

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Director of the Manufactured Housing and)
Modular Units Program of the Missouri)
Public Service Commission,)

Complainant,)

v.)

Brookside Homes, Inc.,)

and)

Steven D. Warren, an individual,)

Respondents.)

Case No. MC-2009-0020

**RESPONSE TO MOTION TO DISMISS
AND SUPPLEMENTAL MEMORANDUM
REGARDING STANDARD FOR SUMMARY DETERMINATION**

COMES NOW the Director of the Manufactured Housing and Modular Units Program of the Missouri Public Service Commission (Director), by and through Staff Counsel, and for his Response to Motion to Dismiss and Supplemental Memorandum Regarding Standard for Summary Determination (Response and Supplemental Memorandum) states as follows:

Procedural History and Background

On March 3, 2009, the Director filed with the Missouri Public Service Commission (the Commission) the Director's First Amended Complaint against Brookside Homes, Inc. (Brookside) and Steven D. Warren (Warren) (collectively referred to hereinafter as the Respondents). On August 25, 2009, the Director filed his Notice of Dismissal of Counts I, II, III, IV, VI, VIII and X, voluntarily dismissing seven (7) of the ten (10) counts then pending against

both Brookside and Warren. The Commission issued its Notice of Dismissal on September 25, 2009.

On August 31, 2009, the Director filed his Motion for Summary Determination on Counts V, VII, and X and Statement of Undisputed Material Facts in Support Thereof (Motion for Summary Determination), as well as his Memorandum in Support of Director's Motion for Summary Determination on Counts V, VII and X (Memorandum in Support) (these documents are incorporated by reference and are collectively referred to hereinafter as the Director's Motion for Summary Determination).

Also on August 31, 2009, Brookside and Warren, by and through counsel, filed a Motion to Dismiss. The Respondents' Motion to Dismiss presents two affirmative defenses that the Respondents claim are dispositive of the allegations against them¹.

On October 5, 2009, the Director filed his Notice of Dismissal of Respondent Steven D. Warren, voluntarily dismissing Warren from this matter.

The purpose of this Response and Supplemental Memorandum is to provide additional clarification to the Commission regarding the standard for summary determination under the Commission's rules and as applied to practice before the Commission. Because the Commission's rule on summary determination is similar to the corresponding Supreme Court Rule (Rule 74.04), the Director believes that Missouri court opinions on the application of Rule 74.04 may guide the Commission in considering this matter.

¹ As explained in the Respondents' Motion to Dismiss, the defenses upon which the motion is based are to be applied to Counts V, VII, and IX, which remain pending after dismissal by the Director of Counts I, II, III, IV, VI, VIII, and X.

Standard for Summary Determination

To begin, the standard for summary judgment contained in the Supreme Court Rules and the standard for summary determination before the Commission are similar in text. Commission Rule 4 CSR 240-2.117(E) provides the Commission standard, stating:

(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest...

In comparison, Supreme Court Rule 74.04(C)(6) provides:

If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith.

Upon comparison of both rules, it is clear that a movant for summary judgment (or determination in the case of the Commission) must establish (1) that there exist no genuine issue of material fact, and (2) entitlement to relief or judgment as a matter of law. Additionally, under the Commission's Rule, the Commission must determine (3) that a grant of the motion is in the public interest.

The Commission's rules and the Supreme Court Rules differ in how these motions are processed. Commission Rule 4 CSR 240-2.117(C) allows respondents to make *discretionary* responses to motions for summary determination:

(C) Not more than thirty (30) days after a motion for summary determination is served, any party may file and serve on all parties a response in opposition to the motion for summary determination. Attached thereto shall be any testimony, discovery or affidavits not previously filed that are relied on in the response. The response shall admit or deny each of movant's factual statements in numbered paragraphs corresponding to the numbered paragraphs in the motion for summary determination, shall state the reason for each denial, shall set out each additional material fact that remains

in dispute, and shall support each factual assertion with specific references to the pleadings, testimony, discovery, or affidavits. The response may also have attached thereto a legal memorandum explaining why summary determination should not be granted.

(emphasis added).

By comparison, the Supreme Court Rule requires parties to file a series of *mandatory* responses, replies and sur-replies, resulting in what has been described by the Missouri Supreme Court as a “step-by-step procedure by which such cases can be identified and resolved.” ITT Commercial Fin. Corp. Mid-America Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993).

The court in ITT Commercial Finance analyzed this procedure and provided practitioners with a number of useful principles that the Director recommends the Commission follow in light of the facts presented in this matter. Specifically, the court in ITT Commercial Finance analyzed the existence of “genuine issues of material fact” and addressed the effect of affirmative defenses on a movant’s claim. In applying the facts of this case to the Commission’s rule the Director suggests the Commission be guided by the decision reached by the court in ITT Commercial Finance.

Genuine Issues of Material Fact and Effect of Failure to File a Response

As discussed above, a movant for summary judgment (or a movant for summary determination before the Commission) must first establish that there exists no genuine issue of material fact. In analyzing the Rule 74.04, the court in ITT Commercial Finance stated that once this allegation is made by the movant

...the non-movant must [then] *create* a genuine dispute by supplementing the record with competent materials that establish a plausible, but contradictory, version of at least one of the movant’s essential facts. Therefore, it is not the ‘truth’ of these facts upon which the court focuses, but whether those facts are disputed. Where they are not, the facts are admitted for the purposes of a summary judgment motion.

ITT Commercial Fin. at 382.

This principle applies in this case because the Respondents have failed to respond to the facts presented in the Director's Motion for Summary Determination. Whether a response is discretionary, as under the Commission rules, or mandatory, as under the Supreme Court Rule, the Respondent in this case has not contested the facts contained in the Director's Motion for Summary Determination and has therefore failed to *create* a genuine dispute.

Since the decision in ITT Commercial Finance, each division of the Court of Appeals of the State of Missouri has reaffirmed the principles set forth therein and specifically addressed the (detrimental) effect of the failure of a non-movant to respond to a motion for summary judgment. Specifically, the Court of Appeals for the Western District has held that “the non-moving party may not rely on mere allegations and denials of the pleadings, but must use affidavits, depositions, answers to interrogatories, or admissions on file to demonstrate existence of genuine issue for trial”. Barner v. The Missouri Gaming Co., 48 S.W.3d 46 (Mo. Ct. App. W.D. 2001) (citing ITT Commercial Fin. at 381).

The Court of Appeals for the Southern District has held that “failure to respond to factual allegations in defendant's motion for summary judgment is an admission of those facts”. Williams v. Thomas, 961 S.W.2d 896, 873 (Mo. Ct. App. S.D. 1998) (citing Komen v. Stoffer, 948 S.W.2d 706, 708 (Mo. Ct. App. E.D. 1997)).

Likewise, the Court of Appeals for the Eastern District has held that “facts set forth by affidavit or otherwise in support of party's motion are taken as true unless contradicted by non-moving party's response to the summary judgment”. Magna Bank of Madison County v. W.P. Foods, Inc., 926 S.W.2d 157, 161 (Mo. Ct. App. E.D. 1996) (citing ITT Commercial Fin. at 376).

The Commission should follow the principles provided by Missouri courts. Because the Respondents have failed to *create* a genuine issue of material fact by contesting the facts contained in the Director's Motion for Summary Determination, the Commission should deem these facts admitted, fulfilling the first prong of the Commission's rule.

Right to Judgment as a Matter of Law
(Effect of Affirmative Defenses)

In order to be entitled to summary judgment under Supreme Court Rule 74.04 (or to summary determination by the Commission), a movant must also establish that the movant is entitled to relief as a matter of law. The ability to establish this entitlement is necessarily subject to any affirmative defenses which have been raised in responsive pleadings. Again, the court in ITT Commercial Finance addressed this Rule 74.04 requirement in its holding:

Therefore, a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law. Unlike the burden of establishing all of the facts necessary to his claim, however, the claimant may defeat an affirmative defense by establishing that any one of the facts necessary to support the defense is absent.

ITT Commercial Fin. at 381.

In their August 31, 2009 Motion to Dismiss, Respondents Brookside and Warren asserted two affirmative defenses that Respondents claim are dispositive of the Director's complaint. As Missouri courts follow the principles of ITT Commercial Finance, so should the Commission in its determination of the Director's entitlement to relief as a matter of law. With this in mind the Director responds to Respondent's affirmative defenses as follows:

1. Director's Failure to State a Claim against Steven D. Warren

The Respondent's first affirmative defense asserts that the Director has failed to state a claim against Steven D. Warren as an individual. On October 5, 2009, the Director filed his

Notice of Dismissal of Respondent Steven D. Warren, voluntarily dismissing the Respondent Steven D. Warren from the Director's First Amended Complaint. Because Steven D. Warren is no longer a party to this action, any defense that pertains to Steven D. Warren as an individual is now moot.

2. Director's Failure to Follow Statute

The second of the defenses asserted by Respondents in their Motion to Dismiss is in essence an allegation that the Director violated the mandates of Section 700.689, RSMo (Cum. Supp. 2008) and that this violation warrants dismissal of this action. This argument, as applied to the remaining counts in the Director's First Amended Complaint, is inapplicable.

Section 700.689, RSMo (Cum. Supp 2008) states as follows:

The commission shall implement a process, by rule, consistent with Title VI of P.L. 106-569 and any federal regulations promulgated pursuant to that act, to resolve disputes arising among manufacturers, dealers, and installers of manufactured homes regarding responsibility for correcting or repairing defects in manufactured homes that are reported during the one-year period beginning on the date of installation. The program shall provide for issuing appropriate orders.

Even though there is currently no rule establishing a formal dispute resolution process, this fact is of no effect when applied to the claims remaining in the Director's First Amended Complaint. Any rule which would have been in effect, by definition, would have only been applied in order to resolve certain "disputes arising among manufacturers, dealers, and installers of manufactured homes".

To begin, there is no "dispute" among the parties that dealers are responsible for the *types* of repairs for which the Director asserts against Brookside in Counts V and VII. To the contrary, as shown in the Director's Motion for Summary Determination, and in the deposition of Steven D. Warren attached thereto, Mr. Warren, the sole officer and director of Brookside Homes,

admitted under oath that dealers, in general, are responsible for types of deficiencies included in Count V. See Motion for Summary Determination, Exhibit C, p. 44, Ins. 4-6.

As for Count VII, a dealer is under the statutory obligation to hire a Commission-licensed installer to install a new manufactured home. See generally Sections 700.650 to 700.692, RSMo (2000); see also § 700.656.3, RSMo (2000). There is no dispute among the parties that the use of a licensed installer is not required for the delivery of a manufactured home from a dealer's sales lot to the customer site. See Motion for Summary Determination, Exhibit B, p. 5; Exhibit C, p. 28, Ins. 3-9. This means that an individual who delivers a home, even if licensed as an installer, is working as the "deliverer" and not as an "installer" at the time of the delivery. In this respect, a deliverer is akin to a subcontractor hired by and supervised by the dealer. The relationship of the subcontractor "deliverer" and the supervising dealer subjects the dealer to any and all liability arising from that relationship. In his deposition, Mr. Warren agreed on behalf of Brookside that if a dealer hires a contractor or subcontractor to perform duties other than the installation of the home and those individuals perform "subpar" work, then it is the dealer's responsibility to ensure that the final product complies with the code. See Motion for Summary Determination, Exhibit C, p. 34, Ins. 7-24. Because there is no "dispute" about the dealer's responsibility in Counts V and VII, a formal dispute resolution process was not initiated by the Director and, given the same facts, the Director would not have initiated such process even had it been provided for by rule.

Additionally, the Director has alleged in Count IX that Brookside did not initially arrange for a Commission-licensed installer to setup the Schmidt Home and is therefore liable for any and all deficiencies. As contained in his Motion for Summary Determination, the Director has knowledge that an unlicensed installer installed the Schmidt Home. In light of this allegation, the Director would not have instituted a formal dispute resolution process to resolve a dispute between a dealer and an unlicensed installer.

Conclusion

In conclusion, in applying Commission Rule 4 CSR 240-2.117 to the Director's Motion for Summary Determination the Director urges the Commission to follow the interpretation given to Rule 74.04 by the courts of this State. Under the guidance of Missouri courts, and for the reasons mentioned above, the Director reaffirms his belief that he is entitled to summary judgment in this case as a matter of law and as a matter of public interest.

WHEREFORE, the Director respectfully submits this Response and Supplemental Memorandum to help clarify for the Commission how the relief sought by the Director in his Motion for Summary Determination may be granted under the Commission's rules and renews his request that the Commission grant the Director's motion.

Respectfully submitted,

/s/ Eric Dearmont

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 14th day of October, 2009.

/s/ Eric Dearmont