State of New Hampshire
Supreme Court

NO. 2017-0714

2018 AUG 22 P 1:01

2018 TERM
AUGUST SESSION

TS&A Motors, LLC d/b/a Kia of Somersworth

v.

Kia Motors America, Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE
MERRIMACK COUNTY SUPERIOR COURT

REPLY BRIEF

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ARGUMENT

I. Kia Had the Same Knowledge of Somersworth's Staffing and Training Breaches in 2011 as it Had in 2015

Kia claims that its knowledge in 2011 about Somersworth's staffing breaches is unrelated to the issues on which it based its 2015 termination. The record belies the claim.

Kia's 2015 notice of termination was based on its allegation that Somersworth failed to "have an adequate, fully-trained staff in place for its sales, service and parts operations," LETTER (Feb. 23, 2015), *Appx.* at 17. The 2015 termination specifically tied that failure to the portion of the parties' Agreement requiring a minimum staff of six trained employees, and said Kia was terminating Somersworth's franchise on that basis. *Id.* (quoting AGREEMENT § IV.A.4, *Addendum* at 28). It also twice cited employee turnover, "either through dismissals or resignations," as an issue. *Id.;* LETTER (Nov. 6, 2014) at 3, *Appx.* at 7, 9.

As noted in Somersworth's opening brief, in the 2011-2012 period, there were four letters from Kia to Somersworth regarding Somersworth's failure to have the minimum six trained employees. Even if some of the letters were to be discounted, as Kia suggests, KIA'S BRF. at 14, the (second) December 1, 2011 letter and the 2015 notice of termination overlap, with nothing in the 2015 termination notice that was not already stated in the December 2011 letter. The other three 2011- and 2012-era letters confirm that Kia knew then everything it later alleged as reasons for termination.

In its brief, however, Kia claims that the 2011 and 2012 record of correspondence "do[es] not relate" to the 2015 notice of termination. KIA'S BRF. at 14, 15.

The record and MVIB's findings contradict Kia's claim. The letters show that Kia had knowledge, before August 27, 2014 (the date the parties agree commences the statutory look-back period, KIA'S BRF. at 12; SOMERSWORTH'S BRF. at 16), of the very same issues –

inadequate staffing and training – that are the basis for the 2015 termination. The MVIB decided against Somersworth, "because of the continuing nature of the staffing problems." ORDER ON MOTION FOR REHEARING (June 20, 2017) at 2, *Addendum* at 49, 50. The superior court acknowledged, and Kia concedes, that "Somersworth's breaches ... evolved over time," KIA'S BRF. at 8 (quotations omitted), as individual employees came and went but the problem never disappeared. This does not make two different breaches, but one long breach, initially tolerated, starting in 2009, continuing to 2014 and 2015.

It cannot be reasonably disputed that what Kia complained about in 2011 was never cured, and is the same issue that prompted it to terminate Somersworth in 2015. In a surprising reversal, however, in its brief Kia says that Somersworth "cured the staffing issue mentioned" in the 2011 second letter. KIA'S BRF at 15. As evidence, it points to employee turnover in the parts and service departments – the same turnover it includes as reason for termination. LETTER (Nov. 6, 2014) at 3, *Appx.* at 7, 9; LETTER (Feb. 23, 2015), *Appx.* at 17. Kia does not explain how its current claim of cure can be reconciled with its allegation of not curing in its notice of termination. *Id.* ("the Dealership has not cured").

Accordingly, Kia's claim that the 2011-2012 breach and the 2014-2015 breach are unrelated is not supported by the record. Kia first acquired knowledge in 2011 (or earlier), and therefore it waived termination based on staffing and training by not diligently pursuing termination long ago.

II. Kia's Current Claim that Termination Was Based on a "Complete" or "Total" Staffing Failure is an Attempt to Mislead

In its brief, Kia insists that termination was based on a "complete staffing failure," KIA'S BRF. at 12, 15, 21, or a "total staffing failure." KIA'S BRF. at 13, 15, 18 n. 5. Neither phrase appears in the record – not in the two MVIB orders, not in the superior court order, not in Kia's memorandum of law to the court.

Whatever it now means by a "complete" or "total" staffing failure, the record shows that Kia's termination was based on something different: Kia terminated Somersworth when Somersworth's staff comprised two of the required six positions. And Kia was explicit, in its correspondence leading up to and terminating Somersworth, that two out of six was termination-worthy.

Kia's current insistence that termination was based on a "complete staffing failure," or a "total staffing failure," is an attempt to distinguish the staffing situation at the time of the 2015 termination from the situation at the time of the 2011-2012 correspondence, and to therefore claim that its knowledge in 2011 was different from its knowledge in 2014. KIA'S BRF. at 12-13. But the record does not show any significant difference in staffing levels in the two time periods, and therefore does not support Kia's attempt to claim a difference in knowledge. This court should not be misled.

In its November 6, 2014 cure letter, Kia specified that Somersworth "had lost (either through dismissals or resignations) its service manager, parts manager, service consultant and parts counterperson." LETTER (Nov. 6, 2014) at 3, *Appx.* at 7, 9. Thus, according to Kia, Somersworth was lacking two required employees in parts and two required employees in service. While the letter is silent on how many staff Somersworth had in sales, given that the

discussion in the letter is headlined "Inadequate Staffing & Training," *id.*, it appears that sales was sufficiently staffed. In total, it appears that Somersworth had two of six required staff. In its February 23, 2015 termination letter, referencing Somersworth's failure to cure the conditions listed in the cure letter, Kia again noted that Somersworth "lacked a minimally adequate service and parts staff and had no service manager, parts manager, service consultant or parts counterperson." LETTER (Feb. 23, 2015), *Appx.* at 17. This letter too was silent about sales, specifying that Somersworth still had only two of six required staff, which Kia considered "extreme" or "critical" enough to terminate. *Id.* ("critical staffing breaches").

The 2011 and 2012 letters show the same number of unfilled positions as prompted the 2015 termination. In the December 1, 2011 letter, Kia complained that Somersworth's "parts and service departments were closed, with the doors locked and the lights off," because they had no staff. LETTER (Dec. 1, 2011), *Appx.* at 3. The letter allowed that while there was technically one employee each in parts and service, Kia did not credit them as fulfilling Somersworth's obligations because "neither … is adequately trained." *Id.* The letter is silent regarding sales, such that it appears Somersworth had just two of six required employees – the same number cited in the 2014 cure letter and 2015 termination letter.

Whatever the exact number of staff at any given time, comparing Kia's 2011-2012 correspondence with its 2014 and 2015 cure and termination letters, shows that Kia had the same knowledge and concern throughout – fewer than the six fully-trained staff listed in the parties' agreement. This places Kia's first knowledge long before the 180-day look-back period.

Finally, Kia's 2015 termination letter alleged that Somersworth's "staffing deficiency has grown even more severe" since the cure letter. LETTER (Feb. 23, 2015), *Appx.* at 17.

Somersworth stipulated that in the period after the November 2014 cure letter, it had essentially no staff in its parts and service departments. STIPULATION, *Appx.* at 19. Kia acknowledges that "[t]his complete staffing failure occurred ... *after* the end of the 60-day grace period Kia had given Somersworth to cure the breaches identified in its November 2014 notice." KIA'S BRF. at 12 (emphasis added). Whether the staffing got worse – whether it became "complete" or "total" – *after* the cure letter, however, is not relevant to this court's consideration, for two reasons: first, the termination letter specified that Kia terminated Somersworth for failure to cure the conditions which were stated in the cure letter, not for a subsequent worsening of the staffing situation; second, whether Somersworth had five, four, three, two, one, or zero staff, it was fewer than the six required in the provision of the parties' agreement which Kia repeatedly cited.

III. Whether a Breach was "Critical" Does Not Determine the Start of the Look-Back Period

Kia alleged in its correspondence, and the MVIB found, that Kia's termination was justified after cure efforts failed and "the breach rose to a critical level." ORDER ON REHEARING (June 20, 2017) at 2, *Addendum* at 49, 50; LETTER (Feb. 23, 2015), *Appx.* at 17 ("critical staffing breaches").

Kia argues that "critical" is "shorthand" for "material"; that because RSA 357-C:7, II(a) restricts termination to breaches of provisions of the parties' agreement that have "material significance to the franchise relationship," Kia had implicit discretion to select when, at what level, and of what nature, a breach became enough to justify termination; and that the "last straw" was Kia's to unilaterally determine. KIA'S BRF. at 13, 14.

Somersworth concedes that the staffing provision of its agreement with Kia has material significance to the franchise relationship.

But there is nothing in the statute pinning the beginning of the look-back period to a subjective notion of criticality or "last straw." Rather, the statute specifies that the look-back period begins when "the manufacturer ... first acquired actual or constructive knowledge of ... failure" "to comply with a provision of the franchise" agreement. RSA 357-C:7, II(a).

While Kia maintains that it alone can subjectively decide when a breach reaches a critical level, materiality is an objective determination. *McNeal v. Lebel*, 157 N.H. 458, 465 (2008) ("plaintiffs' subjective satisfaction, or lack thereof, with [defendant's] work is legally irrelevant so long as any flaws in [defendant's] performance did not amount to a material breach"); *Energynorth Natural Gas v. Continental Ins. Co.*, 146 N.H. 156, 165 (2001) ("facts are not material ... where it has been determined that [the] conduct meets the objective inherently injurious test"). And materiality has a clear, non-arbitrary, definition. *Foundation*

for Seacoast Health v. Hosp. Corp. of America, 165 N.H. 168, 181-82 (2013) ("For a breach of contract to be material, it must go to the root or essence of the agreement between the parties, or be one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract.").

Even if the law allowed materiality to be determined subjectively and unilaterally, neither Kia, the court, nor the MVIB specified what event commenced the material breach, when the critical "last straw" occurred, or whether it was before or after August 27, 2014. This makes Kia's "critical level" argument merely arbitrary.

Finally, if the critical or material breach was Somersworth's failure to have less than a full complement of six trained staff, the record shows that Kia first learned of such a breach in 2009 or in 2011. LETTER (Mar. 17, 2011), *Appx.* at 1, (Somersworth "failed to meet the minimum technician training requirements for the last two consecutive years (2009 and 2010)"); LETTER (Dec. 1, 2011), *Appx.* at 3. If the lack of a fully-trained full staff was "critical" in 2015, Kia has not offered any reason it was any less critical in 2009 or 2011.

IV. Statutory Construction Issue

A. "Such Failure"

In its brief, Kia makes a statutory construction argument to support its claim that the manufacturer can arbitrarily choose when to begin the look-back period. Kia circularly says that "[t]he phrase 'such failure' refers to the failure on which the termination was based." KIA'S BRF. at 11.

The look-back statute provides:

> [G]ood cause shall exist for the purposes of a termination ... when [t]here is *a failure by the new motor vehicle dealer to comply with a provision of the franchise*, ... provided ... that the manufacturer ... first acquired actual or constructive knowledge of *such failure* not more than 180 days prior to the date on which notification is given.

RSA 357-C:7, II(a), *Appx*. at 42 (emphasis added).

The statute uses the word "failure" twice. The initial use defines what failure is relevant to good cause – "a failure ... to comply with a provision of the franchise." The second use, "such failure," references the initial failure to comply with a provision of the franchise.

The commencement of the look-back period is also defined – when "the manufacturer ... first acquired actual or constructive knowledge of such failure." Thus, the look-back period begins when the manufacturer first learned of the failure to comply. It does not begin at an invented "failure on which termination was based."

B. "First"

Kia makes a second statutory construction argument, in an apparent attempt to work a way around the plain meaning of "first." KIA'S BRF. at 20

Because "first" modifies "acquired," and because the second "such failure" references the initial "failure ... to comply with a provision of the franchise," the question the statute forces the court to answer is: When did the manufacturer "first" acquire knowledge of "a failure ... to comply with a provision of the franchise"? It is Kia who would rewrite the statute, to read: "first acquired ... knowledge of [any] ~~such~~ failure."

Kia's revision does not just rearrange the text, it changes its meaning. By ignoring the word "such," it untethers the look-back period from the first knowledge of the breach. Instead of asking when the manufacturer first learned of the breach of "a provision of the franchise," the look-back period would ask when the manufacturer learned of *any* prior breach, a word not appearing in the statute.

V. New Hampshire Statute Does Not Contain a Daily Violation Provision

Kia says that even if the 2011-2012 breach is the same as the 2014 breach, its notice was nonetheless timely. It cites foreign cases which read into those jurisdictions' statutes a notion that each day of breach is a new violation. KIA'S BRF. at 16. Such a provision is plainly not included in New Hampshire's statute. The New Hampshire legislature is capable of writing daily-violation statutes. *See, e.g.*, RSA 540-A:4, IX(a) (landlord-tenant: "Each day that a violation continues ... shall constitute a separate violation."); RSA 676:17, I (municipal land use: "Each day that a violation continues shall be a separate offense."). This court is charged with construing *New Hampshire* law written by the *New Hampshire* legislature. N.H. CONST. pt. II, art. 72-a; RSA 490:4; *Petition of Judicial Conduct Committee*, 145 N.H. 108 (2000).

VI. Somersworth's Position Reflects a Reasonable Legislative Choice

Kia's position is that a manufacturer may unilaterally decide that a waived cause for termination can be resurrected whenever the manufacturer wishes, by arbitrarily designating a date to begin counting the look-back period. KIA'S BRF. at 20-22. Somersworth's position is that the manufacturer must terminate within six months of first learning of the breach, and can then stay the termination to give the dealer an opportunity to cure.

These are procedural choices, committed to the legislature. There is nothing absurd or unreasonable about New Hampshire's choice of the terminate-and-stay procedure over the arbitrarily-choose procedure, and this court should enforce the statute's plain language.

VII. This Court Should Issue a Precedential Opinion

Although Kia acknowledges that "this appeal involves a ... question of statutory interpretation," it contrarily says that it involves only the application of fact to settled law, and therefore can be resolved on summary procedure. KIA'S BRF. at 23.

There is no known decision of this court resolving, or even addressing, the commencement of the look-back period under New Hampshire's RSA 357-C:7, II(a). It therefore cannot be said that the matter is settled.

Because the matter is of interest to citizens, dealers, and manufacturers, this court should hear oral argument and issue a well-considered precedential opinion. Any time saved by a summary procedure is dwarfed by the years Kia failed to pursue termination after it first learned of Somersworth's staffing issues in 2009 or 2011.

Kia and Somersworth are intertwined, as franchisor and franchisee, because that is the nature of their relationship. Termination of a franchise is existential for dealers, and there is

no allegation that Somersworth was dilatory in any stage of this proceeding. The procedure for termination in RSA 357-C:7 takes time, as the legislature intended.

Respectfully submitted,

Kia of Somersworth
By its Attorney,
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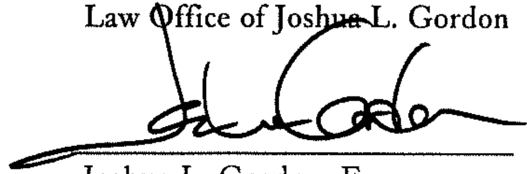

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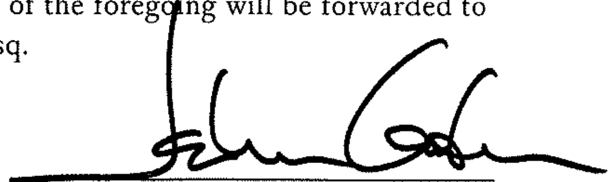
CERTIFICATIONS

I hereby certify that this brief contains no more than 2,660 words, exclusive of those portions which are exempted.

I further certify that on August 22, 2018, copies of the foregoing will be forwarded to Nathan Warecki, Esq.; and to Catherine E. Stetson, Esq.



Dated: August 21, 2018

Joshua L. Gordon, Esq.