2016 IL App (3d) 160090-U

Order filed December 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

SCOTT FRANKLIN,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
Plaintiff-Appellee,	)	La Salle County, Illinois,
	)	
v.	)	Appeal No. 3-16-0090
	)	Circuit No. 15-SC-1570
DAVID RABIDEAU d/b/a	)	
NOAH'S ARK CARPENTRY, INC.,	)	Honorable
	)	Karen C. Eiten,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's determination that plaintiff was an employee under the Employee Classification Act was not contrary to the manifest weight of the evidence.

¶ 2 Defendant, David Rabideau, d/b/a Noah's Ark Carpentry, Inc., appeals from the trial court's order entering judgment against him in the amount of $7508. Defendant argues that the trial court erred in finding that plaintiff was an employee of defendant as defined in the Employee Classification Act. We affirm.

¶ 3 FACTS

¶ 4 Plaintiff, Scott Franklin, filed a complaint against defendant in small claims court. In count I of the complaint, plaintiff alleged that defendant violated the Minimum Wage Law (820 ILCS 105/1 *et seq*. (West 2014)) in that defendant did not pay plaintiff for his overtime hours at the appropriate rate. In count II of the complaint, plaintiff alleged that defendant failed to properly designate and classify plaintiff as an employee, in violation of the Employee Classification Act (Act) (820 ILCS 185/1 *et seq*. (West 2014)). Plaintiff alleged that he was an employee of defendant, and worked for defendant as a carpenter from February 2 through May 1, 2015.

¶ 5 Plaintiff testified that he and defendant reached an agreement in February of 2015 under which plaintiff would perform carpentry work for Noah's Ark Carpentry. Plaintiff described himself in court as a carpenter. Soon after reaching the agreement, plaintiff was given instructions regarding time slips and payment. A copy of those instructions was entered into evidence. The instructions, entitled "WELCOME TO NOAH'S ARK CARPENTRY!," provided that "[t]ime sheets are due on Tuesdays. Payday is every Friday."

¶ 6 Plaintiff began working for defendant on February 2, 2015. On that day, defendant instructed plaintiff to plow snow for a number of defendant's clients. For a number of days following, plaintiff continued to plow snow. When plaintiff plowed snow, he would frequently use defendant's truck, but would occasionally use one of the clients' trucks. Plaintiff testified that he began his work days at 7 or 8 a.m. He would often proceed straight to the job site in the morning, but sometimes would go to defendant's office or home to discuss the work that needed to be completed that day. Plaintiff testified that he and defendant frequently had morning conversations on the telephone discussing the work to be done that day. Plaintiff never billed

defendant's clients directly, and always received payment from defendant based on his time slips.

¶ 7 Plaintiff testified that he frequently worked more than 40 hours in a single week. He explained that the overtime hours he accumulated "went into a banked-up system." When plaintiff worked more than 40 hours in a week, those extra hours would be banked, to be added to his hours in any week where he worked less than 40 hours. At a payment rate of $18 per hour, this system allowed plaintiff to receive paychecks of $720 every week. In his time working for defendant, plaintiff testified that he accumulated 103.5 banked overtime hours. He had applied 7 of those hours to weeks in which he worked less than 40 hours. Plaintiff billed defendant for his 96.5 unpaid hours, but was never paid. Carbon copies of the invoices plaintiff presented to defendant were entered into evidence. Plaintiff further testified that he had never done business in his own name as a carpenter. Instead, he had always worked for other contractors.

¶ 8 During cross-examination of plaintiff, defendant entered into evidence the top copies of the invoices that plaintiff had presented to defendant. Each of the invoices showed "Scott Franklin Builders" stamped in the top left corner, along with a Texas telephone number. Plaintiff explained that he had residency in Texas. When asked if he had ever invoiced a business as "Scott Franklin Builders," plaintiff replied: "The invoice states it, but I'm not my own contractor." Plaintiff explained on redirect examination that defendant had instructed him to put a company name on his invoices. Plaintiff had never done business as "Scott Franklin Builders" in the past. Aside from the invoices he submitted to defendant, plaintiff had never used that stamp.

¶ 9 Plaintiff also testified on cross-examination that he "brought in two guys" to help with a job. He had asked defendant if he could do so, and defendant offered to pay plaintiff money with

which plaintiff would pay the other men. Plaintiff would invoice the men's hours on their behalves, defendant would pay plaintiff for those hours, and plaintiff would then give that money to the men. Plaintiff negotiated a pay rate of $13 per hour with the men, and plaintiff directed their work. On redirect examination, plaintiff testified that he paid the men exactly what defendant paid him, such that plaintiff took no mark-up or profit.

¶ 10 Plaintiff also elaborated on cross-examination as to how the hour-banking system originated. He testified that defendant had told him that past employees had implemented the same system, in order to ensure a full week's pay each week.

¶ 11 Following plaintiff's testimony, he called defendant as an adverse witness. Defendant testified that Noah's Ark Carpentry is a general contracting business. Defendant explained that the business completes a wide variety of work, from plowing snow, to hanging toilet paper holders, to restoration and remodeling. Defendant testified that he hired plaintiff to do carpentry work "[a]nd whatever else he's willing to do."

¶ 12 Defendant characterized the choice to implement the hour-banking system as "a mutual decision." Defendant testified that plaintiff stopped working for him when defendant insisted that plaintiff purchase builder's insurance. Defendant explained that he needed his subcontractors to carry builder's insurance so that his own insurance company would not charge him more. Defendant repeatedly asked plaintiff to obtain insurance and inquired about the insurance numerous times in the three months plaintiff worked for him. Defendant testified that he did not hire or fire the men plaintiff hired to help him, and they were not defendant's employees. Defendant also denied that he instructed plaintiff to acquire a stamp for his invoices. Defendant also testified that plaintiff left his post to work on other projects on at least one occasion.

¶ 13 Defendant did not call any witnesses in his case-in-chief. Plaintiff was then recalled. He testified that upon learning how much builders insurance would cost, he decided he was not earning enough money to afford it. Plaintiff also testified that he left his work for defendant early on two occasions, each time to help his parents with projects. He did not charge his parents for his help.

¶ 14 Each party subsequently filed a position paper, in lieu of closing arguments. The trial court delivered its ruling on March 7, 2016, finding in favor of plaintiff. Specifically, the court found that plaintiff had been an employee of defendant:

> "[Defendant] told [plaintiff] what to do, where to go, what jobs he'd work on. While [plaintiff] may have had some input at some points in time over what materials would be used, he wasn't the boss. He was being told what to do. He had a regular start time. When he wanted to take a day off, he requested that from [defendant]. The only day off that he testified about was a day that he took to do some work at his mother's house.
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> * * *
>
> And the fact is that [plaintiff] did other things that were outside the realm of carpentry. He plowed parking lots. He did whatever [defendant] told him to do. I think that makes him the employee."

¶ 15 The trial court found that plaintiff had worked 103.5 hours of overtime. Under the Minimum Wage Law, the court found plaintiff was entitled to time-and-a-half for those hours, or $27 per hour. Defendant had not paid plaintiff for 96.5 of those hours, and thus owed plaintiff $2,605.50. For seven of those hours, defendant paid plaintiff at the standard rate, and thus owed him an additional $63, bringing the total wages owed to $2,668.50. The trial court also found

that plaintiff was an "employee" of defendant, as defined in the Act. Pursuant to the Act, the court imposed a penalty of $2,668.50 in liquidated damages, a $1 penalty for violation of Act, and attorney fees and costs. The trial court entered judgment against defendant in the amount of $7508.

¶ 16 ANALYSIS

¶ 17 In the headings of his brief, defendant characterizes his position on appeal as being comprised of two distinct inquiries: whether plaintiff was an employee for the purposes of the Minimum Wage Law, and whether plaintiff was an employee for the purposes of the Act. In his actual arguments, however, defendant contends that these two inquiries turn on the same question, asserting: "Whether a person acts as a subcontractor or employee is defined by looking at The Employment Classification Act." From there, defendant exclusively discusses the definition of "employee" found in the Act, arguing that it does not apply to plaintiff.

¶ 18 Defendant's position ignores the fact that the Minimum Wage Law and the Act provide separate definitions of the term "employee." Compare 820 ILCS 105/3(c), (d) (West 2014) with 820 ILCS 185/10(b), (c) (West 2014). A person is eligible for time-and-a-half pay for overtime hours under the Minimum Wage Law if that person meets the definition of "employee" provided by *that* statute. See 820 ILCS 105/4a(1) (West 2014). In other words, whether a person meets the definition of "employee" under the Act has no bearing on whether that person is an employee under the Minimum Wage Law. Because defendant has failed to actually argue that plaintiff is not eligible for time-and-a-half pay for his overtime hours under the definitions of the Minimum Wage Law, he has waived the issue. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 19 As a result of defendant's waiver, the only issue this court must consider is whether plaintiff was defendant's "employee" under the Act. Whether an individual is the employee of

another is a question of fact. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000). Accordingly, we will not disturb the trial court's finding that plaintiff was defendant's "employee" under the Act unless that finding is contrary to the manifest weight of the evidence. *Id*. "A finding is contrary to the manifest weight of the evidence if the opposite conclusion is clearly apparent." *Id.*

¶ 20 The Act provides: "It is a violation of this Act for an employer or entity not to designate an individual as an employee under Section 10 of this Act unless the employer or entity satisfies the provisions of Section 10 of this Act." 820 ILCS 185/20 (West 2014). Section 10(b) of the Act, in turn, provides that:

> "[a]n individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that:
>
> (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact;
>
> (2) the service performed by the individual is outside the usual course of services performed by the contractor; *and*
>
> (3) the individual is engaged in an independently established trade, occupation, profession or business ***." (Emphasis added.) 820 ILCS 185/10(b) (West 2014).

Thus, to rebut the presumption that an individual working for a contractor is an employee, the employer must prove each of the three elements above.

¶ 21 Section 10 of the Act also provides a second way in which an employer may rebut the presumption that an individual is an employee. As a disjunctive element under section10(b)(4),

the Act allows an employer to rebut the presumption that an individual is an employee of a contractor by showing "the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this Section." 820 ILCS 185/10(b)(4) (West 2014). In turn, section 10(c) lists 12 factors, each of which must be proven in order for an individual to be deemed a legitimate sole proprietor, and thus not an employee. Those 12 factors are:

> "(1) the sole proprietor or partnership is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;
>
> (2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;
>
> (3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;
>
> (4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the sole proprietorship or partnership;
>
> (5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;
>
> (6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
>
> (7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;

(8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;

(9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) if necessary, the sole proprietor or partnership hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;

(11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; *and*

(12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis and whenever it chooses." (Emphasis added.) 820 ILCS 185/10(c) (West 2014).

¶ 22 An individual performing services for a contractor is presumed to be an employee of that contractor under the Act. One may rebut that presumption in one of two ways, either by proving factors (1), (2), and (3), under section 10(b), or by proving each of the 12 factors under section 10(c). Defendant argues that he has done both.

¶ 23 In finding that plaintiff was an employee as defined by the Act, the trial court was not explicit as to which elements of section 10(b) or section 10(c) defendant failed to prove. However, the trial court, in delivering its ruling, emphasized that "[Defendant] told [plaintiff] what to do, where to go, what jobs he'd work on. While [plaintiff] may have had some input at some points in time over what materials would be used, he wasn't the boss. He was being told

what to do. He had a regular start time." Thus, the trial court implicitly found that defendant had not shown that plaintiff was "free from control or direction over the performance of the service for the contractor." 820 ILCS 185/10(b)(1) (West 2014).

¶ 24 Such a finding was not contrary to the manifest weight of the evidence. Defendant told plaintiff where to go and what to do. Defendant frequently discussed with plaintiff what plaintiff's tasks for the day would be. Plaintiff often used defendant's truck when defendant directed him to plow snow. Indeed, defendant's own testimony that he hired plaintiff for carpentry and "whatever else he [was] willing to do" indicates that plaintiff's work would be directed by defendant on an *ad hoc* basis. Because plaintiff was not free from the control or direction of defendant, the trial court found that defendant could not rebut the presumption, under section 10(b), that plaintiff was his employee. The opposite conclusion is not "clearly apparent." *Ware*, 318 Ill. App. 3d at 1122.

¶ 25 The trial court also implicitly found that defendant had failed to rebut the employee presumption by demonstrating that plaintiff was a legitimate sole proprietor under the section 10(c) factors. 820 ILCS 185/10(c) (West 2014). While the trial court was again not explicit as to which of those 12 factors defendant failed to establish, a cursory review of the list shows that defendant did not prove all of them. Specifically, the evidence showed that plaintiff occasionally used defendant's truck to complete his tasks (undermining factor (c)(9)) and that defendant reimbursed plaintiff for the work done by plaintiff's assistants (undermining factor (c)(10)). See 820 ILCS 185/10(c)(9), (c)(10) (West 2014). Moreover, factor (c)(1) requires one to show that the individual performed services free from the direction and control of the contractor. 820 ILCS 185/10(c)(1) (West 2014). As discussed above, the trial court's finding that defendant failed to satisfy such a requirement was not contrary to the manifest weight of the evidence.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of La Salle County is affirmed.

¶ 28 Affirmed.