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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOSEPH J. ALBANESE, INC., Plaintiff and Appellant, v. PATRICK W. HENNING, as Director, etc., Defendant and Respondent.	C078957 (Super. Ct. No. 34201280001109CUMCGDS)

Plaintiff Joseph J. Albanese, Inc. (Albanese) constructed several projects in the City of San Jose. When construction impinged on a right of way, the city required Albanese to retain the services of off-duty San Jose Police Department (SJPD) officers to control traffic during the construction. Albanese applied to the SJPD to become a secondary employer of the police officers and signed an employer conditions agreement and an indemnity agreement. The SJPD supplied officers to direct traffic at the construction sites. Subsequently, the Employment Development Department (Department) determined that for the purposes of unemployment insurance taxes,

Albanese was the employer of the police officers while they performed their traffic control duties. Albanese appealed, and the trial court affirmed the Department's decision. Albanese appeals, challenging the court's interpretation of the terms of the conditions and indemnifications agreements. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

During the tax period of October 1, 2002, through September 30, 2005, Albanese provided concrete work including grading, paving, and demolition. Several projects were in San Jose.

Some projects required Albanese to interfere with or close public thoroughfares. Such construction required Albanese to obtain an encroachment permit from the city. The encroachment permit required Albanese to use SJPD officers to control traffic at the public right of way during the construction. SJPD sent officers who were not performing regularly scheduled duties.

Prior to obtaining the services of an SJPD officer to perform traffic control services a business must comply with chapter 8.16 of the San Jose Municipal Code (hereafter Chapter 8.16). Chapter 8.16 governs approval by the SJPD to supply officers to control traffic at construction sites. The SJPD formed the Secondary Employment Unit to comply with the requirements in Chapter 8.16. The Secondary Employment Unit coordinates, schedules, and assigns off-duty police officers to work as traffic controllers at construction sites when they are not otherwise on duty. The permits sergeant schedules traffic control officers at construction sites.

Under Chapter 8.16, a business must first apply to the SJPD Secondary Employment Unit to become a secondary employer, be approved by the SJPD Chief of Police, and comply with all the requirements to gain secondary employment approval.

The San Jose Municipal Code describes the off-duty officer providing traffic control during construction projects as providing "private security services." (San Jose

Mun. Code, ch. 8.16, § 8.16.70(C)(1)(c).) Under the code, the chief of police is authorized to impose any terms and conditions on secondary employment approval determined to be necessary to ensure it does not conflict with city employment. (San Jose Mun. Code, ch. 8.16, § 8.16.070(D).)

SJPD requires the off-duty officers to wear regular-duty uniforms and badges, carry their weapons, and wear a special traffic safety vest. The officers remain subject at all times to the management and control of the SJPD and may be called off the job and into active service at a moment's notice. While on the job, the officer conducts himself or herself according to the SJPD duty manual.

Albanese submitted an application to the SJPD Secondary Employment Unit to become a secondary employer. Albanese also signed two agreements required for secondary employment approval: a secondary employer indemnity agreement (Indemnity Agreement) and a secondary employer conditions agreement (Conditions Agreement). The Conditions Agreement set forth the conditions of secondary employment of officers, including that Albanese meet certain indemnification requirements and that it pay the officers' wages. The Indemnity Agreement outlined Albanese's obligations to San Jose as a condition to employ its officers.

After San Jose approved Albanese as a secondary employer, Albanese submitted requests to perform traffic control services. The Secondary Employment Unit coordinated all the traffic control assignments at the construction zones. Chapter 8.16 did not allow Albanese to directly contact the officers.

While performing traffic control on Albanese construction sites, officers wore police uniforms and remained subject to the management and control of the SJPD. The SJPD also retained the discretion to hire and terminate officers and determine the rate of pay. Albanese paid the officers directly. The SJPD required that the officer prepare a traffic control invoice and submit it to Albanese for payment directly to the officer.

Albanese was required to maintain records of each officer's hours of work in a format approved by the chief of police and to make those records available for review.

The Department audited Albanese under the unemployment insurance program, focusing on Albanese's use of SJPD officers to control traffic at construction sites. The Department determined that, under Unemployment Insurance Code section 606.5, subdivision (c),[1] Albanese was the officers' employer. It further found that Albanese had not remitted the necessary tax assessment for unemployment insurance contributions for the officers.

After paying the assessment, Albanese filed a petition to reassess the tax. The petition was converted into a claim for refund. Albanese argued the officers were independent contractors, not employees of Albanese.

An administrative law judge found Albanese responsible for payment of unemployment insurance taxes under section 606.5. The Unemployment Insurance Appeals Board upheld the finding.

Subsequently, Albanese filed a complaint under section 1241 seeking a refund of the unemployment insurance taxes. Albanese renewed its argument that it properly classified the police officers as independent contractors and section 606.5 did not apply.

Initially, the trial court determined that under the common law, Albanese would not be considered an employer and the officers would be independent contractors.[2] However, the trial court found section 606.5, subdivision (c) applied regardless of whether the officers were independent contractors and not employees under the common law. In addition, the court determined a contract to supply officers to Albanese for traffic

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[1] All further statutory references are to the Unemployment Insurance Code unless otherwise designated.

[2] Not surprisingly, Albanese focuses on the court's conclusion regarding the common law agreeing "wholeheartedly" with the court's analysis and reasoning.

control brought the hiring within section 606.5, subdivision (c), therefore requiring Albanese to pay unemployment insurance taxes. Following entry of judgment, Albanese filed a timely notice of appeal.[3]

DISCUSSION

I

Albanese does not dispute the trial court's findings of fact, only the application of the relevant law to those facts. We review questions of law and the court's interpretation of a statute de novo. (*Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1149; *Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)

II

The Unemployment Insurance Code creates "a system of unemployment insurance providing benefits for persons unemployed through no fault of their own." (§ 100.) Unemployment insurance is funded by contributions from employers to the Department. (*Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal.App.4th 923, 932.) If the Department is not satisfied with an employer's report on its contributions, the Department may compute and assess a tax deficiency against the employer. (§ 1127.)

Section 606.5, and not principles of common law, determines when an entity is the employer of temporary or leased workers for purposes of unemployment insurance taxes. Section 606.5, subdivisions (a), (b), and (c) state:

"(a) Whether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship, except as provided in subdivisions (b) and (c).

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[3] We grant Albanese's motion for judicial notice filed November 18, 2016, and the Department's motion for judicial notice filed August 30, 2016.

"(b) As used in this section, a 'temporary services employer' and a 'leasing employer' is an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions:

"(1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.

"(2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.

"(3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.

"(4) Assigns or reassigns the worker to perform services for a client or customer.

"(5) Sets the rate of pay of the worker, whether or not through negotiation.

"(6) Pays the worker from its own account or accounts.

"(7) Retains the right to hire and terminate workers.

"(c) If an individual or entity contracts to supply an employee to perform services for a customer or client, and is a leasing employer or a temporary services employer, the individual or entity is the employer of the employee who performs the services. If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or a temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer or client and pays wages to the employee for the services, but is not a leasing employer or a temporary services employer, pays the wages as the agent of the employer." (§ 606.5, subds. (a)-(c).)

III

Albanese contends the SJPD officers it used to direct traffic during construction projects were not its employees and therefore it was not a "temporary service employer"

as defined under the Unemployment Insurance Code, but rather the officers were independent contractors. Nor did Albanese enter into any contract with SJPD that would bring its hiring of off-duty traffic officers within the ambit of section 606.5.

Under section 606.5, the common law principles of employment relationships apply in all but certain enumerated situations, including where an entity is deemed a leasing agency or a temporary services employer. If a party to an agreement fits one or more of these categories, the payment of unemployment insurance is dictated by statute, not by common law. Simply put, the statute, and not common law principles, controls who pays for unemployment insurance taxes.

Under section 606.5, subdivision (b), a temporary services employer or a leasing employer is an employer that contracts with clients to supply workers to perform services for the client and performs all of the enumerated functions. A review of the enumerated functions reveals that Albanese did not perform all the required functions. For example, although Albanese pays the officers, it has no control over assignments, rate of pay, or hiring and firing. Conversely, SJPD performs all of the enumerated factors, save one. SJPD does not pay the worker from its own account. Therefore, neither Albanese nor SJPD is a leasing employer or temporary services employer under subdivision (b).

Under subdivision (c), ". . . If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer or client and pays wages to the employee for the services, but is not a leasing employer or temporary services employer, pays the wages as the agent of the employer." (§ 606.5, subd. (c).)

As in the trial court, Albanese argues subdivision (c) does not apply because there is no contract to supply police officers between Albanese and San Jose. However, there are two agreements that govern the relationship between the parties: the Indemnity

Agreement and the Conditions Agreement. According to Albanese, the agreements do not contemplate the terms of the supply of off-duty officers. "Albanese contends that under California law no such contract existed between the parties and the idea of such a contract is merely fiction created by the trial court to allow the Traffic Control Officers to be determined employees under UIC 606.5(c)."

Chapter 8.16 of the San Jose Municipal Code provides that no person shall employ SJPD officers to provide traffic control without first obtaining approval from the chief of police. The chapter imposes conditions and terms for approval, including indemnification. A contractor who desires to hire officers to proceed with a project must sign the agreements required in order to gain approval.

To comply with these requirements, Albanese applied to the Secondary Employment Unit to become an approved secondary employer of officers who would control traffic at its construction sites. As part of the process, the city required Albanese to sign the Indemnity Agreement and the Conditions Agreements.

The Indemnity Agreement lists Albanese as a secondary employer of officers. It specifies the indemnification requirements under the San Jose Municipal Code Albanese was required to meet prior to using the police officers. Albanese agreed to indemnify the city from liability arising out of services performed by officers directing traffic for Albanese. The agreement states: "NOW THEREFORE, for and in consideration of the City's consent to allow the SECONDARY EMPLOYER to employ off-duty San Jose Peace Officers for private security services and, when required, under San Jose Municipal Code Section 8.16.090, in consideration of the SECONDARY EMPLOYER'S payment of the SECONDARY EMPLOYER approval fee, the SECONDARY EMPLOYER agrees as follows . . . ."

The Conditions Agreement provided that "[a]s a condition of Secondary Employment of off-duty San Jose Police Officers," Albanese agreed to maintain records of each officer's work in a format approved by the chief of police and to make those

records available for review by the chief of police. The agreement also required Albanese to authorize inspection of its premises during business hours by the SJPD to ensure it was in compliance with the approval and the law.

Albanese signed both agreements and submitted the application. SJPD approved Albanese as a secondary employer of the officers. SJPD supplied officers to Albanese to perform traffic control services at its construction sites.

The trial court agreed that "the unusual circumstances here must be taken into consideration in determining whether there was a contract and how it is to be interpreted in light of the Insurance Code designation as to who will pay the taxes." Albanese argued the fact that SJPD was not required to provide officers whenever requested negated a finding of a contract. The trial court rejected the argument and so do we: "The only reason for the agreement was Plaintiff's need to be an approved secondary employer for city police officers. In return for the approval, SJPD agreed to allow Plaintiff to employ off-duty police officers. Allowing Plaintiff to employ the officers necessarily implies the officers will be supplied. This is sufficient to meet the requirements of a valid contract to supply officers for purposes of § 606.5 (c)."

We agree with the trial court's analysis of the position of the parties and the ramifications of their agreement. The existence of a contract poses a question of law we review de novo. (*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal.App.4th 1312, 1320; *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 591.) The essential elements of a contract are: parties who are capable of contracting; their consent; a lawful object; and sufficient consideration. (Civ. Code, § 1550.)

Albanese challenges the consent element, arguing the SJPD and the city did not consent to the contract to supply officers because the Indemnity Agreement references future contracts; the parties did not intend to be bound by the terms of agreement. However, "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.) Here, Albanese

signed both agreements required by the city in order to employ officers required to control traffic at its construction sites. This necessitated the city approving Albanese as a secondary employer. In return for this approval, the city and SJPD consented to Albanese employing officers, subject to the Indemnity Agreement. Under these circumstances, Albanese signed the agreement to obtain the officers at construction sites; the city agreed to supply the officers, subject to the agreement. The agreements describe Albanese as a secondary employer of the police officers and the supplying of police officers as secondary employment, further underscoring the agreement for SJPD to supply and Albanese to hire officers to facilitate construction projects. Viewed in context, the Indemnity Agreement and the Conditions Agreement are components of an overall contractual scheme that obligated SJPD to supply officers for traffic control. The precise terms of the contractual undertaking are not at issue. What is important is that the relationship between the two parties was contractually based.

Under section 606.5, subdivision (c), where an entity that is not a leasing or temporary employer contracts to supply an employee to perform services for a client, the client is the employer for purposes of paying unemployment insurance taxes. Under subdivision (b), SJPD is not a temporary services employer or a leasing employer. Under the facts before us and the clear language of the statute, Albanese entered into a contract with SJPD to provide officers for construction duty. The contract specified defendant was a secondary employer and responsible for paying the off-duty officers. Under subdivision (c) Albanese is the client and employer responsible for payment of unemployment insurance taxes.[4]

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[4] Albanese also argues section 606.5, subdivision (c) only applies if the workers are found to be the client's employees under the common law as defined in section 621, subdivision (b). Under section 621, " 'Employee' means all of the following: [¶] . . . [¶] (b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Albanese contends,

DISPOSITION

The judgment is affirmed. Department shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RAYE, P. J.

We concur:

HULL, J.

MURRAY, J.

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because the officers supplied by SJPD would be considered independent contractors under common law, section 606.5 subdivision (c) does not apply. However, Albanese overlooks the plain language of section 606.5 which states the "common law rules" do not apply when subdivision (b) or (c) apply.