

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUST NEW HOMES, INC. and : CIVIL ACTION  
D. RICHARD TONGE :  
 :  
v. :  
 :  
BEAZER HOMES, PULTE HOMES, :  
TOLL BROTHERS, et al. : NO. 05-04198-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

November 28, 2005

Plaintiff D. Richard Tonge, and his firm, Just new Homes, Inc. are real estate brokers licensed in 14 states plus the District of Columbia. They will jointly be referred to herein as "plaintiff."

Plaintiff represents potential purchasers of residential real estate; he does not represent sellers. Plaintiff's business is conducted primarily through the internet. He has compiled a nationwide database of new housing developments. By communicating with plaintiff's web page, prospective purchasers of new homes can obtain extensive information about locations, prices, designs, specifications, etc., and can thus be guided toward the builders and sellers of homes they might wish to purchase. For his services as agent for such prospective purchasers, plaintiff would like to share in the brokerage commission when a sale results.

The defendants in this action are 11 firms in the Bucks-Montgomery County area which build and sell new homes,

together with five real estate firms and the Home Builders Association of Bucks and Montgomery Counties. They have been enforcing a policy of permitting agents for purchasers to share in the real estate commission generated by the sale of a home only if the purchaser's agent has physically escorted the proposed purchaser to the site where the new home is located or is proposed to be built, and "registering" the purchaser in person.

Plaintiff, on the other hand, prefers simply to give the prospective purchaser a document attesting to plaintiff's agency status, and to "register" the purchaser either by presentation of this documentary evidence to the seller's representative, or by mail or facsimile.

In this action, plaintiff asserts that the combined actions of the defendants, in insisting upon personal presence of the purchaser's agent, violates the antitrust laws. Plaintiff has sought a preliminary injunction requiring the defendants to abandon the "personal appearance" policy. An evidentiary hearing was held on November 22, 2005.

It is well established that the grant of a preliminary injunction is an extraordinary remedy, which can be afforded only if the plaintiff establishes (1) a likelihood of success on the merits; (2) irreparable harm in the absence of the grant of the injunction; (3) absence of irreparable harm to the defendants; and (4) that granting preliminary relief would be in the public

interest. P.C. Yonkers, Inc., et al. v. Celebrations The Party and Seasonal Superstore, et al., \_\_\_ F.3d \_\_\_ (3d Cir., Nov. 7, 2005), 04-4254; Nutrasweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 153 (3d Cir. 1999). On the basis of the record thus far developed, I am satisfied that plaintiff has not established a right to preliminary injunctive relief.

The defendants all have a legitimate interest in avoiding disputes about whether a broker is or is not entitled to a commission - i.e., whether the particular broker was indeed a part of the inducing cause for the sale. Requiring the agent seeking a commission to accompany the proposed purchaser to the site, and to participate in the sale process, helps to accomplish the goal of avoiding disputes, and imposes no great burden upon the agent. Thus, even if plaintiff may ultimately be successful in showing that the disputed policy violates the antitrust laws, there is no need for immediate relief, since plaintiff can be made whole by an award of damages (represented by the additional cost and inconvenience of arranging for attendance at the site).

The evidence thus far produced tends to show that plaintiff will have great difficulty in establishing that any of the defendants took part in a conspiracy, or that plaintiff suffered an "antitrust injury." (Plaintiff is not a competitor of the builders, and is being treated the same as all of the real estate brokers involved.)

The evidence establishes that plaintiff has known of the challenged policy for at least five years. The delay in seeking preliminary relief, standing alone, suffices to support denial of the requested injunction. Finally, plaintiff has requested relief only with respect to builders in the area of Bucks and Montgomery Counties, Pennsylvania; presumably, plaintiff's ability to function in the remainder of the 14 states in which he is licensed will continue undisturbed.

For all of these reasons, plaintiff's application for a preliminary injunction will be denied.

Defendants have, quite recently, filed a motion to dismiss the entire action. Although couched as a motion for dismissal under Rule 12(b)(6), in view of the fact that evidence has been presented at the preliminary injunction hearing, the motion to dismiss will be treated as a motion for summary judgment. Plaintiff will be afforded an opportunity for further response to that motion, if desired.

An Order follows.

