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Re: *Naughty Monkey LLC v. MarineMax Northeast LLC*
C.A. No. 5095-VCN
Date Submitted: May 26, 2011

Dear Counsel:

Plaintiff Naughty Monkey LLC has moved to enforce the February 28, 2011 order and final judgment entitling it to a credit of $1,636,250 toward the purchase of another boat, together with options and dealer-installed equipment, from Defendant MarineMax Northeast LLC.[1] As the Court recognized, the sticker price

[1] The right to a credit was established in *Naughty Monkey LLC v. MarineMax NE LLC*, 2010 WL 5545409 (Del. Ch. Dec. 23, 2010) (the "Mem. Op."). Plaintiff's Motion for Clarification was addressed in *Naughty Monkey LLC v. MarineMax NE LLC*, 2011 WL 684626 (Del. Ch. Feb. 17, 2011) (the "Clarification Op."). The Court presumes familiarity with both opinions and

and a negotiated sale price may vary significantly.[2] Despite twice reminding the parties to "conduct any transaction involving . . . a credit [generated by trading-in the Naughty Monkey] 'in the ordinary course of business,'"[3] problems remain.

* * *

Because the Plaintiff was skeptical about the fairness and good faith of the Defendant in negotiating a new purchase using the credit, it formed a limited liability company, Jolly Prospect LLC, as an intervening negotiating entity. The Bohonnon Law Firm of New Haven, Connecticut was retained to pursue the transaction.[4]

Michael Stock, Plaintiff's principal, found, among Defendant's inventory, a 2008 Ferretti 681 motor yacht (the "Ferretti").[5] Its advertised list price was

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will generally employ the same nomenclature.

[2] Mem. Op., 2010 WL 554509, at *8 n.64.

[3] Clarification Op., 2011 WL 684626, at *1 (quoting Mem. Op., 2010 WL 5545409, at *8 n.64).

[4] That firm, with its practice focus on recreational vessels, had assisted the Plaintiff with financing the Naughty Monkey.

[5] The Ferretti that Stock identified was being sold by MarineMax East, Inc., an affiliate of the Defendant. The Purchase Agreement (the "Agreement") that was eventually signed, however, provided that it was binding on MarineMax East and "[i]ts [p]arent, [s]ubsidiary and/or [a]ffiliated [e]ntities." Pl.'s Mot. to Enforce Order and Final Judg. ("Pl.'s Mot.") at Ex. A. That language encompassed the Defendant

$2,490,223,[6] but, recognizing that it was a "buyer's market," the Plaintiff expected to achieve a substantial reduction in price through negotiation.

David M. Bohonnon, Esquire ("Bohonnon") contacted a broker for the Defendant.[7] They were able to negotiate a price of $1,755,000.[8] That agreement expired, and they sought to negotiate a substitute. Bohonnon prepared a form of agreement that included a provision freely allowing assignment in a form similar to the comparable provision in the expired agreement. Defendant's position was, consistent with its standard practice, to limit assignability. Within the Defendant, the Jolly Prospect assignment issue worked its way up to Paulee Day, Esquire ("Day"), Defendant's general counsel.

Bohonnon and Day had two telephone conversations on April 1, 2011. During the second conversation, they agreed to a provision allowing Jolly Prospect to assign the right to acquire the Ferretti to a related entity or to another entity subject to Defendant's approval. Day and Bohonnon, however, have markedly

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[6] Defendant, MarineMax Northeast, LLC's Response in Opp'n to Pl.'s Mot. to Enforce Order and Final Judg., Def.'s Cross Mot. for Relief from Judg. and/or Sanctions and Def.'s Cross Mot. to Enforce the April 1, 2011 Purchase Agreement as Written at ¶ 6 & Ex. C.

[7] Stock did not participate in any of the discussions. Bohonnon did not disclose that he was working for Stock and the Plaintiff, and he did not disclose, until after the contract was executed, that the credit ordered by the Court would be applied against the purchase price.

[8] The Defendant was expecting a full cash payment.

different recollections of that second conversation.[9] According to Day, she asked Bohonnon if there was any intention to assign the contract and Bohonnon denied any such intention.[10] According to Bohonnon, he was not asked about any then-present intention to assign the contract.[11] The Agreement,[12] with the assignability provision to the Plaintiff's liking, was finalized and executed.

Not long thereafter, Bohonnon, in advance of sending a writing to Day advising of the assignment and the intention to use the credit remaining from the Naughty Monkey transaction, called Day and informed her of this additional information. He anticipated that she would not be happy to learn that the Plaintiff was the real buyer. That conversation did not go well. Day would report that she was stunned and felt that she had been misled by Bohonnon. By email dated April 7, 2011, Bohonnon transmitted to the Defendant notice of both the assignment of the Agreement to the Plaintiff and the intended use of the credit to

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[9] An evidentiary hearing was held to resolve this factual discrepancy. Whether the dispute was the result of misunderstanding, unwarranted assumption, poor communication, or dishonesty is a question open to debate. This Letter Opinion is the result of the evidentiary hearing.
[10] Evidentiary H'rg Tr. 13.
[11] *Id.* at 95-96. Day and Bohonnon could not even agree on whether one of Bohonnon's associates was on the phone for that call.
[12] Pl.'s Mot. at Ex. A.

pay for the Ferretti.[13] The Defendant has refused to allow use of the credit in the purchase of the Ferretti.[14]

* * *

The Agreement for the sale of the Ferretti provides in an addendum for assignment:

> 9. Assignment
> Subject to the terms and conditions contained herein, the Agreement and this Addendum, including the benefits of any payments or deposits made hereunder, may be assigned by Buyer to any company affiliated with Buyer, provided that Buyer jointly and severally guarantees to Seller the performance of the obligations of any assignee hereunder. An assignment by Buyer to any company or entity not affiliated or related to Buyer may only be made after Buyer has obtained prior written consent from Seller, which shall not be unreasonably withheld.

The Plaintiff, as the sole owner of Jolly Prospect, clearly is an "affiliate" of Jolly Prospect. By its terms, the Agreement could be assigned to the Plaintiff.

The Agreement also contains the Defendant's standard form integration clause that reads:

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[13] *Id.* at Ex. B.
[14] By letter dated April 11, 2011, Day informed Bohonnon that the Plaintiff and Stock (as well as Bohonnon) had "totally abandon[ed] their contractual obligations of good faith and fair dealing" and that the proposed transaction would not qualify as "in the ordinary course of business." *Id.* at Ex. C.

> 8. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement between the parties and no other verbal, written or printed representations, claims or inducements are incorporated into this Agreement, unless in writing and signed by both parties. This Agreement supersedes any prior Purchase Agreement between Buyer and Seller for the purchase of a boat, motor and/or accessories that had not been consummated. Except as specifically set forth in this Agreement, Seller disclaims any representations or statements by any agents, employees or representatives whether verbal or in writing, in advertisements or brochures, and Buyer has not relied upon any such representations or statements.[15]

Nothing in the text of the Agreement refers to (or suggests any reliance by Defendant's representatives on) any statement that Bohonnon made with respect to the likelihood of assignment.

The Agreement says nothing about the application of any credit against the purchase price.[16]

* * *

The Plaintiff did have one option in addition to assignment of the contract from Jolly Prospect: merger of Jolly Prospect and the Plaintiff.[17] If Jolly Prospect and the Plaintiff merged, then, by operation of law, the surviving entity would have

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[15] Perhaps it should be noted that there is no provision stating that the Buyer disclaims any representation.
[16] The trade-in value shows as $0.00. Pl.'s Mot. at Ex. C.
[17] Evidentiary H'rg Tr. 90.

held both the contractual right to purchase the Ferretti and the credit owed by the Defendant. Although the Defendant may be skeptical of when the concept of merger was developed, the record supports the inference that merger was an option under consideration at the time of the Bohonnon-Day conversation during the afternoon of April 1, 2011. Thus, at that time, it was literally true that no decision on assignment had been conclusively reached.

* * *

How the Defendant had planned all along to deal with Plaintiff's credit is not clear. Day, who, as Defendant's general counsel, would presumably be the most knowledgeable representative, either did not know or searched for a means of avoiding setting forth that position.

> Q. [By Mr. Dent] Do you have any reason to know at what price MarineMax would have been willing to sell this Ferretti to plaintiff utilizing the credit?
>
> A. [Ms. Day] I do not know.
>
> Q. Is it the case, however, that you do know that MarineMax would not have been willing to accept that 1.6 million, roughly, credit on a dollar-for-dollar basis towards the purchase of this Ferretti?
>
> A. I don't know.

> Q. You're the general counsel. Is MarineMax willing to tell the Court here today that it will accept the $1.6 million credit on a dollar-for-dollar basis towards the purchase of the Ferretti?
>
> A. I don't have the authority to make that decision. I don't know what you're asking me.
>
> Q. Who would make that decision? Who would have the authority?
>
> A. I don't know.[18]

* * *

The Plaintiff seeks "an [o]rder from this Court requiring Defendant to accept the $1,636,250.00 [c]redit as partial payment towards the purchase of the Ferretti, pursuant to the terms of the . . . Agreement."[19] Although a party may escape a contract which it was induced to enter by the other party's fraudulent or material misrepresentation,[20] that type of conduct has not been established here. Instead, the Agreement was reached without any specific wrongdoing on behalf of the Plaintiff. Although the Defendant has noted some technical defenses, such as the

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[18] Evidentiary H'rg Tr. 57-58.
[19] Pl.'s Mot. ¶ 10.
[20] *See*, *e.g.*, *Berdel, Inc. v. Berman Real Estate Mgmt., Inc.*, 1997 WL 793088, at *8 (Del. Ch. Dec. 15, 1997) (citation omitted).

fact that the Naughty Monkey was not traded-in in advance of execution of the Agreement, none appears to leave the Plaintiff with an invalid contract. Bohonnon's dealing approach—representing an undisclosed principal with whom the Defendant had a negative relationship—may have been harsh, but it was not dishonest. Although Bohonnon may not have been forthcoming, the questions asked by Day were sufficiently unfocused that Bohonnon's answers (and other statements) were not false.[21] In sum, Bohonnon's conduct was not expressly dishonest and, given the difficulties that the Plaintiff and the Defendant had experienced, his actions were not of the nature that would justify denying the Plaintiff the relief it seeks. The Agreement is clear and it is valid.[22] A price—mutually agreed upon—was reached. One side assumed cash; one side intended the use of a credit. It is, of course, likely that a buyer paying cash would achieve a more favorable price than a buyer using a credit, especially one awarded by a court after litigation, but the Plaintiff's stratagem in this context was not without a basis.

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[21] Although not entirely clear, it seems that Day was more focused on her employer's standard form language regarding assignments than she was on the possibility that Bohonnon was making inquiries on behalf of the Plaintiff.

[22] The assignment from Jolly Prospect to the Plaintiff was allowed by the Agreement and is otherwise valid.

How else this could have been worked out may well be another one of those unanswerable questions.[23]

* * *

Accordingly, the Plaintiff's motion to enforce the February 28, 2011 order by requiring Defendant to accept the credit awarded is granted.[24]

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[23] The Plaintiff did not expressly seek specific performance of the Agreement. That may have been a conscious decision. "All plaintiffs seeking the aid of equity's extraordinary remedies [such as, for example, specific performance] do so subject to the maxim that he who seeks equity must do equity." *Nevins v. Bryan*, 885 A.2d 233, 248 (Del. Ch. 2005) (quoting *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49, 54 (Del. 1952)). Although Bohonnon's actions were not dishonest, he consciously hid from Day his real purposes, finding a way to get the Ferretti to the Plaintiff and using the credit awarded by the Court to facilitate that transaction. As such, the Plaintiff's agent's conduct may fall—something the Court need not now decide—within the framework set forth in *Turchi v. Media Partners, Ltd.*, 1990 WL 27531, at *8 (Del. Ch. Mar. 14, 1999) (quoting *Pomeroy Equity Jurisprudence* § 400, at 100-01): "[S]pecific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious[.]" Whether the Defendant's treatment of the credit, *see* text accompanying note 18, *supra*, would absolve the Plaintiff of responsibility for any such conduct is, of course, another question that the Court does not now decide.

[24] Plaintiff's application for an award of attorneys' fees and costs is denied because it has not demonstrated a sufficient basis for deviating from the American Rule. In short, although the Court is not persuaded that the conduct of Plaintiff and its agents vitiated the Agreement, that conduct provided Defendant with a good faith basis for contesting Plaintiff's rights under the Agreement. Similarly, for the reasons set forth above, Defendant's Cross-Motion for Relief from Judgment and/or Sanctions and Defendant's Cross-Motion to Enforce the [Agreement] as Written are denied.

Counsel are requested to confer and to submit an implementing form of order.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K