

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PR ACQUISITION LLC	:	CIVIL ACTION
	:	
v.	:	
	:	
BMW OF NORTH AMERICA, LLC	:	NO. 03-3731

**MEMORANDUM**

**Baylson, J.**

**November 3, 2004**

**I. Introduction**

This suit was initiated in the Court of Common Pleas of Chester County, Pennsylvania, on May 19, 2003. On June 20, 2003, it was removed to this Court pursuant to 28 U.S.C. §1441 on the basis of the diversity of citizenship between the parties. Plaintiff PR Acquisition LLC (“PRA”) is a Pennsylvania corporation with its principal place of business in West Chester, Pennsylvania. Defendant BMW of North American, LLC (“BMW”) is a Delaware corporation with its principal place of business in Woodcliff Lake, New Jersey.

In its Complaint, PRA sued BMW for damages, alleging violations of the Pennsylvania Board of Vehicles Act, 63 PA. Cons. Stat. Ann. § 818 *et seq.* (the “Act”), the relevant provisions of which provide that a manufacturer or distributor exercising its right of first refusal must reimburse the proposed new owner of a dealership for:

“the reasonable expenses, including reasonable attorney fees . . . incurred by the proposed new owner and transferee prior to the manufacturer’s or distributor’s exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of . . . ownership.”

63 PA Cons. Stat. Ann. § 818.16(4). PRA alleges that it incurred \$463,655 of reasonable expenses in negotiating and implementing an Asset Purchase Agreement (the “Agreement”) to

buy dealerships from the Don Rosen Organization (“Rosen”) prior to BMW’s exercise of its right of first refusal.

Presently before the Court is BMW’s Motion for Summary Judgment, filed on August 3, 2004. A response was filed by PRA on August 17, 2004, and BMW filed a reply brief on August 24, 2004. Oral argument was held on October 29, 2004.

BMW admits that PRA, as a proposed new owner under the Act, has standing to sue BMW for the payment of expenses that PRA incurred in negotiating and implementing the Agreement before BMW exercised its right of first refusal. In its motion, BMW argued, however, that the expenses that PRA has alleged are in fact expenses incurred by another corporate entity, Pennmark Automotive Enterprises, Inc. (“Pennmark”), and are therefore not recoverable under the Act. BMW also contends that PRA’s calculation of Pennmark’s expenses includes operating costs -- namely, wages and benefits of Pennmark personnel -- that are not recoverable under the Act.

At the oral argument, counsel for BMW raised a new issue which had not been included in the parties’ briefs with an explanation that the facts supporting the argument had not been fully developed as of the date that the briefing was completed. This argument concerns BMW’s assertion that the expenses allegedly incurred by Plaintiff were not incurred prior to BMW’s exercise of its right of first refusal, and that therefore, under the statutory language, Plaintiff is not entitled to recover any expenses from Defendant.

As will be discussed below, genuine issues of material fact exist as to whether the expenses alleged by PRA are recoverable under the Act. Defendant’s motion is therefore denied.

## **II. Facts**

PRA is a limited liability company, organized on November 6, 2002, whose members are George Marucci (“Marucci”), Donald Besecker (“Besecker”), and Laura Besecker. PRA has no employees. Pennmark is a Pennsylvania corporation, owned by Marucci and Besecker.

Pennmark provides management, operating, and financial services for Pennmark Holdings, a Pennsylvania corporation also owned by Marucci and Besecker. Pennmark is paid management fees by Pennmark Holdings dealerships. The parties dispute whether these management fees constitute reimbursement for the services rendered by Pennmark or whether Pennmark’s expenses are greater than the amount it receives in management fees.

On or about December 1, 2002, PRA entered into an Asset Purchase Agreement with Rosen to purchase four dealerships owned by Rosen. Prior to the closing, BMW notified PRA, on February 10, 2003, that BMW had exercised its right of first refusal pursuant to the Act, thus preventing the sale of the dealerships to PRA. On that same day, BMW requested that PRA provide an accounting of the “reasonable expenses” PRA had incurred in negotiating and implementing the Agreement within twenty days, as required by the Act. On February 21, 2003, PRA submitted a claim to BMW for expenses allegedly incurred as of February 10, 2003, which included \$412,094 for the “Use of Pennmark Auto Group Employees.” (Def. Mot. for S.J. Ex. J.) In subsequent correspondence, PRA provided supporting information which included the “Pennmark Automotive Enterprises Costs Related to Don Rosen Acquisition,” an itemized list which includes costs relating to eight employees between October 7, 2002, and February 20, 2003, as well as costs for services rendered by third parties. (Def. Mot. for S.J. Ex. L.) The focal point of BMW’s motion for summary judgment is BMW’s contention that PRA’s income

statements and tax returns relating to the relevant period do not support PRA's contention that these expenses were "incurred" by PRA under the language of the Act.

BMW supports its argument that PRA's expenses were not incurred prior to BMW's exercise of right of refusal by asserting that Pennmark, which shares common ownership with PRA, was always going to bear these expenses itself and was only to be paid a management fee if the deal with Rosen was completed. It was only when PRA learned that BMW had exercised its right of first refusal, BMW asserts, that PRA made a new agreement with Pennmark in order to assert that PRA had incurred these expenses, so that these expenses could be recoverable from BMW. BMW relies for this assertion on the testimony of Mr. Rhodes, who was designated as a Rule 30(b)(6) deponent on behalf of PRA, and BMW has attached some excerpts from his deposition, as has PRA. Mr. Rhodes appears to be an attorney who had no personal knowledge of the various agreements, and his testimony, although supporting some aspects of BMW's arguments, is not sufficiently definitive for the Court to ignore contrary assertions by other PRA witnesses. It appears from Mr. Rhodes' testimony that the same individuals who made the agreement for PRA also made the agreement on behalf of Pennmark. In this situation, it would be extremely difficult for the Court to determine as a matter of law that the agreements asserted cannot possibly allow for Plaintiff to recover without these individuals being subject to direct and cross examination in a trial context.

PRA cites other portions of Rhodes' testimony to dispute BMW's position and asserts that it was always contemplated, at least between PRA and Pennmark, that PRA would incur these expenses. In support, PRA cites paragraph 6 of the affidavit of George E. Marucci, Jr., which states, "It was always understood that the Automotive Professionals [the umbrella name

for the entities that were retained to perform services in connection with the proposed sale] would be compensated for their services performed for PRA in this deal.” PRA’s counsel asserts that this paragraph, by its very language, reflects the existence of an agreement between PRA and Penmark.

Also relevant is paragraphs 11, 12 and 13 of Marucci’s affidavit which refers to “Penmark” as “Enterprises” and reads as follows:

11. Consistent with Enterprises’ prior practice, PRA and Enterprises agreed that in the event that the Agreement was consummated, Enterprises would receive a fee from the revenues from the Dealerships after their acquisition.

12. Since BMW prevented the consummation of the Agreement, PRA and the Automotive Professionals were forced to provide for different terms for the payment of the Automotive Professionals.

13. It was agreed that in the event that PRA did not consummate the Agreement, the Automotive Professionals would still be paid for their services. The amount of the payment would be based upon the amount of time an individual spent on the deal and would be calculated by multiplying the percentage of time spent on the deal with the value of that individual’s annual compensation.

According to PRA’s counsel, Paragraph 11 represents an agreement with PRA prior to BMW’s exercise of first refusal, whereas the agreement reflected in paragraphs 12 and 13 above reflects an agreement reached after BMW’s exercise of right of first refusal. It is fair to conclude that the assertions of Mr. Marucci are ambiguous and not as definitive as they could or should be; however, since the Plaintiff is defending against summary judgment, the Court must make inferences favorable to the Plaintiff.

### **III. Legal Standard**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the non-moving party. Id. at 255.

### **IV. Discussion**

The Pennsylvania Board of Vehicles Act “is a comprehensive statute governing the relationship between automobile manufacturers and their franchise dealers. The Act prohibits a manufacturer from unreasonably withholding consent to the sale of a franchise to a qualified buyer.” Rosado v. Ford Motor Co., 337 F.3d 291, 293 (3d Cir. 2003). In 1996, the Act was amended to include the right of first refusal provisions at issue in this case, which provide that “when exercising the right of first refusal the manufacturer must pay ‘the reasonable expenses including reasonable attorney fees’ to the ‘proposed new owner’ incurred in negotiating a contract to purchase the dealership.” Id. (quoting 63 PA Cons. Stat. Ann. § 818.16(4)).<sup>1</sup> Neither

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<sup>1</sup>§ 818.16 states in pertinent part:

A manufacturer or distributor shall be permitted to enact a right of first refusal to acquire the new vehicle dealer’s assets or ownership in the event of a proposed change of all or substantially all ownership or transfer of all or substantially all dealership assets if all of the following requirements are met:

party disputes that PRA is a “proposed new owner” under the Act, and the Third Circuit has made clear, and the parties do not dispute, that a proposed new owner such as PRA has standing to sue for a manufacturer’s violation of § 818.16(4). Id. at 295.

Since 1996, when the Act was amended to include the right of first refusal provisions, no state or federal court has had the occasion to issue a reported opinion as to § 818.16(4)’s “reasonable expenses” provision. The Third Circuit has construed § 818.16 only in reference to a standing issue irrelevant to the case presently before the Court. Id. at 292 (holding that a prospective purchaser of an automobile dealership lacks standing to challenge the exercise of a manufacturer’s right of first refusal). There is no caselaw, therefore, to guide the Court in determining how this provision of Pennsylvania law would be applied by the state courts. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1382 (3d Cir. 1992)(“Since this court raises an issue of Pennsylvania law, our duty is to predict how the Pennsylvania Supreme Court would decide this issue.”).

The first question is whether PRA has produced sufficient evidence on these questions to create triable issues and survive summary judgment. In support of its Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment, PRA has submitted the following:

A. An itemized list of the expenses PRA allegedly incurred in negotiating and implementing the Agreement (Pl’s Resp. to Def. Mot. for S.J. Ex. A.);

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(4) The manufacturer or distributor agrees to pay the reasonable expenses, including reasonable attorney fees which do not exceed the usual, customary and reasonable fees charged for similar work done for other clients, incurred by the proposed new owner and transferee prior to the manufacturer’s or distributor’s exercise of its right of first refusal in negotiating and implement the contract for the proposed change of all or substantially all ownership or transfer of all or substantially all dealership assets.

B. An affidavit of George E. Marucci, Jr., stating, inter alia:

1. PRA retained Enterprises, Besecker and Marucci to assist in the negotiation and implementation of the Agreement;
2. It was always understood that they would be compensated for their services;
3. They were authorized by PRA to retain other professionals to provide services on PRA's behalf;
4. The other professionals thus retained, including a law firm, an accounting firm, real estate appraisers and environmental experts, were at all times performing services for PRA;
5. The expenses incurred by PRA relating to Enterprises employees are not for the payment of salaries but simply a method to determine the value of their services to be charged to PRA (Pl's Resp. to Def. Mot. for S.J. Ex. C, ¶5-14);

C. Copies of PRA's balance sheets dated February 28, 2003, and June 30, 2003 (Pl's Resp. to Def. Mot. for S.J. Ex. D.); and

D. An affidavit of Ernie Volpe, who prepared PRA's financial statements and 2003 tax return, stating that the costs incurred by PRA in negotiating and implementing the Agreement were not included in the income statement or tax return because PRA was to be reimbursed for the expenses by BMW and, when reimbursed, would immediately pay those amounts to the third parties still owed for their services. (Pl's Resp. to Def. Mot. for S.J. Ex. E., ¶3). This evidence, along with the testimony of Mr. Rhodes previously discussed, is sufficient to create a triable issue of material fact as to whether PRA may recover from BMW under the Act.

Secondly, in the absence of Pennsylvania or Third Circuit authority interpreting the Act, this Court is not inclined to grant summary judgment against PRA when PRA has some factual support for its contention that the expenses for which it requests reimbursement were in fact “incurred by” PRA prior to BMW’s exercise of its right of first refusal and were “reasonable” in accordance with the Act’s provisions.

The third reason why the Court cannot grant summary judgment is because the alleged agreements between PRA and Pennmark are verbal in nature, the record is not clear as to which of those agreements, if any, were reached prior to BMW’s exercise of its right of first refusal, and which were reached afterwards. In Pennsylvania, it is clear that the court, in interpreting the terms of a contract, must give primary consideration to the intent of the parties, and this Court is unable, on the present summary judgment record, to ascertain the intent of the parties as undisputed and with sufficient clarity and definition so as to render judgment as a matter of law in this dispute.

If it appears after trial, as BMW contends, that Pennmark always intended to bear these expenses, and that the agreements between PRA and Pennmark were after the fact suppositions designed to force BMW to make payments because of its exercise of the right of first refusal, which it otherwise would not have been required to pay, then the Court, upon making such a finding, will find in favor of BMW. However, the record on these points is not clear, and thus the matter will have to proceed to trial.

The statute, in using the “incurred by” language does not restrict the dealer to expenses it pays its own employees and does not prohibit using third party expertise in negotiating or implementing the contract. This Court is unwilling to read these requirements into the statute as

a matter of law.

**V. Conclusion**

Based on the foregoing, the Court holds that there are genuine issues of material fact outstanding that could permit a verdict in favor of PRA. As such, BMW's Motion for Summary Judgment is denied.

An appropriate Order follows.

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PR ACQUISITION LLC	:	CIVIL ACTION
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v.	:	
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BMW OF NORTH AMERICA, LLC	:	No. 03-3731

**ORDER**

AND NOW, this 3<sup>rd</sup> day of November, 2004, in accordance with the foregoing Memorandum, Defendant's Motion for Summary Judgment (Docket No. 20) is DENIED.

It is ORDERED that this case will proceed to trial, non-jury, on November 29, 2004, or if a trial is still pending on that date, as soon as that trial is completed. The Court will bifurcate liability and damages and require the Plaintiff to proceed to prove that Plaintiff is entitled to recover under the statute, leaving for additional proof as to the amount of damages and reasonableness thereof, if the Court finds that Plaintiff has met its burden of proof on liability.

It is FURTHER ORDERED that no later than November 15, 2004, Plaintiff shall file its Proposed Findings of Fact and Conclusions of Law, and shall state its facts in chronological order. As to any agreements on which Plaintiff relies, if they are in writing, they shall be attached; if they are verbal, then the Proposed Findings shall state in detail the date each agreement was made, the people who formed the agreement, who the people were representing, and all material terms of the agreement.

Defendant shall submit its Proposed Findings of Fact, limited to those matters which are in dispute, on November 22, 2004.

The Proposed Findings of the parties shall be stated as plain and simple facts without

characterization or advocacy, and shall be limited to the issue of liability.

BY THE COURT:

s/ Michael M. Baylson  
Michael M. Baylson, U.S.D.J.

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