

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: March 17, 2006
Written Decision: March 21, 2006

ORDER

Upon Defendants' Motion to Dismiss.
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 Moving Defendants.

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

WITHAM, R.J.

Defendants, Paul Robino (“Robino”), Frank Robino Associates, Inc. (“Associates”), Robino-Seaside, LLC (“Seaside”), Robino-Sanibel Village, LLC (“Sanibel”), and Robino Cottagedale, LLC (“Cottagedale”), filed a motion to dismiss the case against them, arguing that Plaintiff, Anthony Kulp, is not an employee of Defendants and Plaintiff’s claims are not yet ripe. Plaintiff asserted that he was an agent of Defendants, and that Defendant Robino supervised Plaintiff and exercised control over his pay.

The salient facts are as follows: Plaintiff signed a Commission Agreement (“Agreement”) with Defendant Mann & Sons, Inc. (“Mann & Sons”), whereby Plaintiff would receive a commission of 1.63% on the base price of new homes sold for Associates and a 5% commission on extras. Plaintiff asserted that he sold a number of these units. However, after he resigned, Plaintiff alleged that he received a letter from Defendant Betty Mann-Beebe (“Mann-Beebe”) stating that she and Robino would be reducing his commission on homes where the sale had not yet been completed by 50%.¹ Plaintiff had an express agreement with Mann-Beebe and her company, Mann & Sons. Plaintiff also claims that he was an agent of Robino, Associates, Seaside, Sanibel and Cottagedale “[b]ecause Plaintiff was required to attend sales meetings, keep the sales office at the Robino communities open during hours specified by Robino, and [was] otherwise subject to the supervision and control of Robino”

¹Plaintiff refers to this letter, dated April 28, 2005, but does not provide a copy of the letter with his Complaint.

For the reasons set forth below, Defendants' motion to dismiss is *denied*.

Standard of Review

In evaluating a motion to dismiss for failure to state a claim, the Court must assume that all well-pled allegations are true.² "A complaint will not be dismissed unless plaintiffs would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."³

Discussion

Defendants contend that they are not employers of Plaintiff. However, Plaintiff argues that they were employers pursuant to the principles of agency. *Fisher v. Townsends, Inc.*⁴ explains when an agency relationship exists. "An agency relationship is created when one party consents to have another act on its behalf, with the principal controlling and directing the acts of the agent."⁵ In determining the specific type of principal/agent relationship, the degree of control is a significant consideration. For example, "[i]f 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

²*Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).

³*Id.*

⁴695 A.2d 53 (Del. 1997).

⁵*Id.* at 57.

agency relationship has been created.”⁶ If the worker is subjected to a lesser degree of control, then he or she is likely an independent contractor.⁷ However, the degree of control is only one factor to consider. This Court examines Section 220 of the Restatement(Second) of Agency for guidance. Section 220 lists the following factors for consideration:

- (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 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 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.⁸

In determining what relationship exists, “each particular case must . . . depend

⁶*Id.* at 59.

⁷*Id.*

⁸*Id.*

on its own facts.”⁹ Notably, “[t]hat determination is ordinarily made by the factfinder.”¹⁰

In the case *sub judice*, Plaintiff alleged that Defendant Robino dictated where and at what times Plaintiff worked. Plaintiff claimed that Defendant Robino required him to attend sales meetings. Plaintiff also asserted that Defendant Robino was involved in the decision to reduce his commission rate by 50%. These facts, when considered in conjunction with established case law that says whether an agency relationship exists is a question for the factfinder, create a reasonably conceivable set of circumstances under which Plaintiff could recover. Therefore, this argument fails.

As for Defendants’ second argument that the claims are not ripe, Plaintiff contends that his complaint should be considered one for declaratory judgment or, in the alternative, the matter should be stayed for one year so that the parties may ascertain the scope of their dispute.

The threshold question for declaratory judgment is whether an “actual controversy” exists.¹¹ “An ‘actual controversy’ exists where one side makes a claim of a present, specific right and the other side makes an equally definite claim to the contrary.”¹² The prerequisites of an “actual controversy” are, “(1) a controversy

⁹*Id.*

¹⁰*Id.*

¹¹*Tri-State Motor Transit Co., v. Intermodal Transp., Inc.*, 1991 WL 1172907, at *2 (Del. Super.).

¹²*Id.*

involving rights or other legal relations of the party seeking declaratory relief; (2) a claim of right or other legal interest must be asserted; (3) interests of the parties must be real and adverse and the issue involved must be ripe for judicial determination.”¹³ This Court has determined that the purpose of declaratory relief is to “promote preventive justice.”¹⁴ Thus, “[t]he availability of declaratory relief in any particular case involves the exercise of judicial discretion which should turn upon a practical evaluation of the circumstances present. This discretion should be liberally exercised so that the remedial purpose of the act may be well served.”¹⁵

Additionally, in addressing ripeness, “what is required, is that the interests of the court in postponing review until the question arises in some more concrete and final form be outweighed by the interests of those who seek relief from the challenged action’s immediate and practical impact upon them.”¹⁶

Here, the Agreement does not provide for Plaintiff’s payment until settlement on the properties. This Court will be unable to ascertain whether the sales will be completed for quite some time because construction has not even begun on two of the properties.¹⁷ Because payment on most of the properties will not be due for some

¹³*Id.*

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷Those properties are Cottagedale and Walls Creek. At oral argument, this Court foreshadowed the difficulty in having this Court delve into factual issues not fully developed at this

Anthony Kulp v. Betty A. Mann-Beebe, et al.

C.A. No. 06C-01-031 WLW

March 21, 2006

time, the impact on Plaintiff is not immediate. There are also factual developments that may affect the outcome of the case. Thus, I find that declaratory judgment is not appropriate at this time.

Based on the foregoing, Defendants' motion to dismiss for failure to state a claim is *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R. J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution

stage. This also goes to ripeness.