STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-10

Darling's

Petitioner

v.

DECISION AND ORDER

Matthew Dunlap, and
Ford Motor Company,

Respondents

This matter is before the Court on Petitioner Darling's request, pursuant to M.R. Civ. P. 80C, for judicial review of certain action of the Maine Motor Vehicle Franchise Board (the Board) and on Darling's Motion to Dismiss Respondent Ford Motor Company's appeal. In its request for judicial review, Darling's maintains that the Board erred when it concluded that Ford's REACT program did not violate Maine's parts price discrimination statute, 10 M.R.S. § 1174(3)(G) (2010). In its Motion to Dismiss, Darling's contends that because Ford did not file its own request for judicial review pursuant to M.R. Civ. P. 80C on its request for a jury trial on the bad faith issue and the related declaratory judgment action, Ford is now precluded from seeking such relief.

Factual and Procedural Background

In 2003, Darling's initiated an action before the Board in part based upon Darling's challenge to Ford's REACT program, by which Ford dealers such as Darling's could qualify for a lower price on parts from Ford as long as the dealers allowed Ford computerized access to certain information about the dealers' parts management system. Following the Board's decision

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in 2005, Darling's and Ford each sought judicial review of portions of the Board's findings and conclusions.

On the issues relevant to this action, Darling's maintained that the Board erred when it concluded (1) that because Darling's failed to demonstrate that it was harmed by Ford's REACT program, Darling's lacked standing to challenge the program; and (2) that Darling's was barred from seeking civil penalties on various warranty claims for which Darling's received payment when the parties resolved two small claims actions commenced by Darling's. In its request for judicial review, Ford challenged several aspects of the Board's decision, and sought a declaration that a provision of the Maine Motor Vehicle Dealer Act, 10 M.R.S. § 1189-B (2010), unconstitutionally interferes with Ford's right to a trial by jury. Ford challenged the statute's jury trial procedure in its request for a jury trial on the Board's conclusion that Ford had acted in bad faith when it denied certain warranty claims. Ford argued that the statute is constitutionally deficient because it requires that the jury presume the correctness of the Board's factual findings, which presumption can only be overcome by clear and convincing evidence.

In its decision dated August 29, 2007, the Superior Court determined that the Board incorrectly concluded that Darling's lacked standing to pursue civil penalties for the alleged warranty violations and remanded the matters to the Board for further hearing on that issue. The Court declined to address Ford's request for declaratory judgment on the constitutional jury trial question at that time. Ford timely filed a request for reconsideration in which it sought clarification of the Court's order on Ford's jury trial issue. The Court denied the motion, reasoning, "[s]ince we do not know yet what the Board will do on remand and whether the issue will even exist after it concludes its further proceedings, the court repeats that consideration would be premature."

On remand, the Board concluded, without a hearing, that Darling's could not seek civil penalties because Darling's acceptance and negotiation of the settlement checks by which the small claims actions were resolved constituted an accord and satisfaction of Darling's claims against Ford. The Board heard argument as to whether the REACT program constituted two-tier pricing in violation of 10 M.R.S. § 1174(3)(G), but did not take any new evidence. The Board heard evidence on the issue at the 2005 hearing, after which the Board dismissed the action citing Darling's lack of damage as the result of the REACT program. Darling's objected to the Board's composition in 2008 because two of the Board members (Adam Lee and Wally Camp, Sr.) who heard the evidence did not participate in the decision, and one of the Board members (Bud Morrison) who deliberated on the issue did not hear the evidence in 2005.[1] The Board Chair overruled the objection.

In its decision dated December 22, 2008, the Board concluded that Ford's REACT program did not violate 10 M.R.S. § 1174(3)(G). Darling's then filed this action seeking judicial review. Ford did not make a similar filing. Instead, Ford filed a Motion to Consolidate and Specify Future Course of Proceedings by which it argued that the Court retained jurisdiction over Ford's earlier request for a jury trial and its attendant challenge to the constitutionality of 10 M.R.S. § 1189-B. Darling's moved to dismiss Ford's request for relief.

Discussion

1. *Whether a Board member who had not heard the evidence in 2005 properly participated in the most recent deliberations and fact-finding on Count VI.*

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[1] At the time of the evidentiary hearing in 2005, the Board was comprised of John McCurry (Chair), Wally Camp, Sr., Carol Kontos, Nelson Carlson, William Dowling and Adam Lee. In 2008, when the Board considered closing argument on the issue upon remand, the Board was comprised of John McCurry, Bud Morrison, Carol Kontos, Nelson Carlson, and William Dowling.

Darling's contends that the Board erred by permitting a Board member (Bud Morrison) who had not heard the evidence in 2005 to consider and deliberate on Darling's assertion that Ford's REACT program constitutes a violation of Maine law. Darling's requests that the Court vacate the Board's decision and remand for consideration by the Board that heard the evidence.

Darling's mainly relies on *Pelkey v. City of Presque Isle*, 577 A.2d 341 (Me. 1990), as support for its argument that due process requires that only individuals who are present for the evidentiary hearing are permitted to deliberate on the matter. In *Pelkey*, the Zoning Board of Appeals, without any written findings of fact, denied the plaintiff's permit application for a special exception use of his property. *Id.* at 342. On the plaintiff's 80B appeal, the Superior Court remanded for findings of fact and conclusions based on those findings. *Id.* at 342-43. The composition of the Zoning Board of Appeals had changed in the interim period, with only two members remaining from the initial proceeding. *Id.* at 343. The new board, without hearing or notice to the plaintiff, issued unanimous findings and conclusions; one of the signatories was a new Board member who had been a vocal opponent to the plaintiff's original application. *Id.* On appeal, the Law Court held that the plaintiff was "entitled to a hearing *de novo* on his application before only those members who, as then members of the public, did not oppose or support his application at the previous hearings." *Id.* at 343-44.

Contrary to Darling's argument, *Pelkey* does not compel a remand to the Board simply because a Board member who was not present during the evidentiary hearing participated in the deliberations and decision. As the Law Court recognized in *Green v. Commissioner of Department of Mental Health*, 2001 ME 86, ¶ 12, 776 A.2d 612, 617, "due process does not require that the decision-maker in an administrative hearing hear or read all the testimony." In *Green*, because the decision-maker considered the evidence and arguments of the parties despite

the fact that the decision-maker was not present during the evidentiary, the plaintiff's due process challenge failed.

Here, there is no evidence in the record to suggest that Mr. Morrison, the one Board member who was not present at the 2005 hearing, did not review the record, including the Board's prior findings, before the Board issued its decision. In fact, Darling's does not assert, nor does the record support, that Board member Morrison was not acquainted with the record. The absence of any evidence to establish Mr. Morrison's failure to review the prior proceedings is significant given that "[t]he presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *In re Gen. Marine Constr. Corp.*, 272 A.2d 353, 356 (Me. 1971) (quotation marks omitted).

In accordance with the Law Court's reasoning in *Green* and the absence of any evidence to suggest that Mr. Morrison did not consider the record before the Board or the Board's findings following the 2005 hearing, the Court presumes that he considered the information. Accordingly, Darling's received the process to which it was entitled and Morrison's participation in the deliberations was not in error.

2. *Whether the Board's Erred in Concluding that Ford's REACT program did not violate 10 M.R.S. § 1174(3)(G).*

In Count VI of Darling's Amended Complaint, Darling's alleges that Ford's policy that requires its dealers to enroll in the REACT program in order to be eligible for the certain discounts violates Maine's parts price discrimination statute, 10 M.R.S. § 1174(3)(G). Darling's challenges that Board's determination that Ford's policy is an incentive program and does not constitute an impermissible "two-tiered" pricing system. A central question is whether under the

law a manufacturer can institute an incentive program that might result in a lower cost for parts for some of its dealers.

The statute makes it unlawful for a manufacturer

> [t]o offer to sell or to sell parts or accessories to any new motor vehicle dealer for use in his own business for the purpose of replacing or repairing the same or a comparable part or accessory, at a lower actual price therefor than the actual price charged to any other new motor vehicle dealer for similar parts or accessories for use in his own business.

10 M.R.S. § 1174(3)(G). A plain reading of the statute reveals that the law prohibits a manufacturer from selling a part to a dealer at a "lower actual price" than the "actual price" charged to another dealer for the same or a similar part. The law does not, however, prohibit a manufacturer from reducing or discounting the cost of parts. Rather, the statute is intended to prevent a manufacturer from reducing the cost for some, but not all dealers.

After a review of the overall objectives of the Maine Motor Vehicle Dealers Act, including the prohibited conduct set forth in 10 M.R.S. § 1174, the Court is convinced that the legislature did not intend to prohibit manufacturers from offering to its dealers incentives that could result in a lower cost for parts, provided that the incentives are reasonably available to all dealers. That is, if all dealers can realize the benefit of the incentive, the cost of the parts would not be disparate among dealers. Given that Darling's approved of and participated in Ford's predecessor program, through which a dealer was entitled to a lower cost provided that the dealer ordered the parts on a designated day, Darling's apparently agrees with this conclusion.

Darling's nevertheless asserts that because Ford requires a dealer to enroll in REACT in order to qualify for a lower cost, the REACT program violates the applicable statute. By definition and by its very nature, an incentive includes certain prerequisites to realizing a benefit. Thus, the mere fact that Darling's is required to enroll in a certain program in order to qualify for

a lower cost for parts does not place the program in violation of the statute. The issue is whether the conditions of the REACT program unreasonably prevent some dealers from qualifying for the lower cost.

Based on the record before the Board, the Court is persuaded that the lower cost for parts that can be realized as part of the REACT program is reasonably available to Darling's and all of Ford's dealers. There is nothing particularly onerous about the program. Dealers with the appropriate computer program must simply provide Ford with computer access to basic information about the management of its parts inventory in order to qualify for the reduced cost for parts. In addition, under Ford's policy, dealers who could not provide Ford with computer access to the information because they did not have the appropriate computer program could also realize the lower cost.

Because the record supports the conclusion that the REACT program is an incentive program that is reasonably available to all Ford dealers, the Board did not commit error when it concluded that the program does not violate 10 M.R.S. § 1174(3)(G).

3. *Whether the Board erred in granting summary judgment to Ford on warranty claims 2002-236992 and 2002-219021 on the ground of accord and satisfaction.*

As explained above, the Board ruled in favor of Ford on Darling's warranty claims 2002-236992 and 2002-219021 because it determined the resolution of two small claims actions asserted by Darling's against Ford constituted an accord and satisfaction of all claims related to those warranties, including Darling's complaint for civil violations for Ford's alleged violation of 10 M.R.S. § 1176 (2010). In its order, the Board wrote: "The two claims at issue are 2002-236992 and 219021. In each Darling's sued and Ford settled the claim. Darling's accepted the settlement check in 'full and final settlement' of the pending matters." Ford contends that because Darling's did not expressly reserve the right to seek civil penalties before the Board,

Darling's is precluded from doing so. *See Butters v. Kane*, 347 A.2d 602, 605 (Me. 1975) ("[T]he making of a settlement without any express reservation of rights constitutes accord and satisfaction of all claims of immediate parties to the settlement arising out of the same accident.")

Preliminarily, use of the term "accord and satisfaction" is arguably misplaced. Accord and satisfaction is contractual in nature. "An accord is a contract under which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty." *Union River Assocs. v. Budman*, 2004 ME 48, ¶ 19, 850 A.2d 334, 340 (quotation marks omitted). "Satisfaction is the execution or performance of the accord. If the obligor breaches the accord, the obligee may enforce either the original duty or any duty pursuant to the accord." *Associated Builders, Inc. v. Coggins*, 1999 ME 12, ¶ 5, 722 bA.2d 1278, 1280 (citation omitted). Ford's payment of the disputed warranty claims, however, was not pursuant to an accord, or an agreement by Darling's to accept a substituted performance. Rather, Ford's payment was in settlement of the two small claims actions that Darling's commenced in Bangor District Court under docket numbers BAN-03-SC-247 and BAN-03-SC-250.

The essence of the parties' current dispute is whether Ford's payment and Darling's acceptance of the payment constitutes a *release* of Darling's request for civil penalties related to the warranty violations that were the subject of the small claims actions. As part of the proceedings before the Board in 2005, Ford submitted two documents in support of its contention that Darling's was foreclosed from pursuing its warranty claims. The first was an e-mail entitled "Settled claim" from Attorney Rosenthal (representing Ford) to Attorney Metcalf (representing Darling's) stating: "It has come to my attention that Ford overnight-mailed the check for $944.40, in settlement of the small claim we have been discussing, directly to

Darling's instead of through me." The second document was a letter from Attorney Rosenthal to Attorney Metcalf, stating: "Enclosed please find a check from Ford Motor Company in the amount of $1,049.79, representing full and final settlement on Darling's small claim against Ford, Docket No. BAN-03-SC-250 in the Bangor District Court."

The Board's primary function is to entertain complaints about violations of the Maine Motor Vehicle Dealers Act. *See* 10 M.R.S. § 1188(1) (2010). In the event of a violation of the Act, the Board does not assess and award an aggrieved party its actual damages. Rather, the Board is authorized to impose civil penalties. *See* 10 M.R.S. § 1188(3) (2010). In this way, the Board is a forum through which a party can seek enforcement of the Act. The legislature did not, however, limit an aggrieved party's remedy to the civil penalties authorized by the Act. Instead, the legislature specifically recognized a party's ability to pursue various judicial civil remedies for damages based on violations of the Act. *See* 10 M.R.S. § 1173 (2010). The civil penalties and the judicial civil remedies are not mutually exclusive. Indeed, if a party's actual damages are modest, without the prospect of civil penalties, the incentive for a manufacturer to comply with the Act's requirements might be relatively low. The Board provides a forum through which the Act is enforced administratively, and the court is the forum through which a party can seek compensation for its damages. A party should not be and is not required to choose between two remedies that were designed to achieve different objectives.

In addition, because a party cannot seek enforcement of the Act in court through the imposition of coercive penalties, the resolution of a civil action cannot be a waiver of a party's ability to seek the imposition of civil penalties before the Board. In this case, the parties' settlement of the small claims actions, and the confirming documentation, while clearly a release of any private action that Darling's has against Ford on the pertinent warranties, do not serve as a

release of the civil penalties that might be warranted as the result of Ford's alleged statutory violations. If the Court were to rule otherwise, a manufacturer could unreasonably refuse to pay a warranty claim, prompt the aggrieved party to commence an action before the Board, but avoid a civil penalty as long as it paid the warranty claim before the Board considers the matter. Such a result would be contrary to sound public policy, and inconsistent with the Board's responsibility to enforce the Act.

4. Darling's Motion to Dismiss

As noted, in May of 2006, Ford and Darling's requested judicial review of an earlier decision of the Board in this action. In its petition for review, Ford asked for a jury trial on the bad faith issue, and included a count for declaratory judgment by which Ford asked the Court to declare that 10 M.R.S. § 1189-B, which requires that "all findings of fact of the board are presumed to be correct unless rebutted by clear and convincing evidence," effectively deprives Ford of its constitutionally protected right to a trial by jury. In the order by which it remanded certain issues to the Board, the Court declined to consider the merits of Ford's argument. Instead, the Court wrote, "[i]n light of the fact that this matter will be remanded to the Board for reasons stated elsewhere in this decision, the court agrees the issue may be raised again, if and when it is necessary for the court to again consider this issue after further action by the Board." When Ford requested reconsideration of the Court's order, the Court concluded that "consideration of the issue would be premature," and denied the request. The Court did not, however, dismiss the declaratory judgment action, and no final judgment on that claim was ever entered on the docket.

Through its motion to dismiss, Darling's contends that the Court cannot and should not act on Ford's request for declaratory judgment because Ford did not file an appeal from or

request judicial review of the decision that the Board issued on remand in 2008. That is, Darling's maintains that in order to preserve the issue for the Court's consideration, Ford was required to file another request for judicial review after the Board ruled on the issues that the Court remanded to the Board in 2007.

Not insignificantly, the request for declaratory judgment and the related jury trial request were not issues that the Court remanded to the Board. Indeed, in its count for declaratory judgment, Ford was not seeking review of governmental action. To assert its constitutional challenge, therefore, Ford was not required to commence an action pursuant to M.R. Civ. P. 80C, but could have asserted its request for declaratory judgment in a separate action. The fact that Ford joined the declaratory judgment action in this 80C proceeding does not change the fundamental nature of the cause of action. Because Ford's constitutional challenge was not a subject on which the Board acted or could have acted, Ford had no Board decision from which it could appeal. In addition, because the Court deferred ruling on Ford's constitutional challenge, the Court took no action on Ford's request for a jury trial. The proper forum for Ford's declaratory judgment action and its request for a jury trial was the Superior Court, which is the forum in which Ford asserted the request for relief. In the absence of a Court order entering judgment in the declaratory judgment action and on Ford's related request for a jury trial, the action remains within the jurisdiction of and pending before the Court.

Conclusion

Based on the foregoing analysis, the Court concludes and orders:

1. The Board did not err when, upon remand, a Board member who was not present for the evidentiary hearing on whether the REACT program violated Maine law participated in the deliberations and decision on the issue.

2. The Board did not err when it concluded that Ford's REACT program did not violate Maine law.

3. The Board erred when it concluded that Ford's payment and Darling's acceptance of payment in settlement of Darling's warranty claims precludes Darling's from seeking from the Board the imposition of civil penalties for the alleged warranty violations. The Court, therefore, remands to the Board the issue of Darling's request for civil penalties.

4. The Court denies Darling's Motion to Dismiss. Ford's request for declaratory judgment remains pending before the Court. Further action on Ford's request for declaratory judgment is stayed until the Board has acted on the issues subject to remand in accordance with this Decision and Order.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 3/7/11

Justice, Maine Business & Consumer Docket