

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

TRAVEL EXPRESS INTERNATIONAL,
INC., a Georgia Corporation;
ROBERT E. LEWIS, II; ALAN D.
HUMPHRIES,

Defendants.

CIVIL ACTION
NO. 1:01-cv-906-GET

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O R D E R

The above-styled matter is presently before the court on:

- (1) defendants' motion to strike the declaration of Kenneth H. Kelly [docket no. 53];
- (2) plaintiff's motion for summary judgment [docket no. 43];
- (3) defendants' motion for summary judgment [docket no. 40].

Background

Plaintiff Federal Trade Commission filed the instant action to secure permanent injunctive relief, restitution, rescission or reformation of contracts, and disgorgement pursuant to the Federal Trade Commission Act ("FTCA"), 15 U.S.C. §§ 53(b) and 57(b), the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101, *et seq.*, and the Telemarketing Sales Rule, 15

C.F.R. Part 310. This court's April 16, 2002 order extended discovery until May 12, 2002. On June 4, 2002, both parties filed motions for summary judgment, and defendants subsequently moved to strike the declaration of Kenneth H. Kelly. On October 25, 2002, the court heard oral argument on these motions. The motions are now ripe for consideration.

Motion for Summary Judgment Standard

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). That burden is "discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Id. at 325; see also U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine issue of

material fact. Celotex, 477 U.S. at 325. The nonmoving party must go beyond the pleadings and submit evidence such as affidavits, depositions and admissions that are sufficient to demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. Id. at 255; Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987). However, an issue is not genuine if it is unsupported by evidence or if it is created by evidence that is "merely colorable" or is "not significantly probative." Anderson, 477 U.S. at 249-50. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof, and (2) the summary judgment movant has made a plausible showing of the absence of evidence of the necessary element. Celotex, 477 U.S. at 323.

Facts

In light of the foregoing standard, the court finds the following facts for the purpose of resolving these motions for summary judgment only. Travel Express International, Inc. ("Travel Express") markets and sells vacation packages for travel primarily to Florida and the Bahamas. Advertising and promotional materials result in most consumers calling Travel Express' office where operators, reading from a sales script, describe and sell the vacation packages. In the initial sales pitch and verification conversation, operators explain several terms and conditions of the package:

1) The vacation package is valid for one year following purchase.

2) After purchasing the package, consumers must give Travel Express forty-five days notice to guarantee the travel dates desired.

3) Cruise ships depart Ft. Lauderdale seven days a week for the 7-hour trip to the Bahamas.

4) The Bahamas vacation package includes hotel accommodations with a choice of three hotels.

5) While on the island, purchasers are responsible for all meals, taxes, and gratuities.

6) On the final day of the Bahamas vacation package, customers return to Ft. Lauderdale on a "moonlight dinner cruise."

7) The Bahamas package, for the dates involved in this suit, costs \$498/couple.

8) If the consumer purchases the package during the initial sales call, the purchaser may receive a promotional 3-day/2-night Orlando, Florida vacation. Travel Express requires callers to pay a deposit of up to \$198 to purchase a package, with the balance due thirty days before the confirmed travel dates. Once a caller agrees to buy the vacation, a "Quality Assurance Department" representative verifies the total price of the vacation and confirms the caller's credit card used for the initial deposit. The operator also explains that a \$50 per person penalty applies for cancellations within the first thirty days of purchase, and the fee increases after this period.

Within six to eight business days after paying the deposit, a consumer receives a pouch of "travel documents." The documents include a reservation form to select specific travel dates and hotels, an information sheet describing inclusive and optional amenities, and "terms and conditions" forms.

The "terms and conditions" delineate fees that cover situations not included in the package price. Specifically, travelers must pay an additional \$30 per person "expedite" fee if reservation requests are received less than 45 days from departure. Travel Express charges a \$30 per person "extension" fee for purchasers who wish to extend the validity of the vacation package

from one year to eighteen months. Travel Express permits transfer of the vacation package to anyone other than the original purchaser for a \$30 fee. Confirmed reservation dates may be changed for a \$30 "change fee" if the purchaser notifies Travel Express in writing twenty-one days before the confirmed arrival date. For consumers who cancel their vacation packages less than 30 days after purchase, Travel Express refunds the deposit minus a \$50 per person cancellation fee. Until 2001, cancellation made 30 days to 180 days after purchase resulted in a penalty of \$100 per person. Consumers cancelling after 180 days forfeit the entire deposit.

Travel Express utilizes various Florida booking agents for the Orlando vacation package, such as 3-2-1 Orlando, to service customers. Typically, 3-2-1 Orlando would reserve accommodations in "standard" hotels and offer travelers an option of upgrading to properties closer to Disney World. To receive the upgrade, 3-2-1 Orlando requires that the vacationer attend a complimentary "breakfast presentation" involving a timeshare sales pitch. Failure to attend the breakfast results in the customer being charged for the upgraded accommodations. Travel Express does not receive direct compensation from the booking agent, although Travel Express advertises the Orlando package as an incentive to purchase the Bahamas trip.

Discussion

Section 5 of the FTCA prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). A business' action is deceptive and unlawful if it is "likely to mislead consumers, acting reasonably under the circumstances, in a material respect." Kraft, Inc. v. F.T.C., 970 F.2d 311, 314 (7th Cir. 1992) (citing FTC Policy Statement on Deception, 103 F.T.C. 110, 174, 1984 FTC LEXIS 71, 166 (1984) ("FTC Policy Statement")). The Telemarketing Sales Rule ("TSR") prohibits deceptive telemarketing acts or practices. See 16 C.F.R. § 310 et. seq. Specifically, the TSR requires a telemarketer to disclose, "in a clear and conspicuous manner," before a consumer pays, material information regarding the product or service sold. See id. at § 310.3(a)(1). Violations of the TSR constitute unfair or deceptive acts or practices in violation of Section 5 of the FTCA. See 15 U.S.C. § 6102(c).

Requiring Consumers to Attend Timeshare Presentations

Count I alleges that Defendants engaged in deceptive advertising by failing to disclose that consumers must attend timeshare sales presentations as part of the Orlando vacation package. Count VI alleges a similar violation under the TSR for failing to disclose that attending a sales pitch is a requirement of the trip. See 16 C.F.R. § 310.3(a)(1)(ii).

Orlando trips are booked by independent contractors who provide travelers basic accommodations. If travelers wish to receive room upgrades, amusement park tickets, complimentary meals, and other promotional amenities, the booking agent requires the vacationer to attend a "breakfast presentation" and tour of the Celebration community. Although the purpose of these events is to sell timeshares, vacationers voluntarily choose to attend the presentation when they accept the added amenities. The record indicates that Travel Express does not require consumers to attend timeshare presentations, and the company receives no direct compensation even if travelers do attend the sales pitch. Moreover, Travel Express disassociated itself with a booking agent who, contrary to Travel Express regulations, required all Orlando travelers to attend timeshare sales meetings. The FTC has failed to establish a material issue of fact that these actions by Travel Express would likely mislead consumers, acting reasonably under the circumstances. See FTC Policy Statement, 1984 FTC LEXIS at 176-77 (stating that "a company is not liable for every interpretation or action by a consumer"). Accordingly, defendants are entitled to summary judgment on counts I and VI with respect to timeshare sales presentations.

Failure to Disclose Cancellation Policy

Counts I and VII of the FTC's complaint allege that Defendants failed to disclose the material terms and conditions of the cancellation policy. Such an omission, plaintiff contends, constitutes a deceptive act in violation of the TSR and FTCA.

Before Travel Express charges a consumer's credit card, an operator informs the purchaser at least twice that cancellation results in a \$50 per person fee within the first thirty days of purchase, with the fee increasing thereafter. Approximately one week after purchase, the consumer receives travel documents specifying the specific cancellation fee after thirty days.

The Defendants' actions in the sales call provide a reasonable consumer full opportunity to make an informed decision regarding purchase of a vacation package. Before paying up to \$198 in deposits, a consumer is aware that cancellation will cost, at a minimum, \$100 per package. Since defendants inform purchasers that cancellation fees increase over the life of the package, it is not unreasonable that eventually, the entire amount is forfeited if cancellation occurs. See FTC Policy Statement, 1984 FTC LEXIS at 176-77. By informing consumers that cancellation fees increase, defendants have disclosed all material terms of the cancellation policy. See 16 C.F.R. § 310.3(a)(1)(iii). Accordingly, summary judgment in favor of the defendants is granted as to Counts I and VII concerning disclosure of cancellation policy.

Misrepresenting the Total Cost of the Vacation Packages

Counts II and IV of Plaintiff's complaint allege that Defendants misrepresented the total cost to purchase a vacation travel package in violation of the FTCA and the TSR. See 16 C.F.R. § 310.3(a)(2)(I). However, the record indicates that defendants did, in fact, disclose the total cost before purchase. Any additional costs associated with the vacation package are in the form of special services and amenities not advertised as part of the basic package.

Defendants disclose that purchasers must provide 45 days notice to guarantee travel dates. If travelers wish more flexibility, upon request, Travel Express attempts to guarantee travel dates less than 45 days from booking for a \$60 "expedite" fee. Such a fee covers defendants' administrative expenses to provide a rush service.

Defendants advertise that the vacation packages are fully transferrable. A purchaser may have the vacation package documents issued to anyone, as advertised. However, once a party has booked travel, defendants charge a \$30 "transfer" fee to defray the administrative costs of reissuing the documents and changing the names of the people traveling. Defendants' charges for post-booking transferability is an optional service not sold as part of the basic package.

Defendants advertise that the vacation package is valid for one year. Defendants charge a fee allowing purchasers to extend the validity of the vacation package beyond the one year period. Also, defendants charge a \$60 fee for travelers who wish to change their travel dates. By giving travelers such flexibility, defendants are providing a service above the basic package.

Plaintiff alleges that defendants do not disclose, prior to purchase, that the return cruise from the Bahamas arrives between 10:00 pm and 11:30 pm. Plaintiff asserts that the timing of the docking forces consumers to pay an additional fee to receive an extra night's hotel in Ft. Lauderdale following the trip. Contrary to plaintiff's allegations, defendants disclose in the initial sales call that the return trip is a "moonlight, dinner cruise." In addition, defendants clearly specify that a consumer is receiving a vacation package of a certain number of days and nights. A reasonable consumer would then realize that he would not be entitled to an additional night of accommodations at no charge. Plaintiff falsely assumes that travelers have no other choice but to purchase an extra night from defendants. As the record indicates, some travelers choose to drive home immediately after disembarking from the ship or to make alternative arrangements. An additional night hotel stay is not a hidden cost, but an extra service that a reasonable traveler would expect to assume if he did not make arrangements after a moonlight cruise.

Travel Express charges a \$20 booking fee if consumers travel to Orlando on a vacation not in conjunction with the Bahamas cruise. A consumer's initial deposit is solely for a trip to the Bahamas, and the trip to Orlando is purely promotional. Accordingly, a consumer has no obligation to travel to Orlando. The \$20 fee is disclosed in the travel documents before a consumer ever books the Orlando trip, and the fee is only incurred if the consumer wishes to travel to Orlando separately from the Bahamas vacation. Thus, the consumer pays for this flexibility.

Accordingly, all the additional fees of which the FTC complains are reasonable costs for added services beyond the basic vacation package. Failure to disclose the costs of these non-obligatory, optional services before the purchase of the package is not material or likely to mislead consumers, acting reasonably. Therefore, defendants are entitled to summary judgment regarding counts II and IV.

Availability Misrepresentations

Counts III and V allege that defendants misrepresent the availability of vacation packages, specifically the dates of travel and age restrictions for the Orlando, promotional package. The undisputed evidence shows that defendants' sales script and travel documents only guarantee dates of travel and not the availability of specific hotels. Plaintiff presents limited examples of a boat

being dry docked and some hotels not being available over New Year's Eve of the millennium to convince the court that deception occurred. Yet, most of the availability examples cited by plaintiff were caused by vacationers either not following defendants' guidelines or not communicating with defendants' staff. With regards to the age limitations to Orlando, defendants submit that this restriction has always been waivable, upon request. These circumstances do not present a material issue of fact. Accordingly, defendants are entitled to summary judgment with regards to counts III and V.

Motion to Strike

Plaintiff submitted a declaration of Kenneth H. Kelly ("Kelly declaration"), an economist for the Federal Trade Commission, to support its motion for summary judgment with regards to the calculation of damages. Defendants have filed a motion to strike the declaration, alleging that the submission violates Fed. R. Civ. P. 56(e) by containing hearsay, impermissible conclusions, and a lack of supporting documentation. See Fed. R. Civ. P. 56(e). Since defendants have prevailed on all counts at summary judgment, consideration of the Kelly declaration is unnecessary. Accordingly, defendants' motion to strike the declaration of Kenneth H. Kelly [docket no. 53] is DISMISSED AS MOOT.

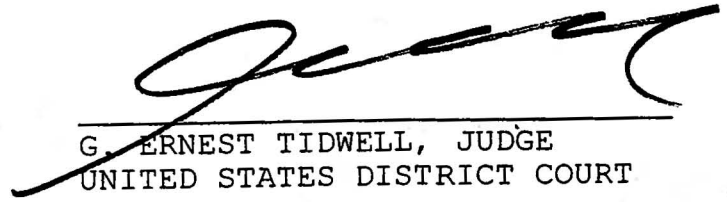
Summary

(1) defendants' motion to strike the declaration of Kenneth H. Kelly [docket no. 53] is **DISMISSED AS MOOT**;

(2) plaintiff's motion for summary judgment [docket no. 43] is **DENIED**;

(3) defendants' motion for summary judgment [docket no. 40] is **GRANTED**.

SO ORDERED, this 15 day of November, 2002.


G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT COURT