STATE OF MICHIGAN

COURT OF APPEALS

TED WILLIAMS,

Plaintiff-Appellant,

v

DOUBLE EAGLE STEEL COATING CO., a Michigan copartnership, USX CORPORATION, a Delaware Corp., individually and as a partner of DOUBLE EAGLE STEEL COATING COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 13, 1996

No. 176372
LC No. 90030073 NO

Before: Marilyn Kelly, P.J., and Gribbs and W.E. Collette,* JJ.

PER CURIAM.

Plaintiff, Ted Williams, appeals as of right from a grant of summary disposition to defendants pursuant to MCR 2.116(C)(10) in this action involving the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA). MCL 418.101 *et. seq*.; MSA 17.237(101) *et. seq*.

He argues that a 1984 joint venture agreement and its 1985 amendment established that he was an employee of Rouge Steel and not the Double Eagle joint venture. He asserts that the court erred in applying the economic reality test where defendants are regulated by the Uniform Partnership Act. MCL 449.1 *et seq*.; MSA 20.1 *et seq*. He alleges in the alternative that, even if the economic reality test applies, conflicting inferences make his employment status a question of fact to be determined by the jury. Finally, he urges that the judge erred by not allowing him to amend his complaint.

I

Plaintiff began working for Rouge Steel Company (Rouge), a subsidiary of Ford Motor Company, on July 15, 1974. On November 30, 1984, USX Corporation[1] entered into a joint venture agreement with Rouge to operate an electrogalvanizing facility in Dearborn. The joint venture was named the Double Eagle Steel Coating Company (Double Eagle).

* Circuit judge, sitting on the Court of Appeals by assignment.

In June, 1986, plaintiff was transferred to the Double Eagle facility where he worked as a Support Operator. On May 4, 1988, he slipped on a conveyor, falling 25 feet, suffering a torn rotator cuff and injuries to his left shoulder and lower back.

He collected worker's compensation payments from January, 1989, through February, 1992. On November 17, 1990, he filed suit against Double Eagle and USX alleging premises liability and negligence. Double Eagle and USX moved for summary disposition on the ground that they had paid worker's compensation benefits to plaintiff and were immune from liability under the WDCA's exclusive remedy provision. MCL 418.131; MSA 17.237(131). The trial judge applied the economic reality test, agreed with defendants and granted the motion.

II

Plaintiff argues that Rouge Steel and USX entered into a partnership, not a joint venture. Therefore, it was improper for the judge to apply the economic reality test to determine plaintiff's employment status. We disagree.

The evidence clearly establishes that Rouge Steel and USX entered into a joint venture. A joint venture is defined as "an association to carry out a single business enterprise for profit." *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983). The existence of a joint venture is a question of law for the trial judge to decide. *Id*. It has the following elements:

> (1) an agreement indicating an intention to undertake a joint venture;
>
> (2) a joint undertaking of
>
> (3) a single project for profit;
>
> (4) a sharing of profits as well as losses;
>
> (5) contribution of skills or property by the parties; and
>
> (6) community interest and control over the subject matter of the enterprise.
>
> [*Id.*, pp 214-215.]

The most important factor is that the parties intended to form a joint venture. *Id.*, p 215.

Here, Rouge Steel and USX entered into a joint venture agreement. They embarked upon a joint undertaking of a single project for profit. The purpose of the joint venture was the construction, operation and management of the Double Eagle facility to electrogalvanize steel coils. The agreement provided that the Rouge Steel and USX would share the construction costs, start-up costs and the fixed costs. Also, they would share profits arising from the operation. The agreement called for each member to make an initial capital investment, and the property acquired by Double Eagle would be jointly owned. Finally, both Rouge Steel and USX named three directors of the management committee

which was responsible for the overall management of Double Eagle. Thus, all the requisites for a joint venture were met.

The fact that the agreement states that the parties would be conducted as a general partnership pursuant to the Uniform Partnership Act is inconclusive. The agreement also states that, to the extent the provisions of the joint venture agreement are inconsistent with general partnership law, the provisions of the agreement apply. Therefore, we conclude that the parties entered into a joint venture and the economic reality test is applicable. *Berger, supra*.

III

A

Under the economic reality test, we find that the trial judge correctly found that plaintiff had joint employers: Rouge Steel, USX, and Double Eagle. The four factors of the economic reality test are: (1) the right to control; (2) the payment of wages; (3) the right to hire, fire and discipline; and (4) the performance of the duties as an integral part of the employer's business for the accomplishment of a common goal. *Amerisure Ins Co v Time Auto Transportation, Inc*, 196 Mich App 569, 575; 493 NW2d 482 (1992); *Berger, supra.* The totality of the circumstances surrounding the work must be considered. No single factor of the test is controlling. *Amerisure, supra*.

Plaintiff asserts that summary disposition was improperly granted where questions of fact arise when the economic reality test is applied. If the evidence concerning the status of a party is reasonably susceptible of but a single inference, the question is one purely of law to be decided by the court. *Nichol v Billor*, 406 Mich 284, 302-303; 279 NW2d 761 (1979). Where the facts bearing on such issues are either disputed, or where conflicting inferences may be reasonably drawn from the known facts, summary disposition is inappropriate. *Id*.

On the issue of control, the record reveals that plaintiff was under the control of Double Eagle. The joint venture agreement provides for a management team to run Double Eagle. It is comprised of employees from Rouge Steel and USX. Any employee of USX or Rouge Steel assigned to the Joint Venture has only the powers and duties which are provided by the Management Committee or redelegated by an authorized individual. Therefore, management personnel of Double Eagle, which are comprised of salaried employees of both USX and Rouge Steel, supervised plaintiff on a day-to-day business. Plaintiff admitted in his deposition that he took direction from both Rouge Employees and USX employees while working at Double Eagle. No question of fact was presented on this issue.

With respect to the payment of wages, it is undisputed that plaintiff's wages were initially paid by Rouge Steel. However, this was Rouge's responsibility as part of the joint venture. As such, Double Eagle in fact paid plaintiff's wages. *Berger, supra*, p 218. Moreover, Kevin McKee, Finance/Systems Manager of Double Eagle, stated in an affidavit that all employee payroll was shared in accordance with the Joint Venture Agreement. Both Rouge Steel and USX shared expenses equally after payment by Rouge or USX directly to their employees. Therefore, all three entities paid plaintiff's wages.

With respect to the right to hire, fire and discipline, Annette Gibbons, Human Resources Manager for Double Eagle, stated in her affidavit that Double Eagle management had the right to discipline, hire and fire all hourly employees working at Double Eagle, including plaintiff. Plaintiff has offered no evidence to refute the affidavit.

Finally, the performance of plaintiff's duties was an integral part of Double Eagle's business toward the accomplishment of a common goal: to realize profits from the electrogalvanizing line. See *Berger, supra*.

III
B

Plaintiff puts much emphasis on the case of *Goodwin v S A Healy Co*, 383 Mich 300; 174 NW2d 755 (1970). There, the Court noted that the parties were incorrect in their assumption that the aspects of the joint venture could be determined solely as a question of law. Rather, the Court noted that it must refer to the parties' specific joint venture agreement in its analysis. *Id*., pp 307-308. In *Healy*, because the agreement was in evidence and was not part of the record, the Court remanded the matter for a new trial.

Here, however, the joint venture agreement itself was taken into account in determining plaintiff's employer. Plaintiff asserts that the amendment to the joint venture agreement is clear. It states that all hourly joint venture personnel will be employees of Rouge Steel, assigned to the joint venture and not employees of the joint venture or USX. Therefore, plaintiff argues that this statement is conclusive as to the true nature of the employment relationship.

However, Gary Lantendresse, Chief Financial Officer and Director of Rouge Steel and a member of the Double Eagle Management Committee, stated in his affidavit that the parties drafted and executed a settlement agreement in 1985 that resolved issues raised by members of the Rouge employee bargaining unit who were assigned to work at Double Eagle. The workers had concerns regarding seniority rights and other rights which they had accumulated over the years working for Rouge Steel. The settlement agreement was entered into to make sure that the Rouge employees working at Double Eagle did not lose those benefits. The 1985 amendment to the joint venture agreement took the settlement agreement into account and reemphasized that the hourly workers at Double Eagle would continue to be employees of Rouge Steel so that they would not lose benefits. Plaintiff presented no evidence to refute the affidavit.

Moreover, the 1985 amendment provides that Double Eagle would reimburse Rouge Steel and USX for all wages and benefits paid by Rouge Steel or USX to an employee assigned to Double Eagle. Therefore, even though the agreement stated in one part that plaintiff is an employee of Rouge Steel, there is no question that Double Eagle and USX effectively shared the cost of paying his worker's compensation benefits. Therefore, plaintiff's suit is barred by the exclusive remedy provision of the WDCA.

IV

Finally, the trial judge did not err in failing sua sponte to grant plaintiff leave to amend his complaint to allege a defective design under the dual capacity doctrine. Plaintiff never asked for leave to amend and USX and Double Eagle did not implicitly or expressly consent to include the issue. See *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194; 480 NW2d 910 (1991).

Additionally, even if plaintiff had requested leave to amend his complaint, such an amendment would have been futile. *Hicks v Vaught*, 162 Mich App 438, 440; 413 NW2d 28 (1987). We previously concluded that plaintiff was an employee of Double Eagle and USX and his tort claims were barred by the exclusive remedy provision. Therefore, they would be immune from a tort claim based on defective design.

Affirmed.

/s/ Marilyn Kelly
/s/ Roman S. Gribbs
/s/ William E. Collette

[1] USX was formerly known as United States Steel Company.