[Cite as *Stars of Cleveland, Inc. v. Fred Martin Dodge Suzuki, Inc.*, 2009-Ohio-4012.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STARS OF CLEVELAND, INC. DBA MONTROSE FORD LINCOLN MERCURY

Plaintiff-Appellant

-vs-

FRED MARTIN DODGE SUZUKI, INC.

Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 2008CA00193

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2007CV03650

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 10, 2009

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Farmer, P.J.

{¶1} Appellant, Stars of Cleveland, Inc. dba Montrose Ford Lincoln Mercury, is a dealership which is part of a group of dealerships known as the Montrose Auto Group. Appellee, Fred Martin Dodge Suzuki, Inc. is a dealership located in Hartville, Ohio. K.O. Jeep Motors, Inc. was a dealership located in Akron, Ohio.

{¶2} On December 31, 2006, appellee and K.O. Jeep entered into an agreement wherein appellee would purchase K.O. Jeep's Chrysler and Jeep franchises. Appellee was required to obtain approval of DaimlerChrysler Motors Company, LLC as an authorized dealer and obtain approval to relocate the dealerships to Hartville, Ohio, obtain approval from the Ohio Regulatory Board, and obtain any necessary consent from any existing Chrysler or Jeep franchisees within the relevant market area, a ten mile radius from the site of the new dealerships. The only existing franchisee located within the relevant market area was Montrose Chrysler in Louisville, part of the Montrose Auto Group.

{¶3} On January 5, 2007, Montrose Auto Group agreed to provide consent in exchange for the transfer of appellee's Suzuki dealership to appellant. The parties entered into an agreement wherein appellant would purchase appellee's Suzuki dealership, contingent on appellee closing on its deal with K.O. Jeep, and subject to Suzuki's approval.

{¶4} On February 5, 2007, DaimlerChrysler denied appellee's request to relocate the K.O. Jeep dealership to Hartville, and exercised its right of first refusal.

{¶5} On February 13, 2007, appellee filed a notice of protest with the Ohio Motor Vehicle Dealers Board. Appellee also filed a complaint in the Court of Common

Pleas of Summit County, Ohio to force DaimlerChrysler to approve the deal between appellee and K.O. Jeep.

{¶6} Sometime thereafter, DaimlerChrysler purchased K.O. Jeep. As a result of the failed K.O. Jeep deal, appellee and appellant could not agree on a deal regarding the Suzuki dealership.

{¶7} On September 6, 2007, appellant filed a complaint against appellee, alleging breach of contract, breach of implied contract (covenant of good faith and fair dealing), and fraud and misrepresentation. On February 22, 2008, appellee filed a motion for summary judgment. By judgment entry filed August 11, 2008, the trial court granted the motion.

{¶8} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶9} "THE TRIAL COURT'S JUDGMENT ENTRY GRANTING FRED MARTIN DODGE SUZUKI, INC.'S MOTION FOR SUMMARY JUDGMENT WAS IN ERROR AND MUST BE REVERSED."

I

{¶10} Appellant claims the trial court erred in granting summary judgment to appellee. We disagree.

{¶11} Summary Judgment motions are to be resolved in light of the dictates of Civ.R. 56. Said rule was reaffirmed by the Supreme Court of Ohio in *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 448, 1996-Ohio-211:

{¶12} "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. *State ex. rel. Parsons v. Fleming* (1994), 68 Ohio St.3d 509, 511, 628 N.E.2d 1377, 1379, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O3d 466, 472, 364 N.E.2d 267, 274."

{¶13} As an appellate court reviewing summary judgment motions, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc*. (1987), 30 Ohio St.3d 35.

{¶14} In its complaint filed September 6, 2007, appellant alleged breach of contract, breach of implied contract (covenant of good faith and fair dealing), and fraud and misrepresentation. By judgment entry filed August 11, 2008, the trial court granted summary judgment in favor of appellee.

BREACH OF CONTRACT

{¶15} Appellant argues summary judgment in favor of appellee was in error on the breach of contract claim. Specifically, appellant argues the trial court failed to find that the condition precedent contained in the Suzuki agreement had been waived; failed to determine that Section 7 of said agreement required a closing; and erred in not determining that the agreement required "best efforts" by appellee.

{¶16} In its judgment entry filed August 11, 2008, the trial court determined the following on the issue of breach of contract:

{¶17} "The [Suzuki] contract is clear and unambiguous that Defendant Fred Martin would sell its existing Suzuki franchise located at the Hartville dealership to Plaintiff Stars of Cleveland only upon closing of the agreement between Fred Martin and K.O. and subject to approval by Suzuki. The language in the contract states that closing of the Fred Martin and K.O. agreement was a condition precedent to the Stars of Cleveland and Fred Martin contract. The condition precedent was not met. Further, there is no evidence that Defendant waived the condition precedent."

{¶18} The historical facts are not in dispute. However, appellant argues the existence of genuine issues of material facts regarding appellee's good faith efforts to fulfill the condition precedent which was the closing of the deal between appellee and K.O. Jeep. The December 31, 2006 agreement between appellee and K.O. Jeep included the following conditions at Section 7:

{¶19} "7. It is understood and agreed that the completion of performance of this Agreement is expressly conditioned upon the following:

{¶20} "A. Consent to the sale as necessary from any other Chrysler/Jeep Franchisee which is to be obtained no later than January 9, 2007.

{¶21} "B. The approval of the Purchaser or the Purchaser' assignee(s)/nominee(s) by the State of Ohio as a licensed new motor vehicle dealer of Chrysler/Jeep motor vehicles; and

{¶22} "C. The approval of DCX [DaimlerChrysler] of the Purchaser or the Purchaser' assignee(s)/nominee(s) as an authorized dealer for the sale and service of

Chrysler/Jeep vehicles at Fred Martin Dodge-Suzuki, Inc., 910 Sunnyside St., Hartville, Ohio, 44636, or such other location designated by Purchaser."

{¶23} Appellant argues the issue in dispute centers around subsection (C). In other words, did appellee exercise its best efforts to obtain DaimlerChrysler's approval of the purchase by appellee of K.O. Jeep?

{¶24} It is undisputed that DaimlerChrysler's approval of the K.O. Jeep purchase was a condition precedent to the Suzuki sale. Appellant argues appellee used DaimlerChrysler's rejection of the K.O. Jeep sale as a bargaining chip to obtain DaimlerChrysler's approval of an "Alpha" complex in Norton, Ohio. Alpha was the name of DaimlerChrysler's project to try and consolidate work and dealerships in areas that would make sense. Appellant argues appellee would receive the Alpha complex in Norton in exchange for a release of its rights under the K.O. Jeep agreement. In support of its argument, appellant points to the following facts:

{¶25} 1. DaimlerChrysler exercised its right of first refusal and denied the K.O. Jeep purchase because of appellee's inadequate facilities to accommodate three dealerships. See, February 5, 2007 Letter from J. W. Dimond, National Dealer Placement Manager, to Bruce Kaufman, President of K.O. Jeep.

{¶26} 2. In his deposition at 23-24, Jack Gannon, DaimlerChrysler's Dealer Network Development Manager, indicated the big issue was the size of appellee's facility. If it was brought up to DaimlerChrysler's standards, plus other requirements, it would have been approved.

{¶27} 3. Appellee attempted to meet DaimlerChrysler's requirements, but set a time of three years into the future. Gannon depo. at 25.

{¶28} 4. Despite any efforts by appellee to update or construct a new facility, Mr. Gannon stated that DaimlerChrysler's market project to first complete the Alpha complex in Norton was also a reason for exercising its right of first refusal. Id. at 28.

{¶29} 5. It was DaimlerChrysler's plan to consolidate the Kent, Norton, Cuyahoga Falls, and Arlington Road dealerships. Id. at 9.

{¶30} 6. The Alpha complex took precedence over any approval of appellee's purchase of the K.O. Jeep dealership. Id. at 42, 50-51.

{¶31} 7. After discussions with Adam Huff, appellee's President, regarding renovations to the Hartville facility to make it compliant, Mr. Huff never submitted a proposal to Mr. Gannon or DaimlerChrysler. Id. at 47.

{¶32} It is clear that DaimlerChrysler failed to approve the sale of the K.O. Jeep dealership and exercised its right of refusal. On February 13, 2007, appellee filed a notice of protest with the Ohio Motor Vehicle Dealer's Board. Appellee also filed a complaint in the Court of Common Pleas of Summit County, Ohio to force DaimlerChrysler to approve the deal between appellee and K.O. Jeep. Sometime thereafter, DaimlerChrysler purchased K.O. Jeep, thereby negating the buy-sell agreement with appellee.

{¶33} Appellant disregards these facts and argues that appellee waived the condition precedent because it negotiated with DaimlerChrysler on the Alpha complex. Appellant's waiver argument is predicated upon Sections 4.1 and 4.3 of the Suzuki agreement between appellant and appellee which state the following:

{¶34} "**4.1 Time, Date and Place of Closing.** Subject to the provisions of Article 7, the closing of the Transaction (the '**Closing**') shall take place at such time and

location as the parties shall mutually select, on or before the day following the Effective Date, subject to the satisfaction (or appropriate waiver) of each of the conditions set forth in Sections 4.2 and 4.3 below, unless the parties otherwise mutually agree (the '**Closing Date**'). Provided the conditions have been met in Sections 4.2 and 4.3., Closing shall take place as soon as practical after Suzuki approves Purchaser and DaimlerChrysler approves Seller's acquisition and transfer of the KO Chrysler Jeep Point. The Closing shall be effective at 5:00 p.m. local time on the Closing Date.

{¶35} "**4.3 Conditions to Obligations of the Seller.** The obligations of the Seller to make the deliveries set forth in Section 4.4 are subject to the fulfillment prior to or at the Closing Date of each of the following conditions, any one or more of which may be waived by the Seller:

{¶36} "***

{¶37} "(c) DaimlerChrysler shall have approved in writing the Assignment by KO to the Seller of its rights and privileges under the existing DaimlerChrysler Dealer Agreement and such written approval shall authorize the dealership relocation to 910 Sunnyside St., Hartville, Ohio."

{¶38} "A waiver is the act of waiving or not insisting upon some right, claim or privilege, a foregoing or giving up of some advantage which but for such waiver the party would have enjoyed. In other words, a waiver is the voluntary yielding up by a party of some existing right which that party has." *Schwartz v. Auto Mutual Insurance Co.* (1938), 27 Ohio Law Abs. 454. "[A] waiver must be voluntary-that is, intentional, with knowledge of the facts and of the party's rights-or it must be implied from conduct which amounts to estoppel." *List & Son Co. v. Chase* (1909), 80 Ohio St. 42, 51.

{¶39} The actions of DaimlerChrysler and appellee operated independently and made the condition precedent an impossibility. We concur with the trial court's analysis on the breach of contract claim as to waiver and condition precedent.

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

{¶40} Appellant argues the trial court disregarded appellee's actions in thwarting the fulfillment of the condition precedent. Appellant argues it is a question of fact as to whether or not appellee thwarted appellant's expectations under the contract.

{¶41} In Ohio, there is a common law duty of good faith which is implied in the performance of contracts. *B-Right Trucking Co. v. Interstate Plaza Consulting,* 154 Ohio App.3d 545, 2003-Ohio-5156. "Good faith" is " 'a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.' " *Ed Shory & Sons, Inc. v. Society National Bank* (1996), 75 Ohio St.3d 433, 443-444, quoting *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting* (C.A.7, 1990), 908 F.2d 1351, 1357-1358.

{¶42} The trial court found the provisions of the Suzuki agreement contemplated that DaimlerChrysler could refuse, thereby negating appellee's duty to fulfill the contract. The duty of good faith argued by appellant goes to the K.O. Jeep contract and not the Suzuki contract between the parties. If the sale of K.O. Jeep to appellee failed, then the entire agreement between appellant and appellee would also fail.

FRAUD AND MISREPRESENTATION

{¶43} In its complaint at Count IV, appellant claimed appellee misappropriated from it a waiver of protest rights; appellee used the Suzuki agreement as a bargaining

chip with DaimlerChrysler; and appellee entered into secret negotiations with DaimlerChrysler and obtained and received significant concessions from DaimlerChrysler. See, Complaint filed September 6, 2007 at ¶36-39.

{¶44} In its February 22, 2008 motion for summary judgment, appellee asserted "the alleged misrepresentations or omissions all occurred after Stars [appellant] already knew that DCX [DaimlerChrysler] had denied Fred Martin's application, which was a condition to closing."

{¶45} As the timeline set forth by appellant in its brief at 4-6 illustrates, the K.O. Jeep agreement was entered into on December 31, 2006. On January 5, 2007, appellee obtained a "Waiver of Protest Rights" i.e., consent, from appellant and the parties entered into the Suzuki agreement, subject to the condition precedent to secure DaimlerChrysler's approval of the K.O. Jeep deal. On February 5, 2007, despite appellant's consent, DaimlerChrysler declined to approve the K.O. Jeep transfer and exercised its right of first refusal. Thereafter, appellee filed a protest and initiated a court action to secure DaimlerChrysler's approval.

{¶46} As Mr. Gannon's deposition at 23-24 illustrates, DaimlerChrysler was interested in the K.O. Jeep sale to appellee if appellee's facilities in Hartville could be made compliant with the DaimlerChrysler "footprint." The K.O. Jeep deal between appellee and K.O. Jeep required appellant's consent because Montrose Chrysler in Louisville was within the relevant market area. Appellant gave consent in exchange for appellee's Suzuki dealership (the Suzuki agreement). After appellee's relocation request was denied and DaimlerChrysler exercised its right of first refusal, appellee's Hartville facility underwent design evaluations. Gannon depo. at 37-38. Thereafter,

DaimlerChrysler and appellee "started going down the path of talking about maybe we could work out the consolidation in Norton." Id. at 42. The K.O. Jeep dealership was an "excess point" and DaimlerChrysler wanted to take its dealer count down in the Akron market as part of the Alpha project. Id. at 29. The project also included an exit strategy for DaimlerChrylser in the Louisville area. Id. at 73. DaimlerChrysler's consolidation plans were open and freely discussed with area dealers. Id. at 78. Any discussions about the Alpha project between DaimlerChrysler and appellee were had after DaimlerChrysler's rejection of the K.O. Jeep deal. Id. at 43.

{¶47} We find the trial court properly analyzed the timeline and found no fraud or misrepresentation at the time of the Suzuki agreement between the parties. All activity relative to the Alpha project was after the failure of the condition precedent.

{¶48} Upon review, we find the trial court did not err in granting summary judgment to appellee.

{¶49} The sole assignment of error is denied.

{¶50} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Hoffman, J. and

Edwards, concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Julie A. Edwards_____

JUDGES

SGF/jbp 0707

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STARS OF CLEVELAND, INC. DBA MONTROSE FORD LINCOLN MERCURY	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
FRED MARTIN DODGE SUZUKI, INC.	:	
Defendant-Appellee	:	CASE NO. 2008CA00193

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Julie A. Edwards

JUDGES