supra*, 176 Cal.App.4th at page 1350, the appellate court found no abuse of discretion in the trial court's ruling that a class of taxi drivers was not suitable for class treatment, despite the fact that the taxi cab company entered into standard leases with

drivers. "Although the leases and training manuals are uniform, the court reasonably found the testimony of putative class members would be required on the issues of employment and fact of damage. Plaintiffs argued at the hearing that proof of employment as to any purported class member would constitute proof as to all purported class members, but the court reasonably rejected the argument that a single set of facts predominates. As the court explained after it issued its tentative ruling, 'the trial [of a class action,] I would expect[,] would be a parade of drivers' presenting individual issues." (*Ibid*.)

In this case, it is clear that individual factual questions predominate over common questions. Distributors who purchased multiple routes and hired employees to service retail stores were in a very different position from distributors who operated their own routes without assistance. Due to the differences among the distributor's structure, it would be necessary to examine the factual circumstances of each distributor to determine whether the distributor was an employee entitled to the protections provided under the Labor Code and any subsequent issues concerning damages. The sheer number of factual issues that would have to be determined as to each distributor in order to resolve the causes of action alleged, such as whether a distributor was entitled to overtime and did not receive sufficient compensation from Sara Lee, or was entitled to meal and rest breaks and did not receive them, would overwhelm any common issue that could be resolved by examination of the distribution contracts and other written documents. We find no abuse of discretion.

DISPOSITION

The judgment is affirmed. Respondents Sara Lee Fresh, Inc. and Sara Lee Corporation are awarded their costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.