IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Civil Action No. 70 C 108 (4)
JOHN H. ARMBRUSTER AND COMPANY; CORNET AND ZEIBIG, INCORPORATED; DOLAN COMPANY SALES, d/b/a DOLAN COMPANY REALTORS; and JEROME L. HOWE, INCORPORATED, Defendants.	)	

MEMORANDUM

This is a suit brought by the Attorney General of the United States seeking to enjoin certain real estate firms from engaging in an alleged pattern or practice of resistance to the full enjoyment of rights granted by Title VIII of the Civil Rights Act of 1968, 42 U.S.C.A. Section 3601 *et seq.*, known as the Fair or Open Housing Act (hereinafter referred to as the "Act"). The defendants are John H. Armbruster and Company (hereinafter referred to as "Armbruster"); Cornet and Zeibig, Incorporated (hereinafter referred to as "Cornet"); Dolan Company Sales, d/b/a Dolan Company Realtors (hereinafter referred to as "Dolan"); and Jerome L. Howe, Incorporated (hereinafter referred to as "Howe").

All defendants have filed numerous motions, including motions to dismiss for failure to state a claim upon which relief can be granted, motions for severance, motions to dismiss for misjoinder or parties defendant, motions to strike, motion for judgment on the pleadings, motions for summary judgment, and motions to compel answers to interrogatories. The parties have argued these various motions and have submitted numerous briefs and suggestions to the Court. The separate motions of Armbruster and Howe to compel answers to interrogatories are moot; plaintiff having filed separate answers to their interrogatories.

The complaint alleges generally that the defendants each and all follow a policy and practice of furthering and perpetuating patterns of racial segregation in housing in that the defendants have failed to show Negroes listings in white neighborhoods while making the same available for whites; made listings available to Negroes only in changing neighborhoods while making the same unavailable to whites; made statements of racial limitation and preference to white persons; advised Negroes that houses in white neighborhoods were not available for purchase or temporarily off the market when in fact the houses were available for purchase; given different and conflicting advice to Negroes and whites about the desirability of certain neighborhoods; all in violation of 42 U.S.C.A. Sections 3604 (a), (b), (c), and (d). Further, the complaint alleges that defendants have utilized a multiple-listing service and have denied Negroes access to such service and have applied discriminatory terms and conditions of access to Negroes, in violation of 42 U.S.C.A. Section 3606. The complaint alleges that the discriminatory practices are maintained, supported and perpetuated by each defendant's employment practices: that Armbruster employs 85 persons, all of whom are white; that Cornet employs all or nearly all white persons; that Dolan employs 120 persons, all of whom are white; that Howe employs 12 white persons and one Negro; and that none of the defendants has recruited Negroes.

Plaintiff seeks an injunction to keep defendants from discriminating against persons on the basis of race, creed, or color with respect to rights secured by the Fair Housing Act; and from failing to take affirmative steps to correct the effects of their past discriminatory actions and insure full enjoinment of the rights secured by the Fair Housing Act.

The allegations of the complaint are general save for the specific allegation concerning the employment practices of the defendants. However, the specific facts supporting the alleged violations of the Act are set out in plaintiff's separate answers to interrogatories propounded by the separate defendants. Defendants' motions to dismiss for failure to state a claim upon which relief can be granted will be treated as motions for summary judgment since matters outside the pleadings have been presented and not excluded by the Court. Rule 12 (b), Federal Rules of Civil Procedure.

In order to pass upon the motions for summary judgment it is necessary to determine whether or not the particular dwellings in question were dwellings intended by Congress to be covered by Section 3603 of Title 42 U.S.C.A. on the dates involved in this litigation. As shown by the record before the Court all acts of discrimination complained of are alleged to have occurred prior to December 31, 1969, and as stated by plaintiff's counsel on oral argument, in all instances the dwelling involved is a single family residence.

Title 42 U.S.C.A. Section 3603 sets out the statutory scheme for the effective dates of certain provisions of the Act for certain types of dwellings, and provides in part:

Exemptions

> (b) Nothing in section 3604 of this title (other than subsection (c) shall apply to-
>
> (1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, nor is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this sub-chapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title....

Section 3603 (a) (2) states that all dwellings covered by Section 3603 (1) (dwellings related to Federal ownership and financing) and other dwellings except those exempted under Section 3603 (b) (1) are covered by Section 3604 as of December 31, 1968. The pertinent language of Section 3603 (b) (1) states that a single family house for sale by an owner is exempt from certain provisions of the Act until December 31, 1969, and is exempt after that date only if the owner does not utilize the services of a broker, agent or salesman and only if the owner does not publish an advertisement or written notice in violation of Section 3604 (c). The sale of a single-family house by an owner, with or without the services of a broker, agent or salesman, prior to December 31, 1969, is exempt under the provisions of Section 3603 (b) (1).

The plaintiff contends, however, that the exemption is to the owner and not to the dwelling. Plaintiff relies on the *United States v. Mintzes*, 304 F. Supp. 1305, 1309 . (D.Md. 1969) wherein the coverage of Section 3604 (e) (concerning representation made by others to the owner of a dwelling and intended to prevent the panic selling which is inimical to the purpose of the Fair Housing Act) is discussed in relation to the exemption of Section 3603 (b) (1):

> . An owner who does not sell or rent or offer to sell or rent his house, whether it be a single-family dwelling or multi-family dwelling, does not need an exemption from the prohibitions of Section 3604 (a)-(b). The exemption provided by Section 3604 (b) (1) was intended to exempt from the provisions of Section 3604 certain owners of single-family dwellings who would be subject to the prohibitions contained in Section 3604 (a)-(d) were it not for the exemption provided by Section 3603 (b) (1). Since the owner of a single-family dwelling who does not sell or rent or offer to sell or rent his house is not within the scope or purpose of the exemption created by Section 3603 (b) (1), that exemption should not be construed to apply to such owners. Although the statute might be clearer, the Court concludes that the draftsman of the Act accomplished this result by making the exemption of Section 3603 (b) (1) apply to "any single-family house sold or rented by the owner", rather than to "any single family house".

While this Court agrees that the statue might be clearer, the Court cannot conclude that the exemption applies to the owner and not to the dwelling. To do so would ignore the plain language of the exemption.

The pattern of effectuating the Fair Housing Act in stages as set out in Section 3603 is to make the statute applicable to certain classes of dwellings at certain times. In addition, the exemption of Section 3603 (b) (1) is not just to "any single-family house sold or rented by an owner", but also contains four provisos. The first three provisos limit the owners who can take advantage of the exemption; the fourth proviso limits the exemption to certain transactions for single family houses prior to December 31, 1969.

In one sense all houses that are sold or rented are sold or rented by the owner, a fact which seems to make the phrase "sold or rented by an owner" as used in the statute somewhat awkward or unnecessary. But if the fourth proviso is to have any meaning at all, "sold or rented by an owner" must be used in the sense that the sale or rental of property can be contracted for only by the holder of the title thereto. Thus, the distinction is made between the sale of a single-family house by an owner accomplished entirely by the owner on the one hand, and on the other hand, the sale of a single-family house by an owner accomplished through the use of a real estate brokerage or agency. And in the case of such a sale by an owner after December 31, 1969, the exemption applies only if it accomplished without the use of a real estate brokerage or agency and without the publication or mailing of any advertisement or written notice in violation of Section 3604 (c).

In the case United States v. Knippers, cited by plaintiff in support of its position that coverage was effective January 1, 1969, the Court does not even discuss the issue stating that in the proof of that particular case, the realtors were in compliance as on January 1, 1969, and pledged themselves to remain in compliance with the Act. Plaintiff contends that even if the exemption applies as stated, acts constituting a violation prior to the effective date of the Act carry over and constitute a violation subsequent to the effective date, relying on United States v. Sheet Metal Workers Local No. 36, 416 F.2d 123 (8th Cir. 1969). That case is based upon a different statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 e to 2000 e-15, and involves facts demonstrably different from the instant case, a pattern or practice of racial discrimination against Negroes by certain unions in their admissions and work referral plans. The Court recognizes the similarity of the pattern and practice provisions of that statute and the Fair Housing Act, but concludes that the case is distinguishable.

In the Sheet Metal Workers case, the Court for the Eighth Circuit Court of Appeals stated that evidence of specific acts of discrimination subsequent to the effective date of the Act was unnecessary.

The Court reasoned that the employment referral system carried forward effects of past discrimination resulting in continuing and future violations of the Act. The Court acknowledged that its decision was a departure from prior cases. Relying on the facts and the record of that particular case the Court stated, at p. 132:

> We recognize that each of the cases cited in n.15 to support our position can be distinguished on the ground that in each case, a number of known members of a minority group had been discriminated against after the passage of the Civil Rights Act.

Here, there is no act of discrimination asserted to have occurred after the effective date of the Act with respect to 42 U.S.C. Section 3604 (a), (b),(d), and (e). There is no obvious or apparent conduit (such as a referral plan or a collective bargaining agreement) to carry forward the effects of past discrimination, if any be found. The record before this Court lacks any inference of the "carrying forward of the effects of prior discrimination". The Court concludes that there is no basis here for extending coverage of the Act to alleged violations occurring before the effective date of the Act.

Insofar as the complaint alleges acts pertaining to the sale or rental of a single-family house in violation of 42 U.S.C. Section 3604 (a), (b), (d), and (e) occurring prior to December 31, 1969, summary judgment will be granted in favor of defendants.

The Court notes that alleged violations of Section 3604 (c) are excepted from the exemption of Section 3603 (b) (1). Similarly, Section 3606 became effective January 1, 1969. All defendants seek to have that portion of the complaint alleging violations of Section 3604 (c) dismissed or stricken. Defendant Dolan has based its motion to dismiss and strike solely on the ground that 42 U.S.C. Section 3604 regulates owners of real property and is not applicable to real estate companies unless such company owns real property. As the preceding discussion indicates, the Court does not agree. Defendants Armbruster, Cornet and Howe base their motions on the ground that Section 3604 (c) is not applicable to oral statements, and if applicable, it is a violation of the

First Amendment. Section 3604 (c) of Title 42 U.S.C. provides that it shall be unlawful:

> to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination.

Section 3604 (c) is not by its terms limited to written notices, statements and advertisements. It is not on its face clearly unconstitutional. Defendants have raised the question as to the constitutionality of Section 3604 (c) in their various motions to strike and the plaintiff has vigorously disputed defendant's contentions. The Court is of the opinion that the issue is not properly to be decided on a motion to strike, particularly when such motions contain hypothetical statements and situations to which the section is deemed to apply. Disputed and substantial questions of law such as presented here should be determined after consideration of facts and evidentiary matters that would be present only after a hearing on the merits.

Defendant Howe seeks to have the alleged violation of Section 3606 (concerning discriminatory use of a multiple-listing service) stricken on the grounds that plaintiff has not alleged control of the multiple-listing service by defendant, and that the supporting facts set out in plaintiff's answers to interrogatories do not constitute a violation of Section 3606. After careful reading of Section 3606, the allegations of the complaint, and plaintiff's answers to interrogatories, the Court concludes that "control" is not a necessary allegation under Section 3606. Further, the allegations raise potential issues of fact which warrant a hearing on the merits. Summary determination upon motion to strike is inappropriate in this instance. Rule 56 (c), Federal Rules of Civil Procedure. Defendant Howe's motion to strike from the complaint the alleged violation of 42U.S.C. Section 3606 will be denied.

All defendants seek to have Paragraph 6 of the complaint concerning the defendant's employment practices dismissed or stricken on that ground that it does not state a claim for relief under 42 U.S.C. Section 3601 _et seq._, and that the allegations are immaterial and impertinent to any matter properly before the Court.

The plaintiff's position is that the allegation cannot be stricken unless there is no possible contingency which would make evidence of defendants' employment practices relevant; that in a "pattern and practice" case such as this the scope of inquiry is extremely broad; and that evidence of defendants' employment practices is relevant to this lawsuit.

There is no section of the Fair Housing Act which makes unlawful any discrimination in employment practices or any failure to recruit Negroes for employment. Clearly, Paragraph 6 of the complaint fails to state any violation of the Act or a claim for relief under the Act.

~~If~~ the allegations about employment practices are, as plaintiff states, evidence relevant to this lawsuit, such evidentiary allegations are certainly undesirable and unnecessary under Rule 8 (a), Federal Rules of Civil Procedure. Nevertheless, motions to strike are not looked upon with favor and will not be granted unless the challenged matter has no relation to the controversy and is prejudicial to defendant, Augustus v. Board of Public Instruction, 306 F. 2d 862 (5th Cir. 1962).

In the present case, the allegations about employment practices are palpably unnecessary and serve only to confuse the issues properly raised under the Fair Housing Act. No state of facts proved in support of the allegations will constitute a valid claim for relief under the Fair Housing Act. In an effort to simplify the issues for ultimate trial, the Court will strike Paragraphs 6 and 7 of the complaint. In addition, the Court will strike that part of the prayer for relief concerning employment practices.

Defendant Dolan has challenged the joinder of defendants under Rule 20 (a) Federal Rules of Civil Procedure, and seeks severance. Rule 20 (a) permits permissive joinder of parties defendant if there is asserted against them jointly, severally or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

There is no allegation of conspiracy, collusion, or complicity among the defendants. The answers to defendants' separate interrogatories show that the transactions and occurrences complained of are separate and distinct with respect to each defendant. Different evidence will be introduced as to each defendant. It does appear that the plaintiff's witnesses will be the same for each defendant, but that the witnesses will relate different transactions and occurrences for each defendant involving different times and places. Plaintiff contends that the alleged steering by all defendants of white persons to some areas and Negroes to other areas on account of race is a common series of transactions. Having found no support for plaintiff's contention, the Court concludes that joinder cannot be supported by Rule 20 (a) Federal Rules of Civil Procedure.

Plaintiff alleges in Paragraph 7 of the complaint that the alleged violations of the Act constitute a pattern or practice of resistance by each defendant, and by the defendants "collectively", to the full enjoyment of the rights secured by the Act. Apparently, plaintiff's position is that the complaint alleges similar conduct by each defendant and it is the "joint impact" of the alleged conduct by all defendants that is significant. Plaintiff states that the resistance to equal housing opportunities is alleged to be by all defendants together, irrespective of whether or not there has been any coordination between them. The basis for plaintiff's position is that this is a "pattern and practice" case.

Section 3613 of Title 42 U.S.C. authorizes the Attorney General to bring a civil action against any person or persons he has reasonable cause to believe is engaged in a pattern or practice of resistance to the full enjoyment of any rights granted by the Act. The determination of what constitutes a pattern or practice by each defendant or among all defendants within the meaning of the Fair Housing Act involves issues of fact and law warranting a full hearing. The phrase is not defined in the Act nor explained by the legislative history and, while the phrase has been used in other statutes, in this case the matter should not be resolved without a hearing. While plaintiff has not alleged complicity, coordination, or indeed, knowledge on the part of the defendants, plaintiff has alleged "collective" action and has alleged that all defendants, together, are engaged in a pattern or practice of acts in violation of the Fair

Housing Act. Since the trial of this case is before the Court without a jury, and Dolan has neither claimed nor shown that prejudice would result from a denial of severance and a full hearing on the issue, the Court will permit the joinder of defendants. Defendant Dolan's motion for severance will be denied.

Dated this 10th day of March, 1971.

H. Kenneth Wangelin
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHN H. ARMBRUSTER AND COMPANY; CORNET AND ZEIBIG, INCORPORATED; DOLAN COMPANY SALES, d/b/a DOLAN COMPANY REALTORS; and JEROME L. HOWE, INCORPORATED, Defendants.	)	Civil Action No. 70 C 108 (4)

O R D E R

The Memorandum of this date is hereby incorporated in and made a part of this Order.

IT IS HEREBY ORDERED that:

The motions of defendant John H. Armbruster and Company for summary judgment, to dismiss, and to strike are sustained insofar as summary judgment is granted in favor of defendants as to Paragraphs 4(a), 4(b), 4(d), and 4(e) of the Complaint; and Paragraphs 6 and 7 are stricken from the Complaint; and that part of the prayer for relief concerning defendants' employment practices is stricken from the Complaint; and said motions are overruled with respect to Paragraphs 4(c) and 5 of the Complaint;

The motions of defendant Jerome L. Howe, Incorporated for summary judgment, to strike or to dismiss are sustained insofar as summary judgment is granted in favor of defendants as to Paragraphs 4(a), 4(b), 4(d), and 4(e) of the Complaint; and Paragraphs 6 and 7 are stricken from the Complaint; and that part of the prayer for relief concerning defendants' employment practices is stricken from the Complaint; and said motions are overruled with respect to Paragraphs 4(c) and 5 of the Complaint;

The motions of defendant Cornet and Zeibig, Incorporated to dismiss, to strike, for judgment on the pleadings or for summary judgment are sustained insofar as summary judgment is granted in favor of defendants as to Paragraphs 4(a), 4(b), 4(d), and 4(e) of the Complaint; and Paragraphs 6 and 7 are stricken from the Complaint and that part of the prayer for relief concerning defendants' employment practices is stricken from the

Complaint; and said motions are overruled as to Paragraphs 4(e) and 5 of the Complaint;

The motions of defendant Dolan Company Sales to dismiss and to strike are sustained insofar as summary judgment is granted in favor or defendants as to Paragraphs 4(a), 4(b), 4(d), and 4(e) of the Complaint; and Paragraphs 6 and 7 are stricken from the Complaint; and that part of the prayer for relief concerning defendants' employment practices is stricken from the Complaint; and said motions are overruled as to Paragraphs 4(e) of the Complaint;

The motion of Dolan Company Sales to sever is denied.

Dated ~~this~~ 10th day of March, 1971.

H. Kenneth Wangelin
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
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UNITED STATES OF AMERICA, Plaintiff, vs. JOHN H. ARMBRUSTER AND COMPANY; CORNET AND ZEIBIG, INCORPORATED; DOLAN COMPANY SALES, d/b/a DOLAN COMPANY REALTORS; and JEROME L. HOWE, INCORPORATED, Defendants.	)	Civil Action No. 70 C 108 (4)

ORDER

IT IS HEREBY ORDERED that the motion of University City, Missouri, to file brief amicus curiae will be and hereby is denied.

Dated this 10th day of March, 1971.

H. Kenneth Wangelin
U. S. District Judge