IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General,

Plaintiff,

v.

KNIPPERS AND DAY REAL ESTATE, INC., et al.,

Defendants.

CIVIL ACTION NO. 68-123

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED ON BEHALF OF DURWARD GULLY

Defendant, Durward Gully's motion for summary judgment appears to be based upon the premise that, "in the absence of active and personal participation," he has no personal responsibility for the consequences of the corporate activities of other agents of Gully Agency, Inc., even though he is president of that Corporation. From this premise, the defendant concludes that he cannot be held personally responsible for the act of discrimination against Mr. Paul J. Brown and therefore cannot properly be joined as an individual party defendant in this action. Both the premise and the conclusions from that premise are incorrect.

I. Defendant's Personal Responsibility for the Discriminatory Act of the Corporations's Agent

The statement in defendant's motion concerning the personal liability of an officer of a corporation, as a statement of the general rule, is unexceptionable; but as a statement of the law applicable to this case, it is simply inaccurate. An officer of a corporation can become

personally responsible for corporate activities in which he has not actively participated in a variety of situations.[1] The propriety of joining corporate officers as individual defendants is especially clear where the suit is by the United States to enjoin corporate activity that is in violation of federal law.

Clearly, Section 813 in authorizing the Attorney General to seek relief against the "persons responsible for such pattern or practice of resistance" did not envisage suits solely against the corporate entity to the exclusion of the officers who established the discriminatory policy of the corporation. It would be inconceivable to think that Congress intended to allow the courts to reach the fictional corporate entity but did not authorize the courts to reach the actual individual who was culpably responsible for the corporate policy that resulted in the unlawful activity, regardless of which corporate agent committed the particular unlawful act. Cf. Standard Distributing, Inc. v. Federal Trade Commission, 211 F. 2d 7, 15 (2d Cir. 1964). A corporation cannot formulate its own policies; as it cannot perform any other act except through its agents.

1/ A cursory survey of any treatise on corporations law will disclose a number of situations in which a corporate officer can become liable to individual plaintiffs for damages caused by corporate activity in which the corporate officer did not personally participate. See e.g., 3 Fletcher, Cyclopedia of Corporations §§1065-1099, pp. 667-714 (Rev. 1965).

Usually the officers and directors establish the policies of a corporation, and Mr. Gully has not denied that, as president and a member of the board of directors, he establishes the policies of Gully Agency, Inc. In reply to an earlier motion for summary judgment, the United States has shown that a genuine issue of fact is presented whether one of those policies is resisting the rights granted by Title VIII. In analogous antitrust cases under Sherman 1 and 2, 15 U.S.C. §§1 and 2, against corporations with policies of monopolization, corporate officers in "policy-making" positions similar to Mr. Gully's are regularly joined as individual defendants in civil antitrust suits for injunction, although whether a decree is entered against them as individuals depends upon the necessity of binding them individually in order to have an effective remedy, which issue can only be determined after a trial on the merits. See Hartford-Empire Co. v. United States, 323 U.S. 386, 434 (1945). 2/ Additionally, these "policy-making" officers can properly be named individually in orders of the Federal Trade Commission prohibiting unfair competitive practices of corporations, Federal Trade Commission v. Standard Education Society, 302 U.S.112, 119-20 (1937); Benrus Watch Company v. Federal Trade Commission, 352 F. 2d 313 (8th Cir. 1965) cert. denied 384 U.S. 939 (1966), even if the actual unlawful acts were committed by subordinate agents. Standard Distributors, Inc. v. Federal Trade Commission, supra.

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2 / A corporate representative's personal liability for Sherman 1 and 2 violations, 15 U.S.C. §§1 and 2, is not based on §14 of the Clayton Act, 15 U.S.C. §24. See United States v. Wise, 370 U.S. 405 (1962).

These cases recognize that unlawful actions of corporations cannot be effectively prevented if the persons responsible for the corporate policies that result in the unlawful activity can use the corporate veil to shield themselves from prosecution. In this case the United States has shown that a genuine issue is presented whether the Gully Agency has a policy of discrimination and whether Mr. Gully is responsible for the existence of that policy. If in pursuance of that policy, an agent of the corporation commits an act of discrimination, Mr. Gully, being the "policy-maker," is as responsible for the act as is the agent-actor and the corporation. 3/

This result should follow whether the discriminatory policy of Gully Agency was purposely established by Mr. Gully or resulted from his negligent failure to

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3/ In any event, Mr. Gully's silence in the face of Mr. Owens' discriminatory act could amount to a ratification of that act. In his deposition Mr. Gully stated that he and Mr. Owens conferred daily on business matters [at 47-8] and he has admitted that Mr. Owens informed him of the dealings with Mr. Brown,[at 74-5] Since he was aware, or by reasonable inquiry could have become aware, of the act of discrimination, Mr. Gully's failure to repudiate the discrimination amounts to a ratification, Emco Mills Inc. v. Isbrandtsen Co., Inc., 210 F. 2d 319, 324 (8th Cir. 1954), and goes a long way toward demonstrating the policy of the corporation. At least, the conflicting inferences that these facts raise require the denial of summary judgment. Paul E. Hawkinson Co. v. Dennis, 166 F. 2d 61, 63 (5th Cir. 1948).

dissipate the effects of the community's traditional practice of segregating housing. 4 / The term "responsible" as used in §813 implies both liability for active participation and liability for failure to perform an act required by virtue of one's office. 5 / Therefore, Mr. Gully is properly joined as an individual defendant in this action. At least, the substantial doubt raised on this issue by the facts presented thus far in this case, precludes the granting of summary judgment. United States v. Dewitt, 265 F. 2d 393, 399 (5th Cir. 1959).

II. Defendant's Joinder as a Party Necessary for Full and Effective Relief

Whether Mr. Gully is personally liable for the specific act of discrimination against Mr. Brown, however, is not determinative of his status as a party in this suit. As the antitrust cases cited above demonstrate, the ultimate test is whether an injunction against the officer individually is necessary in order to grant full and effective relief. The basic error underlying the faulty reasoning of the defendant's motion is the assumption that this suit was brought by the United States to punish the defendants for the one act of discrimination against Mr. Brown. To the contrary, the purpose of the suit is to bring to an end the defendants' practices and policies of resistance to the rights granted to Negroes by Title VIII.

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4 / This reasoning follows the traditional view that an officer can be held personally liable for the actions of an agent when the officer negligently fails to properly supervise the agent. See, Fletcher, op. cit. supra note 1 at §§1070 and 1099.

5 / For an analogous liability for unintentional conduct under a statute that does not expressly mention corporate representatives, see the criminal sanctions of the Pure Food and Drug Act, 21 U.S.C. §333 as applied in United States v. Dotterweich, 320 U.S. 277 (1943).

In pursuing that end the Attorney General is authorized by Section 813 to seek ". . . such preventive relief . . . against the person or persons responsible for such pattern or practice . . . as he deems necessary to insure the full enjoyment of the rights granted by this Title." Certainly, as president and a member of the board of directors of Gully Agency, Inc., Mr. Gully is responsible for the policies of that corporation and can properly be enjoined from continuing those policies in his capacity as an officer of that corporation. Under the facts of this case, however, enjoining Mr. Gully personally is "necessary to insure the full enjoyment of the rights granted by" Title VIII.

Mr. Gully stated in his deposition that before completing a sale of a house Gully Agency, Inc. must obtain the approval of the owner. [at 89-90]. Mr. Gully or one of the other corporations that he controls is the owner-builder of 30 to 40 percent of all the houses sold by Gully Agency. [at 17]. If he is not personally enjoined, the prohibitions of any injunction against Gully Agency and its officers and agents could be avoided in a substantial number of sales by Mr. Gully denying approval in his capacity as owner-builder. Also, Mr. Gully is president of several other real estate businesses [at 13-21] and unless he is personally enjoined would be free to continue his policy of discrimination in those businesses. Since Mr. Gully has permitted Gully Agency to follow a policy of discrimination even after certifying to the FHA and VA that the corporation would not discriminate in sales, 6/ there is good reason

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6 / See, Certification on Subdivision Information, FHA Form No. 2084, VA Form 26-1887, Revised July, 1967.

to believe that this method, or other methods, of avoiding the effect of any injunction will be employed if Mr. Gully is not personally enjoined.

Because of the disputed factual issues involved in determining whether Mr. Gully should be personally enjoined, the motion for summary judgment should be denied.

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