

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4717-11T2

FOULKE MANAGEMENT CORP.,
d/b/a ATLANTIC AUDI,

Plaintiff-Respondent,

v.

AUDI OF AMERICA, INC.,

Defendant-Appellant.

Argued December 5, 2012 - Decided December 18, 2012

Before Judges Axelrad, Nugent and Haas.

On appeal from an interlocutory order of Superior Court of New Jersey, Law Division, Camden County, Docket No. L-277-12.

Randall L. Oyler (Barack, Ferrazzano, Kirschbaum & Nagelberg, L.L.P.) of the Illinois bar, admitted pro hac vice, argued the cause for appellant (Youngblood, Lafferty & Sampoli, P.A. and Livia M. Kiser (Barack, Ferrazzano, Kirschbaum & Nagelberg, L.L.P.) of the Illinois bar, admitted pro hac vice, attorneys; Randolph C. Lafferty and Ms. Kiser, on the brief).

William M. Tambussi argued the cause for respondent (Brown & Connery, L.L.P., Richard N. Sox (Bass Sox Mercer) of the Florida bar, admitted pro hac vice, Robert C. Byerts (Bass Sox Mercer) of the Florida bar, admitted pro hac vice, and Jason T. Allen (Bass Sox Mercer) of the Florida bar, admitted pro hac vice, attorneys; Mr. Tambussi and Mr. Allen, on the brief).

PER CURIAM

In this motor vehicle franchise termination action, we granted defendant Audi of America, Inc.'s (Audi's) motion for leave to appeal to review paragraph two of the April 18, 2012 order of the Law Division. In that paragraph of the order, the trial judge required Audi to provide its franchisee, plaintiff Foulke Management Corp., d/b/a Atlantic Audi (Atlantic), with a guaranteed number of new vehicles each month during the pendency of the litigation. Audi argues the judge exceeded his authority under the New Jersey Franchise Practices Act (the Act), N.J.S.A. 56:10-1 to -31, and because there were sharply disputed issues of material facts, mandatory preliminary injunctive relief should not have been granted. After reviewing the record in light of the contentions advanced on appeal, we reverse the judge's decision, vacate paragraph two of the April 18, 2012 order, and remand for further proceedings consistent with this opinion.

I.

Audi sells and distributes Audi-brand vehicles, parts, and accessories to authorized Audi dealers in the United States. Atlantic initially became an authorized Audi dealership in November 1996. Atlantic is located in Pleasantville and is

assigned to Audi's Eastern Region. Atlantic also sells Volkswagens, Chryslers and Jeeps.

On February 3, 2003, Audi and Atlantic entered into their latest Dealer Agreement (the Agreement), which requires Audi to "sell and deliver Authorized Products to [Atlantic] in accordance with" its terms. The Agreement does not give Atlantic "any exclusive right to sell or service" Audi vehicles or products "in any area or territory."

Article Five of the Agreement requires Atlantic to "use its best efforts to promote the sale" of Audi vehicles "at such levels as may be indicated from time to time by" Audi. Atlantic is also required to "achieve the best sales possible" in its area "for each model and type of" Audi vehicle.

Audi uses an industry-standard "sales expectation" approach to evaluate a dealer's sales effectiveness. As explained in the certification of its General Manager for the Eastern Region, Michael Brairton, Audi compares the dealer's total number of sales against the "sales expectation," which is the number of Audi vehicles that would need to be sold in the dealer's local geographic area for Audi to achieve regional average market share in that area. According to Audi's calculations, "in order to be an average performing dealer[,] Atlantic would have had to have sold 150 vehicles" in 2010.

The Agreement does not provide that a specific number of vehicles will be allocated to Atlantic to sell in any given year. Because the vehicles are manufactured in Germany and distributed throughout the world, there is a limited supply of vehicles in the United States. Although Article Eight of the Agreement states that "Audi will endeavor to make a fair and equitable allocation and distribution of the [vehicles] available to it" to each dealer, no franchisee is guaranteed that it would receive the number of vehicles that would enable it to meet Audi's regional sales expectations for the dealer.

Instead, dealers compete with each other to earn vehicles. Using a computerized system and various proprietary formulae, allocations of vehicles are made with a goal of equalizing all dealers' available supply of vehicles, i.e., each dealer should have a certain number of vehicles in its inventory at any given time. A dealer "earns" an allocation of new vehicles based on its current inventory level and the rate at which it sells vehicles. Simply stated, the dealers that sell the most vehicles in the shortest period of time have their inventories replenished the soonest and these dealers receive the most new Audis each year. Dealers that do not do as well receive fewer vehicles each month.

Audi asserts that, beginning in 2006, Atlantic failed to meet Audi's annual sales expectations. As a result, and pursuant to its allocation system, Audi began sending Atlantic fewer new vehicles to sell. In the three years prior to the commencement of this litigation, Atlantic's performance was particularly poor. In 2009, Atlantic earned and received twenty-nine new cars from Audi and sold thirty-five.¹ In 2010, it received thirty-eight new vehicles and sold forty-two. In 2011, it received an allocation of forty-six new vehicles and sold forty-eight.

On November 22, 2011, Audi sent a termination notice to Atlantic stating that the Dealer Agreement would be terminated within sixty days. Audi explained the notice was based upon Atlantic's poor sales effectiveness, which placed it "at or near the very bottom of Audi's entire dealer network in the United States." Audi also stated that Atlantic's "customer service satisfaction is also well below that of other dealers[.]" Finally, Audi asserted that Atlantic had changed its ownership without receiving Audi's prior approval.

¹ In addition to receiving new vehicles from Audi, an authorized dealer may buy cars from, and trade vehicles with, other dealers. It may also retain inventory from year to year. This explains, at least in part, how Atlantic's sales exceeded the number of vehicles allocated to it directly from Audi between 2009 and 2011.

On January 19, 2012, Atlantic filed a complaint against Audi in the Law Division and sought to prevent the termination of its franchise under the provisions of the Act. Atlantic sought an immediate stay of the termination pursuant to N.J.S.A. 56:10-30a which states, in pertinent part:

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 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.

In its complaint, Atlantic alleged that Audi had not allocated new vehicles to it in the manner required by the Agreement and had reduced its annual allocations in an effort to bolster the performance of a new dealership in Turnersville.

After Audi filed its answer, Atlantic applied for and received an order to show cause. Atlantic sought to restrain Audi from terminating the Agreement in accordance with N.J.S.A. 56:10-30a. Atlantic also asked that Audi be ordered to

deliver the number and mix of Audi vehicles to allow Atlantic to maintain a 60 day supply of vehicles in on-ground inventory or approximately 32 vehicles in on-ground inventory each month and replacing the number of vehicles sold in the prior month by Atlantic with the equivalent number of

vehicles with the same model, color and equipment per vehicle.

On the return date of the order to show cause, the trial judge did not conduct a plenary hearing on Atlantic's application. Following oral argument, the judge issued a written opinion and order on April 18, 2012. In paragraph one of this order, the judge stayed the termination of the Agreement pending trial. This provision is not at issue on appeal.

Based upon his review of the parties' certifications and the limited number of exhibits attached thereto, the judge also concluded that Atlantic had demonstrated that it was "not receiving a fair and equitable inventory of cars from" Audi. This finding was based upon the judge's observation that, although Audi expected Atlantic to sell, for example, 150 new vehicles in 2010 based upon Brairton's certification, it only delivered thirty-eight vehicles to Atlantic in that year. Thus, the judge found, Atlantic was not able to meet Audi's sales expectations and would not be able to do so during the pendency of the litigation if it was not guaranteed it would receive at least the number of vehicles each year that Audi expected it to sell.

To ensure that Atlantic was accorded "all rights and privileges of a franchisee as if notice of termination had not been given" as required by N.J.S.A. 56:10-30a, the judge

therefore found "it necessary and appropriate" to alter the established vehicle allocation system employed since 1996. The judge explained:

Said another way, and for purposes of the stay, the court finds it necessary and appropriate to fix a business relationship between the parties as reasonably envisioned by them. Simply put, it is reasonable to establish as a baseline that [Audi] expected to supply vehicles to Atlantic and Atlantic expected to sell them. Both parties expected a fair and equitable allocation and distribution of an inventory of an assortment and quantity of authorized products.

Rather than requiring Atlantic to earn vehicles by selling the ones it currently had in inventory at a rate comparable to that of other dealers as required by the Agreement, the judge determined to instead require Audi to supply Atlantic with a guaranteed number of new vehicles each month. Because Audi's sales expectation for an "average dealer" in the region was 170 vehicles per year in 2011, the judge ordered Atlantic to provide this number of vehicles to Atlantic in 2012. To meet this figure, the judge first directed Audi to "immediately make arrangements to deliver a number of vehicles for the months of January 2012 through April 2012 that represents 56 vehicles (minus the number of vehicles already delivered to Atlantic during this time period)." Thereafter, Audi was to deliver

at least 14 new vehicles per month to Atlantic in a reasonable, and appropriate mix and assortment[] so as to allow Atlantic to arrive at an approximate 32 vehicles on-ground inventory each month and thereafter replacing the number of vehicles sold in the prior month by Atlantic with an equivalent number of vehicles of substantially the same type of vehicle.

There was no requirement that Atlantic sell this many vehicles each month. It would receive at least fourteen new vehicles regardless of its sales performance.

The judge's ruling was set forth in paragraph two of the April 18, 2012 order. On May 30, 2012, we granted Audi's motion for leave to appeal this provision of the order. On June 15, 2012, the trial judge denied Audi's motion for a stay pending appeal. Audi did not seek a stay from us.

II.

On appeal, Audi contends that the judge misapplied the automatic stay provision in N.J.S.A. 56:10-30(a). Audi cites the language of this provision that mandates an automatic stay of the termination of the franchise and requires the franchisor to provide the franchisee with "all rights and privileges of a franchisee as if notice of termination had not been given" during the pendency of the litigation. It argues that provision requires the status quo to be maintained. According to Audi, this would mean that Atlantic would continue to earn and receive

new vehicles under Audi's nationwide allocation system, just as it did prior to the termination notice. Audi contends the judge went far beyond maintaining this status quo and, in effect, established a new "business relationship" between the parties that no longer required Atlantic to earn vehicles and guaranteed it would receive more vehicles than it had ever earned and received under the allocation system.

Having reviewed these contentions in light of the clear provisions of the Act and our standard of review, we agree that the judge misapplied N.J.S.A. 56:10-30a and, therefore, we reverse paragraph two of the judge's order.

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference" on appeal. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995). Because the interpretation of N.J.S.A. 56:10-30a is a legal question, our standard of review is de novo. H.J. Bailey Co. v. Neptune Twp., 399 N.J. Super. 381, 385 (App. Div. 2008).

Our analysis of a statute begins with its plain language, giving the words their ordinary meaning and significance. DiProspero v. Penn, 183 N.J. 477, 492 (2005). Where the language is clear and unambiguous, and subject to only one interpretation, the court must infer the Legislature's intent

from the statute's plain meaning. Ibid.; O'Connell v. State, 171 N.J. 484, 488 (2002).

However, if there is any ambiguity in the statutory language, a court may look at extrinsic evidence such as "the statute's purpose, legislative history, and statutory context." State v. Fortin, 178 N.J. 540, 607 (2004). A court may also consider extrinsic evidence if "a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." DiProspero, supra, 183 N.J. at 493.

"[A]ll sections [of a statute] must be read together in the light of the general intent of the act so that the auxiliary effect of each individual part of a section is made consistent with the whole." Febbi v. Bd. of Review, 35 N.J. 601, 606 (1961) (citations omitted). "A court may neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell, supra, 171 N.J. at 488.

The Act "reflects the legislative concern over long-standing abuses in the franchise relationship," caused by "the franchisor's superior bargaining position in the franchise relationship, and 'the inevitable intertwining of the franchisee's livelihood with the franchise.'" Gen. Motors Corp.

v. Gallo GMC Truck Sales, Inc., 711 F. Supp. 810, 814 (D.N.J. 1989) (quoting Amerada Hess Corp. v. Quinn, 143 N.J. Super. 237, 253 (Law Div. 1976)). Thus, the intent of the Act is to "level the playing field" between the franchisor and its franchisee. In General Motors Corp., supra, 711 F. Supp. at 814, the court explained:

Despite their common interest in the success of the franchise, the franchisor and the franchisee also have vastly divergent interests. As long as the franchisor benefits from the increased public exposure and distribution of its goods, it matters little to the franchisor whether a particular franchisee remains in business, as there will always be another franchisee available to take that place in the distribution network. Once a franchisee has succeeded, through the expenditure of his own efforts and capital, to establish a local reputation for the franchise name, his franchise is vulnerable to termination. Id. It is the potential for abuse attendant upon an arbitrary and uncompensated termination of a franchise which the [Act] was intended to address.

[(Citation omitted).]

The automatic stay provision of N.J.S.A. 56:10-30a was added to the Act in a 2011 amendment. According to the legislative history, this amendment was designed "to protect New Jersey new car dealerships and their employees from further economic dislocation imposed by automakers," and "to level the playing field on which auto franchisees and auto franchisors do

business[.]" Assemb. Commerce & Econ. Dev. Comm., Statement to A. 3722 (Jan. 20, 2011) (enacted as L. 2011, c. 66, effective May 4, 2011).

To accomplish these goals, N.J.S.A. 56:10-30a requires that two things automatically occur "[u]pon [the] timely institution of an action . . . to enjoin the termination of a motor vehicle franchise agreement on the ground that such termination would be in violation of [the Act]." First, "the termination shall be automatically stayed pending final disposition of such action[.]" Ibid. Second, "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." Ibid.

In other words, the franchisee that the franchisor is attempting to terminate must be treated the same as all other franchisees during the pendency of the litigation. In short, the status quo between the parties must be maintained. There is nothing in the plain language of the Act generally, or N.J.S.A. 56:10-30a specifically, that permits a trial court to rewrite the parties' prior business relationship or to provide either party with more rights and privileges than they enjoyed under their existing franchise agreement.

Applying this clear statutory direction in this case, Atlantic was obviously entitled to an automatic stay of the termination of the Agreement once it filed its complaint. It was also entitled to continue to operate subject to the terms of the Agreement the parties had entered into in 2003 during the pendency of the litigation. Under that Agreement, there was no guarantee or requirement that Audi would provide Atlantic with a specific number of new vehicles each month. Rather, Atlantic was required to earn additions to its inventory each month through its sales performance.

Therefore, in order to "accord [Atlantic] all rights and privileges of a franchisee as if notice of termination had not been given" under the plain language of N.J.S.A. 56:10-30a, and thereby maintain both the status quo and a level playing field during the course of the litigation, Audi was required to allocate new vehicles to Atlantic pursuant to its long-standing allocation formulae. This is how vehicles were allocated prior to 2006, when Atlantic met or exceeded Audi's sales expectations. As a result, Atlantic had its inventory regularly replenished with new vehicles. Thereafter, however, because Atlantic allegedly failed to meet sales expectations, Audi sent it fewer new vehicles.

Thus, we conclude the trial judge erred in going beyond the mandate of N.J.S.A. 56:10-30a and radically changing the parties' business relationship from what it was prior to the November 22, 2011 termination notice. The judge made no finding that Audi was not distributing new vehicles to Atlantic on the basis of the long-standing allocation formulae. Rather, the judge simply found that Audi had not delivered the number of new vehicles to Atlantic that it expected an "average dealer" that was meeting sales expectations to sell each year.

The problem with this finding is that it ignores the terms of the parties' Agreement, under which all dealers must earn each vehicle they receive through their sales performance. The "average dealer" is only able to sell 170 vehicles per year because it has earned the opportunity to receive those vehicles by turning its inventory over on a more expeditious basis as compared to other dealers in the region. Thus, the trial judge's finding that, because Atlantic sold every vehicle that Audi allocated to it each year, it should now automatically receive, for example, 135 more vehicles than it was able to earn and sell in 2009, is based on a faulty premise. There is nothing in this record to demonstrate that Atlantic ever earned more vehicles than what it was allocated each year by Audi or

that it would be now able to reverse its sales performance and sell this new and unprecedented inventory.

Therefore, N.J.S.A. 56:10-30a does not support the judge's decision to "fix" a new business relationship for the parties. Pursuant to this statute, and the parties' Agreement, Audi is required to deliver vehicles to Atlantic pursuant to its established allocation formulae. By requiring Audi to adhere to the established allocation process, Atlantic will maintain its ability to earn, and thereby the opportunity to sell, the number of vehicles necessary to meet Audi's sales performance requirements. On the other hand, if its sales performance continues to suffer, it will not receive such an allocation. This was the status quo between the parties prior to the termination notice and, as required by N.J.S.A. 56:10-30a, this is the status quo that must be maintained.

Atlantic argues that, assuming N.J.S.A. 56:10-30a does not support paragraph two of the April 18, 2012 order, the judge was still justified in issuing mandatory injunctive relief to it in the form of the increased allocation of vehicles. It argues that such an allocation is needed to address Audi's refusal to follow the allocation system and to prevent Atlantic from going out of business. Without now deciding whether the Act provides franchisees with their exclusive remedy in terms of injunctive

relief, it is clear that this argument lacks merit under the circumstances of this case.

Unlike a prohibitory injunction, such as that embodied in the stay of franchise termination requirement of N.J.S.A. 56:10-30a, "a mandatory injunction commands the defendant to do some positive act or a particular thing[.]" Samaritan Ctr. v. Englishtown, 294 N.J. Super. 437, 444 n.4 (Law Div. 1996). "[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006) (quoting Punnett v. Carter, 621 F.2d 578, 582 (3d Cir. 1980)). In order to obtain such relief, the applicant must demonstrate by clear and convincing evidence that the injunction is necessary to prevent irreparable harm; the legal right underlying the claim is settled; the material facts are substantially undisputed; the applicant has a reasonable probability of success on the merits; and that a balancing of the equities and the hardships weighs in favor of granting the requested relief. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982); Guaman v. Velez, 421 N.J. Super. 239, 248 (App. Div. 2011).

"An appellate court applies an abuse of discretion standard in reviewing a trial court's decision to grant or deny a preliminary injunction." Rinaldo, supra, 387 N.J. Super. at

395-96. Applying this standard, we conclude the judge erred in granting this relief to Atlantic.

The judge granted Atlantic mandatory preliminary injunctive relief by requiring Audi to provide it with a guaranteed number of new vehicles each month during the pendency of the litigation. It did so based on a very limited record, consisting only of the four-page affidavit of Atlantic's vice-president, Charlie Foulke, III; Audi's regional general manager Michael Brairton's seven-page certification; the Agreement; and a few additional exhibits. Significantly, the judge did not conduct a plenary hearing before determining Atlantic had met its burden of demonstrating by clear and convincing evidence that it was entitled to mandatory injunctive relief.

The failure to conduct such a hearing was critical because the facts underlying each of the parties' respective claims were sharply disputed. For example, Foulke certified that, beginning in 2006, "Audi began to systematically reduce the number and mix of new Audi vehicles being provided to Atlantic while continuing to supply other dealers with substantial inventory." This statement supported Atlantic's underlying contention that Audi was manipulating the allocation process to favor a new franchisee in Turnersville. On the other hand, Brairton certified that Audi had no such motive and that vehicles were

allocated to Atlantic and all other dealers pursuant to the established allocation formulae.

Foulke made additional factual statements that were disputed by Brairton. Foulke asserted the Turnersville dealership received a "disproportionately high number of new vehicles" from Audi, while Brairton claimed all franchisees received vehicles under the same allocation system. Foulke stated that Atlantic was unable to meet Audi's sales performance requirements simply because it did not receive sufficient vehicles to do so. Disputing this claim, Brairton certified that "[i]f Atlantic increases the pace of its new vehicle sales, [Audi's] allocation methodology will operate to increase Atlantic's allocation over time, as is evident from allocations in past years." While Foulke certified that Atlantic would suffer financially if it did not receive a guaranteed allocation of vehicles, it presented no financial records to support the imminent demise of its dealership and Brairton noted that Atlantic sold other brands of vehicles and that its Audi sales accounted for less than ten percent of its total business.

In order to obtain injunctive relief, the moving party must establish all of the Crowe factors. McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007). It is well-settled that an "injunction should not issue where all material facts are

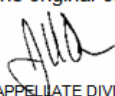
controverted." Crowe, supra, 90 N.J. at 133. That was plainly the case here. An evidentiary hearing was required to address the drastically conflicting claims set forth in Foulke's affidavit and Brairton's certification. The two completely opposing views of the parties' principals could not be resolved by the judge without subjecting both affiants to cross-examination during the course of a plenary hearing. Subcarrier Comm., Inc. v. Day, 299 N.J. Super. 634, 640 (denying preliminary injunctive relief where affidavits conflict).

Because the facts underlying the parties' respective claims were disputed, there was no foundation upon which the judge could properly address the remaining Crowe factors. Atlantic could not demonstrate a reasonable probability of success on the merits because a finding could not be made on this record that Audi was favoring another dealership as opposed to simply following its established allocation system. Irreparable harm could not be properly determined when the judge did not address how Atlantic was able to continue to remain in business in the years following 2006, when it began to receive fewer vehicles than in previous years. Finally, the judge could not correctly balance the equities and hardships between the parties where the facts underlying those factors were controverted.

Therefore, the judge misapplied his discretion in granting Atlantic mandatory injunctive relief under the circumstances of this case. Accordingly, we reverse the judge's decision to grant such relief; vacate paragraph two of the April 18, 2012 order; direct the Law Division to issue an amended order providing, in paragraph two, that "pending final disposition of the action, Audi shall accord Atlantic all rights and privileges of a franchisee as if notice of termination had not been given"; and remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION