

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

JOANNA PACITTI, a minor, by JOSEPH : CIVIL ACTION  
PACITTI and STELLA PACITTI, her parents :  
and guardians :  
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 :  
v. :  
 :  
MACY’S and MACY’S EAST, INC. : NO. 97-2557

Giles, J.

August , 1998

MEMORANDUM & ORDER

FACTS

Macy’s (including Macy’s East, Inc.), is a retail department store with stores across the country. Its flagship store is in New York City, and it has a branch store in King of Prussia, Pennsylvania. In 1996, Macy’s contracted with the Classic Annie Production Limited Partnership (“the Producers”), to promote the auditions for the stage role of Annie in the 20th Anniversary Broadway Production and national tour of the musical “Annie.” Macy’s heavily advertised the auditions by placing advertisements in five different regional area newspapers and by postering its stores. In all these advertisements, Macy’s announced the contest as, “Macy’s Search for Broadway’s New

Annie.” The advertisement in the Philadelphia Inquirer, from which Plaintiffs learned of the “Annie Search,” stated, in pertinent part:

Imagine, putting on a great big show like Annie without “Annie.” It’s unthinkable! Unimaginable even! But you can help! If you are a girl between 7 and 12 years old and 4’ 6” or under, the starring role in this 20th Anniversary Broadway Production and National Tour could be yours!

Just get your hands on an application . . . Annie’s director/lyricist Martin Charnin will pick the lucky actresses for final callbacks at Macy’s Herald Square . . . .

The Official Application, which all competing girls were required to fill out, stated in part: “Annie, America’s most beloved musical and Macy’s, the world’s largest store, are conducting a talent search for a new “Annie” to star in the 20th Anniversary Broadway production and national tour of “Annie . . . . Macy’s invites girls . . . to the following auditions in the Macy’s stores listed below . . . .”

The Official Rules entitled “Macy’s Search for Broadway’s New ‘Annie,’” stated in part:

2. The “Annie” selected at the “Annie-Off-Final Callback” will be required to work with a trained dog. The tour commences Fall 1996, with a Broadway opening tentatively scheduled for Spring 1997, with a post-Broadway tour to follow. Parent(s) or guardian(s) will accompany tour children.
3. By participating, you agree to follow these Official Rules and you consent to the taking of a photograph, for identification purposes only. You also agree that Macy’s (and/or a Macy’s designee) may use your name, likeness, biographical data and/or voice for advertising, promotional activities and/or publicity, whether or not related to the audition and also acknowledge that such use requires neither any further permission nor any compensation.
8. All determinations made by the Producers or their designate judges are being made at their sole discretion and each such determination is final.

Preliminary auditions were held at five regional Macy's stores. One finalist from each store, and five other girls selected from an audition process advertised only in trade papers, competed for the role in the "Annie-Off Final Callback" held at Macy's Herald Square in New York City on August 8, 1996. The chosen girl, after signing a contract with the Producers, was expected to participate in the national tour and then to open on Broadway as "Annie."

Joanna Pacitti, who was 12 years old at the time, was brought to audition at the Macy's King of Prussia store by her mother on June 23, 1996. She was selected from among that group of participants. She was provided transportation and expenses to attend the final "Annie-Off" in New York City. She prevailed. In a bout of publicity, Macy's promptly proclaimed her to the public as "Broadway's new Annie." The Pacitti's signed a standard equity contract with the Producers and young Ms. Pacitti set out on their national tour, starring as Annie.

In February 1997, while traveling between shows in Connecticut and Pennsylvania, after performing over 100 shows throughout the country, and just two weeks shy of the anticipated Broadway opening, the Producers faxed Ms. Pacitti notice that she was being removed from the Annie role, but would continue to receive her weekly salary pursuant to the standard equity contract.

Ms. Pacitti and her parents, have now sued alleging that Macy's breached a "contract" with them and made fraudulent misrepresentations and omissions concerning

the “Annie” audition process.<sup>1</sup> Because the court finds that Macy’s had no contractual obligation to the Plaintiffs guaranteeing that she would, in fact, perform on Broadway as Annie, Macy’s motion for summary judgment must be granted.

### CONTRACT CLAIM

Plaintiffs argue that Macy’s offered the award of a prize, i.e., appearing on Broadway, to the winner of what they have characterized as the “Annie contest.” They vehemently resist the description of the screening events as auditions. Therefore, they contend that Macy’s should be held liable because Ms. Pacitti did not appear on Broadway as “Annie,” although she won the prize at the Herald Square “Annie Off.” Plaintiffs cite a long line of cases from New York and Pennsylvania<sup>2</sup> which stand for the proposition that a general offer of a prize to contestants by a contest promoter, and the subsequent tender of the performance requested in the offer by the contestants, can create an enforceable contract with regard to the contestant’s entitlement to the prize. See e.g. Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248 (1989) (holding that the offer of a new car for the shooting of a hole-in-one was enforceable); Hoff v. Daily Graphic, Inc., 230

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<sup>1</sup> In their amended complaint, Plaintiffs assert the following contract and tort claims: fraudulent misrepresentation (Count I); equitable estoppel (Count II); fraudulent misrepresentation (Count III); breach of contract (Count IV); public policy tort (Count V); breach of implied covenant of good faith and fair dealing (Count VI); and for punitive damages (Count VII).

<sup>2</sup> Because there is no material difference between Pennsylvania and New York state law in regard to the issues of this case, the court declines to conduct a choice of law analysis.

N.Y.S. 360 (N.Y. Sup. Ct. 1928) (finding that the winner of a contest to name movie titles was entitled to receive the offered prize of a model home).

To support this position, Plaintiffs assert that they relied on Macy's advertisement, "Macy's Search for Broadway's New Annie," the Official Rules, and the "contest-like" atmosphere, i.e. buttons, balloons, t-shirts and posters, in believing reasonably that Macy's was offering the Broadway role as the prize for winning the Annie Search. Specifically, they point to language in the Philadelphia Inquirer advertisement which stated: "The starring role in this 20th Anniversary Broadway Production and National Tour could be yours!" and in the Official Application which declared that the Producers and Macy's were "conducting a talent search for a new "Annie" to star in the 20th Anniversary Broadway production . . . . Plaintiffs also point to paragraph 3 of the Official Rules which allowed Macy's to use the chosen girl's "name, likeness, biographical data and/or voice" for commercial purposes and without compensation, as evidence of the benefit that Macy's was receiving in exchange for the "prize" of a Broadway appearance.

The primary question at this stage is whether the Official Rules to which Plaintiffs were signatories reasonably permits a construction that what was occurring was a contest for a prize as opposed to an audition. As a matter of law, the court concludes that the Official Rules language is not ambiguous. Paragraphs 4 and 7 thereof specifically describe the screening event as an audition. Paragraph 4 reads, "In order to participate in

the audition . . .” and paragraph 7 states that “[t]he audition is subject to all applicable laws and regulations.” Further, the Official Rules specifically state that the Producers would determine who would be selected from the participants as the winner of the Annie Search. It reads “All determinations made by the Producers or their designated judges are being made at their sole discretion and each such determination is final. Therefore, Plaintiffs could not reasonably have relied upon Macy’s as the selector of “Annie” or as a controller of the Producers.

Plaintiffs also released Macy’s from any legal responsibility to them for any “liability to or with regard to the participants and/or her parent or legal guardian with respect to the audition(s).” Official Rules ¶ 6. Hence, they knew that while Macy’s was promoting the Annie Search, it was not the entity that would be contracting with the new “Annie.”

Finally, it is undisputed that upon being selected by the Producers as the winner of the Annie Search, Ms. Pacitti and her parents were given the opportunity by the Producers of signing a contract. That was wholly expected and necessary. Plaintiffs’ knowledge of the Producers as the sole determiners of the Annie role was reinforced through execution of the standard equity contract.

Macy’s hope that Ms. Pacitti would become the next Broadway Annie were at least as high as the Plaintiffs’. This is evidenced by the enthusiastic, supportive advertisement campaign which followed the final selection at the “Annie Off.” However, Macy’s is not

liable monetarily for Plaintiffs' dreams being shattered by the Producers' exercise of their contractual right to terminate Ms. Pacitti's services prior to a Broadway appearance.

A Broadway role is not comparable to other contest awards. It is not like winning the "prize" of a new car for shooting a "hole in one," in golf, Cobaugh, 561 A.2d at 1249-50, or similar to winning a new house for choosing movie titles, Hoff, 230 N.Y.S. at 362-64. Here, it was obvious that Macy's was promoting auditions for the benefit of the Annie Producers who would select the successful auditioner for the Annie role.<sup>3</sup> The contract which she signed with the Producers did not guarantee her that she would open on Broadway, but instead considered her to be like every other actor in "Annie" who had won their role through an audition process but could be replaced at the Producers' discretion pursuant to the standard equity contract.

Plaintiffs received the benefit of their bargain by being offered a contract with the Producers for the "Annie" role, in exchange for Ms. Pacitti participating in "Macy's Search for Broadway's New Annie."

That Macy's could not reasonably be found to have offered a guaranteed Broadway opening is further supported by the Producers' explicit involvement in the audition process. When the Producers offered a contract to Plaintiffs consistent with the terms of the Official Rules any possible obligation Macy's had to Plaintiffs was fully met.

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<sup>3</sup> In its promotional materials Macy's uses the word "audition" over and over again. The word "contest" is never used.

## TORT CLAIMS

Plaintiffs' tort claims are predicated on their assertion that Macy's made fraudulent misrepresentations to them in the Official Rules and Application and in the attendant promotional publicity, to the effect that Macy's could ensure that the winner of the Annie Search would star on Broadway. Because, this court has found above that Macy's made no such claim, express or implied, these claims must be denied.

## CONCLUSION

An appropriate Order follows.

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ORDER

AND NOW this        day of August 1998, upon consideration of Macy's East, Inc.'s Motion for Summary Judgment, it is hereby ORDERED that the Defendant's motion is GRANTED. Summary Judgment is entered in favor of Defendant and against the Plaintiffs.

It is further ORDERED that all outstanding motions are DENIED as MOOT.

BY THE COURT:

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J.