

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
MARK & DIANE VANDERLOO,) CASE NO. BK01-83389
) Chapter 7
DEBTOR(S))

MEMORANDUM

Hearing was held on April 18, 2002. Appearances: Kathryn Derr for the debtors, Jerry Jensen for the United States Trustee, and Thomas Stalnaker for the Chapter 7 Trustee. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(B).

In this Chapter 7 case, the debtor, a real estate sales person, claimed as exempt as "wages" certain real estate commissions which were earned, but unpaid, on the date of the petition. The statutory authority for such exemption claim is Neb. Rev. Stat. § 1558.¹

¹ Wages; subject to garnishment; amount; exceptions.

(1) Except as provided in subsection (2) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment shall not exceed the lesser of the following amounts:

(a) Twenty-five percent of his or her disposable earnings for that week;

(b) The amount by which his or her disposable earnings for that week exceed thirty times the federal minimum hourly wage prescribed by 29 U.S.C. 206(a)(1) in effect at the time earnings are payable; or

(c) Fifteen percent of his or her disposable earnings for that week, if the individual is a head of a family.

(2) The restrictions of subsection (1) of this

section shall not apply in the case of:

(a) Any order of any court for the support of any persons;

(b) Any order of any court of bankruptcy under Chapter XIII of the Bankruptcy Act; or

(c) Any debt due for any state or federal tax.

(3) No court shall make, execute, or enforce any order or process in violation of this section. The exemptions allowed in this section shall be granted to any person so entitled without any further proceedings.

(4) For the purposes of this section:

(a) Earnings shall mean compensation paid or payable by an employer to an employee for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program;

(b) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld;

(c) Garnishment shall mean any legal or equitable procedure through which the earning of any individual are required to be withheld for payment of any debt; and

(d) Head of a family shall mean an individual who actually supports and maintains one or more individuals who are closely connected with him or her by blood relationship, relationship by marriage, by adoption, or by guardianship, and whose right to exercise family control and provide for the dependent individuals is based upon some moral or legal obligation.

The Chapter 7 Trustee and the United States Trustee have objected to the claim of exemption. It is their position that the debtor is an independent contractor and because the exemption applies only to compensation payable by "an employer to an employee," the debtor, as an independent contractor, without an employer, cannot claim the exemption.

Under Nebraska law, a party's status as an employee or an independent contractor is generally a question of fact. Reeder v. State, 254 Neb. 707, 578 N.W.2d 435 (1998); Kime v. Hobbs, 252 Neb. 407, 562 N.W.2d 705 (1997).

In this case, although there is a written agreement between the debtor and the real estate brokerage company for which he provides services, and, although such written agreement identifies the debtor as an independent contractor, and not as an employee, such agreement is not dispositive.

As the Nebraska Supreme Court has stated in several cases, there is no single test for determining whether one performs services for another as an employee or an independent contractor, and the following factors must be considered: (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in the 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 one employed supplies the instrumentalities, tools and the place of work for the person doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. Reeder v. State, *supra*; Omaha World-Herald v. Dernier, 253 Neb. 215, 570 N.W.2d 508 (1997); Kime v. Hobbs, *supra*; Pettit v. State, 249 Neb. 666, 554 N.W.2d 855 (1996). No single factor is conclusive and they must be weighed in determining whether an employment or independent

* * *

(emphasis added)

contractor relationship exists. Omaha World-Herald v. Dernier, supra.

Facts and Discussion

The following statement of facts and references to applicable case law taken from the brief submitted by debtor is adopted as the findings of fact:

(1) Control.

"While not in itself determinative, control is the most important factor to be considered in determining whether someone acts as an independent contractor or as an employee." Omaha World-Herald v. Dernier, 253 Ne. 2d 215, 223, 570 N.W.2d 508, 514 (1997); Kime v. Hobbs, 252 Neb. at 414, 562 N.W.2d at 711.

The evidence in this case demonstrates that RE/MAX Real Estate Group exercises considerable control over Vanderloo, not only in the manner in which the work is performed, but also over the final result of the work.

As set forth in Vanderloo's affidavits, RE/MAX Real Estate Group and his employing broker, Beth Luebbe, exert considerable control over important aspects of Vanderloo's work performance:

RE/MAX Real Estate Group provides an office for Vanderloo from which to perform his services (Vanderloo Affidavit at ¶ 13).

RE/MAX Real Estate Group must approve an assistant that Vanderloo chooses to work with. While he may choose not to work with a particular assistant, he has no ultimate authority to hire or fire assistants who work with him. (Vanderloo Affidavit at ¶ 13).

Vanderloo is prohibited from working with an employing broker other than Ms. Luebbe without Ms. Luebbe's permission. (Vanderloo Affidavit at ¶ 14).

Any commissions earned by Vanderloo are paid by RE/MAX Real Estate Group, not the seller of the property. Vanderloo may not accept a commission directly from the

seller, normally he pays a commission to another agent. (Vanderloo Affidavit at ¶ 14).

RE/MAX Real Estate Group maintains exclusive control over all paperwork associated with Vanderloo's listings and sales. RE/MAX Real Estate Group dictates the specific forms that Vanderloo must use, including when and how the forms are to be completed, who signs the forms, and who gets copies. (Vanderloo Affidavit at ¶ 16).

Vanderloo has no authority over escrow accounts, and all earnest money deposits generated from his sales must be deposited in the escrow account maintained by his employing broker. Vanderloo has not authority to withdraw money from the escrow account. (Vanderloo Affidavit at ¶ 17).

RE/MAX Real Estate Group has exclusive control over the percentage commission fees that Vanderloo may charge as listing agent, or that may be accepted by him as selling agent. (Vanderloo Affidavit at ¶ 19). RE/MAX Real Estate Group directs that Vanderloo charge a minimum 6% and maximum 7% commission on all of his listings. (Vanderloo Supplemental Affidavit at ¶ 4).

RE/MAX Real Estate Group encourages Vanderloo to use or not use certain third party contractors such as home inspectors, mortgage brokers, or title companies (Vanderloo Affidavit at ¶ 20). Vanderloo's employing broker has an affiliation and/or ownership interest in a mortgage company and title company and encourages that agents use these firms. (Vanderloo Supplemental Affidavit at ¶ 5).

RE/MAX Real Estate Group expects Vanderloo to following its sexual harassment policy. (Vanderloo Affidavit at ¶ 21).

RE/MAX Real Estate Group dictates under what circumstances Vanderloo may purchase real estate for his own investment/real estate portfolio, and may, in its sole discretion, preclude such a purchase. (Vanderloo Affidavit at ¶ 23).

RE/MAX Real Estate Group has issued comprehensive written policy and procedure manuals to Vanderloo which define

the manner in which he is to perform certain tasks, even to the extent of dictating a dress code for Vanderloo. (Vanderloo Affidavit at ¶ 23).

Vanderloo may be terminated if he does not generate sufficient sales. (Vanderloo Supplemental Affidavit at ¶ 6).

As an agent, he is expected to strictly conform to the policies and procedures established by [his] employing broker, Beth Luebbe. Any variance from these policies and procedures is strongly discouraged. (Vanderloo Affidavit at ¶ 23). (Vanderloo Supplemental Affidavit at ¶ 7).

While Vanderloo and RE/MAX Real Estate Group have a written agreement between them that identifies the relationship as that of "independent contractor," and Vanderloo admits that for federal and state income tax purposes, the parties treat Vanderloo as an independent contractor, this alone is not determinative of the nature of the relationship for other purposes. The Nebraska Supreme Court has found that where the employer exercised control over the manner and method of the work performed by the individual, there existed a common law employer/employee relationship. Keller v. Tavarone, 262 Neb. 2, 628 N.W.2d 222 (2001); Larson v. Hometown Communications, Inc., 248 Neb. 942, 540 N.W.2d 916 (1995); Hemmerling v. Happy Cab Co., 247 Neb. 919, 530 N.W.2d 916 (1995).

In Larson, a teenage newspaper carrier brought a claim for workers' compensation benefits after she was severely and permanently injured when hit by an automobile while delivering newspapers. The newspaper publisher entered into an "independent contractor agreement" with each newspaper carrier. Along with the independent contractor agreement, the publisher provided the carrier with a written policy manual instructing the carrier on his/her duties. The court found that the policy manual provided the publisher with greater control than simply the delivery of newspapers and held that there existed an employer/employee relationship despite the "independent contractor" agreement between the parties.

In Hemmerling, the court found that the employer's extensive control over the individual found in the written agreements between the parties created an employer/employee

relationship. Hemmerling operated a taxi cab for Happy Cab Co. Hemmerling leased a vehicle from the Happy Cab Co. for a renewable term. Hemmerling was required to pay all maintenance costs associated with operation of the vehicle, such as gas, oil, repairs, and other operating expenses; he retained 100% of all fares he generated. Hemmerling was not required to work a set number of hours, he was not required to work when called by Happy Cab Co., he could solicit business independently of the dispatch service, and he was free to solicit business from any number of areas. However, because Happy Cab Co. exercised considerable control over Hemmerling's use of the vehicle used in the taxi business in the written agreement between the parties, Hemmerling was found to be an employee, not an independent contractor.

In Keller, the court found that a medical doctor was an employee of the hospital he worked for where: (1) the doctor was required to make medical decisions within guidelines established by the hospital; (2) the hospital maintained the medical and clinical records of the doctor, and; (3) the doctor was not permitted to engage in the practice of medicine without the permission of the hospital and the doctor had no other employment of any nature.

Likewise, as described above, while Vanderloo may market real estate using some degree of independent decision making, RE/MAX Real Estate Group and Vanderloo's employing broker, Beth Luebbe, exert considerable control over Vanderloo, sufficient to find that there exists an employer/employee relationship for purposes of Nebraska's wage exemption statute.

(2) Distinct Business.

It is undisputed that Vanderloo is not engaged in the operation of any business other than his duties as a real estate agent for RE/MAX Real Estate Group; he has no other source of income. (Vanderloo Affidavit at ¶ 12). RE/MAX Real Estate Group is involved in the marketing of real estate. Vanderloo, and agents like him, are integral to its business. Vanderloo is employed to further the business of RE/MAX Real Estate Group, not to perform some function in which he is a specialist. This evidence weighs in favor of finding an employer/employee relationship. See e.g., Keller, 262 Neb. at 10, 628 N.W.2d at 229; Larson, 248 Neb. at 955, 540 N.W.2d at 349.

(3) Whether in Locality, Work is Ordinarily Done under Supervision of Employer, or by Specialist Without Supervision.

Nebraska law requires that all real estate sales agents work under the supervision of an employing broker. Regulations of the Nebraska Real Estate Commission, Title 229, Ch. 2, § 008; Ch. 5, § 003.22. Vanderloo may not work for more than one employing broker without the employing broker's permission. Neb. Rev. Stat. § 81-885.24(8). In this case, Vanderloo does not work for any other broker. (Vanderloo Affidavit at ¶ 12). This evidence weighs in favor of finding an employer/employee relationship. See, Keller, 262 Neb. at 9, 628 N.W.2d at 228-29.

(4) Skill Required by the Occupation.

Vanderloo must be licensed to work as a real estate sales agent. Neb. Rev. Stat. §§ 81-885.11, 81-885.12, 81-885.13. However, this alone does not prohibit the finding of an employer/employee relationship. See Keller, 262 Neb. at 8-10; 628 N.W.2d at 229-29 (medical doctor found to be engaged in employer/employee relationship with hospital).

(5) Whether Worker or Employer Supplies Instrumentalities, Tools, and Place of Work to be Performed.

RE/MAX Real Estate Group provides Vanderloo an office in which to perform his work. (Vanderloo Affidavit at ¶ 13). RE/MAX Real Estate Group dictates the specific forms that Vanderloo must use, including when and how the forms are to be completed, who signs the forms, and who gets copies. RE/MAX Real Estate Group maintains exclusive control over all paperwork involved in real estate transactions in which Vanderloo is involved. (Vanderloo Affidavit at ¶ 16). This evidence weighs in favor of an employer/employee relationship. Keller, 262 Neb. at 9, 628 N.W.2d at 228-29.

(6) Length of Time for Which Person is Engaged.

Vanderloo is employed on a continuous basis, not for a particular terminable job. This evidence weighs in favor of an employer/employee relationship. Keller, 262 Neb. at 9, 628 N.W.2d at 228-29.

(7) Method of Payment.

Vanderloo is paid a commission for each sale generated by him. (Vanderloo Affidavit at ¶ 3-5) Nebraska's wage exemption statute, Neb. Rev. Stat. § 25-1558(4)(a), defines "earnings" to include the payment of commissions:

- (a) Earnings shall mean compensation paid or payable by an employer to an employee for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

Id. (emphasis added). Furthermore, Nebraska law does not require that Vanderloo be paid weekly, bimonthly, or monthly in order to be considered an employee. "Payment of wages on a piece or quantity basis is not inconsistent with the status of an employee." Larson, 248 Neb. at 957-58; 540 N.W.2d at 350.

(8) Whether or not Work is Regular Part of Business of Employer.

RE/MAX Real Estate Group and/or Vanderloo's employing broker, Beth Luebbe, are involved in the business of marketing real estate for a fee or commission. See, e.g., Neb. Rev. Stat. § 81-885.01(2). Vanderloo identifies himself and his services to the public as a "RE/MAX" real estate agent. Vanderloo's activities are a significant part of RE/MAX Real Estate Group's business. This weighs in favor of an employer/employee relationship. Keller, 262 Neb. at 10, 628 N.W.2d at 229.

(9) Whether or not the Parties Believe They are Creating the Relation of Master and Servant.

For federal and state income tax purposes, Vanderloo and RE/MAX Real Estate Group treat their relationship as one of independent contractor. This factor, however, is not controlling, and is negated by other evidence of the relationship. See Larson, 248 Neb. at 958-59, 540 N.W.2d at 350-51. Furthermore, while state and federal income tax laws exempt RE/MAX Real Estate Group from withholding income and Social Security taxes from the earnings of Vanderloo, this does not indicate either an independent contractor or employee status. See Larson, 248 Neb. at 958-59, 540 N.W.2d at 350-51 (statutory exemption from requirement to withhold taxes from the individual does not indicate either employee or independent contractor status).

(10) Whether or not the Employer is Engaged in Business.

There is no doubt that RE/MAX Real Estate Group and/or Beth Luebbe as Vanderloo's employing broker are engaged in a business. Again, this evidence weighs in favor of an employer/employee relationship. Keller, 262 Neb. at 10, 628 N.W.2d at 229.

Under the factors established by the Nebraska Supreme Court, the evidence clearly weighs in favor of finding an employer/employee relationship between Vanderloo and RE/MAX Real Estate Group and/or Beth Luebbe. This interpretation is also consistent with the directive that courts are to construe exemption statutes liberally in favor of the debtor. Wallerstedt v. Sosne, 930 F.2d 630, 631 (8th Cir. 1991); In re Wellborne, 63 B.R. 23 (Bankr. D. Neb. 1986). As an employee, and head of family, Vanderloo is entitled to exempt 85% of his pre-petition earned but unpaid commissions under Nebraska's wage exemption statute.

Conclusion

Considering all of the above factors in light of the Nebraska Supreme Court decisions concerning how one determines whether a person is an employee or an independent contractor, I find as a fact that the debtor is an employee for purposes of the Nebraska wage exemption statute. Because of this factual finding, the other issues addressed by the debtor concerning the applicability of the Federal Consumer Credit Protection Act and the constitutionality of the Nebraska exemption statute need not be reached.

For purposes of Neb. Rev. Stat. § 25-1558, the debtor is an employee who receives compensation payable by an employer for personal services denominated as commission. The debtor's claim

of exemption is granted and the objections of the Chapter 7 Trustee and the United States Trustee are denied.

DATED: June 3, 2002

BY THE COURT:

/s/Timothy J. Mahoney

Chief Judge

Notice given by the Court to:
Kathryn Derr, Esq.
Thomas Stalnaker, Esq.
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
MARK & DIANE VANDERLOO,) CASE NO. BK01-83389
) A
DEBTOR(S))
) CH. 7
) Filing No. 6, 7, 11, 16
Plaintiff(s))
vs.) ORDER
)
)
)
Defendant(s)) DATE: June 3, 2002
HEARING DATE: April 18,
2002

Before a United States Bankruptcy Judge for the District of Nebraska regarding Objection to Debtors' Claim of Exemptions filed by the United States Trustee; Objection to Exemptions filed by Thomas Stalnaker; Resistance by the Debtor; Amended Resistance by the Debtor.

APPEARANCES

Kathryn Derr for the debtors
Jerry Jensen for the United States Trustee
Thomas Stalnaker for the Trustee
(X) Copy to Law Clerk

For purposes of Neb. Rev. Stat. § 25-1558, the debtor is an employee who receives compensation payable by an employer for personal services denominated as commission. The debtor's claim of exemption is granted and the objections of the Chapter 7 Trustee and the United States Trustee are denied.

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