

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

PAUL MORELLI DESIGN, INC. : CIVIL ACTION  
: :  
v. : :  
: :  
MERIT DIAMOND CORP. a/k/a : :  
MERIT JEWELRY CORPORATION, : :  
MACY'S EAST, INC. d/b/a MACY'S : :  
a/k/a FEDERATED/MACY'S EAST, : :  
INC. AND FEDERATED DEPARTMENT : :  
STORES, INC. : NO. 99-3219

MEMORANDUM ORDER

Presently before the court is plaintiff's Motion to Dismiss Defendants' Counterclaims for unfair competition and tortious interference with a contractual relationship.

Unfair competition is "[a]nything done by a rival in the same business by imitation or otherwise designed or calculated to mislead the public in the belief that, in buying the product offered by him for sale, they were buying the product of another manufacturer." B.V.D. Co. v. Kaufmann & Baer Co., 116 A. 508, 508-09 (Pa. 1922).

To state a common law claim for unfair competition, a claimant must allege a false description or designation of origin, false or misleading description of fact, or false or misleading representation of fact with respect to goods or services which is likely to deceive as to the origin of those goods or services and that the claimant has a reasonable basis to believe it has been injured by the false designation, description of fact or representation. See 15 U.S.C. § 1125(a)(1)(A);

International Hobby Corp. v. Rivarossi S.p.A., 1998 WL 376053, \*7 n.7 (E.D. Pa. June 29, 1998) (elements of unfair competition claim same as those for Lanham Act claim except for requirement of affect on interstate commerce); Allen-Myland v. International Bus. Mach. Corp., 746 F. Supp. 520, 553 (E.D. Pa. 1990), decision supplemented on other grounds, 770 F. Supp. 1014, 1030 (E.D. Pa. 1991); Moore Push-Pin Co. v. Moore Business Forms, Inc., 678 F. Supp. 113, 116 (E.D. Pa. 1987).

To state a claim for tortious interference with contractual relations, a claimant must allege the existence of a contractual relation between the claimant and a third party; purposeful action on the part of the defendant specifically intended to harm the existing relation; the absence of a privilege or justification for doing so; and, actual legal damage as a result of the defendant's conduct. See Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 530 (3d Cir. 1998). The gravamen of the tort is intentional improper conduct "causing the third person not to perform the contract" with the claimant. Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175, 1183 (Pa. 1978) (quoting Restatement (Second) of Torts § 766), cert. denied, 442 U.S. 907 (1979). Liability is based on the pecuniary loss to the claimant resulting from the refusal of the third party to perform. Id.

Defendant-counterclaimants have sufficiently alleged that plaintiff made a false description of fact or false representation with respect to goods which was likely to deceive as to their origin. Macy's East and Federated Department Stores, however, are not "consumers" of the products in question in the usual sense as they clearly intended to re-sell the products to traditional consumers in the retail market. Even accepting that these counterclaimants were "consumers," there is no allegation or suggestion that they compete with plaintiff for business and that its alleged conduct resulted in competitive injury. See Serbin v Ziebart Int'l Corp., 11 F.3d 1163, 1175, 1179 (3d Cir. 1993) (plaintiff must prove commercial harm from "competitor's" false statements and thus injury suffered only in consumer context is not cognizable).

It appears that plaintiff undertook purposeful action specifically intended to disrupt a contractual relationship between Macy's and Merit by threatening Macy's with legal action for distributing jewelry supplied by Merit based on a false representation that the pieces were "blatant copies" of plaintiff's designs. See Total Care Sys., Inc. v. Coons, 860 F. Supp. 236, 241 (E.D. Pa. 1994) (intent may be shown "where the actor knows an injury is certain or substantially certain to occur as a result of his action"). There is no allegation, however, that the relationship was disrupted.

It is alleged that Macy's has purchased jewelry from Merit since November 1998, but there is no averment that the relationship was terminated because of plaintiff's interference. Further, even if plaintiff may have caused Macy's not to perform a contract with Merit, there is no suggestion whatsoever that Merit refused to sell jewelry to Macy's because of plaintiff's conduct. In fact, none of the counterclaimants has alleged any damages whatsoever in either counterclaim.

**ACCORDINGLY**, this                      day of May, 2000, upon consideration of plaintiff's Motion to Dismiss Counterclaims (Doc. #7) and the response of defendant-counterclaimants, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and defendants' counterclaims are **DISMISSED** without prejudice to Merit promptly to replead if it can in good faith aver actual interference with its contractual relations with Macy's or injury resulting from the alleged false statement, and without prejudice to Macy's and Federated promptly to replead if either or both can in good faith aver competitive injury or a refusal by Merit to perform as a result of plaintiff's alleged false statement.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**