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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Petition of
BLACK ON BLACK IMPORTS, INC.,

Petitioner,

vs.

R.B.B., INC., dba FERRARI OF LOS
GATOS; Brian Burneett; Scott Cote,

Respondent.

Petition No. P-239-92

DECISION

In the Matter of the Petition of

R.B.B., INC., a California
Corporation, dba FERRARI OF LOS
GATOS,

Petitioner,

vs.

BLACK ON BLACK IMPORTS, RICK
BLACK, an individual, and DOES
1 through 20, Inclusive,

Respondents.

Petition No. P-247-92



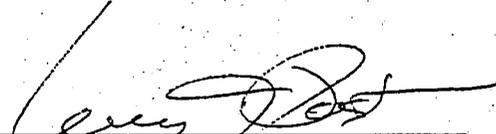
DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the New Motor Vehicle Board as its Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS ninth day of July, 1993.

By


MANNING J. POST
President
New Motor Vehicle Board

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PROPOSED DECISION

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PROCEDURAL BACKGROUND

1. On June 22, 1992, Petitioner Black on Black Imports, Inc. ("Black on Black") filed petition number P-247-82 with the New Motor Vehicle Board ("Board") pursuant to Vehicle Code section 3050(c),^{1/}. On October 28, 1992, R.B.B., Inc. dba Ferrari of Los Gatos ("Ferrari of Los Gatos") filed petition number P-247-92 with the Board. By Order dated December 15, 1992, these petitions were consolidated for purposes of hearing.

2. Black on Black is a merchant in exotic cars and is located at 8500 Wilshire Boulevard, Beverly Hills, California. Rick Black is the dealer principal of Black on Black.

3. Ferrari of Los Gatos is a licensed new motor vehicle dealer enfranchised to sell Ferrari vehicles. Ferrari of Los Gatos is located at 66 East Main Street, Los Gatos, California. Brian Burnett is the dealer principal of Ferrari of Los Gatos.

4. These consolidated petitions concern a contract for sale of a Ferrari Testarosa automobile that Black on Black was to purchase from Ferrari of Los Gatos. The Board, after consideration of the allegations of the petitions, referred these matters to an Administrative Law Judge for hearing.

5. A hearing was held before Douglas H. Drake, Administrative Law Judge for the Board, on June 18, 1993.

6. Black on Black was represented by G. Richard Green, Esq., Manns and Green, 9665 Wilshire Boulevard, Suite 850,

^{1/} All statutory references are to the Vehicle Code unless otherwise indicated.

Beverly Hills, California.

7. Ferrari of Los Gatos was represented by Randall Aiman-Smith, Esq., Aiman-Smith and Bauman, 100 Pine Street, Suite 2100, San Francisco, California.

ISSUES PRESENTED

8. The Petition of Black on Black, presented the following issues:

a. Whether Vehicle Code section 11713(b) was violated, which forbids a dealer to:

Advertise or offer for sale or exchange in any manner, any vehicle not actually for sale at the premises of the dealer or available to the dealer from the manufacturer or distributor of the vehicle at the time of the advertisement or offer.

b. Whether Vehicle Code section 11713(p) was violated, which forbids a dealer to:

Accept a purchase deposit relative to the sale of a vehicle, unless the vehicle is present at the premises of the dealer or available to the dealer directly from the manufacturer or distributor of the vehicle at the time the dealer accepts the deposit.

c. Whether Vehicle Code section 11713.1(a) was violated, which forbids dealer to:

Advertise any specific vehicle for sale without identifying the vehicle by either its vehicle identification number or license number.

d. Whether Ferrari of Los Gatos violated Civil Code Section 1982.7(a) which provides that a purchaser under an automobile conditional sales contract shall be refunded its deposit. To reach this issue, the Board must decide

whether the contract is a conditional sale contract as defined by Civil Code section 2981, which reads as follows:

(a) "Conditional sale contract" means:

(1) Any contract for the sale of a motor vehicle between a buyer and a seller, with or without accessories, under which possession is delivered to the buyer and either (A) the title vests in the buyer thereafter only upon the payment of all or a part of the price, or the performance of any other condition, or (B) a lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition, or . . . (emphasis added)

e. Whether Ferrari of Los Gatos defrauded Black on Black, that is whether Ferrari of Los Gatos made a misrepresentation of a material fact with the intent to deceive, upon which Black on Black justifiably relied, the misrepresentation being that Ferrari of Los Gatos represented that it would provide a confirmation number or VIN.

f. Whether the conduct of Ferrari of Los Gatos was malicious, fraudulent or oppressive so as to justify punitive damages.

g. Whether Black on Black should recover attorneys fees and costs.

9. The petition of Ferrari of Los Gatos presented the following issues:

h. Whether Black on Black breached a contract to purchase a 1990 Ferrari Testarosa automobile.

i. Whether Ferrari of Los Gatos should recover attorneys fees and costs.

The evidence also raised the following issues:

j. Whether Ferrari of Los Gatos breached its duty to mitigate its damages by selling the disputed Ferrari for the best price available.

k. The amount of damages suffered by either party.

FINDINGS OF FACT

10. Just before September 8, 1989, Rick Black contacted every Ferrari dealer in the United States looking for the best combination of price and delivery date.

11. There were approximately 40 Ferrari dealers in the United States at this time.

12. Ferrari of Los Gatos had the best combination of price and delivery date, so Rick Black instructed his attorney, Jeff A. Lesser, to negotiate the remaining terms of a contract for Black on Black to purchase a 1990 Ferrari Testarosa from Ferrari of Los Gatos.

13. Black on Black's attorney, Jeff A. Lesser, wrote a letter requesting a contract between Ferrari of Los Gatos and Black on Black. A \$50,000.00 down payment accompanied this letter.

14. Scott Cote was a salesman for Ferrari of Los Gatos.

15. Scott Cote and Black on Black's attorney, Jeff A. Lesser, negotiated a form of contract.

16. The form of contract was a standard retail contract.

17. Scott Cote sent the form of contract to Black on Black's attorney for review and execution.

18. Jeff A. Lesser, Black on Black's attorney, executed the contract on behalf of Black on Black and returned it to Ferrari of Los Gatos, with a copy to Rick Black.

19. The contract was executed September 8, 1989.

20. At all times that Jeff A. Lesser, Black on Black's attorney, was negotiating and executing the contract, he was doing it pursuant to the instruction of Rick Black.

21. The terms of the contract provided for Ferrari of Los Gatos to sell to Black on Black a 1990 Ferrari Testarosa, red color with a tan interior, for delivery in February or March, 1990. The sales price was \$300,000.00. A \$50,000.00 deposit having already been paid, \$250,000.00 was due on the contract at the date of delivery of the Ferrari.

22. The contract did not provide for sales tax or Department of Motor Vehicles' fees.

23. The contract was for the sale of a car between dealers and merchants.

24. On February 28, 1990, Black on Black wrote a letter canceling the the contact.

25. The grounds stated in the letter were that Ferrari of Los Gatos failed to provide to Black on Black either a VIN or a confirmation number for the specific Testarosa ordered.

26. Neither the distributor, Ferrari of North America, nor Ferrari of Los Gatos have confirmation numbers.

27. VIN numbers of Ferraris are not available until a week before shipping from the distributor.

28. The contract did not require that Ferrari of Los Gatos provide either a VIN or confirmation number to Black on Black.

29. Ferrari of Los Gatos did not represent that it would provide a confirmation number or VIN to Black on Black.

30. Ferrari of Los Gatos did represent that it would not provide a VIN to Black on Black.

31. Black on Black failed to establish that Ferrari of Los Gatos intended to deceive Black on Black.

32. Three Ferrari Testarosas were delivered to Ferrari of Los Gatos during the delivery period of the contract, February and March of 1990.

33. At least two of these Ferraris were red with tan interior, one of which was sold to a Mr. Dane and the other which was earmarked for Black on Black.

34. Mr. Dane's Ferrari was delivered to Ferrari of Los Gatos on March 12, 1990 and thereafter sold for \$265,000.00.

35. Black on Black's Ferrari was delivered to Ferrari of Los Gatos on March 22, 1990.

36. Ferrari of Los Gatos wrote to Black on Black, demanding performance by April 25, 1990.

37. Black on Black failed to perform by April 25, 1990, or at any other time.

38. As a result of Black on Black's failure to take delivery or pay the purchase price, Ferrari of Los Gatos had to sell the car to another purchaser.

39. Ferrari of Los Gatos sold the red and tan 1990 Ferrari Testarosa to Sports Car Exchange, a franchised Ferrari dealer, on a wholesale contract for \$225,000.00.

40. Ferrari of Los Gatos could have sold this Ferrari for \$265,000.00 had Ferrari of Los Gatos sold it retail rather than wholesale.

DETERMINATION OF ISSUES

1. a. Ferrari of Los Gatos did not violate Vehicle Code section 11713(b) in that it had at least two cars available during the delivery period.
- b. Ferrari of Los Gatos did not violate Vehicle Code section 11713(p) in that it had at least two cars available during the delivery period.
- c. Vehicle Code section 11713.1(a) was not violated in that Ferrari of Los Gatos did not advertise a car for sale to Black on Black.
- d. The contract between the parties was not a conditional sale contract within the meaning of Civil Code section 2981, as possession was not to be delivered to the buyer prior to title vesting.
- e. Black on Black failed to establish that Ferrari of Los Gatos defrauded Black on Black in that there was no evidence presented of misrepresentation nor any intent to deceive.
- f. Black on Black failed to establish that Ferrari of Los Gatos acted maliciously, oppressively, or fraudulently in any of these dealings.

g. For the reasons as set forth below, Black on Black is not entitled to recover reasonable attorney's fees or costs.

h. Black on Black breached the contract to purchase the 1990 Ferrari Testarosa from Ferrari of Los Gatos for the following reasons:

1. The letter of February 28, 1990, from Black on Black to Ferrari of Los Gatos, constituted an anticipatory breach of the contract.
2. Black on Black refused to perform the contract by taking delivery and paying for the Ferrari.

i. For the reasons as set forth herein, Ferrari of Los Gatos is not entitled to recover reasonable attorney's fees or costs.

j. Ferrari of Los Gatos breached its duty to mitigate its damages for the following reasons:

1. Ferrari of Los Gatos had a duty to mitigate its damages by selling the Ferrari designated for delivery to Black on Black for the highest price obtainable.
2. Ferrari of Los Gatos breached its duty by failing to market the car for the highest price obtainable, and instead, by selling the car wholesale to another Ferrari dealer.
3. The best evidence of the highest price obtainable in a retail sale was the price paid by Mr. Dane 10 days earlier, for essentially the identical vehicle, of \$265,000.00.

k. Ferrari of Los Gatos suffered damages in the amount of \$35,000.00 due to the breach of the contract by Black on Black, the difference between the contract price of \$300,000.00 and what it could have sold the car for, ie. \$265,000.00.

2. Black on Black, being in breach of the contract, and Ferrari of Los Gatos having breached its duty to mitigate damages, there is no prevailing party within the meaning of Civil Code Section 1717, and each party shall bear its own attorneys fees and costs.

3. Ferrari of Los Gatos was unjustly enriched by its retention of the difference between Black on Black's down payment of \$50,000.00 and the \$35,000.00 in damages it suffered.

PROPOSED DECISION

1. Ferrari of Los Gatos is denied recovery on its petition for \$75,000.00 in damages for breach of the contract.

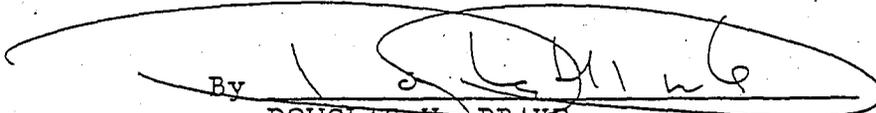
2. Black on Black is denied recovery for the down payment of \$50,000.00, having been found to be in breach of contract for purchase.

3. Ferrari of Los Gatos shall, within 30 days of the effective date of this decision, return to Black on Black the sum of \$15,000.00, plus interest at 10% per annum from April 26, 1990, to date of payment.

I hereby submit the foregoing which constitutes my proposed decision in the above-entitled matter, as a result of a hearing before me on the above dates and recommend the adoption of this proposed decision as the decision of the New Motor Vehicle Board.

DATED: July 7, 1993

By


DOUGLAS H. DRAKE