

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CAUSE NO. 3:01cv0040AS
)
 EDWARD ROSE & SONS, INC., *et al.*,)
)
 Defendants.)

ORDER

On December 12, 2002, the Plaintiff, United States of America, filed a Motion to Compel the Rose Defendants to Permit Entry Upon Land for Inspection and to Produce Documents [Doc. No. 60]. On December 30, 2002, the Defendants, Edward Rose & Sons, Inc., Edward Rose Construction Co., Edward Rose of Indiana, Edward Rose & Associates, Edward Rose Development Co., LLC and Occidental Development Ltd., L.P. (collectively the "Rose Defendants") filed their response in opposition to Plaintiff's Motion to Compel. The Rose Defendants also filed a Supplemental Opposition to Plaintiff's Motion to Compel on January 6, 2003. And on January 13, 2003, the Plaintiff, United States of America, filed its Reply to Defendants' Opposition to Plaintiff's Motion to Compel.

This motion was referred to the undersigned Magistrate Judge by the Honorable Allen Sharp, United States District Judge, on January 27, 2003, to conduct such proceeding as are required and enter into the record a written order setting forth the disposition of the motions to compel. All pursuant to 28 U.S.C. §636(b)(1)(A).

For the reasons set forth, the Plaintiff's Motion to Compel the Rose Defendants to Permit Entry Upon the Land for Inspection and to Produce Documents [Doc. No. 60] is **GRANTED**.

I. Background

On January 18, 2001, and August 31, 2002, respectively, the United States filed its Complaint and Amended Complaint in this matter. As amended, the United States Complaint alleges, *inter alia*, that Rose Defendants, have engaged in a pattern or practice of discrimination on the basis of disability, and have denied rights to a group of persons on the basis of disability, in violation of the Fair Housing Act, Title VII of the Civil Rights Act of 1968, as amended, 42 U.S.C. §§ 3601 et seq.

In its Amended Complaint, the United States alleges that the Rose Defendants' pattern or practice of denial of rights has "include[d]" – but is not necessarily limited to – the failure to design and construct fourteen specified apartment complexes, mostly in Indiana, so that they are accessible to persons with disabilities, as required by the Fair Housing Act. The Amended Complaint also alleges that the Rose Defendants failed to design and construct "other" complexes without the required accessibility features. Since filing the Amended Complaint, the United States has learned that the Rose Defendants may have designed and constructed at least five additional complexes in Indiana without the required accessibility features.

Despite the Plaintiff's requests, the Rose Defendants have refused to provide any information or documents about, or to allow any inspections of, the five Indiana complexes not specified in the Plaintiff's Amended Complaint. Specifically, the United States has served requests for entry upon land so that it can inspect these five additional properties. The United States has also tendered document requests seeking documents relating to the design and construction of these properties. The Rose

Defendants have refused to permit the inspections or otherwise provide discovery regarding these properties.

By way of response, the Rose Defendants do not deny that they have designed and constructed the additional properties or that the complexes have design features that are similar or identical to those of the other fourteen complexes. Rather, the Defendants argue that, unless properties are named in the Amended Complaint, they are not subject to this litigation, and therefore not relevant for the purposes of discovery.

II. Analysis

The United States brought this action, in part, under 42 U.S.C. § 3614(a). This section of the Fair Housing Act empowers the Attorney General to commence a civil action, “[w]henver the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance.” Id. In order to show a pattern or practice of discrimination, the United States must show more than merely isolated or sporadic acts of discrimination. See United States v. Balistrieri, 981 F.2d 916, 929 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993). Rather, “the government must present evidence from which the fact-finder can reasonably conclude [] that the discrimination was the [defendant’s] standard operating procedure – the regular rather than the unusual practice.[]” Id.

Although the United States’ Amended Complaint refers to specific non-compliant properties developed by the Rose Defendants’, these properties are more accurately viewed as instances of

discrimination. Under well established principals of notice pleading, the Amended Complaint properly places the Defendants on notice of the Plaintiff's claim. Fed. R. Civ. Proc. 8 The scope of the Plaintiff's claim is not limited to those specifically named properties.

Furthermore, paragraph 5 of Plaintiff's Amended Complaint reads: "The Rose defendants are responsible for the design, construction, and overall development of a number of apartment complexes, including the following. . ." (specific list of properties omitted). Paragraph 12 states: "Defendants have failed to design and construct the covered dwelling units and common use and public use areas in the subject complexes and others in such a manner that . . ." (emphasis added). Paragraph 19 reads: "The Rose defendants have failed to design and construct the rental offices at the subject complexes and others . . . in such a manner that the facilities are readily accessible to and useable by individuals with disabilities." (emphasis added).

Additionally, it is Prayer for Relief, the United States asked the Court to enjoin the defendants from "[f]ailing or refusing to bring the covered dwelling units and public use and common use areas at the subject complexes and others into immediate compliance with the requirements of 42 U.S.C. §3604(f)(3)(C)" (emphasis added). The United States also asks the Court to enjoin the defendants from "[f]ailing or refusing to bring the rental offices at the subject complexes and others, and the parking, sidewalks, and restrooms at the rental offices, into compliance with the requirements of 42 U.S.C. §12183(a)(1)" (emphasis added).

This language clearly broadens the scope of the United States' claim beyond the fourteen specific properties mentioned in the Amended Complaint and properly places the Defendants on notice that the United States' claim extends beyond the specific properties listed in the Amended Complaint.

Under Federal Rules of Civil Procedure 26, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). The goal of discovery is to “narrow and clarify the basic issues between the parties” and to ascertain facts or information relative to those issues in order for the parties to “obtain the fullest possible knowledge of the issues and facts before trial.” Hickman v. Taylor, 329 U.S. 495, 500-501 (1947).

Addressing a similar situation in a case where the plaintiff alleged that a state agency had engaged in a pattern of discrimination, the Eleventh Circuit held “discovery requests relevant to the showing a pattern or practice ... As to the entire state is properly within the scope of discovery.” Panola Land Buyers Association v. Sherman, 762 F.2d 1550, 1559-60 (11th Cir. 1985).

In this circuit, the Seventh Circuit held that a Plaintiff’s complaint in a “pattern or practice” Fair Housing Act case put the Defendant’s on notice of the government’s claim and then discovery “fleshed out” the claim. The Court noted “the term ‘pattern or practice’ itself implies an ongoing series of acts; it would be asking next to the impossible to demand that the government know about every victim of that alleged pattern before filing a complaint.” United States v. Balistrer, 981 F.2d 916, 935 (7th Cir. 1992).

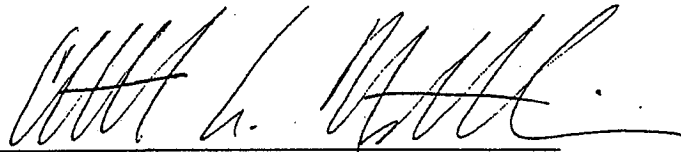
So too in this case. The United States has alleged that the Defendants have engaged in a pattern or practice violating the Fair Housing Act and may seek broad discovery against the Defendant’s in order to establish its claim. The Plaintiff’s requested discovery concerning the Defendant’s five additional properties not specified in the Amended Complaint is well within the broad and long established boundaries of notice pleading and Rule 26 discovery.

III Conclusion

Because the Plaintiff's request for discovery is not limited to the specific properties listed in the Amended Complaint and falls well within the limitations of Rule 26, the Plaintiff's Motion to Compel the Rose Defendants to Permit Entry Upon Land for Inspection and to Produce Documents [Doc. No. 60] is now **GRANTED**.

SO ORDERED.

Dated this 4 day of February 2003.



Christopher A. Nuechterlein
United States Magistrate Judge

cc: Judge Sharp
Counsel of record