T. A. v. Ann Johnston and Charlotte Rancourt, dba Karma Farm (September 12, 2007)

STATE OF VERMONT
DEPARTMENT OF LABOR

T. A.
v.
Ann Johnston and Charlotte Rancourt, dba Karma Farm

Opinion No. 05S-07WC

By: Phyllis Severance Phillips Esq.
Hearing Officer

For: Patricia Moulton Powden,
Commissioner

State File No. W-01682

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Rebecca A. Rice, Esq., for Claimant
David R. Bookchin, Esq., for Defendants

ISSUE PRESENTED:

Whether a genuine issue of material fact exists as to the applicability of the exclusions from workers' compensation coverage provided by Vermont's statute as to casual employment, 21 V.S.A. §601(14)(A), farm employment, 21 V.S.A. §601(14)(C), and/or service in or about a private dwelling, 21 V.S.A. §601(14)(E).

FINDINGS OF FACT:

As a preliminary procedural issue, Defendants contend that Claimant failed to provide a separate statement of contested facts in response to Defendants' Motion for Summary Judgment, as required by Vermont Rule of Civil Procedure 56(c)(2). As a consequence, Defendants argue that Claimant must be deemed to have admitted the assertions contained in Defendants' Statement of Material Facts.

Vermont Rule of Civil Procedure 56(c)(2) requires a party moving for summary judgment to attach to its motion a "separate, short, and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be tried." The rule further provides that the party opposing summary judgment:

> *shall include* with [its] affidavits and memorandum . . . *a separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.* All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.

V.R.C.P. 56(c)(2) (emphasis added).

The Vermont Supreme Court recently addressed the specific requirements of V.R.C.P. 56(c)(2) in *Webb v. LeClair*, 2007 Vt. 65 (Sept. Term 2006). The defendant in that case had filed a motion for summary judgment supported with a statement of undisputed facts as required by V.R.C.P. 56(c)(2). The plaintiff failed to file a separate statement of contested facts in response. Instead, she filed a lengthy memorandum of law, with accompanying exhibits, in which she took issue with at least some of the facts proffered by the defendant. The trial court determined that plaintiff's filing did not comply with the requirements of the rule and therefore admitted all of the facts as proffered by the defendant as undisputed.

On appeal, the plaintiff argued that her "stylistic decision" to present the facts she was contesting in narrative form rather than in a separate statement constituted sufficient compliance with the requirements of V.R.C.P. 56(c)(2). The Vermont Supreme Court disagreed, and upheld the trial court's determination. It noted that the intent of the rule's requirement was to focus summary judgment arguments and allow the fact finder to more readily determine the material facts at issue, without having to sift through the pleadings to discern what is disputed and what is not. Thus it held that the trial court correctly took the defendant's submitted facts, which were supported adequately and appropriately by the record, as true.

In the current claim, Claimant filed a brief legal memorandum in opposition to Defendants' Motion for Summary Judgment, in which she contested the legal import of some of the facts proffered by Defendants but did not dispute them *per se*. Her supporting affidavit alleged her lack of personal knowledge as to certain facts but again, did not dispute them *per se*. She did not file any separate statement of disputed material facts. On this record, and given the clear requirements of V.R.C.P. 56(c)(2), I must conclude that the facts as proffered by Defendants and supported by the record are true.

Accordingly, the undisputed facts are as follows:

1. At all material times, including the period between June 9, 2004 and January 21, 2005 Defendants were the owners of real property, consisting of a dwelling house and two barns on 20 acres of land located in Moretown, Vermont (the "Moretown property"). Defendants had moved to the property in February 2004 and used it as their primary residence.

2. Defendant Ann Johnston owned a horse, which she wanted to relocate to the Moretown property for easy access and riding.

3. In the spring of 2004, Defendant Johnston became acquainted with Claimant. Upon learning that Claimant was an equestrian with experience in caring for horses, Defendant Johnston discussed her goal of relocating her horse to the Moretown property.

4. On June 9, 2004 Defendants and Claimant entered into a written agreement which provided for Claimant: (1) to reside with Defendants at the Moretown property until July 1, 2005 in exchange for bartered rent; and (2) to perform both skilled equestrian work and unskilled labor, a portion of the compensation for which would be applied to the bartered rent. The agreement also provided for Claimant to board her own horse at the Moretown property beginning in August 2004.

5. The June 9, 2004 agreement referred to the Moretown property as "Karma Farm" and stated the goal of creating a small working horse farm on the property. It reflected the parties' plan to bring two horses to the Moretown property, one belonging to Claimant and one belonging to Defendant Johnston. The agreement did not include any other provisions for bringing additional horses to the property.

6. The June 9, 2004 agreement provided that Claimant would do "all the necessary preparation and maintenance work to keep the two horses on the property healthy and happy and safe." The agreement provided that Claimant would be compensated at the rate of $35 per hour for skilled equestrian work and $10 per hour for unskilled labor. The compensation she earned at these rates was to be applied both to her bartered rent obligation, which the parties valued at $500 per month, and beginning in August 2004, to her bartered horse board obligation as well, valued at $200 per month.

7. Neither Claimant nor Defendants ever brought any horses to the Moretown property.

8. By September 2004 Claimant was no longer paying rent and had ceased doing the work envisioned by the June 9, 2004 agreement.

9. In October 2004 the parties participated in a mediation to resolve a number of disputes that had arisen between them. The mediation culminated in a new agreement, which the parties executed on October 30, 2004.

10. Under the terms of the October 30, 2004 agreement, (1) Claimant agreed to move from the Moretown property within thirty days of signing a new lease elsewhere, but no later than December 31, 2004; (2) the parties all agreed to maintain their own property and casualty insurance; and (3) Defendants agreed to rent Claimant the barn on the property until June 30, 2005 provided that Claimant signed a lease containing certain specific conditions.

11. Claimant resided at the Moretown property and performed work for Defendants pursuant to the June 9, 2004 agreement from that date until no later than October 30, 2004.

12. After signing the October 30, 2004 agreement Claimant continued to reside at the Moretown property until on or about January 21, 2005. Defendants continued to use the Moretown property as their primary residence during this period as well.

13. After October 30, 2004 Claimant and Defendants had few verbal communications, and had no communications about additional work, if any, to be performed by Claimant on the property.

14. During the period from June 9, 2004 until January 21, 2005, Defendants never operated any business on or from the Moretown property, including any business involving or relating in any way to Claimant, to horses, or to any other matter contemplated by the June 9, 2004 agreement. At all material times during this time frame, Defendant Ann Johnston was a lawyer working towards satisfying her attorney licensing requirements in Vermont. Defendant Charlotte Rancourt was either unemployed, working at temporary retail jobs and/or seeking employment in her professional field of computer hardware and software market analysis.

15. Claimant resided at the Moretown property for less than seven months. Under the terms of the June 9, 2004 agreement, the total value of the bartered rent Claimant received from Defendants during this period was $3,500 ($500 per month times seven months).

16. In addition to the bartered rent referred to above, Defendants also paid Claimant $1,786 in monetary compensation for work performed pursuant to the June 9, 2004 agreement.

17. Defendants also paid Claimant $400 on August 28, 2004 because they orally had agreed to pay Claimant this amount to exercise Defendant Johnston's horse during that month if it had been brought to the Moretown property.

18. Defendants also paid Claimant $2,550 on October 30, 2004 in accordance with the terms of the October 30, 2004 agreement.

19. In all, the total compensation Defendants paid to Claimant for work performed at the Moretown property was $8,236.

20. During calendar years 2004 and 2005 Defendants did not pay any wages, either to themselves or to any other person, aside from the $8,236 paid to Claimant from June 9, 2004 through January 21, 2005.

21. On January 5, 2005 Claimant filed a wage claim against Defendants with the Vermont Department of Labor & Industry (Claim #1589), in which she alleged that Defendants owed her unpaid wages totaling $11,840 for the period from September 1, 2004 through January 1, 2005. On June 16, 2006 the Vermont Department of Labor denied Claimant's wage claim in its entirety.

22. On January 18, 2005 Claimant and Defendants were parties in a civil trial in the matter of *Johnston and Rancourt v. Artemis*, Washington Superior Court, Docket No. 708-12-04Wncv, which resulted in a decision issued on January 21, 2005. In this decision, the Superior Court granted Defendants' request to evict Claimant from the Moretown property. The Court also determined that the $2,550 paid by Defendants to Claimant under the terms of the October 30, 2004 agreement amounted to an accord and satisfaction. This had the legal effect of discharging all of the parties' obligations under the June 9, 2004 agreement and substituting the terms of the October 30, 2004 agreement instead. The Vermont Supreme Court affirmed the Superior Court's decision in its entirety on June 22, 2006.

23. On January 5, 2005 Claimant filed a Notice of Injury and Claim for Compensation with the Vermont Department of Labor & Industry in which she alleged that she suffered work-related injuries in the course of her employment for Defendants on November 30, 2004, December 25, 2004, January 2, 2005 and January 5, 2005. Claimant alleged that on each of these dates she slipped and fell on the ice while shoveling snow from a driveway between the dwelling house and the barn at the Moretown property.

24. In conjunction with the June 9, 2004 agreement Defendants purchased a workers' compensation insurance policy to cover Claimant's employment through Hartford Underwriters Insurance Company, policy number 6S6OUB 3389B437, with an original policy period from August 1, 2004 through August 1, 2005.

25. After executing the October 30, 2004 agreement, Defendants stopped paying the premium on this workers' compensation policy. The policy was canceled for non-payment of premium effective November 25, 2004.

26. In addition to the workers' compensation insurance policy referred to above, Defendants also had a separate farm owner insurance policy through American Bankers Insurance Company of Florida, policy number FSL 4000609, effective November 9, 2004 through November 9, 2005. This policy provided coverage for any farm activities associated with Claimant's use of the barn at the Moretown property in accordance with the October 30, 2004 mediation agreement. This policy did not include any workers' compensation coverage.

27. Defendants did not have workers' compensation insurance in effect on any of the injury dates alleged by Claimant and had not notified the Commissioner of Labor & Industry that they intended to be included within the provisions of Vermont's workers' compensation laws on any of those dates.

CONCLUSIONS OF LAW:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *See Samlid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *See State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425 (1979).

2. In the current claim, Defendants' motion for summary judgment is based on the applicability of any one of three exclusions to coverage under Vermont's workers' compensation act – the "farm employment" exclusion, 21 V.S.A. §601(14)(C); the "private dwelling" exclusion, 21 V.S.A. §601(14)(E); and/or the "casual work" exclusion, 21 V.S.A. §601(14)(A).

3. The "farm employment" exclusion provides that the term "worker" or "employee" does not include:

> (C) An individual engaged in agriculture or farm employment for an employer whose aggregate payroll is less than $10,000.00 in a calendar year, unless the employer notifies the commissioner that the employer wishes to be included within the provisions of this chapter; the existence of a contract of insurance shall be considered sufficient notice.

21 V.S.A. §601(14)(C).

4. Employment involving activities such as raising, training or selling horses falls within the confines of "farm employment." *See, e.g., Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984) (holding that the duties of a horse trainer fall within the statutory exception); *Wolf v. Foxhall Village Stables*, 63 A.D. 753, 404 N.Y.S.2d 721 (1978) (holding that the business of raising and selling horses constituted a farm within the meaning of the workers' compensation law).

5. In the current claim, the undisputed facts establish that Defendants were not engaged in operating a farm on any of the injury dates alleged by Claimant. Although this may have been what the parties contemplated when they executed the June 9, 2004 employment agreement, this dream never came to fruition. No horses were ever brought to the property and no work towards making the Moretown property a working horse farm was being performed after October 30, 2004. Under these circumstances, it would be stretching reality to conclude that Defendants were actively engaged in any agricultural or farm pursuits such that Claimant could be deemed to be their farm employee on the dates when she was injured.

6. Even assuming that Defendants were operating a farm, furthermore, and that Claimant was their farm employee, it is undisputed that their aggregate payroll for calendar years 2004 and/or 2005 was less than the $10,000 minimum established by the statute in order for mandatory workers' compensation coverage to be imposed. It also is undisputed that Defendants had canceled their workers' compensation insurance coverage prior to the dates of Claimant's alleged injuries, and had not otherwise notified the Commissioner that they desired to be included voluntarily within the provisions of the Act.

7. The undisputed facts establish, therefore, that Defendants were not operating a farm on the dates of injury Claimant alleged. Even if they were, this would not avail Claimant in any way, as the application of 21 V.S.A. §601(14)(C) would exclude her from workers' compensation coverage in any event.

8. Turning to the next possible exclusion, the "private dwelling" exclusion provides that the term "worker" or "employee" does not include:

> (E) Any individual engaged in any type of service in or about a private dwelling unless the employer notifies the commissioner that the employer wishes to be included within the provisions of this chapter; the existence of a contract of insurance shall be considered sufficient notice.

21 V.S.A. §601(14)(E).

9. It is undisputed that the Moretown property was Defendants' primary residence. If they were not operating a farm there on the dates Claimant was injured, such that she was not engaged in farm employment, then her activities on those dates – shoveling snow from Defendants' driveway – certainly fall under the category of "service in or about a private dwelling." Were Defendants to have in effect a workers' compensation insurance policy on the relevant dates of injury, therefore, Claimant might be covered.

10. The undisputed facts establish that Defendants did not have a contract of insurance for workers' compensation coverage in effect as of the dates Claimant was injured. Thus, the application of 21 V.S.A. §601(14)(E) excludes Claimant from workers' compensation coverage.

11. In sum, therefore, the undisputed facts establish that Claimant was excluded from workers' compensation coverage under either 21 V.S.A. §601(14)(C) or under 21 V.S.A. §601(14)(E). Either Claimant was engaged in farm employment at the Moretown property on the dates she was injured, or she was engaged in service in or about Defendants' private dwelling there. In either case, Defendants were not required to maintain workers' compensation coverage for her activities, and the undisputed facts establish that they opted not to do so voluntarily.

12. Defendants were not engaged in any other business at the Moretown property and therefore there is no other basis for imposing any obligation on them to maintain workers' compensation coverage.[1]

13. No genuine issues of material fact exist as to Claimant's exclusion from workers' compensation coverage relating to her activities at the Moretown property on the dates of injury she alleged. Defendants are entitled to summary judgment as a matter of law.

ORDER:

Defendant's motion for summary judgment is **GRANTED**. Claimant's claim for workers' compensation benefits arising out of her alleged injuries on November 25, 2004, December 25, 2004, January 2, 2005 and/or January 5, 2005 is **DISMISSED**.

Dated at Montpelier, Vermont this 12th day of September 2007.

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Patricia Moulton Powden
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.

[1] Under these circumstances, there is no need to reach the possible application of the "casual work" exclusion, 21 V.S.A. §601(14)(A).