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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

CRAZY FREDDY'S MOTORSPORTS, INC.,

Plaintiff,

- against -

AMERICAN HONDA MOTOR CO., INC.

Defendant.

INDEX NO.: 019632/2009
MOTION DATE: 3/28/11
SEQUENCE NO.: 03

The following documents were read on this motion:

Defendant's Motion for Summary Judgment on First Cause of Action	1.
Corrected Affidavit of William Herten in Support	2.
Defendant's Memorandum of Law in Support of Motion	3.
Affirmation in Opposition to Motion	4.
Plaintiff's Memorandum of Law in Opposition to Motion	5.
Reply Affidavit of Michael J. Levin in Further Support of Motion ...	6.
Reply Affidavit of William Herten in Further Support of Motion	7.
Defendant's Reply Memorandum of Law in Further Support of Motion	8.

PRELIMINARY STATEMENT

Defendant moves for an Order pursuant to § 3212 of the Civil Practice Law and Rules for an order granting defendant summary judgment dismissing the First Cause of Action, alleging that American Honda lacks due cause to terminate plaintiff's dealership, on the grounds that American Honda is entitled to judgment as a matter of law, and severing the remaining causes of action after granting summary judgment on the First Cause of Action.

BACKGROUND

Defendant contends that plaintiff has abandoned its dealership, and is causing continuing financial injury to plaintiff, because as long as the franchise technically continues to exist, Honda is barred by the New York Franchised Motor Vehicle Dealer's Act, from appointing a replacement within six miles of plaintiff's location.

On December 20, 2005 and January 6, 2006, American Honda entered into a Sales and Service Agreement with plaintiff by virtue of which plaintiff became an authorized Honda motorcycle, motor scooter, all-terrain vehicle and personal watercraft dealer.[1] Each of the Agreements incorporated by reference American Honda's "Standard Provisions" for such dealerships. [2] The Sales and Service Agreements identified a single location for the dealership: 173 E. Sunrise Hwy., Freeport, NY 11520.

The term "Dealership Operations" is defined in the Standard Provisions as "(a)ll operations, contemplated by the [Sales and Service] Agreements. These operations include the sale and service of Honda Products, and any other activities undertaken by Dealer related to Honda Products, whether conducted directly or indirectly by Dealer". [3]

Other provisions of the Standard Provisions require that the dealer maintain the premises in a neat and orderly condition[4]; that the dealer will conduct its business in a manner "to protect the reputation and goodwill of the Honda Trademarks and Honda products"[5] ; that "Dealership Operations shall be conducted in the normal course of business during and for not less than the days of the week and hours of the day customary

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[1] Exh. "A" to Motion.

[2] Exh. "B" to Motion.

[3] Standard Provision 1.7.

[4] Standard Provision 5.1

[5] Standard Provisions 2.2

for retail businesses in the Primary Market Area"[6] ; provide proper and ongoing service to Honda customers at the Dealership Location[7]; maintain at the Dealership Location "an inventory of Honda [Products] which comprises a representative sample thereof (subject to availability"[8]; and also to maintain adequate capital and financing, including a satisfactory floor plan line of credit[9].

Defendant relies upon documentary evidence of the failure of plaintiff to comply with each of the foregoing requirement, including on-site inspections by Honda representatives, together with photographs showing handwritten signs directing prospective motorcycle purchasers to a location in Massapequa, a site which Honda had disapproved as an alternate site to Freeport, the voluntary surrender by the principal of Crazy Freddy's, Fred Ippolito, of the American Honda Finance Corporation floor-planned inventory, the termination of the required floor plan, the failure to provide required maintenance services, and the failure to purchase inventory.

Plaintiff responds that Honda has failed to establish due cause for termination of his franchise. He points to Vehicle and Traffic Law § 463 (2)(d)(1), which makes it unlawful for any franchisor "to terminate, cancel or refuse to renew the franchise of any franchisee motor vehicle dealer, except for due cause, regardless of the terms of the franchise".

In this case American Honda served a Notice of Termination dated May 29, 2009, alleging violation of the following obligations under the dealership agreement:

- abandonment of Dealership Operations;
- failure to maintain a going business in the Primary Market Area for seven (7) consecutive days;

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[6] Standard Provisions 5.5

[7] Standard Provision 8.1

[8] Standard Provision 6.2

[9] Standard Provision 15 (B)(4).

- failure to adequately represent, promote, sell or service Honda products;
- failure to maintain an operating floor plan financing (line of credit) from any financial institution.

The Notice of Termination followed on the heels of American Honda Finance Corp.'s May 19, 2009 cancellation of plaintiff's financing floor plan arrangement, and the November 2008 request to relocate the franchise to Massapequa. If there were evidence produced that the conditions reflected in the inspection reports did not exist prior to the termination of financing, plaintiff would raise a significant question of fact as to whether the actions of American Honda Finance, allegedly an entity completely separate and apart from American Honda Motor Co., Inc., created the conditions leading to the Termination Notice. Plaintiff does not offer evidence that the franchise was operating in compliance with the Dealership Agreement, other than mere assertions that it was.

In the face of the documentary evidence submitted in support of the motion, it is not time for plaintiff to rely solely on challenges to the adequacy of defendant's allegations. Defendants have established a prima facie claim for termination, and plaintiff is required to bare his proof to the contrary. Unsupported assertions that the location is open for business on a regular basis, maintained in good condition, and is in compliance with the obligations to maintain a service center and a floor plan agreement are not meaningful in the face of the submitted documents and photographs.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact."[10] To grant summary judgment, it

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[10] *Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450, (1st Dept.1992); See also, *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343 (1974).

must clearly appear that no material and triable issue of fact is presented.[11] It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue.[12] However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial".[13]

The evidence will be considered in a light most favorable to the opposing party.[14] The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party.[15] On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. ' "[16] But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact.[17] (*Zuckerman v. City of New*

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[11] *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957).

[12] *Moskowitz v. Garlock*, 23 A.D.2d 94 (3d Dept. 1965); *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 (3d Dept.1965).

[13] *Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 (1st Dept.1965).

[14] *Weill v. Garfield*, 21 A.D.2d 156 (3d Dept. 1964).

[15] *Tortorello v. Carlin*, 260 A.D.2d 201, 206 (1st Dept.2003).

[16] *Braddock v. Braddock*, 2009 WL 23307 (N.Y.A.D. 1st Dept. 2009), citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 (1994).

[17] *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

York, 49 N.Y.2d 557, 562 [1980]).

Plaintiff does have the benefit of the Franchised Motor Vehicle Dealer Act.[18] It prohibits automobile manufacturers from (1) terminating a franchise except for "due cause"; (2)coercing a dealer to enter into an agreement or act in a manner contrary to its economic interests by threatening to cancel an unexpired contractual agreement; (3) conditioning a franchise renewal on a dealer making substantial renovations or constructing a new facility, except in limited circumstances; or (4) imposing unreasonable restrictions on the transfer or sale of a franchise.[19]

Except for the issue of loss of financing, the condition and location of Crazy Freddy's is the crux of this action. Honda claims that it is entitled to summary judgment on the issue that it had "due cause" to terminate the franchise. It must be noted that "due cause" is not limited to what is contained in the Dealership Agreement.

Plaintiff has not adequately raised a genuine question of fact with respect to the legitimacy of defendants determination to terminate the plaintiff's franchise. Defendant's motion to dismiss the First Cause of action is granted, and the balance of the allegations of the complaint are severed for further proceedings.

This constitutes the Decision and Order of the Court.

Dated: July 11, 2011

J.S.C.

[18] Veh. & Tr. Law §§ 462 et seq.

[19] *Action Nissan, Inc. v. Nissan North America,* 454 F. Supp.2d 108 (U.S.D.C., S.D.N.Y 2006).