

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Ric Temple and)	Docket No. TSCA-5-99-015
Paul Nay & Associates)	
)	
Respondent)	

ORDER GRANTING MOTION FOR PARTIAL ACCELERATED DECISION
ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION ON PENALTY
ORDER GRANTING MOTION FOR CONFIDENTIALITY

On August 4, 1999, the Region 5 Office of the United States Environmental Protection Agency (the "Region" or "Complainant") filed a Complaint¹ against the Respondents, Ric Temple and Paul Nay & Associates. The Complaint alleges that the Respondents, real estate agents in North Vernon, Indiana, failed to comply with the disclosure requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §4851 *et seq*, and its implementing regulations at 40 CFR Part 745, Subpart F (the "Disclosure Rule"). The Complaint alleges that the Respondents were agents in the sale of a home in North Vernon, Indiana, to Kevin P. Morris and Courtenay C. Morris in October 1997. The home is alleged to have been built before 1978, and is thus characterized as "target housing" under the Act.

The Complaint states seven counts of violations, all stemming from the alleged failure of the Respondents to fulfill their duty to ensure that the sellers comply, or that the agents themselves comply, with the Disclosure Rule. These include the failure to provide the buyers with a lead hazard information pamphlet, the failure to allow them to inspect the house for lead-based paint, the failure to include a lead warning statement with the contract of sale, and the failure to obtain attestations by the purchasers concerning the disclosure of lead-based paint hazards.

In their Answer, the Respondents denied liability for these alleged violations. The Respondents assert that they lack knowledge of whether the subject home was "target housing" as defined in the Act, and that they are without knowledge as to what

¹ The Region filed an Amended Complaint on March 20, 2000, pursuant to an order of the Administrative Law Judge. This clarified certain facts but did not change the alleged counts of violations. Hence, for convenience, "Complaint" also refers to the Amended Complaint in this order.

the sellers may have disclosed to the buyers of the home concerning possible lead-based paint hazards.

The parties have already filed their prehearing exchanges of evidence. The hearing in this matter is scheduled to take place June 20-21, 2000, in Columbus, Indiana.

The Region filed a "Motion for Partial Accelerated Decision as to Liability" on April 17, 2000. The Respondents have not responded to that motion. Under the EPA's Consolidated Rules of Practice, at 40 CFR §22.16(b), a party must file a response to a written motion within 15 days after service of such motion. If a party fails to respond within that time period, the party "waives any objection to the granting of the motion." Hence, the Respondents' failure to respond means that they have waived any objection to granting the Region's motion to find the Respondents liable for the violations alleged in the Complaint.

This decision will therefore grant the Complainant's motion for such partial accelerated decision. I further note that there is nothing in the evidentiary materials submitted by the parties that indicates that the Respondents have any factual defenses to the specific charges alleged in the Complaint. The Respondents' prehearing exchange states that Ric Temple "provided [the Morrises] with a copy of the lead-based paint disclosure statute." If this can be established, it still would not provide any evidence that the Respondents complied with the specific disclosure requirements alleged in the Complaint. The Complainant has provided affidavits by the purchasers and copies of the sales documents that indicate that the Respondents did not comply with the Disclosure Rule or otherwise warn the purchasers of lead-based paint hazards in the subject house.

The record also indicates that the Respondents are "agents" and that the subject house was "target housing" built before 1978 as defined in Disclosure Rule regulations at 40 CFR §745.103. Pursuant to the compliance assurance of the Act, 42 U.S.C. §4852d(4), agents in the sale of target housing are required to ensure compliance with the disclosure requirements on behalf of the seller. The Respondents have not refuted any of the specific charges in the Complaint. Therefore, the Respondent is determined to have committed the violations alleged in the Complaint, recited in the following Conclusions of Law.

Conclusions of Law

1. The Respondents Ric Temple and Paul Nay & Associates, real estate agents in a sale of target housing, committed a violation of

40 CFR §745.107(a)(1) and 42 U.S.C. §4852d (a)(1)(A) by failing to provide the buyers of such housing, the Morrises, with an EPA-approved lead hazard information pamphlet, or to ensure that such a pamphlet was provided by the sellers.

2. The Respondents committed a violation of 40 CFR §745.110(a) and 42 U.S.C. §4852d(a)(1)(C) by failing to allow the Morrises a 10-day period to conduct a risk assessment or inspection for lead-based paint hazards before becoming obligated under the sales contract, or to ensure that such an inspection period was granted by the sellers.

3. The Respondents committed a violation of 40 CFR §745.113(a)(1) and 42 U.S.C. §4852d(2) by failing to include the prescribed Lead Warning Statement in the contract of sale, or to ensure that the sellers did so.

4. The Respondents committed a violation of 40 CFR §745.113(a)(4) by failing to include in the contract a statement by the purchasers affirming their receipt of the lead information pamphlet and other lead-based paint hazard disclosure information, or to ensure that the sellers did so.

5. The Respondents committed a violation of 40 CFR §745.113(a)(5) by failing to include in the contract a statement by the purchasers that they had received the opportunity to conduct a lead risk assessment, or had waived that opportunity, or to ensure that the sellers did so.

6. The Respondents committed a violation of 40 CFR §745.113(a)(6) by failing to include in the contract a statement that the agents had informed the seller of the lead Disclosure Rule requirements and that the agents were aware of the requirements.

7. The Respondents committed a violation of 40 CFR §745.113(a)(7) by failing to include in the contract the signatures of the agents, sellers, and purchasers certifying to the accuracy of their statements concerning lead-based paint hazards in the subject house.

Order Denying Accelerated Decision on Penalty

The Region filed a "Motion for Partial Accelerated Decision on the Issue of Penalty" in this matter on May 19, 2000 (received by the ALJ on May 22), over a month after filing its motion for accelerated decision on liability. This motion must be denied as untimely. I am scheduled to be out of the office almost continuously on other hearings from now until the date scheduled for this hearing to begin, June 20, 2000. Under the Consolidated Rules of Practice, at 40 CFR §22.16(b), the Respondents would have 15 days to respond to the Region's motion from the date of service. With additional time for service by mail under 40 CFR §22.7(c), the Respondents' response could well not be due until virtually the eve of the hearing. In any event, I simply have no time to rule on the instant motion. In addition, in the interests of judicial economy, the Region should have consolidated its motion for accelerated decision on penalty with its earlier motion on liability.

The denial of the motion for accelerated decision on the penalty will be conditioned, however, on the Respondents' filing a response indicating that they oppose the relief sought. The Respondents did not oppose the motion for accelerated decision on liability. Similarly, if they do not oppose the instant motion for accelerated decision on the penalty, the need to hold the hearing will likely be obviated, and the full penalty may be assessed.

Therefore, if the Respondents wish to maintain their right to a hearing on the penalty, they will be directed to file a response in opposition to the Region's motion. The response should include a brief summary, in the nature of a supplemental prehearing exchange, of the Respondents' arguments on why the proposed penalty should be reduced or eliminated.

Order Granting Motion for Confidentiality

The Complainant has moved for an order to protect the confidentiality of the social security numbers of the sellers and purchasers, the Rulons and Morrises, pursuant to the Privacy Act 5 U.S.C. §552(a). This motion is unopposed and will be granted. The Regional Hearing Clerk and counsel for the Respondents will be directed to redact those social security numbers from the copies of all documents submitted in this proceeding.

Summary of Orders

1. The Complainant's motion for partial accelerated decision with respect to the Respondents' liability for the violations alleged in the Complaint is granted.

2. The Complainant's motion for partial accelerated decision on the amount of the penalty is denied, provided the Respondents file a response in opposition to such motion as described above. The response will be due by June 8, 2000. If the Respondent does not file such a response, the hearing may be canceled and the full proposed penalty may be assessed as sought in the Region's motion. If the Respondent does file a response in opposition, the hearing on the amount of the penalty will proceed as scheduled on June 20-21, 2000 in Columbus, Indiana.

3. The Region's motion for a confidentiality order is granted. The Regional Hearing Clerk and counsel for the Respondents are directed to redact all appearances of the social security numbers of the Rulons and Morrises in all documents on file or received in this proceeding.

Andrew S. Pearlstein
Administrative Law Judge

Dated: May 26, 2000
Washington, D.C.