STATE OF VERMONT
DEPARTMENT OF LABOR

Ronald Dwinell	Opinion No. 40-09WC
	By: Phyllis Phillips, Esq. Hearing Officer
v.	
Merchants Bancshares, Inc.	For: Patricia Moulton Powden Commissioner
	State File No. AA-55159

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

APPEARANCES:

David Lynch, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE:

The parties assert cross motions for summary judgment on the issue whether Defendant was Claimant's statutory employer at the time of his September 9, 2007 injury.

FINDINGS OF FACT:

With one exception, discussed below, the relevant facts are not disputed. Claimant and his wife were the principals of Dwinell Enterprises, LLC ("the LLC"). In November 2002 the LLC purchased the Fountain of Youth fitness center in White River Junction. Claimant and his wife operated the business, which at one time employed as many as forty people.

In 2004 Claimant approached Ed Childs, Defendant's commercial loan officer, about refinancing the LLC's property so that the indoor pool could be improved. Mr. Childs assisted the LLC in securing two loans to replace its original purchase financing – one for $425,000 issued directly from Defendant, and the second for $180,000 issued from Defendant and guaranteed by the Small Business Administration. Both loans were secured by mortgages on the LLC's real property and equipment, and both were personally guaranteed by Claimant and his wife.

In early 2007 the LLC defaulted on both loans. In prior years Defendant had maintained a separate "work-out department" to negotiate in such situations with defaulting borrowers, liquidate collateral and manage properties while they were being sold. That department had been phased out as of the time of the LLC's default. Typically those responsibilities now fall to the loan officer who originated the loan.

It was in that context that Mr. Childs met with Claimant and his wife after the LLC became delinquent on its loan to discuss how best to proceed. As a result of this meeting, Defendant, the LLC, Claimant and his wife negotiated a Plan and Agreement of Resolution ("the Agreement"), which all parties executed on July 2, 2007. Among the terms of the Agreement were:

- That Defendant would institute foreclosure proceedings;
- That the fitness center would be closed by June 30th or July 1st, 2007;
- That both the real property and equipment securing the mortgages would be liquidated, either by private sale or through auction; and
- That the LLC, Claimant and his wife would cooperate "to their fullest extent" with Defendant in order to expedite the process of liquidating the LLC's assets and maximize any recovery from the sale of the collateral.

In addition, the Agreement provided as follows:

> Personal Guarantees. So long as the LLC and Ronald and Lynn Dwinell cooperate in connection with the Plan set forth herein and with all other reasonable requests of the Lender in connection therewith, then, subject to SBA approval, Lender shall not seek to enforce either of the Commercial Guarantees given by Ronald Dwinell or Lynn Dwinell.

After executing the Agreement, at Mr. Childs' request Claimant returned to the property one time to check on a possible water leak, and two times to mow the lawn. Claimant understood that these actions, which he characterized as "maintaining the building" and "keeping the property presentable for sale," constituted part of his agreement to cooperate with Defendant in the liquidation process so that he and his wife would be released from their personal guarantees on the defaulted loans.

Also at Mr. Childs' request, in August 2007 Claimant returned to the property to meet with Toby Hirchak, the auctioneer Mr. Childs had hired to appraise and auction off the fitness center's equipment. Here the parties dispute the precise nature of Mr. Childs' instructions. According to Mr. Childs, the only instruction he gave Claimant was to let Mr. Hirchak into the building, because "he [Claimant] basically controlled the keys." Claimant's understanding, however, was that in the context of his agreement to cooperate in the liquidation process, Mr. Childs had directed him to follow the auctioneer's instructions, to "move what needed to be moved and [do] what needed to be done."

Together, Claimant and Mr. Hirchak walked through the fitness center and designated the cardio room as the best place for the upcoming equipment auction. Subsequently, Claimant returned to the fitness center and began moving equipment. On September 9, 2007 he was removing a mirror from a wall in order to bring it to the cardio room. As he did so, the mirror broke and fell onto his left forearm, severing several tendons.

Immediately after the accident, Claimant ran next door to call an ambulance. He was hospitalized overnight and underwent physical therapy for many months thereafter. On January 30, 2008 he began a new job as general manager for a local hotel.

Claimant informed Mr. Childs of his injury within a week after it occurred. By letter dated November 3, 2008 his attorney notified Defendant of his claim for workers' compensation benefits arising out of the incident on the grounds that it occurred in the course and scope of his statutory employment.

DISCUSSION:

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. *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. *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).

At issue in this claim is whether Defendant bears responsibility for Claimant's injuries because it qualifies as his "statutory employer" under 21 V.S.A. §601(3). That statute defines an "employer" to include "the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed." With this definition, Vermont's workers' compensation law creates a statutory employer/employee relationship where no such relationship existed at common law. *In re Chatham Woods Holdings, LLC*, 2008 VT 70 ¶10 (May 16, 2008), citing *King v. Snide*, 144 Vt. 395 (1984).

The Vermont Supreme Court has embraced the "nature of the business" test in determining whether a statutory employment relationship exists. This test asks whether the work performed by the putative employee "is a part of, or process in, the trade, business or occupation" of the putative employer. *In re Chatham Woods Holdings, LLC, supra* at ¶11. The critical inquiry, therefore, is "whether the type of work being carried out by the independent contractor is the type of work that could have been carried out by the owner's employees as part of the regular course of the business." *Frazier v. Preferred Operators*, 177 Vt. 571, 573 (2004). The test is to be applied broadly, in keeping with the purposes of Vermont's workers' compensation laws. *In re Chatham Woods*, *supra* at ¶8. At the same time, due regard must be given to the facts of each particular situation. *King, supra* at 401.

Here, Claimant argues that after the LLC defaulted on its loans Defendant employed him to assist in the process of maintaining its collateral and making it presentable for sale. Claimant asserts that rendering such assistance is an integral part of Defendant's business, which includes not just making loans but also at times liquidating collateral to collect on those that default. According to him, therefore, the duties he performed – checking for a water leak in the building, mowing the lawn and moving fitness equipment to prepare it for auction – were jobs that Defendant's own employees could have carried out in the regular course of its business.

Claimant's argument misses the mark. It is true that Defendant's employees are sometimes engaged in the business of overseeing the process by which collateral is liquidated. It by no means follows, however, that Defendant itself is in either the property maintenance business, the lawn mowing business or the auction business. Overseeing the liquidation process may require contracting with those who perform these functions, and probably a multitude of others as well, in the regular course of *their* businesses. It does not make them all statutory employees.

I find, therefore, that Defendant contracted with Claimant to perform certain services in the context of preparing its collateral for liquidation. As consideration for the contract, Defendant agreed to release Claimant and his wife from their personal loan guarantees. No facts have been presented which would turn this contractual arrangement into a statutory employment relationship.

ORDER:

Claimant's Motion for Summary Judgment is hereby **DENIED**. Defendant's Motion for Summary Judgment is hereby **GRANTED**. Claimant's claim for workers' compensation benefits causally related to his September 9, 2007 injury is **DISMISSED**.

DATED at Montpelier, Vermont this 14th day of October 2009.

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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.