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Jos. A. Bank Escapes Deceptive Ad Suit Over Discounts

By **David McAfee**

Law360, Los Angeles (January 28, 2013, 7:36 PM ET) -- A New Jersey federal judge on Monday threw out a proposed class action by two consumers who claimed men's clothing retailer Joseph A. Bank Clothiers Inc. used deceptive advertising practices to lie about discounts, saying plaintiffs failed to specifically show unlawful conduct.

Monday's dismissal puts an end to allegations that Jos. A. Bank misled consumers by offering its "sale" items at perpetual discounts for a number of years and never actually selling at the purported regular price, in violation of the New Jersey Consumer Fraud Act. U.S. District Judge Dennis M. Cavanaugh said the plaintiffs failed to provide specific claims under Rule 9(b) of the Federal Rules of Civil Procedure.

"Even after amendment, the amended complaint still fails to meet the particularity standard set forth in Rule 9(b)," Cavanaugh said in the opinion. "Plaintiffs have alleged that Jos. A. Bank misrepresented the regular pricing of its merchandise, yet have not provided any facts which demonstrate that the 'sale' price offered is identical to the true regular price of the merchandise and thus a misrepresentation."

Judge Cavanaugh also said the plaintiffs failed to show actual monetary losses as a result of the clothing retailer's advertising practices, a requirement for claims under the NJCFA, according to the opinion.

"Plaintiffs allege only that 'the ascertainable loss suffered by plaintiffs is the difference between what the regular price actually was and what the discount price should have been, yet have failed to provide this court with even a vague estimate of that figure or facts suggesting one exists,'" Cavanaugh said. "Therefore, the facts as alleged in the complaint do not constitute an 'ascertainable loss' under NJCFA."

Plaintiffs James Waldron and Matthew Villani filed suit against the retailer April 5, seeking to represent a class of Jos. A. Bank customers who purchased items "on sale" between April 2006 and now.

In August, Waldron and Villani amended the complaint and asserted a violation of the NJCFA and claims of unjust enrichment and common law restitution for which they sought an injunction on the deceptive advertising practices, damages, the costs of the suit and attorneys' fees.

But Judge Cavanaugh found that the plaintiffs failed to show specific violations of the NJCFA and, without actual losses, were without standing to sue for injunctive relief or damages.

"It is the finding of this court that plaintiffs have failed to show a real or immediate threat, or even likelihood, that they will suffer future injury as a result of advertising done by Jos. A. Bank," Judge Cavanaugh said. "Plaintiffs have similarly not provided any calculations for this court to evaluate demonstrating a markup of price or what the average 'regular' price to be paid for the merchandise in question was."

No oral argument was heard.

Representatives for the parties didn't immediately respond to requests for comment Monday.

Plaintiffs are represented by Charles A. Germershausen of Gardy & Notis LLP.

Joseph A. Bank is represented by Elina Chechelnitzky, Edward B. Deutsch and Ryan P. Mulvaney of McElroy Deutsch Mulvaney & Carpenter LLP.

The case is James Waldron et al. v. Jos. A. Bank Clothiers Inc., case number 12-cv-02060, in the U.S. District Court for the District of New Jersey.

--Editing by Lindsay Naylor.

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