

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

STATE OF IOWA ex rel.)
THOMAS J. MILLER, 99AG25112)
ATTORNEY GENERAL OF IOWA)
Plaintiff,)
v.)
TIERNEY BROTHERS CONSTRUCTION, LLC,)
SEAN TIERNEY AND TRACY TIERNEY,)
Defendants.)

EQUITY NO. CE CE 67104

PETITION AND REQUEST-
FOR PERMANENT
INJUNCTION

COMES NOW the State of Iowa ex rel. Attorney General of Iowa, Thomas J. Miller, by Assistant Attorney General Benjamin E. Bellus, pursuant to the provisions of Iowa Code § 714.16 (2009), commonly referred to as the Iowa Consumer Fraud Act, and for its claim against Defendants Tierney Brothers Construction, LLC, Sean Tierney and Tracy Tierney, states as follows:

PARTIES

1. Plaintiff is the State of Iowa, ex rel. Attorney General Thomas J. Miller, the duly elected Attorney General of Iowa. The Attorney General of Iowa is expressly authorized pursuant to Iowa Code § 714.16(7) to file a civil action against any person who has engaged in a practice declared to be unlawful under Iowa Code § 714.16.

2. Defendant Sean Tierney is an owner, operator and managing agent of a home repair and contractor business registered with the Minnesota Secretary of State as Tierney Brothers Construction, LLC. At all times relevant to the transactions from which this suit arose, the places of business for Sean Tierney under any business name were 6731 137th Avenue, NW,

Ramsey, Minnesota and 5220 NE 14th Street, Des Moines, Iowa. Defendant Sean Tierney is named in his individual capacity as well as his past or present corporate capacities.

3. Defendant Sean Tierney formulated, directed, controlled, was a primary participant in, and had, or should have had, knowledge of the acts and practices of Tierney Brothers Construction, LLC, constituting the violations of Iowa law as alleged herein and, at all times relevant hereto, was an officer, director, owner, and/or agent of Tierney Brothers Construction, LLC.

4. Defendant Tracy Tierney is an owner, operator and managing agent of a home repair and contractor business registered with the Minnesota Secretary of State as Tierney Brothers Construction, LLC. At all times relevant to the transactions from which this suit arose, the places of business for Tracy Tierney under any business name were 6731 137th Avenue, NW, Ramsey, Minnesota and 5220 NE 14th Street, Des Moines, Iowa. Defendant Tracy Tierney is named in her individual capacity as well as her past or present corporate capacities.

5. Defendant Tracy Tierney formulated, directed, controlled, was a primary participant in, and had, or should have had, knowledge of the acts and practices of Tierney Brothers Construction, LLC, constituting the violations of Iowa law as alleged herein and, at all times relevant hereto, was an officer, director, owner, and/or agent of Tierney Brothers Construction, LLC.

6. Defendant Tierney Brothers Construction, L.L.C. is an incorporated business entity in the state of Minnesota which provides home repair and contractor services to a predominately residential market in Minnesota, Colorado and Iowa. Defendant is registered as a "contractor" with Iowa Workforce Development to do business in Iowa. At all times relevant to the transactions from which this suit arose, the Iowa place of business for Tierney Brothers, Inc, was

a hotel room located at 5220 NE 14th Street, Des Moines, Iowa and the main corporate office was located at 6731 137th Avenue, NW, Ramsey, Minnesota.¹

7. The phrase "home repairs or contractor services," as used herein, includes any work on any residential dwelling or other structure; and any work on other things commonly found on residential real property including, but not limited to, garages, basements, interiors, roofs, porches, driveways, sidewalks, patios and fences.

VENUE

8. Venue is proper in Polk County, Iowa, because the Defendants engaged in the activities that are the subject of this Petition in Polk County, Iowa. Moreover, Defendants do business in Polk County and one or more victims of the practices in question reside in Polk County. Iowa Code § 714.16 (10).

JURISDICTION

9. The Iowa Consumer Fraud Act, Iowa Code § 714.16 (2)(a) ("the Consumer Fraud Act") provides in pertinent part:

The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.

10. Iowa Code § 714.16(1) provides the following definitions:

(f) "Deception" means an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

(n) "Unfair practice" means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits

¹ The Minnesota address is alternatively listed by Defendants as 6731 137th Avenue, NW, Anoka, Minnesota.

which the practice produces.

11. Iowa Code § 714.16 (7) provides, in pertinent part:

Except in an action for the concealment, suppression, or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction, to allege or to prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth.

12. In describing remedies under the Consumer Fraud Act, Iowa Code subsection

714.16(7) provides in pertinent part as follows:

If it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful by this section, the attorney general may seek and obtain in an action in a district court a temporary restraining order, preliminary injunction, or permanent injunction prohibiting the person from continuing the practice or engaging in the practice or doing an act in furtherance of the practice. The court may make orders or judgments as necessary to prevent the use or employment by a person of any prohibited practices, or which are necessary to restore to any person in interest any moneys ... which have been acquired by means of a practice declared to be unlawful by this section ...

In addition to the remedies otherwise provided for in this subsection, the attorney general may request and the court may impose a civil penalty not to exceed forty thousand dollars per violation against a person found by the court to have engaged in a method, act, or practice declared unlawful under this section; provided, however, a course of conduct shall not be considered to be separate and different violations merely because the conduct is repeated to more than one person. In addition, on the motion of the attorney general or its own motion, the court may impose a civil penalty of not more than five thousand dollars for each day of intentional violation of a ... permanent injunction issued under authority of this section.

13. In describing remedies under the Iowa Door-To-Door Sales Act, Iowa Code §

555A.6(2) provides in pertinent part as follows:

A violation of this chapter is a violation of section 714.16, subsection 2, paragraph “a”.

FACTUAL ALLEGATIONS

Background

14. Defendants engaged in the business of providing services and materials for home

repairs or contractor services at the homes of Iowa consumers.

15. Defendants offered to sell home repairs or contractor services to consumers through direct mail advertising, print advertising, an internet website and direct sales.

16. As part of their advertising efforts, Defendants mailed letters to Iowa consumers which represented that the Defendants were contacting consumers “in accordance” with the “Iowa Insurance Commission” to provide free repair estimates to homeowners in communities which had suffered storm damage.

17. Defendants had in fact not received any directives from the Iowa Insurance Division nor were they in any other way working with the Iowa Insurance Division.²

18. If a consumer expressed interest in hiring Defendants to provide home repairs or contractor services, Defendants met with consumers at the consumers’ residences where the contract was finalized and signed by both parties.

19. All contracts for home repairs or contractor services between Defendants and Iowa consumers were signed at a location other than the Defendants’ place of business.

20. In most, if not all, sales of home repairs or contractor services to Iowa consumers, Defendants used a form contract which stated:

The property owner agrees to let Tierney Bros. Construction, LLC work with the insurance company to negotiate the costs of the repairs and do the work specified in the loss sheet.

21. Despite the representations made in their contracts, the Defendants were not licensed as public adjusters pursuant to Iowa Code § 522C.4 and thus could not negotiate the settlement of the consumers’ claim for repairs with the consumers’ insurance companies.

² The Iowa Insurance Division is the primary state agency for the regulation of insurance-related business in Iowa. There is no state agency called the “Iowa Insurance Commission”.

22. In most, if not all, sales of home repairs or contractor services to Iowa consumers, Defendants used a form contract which provided no scope of work, no description of materials to be used and no total cost under the contract; but the contract did state that Defendants would directly negotiate with the consumers' insurance companies to determine what repairs would be made to the consumers' homes, what materials would be used for the repairs and the cost of the repairs.

23. Defendants' form contract further provided that the consumers would either accept the contract as subsequently and separately negotiated between the Defendants and the consumers' insurance companies, or the consumers would be forced to pay the Defendants liquidated damages in the amount of 25% of the contract price independently agreed upon by the Defendants and the consumers' insurance companies - with the consumers having no right to dispute either the scope of work, the materials to be used or the total price of the contract.

24. In most, if not all, sales of home repairs or contractor services to Iowa consumers, Defendants used a form contract which failed to comply with the Iowa Door-to-Door Sales Act (Iowa Code Chapter 555A) in a manner including, but not limited to:

- a. failing to disclose the consumers' right to cancel in 10 point boldface type on the front of the contract or receipt, as required by Iowa Code § 555A.2; and
- b. failing to provide the consumers with a "Notice of Cancellation" drafted in the required form and content, as required by Iowa Code § 555A.3.

25. In most, if not all, sales of home repairs or contractor services to Iowa consumers, Defendants further failed to comply with the Iowa Door-to-Door Sales Act (Iowa Code Chapter 555A) in a manner including but not limited to:

- a. failing to furnish to consumers two copies of the notice of cancellation which included the date by which the consumers must give the notice of cancellation to the Defendants, as required by Iowa Code § 555A.4(1);

- b. failing to orally inform the consumers of their right to cancel, as required by Iowa Code § 555A.4(3);
- c. misrepresenting the consumers' right to cancel the transaction as provided in Iowa Code § 555A.4(4); and
- d. failing to honor valid cancellations by consumers and failing to refund all payments made under the contracts or sales within ten (10) business days of the cancellation, as required by Iowa Code § 555A.4(5).

26. On information and belief, Defendants have on numerous occasions engaged in practices similar to those alleged in paragraphs 14 through 25, above, regarding the sales of home repairs or contractor services to other consumers.

27. It is in the public interest that permanent injunctive relief be issued herein to protect the people of the State of Iowa from any further losses from any similar conduct by the Defendants in Iowa in the future.

28. The State's petition for injunctive relief has not been presented to, or denied by, any other judge of the district court.

CAUSES OF ACTION

Count I

Violations of Iowa Door-To-Door Sales Act - Iowa Code Chapter 555A.

29. The State incorporates by this reference all allegations set forth in Paragraphs 14, 15, 18, 19, 23 through 26.

Count II

Violations of Iowa Consumer Fraud Act - Iowa Code § 714.16.

30. The State incorporates by this reference all allegations set forth in Paragraphs 14 through 26.

31. Pursuant to Iowa Code § 555A.6(2), each of Defendants' violations listed in Count I

constitute a violation of Iowa Code § 714.16(2)(a).

32 . Defendants acted, used or employed unfair practices, deception, fraud, false pretense, false promise, misrepresentation and/or concealment, suppression, or omission of material facts with the intent that consumers rely on the concealment, suppression or omissions, in violation of Iowa Code § 714.16(2)(a), in a manner including, but not limited to:

a. representing to consumers that Defendants were contacting the consumers pursuant to a directive from a state agency, or otherwise in partnership with a state agency; when in fact the contact was solely a marketing effort by the Defendants and no agency of the State was involved in any manner;

b. representing to consumers that, as part of the services provided under the contract, Defendants would perform the duties of an insurance adjuster with the consumers' insurance companies when, in fact, Defendants could not legally provide said services; and

c. employing contracts which failed to disclose material terms of the contracts between the Defendants and the consumers but contained provisions which, when taken together, forced the consumers to accept whatever agreement was subsequently and independently reached between the Defendants and the consumers' insurance companies in regards to the scope of work for repairs, the materials to be used and the total price - or the consumers were forced to pay the Defendants 25% of the total contract price agreed upon between Defendants and the consumers' insurance companies.

REQUEST FOR RELIEF

33. The State respectfully requests that the Court order joint and several relief against Defendants Tierney Brothers Construction, LLC, Sean Tierney and Tracy Tierney, as follows:

A. That the Court, pursuant to Iowa Code § 714.16(7), permanently enjoin Defendants from:

1. failing to comply in all respects with the requirements of the Iowa Door-to-Door Sales Act, Iowa Code Chapter 555A;

2. misrepresenting the Defendants' qualifications, training, certifications, licences, experience, or any other information which would be material to consumers when choosing a contractor;

3. misrepresenting the Defendants' associations, affiliations, partnerships, or any

other information which would be material to a consumers when choosing a contractor;

4. employing any contract or other device which obligates consumers to the payment of damages to the Defendants for cancelling said contract unless all material provisions of the contract (e.g. scope of work, materials to be used, total cost to the consumer, etc.) are disclosed to the consumer before the consumer signs the contract; and

5. employing any contract, sales strategy, marketing device or other means which would serve to deprive consumers of the ability to enforce all decision-making rights, legal rights and legal remedies with third parties, such as their insurance companies.

B. That the Court order Defendants to restore any money to consumers whom the Court deems to be entitled to restitution as a result of Defendants' unlawful acts or practices, pursuant to Iowa Code § 714.16(7).

C. That the Court order Defendants to pay a civil penalty to the State in an amount not to exceed \$40,000.00 per violation, pursuant to Iowa Code § 714.16(7).

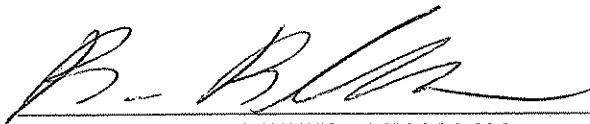
D. That the Court order Defendants to pay the State's costs including, but not limited to, reasonable attorney fees, court costs and investigative costs incurred in this action, pursuant to Iowa Code § 714.16(11).

E. That the Court award the State interest as permitted by law.

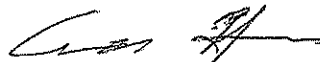
F. That the Court grant any further relief as the Court deems just and equitable.

Respectfully submitted,

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Attorney General of Iowa



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