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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY

CLASSIC MOTOR CAR CO.

-vs.-

AUTOMOBILI LAMBORGHINI AMERICA

DOCKET No. BER-C-213-11

CIVIL ACTION

DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ARGUED NOVEMBER 15, 2011

DECIDED NOVEMBER 29, 2011

APPEARANCES:

Bradford Bury, Esq., appearing on behalf of Plaintiff, Classic Motor Car Co. (Bury & Associates).

Mary Ellen Rose, Esq., appearing on behalf of Defendant, Automobili Lamborghini America (Capehart & Scatchard, P.A.).

Livia Kiser, Esq., appearing on behalf of Defendant, Automobili Lamborghini America (Barack Ferrazzano Kisschbaum & Nagelberg LLP).

Randall Oyler, Esq., appearing on behalf of Defendant, Automobili Lamborghini America (Barack Ferrazzano Kisschbaum & Nagelberg LLP).

ROBERT P. CONTILLO, P.J.CH.

I. Statement of Facts

This matter was brought before the Court by way of Order to Show Cause, seeking Temporary Restraints, on July 22, 2011. In its pleadings, Classic Motorcar Company, LLC d/b/a Lamborghini Bergen County ("Plaintiff" or "Classic") sought to enjoin the termination of its Dealer Agreement with Automobili Lamborghini America, LLC, ("Defendant" or "ALA"). The Complaint stated three causes of action against ALA: (1) a violation of the New Jersey Franchise Practices Act ("NJFPA"); (2) a breach of the Dealer Agreement; and (3) a breach of the covenant of good faith and fair dealing. Subsequently, Classic amended its request for an injunction to include a request for a recognition and imposition by the Court of an "automatic stay" under the NJFPA, as recently amended. N.J.S.A. 56:10-30. This Court, on August 26, 2011, issued an Order denying Classic's motion for injunctive relief, but provisionally recognizing the statutory stay, pending further Order of the Court. Presently, the Court has before it a Motion for Summary Judgment filed by Defendant, ALA, on September 26, 2011. The matter was argued on November 15, 2011, and the Court reserved decision.

The following facts are undisputed:

Plaintiff Classic entered into a Dealer Agreement with Automobili Lamborghini S.p.A ("ALSpA") dated January 15, 2007. Pursuant to that Agreement, Classic became an authorized dealer of Lamborghini vehicles. ALSpA subsequently assigned its interest in the Dealer Agreement to ALA. The location of the dealership is 30 Essex Street, Lodi, New Jersey.

ALA is the U.S. importer and distributor of Lamborghini vehicles. It purchases new Lamborghini vehicles from ALSpA and then sells those vehicles to Lamborghini dealers throughout the United States. In order to acquire new vehicles, Lamborghini dealers require financing known as "floor plan financing". Classic had a floor plan line of credit with JP Morgan Chase Bank until it was revoked by Chase in May of 2009. Classic has not been able to obtain alternate financing since it lost the Chase financing in May of 2009.

In 2007, Classic agreed to order 15 vehicles. In 2010, after Classic lost its financing, it only ordered three of the six vehicles from ALA that had been allocated to Classic for delivery in 2010. Classic sold three new vehicles in 2010. During 2011, Classic ordered no new Lamborghini vehicles, had no new Lamborghini vehicles in stock, and did not sell any new Lamborghini vehicles. Classic closed its facility in May 2011, stating that it closed "temporarily for renovations".

On June 16, 2010, ALA provided written notice to Classic regarding what it considered to be material deficiencies in Classic's performance under the Dealer Agreement. The Dealer Agreement provides for immediate termination upon written notice without an opportunity to cure where there dealer fails to conduct its customary sales and service operations for a continuous period of seven business days. ALA alleges that, among other things, Classic (i) failed to order vehicles consistent with its allocation plan; (ii) failed to take timely delivery of those vehicles that it did ultimately purchase, and (iv) failed to keep an inventory of vehicles in stock.

On April 15, 2011, ALA sent a written notice of termination to Classic, stating that it was terminating the franchise for good cause pursuant to the Dealer Agreement and the NJFPA. The Notice of Termination states that the Dealer Agreement would terminate effective sixty days after Classic's receipt of notice. Thereafter, the parties had a series of meetings and the effective date of termination became July 22, 2011. On July 22, 2011, a Verified Complaint, together with an Order to Show Cause, seeking an immediate order enjoining the termination of the Dealer Agreement, was filed by Classic here in the Superior Court of New Jersey, Chancery Division.

II. Summary Judgment Standard

Under R. 4:46-2(c), a moving party is entitled to judgment or order as a matter of law if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact challenged and the moving party is entitled to judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. The standard to be applied when deciding a motion for summary judgment was set forth by the Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). In Brill, the Court expressed the standard in terms of a prima facie case or defense and the movant is entitled to judgment if, on the full motion record, the adverse party, who is entitled to have the facts and inferences viewed most favorable to it, has not demonstrated the existence of a dispute whose resolution in his favor will ultimately entitle him to judgment. Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must

prevail as a matter of law." Id. at 540. At the summary judgment phase, "the burden is placed on the movant to exclude any reasonable doubt as to the existence of any genuine issue of material fact and all inferences of doubt are drawn against the moving party in favor of the opponent." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-5 (1954). Further, if it is reasonably possible for a fact finder to "draw or reject an inference or if conflicting inferences may be drawn from a given set of facts, the issue is one of fact, and summary judgment is inappropriate." Bonnet v. Stewart, 68 N.J. 287, 294 (1975).

III. Discovery Completion

Classic argues that summary judgment is inappropriate where discovery is incomplete. See Crippen v. Central Jersey Concrete Pipe Co., 176 N.J. 397, 409 (2003). It argues that ALA is in a unique position to shed light on whether ALA's own conduct has negatively affected its brand, whether enforcement of the franchise agreement is arbitrary and whether such enforcement imposes unreasonable standards of performance on Classic.

ALA argues that additional discovery could not lead to any facts that could refute the admitted facts that are the basis for the motion, and that Classic's proffered need for discovery is also inconsistent with Classic's representation to ALA and the Court that Classic did not oppose postponing discovery until after the Court decided the present motion. Furthermore, a party opposing summary judgment on the ground that discovery is incomplete "must specify what further discovery is required rather than simply asserting a generic contention" that it needs further discovery. Rozenshtein v. AIG Personal Lines Claims, 2011 N.J. Super. Unpub. LEXIS 2374, at *11, and, argues ALA, Classic has not done so.

IV. Count I of Classic's Complaint: Alleged Violations of the New Jersey Fair Foreclosure Act (N.J.S.A. 56:10-1, et seq.)

ALA argues that summary judgment should be granted on the First Count of the Complaint, because (i) the undisputed facts establish that Classic committed multiple material breaches of the Dealer Agreement, (ii) the material breaches mean that Classic has failed to substantially comply with the terms of the Dealer Agreement and (iii) under §56:10-9 of the NJFPA, Classic's failure to substantially comply with the terms of the Dealer Agreement bars the cause of action as a matter of law. Section 56:10-9 of the NJFPA specifically provides that it "shall be a defense for a franchisor, to any action brought under this act by a franchisee, if it be shown that said franchisee has failed to substantially comply with requirements imposed by the franchise."

Additionally, a franchisee's material breach of a franchise agreement is synonymous with a franchisee's failure to substantially comply with the agreement. Gen. Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d. 296, 317 n.8 (3d Cir. 2001) (applying New Jersey law) ("Put simply, we see no real or practical difference between a conclusion that a party materially breached a contract, and a conclusion that the party failed to substantially comply with its obligations under a contract.").

a. Failure to Maintain Floor Plan Financing

According to ALA, the Dealer Agreement provides that Classic must maintain a line of credit of no less than $1.5 million for the wholesale purchase of new Lamborghini vehicles. Courts recognize that the requirement of floor plan financing is a reasonable and material term of a franchise agreement. See, Coast Automotive Grp. Ltd. V. VW Credit, Inc., 119 Fed. Appx. 419, 424 (3d Cir. 2005) (applying New Jersey law and finding sufficient evidence to affirm jury verdict that franchisee failed to substantially comply with its obligations under the franchise agreement as a result of the franchisee's breach in "failing to maintain an adequate floor plan for purchasing new vehicles").

Classic admits that it failed to maintain floor plan financing with JPMorgan Chase, has not had floor plan financing in place since May of 2009, and currently does not possess financing. Classic states that the reason it was unable to obtain financing was because lenders, concerned about the flood of Lamborghinis in the marketplace, along with little demand and low to no inventory turnover, were unwilling to accept Lamborghini products as collateral for automobile floor plan financing.

b. Failure to Meet Minimum Purchase, Inventory and Sales Requirements

ALA also alleges that the Dealer Agreement requires Classic to make minimum purchases of new vehicles, maintain an adequate inventory, and exploit market opportunities for sales, which are also reasonable and material terms. See Gelardi Corp. v. Miller Brewing Co., Inc., 421 F.Supp. 237, 247 (D.N.J. 1976)(delivery of product in primary market area is a "crucial" and "important" requirement of the franchise); Amerada Hess Corp. v. Quinn, 143 N.J.Super. 237, 256 (Law Div. 1976)("Plainly, noncompliance by a franchisee with his reasonable franchise obligations, resulting in an actual or potential adverse effect upon the sales of the franchisor's products, would constitute substantial noncompliance thereof for purposes of termination, impairing as it does the franchisor's fundamental reason for initially entering into the

relationship"). Classic failed to order vehicles consistent with its agreed upon allocation plan; failed to take delivery of vehicles that it had ordered; failed to take timely delivery of vehicles that it did purchase; and failed to keep any inventory of vehicles in stock. None of these allegations is factually rebutted by Classic. Rather, Classic counters that it refused to purchase additional inventory as each purchase would have required Classic to incur a substantial loss. Furthermore, as for the new vehicles at port that Classic could not pay for, ALA routinely reallocated the vehicles ordered by Classic to other dealerships. Therefore, Lamborghini did not lose any money as a result of Classic's inability to pay.

c. Failure to Maintain an Open Dealership Facility

ALA alleges that the Dealer Agreement required Classic to equip and maintain a business premises. It also required Classic to conduct usual and customary business operations on all business days. The requirement that a dealer provide an open dealership location is a reasonable and material requirement of a franchise. See Mathews v. Rescuecom Corp., No. 05-4834, 2006 U.S. Dist. LEXIS 8608, at *14 (D.N.J. Feb. 16, 2006) (the NJFPA "contemplates a location where selling is a major activity – a particular kind of selling involving the interplay of goods on display, the physical presence of the customer and the selling efforts of the vendor")(quotation omitted).

Classic admits it shut the doors of its dealership in May of 2011. It claims, however, that it closed, temporarily, for renovations in or about May of 2011. However, ALA argues that there is no evidence to support that the dealership closing was temporary or for purposes of renovation. Classic's owner, Onofrio Triarsi, admits that the local zoning board had already denied the necessary permits for renovations, and the dealership to this day remains dormant and shuttered, without cars, without car salesmen, without parts salesmen, without employees and without floor plan financing.

V. Count II of Classic's Complaint: Alleged Breach of Contract

Count II states a claim against ALA for (i) attempting to terminate the Dealer Agreement without "good cause" as defined by the NJFPA, and without providing sufficient notice and an opportunity to cure as required by the Dealer Agreement and (ii) "unjustfully pulling warranty work." ALA argues that it is entitled to summary judgment because the undisputed record evidence demonstrates that ALA had "good cause" to terminate the Dealer Agreement and that it provided written notice ten months prior to termination, and during that period Classic failed to

cure or come up with a plan to address the issues. Also, the Dealer Agreement does not impose any duties on ALA with respect to the distribution of warranty work or guarantee any particular amount of warranty work to Classic.

a. Classic's Material Breach

An essential element for a breach of contract under New Jersey law is that the party claiming breach of contract demonstrates that it has complied with its own contractual obligations. Frederico v. Home Deport, 507 F.3d 188, 203 (3d Cir. 2007)(Under New Jersey law, "[t]o state a claim for breach of contract, [plaintiff] must allege (1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations.")

b. "Good cause" to terminate the dealer agreement

The NJFPA defines "good cause" as the "failure by [a] franchisee to substantially comply with those requirements imposed upon him by the franchisor." NJFPA 56:10-5. Based on the above material breaches by Classic, ALA states that it had good cause to terminate the Dealer Agreement.

Classic contends that ALA's actions preclude a finding of good cause. According to Classic, ALA has engaged in conduct that has been harmful and damaging to the brand and has made it difficult for car dealers to get any type of floor plan financing for Lamborghinis. Furthermore, ALA would reportedly not resolve any issues unless Classic agreed to an onerous provision waiving all of its statutory protections under a Memorandum of Understanding ("MOU") sent to counsel for Class on July 15, 2011. The MOU would have required, among other things, that Classic pre-execute a Surrender and General Release in exchange for Lamborghini being willing to even consider withdrawing the Termination Notice in the event that Classic satisfied the terms as a condition to saving the franchise. In this regard, the MOU constitutes an "agreement ancillary or collateral to the franchise" which is "not in good faith, is not for good cause, or would adversely and substantially alter the rights [and] obligations…of the motor vehicle franchisee." See N.J.S.A. § 56:10-7.4(o). In addition, the Act as applicable to motor vehicle franchises makes it a violation "for any motor vehicle franchisor…[t]o impose unreasonable standards of performance or unreasonable facilities, financial, operating or other requirements upon a motor vehicle franchisee." N.J.S.A. § 56:10-7.4(a). Classic argues that by the Dealer Agreement and the MOU, ALA has imposed such unreasonable standards.

However, ALA argues that this position is contrary to the relevant law, which finds that only the franchisee's conduct is at issue. General Motors Corporation v. New A.C. Chevrolet, Inc., 263 F.3d 296 (3rd Cir. 2001) at 321 n11. Furthermore, ALA asserts that Classic has given no evidence that ALA caused Classic's inability to perform its contractual obligations.

c. Notice and Opportunity to Cure

According to ALA, the record is undisputed. The correspondence makes it evident that ALA gave Classic notice of its breaches and an opportunity to cure of no less than ten months. Classic also failed to submit a plan to cure its breaches after ALA served the Notice of Termination and extended the effective date of the termination. Termination, it contends, was supported by ample "good cause".

d. Pulling Warranty Work

Classic argues that ALA wrongfully "pulled" warranty work. ALA argues that the Dealer Agreement does not contemplate the assignment of or control over warranty work by ALA, nor does it create any duties on the part of ALA to guarantee any particular amount of warranty work to Classic. Rather, Art. 6.4 provides "dealer shall undertake the services offered by Dealer to the customer under the terms of the Warranty in relation to any motor vehicle Contractual Product…and shall provide free Warranty servicing and vehicle recall work for the motor vehicle contractual products…". Classic does not address this point in its opposition.

VI. Count III of Classic's Complaint: Alleged Breach of the Covenant of Good Fair and Fair Dealing

Classic asserts a claim against ALA for violating the covenant of good faith and fair dealing (i) by attempting to terminate the Dealer Agreement without good cause as defined by the NJFPA, without an opportunity to cure and (ii) by "causing the loss of Plaintiff Classic's franchise investments". The actions that Classic alleges constitute a breach of the covenant of good faith and fair dealing are the same actions that Classic alleges constitute a breach of express contract.

In New Jersey, "a plaintiff cannot maintain a claim for breach of the implied covenant of good faith and fair dealing when the conduct at issue is governed by the terms of an express contract or the cause of action arises out of the same conduct underlying the alleged breach of contract." Hahn v. OnBoard, LLC, No. 09-03639, 2009 U.S. Dist. LEXIS 107606, at *15 (D.N.J. Nov. 16, 2009). Therefore, ALA argues, Classic cannot maintain a claim for breach of the

covenant of good faith and fair dealing arising from the termination of the Dealer Agreement, which was a completely lawful act.

VII. Whether the Court Should Vacate the Provisional Stay and Find That Termination Is In Effect.

Pursuant to Section 56:10-30 of the Act, effective as of May 4, 2011, and applicable specifically to motor vehicle franchises of new vehicles, an automatic stay precludes dealership termination, pendent elite, if the dealer timely files an action to enjoin termination:

> Upon timely institution of an action…to enjoin the termination of a motor vehicle franchise on the ground that such termination would be in violation of the [Act], the termination shall be automatically stayed pending the final disposition of such action…, and the motor vehicle franchisor shall accord the motor vehicle franchisee all rights and privileges of a franchisee as if notice of termination had not been given.

The Dealer Agreement between the parties is dated January 15, 2007. ALA's Notice of Termination was sent on April 15, 2011. Both predate the May 2011 amendment. The agreed upon, extended date of termination was July 22, 2011, which post-dates the amendment.

ALA contends that the Supreme Court of New Jersey has "long followed a general rule of statutory construction that favors prospective application of statutes." Cruz v. Central Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008), unless one of three exceptions is found to apply: (1) where the legislature expresses an intent that it be applied retroactively; (2) when the amendment is "curative"; or (3) when the expectations of the parties so warrant. Id at 46.

Here, ALA argues, there was no legislative intent to have the amendment apply retroactively. Rather, it simply states that it "shall take effect immediately." 2011 NJ Sess. Law Serv. Ch. 66, ¶ 14 (ASSEMBLY 3722) (WEST). However, Classic argues that as the Court noted in dicta at the August 25, 2011 preliminary injunction hearing, the application of the stay to ban termination of the parties' relationship would not be a retroactive application of the statute because the law "was in effect prior to the effective date of the termination…..The automatic stay protection went into effect before the termination went into effect. And, therefore, it applies…to this transaction". (17:20-18:2)

ALA responds that the date upon which applicability of the Amendment would or would not be based is not the date when the lawsuit was filed, as Classic argues. Rather, says ALA, the relevant date is the date the Dealer Amendment was entered into. It argues that the fact that the

effective date of termination occurred after the amendment was in effect in no way makes the application of Section 56:10-30 prospective. This is because that section takes away substantive rights that franchisors had prior to the amendment, and in turn, grants new substantive rights to franchisees. New Jersey law does not allow a statutory amendment to be applied retroactively when doing so would alter antecedent rights. See Street v. Universal Maritime, 300 N.J. Super 578, 581 (App. Div. 1997) (where an amendment interferes with an antecedent right, the "general rules is that courts will not give retrospective operation to such a statute absent an unequivocal expression of legislative intent to the contrary.") In fact, ALA argues, the Sixth Circuit Court of Appeals in Dale Baker Oldsmobile, Inc. v. Fiat Motors of N.A., Inc, 794 F.2d 213, 214-15 (6th Cir. 1986)(applying Michigan law) expressly rejected the argument that the fact that the date of termination occurred after the statute had been passed necessarily meant that the amendment would not have been applied retroactively.

Based on the same issue of elimination of franchisor rights, ALA argues that the amendment is in no sense curative as it eliminates substantive rights that the franchisor had prior to the amendment and grants the franchisee substantive rights: now a franchisee's filing of a timely Complaint seeking injunctive relief automatically stays the termination. Finally, when the parties entered into the Dealer Agreement, the amendment was not in place and, therefore, the parties would have reasonably expected that the filing of an injunction would not operate to automatically stay a termination, because that was the state of the law at the time. The issue has particular significance here because the Court has determined that Classic has failed to prove entitlement to a preliminary injunction under the traditional Crowe v. DeGioia standards 90 N.J. 126 (1982). Therefore, absent the stay, ALA would be free to implement the termination, and Classic would have none of the rights or protections enjoyed by an un-terminated franchisee.

VIII. Timeliness of the Filing of the Lawsuit under N.J.S.A. 56:10-30

ALA argues that Classic did not file its lawsuit until after the termination became effective, and therefore the action was untimely, depriving Classic of the stay, even if the statute otherwise applied. The parties agreed that the termination of the Dealer Agreement was made effective July 22, 2011. Therefore, in ALA's reading, it became effective at 12:01 am that day and the filing of the lawsuit occurred after the termination took effect.

Classic argues that ALA's own behavior contravenes that point. At no time did ALA's corporate counsel ever indicate that the termination would take effect on 12:01 a.m. on the

termination date. ALA contends the dealership was not to terminate until July 22, 2011 expired, giving it all day on the 22nd to file its action. Furthermore, ALA has indicated specific termination times in other cases, not presently at bar, in which it has attempted to terminate a franchise (e.g. 12:01 a.m. on x date, Mountain Time). Given that no specific time of day was indicated in the instant matter, Classic asserts that the failure to specify must be interpreted against ALA, and Classic's filing of the suit on July 22, 2011 should be deemed timely for purposes of triggering the automatic stay.

DECISION OF THE COURT

This matter is before the Court upon ALA's motion for summary judgment. ALA seeks judgment in its favor, against Classic, on all claims set forth in Classic's Verified Complaint, and it asks the Court to vacate the automatic stay of the termination of Classic's motor vehicle franchise provisionally granted by the Court in its Order of August 26, 2011.

A. The Automatic Stay

The parties dispute whether ALA had the requisite good cause to terminate the Dealer Agreement between them. For the reasons set forth on the record on August 25, 2011, the Court, on August 26, 2011, denied Classic's request that ALA be preliminary enjoined from implementing the termination of its Lamborghini automobile dealership franchise. Applying Crowe v. DeGioia, 90 N.J. 126, A. 2d 173 (1982). Classic was found to have failed to establish entitlement to the extraordinary relief of an injunction. In the Court's view, Classic had failed to demonstrate any likelihood of ultimate success on the merits of any of its claims. In the same Order, however, the Court directed that

> …Classic's application seeking an automatic stay of the termination of its motor vehicle franchise be, and hereby is, provisionally granted; and said termination is stayed pending further Order of the Court.

The automatic stay referenced in the Court's decision and in its Order of August 26, 2011 is a recent legislative enactment, N.J.S.A. 56:10-30. The law, specifically and solely applicable to motor vehicle franchises selling new vehicles, is a part of the New Jersey Franchise Practice Act (NJFPA), N.J.S.A. 56:10-1, et seq. It provides as follows:

> upon timely institution of an action . . . to enjoin the termination of a motor vehicle franchise on the ground that such termination would be in violation of the [Act], the termination shall be automatically stayed pending the final disposition of such action . . ., and the motor vehicle franchisor shall accord the motor vehicle

> franchise all rights and privileges of a franchise as it notice of termination had not been given.

(Emphasis added).

This law was enacted in May of 2011. The effective date of the law is May 4, 2011.

The current Dealership Agreement between the parties was signed on January 15, 2007. On June 16, 2010, ALA sent Classic a letter detailing Classic's alleged breaches of the Dealer Agreement. Perceiving that the alleged breaches were not cured, or even addressed, ALA determined to terminate the Dealer Agreement. On April 15, 2011, it sent a written Notice of Termination, advising Classic that the Dealer Agreement would terminate effective sixty (60) days after Classic's receipt of the notice. That effective date of termination would have been on or about a date in late June of 2011.

Thereafter, the parties met and engaged in a series of communications. Classic requested extension of the effective date of termination, and ultimately, the effective date of the termination of the Dealer Agreement became July 22, 2011.

On July 22, 2011, Classic filed its Verified Complaint and application for Entry of An Order to Show Cause with Temporary Restraints.

Classic asserted that it was entitled to a temporary and then preliminary injunction against termination, based upon the principles of Crowe v. DeGioia 90 N.J. 126 (1982). It also thereafter argued that it was entitled to the benefit of the new automatic stay legislation. N.J.S.A. 56:10-30.

ALA contended that Classic could not invoke the protections of the automatic stay because the act applied only prospectively – to new or renewed automobile franchise agreements, and could not be made to modify the existing rights of ALA and Classic, as established in their 2007 Dealer Agreement. In addition, the stay applied by its terms only "upon timely institution of an action" to enjoin termination. Here, the parties agree that the termination of the Dealer Agreement became effective July 22, 2011, the same day Classic came to Court and filed its Verified Complaint and proposed Order to Show Cause. In ALA'S view, as the Dealer Agreement was terminated "effective July 22, 2011", Classic was a day late. Classic replies that the Dealer Agreement remained in effect throughout the entire day of the effective date of termination – July 22, 2011 – and thus its institution of the lawsuit was "timely" and it is entitled to the stay.

As aforesaid, the Court, by decision dated August 25, 2011, and Order dated August 26, 2011, denied the request for temporary or preliminary injunctive relief, finding that Classic had failed to establish that it had any reasonable probability of ultimate success on the merits of any of its claims. While questioning whether Classic was entitled to the protections of the automatic stay, the Court "provisionally" imposed, or recognized, the stay, declining to conclusively determine its applicability or non-applicability in the context of a preliminary injunction hearing, where an adverse finding would work to terminate, conclusively, Classic's dealership.

This issue of first impression is now teed up for determination in the context of this summary judgment application and is ripe for adjudication by the Court.

The Court notes initially that this is remedial legislature, designed to strengthen the hand of automobile franchisees whom franchisors are attempting to terminate. As set forth in the New Jersey Assembly Committee Statement which preceded enactment of the automatic stay statute the legislation is designed

> to address new threats to the consumer and the public interest in the franchise system. Recent developments in the auto industry have highlighted the unequal bargaining position of dealers vis-à-vis manufacturers. Dozens of New Jersey new car dealerships and thousands of dealership jobs have been lost. New Jersey consumers and the economy have suffered as a result.
>
> This bill is intended to protect New Jersey new car dealerships and their employees from further economic dislocation imposed by automakers. The bill is designed to level the playing field on which auto franchises and auto franchisors do business, and to protect the consumer and the public interest in a strong and secure franchise system of responsible local businesses.

N.J. Assem. Comm. State., A.B. 3722, 1/20/2011.

The playing field is leveled in favor of the new car dealerships, against the franchisors, by barring dealership terminations until final resolution of the case, and stripping franchisors of their previously extant right to terminate an automobile dealership, for good cause, unless the franchisee is able, in the context of a TRO or preliminary injunction application, to convince a Court to grant the extraordinary relief of a TRO, or preliminary injunction, against termination, pendente lite. Under classic Crowe v. DiGioia injunctive relief practice, the party seeking emergent judicial relief must establish, by clear and convincing evidence, inter alia, that irreparable harm will be suffered in the absence of relief, and that none of the material facts regarding the purported "good cause" franchise termination are in dispute. Automobile

franchisors have typically argued, as does ALA here, that money damages are a sufficient remedy for a wrongfully terminated car dealership and, in any event (again as is frequently the case in Order to Show Cause jurisprudence), the Franchisee and Franchisor will typically disagree as to whether the attempted termination lacks the requisite statutory good cause. Such a dispute over this fundamental, material aspect of the case is itself, is Order to Show Cause jurisprudence, a factor against equitable, injunctive relief, as it is established law that no such relief should be awarded in the face of such a factual/legal dispute.

The upshot – cured by this remedial legislation – is that the termination of the dealership would then become effective – and irreparable – and the litigation would be simply about the amount of money damages, if any, the Franchisor would owe the Franchisee, for the death of the dealership (assuming the dealership was eventually able to prove liability and/or breach, and damages). That is no longer the scenario in New Jersey, as to dealerships of new motor vehicles, effective May 4, 2011. Now, the mere filing of a challenge to unimplemented termination stays termination, pendente lite.

The question presented is whether Classic can invoke the protections of the stay. For the reasons set forth below, I find that the answer to that question is 'No' – because Classic failed to file its legal challenge to termination until after it had been effectively terminated by ALA.

ALA gave Classic notice of termination "at least 60 days in advance of such termination", as ALA was required to do, under the NJFPA. N.J.S.A. 56:10-5. In the Notice of Termination of April 15, 2011, Classic was specifically advised that "… this termination will be effective on the date that is sixty (60) calendar days after the date this Notice of Termination is received by Dealer". The effective termination date was then extended, at Classic's request on July 14, 2011, to July 22, 2011, which ALA refused to further adjourn. As set forth in an email from a representative of ALA:

> Lamborghini is not willing to extend the effective termination date. The effective termination date is July 22, 2011. To the extent that an action is filed by the dealership, please provide me with any and all applicable notices and filings.

(Emphasis added).

The parties agree that the effective termination date was July 22, 2011 (a non-holiday Friday). Classic argues that it had as late as all day Friday to file its suit, because the termination would not go into effect until July 22, 2011 passed into July 23, 2011. This seems to me a

strained reading. If I am told that I am terminated effective July 22nd, then the dealership relationship no longer exists as of July 22nd, not July 23rd, as Classic would have it.

Classic notes that the initial Notice of Termination stated that termination "will be effective on the date" (as opposed to "as of" the date) that is 60 days after receipt of the notice. This to me is a distinction without a difference. If you are advised that your dealership will terminate "on" July 22, 2011, it is the same as being advised that it is terminated "as of July 22, 2011": it terminates July 22, 2011, and not July 23, 2011.

The parties here agreed that the termination of the dealership would become effective on July 22, 2011. The parties' obligations under the Dealer Agreement ceased as of that date. See The Bluffs at Ballyowen LLC v. Toll Bros., Inc., 2010 WL 4823819, at *7 (N.J. Super. App. Div. Nov. 30, 2010) (where parties agreed that December 14, 2005 was the "effective date" of the agreement, the parties' obligations under the contract took effect "as of that date"). And, such obligations ceased as soon as the effective day started – at 12:01 a.m. on July 22, 2011. See, e.g., Hurwitz v. Boyle, 117 N.J. Super. 196, 205 (App. Div. 1971) (holding that a day begins at 12:01 a.m.); Walinski v. Gloucester, 25 N.J. Super. 122, 133 (Ch. Div. 1953) ("A day begins at midnight and ends the following midnight, 24 hours later"). Thus the stay provision of § 56:10-30 is not available to Classic in this case because the filing of the lawsuit occurred after the termination took effect, which means Classic's lawsuit was not "timely institute[ed]".

There is, by the way, no suggestion in the record that Lamborghini lulled Classic into untimliness. Classic considered that it had until all day on July 22, 2011 to file, and so it filed on the 22nd. But that was, in my view, a day late.

I recognize that no harm befalls ALA if the Court views the deadline as flexible – either out of some general sense of equity and fairness, untethered to the statute, or because of some perceived ambiguity in the language used to express when termination was to occur. Classic cites to another Notice of Intention, in another state, at another time, to another dealer, by ALA, in which the dealer is advised that ALA '… intends to terminate the Dealer Agreement … at 12:01 a.m. Mountain Time on the date that is thirty (30) calendar days after the date of the Dealer's receipt of this notice via certified mail". That certainly obliterates any ability to contest when ALA intended to terminate that Dealer Agreement. But the fact that expression of intent is susceptible to being made more precise does not serve to blunt the conclusion that a termination

of a relationship "on" or "effective as of" July 22, 2011 means that termination became effective on July 22, 2011, not on July 23, 2011, which is the day after the dealership was terminated.

There is no request that the Court reconsider its denial of the preliminary injunction – under traditional Order to Show Cause jurisprudence – and the summary judgment record does nothing to rehabilitate the deficiencies of Classic's case under that analysis.

The next issue is whether the stay legislation can apply to a franchise operating under a Dealer Agreement entered into in 2007, or whether it can provide relief only to parties who entered into a contractual relationship or after the effective date of the Act, i.e., May 4, 2011. When the parties entered their 2007 Agreement, a franchisee's injunction lawsuit would not automatically stay a franchise termination. Now it does. The following findings I make for purposes of completeness, as my determination that the stay was untimely invoked moots the issue.

If it is assumed that Classic's suit was "timely" for purposes of the automatic stay provision of N.J.S.A. 56:10-30, the question remains as to whether or not the stay is applicable where, as here, the Dealer Agreement binding the parties was entered into in 2007, and the "effective date" of the automatic stay legislation, which is part of the NJFPA, is May 4, 2011. ALA contends that the legislation can not modify the "playing field" established by the 2007 Dealer Agreement, but can only be held to apply to new agreements, or to agreements that are extended or modified after the effective legislation. Classic argues that it is absurd to suppose that the Legislature intended to exempt all the exposed, existing dealerships of new motor vehicles, under existing Agreements, from this remedial legislation.

The Dealer Agreement is dated January 15, 2007. It has no specific termination date. ALA's Notice of Termination was sent on April 15, 2011, and was to be effective 60 days from when Classic received it, i.e., say, June 16 or 17 or 18, 2011, i.e., after the effective date of the legislation (May 4, 2011). The termination date was extended to, and became effective on, July 22, 2011 (or, in Classic's view, after the clock struck 11 o'clock, 59 minutes, 59 seconds, on the evening of July 22, 2011), i.e., in any event, also after the effective date of the automatic stay legislation. The effective date of the legislation pre-dates the effective date of the termination by two and one-half months and, in that sense, and to that extent, the Court would not be applying the act "retroactively" if it were to find that it protects Classic in the instant case. That was my

observation (dicta) at the hearing on the preliminary injunction and I now ripen it to a formal determination, for the reasons that follow.

The NJFPA, by its terms, did not apply, upon adoption, to existing franchises. ("This act shall not apply to a franchise agreement granted prior to the effective date of this act, provided, however, that a renewal of a franchise or an amendment to an existing franchise shall not be excluded from the application of this act"). N.J.S.A. 56:10-8. But here, the legislature singled out for special protection a specific franchise industry (dealerships of new motor vehicles), from a specific and immediate threat (destruction of car dealerships by franchisors prior to a final judicial determination of whether or not "good cause" for termination exists). In the face of this perceived harm, the Legislature specified that the act "shall take effect immediately". 2011 NJ Sess. Law Serv. Ch. 66, 91 14 (Assembly 3722) (West). If the legislature intended the automatic stay legislation to take effect "immediately", it took effect on May 4, 2011, i.e, prior to the attempted July 22, 2011 termination of the Dealer Agreement.

I recognize for the reasons set forth above at pages 13-15, that this legislation significantly alters the playing field in favor of automobile franchisees who sell new cars, and against the Franchisors, at least with respect to TRO and Preliminary Injunction jurisprudence: the dealership will remain in place for the duration of the lawsuit, even if it might not be able to satisfy each of the criteria set forth in Crowe v. DiGioia, 90 N.J. 126 (1982). But this remedial legislation merely preserves the status quo – i.e., literally, it allows the dealership to continue to exist, pendente elite, even in the face of disputes as to whether or not "good cause" has been shown for its elimination.

This finding is, I think, particularly valid in the context of this industry. The Dealer Agreement here dates back to January, 2007, nearly 5 years ago. The agreement might continue unamended for decades, as it has no termination date, and, being a franchise agreement, could arguably have no specific termination date. Under N.J.S.A. 56:10-5, it is a violation of the NJFPA "…for a franchisor to terminate, cancel or fail to renew a franchise without good cause". Indeed, "once a franchise relationship begins [under the NJFPA], all that a franchisee must do is comply substantially with the terms of the agreement, in return for which he receives the benefit of an "infinite" franchise – he cannot be terminated or refused renewal". Dunkin Donuts of America, Inc. v. Middletown Donut Corp., 100 N.J. 166, 185 (1985). (Citing N.J.S.A. 56:10-5). It is highly unlikely that the legislature intended to immunize all existing new car dealership

agreements from legislation meant to ameliorate an immediate and extensive problem facing such dealerships in New Jersey.

Accordingly, I decline to apply the "retroactive" applicability analysis set forth in ALA's briefs, as the stay legislation is not being applied retroactively, under this analysis, but rather would be applied "immediately" to protect a dealership that filed – pre-termination – a timely challenge to termination. Again, this is all theoretical, as Classic failed to timely invoke the stay, and thus can not have the benefits of the stay, regardless of whether the statute would otherwise have governed this termination.

B. ALA Is Entitled to Summary Judgment

The Court has determined that Classic is not entitled to the protections of the automatic stay, because it failed to file an application challenging termination of the Dealer Agreement, prior to the effective termination of the Dealer Agreement. And, in addressing Classic's request for a TRO barring termination, the Court determined that Classic had failed to demonstrate any likelihood of ultimate success on the merits, or to otherwise demonstrate entitlement to the extraordinary relief of an injunction, a finding I hereby affirm. ALA now asks the Court to take the next step, and grant summary judgment, dismissing all Classic's claims – including Classic's claim that ALA lacked or lacks good cause to terminate it – with prejudice.

There can be no dispute that Classic has utterly failed to comply with its material obligations under the Dealer Agreement.

The following recitation is derived from ALA's R. 4:46-2 statement of Material Facts, to which Classic proffered no rule–compliant response, and which in any event are the unrebutted facts of the case:

1. Lamborghini dealers require financing (known as "floor plan financing") in order to be able to acquire new vehicles for resale.
2. The Dealer Agreement requires Classic to maintain an adequate level of floor plan financing at all times.
3. The Dealer Agreement requires Classic to "perform all of the duties imposed upon it under [the] Agreement … and … fully exploit market opportunities for [vehicles] and … promote in all respects the image and good reputation of Lamborghini." Specifically, the Dealer Agreement required Classic: (1) to equip and maintain a business premises; (2) to make minimum annual purchases of new Lamborghini vehicles pursuant to an agreed

4. Authorized Lamborghini dealers sell the Lamborghini vehicles they purchase from ALA to the consuming public.
5. In 2007, Classic agreed to order fifteen (15) vehicles, including 4 Gallardo Coupe, 8 Gallardo Spyder, 2 Murcielago Coupe and 1 Murcielago Roadster.
6. Prior to May, 2009, Classic had a floor plan line of credit with JP Morgan Chase Bank ("Chase").
7. Chase revoked Classic's floor plan line of credit in or around May of 2009, because Classic did not meet Chase's standards of financial stability.
8. Classic never obtained alternative floor plan financing after Chase revoked its floor plan line of credit in or around May of 2009, and its most recent efforts to obtain floor plan financing occurred in September of 2010.
9. In 2010, after it lost its floor plan financing, Classic failed to order vehicles in accordance with its allocation plan, ultimately ordering only three (3) of the six (6) vehicles from ALA that had been allocated to Classic for delivery in 2010. Classic sold just three (3) new vehicles in 2010.
10. During 2011, Classic ordered zero (0) new Lamborghini vehicles and had zero (0) new Lamborghini vehicles in stock.
11. Classic claims it failed to pay for new vehicles it did order and stopped ordering new vehicles, because "it was financially impossible for Classic to adhere to such requirements."
12. Classic has sold zero (0) new Lamborghini vehicles in 2011.
13. Classic shuttered its facility in May of 2011, claiming it closed "temporarily for renovations". However, it has since been denied permission by local municipal authorities to undertake requested remodeling of the facilities, and now states in its

Verified Complaint that the status of its dealership operations is "on hold pending the outcome of the parties' differences."

14. The Dealer Agreement expressly provides for immediate termination upon written notice without an opportunity to cure where the dealer fails to conduct its customary sales and service operations for a continuous period of seven business days.
15. By letter dated June 16, 2010, ALA provided written notice to Classic regarding material deficiencies in Classic's performance under the Dealer Agreement.
16. Among other things, Classic (i) failed to order vehicles consistent with its agreed-upon allocation plan; (ii) failed to take delivery of many vehicles that it had ordered; (iii) failed to take timely delivery of those vehicles that it did ultimately purchase, and (iv) failed to keep any inventory of vehicles in stock.
17. On July 15, 2010, Classic sent a written response to ALA. The letter failed to contain proposals to address the material breaches identified in ALA's letter. By way of example, the letter contained no commitment to obtain a floor plan line of credit and no commitment to order vehicles.
18. On August 24, 2010, ALA sent a follow-up letter to Classic identifying deficiencies in Classic's response.
19. On October 8, 2010, Classic sent a written response to ALA requesting additional time to provide a substantive response. Subsequently, ALA extended the time for Classic to respond to ALA's August 24, 2010 letter to December 10, 2010.
20. ALA never received any substantive response from Classic to its August 24, 2010 letter.
21. Classic failed to address the material breaches identified in the August 24, 2010 letter.
22. On April 15, 2011, ALA sent a written notice of termination to Classic detailing the ways in which Classic had materially breached the Dealer Agreement and terminating the Dealer Agreement for good cause pursuant to the Dealer Agreement and the New Jersey Franchise Practices Act. The Notice of Termination stated that the Dealer Agreement would terminate effective sixty days after Classic's receipt of notice.
23. At Classic's request, the parties had a meeting and engaged in a series of communications, but Classic failed to submit any plan to cure its breaches during this period.

24. Classic also requested several extensions of the effective date of termination, and ultimately, the effective date of termination became July 22, 2011.

There have been no indicia of an active dealership at the site since May of 2011 – no cars, no sales, no salesmen, no customers, no employees and, since May of 2009, no floor plan financing.

The unremedied failure of Classic to function at any level as a dealership of Lamborghini automobiles provided ALA with the requisite statutory "good cause" to terminate the Dealer Agreement (N.J.S.A. 56:10-5), and that good cause termination will be validated by the Court in the context of this summary judgment application, unless there is some procedural or substantive defect precluding such a determination.

The procedural implementation of termination was in compliance with the requirements of the Dealer Agreement, and in compliance with the strictures of the NJFPA. Due notice was given. An opportunity to cure was provided. Classic failed to substantively respond to nearly all of the issues raised by ALA. Classic's claim that ALA failed to provide notice and/or an opportunity to cure is simply without a factual basis in the record.

As to the facts, Classic asserts that ALA is the cause of Classic's inability to maintain a viable dealership: the failures of Classic to sell cars, or, since May of 2009, to have floor plan financing, is because the cars themselves are unattractive to buyers, not for lack of effort by Classic. Here, the allegations are contained in the certification of Onofrio Triarsi, Classic's managing member. He details the money invested and lost in the dealership and the "melting away" of a market for Lamborghini's, owing to the poor management of ALA. (Para. 6-7). Mr. Triarsi also alleges that ALA engaged in "strong arm" tactics, whereby the parties' efforts to "resolve their differences" would have required Classic, improperly, to agree to "onerous provisions" and to waive "all of its statutory protections". (Para 32). He asserts that the requirements of ALA of Classic, per the Dealer Agreement, are "unreasonable" (paragraph 35), because adherence to them (i.e., maintaining an actual dealership) would cause him to lose money.

The Court acknowledges that the case is new, and discovery (by consent of the parties) has been largely withheld pending resolution of this motion. Assume arguendo the truth of Classic's claims – the dealership failed because the products are anathema to the motoring public, owing to Franchisor blunders in pricing, marketing and/or engineering. If I assume the

veracity of these claims (which have no actual factual support in the record)[1], they provide no defense to termination, and no obstacle to summary judgment. It is well-settled law that the franchisor's (i.e., ALA's) conduct is irrelevant to the "good cause" analysis.

Courts have considered – and rejected – the notion that when determining whether a franchisor has "good cause" to terminate a dealer, ancillary conduct of the franchisor is somehow relevant. General Motors Corp. v. The New A.C. Chevrolet, 263 F.3d 296, 302 (3d Cir. 2001) ("New A.C. II"). In New A.C. II, the dealer breached its dealer agreement with GM by putting in another franchise of a different manufacturer without GM's permission. Id. at 302. GM sought summary judgment from the district court that its termination of the parties' dealer agreement was for "good cause" as that term is defined in the NJFPA. Id. at 310. The dealer opposed GM's motion by trying to claim that even though the additional franchise might be a breach of the dealer agreement, GM's failure to allow the new franchise and other conduct imposed performance standards on the dealer that were "unreasonable". Id. at 310-311. The dealer further argued that summary judgment was improper because there was a question of fact as to whether GM had acted in bad faith in connection with its enforcement of the dealer agreement. Id. at 313.

The district court rejected all of the dealer's arguments and granted summary judgment to GM. Specifically, the Court found that where (as here) the dealer materially breached the dealer agreement, GM had good cause pursuant to Section 56:10-5 of the NJFPA to terminate it, and GM's own "good faith or lack thereof – was irrelevant". Id.

The Third Circuit affirmed the district court. In so doing, it noted that "a franchisee's breach of a reasonable franchise operation – committed over the express and persistent objections of the franchisor – is a material one". Id. at 317. It further observed that the "statutory definition of 'good cause' [in the NJFPA] focuses solely on the objective actions of the franchisee – i.e., whether the franchisee substantially complied with the franchise requirements. Id. at 320 (emphasis supplied). Accordingly, because there was no dispute that the dealer had, in fact, put into the dealership a different franchise without GM's permission,

[1] The idea that it is "impossible" to sell Lamborghini vehicles – or obtain the requisite floor plan financing to make sales at the dealer level possible – is belied by the only facts in the record on the issue: Ex. "C" to Mr. Triasi's certification of August 18, 2011. It shows that for the period of January through August of 2011 – a period of time during which Classic sold no vehicles – Lamborghini of Newport Beach sold 18, Miami sold 14, Gold Coast 13, Manhattan 12, etc. It is true that Boston and Denver and Long Island, like Lodi, sold none, but the point is that the idea that it is "impossible" to secure floor plan financing, or sell Lamborghinis, has no support in the record, and is refuted by the record.

there was likewise no dispute that the dealer materially breached the dealer agreement. Id. at 321. GM thus had good cause to terminate the dealer agreement. Id.

The same result obtains here. Like the dealer in New A.C. II, Classic is attempting to avoid summary judgment in spite of its admitted, material breaches of the Dealer Agreement by trying to claim ALA has itself somehow violated the NJFPA. Pls. Opp. At 6-8. Classic's unsubstantiated assertions about ALA, - even if credited merely for the sake of argument - cannot and do not operate to defeat a grant of summary judgment in ALA's favor. New A.C. II, 263 F.3d at 321 n.11. The conduct of which Classic purports to complain is wholly irrelevant to (and in no way excuses) Classic's material breaches and its repeated, uncured failure to perform its obligations under the Dealer Agreement. Rather, Classic's performance failures operate to provide ALA a "complete defense" to Classic's claims. Coast, 119 Fed. Appx. At 423; see also N.J.S.A. § 56:10-9. Plaintiff Classic cites no specific acts of ALA's that constitute a breach of the agreement, or a breach of the duty of good faith and fair dealing. ALA has established "good cause" for the termination, for the reasons set forth above. The allegation of "pulling warranty work" has no textual support in the parties Agreement, which imposes no duties upon ALA with respect to the distribution of warranty work. The termination of the Agreement is buttressed by statutory "good cause", and authorized by the terms of the parties' Agreement. There can be "… claim for breach of the implied covenant of good faith and fair dealing when the conduct at issue is governed by the terms of an express contract or the cause of action arises out of the same conduct underlying the alleged breach of contract". Hahn v. OnBoard, LLC, No. 09-03639, 2009 U.S. Dist. Lexis 107606 at ∗15 (D.N.J. Nov. 16, 2009). Therefore, Classic has no viable claim of breach of the covenant of good faith and fair dealing arising from the termination of the Dealer Agreement, which was a completely lawful act. None of the other contentions in the Triarsi Certification have any bearing on the fact that the undisputed facts entitle ALA to summary judgment, on the NJFPA claim, the breach of contract claim, and the good faith/fair dealing claim.

Lastly, Classic has failed to demonstrate that discovery will alter or affect the outcome, and has failed to specify what discovery is required to develop support for any of its claims or defenses.

CONCLUSION

For the reasons set forth above, the Court determines that the automatic stay legislation amending the New Jersey Franchise Practices Act (N.J.S.A. 56:10-30(a)) is unavailable to plaintiff Classic because it was not invoked by the filing of a timely action, and, further, that ALA is entitled to Summary Judgment on all claims.

Defense counsel shall submit a form of Judgment under the Five Day Rule.

_____

ROBERT P. CONTILLO, P.J.Ch.