STATE OF VERMONT
WINDSOR COUNTY, SS.

LONNIE R. MCLAIN, Plaintiff	:	WINDSOR SUPERIOR COURT
	:	DOCKET NO. S319-95 WrC
v.	:	
VERNE DREW, Defendant	:	

DECISION RE: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case concerns plaintiff's allegations that he sustained injury as a result of negligence by the defendant, his landlord. Defendant, an owner of the corporation that employees plaintiff, contends that this action is barred by the exclusive remedy provisions of the workers' compensation statutes, 21 V.S.A. § 601, *et seq*. Defendant has filed a motion for summary judgment.

SUMMARY JUDGMENT

Summary judgment is appropriate if there is no genuine issue as to any material fact and any party is entitled to a judgment as a matter of law. V.R.C.P. 56(c)(3). The moving party has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether or not a genuine issue of material fact exists. Price v. Leland, 149 Vt. 518 (1988).

FACTS[1]

1. Plaintiff alleges that he was injured when a stair leading to the basement of the Old Ricker House broke underneath him.

2. At the time of plaintiff's alleged injury, he was an employee of Pompy Farms Crushed Stone, Inc. (Pompy Farms).

[1]These Facts are based upon the undisputed facts submitted by defendant pursuant to V.R.C.P. 56(c)(2), which plaintiff has not disputed.

3. At the time of his alleged injury, plaintiff was living in the Old Ricker House.

4. Plaintiff was allowed to live in the Old Ricker House as part of his compensation for working at Pompy Farms.

5. At the time of plaintiff's alleged injury the Old Ricker House was owned by the defendant, Verne Drew.

6. Verne Drew is sole shareholder of Pompy Farms and is Chairman of its Board of directors.

7. Verne Drew allowed Pompy Farms to use the Old Ricker House as housing for its employees.

8. Pursuant to the agreement between Verne Drew and Pompy Farms, Pompy Farms was responsible for all repairs and maintenance of the house as well as paying all of the taxes and utility bills.

DISCUSSION

Defendant has moved for summary judgment, arguing that plaintiff's claim is barred by the exclusive remedy provision of the workers' compensation statutes, 21 V.S.A. § 622. According to defendant, plaintiff has an exclusive remedy under the statutes because he alleges injury "by accident arising out of and in the course of his employment," 21 V.S.A. § 618, under the "positional risk" doctrine. The Vermont Supreme Court approved of the positional risk doctrine in a case involving the stabbing of a migrant worker in a bunkhouse where the plaintiff resided with eight other workers, Shaw v. Dutton Berry Farm, 160 Vt. 594 (1993). The Court quoted, with approval, the following explanation by Professor Larson:

> An injury arises out of the employment if it would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured. It is even more common for the test to be approved and used in particular situations. This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when [employee] was injured by some neutral force, meaning by "neutral" neither personal to the claimant nor distinctly associated with the employment.

Shaw at 599, *quoting* 1 Larson, Workmen's Compensation Law § 6.50 (1990) (original emphasis). The

current Desk Edition contains virtually identical language. Larson's Workers' Compensation, Desk Edition § 6.50 (1997).

The instant case raises a significant issue as to whether or not "the conditions and obligations of the employment" placed plaintiff in the position where he was injured. As this court understands the undisputed facts, plaintiff received as a portion of his compensation the right to live in the Old Ricker House, but residency there was simply a form of compensation and not a function of his job responsibilities as an employee of Pompy Farms. For the applicable law, this court again refers to Professor Larson:

> When residence on the premises is merely permitted, injuries resulting from such residence have generally not been held compensable under the broad doctrines built up around employees required to reside on the premises. . . .
>
> * * *
>
> Even in the absence of a requirement in the employment contract, residence should be deemed "required" whenever there is no reasonable alternative, in view of the distance of the work from residential facilities or the lack of availability of accommodations elsewhere. . . .

Id. at § 24.40. The instant case is factually distinguishable from Shaw in that plaintiff resided in an apartment house in lieu of receipt of a portion of his wages in cash, rather than in a bunkhouse with other workers as part of the nature of the job. Defendant has not set forth any facts showing a connection between plaintiff's residency in the Old Ricker House and the nature of his work, except that it was compensation in lieu of cash. The court cannot conclude that the alleged injury arose "out of and in the course of employment" as a matter of law.

The court is also not persuaded that defendant is entitled to immunity under 21 V.S.A. § 622 because he is the sole owner of the corporation that employs plaintiff. Plaintiff alleges a breach of duty on the part of his landlord. *See* Favreau v. Miller, 156 Vt. 222 (1991) (landlords may be held liable for exposing their tenants to unreasonable risks of harm in the leased premises). Plaintiff's allegations differ from those of Garrity v. Manning, 7 Vt.L.W. 20 (1996), where the plaintiff claimed that the defendant had breached a duty to provide safety in the workplace. The instant case lacks the

concern of Garrity that a suit "against officers, directors or shareholders would, in effect, deprive the corporation of the benefit of its bargain with an employee to provide workers' compensation benefits as the exclusive response to a workplace injury." Id. at 21.

In this situation, the residence and the workplace were at two different places. Although the corporation and defendant may have had an arrangement between them entitling Pompy Farms to offer use of the property as compensation to its employees, and allocating responsibility between them for the incidents of property ownership and management, such an arrangement does not alter the fact that Verne Drew, and not Pompy Farms, was landlord of the property in which plaintiff was a resident. The issue in this case is a landlord's duty of safety to a tenant in his home, and not an employer's duty of safety to an employee in his workplace. As stated above, on the facts presented as undisputed, the Old Ricker House was not plaintiff's workplace. Verne Drew, as sole owner of Pompy Farms, could not be sued individually for any injury plaintiff might have sustained while working at his job at Pompy Farms. Nonetheless, the fact that Verne Drew owns both Pompy Farms and the Old Ricker House does not relieve him individually of his obligations as a landlord to tenants of the Old Ricker House, which is a separate residential property and not a workplace.

CONCLUSION

For the above reasons, the court concludes that defendant is not entitled to judgment as a matter of law on the grounds claimed, and defendant's motion for summary judgment is denied.

ORDER

Defendant's Motion for Summary Judgment is DENIED.

Dated this 18th day of July, 1997.

Mary Miles Teachout

Hon. Mary Miles Teachout,
Presiding Superior Court Judge