COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.

NISSAN MOTOR ACCEPTANCE COMPANY LLC,

Plaintiff,

v.

BELLA AUTO GROUP, LLC (dba Bella Nissan of Pittsfield),

Defendant.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND SUPPORTING MEMORANDUM OF LAW

Plaintiff Nissan Motor Acceptance Company LLC ("NMAC" or "Plaintiff") hereby move for a temporary restraining order against Defendant Bella Auto Group, LLC (dba Bella Nissan of Pittsfield) ("Bella Nissan"). As discussed herein and in the Verified Complaint submitted herewith, immediate injunctive relief is necessary to prevent Defendant from disposing of readily movable collateral securing Defendant's obligations to Plaintiff.

The factual background and statement of facts in support of this Motion are contained in the Verified Complaint filed herewith. Those allegations demonstrate that Bella Nissan, a dealership of Nissan automobiles located in Pittsfield, Massachusetts, has defaulted repeatedly in respect of a floorplan lending agreement with NMAC. At its most basic, the floorplan financing provided by NMAC enables Bella Nissan to purchase automobiles from a manufacturer.[1] In turn,

[1] Plaintiffs detail the complete network of contracts and parties relevant to the floorplan financing at issue in the Verified Complaint.

Bella Nissan must repay NMAC once it sells said automobiles. NMAC has a priority security interest in the automobiles. Despite its repayment obligations, Bella Nissan has repeatedly defaulted and owes a balance to NMAC in excess of $1.5 million.

Argument

Injunctive relief should issue where a moving party has shown (1) a likelihood of success on the merits of its claims; (2) that it will suffer irreparable harm if injunctive relief is not granted; and (3) the risk of irreparable harm to the moving party outweighs any potential harm to the non-moving party in granting the injunction. *Tri-Nel Mgmt., Inc. v. Bd. Of Health of Barnstable*, 433 Mass. 217, 219 (2000) (*citing Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980)). A temporary restraining order may issue *ex parte* if it appears from the Verified Complaint that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." Mass. R. Civ. P. 65(a).

Here, Plaintiff's Verified Complaint demonstrates a high likelihood that they will succeed on the merits of their claims. Plaintiffs bring claims for replevin and injunctive relief. As to the contractual claims, Bella Nissan (and its guarantors) covenanted to repay NMAC for its financing upon the sale of the secured motor vehicles. Despite that obligation, Bella Nissan failed to do so and cannot present any legitimate defenses. Plaintiff is similarly likely to succeed on its claim for replevin. Under the terms of the applicable contracts, Bella Nissan's default entitles Plaintiff to take possession of the collateral securing Bella Nissan's payment obligations. Thus, Plaintiff's request to replevy said collateral is consistent with the contracts and legally permissible. *See, e.g., Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, No. SUCV200904717C, 2013 WL 7760827, at *7 (Mass. Super. Dec. 17, 2013) ("The elements of replevin are: (1) the goods in question have a value greater than twenty dollars; (2) the goods are unlawfully taken or detained;

and (3) the owner or person entitled to possession is deprived of the goods.") (*citing* Mass. Gen. Laws ch. 247, § 7).

In the absence of an injunction, Plaintiff will suffer irreparable harm. Bella Nissan's non-payment suggests that its current financial capabilities are limited. Thus, there is a substantial risk that Bella Nissan or its guarantors, all of which have the same proprietor, will be likely to satisfy any judgment against it. "The most compelling reason" in favor of entering an injunction is "the need to prevent the judicial process from being rendered futile by [the] defendant's action or refusal to act." 11 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure,* § 2947, p. 424. The absence of an adequate remedy at final judgment establishes irreparable harm. *GTE Products Corp. v. Stewart*, 414 Mass. 721, 610 N.E.2d 892 (1993). Where, as here, there is a substantial likelihood that Defendant will not satisfy the monetary judgment obtained against it, an injunction is appropriate. *See William R. Marino, P.C. v. PJD Entertainment, Inc.*, 1998 Mass. Super. LEXIS 411, *2 (Mass. Super. Ct. July 13, 1998) (granting injunction where "the Defendants are in the process of selling the business assets of the corporate defendant" because "the Plaintiffs will be without any means of recovery."). The Superior Court explained that even if "a judgment may issue in the full amount after trial, if the Defendants are insolvent, or if their assets are unreachable, as is a probability in the present case, the remedy at law is inadequate." *Id.*

Like the plaintiff in *William R. Marino*, Plaintiff will suffer irreparable harm if Bella Nissan cannot satisfy its judgment. Indeed, courts routinely grant injunctive relief to protect the rights of property owners in circumstances where a defendant has taken possession of property to which it is not entitled. *See, e.g., Ford Motor Credit Co. v. Doe*, No. 200600239, 2006 WL 1075586, at *1 (Mass. Super. Ct. Mar. 27, 2006) (granting preliminary injunction of comparable scope in favor of first lien holder Ford where "Ford wishes to proceed against the truck, [and] has performed all conditions precedent to its right to do so, but has been hitherto unable to effect peaceful repossession thereof"). Accordingly, an injunction ordering Bella Nissan to deliver the motor vehicles it acquired through financing provided by NMAC and preventing Bella Nissan from disposing of said vehicles in any way is necessary given the substantial risk that Bella Nissan will not have the means to satisfy a judgment against it.

Finally, the risk of irreparable harm to Plaintiff outweighs any potential harm to Bella Nissan in granting the injunction. The injunction Plaintiff is seeking would not interfere with any rights of, or otherwise prejudice, Bella Nissan because, in light of its default, Bella Nissan has no right to possess or dispose of the collateral. Plaintiff, however, faces material prejudice if Bella Nissan is able to maintain the collateral because Bella Nissan may attempt to sell, transfer, dispose of, or otherwise reduce the collateral's value. This, of course, would limit Bella Nissan's ability to satisfy a judgment entered against it. Accordingly, Plaintiff is entitled to an injunction.

Conclusion

For the foregoing reasons as well as those set forth in the Verified Complaint, Plaintiff respectfully requests that this Court enter a temporary restraining order preventing Defendant from (i) continuing to withhold funds from Plaintiff in violation of the agreements detailed in the Verified Complaint and (ii) selling or otherwise disposing of the collateral securing Defendant's obligations to Plaintiff.

Signatures on Following Page

Respectfully submitted,

Nissan Motor Acceptance Company LLC,

By its attorneys,

/s/ Kevin P. Polansky

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