

NO. 2006CI04304

THE STATE OF TEXAS
Plaintiff

§ IN THE DISTRICT COURT

§

§

v.

§ BEXAR COUNTY, TEXAS

§

MARIO MONTALBO and
ANNA SAENZ MONTALBO,
d/b/a DIAMOND HOMES
Defendants

§

§

§

§ 288TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff State of Texas, acting by and through Attorney General of Texas Greg Abbott, complains of MARIO MONTALBO and ANNA SAENZ MONTALBO d/b/a DIAMOND HOMES, Defendants, and for cause of action would respectfully show as follows:

AUTHORITY

1.1. This action is governed under Discovery Control Plan level II pursuant to TRCP Rule 190.3 and is brought by Attorney General Greg Abbott, through his Consumer Protection Division, in the name of the State of Texas and in the public interest under the authority granted him by §17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* (hereafter the "DTPA") upon the ground that Defendants have engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, §§17.46(a) and (b) of the DTPA.

DEFENDANTS

2.1. Defendant Mario Montalbo is an individual doing business in Texas as alleged specifically below and may be served with process at 6415 Peace Pipe Dr., San Antonio, Texas, 78238 or at 430 Scotty Drive, San Antonio, Texas, 78227.

2.2. Defendant ANNA SAENZ MONTALBO is an individual doing business in Texas as alleged specifically below and may be served with process at 6415 Peace Pipe Dr., San Antonio, Texas, 78238 or at 430 Scotty Drive, San Antonio, Texas, 78227.

2.3. Defendants MARIO MONTALBO and ANNA SAENZ MONTALBO do business under the assumed name of DIAMOND HOMES.

VENUE

3. Venue of this suit lies in Bexar County, Texas for the following reasons:

A) Under TEX. CIV. PRAC. & REM. CODE §15.001, venue is proper because all or part of the causes of action alleged herein accrued in Bexar County, Texas.

B) Under TEX. CIV. PRAC. & REM. CODE §15.036, venue is proper because the principal place of business of Defendants is in Bexar County, Texas.

C) Under the DTPA §17.47(b), venue is proper because Defendants have done business in Bexar County, Texas as follows: Defendants, who operate out of their home in Bexar County, misrepresent to consumers that they sell homes pursuant to the authority granted them under a manufactured home retailer's license issued by the Texas Department of Housing and Community Affairs - Manufactured Housing Division, when in fact they do not possess such a license. Sales to consumers in Bexar County or anywhere else in Texas are

therefore illegal and not covered either under the Texas Home Owners Recovery Trust Fund or under a surety bond properly issued to Defendants.

PUBLIC INTEREST

4. Because Plaintiff STATE OF TEXAS has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe Defendants have caused and will cause loss and damage to the State of Texas, and will also cause adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State. Therefore, the Consumer Protection Division of the office of the Attorney General of the State of Texas (hereafter "OAG") believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

5. Defendants have, at all times described below, engaged in conduct which constitutes "trade" and "commerce" as those terms are defined by §17.45(6) of the DTPA.

ACTS OF AGENTS

6. Whenever in this Petition it is alleged that Defendants did any act, it is meant that:

- A) Defendants performed or participated in the act, or
- B) Defendants' officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendants.

NOTICE BEFORE SUIT NOT GIVEN

7. Pursuant to §17.47(a) of the Consumer Protection Act, contact has been attempted but has not been made with the Defendants herein to inform them of the unlawful conduct alleged herein. The OAG has good cause to believe that the Defendants would evade service of process. This good cause is based upon the following facts:

(A) on November 7, 2005 OAG sent Defendants Statutory Directives and Civil Investigative Demands to a previous residence and to their post office box pursuant to §§17.60, 17.61 requiring them to appear in the San Antonio regional office of OAG to give their statement and to provide documents regarding certain transactions. These statutory directives and civil investigative demands were sent by certified mail which were returned unclaimed from their post office box. The statutory directives and civil investigative demands which were sent to the previous residence were returned as undeliverable because Defendants had moved and had left no forwarding address.

(B) on December 1, 2005 OAG sent Defendants Statutory Directives and Civil Investigative Demands to their residence on Scotty Dr. pursuant to §§17.60, 17.61 requiring them to appear in the San Antonio regional office of OAG to give their statement and to provide documents regarding certain transactions. This directive was sent not only by regular mail but also by certified mail. The regular mail was not returned, the certified mail was returned unclaimed, leading OAG to believe that Defendants know what this matter is about but are specifically avoiding and evading OAG in an effort to avoid refunding consumer funds which should be refunded.

(C) The affidavit of a consumer who has been harmed by these Defendants leads OAG to believe that Defendants are evading not only this consumer, but OAG as well.

NATURE OF DEFENDANTS' OPERATIONS

8.1. Defendants are engaged in the sale of manufactured homes. They place advertisements in local newspapers for manufactured homes and respond by telephone to consumers who inquire about these homes. They operate their business “Diamond Homes” from their residence.

8.2. Although Defendant Anna Saenz was licensed from December 2, 2003 to December 1, 2004, under license number RBI35444, this license has expired and the Texas Department of Housing and Community Affairs - Manufactured Home Division, has not issued a current retailers or sales person license to either of these Defendants, yet these Defendants represent to consumers that they are currently and properly licensed.

8.3. Defendants are engaged in the illegal and unlicensed sale of manufactured homes.

SPECIFIC FACTUAL ALLEGATIONS

9.1. On August 26, 2005, consumer David Felder gave checks totaling \$14,695 to Defendants for the purchase of a manufactured home. Defendants had represented to this consumer that they would sell him this home and provide him with the title, however, after Defendants received the checks and cashed them, this consumer has not received the home nor has he been able to contact Defendants for the return of his money. His affidavit is Attachment A and is incorporated herein as if fully set out.

FALSE, MISLEADING OR DECEPTIVE ACTS

10. Defendants, as alleged above and detailed below, have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in §§17.46(a) and (b) of the DTPA. Such acts include:

(A) Selling manufactured homes to consumers without providing the consumer with good and marketable title with all back rent and taxes paid and free of all liens and encumbrances, in violation of TEX. OCC. CODE §§1201.451, 1201.603, in addition to the allegations regarding the consumer in paragraph 9.1;

(B) Selling manufactured homes to consumers without providing the consumer with a written 60 day warranty of habitability, in violation of TEX. OCC. CODE §§1201.455, 1201.603, in addition to the allegations regarding the consumer in paragraph 9.1;

(C) Selling manufactured homes to consumers without providing the consumer with a notice regarding formaldehyde, in violation of TEX. OCC. CODE §§1201.153, 1201.603, in addition to the allegations regarding the consumer in paragraph 9.1;

(D) Selling manufactured homes to consumers without providing the consumer with the disclosures required, including a notice of a right of rescission in violation of TEX. OCC. CODE §§1201.162, 1201.1521, 1201.603, in addition to the allegations regarding the consumer in paragraph 9.1;

(E) Selling manufactured homes to consumers from unlicensed, unbonded locations, in violation of TEX. OCC. CODE §§1201.107,¹ 1201.603, in addition to the allegations regarding the consumers in paragraph 9.1;

(F) Deceptively selling manufactured homes to consumers without a license duly issued by MHD, in violation of TEX. OCC. CODE §§1201.101(b)(c)(f)(g), 1201.603, in addition to the allegations regarding the consumer in paragraph 9.1;

(G) Accepting purchase money for a manufactured home, failing to deliver the manufactured home to the purchaser, and failing to return the purchase money or deposit, in violation of TEX. OCC. CODE §§1201.151, 1201.603 in addition to the allegations regarding the consumer in paragraph 9.1.

INJURY TO CONSUMERS

11. Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award of damages.

PRAYER

12. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated and will continue to violate the law as alleged in this Petition.

¹The Texas Manufactured Housing Standards Act was amended by HB 2438, effective September 1, 2005, amending this section of Chapter 1201. This violation of the TMHSA is cited to the statute then in effect at the time of the violation.

Unless enjoined by this Honorable Court, Defendants will continue to violate the laws of the State of Texas and cause loss and damage to the State of Texas and to the general public.

13. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, their officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

A) Selling manufactured homes to consumers without providing the consumer with good and marketable title with all back rent and taxes paid and free of all liens and encumbrances, in violation of TEX. OCC. CODE §1201.451.

B) Selling manufactured homes to consumers without providing the consumer with a written 60 day warranty of habitability, in violation of TEX. OCC. CODE §1201.455.

C) Selling manufactured homes to consumers without providing the consumer with a notice regarding formaldehyde, in violation of TEX. OCC. CODE §1201.153.

D) Selling manufactured homes to consumers without providing the consumer with the disclosures required, including a notice of a right of rescision, in violation of TEX. OCC. CODE §1201.162 and 1201.1521.

(E) Selling manufactured homes to consumers without contractually providing that a bond identified to a license and on file with the

MHD applies to a sale being made to a consumer, in violation of TEX. OCC. CODE §§1201.107;²

F) Using, allowing, or causing salespersons or employees who do not possess a license duly issued by MHD, to sell or install manufactured homes;

G) Selling manufactured homes to anyone without a license duly issued by MHD;

H) Accepting deposits or purchase money for the purchase of a home, then failing to provide the home or refund the deposit or purchase money;

I) Promising appliances, benefits, or attachments to induce the sale of a home, then failing to provide the appliances, benefits, or attachments upon tender or delivery of the purchased home; or

J) Lending, renting, leasing, or allowing another person to use for any reason or for any consideration, a license issued by MHD which is not in the name of the person to whom the license was issued.

14. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:

A) Adjudge against each Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of \$20,000 per violation of the DTPA and an additional amount up to \$250,000 for calculating to acquire or deprive money or other property from a consumer who was 65 years of age or older, pursuant to TEX. BUS. COMM. CODE §17.47(c);

²Prior to September 1, 2005 this statute prohibited all sales from unbonded, unlicensed locations; pursuant to the amendment, a sales contract must identify the license and bond as applying to a specific sale from a specific location if it is not from a bonded location.

B) Order Defendants, jointly and severally, to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses.

C) Order Defendants, jointly and severally, to pay Plaintiff STATE OF TEXAS attorney fees and costs of court pursuant to the TEX. GOVT. CODE, §402.006(c).

D) Order Defendants, jointly and severally, to pay pre-judgment interest on all awards of restitution, damages or civil penalties, as provided by law.

E) Grant all other relief to which Plaintiff STATE OF TEXAS may show itself entitled.

Respectfully submitted,

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First Assistant Attorney General

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PAUL CARMONA
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