

No. D-1-CV-09-002004

STATE OF TEXAS,

Plaintiff

v.

JOSE FERNANDO HERNANDEZ,
FERN HERNANDEZ REALTY INC., AND
ODESSA S. HERNANDEZ,
Defendants.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

250th JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW THE STATE OF TEXAS, Plaintiff in the above-entitled and numbered cause, acting by and through the Attorney General of Texas, GREG ABBOTT, and files this original petition and application for temporary and permanent injunctions, complaining of JOSE FERNANDO HERNANDEZ, FERN HERNANDEZ REALTY INC. and ODESSA S. HERNANDEZ, hereinafter referred to as Defendants, and for cause of action would respectfully show:

DISCOVERY CONTROL PLAN

1.1 The discovery in this case is intended to be conducted under Level 2 pursuant to Texas Rules of Civil Procedure 190.2(b)(3) and 190.3.

NATURE OF THIS SUIT

2.1 The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the

name of the State of Texas through his Consumer Protection and Public Health Division against Defendants for violations of the Texas Deceptive Trade Practices - Consumer Protection Act, Texas Business and Commerce Code, sections 17.41-.904 (hereinafter "DTPA") and Texas Property Code, sections 5.061-.70. Section 17.47 of the DTPA grants authority to the Attorney General to seek a restraining order, injunctive relief and civil penalties for violations of its provisions.

DEFENDANTS

3.1 Defendant Jose Fernando ("Fern") Hernandez is a licensed real estate broker engaging in real estate transactions in Travis County. **Defendant Fern Hernandez may be served with service of process at his business address of 1001 S. Mays, Round Rock, Texas 78664.**

3.2 Defendant Odessa S. Hernandez is an individual residing in Williamson County, Texas and engaging in real estate transactions in Travis County. She is also the spouse of Defendant Fern Hernandez.¹ **Defendant Odessa Hernandez may be served with service of process at her home address, 104 Lauren Lane, Georgetown, Texas.**

3.3 Fern Hernandez Realty Incorporated is a corporation doing business in the State of Texas. It sometimes does business as "Su Casa el Sueno Americano."² It may be served with service of process by serving its registered agent, **Jose Fernando Hernandez, at his business address of 1001 S. Mays, Round Rock, Texas 78664.**

¹ Defendants Jose Fernando Hernandez and Odessa S. Hernandez filed a Chapter 7 Bankruptcy proceeding on July 30, 2009. However, this does not stay this proceeding as explained in *In re Gandy and In re Diaz*, 327 B.R. 796, 802 (Bkrpty Ct., S.D. Houston 2005) ("where a governmental unit is suing a debtor to prevent or stop violation of fraud,...consumer protection...laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." (Citation omitted)).

²"Your house the American Dream"

AUTHORITY

4.1 This Court has jurisdiction over this action pursuant to section 17.47(b) of the DTPA.

VENUE

5.1 The venue of this suit lies in Travis County, Texas pursuant to section 17.47(b) of the DTPA because Defendants have been doing business in the county of suit.

PUBLIC INTEREST

6.1 Plaintiff has reason to believe that Defendants are engaging in, have engaged in, or are about to engage in, the unlawful acts or practices set forth below, that Defendants adversely affect the lawful conduct of trade and commerce, thereby directly or indirectly affecting the people of this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

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

ACTS OF AGENTS

8.1 Whenever in this petition it is alleged that a Defendant did any act, it is meant that such Defendant performed or participated in the act, or that the officers, agents or employees of such Defendant performed or participated in the act on behalf of and under the authority of such Defendant.

NOTICE BEFORE SUIT

9.1 The Consumer Protection and Public Health Division contacted Defendants at least seven

days before suit was filed to inform them in general of their unlawful actions.

NATURE OF DEFENDANTS' OPERATIONS

10.1 Defendants are engaged in selling and/or leasing property located in Central Texas.

Defendants inform Spanish-speaking consumers that they can help them obtain a home by having investors buy the house, with the consumers making monthly payments to the investors for a year, after which the investors will transfer the house to the consumers' names. However, there are no outside investors. Defendants purchase the houses themselves, and give the consumers a lease with option to purchase, which is written in English. The consumers pay a sizeable down payment to Defendants. After the year is up, rather than put the house in the consumers' names, Defendants inform the consumers that they have a lease with option to purchase and the down payment was only a payment for the option.

SPECIFIC FACTUAL ALLEGATIONS

11.1 Fern Hernandez is a real estate broker, and president of the corporation, Fern Hernandez Realty Incorporated, doing business as "Su Casa el Sueno Americano," which means "Your House the American Dream." Odessa S. Hernandez is his wife and she, with her husband, invests in real property in Travis and Williamson Counties.

11.2 During the period of 2005 to 2007, CenTex Inc. was offering real estate agents a nine percent (9 %) commission for sales of CenTex homes in Central Texas. It had several developments being built in Travis and Williamson Counties. Fern Hernandez or one of his agents took his Spanish-speaking clients to those developments when they came to him seeking to buy a house.

11.3 After the consumers found a home they wanted or a model home similar to what they wanted built, Mr. Hernandez would instruct them to pay CenTex \$500.00 as earnest money to secure

the house or to begin the building process.

11.4 If the consumers needed financing, Mr. Hernandez referred them to Cima Mortgage, a mortgage brokerage firm owned by his sister. Many of the consumers did not qualify for traditional financing. Mr. Hernandez offered these consumers alternate financing, informing them he had a group of investors that would buy the house for the consumers, the consumers would pay the investors a monthly sum which included the mortgage payment plus an extra fee for a year, after which the investors would put the house in the consumers' names. Mr. Hernandez told some of the consumers that the investors would give them a contract memorializing this agreement.

11.5 If the consumers agreed to the alternate financing, Mr. Hernandez would send them back to the CenTex house they had chosen. Consumers could request that CenTex customize the house being built. For example, one consumer requested a special brick exterior and paid an additional sum for that customization. Once a house was completed, the consumers did a final walk-through with a CenTex salesperson, who would also provide them with the information that CenTex normally provided new homebuyers.

11.6 Mr. Hernandez would then close on the house, with either he or his wife acting as the official buyer, while the consumers provided the down payment. Mr. Hernandez would also instruct CenTex to apply the \$500.00 earnest money paid by the consumer to the sales price. Mr. Hernandez would then receive his nine percent real estate commission. Cima Mortgage would obtain the financing for the Hernandez' purchase and also received a fee from the sale. The consumers would move in, and make monthly payments to the Hernandezes on the home. Despite promises to the contrary, Mr. Hernandez would not provide them with a contract for the purchase until well after the consumers had moved into the house. One couple persisted, and received from Mr. Hernandez a

contract entitled "Lease with Option to Purchase." The consumers refused to sign the contract and took it to a friend who could read and understand English. When she explained that the contract was a lease and not a contract showing the purchase of the house, the consumers became upset and demanded a contract for purchase. Mr. Hernandez refused, stating that the down payment they had given him was for the option to purchase at a certain price. Mr. Hernandez informed the consumers that they still needed to obtain financing from a third party to have the home placed in their names. Cima Mortgage then informed the consumers they had to pay another \$7,500.00 to have the deed put in their name. This particular couple ended up moving from the house. Other consumers, however, did sign the documents, thinking they were contracts for purchase. The documents were explained to them by Mr. Hernandez or one of his employees.

11.7 In 2008, Defendants Fern and Odessa Hernandez owned at least fourteen properties, excluding their homestead, in the Central Texas area. At least six of those properties were "leased" as set out in this Petition. The Hernandezes sold two other properties as "owner-financed." The Hernandezes still owed the underlying non-assumable mortgages on these two properties.

11.8 At all times that Defendant Jose Fernando Hernandez was interacting with consumers he was acting in his capacity as a real estate broker and/or the consumers believed that he was acting as their real estate broker.

VIOLATIONS

12.1 Defendants, as alleged above, have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in sections 17.46(a) and (b) of the DTPA as follows:

A. By representing that the consumers were purchasing the home, when in fact,

Defendants were offering a lease with option to buy, Defendants represented that their goods and services had characteristics, uses or benefits which they did not have, in violation of section 17.46(b)(5) of the DTPA.

B. By representing that investors would transfer title of the property to the consumers a year after the original purchase, Defendants represented that an agreement conferred or involved rights, remedies or obligations which it did not have or involve, or which are prohibited by law, in violation of section 17.46(b)(12) of the DTPA.

C. By failing to disclose that consumers were leasing the home with the option to buy, when such failure to disclose was intended to induce the consumers into paying the closing costs, deposit, and appraisal fee for Defendants, a transaction into which the consumers would not have entered had the information been disclosed, Defendants are in violation of section 17.46(b)(24) of the DTPA.

D. By failing to disclose that the owner-financed homes the consumers were purchasing were held by Defendants under non-assumable mortgages with due-on-sale clauses which could trigger an immediate foreclosure, when such failure to disclose was intended to induce the consumers into purchasing the house, a transaction into which the consumers would not have entered had the information been disclosed, Defendants are in violation of section 17.46(b)(24) of the DTPA.

E. By failing to provide disclosures in Spanish when all negotiations have been conducted in Spanish and by failing to provide a legible copy of any document that describes an encumbrance or other claim, including a restrictive covenant or

easement that affects title to the property, Defendants are in violation of Texas Property Code section 5.069 and section 17.46 of the DTPA.

E. By failing to provide disclosures on tax payments and insurance coverage, Defendants are in violation of Texas Property Code section 5.070 and section 17.46 of the DTPA.

12.2 Defendants, as alleged above, acted knowingly and intentionally in engaging in these DTPA violations.

12.3 Defendants, as alleged above, have committed actual fraud on consumers by making a material misrepresentation to the consumers, which was false and the Defendants either knew it was false when they made the representation or they made the representation without knowing whether it was true. Defendants intended for the consumers to act upon the misrepresentation and consumers relied upon the misrepresentation and suffered damages as a result.

INJURY TO CONSUMERS

13.1 Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated the law as alleged in this petition. Unless restrained by this Honorable Court, Defendants will continue to violate the laws of the State of Texas and cause damage to the general public.

PRAYER

14.1 WHEREFORE, PREMISES CONSIDERED, 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 and their agents, servants, employees, and representatives

from making the following representations and engaging in the following practices in the pursuit and conduct of trade or commerce within the State of Texas:

- A. Representing, directly or by implication, that Defendants or their investors are selling the property to consumers when Defendants are offering the property under a lease with an option to purchase.
- B. Representing, directly or by implication, that Defendants or their investors will place the property in the consumers' names after the consumers have paid a down payment and made monthly payments for a year when Defendants are offering the property under a lease with an option to purchase.
- C. Failing to disclose to consumers that they will need to get third party financing to purchase and that the fees paid during the initial purchase, such as appraisal, deposit, and closing costs, would be considered by Defendants as payment for the option to purchase and will need to be paid by consumers again when they financed the purchase through a third party.
- D. Failing to provide in the transfer of real property through a lease with option to buy:
 - i. A legible copy of any document that describes an encumbrance or other claim, including a restrictive covenant or easement that affects title to the property.
 - ii. A tax certificate from the collector for each taxing unit that collects taxes due on the property as provided by Section 31.08, Tax Code.
 - iii. A legible copy of any insurance policy, binder, or other evidence relating to the property that indicates (a) the name of the insurer and the insured; (b) a description of the property insured; and (c) the amount for which the property is insured.
 - iv. The disclosures and contracts for deed in Spanish when the sale negotiations have been conducted in Spanish.

- E. Failing to disclose that property being sold under owner-financing is subject to a non-assumable mortgage with a due-on-sale clause.
- F. Transferring, concealing, destroying, or removing from the jurisdiction of this Court:
 - i. Any books, records, documents, invoices or other written materials relating to Defendants' business currently or hereafter in Defendants' possession, custody, or control except in response to further orders or subpoenas in this cause
 - ii. Any money, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies of insurance, trust agreements, or other property, real, personal, or mixed, wherever situated, belonging to or owned by, in the possession of, or claimed by said Defendants, save and except for the expenditure of funds reasonably necessary for the payment of taxes, attorneys' fees, and, in the case of the individual Defendants sued, their reasonable living expenses; provided that none of the foregoing expenditures shall be made without notice to Plaintiff and the approval of this Court.

14.2 Plaintiff further requests that Plaintiff be granted leave to take telephonic, video, written, and other depositions prior to any scheduled temporary injunction hearing upon reasonable shortened notice to Defendants.

14.3 In addition, Plaintiff respectfully requests that this Court will:

- A. Adjudge against Defendants' civil penalties in favor of Plaintiff of up to \$20,000.00 per violation of the DTPA;
- B. Order Defendants 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. Find that Defendants' actions constitute actual fraud on the consumers and/or were committed knowingly and intentionally;

- D. Order Defendant to pay all costs of Court, costs of investigation, and reasonable attorney's fees pursuant to Texas Government Code section 402.006(c);
- E. Adjudge against Defendants prejudgment and postjudgment interest at the highest lawful rate; and
- F. Adjudge that all fines, penalties or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to section 523(a)(7) of Title 11 of the United States Code.

14.4 Finally, Plaintiff respectfully requests that this Court grant all other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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