

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 14th day of
February, 2008.

Director of the Manufactured Housing and)
Modular Units Program of the Missouri)
Public Service Commission,)
)
Complainant,)
)
v.)
)
Amega Sales, Inc., d/b/a)
Quality Preowned Homes,)
Columbia Discount Homes,)
Mark Twain Mobile Home Sales,)
Chateau Homes, and)
Amega Sales, Inc.,)
)
Respondent.)

Case No. MC-2008-0071

ORDER REGARDING MOTIONS TO DISMISS

Issue Date: February 14, 2008

Effective Date: February 14, 2008

On September 7, 2007, the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission filed a complaint against Amega Sales, Inc., d/b/a Quality Preowned Homes, Columbia Discount Homes, Mark Twain Mobile Home Sales, Chateau Homes, and Amega Sales, Inc. Amega currently holds a separate Certificate of Dealer Registration under each of the five names under which it is doing business.

Staff's complaint alleges seven counts, involving three manufactured homes sold by Amega through one of the entities by which it does business. Counts I and II concern a

manufactured home sold to a customer named Nelson, which the Director alleges was damaged in transit or at Amega's sales lot. Because of the damage, the manufactured home did not comply with the applicable HUD Code, but the Director alleges Amega sold the home to its customer as a new home without disclosing the damage or the failure of the home to comply with Code. Count I requests authority to seek monetary penalties against Amega, while Count II asks the Commission to revoke all the dealer registrations under which Amega does business.

Counts III and IV concern a manufactured home sold to a customer named Whitford, and Counts V and VI concern a manufactured home sold to a customer named Gilmore. Again, the Director alleges Amega sold damaged homes without disclosing the damage or the failure of the home to comply with Code. Counts III and V request authority to seek monetary penalties against Amega and Counts IV and VI ask the Commission to revoke Amega's dealer registrations.

Count VII concerns the manufactured home sold to Gilmore and alleges Amega attempted to deliver the home to the customer even after the Director's inspector "red tagged" the home as being in violation of Code. The complaint alleges this attempt to sell a "red tagged" home violates the terms of a stipulation and agreement approved by this Commission to resolve an earlier complaint by the Director against Amega and its owner, Greg DeLine. The Director alleges that stipulation and agreement requires Amega to pay a \$10,000 civil penalty if it attempts to sell a "red tagged" home and asks for authority to seek such a penalty.

On January 18, 2008, Amega filed three separate motions asking the Commission to dismiss various counts of the Director's complaint. On January 28, the Director filed a

timely response to each of Amega's motions. Amega replied on February 4. Although Amega filed its motions separately, they are interrelated and the Commission will take them up in this single order.

The Motion to Dismiss Counts II, IV, and VI

Amega's first motion asks the Commission to dismiss Counts II, IV, and VI of the Director's complaint. The counts Amega challenges in this motion are those that ask the Commission to revoke Amega's dealer registrations. The Director alleges those registrations should be revoked because Amega's misrepresentations to its customers, its failure to disclose the true condition of the manufactured home, and its concealment of material facts about the condition of the home, violate the provisions of Missouri's Merchandising Practices statute, specifically, Section 407.020, RSMo (Supp. 2007). In addition, the Director alleges the sale of a manufactured home that did not comply with code is a violation of Section 700.015.1, RSMo (Supp. 2007), which is made a violation of Section 407.020 by Section 700.115.1, RSMo 2000.

Amega challenges the Director's legal authority to bring its complaint on several grounds, some general, and some specific to these counts. First, as a general matter, Amega argues the Director lacks statutory or other authority to file a complaint before the Commission. Amega is incorrect; the Director's authority is based on a series of statutory and regulatory provisions.

Section 700.040.4, RSMo 2000 gives the Commission authority to "appoint such employees within its department as it may deem necessary for the administration of the provisions of sections 700.010 to 700.115." Commission Rule 4 CSR 240-120.031 delegates the Commission's power and responsibility under Chapter 700, RSMo to the

Director of the Manufactured Housing and Modular Units Program of the Public Service Commission. Section 700.100.2, RSMo (Supp. 2007) allows the Commission to consider a complaint filed with it to revoke or suspend a dealer's registration. Finally, Section 386.390, RSMo 2000 allows the Commission to hear a complaint brought on its own motion. Since the Director is acting under a delegation of power and responsibility from the Commission, his authority to bring a complaint is the same as the authority of the Commission to bring a complaint on its own motion.

As a second general argument, Amega contends the Director is part of the Commission, meaning the complaining party and the trier of fact are essentially the same entity. It argues that circumstance violates the substantive and procedural due process clauses of the United States Constitution and the Missouri Constitution, the equal protection clauses of the Missouri Constitution and the United States Constitution, and the Doctrine of Separation of Powers found in the United States Constitution and the Missouri Constitution.

This Commission, of course, has no authority to declare any statute unconstitutional, so it cannot rule on Amega's constitutional arguments. The Commission notes, however, that when ruling on this question, the United States Supreme Court found this administrative arrangement to be constitutional.¹

In addition to its general arguments, Amega raises arguments specific to these counts and the statutes under which the Director asks the Commission to act. Amega points out that the Director's complaint asks the Commission to revoke Amega's registrations under authority granted to the Commission in Section 700.100.3, RSMo. That

¹ *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975).

statute specifies eleven actions that would constitute sufficient grounds for the revocation of a dealer's registration.² The Director's complaint asks the Commission to revoke Amega's registrations on two of those grounds.

First, the Director contends Amega has engaged in conduct that violates the provisions of Section 407.020, which is a section of Missouri's Merchandising Practices statute that defines unlawful merchandising practices. Second, the Director contends that Amega has violated Section 700.015.1, RSMo, which forbids the sale of a manufactured home that does not comply with Code.³

Amega attacks the second ground by pointing out that Section 700.100.3 does not specifically list the violation of Section 700.015 as a ground for the revocation of a registration, although it does specifically list the violation of other sections of Chapter 700

² That section of the statutes states as follows:

3. The following specifications shall constitute grounds for the suspension, revocation or placing on probation of a manufacturer's or dealers' registration:

- (1) If required, failure to comply with the provisions of section 301.280, RSMo;
- (2) Failing to be in compliance with the provisions of section 700.090;
- (3) If a corporation, failing to file all franchise or sales tax forms required by Missouri law;
- (4) Engaging in any conduct which constitutes a violation of the provisions of section 407.020, RSMo;
- (5) Failing to comply with the provisions of Sections 2301-2312 of Title 15 of the United States Code (Magnuson-Moss Warranty Act);
- (6) As a dealer, failing to arrange for the proper initial setup of any new manufactured home or modular unit sold from or in the state of Missouri, unless the dealer receives a written waiver of that service from the purchaser or his or her authorized agent;
- (7) Requiring any person to purchase any type of insurance from that manufacturer or dealer as a condition to his being sold any manufactured home or modular unit;
- (8) Requiring any person to arrange financing or utilize the services of any particular financing service as a condition to his being sold any manufactured home or modular unit; provided, however, the registered manufacturer or dealer may reserve the right to establish reasonable conditions for the approval of any financing source;
- (9) Engaging in conduct in violation of section 700.045;
- (10) Failing to comply with the provisions of section 301.210, RSMo;
- (11) Failing to pay all necessary fees and assessments authorized pursuant to sections 700.010 to 700.115.

³ That section of the statute states as follows:

No person shall rent, lease, sell or offer for sale any new manufactured home manufactured after January 1, 1974, unless such manufactured home complies with the code and bears the proper seal.

as grounds for revocation. Staff attempts to get around the statutes' omission of Section 700.015 by citing Section 700.115.1, which establishes that "a violation of the provisions of sections 700.010 to 700.115 shall constitute a violation of the provisions of section 407.020". Since the violation of Section 700.015 constitutes a violation of Section 407.020, and Section 700.100.3(4) allows the Commission to revoke a registration for "any conduct which constitutes a violation of the provisions of section 407.020, RSMo", the Director's argument is that the Commission can revoke a registration for violation of Section 700.015, as a violation of Section 407.020.

The Director's argument is logically sound, but unfortunately for his position, the Missouri Court of Appeals rejected that argument in a 1996 decision. In *State ex rel. Mobile Home Estates, Inc. v. Public Service Commission*,⁴ the Commission had suspended the dealer registration of a manufactured housing dealer for one year for selling a home that did not meet Code. In suspending the registration, the Commission found that the dealer had engaged in conduct constituting a violation of the provisions of Section 407.020, the ground specified in Section 700.100.3(4). The Commission reached that conclusion on the basis of the violation of Section 700.015.1, which is made a violation of Section 407.020 by Section 700.115.1.

The Court of Appeals, however, found that Commission's order to be unlawful in that the Commission lacked authority to suspend the registration for violation of Section 700.015.1. The court specifically rejected the Commission's argument that Section 700.115 made the violation of Section 700.015 a violation of Section 407.020 for purposes of giving the Commission authority to revoke a dealer's registration.

⁴ 921 S.W. 2d 5 (Mo. App. W.D. 1996)

The argument rejected by the *Mobile Home Estates* court is legally and factually indistinguishable from the argument offered by the Director in this case. Therefore, the *Mobile Home Estates* decision is controlling and the Commission must conclude that it does not have authority to revoke Amega's registration for an alleged violation of Section 700.015. To that extent, Amega's motion to dismiss must be granted.

However, a violation of Section 700.015 is not the only ground on which the Director asks the Commission to revoke Amega's registration. The Director also alleges that Amega directly violated the provisions of Section 407.020.1 by misrepresenting the condition of the homes, failing to disclose that the homes had been damaged, and concealing material facts about the condition of the homes from the purchasers. Section 700.100.3(4) explicitly gives the Commission authority to revoke a registration for "engaging in any conduct which constitutes a violation of the provisions of section 407.020, RSMo," so the *Mobile Home Estates* decision does not bar the Commission's consideration of that portion of the Director's complaint.

Amega instead argues that the Commission is without authority to find a violation of Section 407.020, contending that such a finding can be made only by a court, not an administrative agency. In support of that argument, Amega cites various decisions dealing with Section 407.020. Those cases explain that the statute supplements the definition of common law fraud to "preserve fundamental honesty, fair play and right dealings in public transactions."⁵ Statutes such as this one do not "attempt to define deceptive practices or

⁵ *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60, 63 (Mo. App. E.D. 1987), quoting *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973)

fraud, but merely declare unfair or deceptive practices unlawful, leaving it to the court in each particular instance to declare whether fair dealing has been violated.⁶

Amega seizes on the statement that a finding that deceptive practices or fraud has occurred is left to the court in each particular instance to argue that only a court, and not an administrative body, may make that determination. That argument is not supported by the decisions and is countered by the explicit language of Section 700.100.3, which gives the Commission authority to revoke a dealer's registration for engaging in conduct that violates the provisions of Section 407.020. For that limited purpose, the legislature gave the Commission the authority to determine whether particular conduct falls within the prohibition of the statute. For the portion of the Director's complaint that seeks to revoke Amega's dealer registration for conduct violating the provisions of Section 407.020, Amega's motion to dismiss will be denied.

This ruling means that if the Director is to prove his complaint, he will need to prove that Amega engaged in conduct that violated the provisions of Section 407.020, not simply that Amega sold a home that did not meet code. That does not preclude the Director from presenting evidence that the Code was violated as part of his proof that the provisions of Section 407.020 have been violated.

The Motion to Dismiss Counts I, III, and V

Counts I, III, and V of the Director's complaint ask the Commission to authorize the Commission's General Counsel to proceed to circuit court to seek civil penalties against Amega for the sale of manufactured homes that did not comply with Code. The

⁶ *Id* (internal citations omitted).

Commission has the authority to pursue such penalties, acting through its General Counsel, under Section 386.600, RSMo 2000.

As indicated in the discussion of the previous motion, the sale of a manufactured home that does not comply with code is a violation of Section 700.015. Section 700.115.2 states in relevant part: “whoever violates any provision of this chapter shall be liable to the state of Missouri for a civil penalty in an amount which shall not exceed one thousand dollars for each such violation.” Section 700.015 is a part of “this chapter” so a violation of that section would justify the imposition of a civil penalty under Section 700.115.2.

Although violation of Section 700.015 directly justifies imposition of a civil penalty under Section 700.115.2, Counts I, III, and V of the Director’s complaint state that Amega’s violation of Section 700.015 is a violation of Section 407.020, and ask the Commission to make a finding to that effect. Amega again argues that only a court, not an administrative agency, can determine that Section 407.020 has been violated. For that reason, Amega asks the Commission to either dismiss Counts I, III, and V, or, as an alternative, strike from the prayer for relief the Director’s request that the Commission find a violation of Section 407.020.

The Commission has previously found that Section 700.100.3(4) gives it the authority to determine whether Section 407.020 prohibits particular conduct within the context of deciding whether to revoke a dealer’s registration. However, Section 700.115.2, which authorizes the imposition of a civil penalty for violation of any provision of Chapter 700, makes no mention of Section 407.020. Therefore, the Commission is not given authority under that section to find a violation of Section 407.020. Furthermore, since it can find a violation of Section 700.015 directly, there is no need for the Commission to make

any findings regarding Section 407.020 in these counts of the complaint. The Director's request that the Commission make such finding will be struck from Counts I, III, and V. In all other respects, the Motion to Dismiss Counts I, III, and V will be denied.

The Motion to Dismiss Count VII

Count VII of the Director's complaint explains that Amega and its owner, Greg DeLine, entered into a stipulation and agreement in 2006 to resolve a previous complaint brought by the Director. The Commission approved that stipulation and agreement in Case Number MC-2004-0079. Paragraph 6.b of the approved stipulation and agreement states in part: "Amega and DeLine covenant and agree that Amega, its affiliate, or DeLine, will not sell any manufactured home that is 'red tagged' at the time of sale." Paragraph 6.c of the stipulation and agreement provides that if Amega, its affiliate, or DeLine violates that provision they are to pay a \$10,000 civil penalty. That paragraph also states: "[t]he Commission shall have the power to determine whether any violations of this Paragraph 6 have occurred, subject to rights of appeal and judicial review as provided for under Missouri law."

The Director's complaint alleges Amega attempted to deliver a "red tagged" home to a customer and thereby violated paragraph 6 of the stipulation and agreement. On that basis, the Director asks the Commission to find that Amega is liable for a penalty of \$10,000 and authorize the General Counsel to go to circuit court to seek such penalties.

Amega argues that since the Commission is not a court, it does not have the authority to construe or enforce contracts. Therefore, the Commission does not have authority to interpret or construe the stipulation and agreement to determine if the actions alleged in the complaint constitute a violation of the stipulation and agreement.

As Amega indicates, the Commission cannot construe or enforce a contract. Furthermore, the Commission cannot order Amega to pay a financial penalty. That power is reserved to the courts. However, the Director does not ask the Commission to grant any relief that is beyond the Commission's authority to give. Rather, the Director asks the Commission to find that Amega has violated paragraph 6 of the stipulation and agreement and authorize the General Counsel to seek penalties for that violation.

When the Commission approved the stipulation and agreement, it also ordered Amega to comply with the terms of the stipulation and agreement.⁷ So, if Amega violated the terms of the stipulation and agreement, it also violated the Commission's order. Section 386.390.1, RSMo 2000 gives the Commission the authority to hear complaints alleging the violation of any "rule or order or decision of the commission." Therefore, the Commission has the necessary authority to hear the Director's complaint alleging a violation of the stipulation and agreement and can direct its General Counsel to pursue penalties in circuit court if it finds such a violation. The enforcement of the stipulation and agreement would then be left to the appropriate judicial authority. Amega's motion to dismiss count VII of the Director's complaint will be denied.

IT IS ORDERED THAT:

1. The portions of Counts II, IV, and VI of the Director's complaint that ask the Commission to revoke Amega Sales, Inc.'s dealer registrations for a violation of Section 700.015.1, RSMo (Supp. 2007) are struck from the complaint. In all other respects, Amega Sales, Inc.'s Motion to Dismiss Counts II, IV, and VI is denied.

⁷ Order Approving Stipulation and Agreement, *Director v. Amega Sales, Inc.* Case No. MC-2004-0079 (October 17, 2006).

2. The portions of Counts I, III, and V of the Director's complaint that ask the Commission find that Amega Sales, Inc. has violated Section 407.020, RSMo (Supp. 2007) are struck from the complaint. In all other respects, Amega Sales, Inc.'s Motion to Dismiss Counts I, III, and V is denied.

3. Amega Sales, Inc.'s Motion to Dismiss Count VII is denied.

4. This order shall become effective on February 14, 2008.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Clayton, Appling,
and Jarrett, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge