IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANTHONY M. KULP,	:	
	:	
Plaintiff,	:	C.A. No. 06C-01-031 WLW
	:	
v.	:	
	:	
BETTY A. MANN-BEEBE, MANN & SONS, INC., PAUL ROBINO, FRANK ROBINO ASSOCIATES, INC. ROBINO-SEASIDE, LLC, ROBINO-SANIBEL VILLAGE, LLC, and ROBINO COTTAGEDALE, LLC.,	:	
	:	
Defendants.	:	

Oral Argument Heard: May 8, 2008
Decided: July 10, 2008

ORDER

Upon Defendants' Motion for Partial Summary Judgment. Denied.

David A. Boswell, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Michael W. Arrington, Esquire of Parkowski, Guerke & Swayze, P.A., Wilmington, Delaware; attorneys for the Robino Defendants.

Eugene M. Lawson, Esquire of Fletcher Heald & Hildreth, PLC, Arlington, Virginia; attorneys for the Mann Defendants.

WITHAM, R.J.

Anthony Kulp v. Betty A. Mann-Beebe, et al.
C.A. No. 06C-01-031 WLW
July 10, 2008

Before the Court is Defendants Betty A. Mann-Beebe and Mann & Sons' Motion for Partial Summary Judgment to dismiss Count One of Plaintiff's First Amended Complaint.[1] The Court finds that whether Plaintiff Anthony M. Kulp was an employee or an independent contractor for Defendant's companies is a genuine issue of material fact and thereby denies the motion.

Procedural History

The Court previously denied co-Defendant Robino's Motion to Dismiss, which had sought a declaration that Plaintiff Kulp was not an employee as a matter of law. In that Order, the Court held that whether the parties' relationship is one of employment is to be determined under § 220 of the Restatement (Second) of Agency.[2] The Order also found that the complaint's pleadings of fact "create a reasonably conceivable set of circumstances under which Plaintiff could recover."

Background

Plaintiff, Anthony M. Kulp (Kulp), was a real estate salesperson for Defendant

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[1] Generally, the Complaint includes counts for breach of contract, for violation of the Wage Payment and Collection Act by Kulp's employers, or, in the alternative, for enforcement of prime contractor liability pursuant to 19 *Del.C.* § 1105, and for fraud. Count One addresses a claim under the Wage Payment and Collection Act, 19 *Del.C.* § 1101 *et seq.*

The original motion also included a request for summary judgment for Count Two, paragraphs 30, 33A, 33 and 34. At the May 8, 2008 hearing, the Court learned that the arguments would *not* affect these common law claims (which include liability by *respondeat superior*, breach of the covenant of good faith and fair dealing, unjust enrichment and *quantum meruit.* Additionally, ¶ 34 argues that Defendants' conduct is wilful and therefore merits an award of exemplary or punitive damages, attorneys fees and costs.).

[2] *Kulp v. Mann-Beebe*, No. 06C-01-031-WLW, 2006 WL 1149146 (Del.Super., March 21, 2006).

Mann & Sons, Inc. (Mann & Sons), whose broker of record, Betty A. Mann-Beebe (Mann-Beebe), is part-owner. Mann & Sons is associated with a number of small companies that design and construct homes (Robino Communities).[3] Defendant Paul Robino (Defendant Robino) owns an interest in Mann & Sons and supervised Kulp.[4] Kulp procured ready, willing, and able buyers for Mann & Sons' houses and was paid by commissions.

After five years of sales work for Defendants, Kulp announced that he was leaving. In response, Defendants Mann-Beebe and Robino notified Kulp by certified letter on April 28, 2005 that they had decided to retroactively reduce by fifty percent (50%) his commission for the ratified contracts he procured but had not closed at the time of his resignation. Kulp asserts that this reduction has neither a contractual or lawful basis.

Since Kulp's resignation, final closings took place on five properties at Defendants' Reserves of Nassau site for which he acquired ratified contracts. Several months after commencing this action, Defendants' counsel tendered Kulp payment for his commissions due on these properties.[5] The commissions were statutorily ten days late and Kulp claims that statutory damages are due in accordance with 19

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[3]These companies are also included as defendants to this case. They are: Defendant Frank Robino Associates, Inc., Defendant Robino-Seaside LLC, Robino-Sanibel Village, L.L.C. and Defendant Robino Cottagedale, LLC (collectively, Robino Companies). These homes were to be built in Robino Companies' communities in Sussex County, Delaware.

[4]Defendant Robino owns an approximate 10% interest in Mann & Sons.

[5]The amount being $12,790.59.

Del.C. § 1103(b).[6] Some of the contracts never closed but instead were cancelled. On these, Defendants allegedly conspired to create cancellations and Kulp claims that therefore he is due commissions as of the date of cancellation plus statutory damages pursuant to 19 *Del.C.* § 1103(b).

Kulp's Count One addresses the claims under the Wage Payment and Collection Act, 19 *Del.C.* § 1101 *et seq*. In order to prevail on this count, Kulp must first be determined to be an employee, not an independent contractor. Contending this, Defendants' motion presents a variety of arguments to support their theory that Kulp is an independent contractor.

First, Defendants contend that Kulp knows that he is an independent contractor from the ninety-nine hours of classes he took to obtain his real estate license. They argue that his courses taught him that most real estate agents are independent contractors and therefore Kulp knew that he was an independent contractor. They argue further that Delaware recognizes this concept under the Delaware Workers' Compensation law, 19 *Del.C.* § 2316(a).[7] Second, Kulp signed contracts that

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[6]19 *Del.C.* § 1103(b) provides entitlement to statutory damages of ten percent per day for each day that payment in full is delayed, up to a cap of one hundred percent, together with attorneys' fees, costs of prosecution, and the costs of this action pursuant to 19 *Del.C.* § 1113(c).

[7]Title 19, section 2316 of the Delaware Code, dealing with Workers' Compensation, provides that Workers' Compensation law does not apply to licensed real estate salespersons who are (1) affiliated with a licensed real estate broker under a written contract, (2) are paid on a commission only basis, (3) are contractually designated as independent contractors and (4) who qualify as independent contractors for federal tax purposes.

19 Del.C. § 2316

allegedly make clear that the relationship was not of employment but between two independent parties. Defendants assert that Kulp was not hired to "work the site." Instead, they hired him because they thought he "would do a good job." Third, Defendants emphasize that Kulp did not file his taxes like an employee. He claimed "zero" as wages, salaries and tips and filed as a sole proprietor. He did not tell his accountant that he was an employee and did not provide W-2s for any company, including Defendants'. Defendants claim that therefore Kulp's only income was for the sales of property as a real estate agent. Finally, Defendants argue that Kulp's benefits were inconsistent with a standard employment contract. Kulp was not paid a salary or provided vacation, sick leave, a pension plan or health benefits. Kulp paid for his own health insurance and made contributions into a self-employed pension plan.

In response, Kulp asserts that the level of control Defendants had over the nature of his employment establishes his employee status. He first argues that his employment with Robino Communities was full time, and therefore he forewent other opportunities, including all other employment with other brokers or developers. Additionally, his classes taught him that he is not an independent contractor, pursuant to § 2316, since he worked for a developer who sold specific properties. There is a line drawn between selling property and products for a developer, and working independently without a set schedule or office, as is typical with a real estate brokerage. Therefore he was not a real estate agent and § 2316(a) does not apply.

Second, regarding the signed contracts establishing an independent contractor

relationship, Kulp argues that the parties' actions were not of an independent contractor but of principal/agent, where Defendants controlled where and when he worked, the amount of commission taken, what he was to sell and held mandatory meetings.[8] Defendant' supplied valuable equipment for his use, including site offices and computer equipment. Third, Kulp claims that his tax status is not controlling and in light of other factors that are to be weighed, does not tip the balance in favor of an independent contractor status. Fourth, the parties disagree as to whether Kulp first needed permission in order to take vacation.

Standard of Review

Summary Judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[9] The facts must be viewed in the light most favorable to the non-moving party.[10] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[11] However, when the facts permit a reasonable person to draw but one inference, the

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[8]Defendants argue that these meetings were attended only for his own benefit, and that attendance was not required.

[9]Del. Super. Ct. Civ. R. 56(c).

[10]Guy v. Judicial Nominating Comm'n, 649 A.2d 777, 780 (Del. Super. 1995).

[11]Ebersole v. Lowengrub, 180 A.2d 467, 470 (Del. 1962).

question becomes one for a decision as a matter of law.[12] When a moving party, through affidavits or other admissible evidence, shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[13]

Discussion

In order to make a claim under the Wage Payment and Collection Act,[14] Kulp must be an employee.[15] Determining employment status is a mixed question of law and fact.[16] Three Delaware Supreme Court cases discuss the means of determining whether an individual is an employee or an independent contractor, *Fairfield Builders, Inc. v. Vattilana*,[17] *Fisher v. Townsends, Inc.*,[18] and *Falconi v. Coombs &*

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[12]Wooten v. Kiger, 226 A.2d 238, 239 (Del. 1967).

[13]Moore v. Sizemore, 405 A.2d 679, 680 (Del. 1979).

[14]19 *Del.C.* § 1101 *et seq.*

[15]19 *Del.C.* § 1103(a).

[16]Gooden v. Mitchell, 21 A.2d 197, 201 (Del.Super. 1941) ("It would be a hopeless task for any Court to lay down a rule whereby the standing of men laboring and contracting together could be definitely construed in all cases as employees or independent contractors. Each particular case must, out of necessity, depend on its own facts, and ordinarily no one characteristic of the relation is decisive. All of the characteristics must be considered. Consequently, in a majority of the cases the question becomes one of fact.").

[17]304 A.2d 58 (Del. 1973).

[18]695 A.2d 53 (Del. 1997).

Coombs, Inc.[19,20]

The Delaware Supreme Court, in the 1973 case, *Fairfield Builders, Inc. v. Vattilana*,[21] determined whether the plaintiff was an employee in the context of the Wage and Compensation Act. Acknowledging that 19 *Del.C.* § 1101(a)(3) provides an unhelpful definition of "employee",[22] the Court concluded that the Legislative intent was to leave it to the Courts to determine employment status on a case-by-case basis.

In *Fairfield*, the Court found that the parties' relationship was based upon a contract that was clearly between two independent parties for which the plaintiff was to undertake a specific service for the defendant for an amount certain. The contract provided for remuneration for professional services but did not create nor contemplate an employer-employee relationship where the plaintiff was placed on the payroll. The Court heavily emphasized the fact that the defendant "retained *no power of control* over the means and methods of doing the work, nor did it attempt to exercise any such power; its only concern was the result to be accomplished and the

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[19]902 A.2d 1094 (Del. 2006).

[20]

[21]304 A.2d at 60 -61.

[22]"'Employee' means any person suffered or permitted to work by an employer under a contract of employment either made in Delaware or to be performed wholly or partly therein." 19 *Del.C.* § 1101(a)(3).

ultimate cost thereof."[23] Further, defendant did not withhold federal or state taxes and federal insurance for plaintiff personally, nor did he provide health insurance, vacations, leave and other benefits consistent with or contemplated by a standard employment contract.

Fairfield was later interpreted in *Montague v. Seacoast Realty, Inc.*,[24] where this Court laid a three-part test: "(1) whether the employer retained control over the means and methods of doing the work; (2) whether the person was taxed like an employee; and (3) whether other benefits consistent with a standard employment contract were provided."[25] Reading *Montague* by itself, it is easy to conclude that each part of the test should receive a weight of about one-third. However, with *Fairfield* in the background, it is clear that control is emphasized by our Courts over any other factor.

The conclusion that control is the determining factor is bolstered by the Delaware Supreme Court's other two discussions that defined "employee." In *Fisher v. Townsends, Inc.*,[26] the Supreme Court laid out the "time, manner and method" rule.[27] That case involved a chicken catcher, John Fisher, employed by Defendant

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[23]*Fairfield Builders*, 304 A.2d at 60.

[24]2003 WL 22787611 at *3 (Del.Super.Ct., Oct. 3, 2003).

[25]*Montague v. Seacoast Realty, Inc.*, 2003 WL 22787611 at *3 (*citing Fairfield Builders*, 304 A.2d at 60 -61).

[26]695 A.2d 53 (Del. 1997).

[27]*Fisher v. Townsends, Inc.*, 695 A.2d at 59.

Townsends, Inc. ("Townsends"). Fisher was seriously injured in an automobile accident when he was a passenger in a car driven by one of Townsends' hired weighmasters. Fisher sought redress against Townsends on the basis of vicarious liability through *respondeat superior*. To prevail, the relationship between Townsends and the weighmaster must be that of a master and servant; not of a contractee and independent contractor.[28] The Court found that the relationship depends on

> the right of control capable of being exercised by the principal. . . . If the principal assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a master/servant type of agency relationship has been created. If, however, the worker is not subject to that degree of physical control, but is subject only to the general control and direction by the contractee, the worker is termed an independent contractor. The right of control is only one component on the list of considerations that must be balanced to determine whether a person is a servant or an independent contractor.[29]

The Court then used the *Restatement (Second) of Agency* § 220 as an authoritative source in determining whether one who acts for another is a servant or an independent contractor. Section 220 provides a list of *nonexclusive* factors to be considered:

> (1) the extent of control which, by the agreement, the master may exercise over the details of the work;
> (2) whether or not the one employed is engaged in a distinct occupation

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[28] *Id.* at 58.

[29] *Id.* at 59 (citations omitted).

> or business;
> (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (4) the skill required in the particular occupation;
> (5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (6) the length of time for which the person is employed;
> (7) the method of payment, whether by the time or by the job;
> (8) whether or not the work is a part of the regular business of the employer;
> (9) whether or not the parties believe they are creating the relation of master and servant; and
> (10) whether the principal is or is not in business.[30]

In *Fisher*, the Court recognized that "no single rule could be laid down to determine whether a given relationship is that of [a servant to a master] as distinguished from an independent contractor."[31]

Finally, the 2006 Delaware Supreme Court case, *Falconi v. Coombs & Coombs, Inc.*,[32] also confirmed that the nature of the relationship is based upon the facts and circumstances of each case, and that the factor that predominates is control.[33] That case involved a Workers' Compensation claim for which the Court

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[30]Restatement (Second) of Agency § 220 (1958); *Fisher v. Townsends, Inc.*, 695 A.2d at 59; *Falconi v. Coombs & Coombs, Inc.*, 902 A.2d 1099-1100 (Del. 2006).

[31]*Fisher v. Townsends, Inc.*, 695 A.2d at 59 (citations omitted).

[32]902 A.2d 1094 (Del. 2006).

[33]*Id.* at 1099.

used the Section 220 factors to determine the nature of the relationship.[34]

In the case *sub judice*, the parties contest many of the facts that in total, determine whether Kulp was an employee of the Defendants, with control being the prevailing factor.[35] This determination is for the fact finder and cannot be decided by the Court.

Conclusion

The Court finds that Kulp is not an independent contractor under the Workers' Compensation Act. Under the common law or under the Wage Payment and Collection Act, even though Kulp contracted as an independent contractor with Defendants and filed his taxes as a sole proprietor, other facts infer an employee status. In total, there are genuine issues of material fact for the jury to determine. Therefore, the Court *denies* Defendant Mann's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

/s/ William L.Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary

[34]*Fairfield Builders, Inc. v. Vattilana*, 304 A.2d 58 (Del. 1973).

[35]*Fairfield Builders* at 60 -61.