

Interlocutory Order

98 F.T.C.

IN THE MATTER OF
SOUTHWEST SUNSITES, INC., ET AL.

Docket 9134. Interlocutory Order, Nov. 10, 1981

AFFIRMATION OF ALJ ORDER DENYING RESPONDENTS MOTION
FOR PARTIAL SUMMARY DECISION

ORDER

Respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Sydney Gross and Edwin Kritzler (collectively "subdivider respondents") have filed an interlocutory appeal from the Administrative Law Judge's ("ALJ") Order Denying Respondents' Motion for Partial Summary Decision, dated October 8, 1980. Pursuant to Section 3.23(b) of the Commission's Rules of Practice, the ALJ, on November 28, 1980, authorized this interlocutory appeal upon a determination that "immediate review may advance the termination of the litigation." (November 26 Order at 4.) For the reasons set forth below, the Commission denies the appeal, having determined that resolution of the issues posed by developer respondents should await development of a full factual record.

I.

The Commission issued the complaint in this matter on April 29, 1980. The complaint charges that the subdivider respondents are engaged in the business of acquiring undeveloped land, subdividing the land into lots, and advertising and selling the lots to the public (Compl. ¶ 4); that the lots are sold by standard installment contracts, over terms of up to 10 years, pursuant to which the subdivider respondents retain title to the lots until the final installments are paid (Compl. ¶ 5); and that the subdivider respondents represent that (i) the lots are good investments and there is little or no financial risk involved in the purchase, and (ii) the lots are suitable for use by purchasers as homesites, farms and ranches. (Compl. ¶¶ 9, 12.) The complaint further alleges that in fact the lots have not been and are not good investments involving little or no financial risk to investors, and that the lots are not suitable for use by purchasers as homesites, farms or ranches. (Compl. ¶¶ 10, 13.)

Finally, the complaint alleges that the subdivider respondents have induced and are continuing to induce purchasers of lots * * * make payments due on their contracts, as well as additional payments substantially in advance of their due dates as provided for

in said contracts." (Compl. ¶ 15.) Such payments are allegedly induced not only by the representations concerning the quality of the investment and the suitability of the lots for use by the purchasers, but "by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning or relating to the subdivisions." (*Id.*)

The notice of contemplated relief that accompanied the complaint stated that if the Commission should determine from the record developed herein that the respondents have violated Section 5 as alleged in the complaint, "the Commission may order such relief as is supported by the record and is necessary and appropriate * * *." Specifically, the notice stated that such relief may include, *inter alia*, (i) "[r]equiring the installation of all improvements promised by subdivider respondents within a reasonable period of time"; (ii) "[r]equiring the mailing of a form letter to all current customers informing them of certain facts concerning their purchase and offering them the right to discontinue payments and receive any refund of monies paid in excess of the lot's fair market value"; (iii) granting purchasers "the right to discontinue payments and to receive a refund of monies paid in excess of the fair market value of the purchasers' lots"; (iv) "[r]equiring the payment of all taxes, mortgage payments, and other obligations on the land"; and (v) "other provisions appropriate to correct the unfair and deceptive practices engaged in by respondents."

On July 31, 1980, the developer respondents moved for a partial summary decision, pursuant to Section 3.24(a)(2) of the Commission's Rules of Practice. They argued that the above-mentioned items listed in the notice of contemplated relief are beyond the Commission's authority to order, relying principally upon *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). They further contended that the question of the Commission's remedial authority in this case is foreclosed under principles of collateral estoppel by the district court's decision in *FTC v. Southwest Sunsites, Inc., et al.*, No. CA 3-80-258-F (N.D. Tex.), *appeal pending* No. 80-1793 (5th Cir.).

II.

The developer respondents have raised important and difficult questions concerning the scope of the Commission's remedial authority in this proceeding. The Commission has concluded, however, that those issues should be resolved on a complete factual record, rather than through a partial summary decision.

Section 3.24 of the Commission's Rules of Practice contemplates

both full and partial summary decisions. Both procedures can be useful in appropriate cases, but they serve somewhat different purposes. A full summary decision can be used to resolve an entire case where the material facts are undisputed and a trial is needless. In contrast, a partial summary decision does not eliminate the need for a trial, but can be useful to limit and focus the issues to be tried. Many issues, however, can better be addressed after the facts are fully explored at trial. In considering a motion for summary decision, the decisionmaker—the ALJ or the Commission—must weigh the possible benefits from streamlining the trial against the value of a fully developed record in illuminating the issues.

Where, as here, the motion for partial summary decision addresses no distinct claims, but rather certain aspects of the notice of contemplated relief, the benefits of a partial summary decision will rarely outweigh the value of awaiting a fully developed record. Even if particular items of proposed relief are eliminated, that will not ordinarily have the effect of significantly limiting the factual issues for trial. For example, in the present case, the factual issues raised by the charges in the complaint would not appear to be substantially narrowed even if the requested partial summary decision were granted. To be sure, it may be possible to isolate some narrow factual issues relating solely to the elements of contemplated relief challenged by the developer respondents, but those relief elements appear to be factually intertwined with the violation charges set forth in the complaint. This conclusion is consistent with the ALJ's order certifying this appeal, since the ALJ appears to have accepted complaint counsel's argument that, even if a partial summary decision were granted, proof of the value of the land would be a principal issue in the case. (Order of Nov. 26, 1980 at 4.)

More important is the fact that relief issues are particularly difficult to resolve in isolation, without consideration of the factual context in which they arise. In construing the Commission's remedial authority, the guiding principle is that "where the problem lies within the purview of the [Commission] * * *, Congress must have intended to give it authority to deal with the evil at hand." *Pan American World Airways, Inc. v. United States*, 371 U.S. 295, 312 (1963). See *Warner Lambert Co. v. FTC*, 562 F.2d 749, 756 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). At the present time, the Commission does not know what, if any, evil is at hand in this case, and the authority required to deal with it cannot be finally determined until completion of this proceeding and review of the full record by the Commission. As the notice of contemplated relief plainly states, at this point the Commission is committed only to

ordering "such relief as is supported by the record and is necessary and appropriate * * *." The difficulty and importance of the issues raised by the developer respondents counsel against premature resolution. The Commission prefers to consider what, if any, relief is appropriate before it considers the outer limits of its authority to grant relief.

The Commission's concern that it is premature to address the relief issues posed by the developer respondents is not overcome by respondents' reliance upon *Heater v. FTC*, *supra*. In *Heater* the Commission determined that Heater and a number of corporations he controlled had made a variety of misrepresentations in marketing a credit card program. *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 643-44 (1973). The Commission ordered restitution of monies collected through the use of the misrepresentations, stating that its goal was "to restore the competitive balance which existed prior to his illegal practices" (*id.* at 652) and to deter future fraudulent and deceptive conduct by depriving Heater of the fruits of his past conduct. *Id.* at 563. On review, the court of appeals held that "[t]he construction placed by the Commission upon its power to define and prohibit 'an unfair act or practice' would, if accepted, operate to invest the Commission with remedial powers which are inconsistent and at variance with the overall purpose and design of the Act. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview." However, the Court also conceded that the Commission "has power, in order to remedy the continuing effect of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal." *Id.* at 324 n.13. See also *FTC v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 55 n.2 (D. Md. 1980), *aff'd*, No. 81-1187 (4th Cir. July 14, 1981) (*per curiam*).

As complaint counsel point out, the Commission has not acquiesced in the reasoning of *Heater*.¹ But even if the *Heater* analysis were accepted, it is not entirely clear, without a complete factual record, precisely how that analysis would apply to the instant proceeding. For example, the complaint raises charges of continuing deception in an ongoing transaction between the developer respondents and land purchasers—allegations which if proven, may significantly distinguish this case from *Heater*.² Under the circum-

¹ The developer respondents also rely on *Congoleum Indus., Inc. v. CPSC*, 602 F.2d 220 (9th Cir. 1979). This case was decided by the same court that issued the *Heater* opinion and rested on the *Heater* precedent. It therefore contributes little to respondents' argument.

² *Holiday Magic, Inc.* 85 F.T.C. 90 (1975), is not inconsistent with the result here. In that case, the Commission

stances, the Commission concludes that a partial summary decision is not appropriate.

III.

The developer respondents also contend that the elements of the notice of contemplated relief that they challenge are foreclosed by principles of collateral estoppel, based upon the district court's decision on the Commission's request for a preliminary injunction in *FTC v. Southwest Sunsites, Inc.*, *supra*. As a preliminary matter, the Commission notes that the decision is presently on appeal, and that a reversal by the court of appeals would obviate any preclusive effect of the district court's decision. See *Prager v. El Paso Nat'l Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969). The developer respondents argue that the pendency of the appeal does not affect the preclusive effect of the district court's decision, so long as that decision stands. The Commission does not accept that proposition, at least as respondents would have it apply to this case in its present posture. It would not be a sensible rule of administration to grant a partial summary decision before the appeal is decided.

In any event, the developer respondents' contention is without merit. The proceeding before the district court was a proceeding for a preliminary injunction pursuant to 15 U.S.C. 53(b). The district court was not empowered to decide the merits of the administrative proceeding, but merely issues relating to preliminary relief. See *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976). In cases arising under the analogous provisions of the National Labor Relations Act, 29 U.S.C. 160(1), it is well settled that determinations by the district court in a preliminary injunction proceeding do "not foreclose a proceeding on the merits * * *." *NLRB v. Denver Bldg. & Const. Trade Council*, 341 U.S. 675, 683 (1951). As the District of Columbia Circuit explained in the same case:

Since two remedies are provided in the statute for the purpose of accomplishing two separate though related purposes of Congress, one in the District Court of a preliminary or interlocutory character, the other before the Board and reviewing courts, of a final character, the separate means designed by Congress for the accomplishment of these purposes must not be permitted to impair the freedom and effectiveness of either.

had issued a final order which included a restitution provision, and review of the order had been sought in the Ninth Circuit. Concluding that it was not "privileged to disregard judicial precedent of such recent and clearly dispositive vintage" (*id.* at 91), the Commission, *sua sponte*, reopened the proceeding and struck the provision for restitutionary relief from the order. In this case, for reasons set forth above, the Commission is not prepared at this time to determine whether, or to what extent, *Heater* would be dispositive as to the elements of the notice of contemplated relief challenged by the developer respondents.

Denver Bldg. & Const. Trades Council v. NLRB, 186 F.2d 326, 331 (D.C. Cir. 1950). Accord, *Walsh v. International Longshoreman's Ass'n*, 488 F. Supp. 524, 528 (D. Mass. 1980) (because preliminary injunction proceedings are "merely ancillary to and in aid of the Board's jurisdiction, *res judicata* and collateral estoppel should not apply"). The Commission believes that the same rule, for the same reasons, is applicable to preliminary injunction proceedings under Section 13(b).

It is, therefore, ordered, That the Administrative Law Judge's order denying the developer respondents' motion for partial summary decision be, and hereby is, affirmed.

Modifying Order

98 F.T.C.

IN THE MATTER OF
RSR CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 8959. Order, Dec. 2, 1976—Modifying Order, Nov. 13, 1981

This order reopens the proceeding and modifies the Commission's order issued on December 2, 1976 (42 F.R. 4; 88 F.T.C. 800), so as to relieve respondent of the obligation of divesting the lead recycling plants specified in the original order, since no purchaser(s) could be found. Among other things, the modified order requires respondent to timely divest or auction at no minimum price all the assets and properties (with certain specified exceptions) constituting the lead recycling plants in Dallas, Texas and Seattle, Washington; and offer to license all of its patented sulphur removal and battery recycling process to a qualified purchaser(s).

ORDER MODIFYING ORDER TO DIVEST AND TO CEASE AND DESIST

On April 17, 1981, respondent RSR Corporation filed a "Petition for Relief From Divestiture Order," seeking to be relieved of its obligation to divest Quemetco, Inc. on the ground that it has been unable to find an acquirer for Quemetco's lead recycling plants at any price. Based upon respondent's petition, supplemental information submitted by respondent, and other information available to it, the Commission has determined that it is in the public interest to reopen and modify the order in this case. The Commission also has considered a draft agreement between its staff and respondent concerning modification of the order and has determined that the agreed-to modification is in the public interest.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That Paragraphs I, II and VII of the Final Order to divest and to cease and desist issued by the Commission on December 2, 1976 be, and they hereby are, modified to read as follows:

I.

It is ordered, That Respondent, RSR Corporation (hereinafter "RSR"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other