

Not Reported in S.E.2d, 2001 WL 541066 (Va.Cir.Ct.)
(Cite as: 2001 WL 541066 (Va.Cir.Ct.))

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Circuit Court of Virginia.
JAZAYERLI, et al.
v.
RENAISSANCE HOUSING CORP., et al.
No. 187583.

April 10, 2001.

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NEY, Judge.

*1 Dear Counsel:

This matter came before the Court on March 30,
2001 on Defendants' Motion for Summary Judgment.

This case involves the Exterior Insulation and Finish-
ing System (hereinafter EIFS), a synthetic stucco
method of exterior cladding for single family residen-
tial properties and the consequential effects of alleged
defects in that cladding and its installation. For the
reasons stated in court, the Motion for Summary
Judgment was granted.

The Court then took under advisement whether fur-
ther consideration of Exhibit C ^{FN1} to Plaintiffs'
Memorandum of Law might change the Court's deci-
sion. Consideration of Exhibit C-the sales brochure-

does not change the outcome of the ruling on Sum-
mary Judgment.

FN1. Exhibit C is a Brochure published by
Renaissance for prospective clients who
may wish to buy a custom made home. The
brochure features several styles and floor
plans. The brochure contains depictions of
exterior elevations of house models that are
constructed with "stucco".

For purposes of Summary Judgment, the Court "must
adopt those inferences from the facts that are most
favorable to the non-moving party". See Carson v.
LeBlanc, 245 Va. 135, 139, 427 S.E.2d 189, 192
(1993). Hence, the Court assumes for the purposes of
this motion that the Plaintiffs were aware of the Ren-
aissance sales brochure and relied on the brochure
when they purchased the house-not from Renais-
sance-but from the original purchasers, Hasan and
Nusrat Naghimi.

Virginia Code § 18.2-216 is a penal statute and must
be construed strictly. ^{FN2}See Henry v. R.K. Chevrolet,
Inc., 219 Va. 1011, 254 S.E.2d 66 (1979). The statute
"cannot be extended by implication, or be made to
embrace cases which are not within its letter and
spirit". McKinney v. Commonwealth, 207 Va. 239,
243, 146 S.E.2d 829, 832 (1966). Here, the question
presented is whether a false or misleading advertise-
ment ^{FN3} relied upon by persons who then purchased
the advertised product-not from the entity which
placed the false advertisement-provides a cause of
action in favor of those persons against the entity
which placed the advertisement.

FN2. § 18.2-216.

Untrue, deceptive or misleading advertis-
ing, inducements, writing or document.-
Any person, firm, corporation or associa-
tion who, with intent to sell or in anywise
dispose of merchandise, securities, service
or anything offered by such person, firm,
corporation or association, directly or in-
directly, to the public for sale or distribu-
tion or with intent to increase the con-

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sumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or any interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper or other publications, or in the form of a book, notice, handbill, poster, blueprint, map, bill, tag, label, circular, pamphlet or letter or in any other way, an advertisement of any sort regarding merchandise, securities, service, land, lot or anything so offered to the public, which advertisement contains any promise, assertion, representation or statement of fact which is untrue, deceptive or misleading, or uses any other method, device or practice which is fraudulent, deceptive or misleading to induce the public to enter into any obligation, shall be guilty of a Class 1 misdemeanor. The words "untrue, deceptive and misleading," as used in this section, shall be construed as including (i) the advertising in any manner by any person of any goods, wares or merchandise as a bankrupt stock, receiver's stock or trustee's stock, if such stock contains any goods, wares or merchandise put therein subsequent to the date of the purchase by such advertiser of such stock, and if such advertisement of any such stock fail to set forth the fact that such stock contains other goods, wares or merchandise put therein, subsequent to the date of the purchase by such advertiser of such stock in type as large as the type used in any other part of such advertisement, including the caption of the same, it shall be a violation of this section; and (ii) the use of any writing or document which appears to be, but is not in fact a negotiable check, negotiable draft or other negotiable instrument notwithstanding the fact that its nonnegotiability is indicated on the writing or document.

FN3. The false or misleading nature of the advertisement is assumed for the purposes of the Opinion only.

The operative language of the statute that applies here can be parsed as follows:

Any... firm... with intent to sell... anything offered by such... firm... or to induce the public in any manner to enter into any obligation relating thereto... publishes... an advertisement... regarding anything so offered to the public... which... contains any... representation... which is untrue... shall be guilty... of a misdemeanor.

Virginia Code § 18.2-216 (1996 Repl.Vol.)^{FN4}

FN4. Civil actions which may be based on a violation of this Section are provided for at Sections 59.1-68.3 and 68.5.

The intention of the statute is straightforward-to punish an offeror who promotes a sale of goods by the use of false advertising. It is not enough that the offeror simply publish the advertisement. There must be an "intention to sell" or an effort "to induce the public... to enter into any obligation" as to the product. The plain language of the statute contains a "sale" or "obligation" nexus.

In *Samuels et al v. King Motor Company of Fort Lauderdale*^{FN5} the Court of Appeals of Florida considered a claim brought pursuant to that state's misleading and false advertising statute.^{FN6} There the plaintiffs alleged that an automobile dealer sold their trade-in vehicle before the purchase contract for their new vehicle had been finalized. The plaintiffs claimed that the "buyers order" used by the dealership was misleading and that they entered into it believing that their trade-in vehicle would not be disposed of until financing had been obtained for the new vehicle. The plaintiffs were disapproved for financing and told to make a larger down payment in order to qualify. They refused to do so and demanded the return of their trade-in vehicle. The dealer had already sold it and the lawsuit followed.

FN5. ___ So.2d ___, 2001 WL 313872 (Fla.App. 4 Dist. March 28, 2001)

FN6. Florida Statutes Section 817.41

(1) It shall be unlawful for any person to

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make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement. Such making or dissemination of misleading advertising shall constitute and is hereby declared to be fraudulent and unlawful, designed and intended for obtaining money or property under false pretenses.

....

(6) The phrase "misleading advertising" includes any statements made, or disseminated, in oral, written, or printed form or otherwise, to or before the public, or any portion thereof, which are known, or through the exercise of reasonable care or investigation could or might have been ascertained, to be untrue or misleading, and which are or were so made or disseminated with the intent or purpose, either directly or indirectly, of selling or disposing of real or personal property, services of any nature whatever, professional or otherwise, or to induce the public to enter into any obligation relating to such property or services.

Florida Statutes Section 817.41

*2 In sustaining the trial court's dismissal of the false advertising claim, the Court of Appeals held that the misleading statement-as to the fact that the trade-in vehicle would not be disposed of before the sale was concluded-was not related to entering into a sales transaction.

Here, the Plaintiffs did not allege that the misleading statement was made with the purpose of selling or disposing of any property. Rather, according to the implications inherent in the allegations, King Motor made the alleged misleading statement for the purpose of inducing the Plaintiffs to give possession of their trade-in vehicle to them. That King Motor might have intended to sell the trade-in vehicle to a third party is unavailing because the 'selling' or 'disposing' of property [mentioned in the Florida statute] must be related to the misleading statement made to the Plaintiffs.

2001 WL 313872 at *4. (March 28, 2001)^{FN7}

FN7. Interestingly, the trade-in aspect of the sales negotiation in King Motor is much closer to if not an integral part of the sale transaction itself than any connection that can be asserted here between the sales brochure and the Plaintiffs' purchase of the house from a third party. Notwithstanding, the Florida Court of Appeal-and the trial court-did not find that the misleading statement related to a "sale" or "obligation". On more difficult facts than those presented here the Court reached the same result as here, and for the same reason.

Plaintiffs do not claim to have purchased their home from or to have interacted directly in any manner with any of the named Defendants or their representatives. Plaintiffs can, at most, allege that Defendants constructed the home at issue and on April 17, 1996, sold it to the original purchasers, who subsequently in November 1999-sold it to Plaintiffs. Plaintiffs have no nexus involving a "sale" or other contractual "obligation" with any of the Renaissance Defendants. Their only connection with Defendants is that they saw a sales brochure for Defendants' new homes. This connection is too remote. It does not involve a "sale" or "obligation" entered into-or contemplated or sought to be entered into-between the Plaintiffs and Defendants as required by the plain language of § 18.2-2.6.

The False Advertising Claim that remained in this case, for the reasons stated both in court on March 30, 2001, and herein, is inapplicable to these Defendants. The Motion for Summary Judgment ^{FN8} is granted. This case is dismissed. The exception of counsel for the Plaintiffs to the Court's ruling is noted.

FN8. No provision exists for permitting amendment of a Motion for Judgment upon the granting of Summary Judgment. This ruling is dispositive and final.

An Order is enclosed.

Va.Cir.Ct.,2001.
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