

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MACY’S RETAIL HOLDINGS, LLC, formerly known as
MACY’S RETAIL HOLDINGS, INC.,

Plaintiff,

- against -

ROCKAWAY KB COMPANY, LLC,

Defendant.

Index No.:

SUMMONS

DATE FILED:

Plaintiff designates New York County
as the place of trial.

The basis of venue is the location
of Defendant’s place of business.

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this Summons, to serve a notice of appearance, on the Plaintiff’s attorneys within 20 days after the service of this Summons, exclusive of the day of service (or within thirty (30) days if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Dated: New York, New York
September 24, 2021

ROBINSON BROG LEINWAND
GREENE GENOVESE & GLUCK, P.C.

By: David Blumenthal
David Blumenthal, Esq.
Andrew B. Zinman, Esq.
875 Third Ave, 9th Floor
New York, NY 10022-0123
(212) 603-6300
Attorneys for Plaintiff

TO: ROCKAWAY KB COMPANY, LLC
1313 Broadway
New York, NY 10001

SUPREME COURT OF THE STATE OF NEW YORK
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MACY'S RETAIL HOLDINGS, LLC, formerly
known as MACY'S RETAIL HOLDINGS, INC.,

Plaintiff,

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ROCKAWAY KB COMPANY, LLC,

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VERIFIED COMPLAINT

Plaintiff Macy's Retail Holdings, LLC, formerly known as Macy's Retail Holdings, Inc., a subsidiary of Macy's Inc. (collectively with plaintiff, "Macy's" or "Plaintiff"), by its attorneys, Robinson Brog Leinwand Greene Genovese & Gluck P.C., as and for its Verified Complaint (the "Complaint") in this action, hereby alleges:

INTRODUCTION

1. The gravamen of this action is to enjoin defendant Rockaway KB Company, LLC ("Defendant") from its articulated intentions to allow a Macy's direct competitor to advertise on the billboard (the "Billboard") situated on the land and building ("Building") owned by Defendant, generally known as 1313 Broadway, New York, New York 10001 ("Premises"), in clear violation of the Restrictive Covenant (hereinafter defined), recorded and running with the land, that prohibits Defendant from allowing such competitor's advertisement.

2. Upon information and belief, the competitor Defendant is contemplating placing on the Billboard is Amazon.

3. The Premises and Billboard are adjacent to Macy's world famous department store located on 34th Street in New York City.

4. To the naked eye, the Billboard is on Macy's department store and in its own right iconic.

5. The Billboard has been the site of Macy's advertising for some 60 year.

6. Macy's right to advertise on the Billboard expired on August 31, 2021, when the term of the Agreement (hereinafter defined) expired.

7. Notwithstanding the expiration of the term of the Agreement, since 1963 Defendant has been prohibited from entering into an agreement with a Macy's competitor to advertise on the Billboard, which prohibition runs with the land forever.

8. Plaintiff seeks a declaratory judgment from the Court declaring that the Restrictive Covenant is in effect, valid and enforceable and a preliminary and permanent injunction against Defendant enjoining Defendant, and any successor in interest, from permitting advertising that "refer[s] directly or indirectly to any establishment selling at retail or directly to any customer" on the Billboard in violation of the Restrictive Covenant.

THE PARTIES

9. Macy's Retail Holdings, LLC. is a limited liability company, organized under the laws of Ohio, with its principal place of business in New York, New York.

10. Upon information and belief, Defendant is a limited liability company, organized under the laws of New York, with its principal place of business located c/o Kaufman Realty Corporation, 450 Seventh Avenue, Nelson Tower Building, New York, New York 10123.

JURISDICTION AND VENUE

11. Jurisdiction and venue before this Court are proper because pursuant to CPLR §503(a) the parties are located in and are both residents of New York County and the Billboard and Premises, upon which the Restrictive Covenant runs, is located in New York County.

BACKGROUND FACTS

12. On May 25, 1948, Macy's predecessor in interest, R.H. Macy & Co., Inc. and Defendant's predecessor in interest, The Robert S. Smith Corporation ("RSS"), entered into an agreement (the "Original Agreement"), restricting the use of the storefront and roof space of the Building, which was then owned by RSS, and, with some exceptions, prohibiting advertisement on the Billboard. A copy of the Original Agreement is annexed hereto as Exhibit A.

13. Defendant succeeded RSS as owner of the Premises.

14. On August 7, 1963, Macy's and Defendant entered into an amendment of the Original Agreement (the "1963 Agreement"), *inter alia*, to permit Macy's to advertise on the Billboard. A copy of the 1963 Amendment is annexed hereto as Exhibit B.

15. The 1963 Amendment was amended in 1973 (the "1973 Amendment").

16. The 1973 Amendment was amended in 1983 (the "1983 Amendment").

17. The 1983 Amendment was amended in 2011 (the "2011 Amendment"; collectively with the Original Agreement, the 1963 Amendment, the 1973 Amendment, and the 1983 Amendment, the "Agreement").

18. The 1963 Amendment provides the following restriction with respect to the advertising that is permitted on the Billboard:

"[t]he advertising or anything else on said signs and structures or replacements thereof, *shall be limited forever*, without limitation as to time and use by any person, firm or corporation, except Macy['s] or any designee, licensee or sublessee of Macy['s] to advertising *which shall not advertise or refer directly or indirectly to any establishment selling at retail or directly to any consumer. . .*"

(the "Restrictive Covenant"). *See* Exhibit B, 1963 Amendment, Section 3.(c). (emphasis added).

19. The Restrictive Covenant was not modified by the subsequent amendments, *i.e.*, the 1973 Amendment, the 1983 Amendment and the 2011 Amendment.

20. Further, all such Amendments confirmed and ratified the terms of the Agreement, and therefore, the Restrictive Covenant has been confirmed and ratified many times over and remains in effect today.

21. The Agreement was recorded and filed in the Office of the City Register of the City of New York on August 18, 2011, and “the world” has been on notice of the Restrictive Covenant ever since.

22. Defendant has been on notice of the Restrictive Covenant since 1963. A copy of the recordation is annexed hereto as Exhibit C.

Recent Negotiations and Defendant’s Threat to Breach the Restrictive Covenant

23. The 2011 Amendment extended the term of the Agreement through August 31, 2021. As the expiration date approached, Macy’s began negotiating with Defendant concerning renewal terms to extend the Agreement.

24. On May 21, 2021, on behalf of Macy’s, Mr. Benjamin Brotzman spoke with Mr. Ed Hart, the managing member of Defendant regarding the prospective renewal of the Agreement.

25. During the call, Mr. Brotzman set forth the general parameters of Macy’s offer for renewal.

26. In response, Mr. Hart informed Mr. Brotzman that Defendant was in discussions with a very “prominent online retailer” concerning the advertising on the Billboard.

27. There was little doubt that Mr. Hart was talking about Amazon on the call.

28. On June 8, 2021, having not heard back from Mr. Hart, Mr. Brotzman emailed him to see if Defendant had a counter-offer to Macy's renewal offer.

29. Mr. Hart responded by email that day and told Mr. Brotzman that his partners were surprised by May's offer and they "are reviewing all alternatives at this time."

30. By early August, it became clear that the parties could not come to renewal terms.

31. On August 20, 2021, counsel for Defendant wrote Macy's counsel informing Macy's that Defendant did not believe that it was bound by the Restrictive Covenant, that it has "the right to license the sign space to any off-site advertisers" without restrictions, and that it "will proceed with alternative advertisers."

32. A clear threat of Defendant's breach of the Restrictive Covenant could not have been more present.

33. The term of the Agreement terminated on August 31, 2021.

34. Macy's abandoned the Billboard as of August 31, 2021.

If Defendant Breaches the Restrictive Covenant and Permits a Competitor to Advertise on the Billboard, Macy's Will be Irreparably Harmed

35. Defendant's threat to enter into an agreement with a competitor of Macy's to advertise on the Billboard is apparent, made even more so by Defendant taking the position that the Restrictive Covenant is not in effect.

36. Macy's department store on 34th Street is Macy's flagship store.

37. Macy's is the most recognizable and famous department store in the world.

38. The Billboard is located in the heart of Manhattan, across the street from Penn Station.

39. The Billboard is viewed annually by the millions of tourists, residents and commuters of New York City.

40. The Billboard is approximately 2200 square feet and is prominently displayed and seen, especially during the Macy's Thanksgiving Day parade. A picture of the Billboard is annexed hereto as Exhibit D.

41. The damages to Macy's customer goodwill, image, reputation and brand, should a "prominent online retailer" (especially, Amazon) advertise on the Billboard are impossible to calculate.

42. Macy's online business grows every year.

43. Amazon and other online retailers are direct competitors of Macy's. If Amazon or another competitor were to advertise on the Billboard, the negative impact on Macy's would be immeasurable.

FIRST CAUSE OF ACTION

(Declaratory Judgment)

44. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 43 of this Complaint as if fully set forth here.

45. Macy's and Defendant as respective successors in interest, are parties to the Agreement.

46. The Agreement contains a Restrictive Covenant that restricts the type of advertising that may be placed on the Billboard and by whom.

47. There is an actual and justifiable controversy between Macy's and Defendant with respect to whether the Restrictive Covenant is in effect.

48. As a result, Macy's seeks a declaration of its legal rights.

49. Macy's has no adequate remedy at law.

50. By reason of the foregoing, Macy's seeks a declaration that:

- a. The Restrictive Covenant is in effect, valid and enforceable;

- b. The Restrictive Covenant runs with the Premises; and
- c. Defendant, and any successor in interest is prohibited from permitting advertising “that refers directly or indirectly to any establishment selling at retail or directly to any customer” on the Billboard in violation of the Restrictive Covenant.

SECOND CAUSE OF ACTION

(for a Preliminary and Permanent Injunction)

51. Plaintiff repeats and realleges each of the allegations contained in paragraphs 1 through 50 of this Complaint as if fully set forth here.

52. Defendant contractually covenanted in the Agreement that Macy’s shall be entitled to injunctive relief to enforce the Restrictive Covenant, agreeing that “Macy shall have the right at any time, without limitation as to time, to enforce by way of injunction” the Restrictive Covenant, a “covenant running with the land [Premises] for the benefit of the adjacent Macy department store premises.” *See* Ex. B. (1963 Amendment, Section 3(c)).

53. Macy’s has demonstrated a likelihood of success on the merits and that a balancing of the equities favors the issuance of an injunction against Defendant, enjoining Defendant from violating the Restrictive Covenant.

54. Unless Defendant is preliminarily enjoined from violating the Restrictive Covenant, Macy’s customer goodwill, reputation, image and name brand will be irreparably damaged, resulting in incalculable damages.

55. Macy’s has no adequate remedy at law.

56. By reason of the foregoing, Macy’s is entitled to a preliminary and permanent injunction against Defendant enjoining Defendant, and any successor in interest, from permitting advertising “that refers directly or indirectly to any establishment selling at retail or directly to any customer” on the Billboard in violation of the Restrictive Covenant.

PRAYER FOR RELIEF

WHEREFORE, Macy's requests that the Court:

- (1) on the First Cause of Action, issue a declaration that;
 - a. The Restrictive Covenant is in effect, valid and enforceable;
 - b. The Restrictive Covenant runs with the land; and
 - c. Defendant, and any successor in interest is prohibited from permitting advertising "that refers directly or indirectly to any establishment selling at retail or directly to any customer" on the Billboard in violation of the Restrictive Covenant.
- (2) on the Second Cause of Action, order a preliminary and permanent injunction enjoining Defendant from permitting advertising "that refers directly or indirectly to any establishment selling at retail or directly to any customer" on the Billboard in violation of the Restrictive Covenant;
- (3) award Macy's its reasonable attorneys' fees and costs of this action; and
- (4) award Macy's such other relief as the Court may deem just and proper.

Dated: New York, New York
September 24, 2021

Robinson Brog Leinwand Greene
Genovese & Gluck P.C.

By: David Blumenthal
David Blumenthal
Andrew B. Zinman
875 Third Avenue
New York, New York 10022
Telephone: 212-603-6300

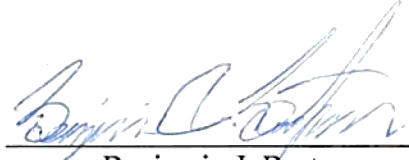
Attorneys for Plaintiff

VERIFICATION

STATE OF OHIO)
) ss:
COUNTY OF HAMILTON)

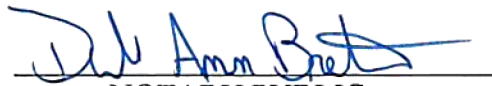
BENJAMIN J. BROTZMAN, being duly sworn, deposes and says:

1. I am a principal in the retail group of Macy’s Corporate Services, LLC., a subsidiary of Macy’s Retail Holdings, LLC, the plaintiff in this action.
2. I have personal knowledge of the allegations set forth in the Verified Complaint except those which are stated upon information and belief, and as to those allegations, I believe them to be true.
3. My belief, as to all matters in said Verified Complaint not stated upon my knowledge, is based on the information acquired from the books and records of Macy’s Retail Holdings, LLC.
4. I am verifying this Complaint because the plaintiff is corporation, and I am a principal thereof.



Benjamin J. Brotzman

Sworn to before me this
24th day of September, 2021



NOTARY PUBLIC



DEBORAH ANN BRELITCH
Notary Public, State of Ohio
My Commission Expires
September 14, 2022

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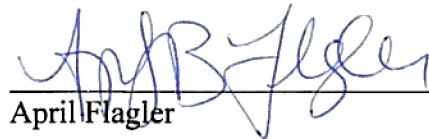
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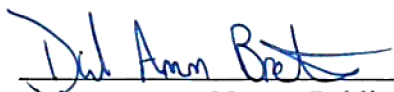
STATE OF OHIO)
) ss.:
COUNTY OF HAMILTON)

CERTIFICATE OF CONFORMITY

The undersigned does hereby certify that he is an attorney at law duly admitted to practice in the State of Ohio; that he makes this certification in accordance with the requirements of the Clerk of the County of Hamilton pertaining to the acknowledgement of the proof of the verification of Benjamin J. Brotzman, to be filed in Supreme Court, New York County; that the foregoing acknowledgment of Benjamin J. Brotzman, taken before Deborah Ann Brelitch, a Notary in the State of Ohio, being the state in which it was taken, and based upon my review thereof, appears to conform with the laws of the State of Ohio, as to the purpose for which it is submitted and filed.


April Flagler

Sworn to before me this
24th day of September 2021


Notary Public



DEBORAH ANN BRELITCH
Notary Public, State of Ohio
My Commission Expires
September 14, 2022