

[Cite as *Transamerica Serv. Tech. Supply, Inc. v Gen. Motors Corp.*, 2004-Ohio-560.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TRANSAMERICA SERVICES TECHNICAL,)
SUPPLY, INC., d.b.a. HANNA)
CHEVROLET-CADILLAC, INC., ET AL.,)

PLAINTIFFS-APPELLANTS,)

VS.)

GENERAL MOTORS CORPORATION,)

DEFENDANT-APPELLEE.)

CASE NO. 02 JE 48

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court
Case No. 01 CV 235

JUDGMENT:

Affirmed

APPEARANCES:

For Plaintiffs-Appellants:

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: February 6, 2004

DONOFRIO, J.

{¶1} Plaintiffs-appellants, Transamerica Services Technical Supply, Inc. d.b.a. Hanna Chevrolet-Cadillac, Inc. and Makram A. Hanna (Hanna), appeal from a Jefferson County Common Pleas Court decision awarding summary judgment to defendant-appellee, General Motors Corporation (“GM”).

{¶2} Hanna owned Hanna Chevrolet-Cadillac (“the dealership”) located in Steubenville, Ohio from 1983 until April 16, 1998, when he sold the dealership to Joseph Staffilino. During Hanna’s ownership period, he operated under a dealer agreement with GM. Per the dealer agreement, Hanna was required to maintain a credit line for the acquisition of new vehicles from GM, known in the auto industry as a “floor plan.” Hanna maintained his floor plan with General Motors Acceptance Corporation (“GMAC”) until May 16, 1997, when GMAC terminated his floor plan. Hanna did not acquire a floor plan from another lender. Since he was in violation of the dealer agreement without a floor plan, GM would not provide Hanna with any new vehicles and it informed Hanna it would terminate the dealer agreement.

{¶3} Hanna decided to sell the dealership. He entered into negotiations with several prospective buyers between May 1997 and January 1998. Per the dealer agreement, in order to sell the dealership, Hanna was required to submit a sale proposal to GM for its approval. Hanna alleges that between May 1997 and January 1998, he submitted several sale proposals to GM for approval. Hanna contends that GM, acting in bad faith, failed to approve any of the sale proposals or to notify him of its decision within the statutory 30-day limit. Eventually, GM approved the sale of the dealership to Staffilino. Hanna contends he was forced to accept less-than-market price for the dealership due to GM’s alleged bad faith in its dealing with him.

{¶4} During the period when Hanna negotiated with the potential buyers, appellants allege the dealership lost money because it operated without new stock from GM. Thus, the longer it took to sell the dealership, the more money Hanna lost. Appellants also contend that the proposal Hanna agreed to with Staffilino was significantly less than the initial offers he received and the fair market value of the dealership.

{¶5} Appellants filed a complaint against GM on June 21, 2001, alleging: (1) GM violated the Ohio Motor Vehicle Dealer Act, R.C. 4517.01 et seq., by failing to provide Hanna with timely written notice of its acceptance or rejection of the McKitrick-Harms sale proposal; (2) GM breached its duty of good faith dealings and violated R.C. 4517.56 by rejecting McKitrick-Harms as a transferee; (3) GM breached its duty of good faith dealings and violated R.C. 4517.56 by rejecting Petrola Motors as a transferee; (4) GM acted in bad faith and violated R.C. 4517.54 by canceling, without good cause or appellants' consent, the dealer agreement; (5) GM violated R.C. 4517.59(M) by engaging in a predatory and/or discriminatory practice against appellants; and (6) GM breached its contractual obligations to deal with appellants in good faith. On July 17, 2002, GM filed a motion for summary judgment on all claims. In its September 17, 2002 judgment entry, the court granted summary judgment in GM's favor on all claims except those for the alleged violation of the 30-day response period as set forth in R.C. 4517.56(B). On October 15, 2002, the parties entered into an agreed final judgment entry, which dismissed appellants' remaining claim, making the trial court's award of summary judgment final and appealable. Appellants filed a timely notice of appeal on November 7, 2002.

{¶16} Appellants raise three assignments of error, which state:

{¶17} “THE TRIAL COURT’S DETERMINATION THAT GENERAL MOTORS’ CONDUCT DOES NOT AMOUNT TO BAD FAITH IS ERRONEOUS.”

{¶18} “GENERAL MOTORS’ FAILURE TO NOTIFY APPELLANTS WITHIN THE PRESCRIBED THIRTY DAY PERIOD OF THEIR DECISION ON APPELLANT’S REQUEST FOR APPROVAL OF THE PROPOSED SALE OF THE ASSETS AND FRANCHISE RIGHTS OF TRANSAMERICA WAS, IN AND OF ITSELF, EVIDENCE OF GENERAL MOTORS’ LACK OF GOOD FAITH.”

{¶19} “GENERAL MOTORS’ DECISION TO ‘PUT THEIR OFFER ON HOLD INDEFINITELY’ WAS CLEARLY COERCIVE AND, AS SUCH, CONSTITUTES A BREACH OF ITS DUTY OF GOOD FAITH TO ITS DEALERS.”

{¶10} All of appellants’ assignments of error are premised upon the contention that GM failed to act in good faith by rejecting buy-sell proposals for the sale of Hanna’s dealership. Therefore, because all of appellants’ assignments share a common question of law and fact, we will address them together.

{¶11} In reviewing an award of summary judgment, appellate courts must apply a de novo standard of review. *Cole v. American Indus. & Resources Corp.* (1998), 128 Ohio App.3d 546, 552. Thus, we shall apply the same test as the trial court in determining whether summary judgment was proper. Civ.R. 56(C) provides that the trial court shall render summary judgment if no genuine issue of material fact exists and when construing the evidence most strongly in favor of the nonmoving party, reasonable minds can only conclude that the moving party is entitled to

judgment as a matter of law. *State ex rel. Parsons v. Flemming* (1994), 68 Ohio St.3d 509, 511. A “material fact” depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.* (1995), 104 Ohio App.3d 598, 603, citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-248.

{¶12} Under the Ohio Motor Vehicle Dealer Act, when a dealer under a franchise agreement intends to sell the dealership “the [dealer/]franchisee shall notify the franchisor of such intention by written notice setting forth the prospective transferee’s name and address and the names and addresses of the transferee’s prospective management personnel.” R.C. 4517.56(A). The dealer and transferee must also provide the franchisor with “such other information regarding the transferee’s character, business experience, and financial ability as may be reasonably requested by the franchisor to enable it to evaluate the transferee’s qualifications and ability to comply with the requirements of the franchise then in effect. The franchisor shall evaluate the prospective transferee and the transferee’s prospective management personnel on the basis of reasonable and objective criteria fairly and objectively applied.” R.C. 4517.56(A). The franchisor must provide the dealer/franchisee and the transferee with “written notice by certified mail of any refusal to approve a sale or transfer of the business * * * within thirty days of receipt of the written notice advising of the proposed transfer.” R.C. 4517.56(B).

{¶13} Appellants’ main contention is that GM failed to act with good faith during the time when Hanna was trying to negotiate a sale of the dealership. Franchisors, such as GM, have a statutory duty to act in good faith, “in acting or purporting to act

under the terms, provisions, or conditions of a franchise or in terminating, canceling, or failing to renew a franchise.” R.C. 4517.59(A).

{¶14} “Good faith” is defined in R.C. 4517.01(BB) as, “honesty in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing in the trade as is defined in division (S) of section 1301.01 of the Revised Code, including, but not limited to, the duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation, or threats of coercion or intimidation; provided however, that recommendation, endorsement, exposition, persuasion, urging, or argument shall not be considered to constitute a lack of good faith.” R.C. 1301.01(S) defines “good faith” as, “honesty in fact in the conduct or transaction concerned.” To “coerce” is “to compel or attempt to compel by failing to act in good faith or by threat of economic harm, breach of contract, or other adverse consequences.” R.C. 4517.01(CC).

{¶15} Appellants argue that GM’s conduct during the time Hanna was in the process of trying to sell the dealership constituted bad faith. While appellants note there is not one act by GM that constituted bad faith, they assert that GM’s pattern of conduct demonstrated at least a question of fact as to whether GM acted in bad faith.

{¶16} In order to understand appellants’ claim, we must examine the facts that led up to the ultimate sale of the dealership to Staffilino. GMAC terminated Hanna’s floor plan in May 1997. Appellants contend this action by GMAC, a wholly owned subsidiary of GM, triggered a scheme by GM to force Hanna to sell the dealership under unfavorable conditions.

{¶17} The dealership's first potential buyer was GM. Alan Tamar, an area GM manager, executed a buy-sell proposal with Hanna on July 16, 1997. (Hanna Affidavit). GM subsequently decided to put the proposal on hold. (Hanna Affidavit; Hanna Dep. 82-88). Appellants allege that GM effectively blocked Hanna's ability to sell the dealership as a result of delaying its decision, which demonstrated bad faith.

{¶18} Staffilino was the next potential buyer. On July 25, 1997, Hanna and Staffilino entered into negotiations to sell the dealership. (Hanna Affidavit; Hanna Dep. 88). Hanna sent GM notice of the negotiations that day and requested application materials for a sale. (Hanna Affidavit; Hanna Dep. 88). On July 27, 1997, GM informed Hanna that the proposed Staffilino deal had to be returned by August 1, 1997. (Hanna Affidavit; Hanna Dep. 88-89). Appellants argue that the imposed deadline was unreasonable and demonstrated bad faith, especially in light of the fact that GM did not impose similar deadlines on any of Hanna's other subsequent buyers. Because of the deadline, appellants contend Hanna was forced to terminate the deal with Staffilino.

{¶19} The next potential buyer was McKitrick-Harms Oldsmobile (McKitrick), owned by Patrick McKitrick and William Harms. McKitrick submitted a sale proposal to Hanna on August 1, 1997. (Hanna Dep. Exh. 19). GM gave preliminary consent to the sale on September 4, 1997. (Hanna Affidavit; Hanna Dep. Exh. 20). However, after conducting an audit, GM rejected the proposal due to accounting irregularities that precluded McKitrick from obtaining financing from GM. (Hanna Dep. Exh. 21; McKitrick Dep. 26-30). Appellants contend that McKitrick fully accounted for the

irregularities in a written response to GM, but GM never responded. (Hanna Dep. Exh. 21). This, appellants claim, again demonstrates bad faith.

{¶20} The next potential buyer was Petrola Motors, Inc. (Petrola). Petrola submitted an application to purchase the dealership to GM in October 1997. (Hanna Affidavit). Appellants allege that the application was complete, yet GM rejected it due to minor technicalities, demonstrating bad faith. (Hanna Dep. 130, Exh. 26). But a letter from GM telling Hanna the application was incomplete also invited him to submit a new application. (Hanna Dep. 129-30, Exh. 26).

{¶21} Appellants further contend that GM frustrated Petrola's ability to purchase the dealership, in bad faith, by requiring Petrola to enter a month-to-month lease and relocate the dealership. However, the letter they cite to for support is not proper summary judgment evidence. Appellants refer us to a letter from Petrola's counsel to Hanna's counsel. (Appellant's brief Exh. R). Per Civ.R. 56(C), courts may only consider "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact" when ruling on a summary judgment motion. The letter does not fit into any of these categories. But even if we considered the letter, we would not find evidence of bad faith. The letter simply stated that Petrola had been involved with negotiations with GM regarding renovation of the dealership and what GM would require in the future and that GM had not provided it with a clear "game plan," resulting in a delay. Nowhere does the letter state that Petrola was not going to purchase the dealership because GM wanted it to enter a month-to-month lease and relocate the dealership. Furthermore, Dr. Frank Petrola testified that he withdrew from negotiations with Hanna not because of

anything GM did, but because Hanna kept changing the sale price. (Petrola Dep. 28). Hanna denied this stating that he only changed terms at Petrola's request. (Hanna Affidavit). But Hanna sent a fax to GM on November 12, 1997, stating that Petrola no longer wished to pursue negotiations so he terminated his deal with Petrola and requested a new application for McKitrick. (Hanna Dep. 134-35, Exh. 29; Petrola Dep. Exh. 6).

{¶22} McKitrick then submitted a second application with GM on November 16, 1997. (Hanna Affidavit). Under this proposal, McKitrick obtained independent financing to alleviate the need for GM to provide financing. (Hanna Affidavit; Hanna Dep. 137). On December 23, 1997, Hanna received notice from GM that it rejected the proposal due to a disagreement with McKitrick's calculation of networking capital. (Hanna Affidavit; Hanna Dep. Exh. 34). Appellants contend that GM violated the statutory 30-day notice requirement, again demonstrating bad faith.

{¶23} Appellants argue that, while the trial court correctly determined that GM failed to comply with its statutorily imposed duty to timely approve or reject a proposed transferee, it erred in failing to address other events that demonstrate a pattern of coercive and arbitrary conduct. Appellants argue that the determination of GM's failure to comply with its statutory duty is prima facie evidence of bad faith, and therefore requires the trial court to consider other relevant evidence.

{¶24} In support of their contention, appellants cite *Chrysler Corp. v. Bowshier*, 10th Dist. No. 01AP921, 2002-Ohio-1443. In *Bowshier*, the court ruled that Chrysler's failure to notify the prospective transferee of its rejection of a sale proposal within the 30-day limit was one factor to consider in determining whether Chrysler had good

cause to refuse the sale. The court stated that a substantive analysis was then required to determine whether Chrysler acted in good faith.

{¶25} In the case at bar, appellants argue, the trial court found that GM violated “a mandatory statutory duty” that gave rise to a cause of action for whatever damage the delay may have caused. Nevertheless, appellants note, the trial court went on to state, “a brief violation of the thirty-day notice period does not amount to bad faith.” Based upon the court’s reasoning in *Bowshier*, appellants argue, the trial court improperly erred in not engaging in a substantive analysis of whether GM had good cause to refuse approval within the thirty-day statutory period. Additionally, appellants argue, when an issue involves the determination of good faith, it is a question that should be left for the finder of fact to decide. Therefore, appellants contend, the trial court should have denied GM’s motion for summary judgment.

{¶26} In the case sub judice, the trial court found, “[t]here is evidence in this case that one or more of the disapprovals may have occurred outside of the thirty-day period.” Hanna submitted the second McKitrick proposal to GM on November 16, 1997. (Hanna Affidavit; McKitrick Dep. 60-61). GM did not respond until December 23, 1997, over 30 days later. (Hanna Dep. Exh. 34). Although appellants voluntarily dismissed their 30-day notice claim, they use this assertion to contend that a substantive analysis of GM’s conduct is required. However, as we will discuss, this substantive analysis does not lead to evidence of bad faith conduct by GM.

{¶27} Regarding the loss of the floor plan, appellants claim that GMAC’s revocation of the floor plan is somehow evidence of bad faith on GM’s part, as GMAC is a wholly owned subsidiary of GM. However, as the trial court properly noted,

“GMAC is a separate corporation and is not a party to this action.” Additionally, appellants offer no evidence to support a contention that GM controlled GMAC in any manner relative to the revocation of their floor plan. Therefore, GMAC’s actions cannot be held against GM. See *Starner v. Guardian Industries* (2001), 143 Ohio App.3d 461, 468; *Belvedere Condominium Unit Owners’ Assn. v. R. E. Roark Cos., Inc.* (1993), 67 Ohio St.3d 274, 287.

{¶28} Next, regarding GM’s withdrawal from negotiations to purchase the dealership, there is no evidence that GM acted in bad faith by doing so. The buy-sell proposal was executed on July 16, 1997, and put on hold one day later. The record demonstrates that Hanna never submitted an application for sale to GM. Rather, the parties were merely engaged in preliminary negotiations that never came to fruition. (Hanna Dep. 82-88; Tamar Dep. 28-33, 42, 61-62). Appellants offer no reason why GM would be obligated to purchase the dealership, and no evidence that GM’s decision was motivated by anything other than legitimate business concerns. Additionally, GM’s withdrawal did not cause any undue delay or hardship in Hanna’s ability to sell the dealership. To the contrary, Hanna began negotiations with Staffilino just days after GM put its proposal on hold. (Hanna Dep. 87-88). And on July 25, 1997, Hanna submitted a letter of intent to enter into a sale proposal with Staffilino. (Hanna Dep. Exh. 11). Appellants offer no evidence of bad faith.

{¶29} Appellants also argue that GM acted in bad faith by setting an unreasonable deadline for submission of the first Staffilino proposal. However, what appellants fail to point out is that Hanna specifically requested that GM expedite the Staffilino paperwork. (Hanna Affidavit; Hanna Dep. 89). He told GM and Staffilino

that “time was of the essence” and that it was important to complete the deal “urgently.” (Hanna Affidavit; Hanna Dep. 89; Staffilino Dep. 12-13). Furthermore, Staffilino stated that Hanna simply backed out of the discussions. (Staffilino Dep. 15). And Hanna stated that he terminated negotiations with Staffilino, GM did not. (Hanna Dep. 97-98). Additionally, before the August 1st deadline arrived, Hanna entered into a proposal with McKitrick. (Hanna Dep. 100). Thus, Hanna did not even wait to see if Staffilino could meet the deadline. As is evidenced by Staffilino’s testimony, this first proposal fell through because Hanna effectively withdrew from negotiations, not because of the imposition of the deadline. (Staffilino Dep. 16). Additionally, Hanna corroborated this testimony in a letter to Staffilino, in which he stated, “as a result of your [Staffilino’s] non compliance with the time element which you were aware of it’s [sic] major importance to me [I am terminating our negotiations].” (Hanna Dep. Exh. 13).

{¶30} Next, appellants argue that GM’s conduct during the McKitrick proposals was the most obvious proof of bad faith. Regarding the first McKitrick proposal, however, the record clearly demonstrates that McKitrick’s failure to obtain financing is what led the deal to fall through. (Hanna Dep. 118; McKitrick Dep. 26-28, 30). GM gave its preliminary approval of the sale on September 4, 1997. (Hanna Affidavit). However, McKitrick was unable to obtain financing. (Hanna Dep. 117; McKitrick Dep. 28). The record demonstrates that the reason that Motors Holding turned down McKitrick’s request for financing was due to an accounting irregularity that related to personal transactions that McKitrick and his partner had with the corporation. (McKitrick Dep. 55-56; Hanna Dep. Exh. 21). Finally, while Motors Holding did not

approve the financing, McKitrick had the option of obtaining alternative financing, but failed to do so at the time of this first proposal. (Hanna Dep. 114-15; McKitrick Dep. 27-30). Therefore, no evidence of bad faith exists.

{¶31} GM rejected McKitrick's second proposal for similar reasons. While McKitrick had obtained independent financing this time, the record demonstrates that an audit of the new proposal reflected a \$700,000 deficiency in net working capital and the application contained incomplete information. (Hanna Affidavit; Hanna Dep. Exh. 34; McKitrick Dep. 35-36). While GM rejected the proposal, it also agreed to consider a resubmitted proposal if it contained corrections for the deficiencies. (Hanna Dep. Exh. 34). The record also establishes that McKitrick never resubmitted the proposal with corrections. (Hanna Dep. 148-50; McKitrick Dep. 37). This second McKitrick deal is also the deal where appellants assert GM violated the 30-day response period. As discussed above, while GM did not respond within the 30-day limit, this action in and of itself does not prove bad faith on GM's part, but only leads to this substantive analysis.

{¶32} Regarding the Petrola deal, the record demonstrates that the proposal was incomplete, as two forms were filled out incorrectly, and another four were incomplete. (Hanna Dep. Exh. 26; Hanna Dep. 128-30; Petrola Dep. 21-25). Once again GM agreed to consider a new proposal if the deficiencies were corrected, but Petrola never submitted any of the missing information or materials. (Hanna Dep. Exh. 26; Petrola Dep. 25). Pursuant to R.C. 4517.56(A), Hanna and Petrola were required to supply GM with "such other information regarding the transferee's character, business experience, and financial ability as may be reasonably requested

by the franchisor to enable it to evaluate the transferee's qualifications and ability to comply with the requirements of the franchise then in effect.” Thus, GM had the right to request additional information, though Petrola and Hanna never submitted this information. Additionally, Petrola testified that he withdrew from negotiations not because of any conduct on the part of GM, but because Hanna kept changing the sale price. (Petrola Dep. 28). And Hanna informed GM that he terminated negotiations with Petrola. (Hanna Dep. 134-35, Exh. 29). Therefore, no evidence of bad faith exists.

{¶33} For the same reasons set forth above outlining GM's alleged bad faith, appellants urge this court to reverse the trial court's decision on its breach of contract claims. GM argues that the breach of contract claims fail because its actions were within the scope of the dealership agreement. However, appellants argue, the dealership agreement does not give GM the right to engage in bad faith conduct.

{¶34} As discussed above, the record does not contain any evidence that GM acted in bad faith in its dealings with Hanna. We need not revisit the issue.

{¶35} Finally, appellants argue that GM was in breach of contract because it failed to comply with its own Plan 2000, which looked to incorporate Chevrolet, Cadillac, and Oldsmobile dealerships under one management. Appellants cite to the language of Article 4.1 of the dealership agreement, wherein Plan 2000 is incorporated:

{¶36} “Because Division distributes its Products through a network of authorized dealers operating from approved locations, those dealers must be appropriate in number, located properly, and have proper facilities to represent and

service Division's Products competitively and to permit each dealer the opportunity to achieve a reasonable return on investment if it fulfills its obligations under its Dealer Agreement. Through such a dealer network, the Division can maximize the convenience of customers in purchasing Products and having them serviced. As a result, customers, dealers, and the Division all benefit." (Hanna Dep. Exh. 2).

{¶37} Appellants argue that under Article 4.1, GM agreed to take specific steps to ensure that its dealers could operate competitively and achieve a reasonable return on their investment. GM, appellants continue, also made a commitment to combine Chevrolet and Cadillac dealerships with Oldsmobile dealerships under its Plan 2000. Therefore, appellants urge, GM had a contractual obligation to review a buyer's application in good faith if that buyer would meet the goals of Plan 2000. However, appellants argue, GM delayed the review of McKitrick's proposals and rejected them for disputed and unreasonable grounds, despite the fact that McKitrick would have met the goals of GM's Plan 2000.

{¶38} As noted previously, McKitrick was unable to obtain financing for the first proposal, the second proposal revealed a net working capital deficiency, and no additional application materials were ever completed even though requested by GM. Therefore, GM never rejected a completed McKitrick proposal with all required financing and capital.

{¶39} Based on the evidence presented, no genuine issue of material fact exists to demonstrate that GM acted in bad faith or that it violated a contractual provision of the dealer agreement. No evidence exists that GM coerced, intimidated,

threatened, or failed to act in good faith in dealing with Hanna. Accordingly, appellants' assignments of error are without merit.

{¶40} For the reasons stated above, the trial court's decision is hereby affirmed.

Judgment affirmed.

Waite, P.J., and DeGenaro, J., concur.