

Macy's Inc. v J.C. Penney Corp., Inc.

2016 NY Slip Op 31045(U)

June 6, 2016

Supreme Court, New York County

Docket Number: 650197/2012

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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MACY'S, INC. and MACY'S MERCHANDISING
GROUP, INC.,

Plaintiffs,

-against-

J.C. PENNEY CORPORATION, INC.,

Defendant.

Index No.: 650197/2012

Mtn Seq. Nos. 020 & 021

DECISION AND ORDER

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JEFFREY K. OING, J.:

Mtn seq. nos. 020 and 021 are hereby consolidated for disposition.

In mtn seq. no. 020, plaintiffs Macy's, Inc. and Macy's and Macy's Merchandising Group, Inc. (together, "Macy's") move, pursuant to CPLR 4403 and 22 NYCRR 202.44(a), to reject in its entirety the report of Hon. Ira Gammerman, J.H.O., dated December 15, 2015.

Defendant J.C. Penney Corp., Inc. ("JCP") cross-moves to confirm in part and reject in part JHO Gammerman's report and recommendations.

In mtn seq. no. 021, JCP moves, pursuant to CPLR 3101, 3103 and 3104, for a protective order vacating the oral order of JHO Gammerman issued at a court conference held on January 28, 2016, which was based on Macy's oral application to compel JCP to produce redacted copies of the detailed fee statements of its counsel for the period of August 2012 through December 2013.

Familiarity with the underlying facts is presumed.

Mtn Seq. No. 020

Pursuant to CPLR 4403, the Court "may confirm or reject, in whole or in part, ... the report of a referee to report; may make new findings with or without taking additional testimony; and may order a new trial or hearing." However, "[t]he determination of a Referee appointed to hear and report is entitled to great weight" and will not be lightly disturbed (Slater v Links at N. Hills, 262 AD2d 299, 299 [2d Dept 1999]). Macy's argues that JHO Gammerman's report dated December 15, 2015 (the "award"), awarding it \$3,477,945 in damages, plus statutory interest, did not properly compensate it for its lost sales profits and therefore should be rejected as inadequate.

Having reviewed JHO Gammerman's report, as well as the testimony and evidence produced before him at the hearing and during months of post-trial discovery, the Court finds that JHO Gammerman's determination and findings are amply supported by the record and in line with the measure of damages set forth in this Court's post-trial decision. Under those circumstances, JHO Gammerman's determination and findings will not be disturbed (see Yahudaii v Baroukhian, 89 AD3d 557 [1st Dept 2011]). JHO Gammerman properly rejected Macy's lost profits theory of damages as speculative and not supported by the record.

He also properly awarded Macy's damages based on the 91 designs that, based on his evaluation of the evidence and testimony before him, were manufactured and sold by JCP and which were covered by the exclusive contract between Macy's and Martha Stewart Living Omnimedia.

To the extent that Macy's seeks to alter the measure of damages set forth in this Court's post-trial decision, Macy's should have raised that argument on appeal. Neither party appealed this issue when an appeal of the Court's post-trial decision was taken. Having failed to do so, Macy's has waived that argument and it is now the law of the case (Glynwill Invs., N.V. v Shearson Lehman Hutton, Inc., 216 AD2d 78, 79 [1st Dept 1995]).

In any event, Macy's lost profits theory of recovery is entirely speculative. As the Court made clear in its post-trial decision, "speculative damages will not be considered" (Post-Trial Decision, p. 56 [NYSCEF Doc. No. 392]).

Accordingly, Macy's motion to reject JHO Gammerman's report is denied. JCP's cross-motion to confirm in part and reject in part the report is denied for the same reasons to the extent that it seeks a modification of Justice Gammerman's order. As this Court has previously noted, however, to the extent that Macy's recovered damages from MSLO for this breach of contract, JCP is entitled to an offset. If there is any dispute as to amount to

be offset, it is respectfully referred to JHO Gammerman to hear and report.

Mtn Seq. No. 021

JCP's motion for a protective order is denied. JHO Gammerman properly determined that JCP's billing records are material and necessary to the determination of Macy's reasonable attorneys' fees and expenses. JCP seeks to challenge Macy's legal bills in this case as unreasonable. What JCP paid for its own legal costs in the same litigation is, thus, directly relevant to resolution of this issue. As JHO Gammerman properly noted, "the reasonableness of attorneys' fees on one side can be influenced by the fees paid by the other side to its attorneys" (Edel Affirm., Ex. B, October 7, 2015 Tr., p. 290:3-5). To the extent that JCP is concerned with privilege or work-product issues, JHO Gammerman previously addressed this concern by allowing JCP to redact its billing records to protect against disclosure of any material subject to the attorney-client privilege and/or work-product doctrine.

Accordingly, it is

ORDERED that plaintiffs' motion to reject the report of Hon. Ira Gammerman, J.H.O., is denied and the December 15, 2015 report is hereby confirmed in all respects; and it is further

ORDERED that defendants' cross motion to confirm in part and reject in part the report is granted; only insofar as the report

is confirmed in its entirety and is otherwise denied; and it is further

ORDERED that plaintiffs are directed to submit a proposed judgment, on notice, to the Court in accordance with this decision, within thirty days of the entry of this decision and order; and it is further

ORDERED that defendant's motion for a protective order is denied.

This constitutes the decision and order of the Court.

Dated: 6/6/16


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.