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

PRESENT: BERNARD J. FRIED **PART 60**
Justice

Revelations Perfume and Cosmetics, Inc.,

Plaintiff,

- v -

Prince Rogers Nelson, et al.,

Defendants.

INDEX NO. **603350/2008**

MOTION DATE _____

MOTION SEQ. NO. **023**

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion: ☐ Yes ☐ No

By order dated January 18, 2011, I granted the motion by the plaintiff Revelations Perfume and Cosmetics, Inc. (Revelations) for the entry of default judgment against defendants Prince Rogers Nelson p/k/a Prince and Paisley Park Enterprises, Inc. (collectively "Prince Defendants") on the remaining causes of action against them in the amended complaint, namely fraudulent inducement, fraud, and tortious interference, and referred the issue of damages to a special referee to hear and report with recommendations.

On August 25, 2011, Special Referee Louis Crespo delivered his report and recommended that (1) Revelations be awarded its out-of-pocket losses of $3,948,798.58; (2) Revelations is not entitled to lost profit damages; and (3) Revelations is not entitled to an award of punitive damages. (Conclusions of Law, ¶¶ 47, 58, 65).

Revelations moves for an order confirming the referee's award of out-of-pocket costs and rejecting the referee's recommendations with respect to lost profit and punitive damages. The Prince Defendants cross-move for an order rejecting the referee's award of out-of-pocket costs and confirming the referee's recommendations with respect to lost profit and punitive damages.

It is fundamental that a referee's report and recommendation should generally be confirmed so long as it is substantially supported by the record. (*Mayer v. Nat'l Arts Club*, 223 A.D.2d 440, 440 [1st Dep't 1996]; *Kardanis v. Velis*, 90 A.D.2d 727, 727 [1st Dep't 1982]). In particular, where issues of fact and credibility are referred to a referee, the

referee's findings should be upheld. (*See Rezzadeh v. Lucas*, 253 A.D.2d 698, 698 [1st Dep't 1998]; *Kardanis*, 90 A.D.2d at 727). But if the record fails to substantiate the referee's findings, those finding may be rejected. (*Kardanis*, 80 A.D.2d at 727).

Here, the record substantially supports the Special Referee's findings and the report is confirmed in all respects.

Regarding Revelations' out-of-pocket costs, the Special Referee found that Revelations relied on the representations and promises of the Prince Defendants in its decision to develop and market the 3121 fragrance and that the fraudulent inducement, fraud, and tortious interference by the Prince Defendants caused Revelations to suffer financial losses. (Conclusions of Law, ¶ 20). The Special Referee credited the testimony of Larry Couey, one of the founders and senior manages of Revelations, who testified that Revelations relied on the multiple misrepresentations by the Prince Defendants regarding Prince's commitment to promote the 3121 fragrance, beginning at the parties' first meeting in August 2006 and continuing throughout the parties' relationship. (Conclusions of Law, ¶¶ 21, 22). The Special Referee also credited the testimony of Neil Katz, one of Revelations' expert witnesses, regarding the importance of a celebrity's active participation in his name fragrance. (Conclusions of Law, ¶¶ 23-26). Thus, the record substantially supports the Special Referee's finding that the fraudulent inducement, fraud, and tortious interference by the Prince Defendants was the proximate cause of Revelations' out-of-pockets costs in developing and marketing the fragrance.

The Prince Defendants argue that the award of out-of-pocket costs should be rejected because Revelations did not rely on Prince's representations in its decision to develop and market the fragrance and thus the Special Referee's finding of proximate cause is not supported by the record. First, the Prince Defendants argue that Revelations could not have relied on the Prince Defendants' representations made in August 2006 because Couey testified that he would not have executed the License Agreement with defendant Universal Music Publishing Group (Universal) on December 1, 2006, unless Prince signed the Inducement Letter contemporaneously. However, this is different from admitting that Couey did not rely on any representation Prince made prior to executing the License Agreement or that Couey relied on the Inducement Letter to the exclusion of the August 2006 representations by the Prince Defendants. Thus, I conclude that Couey's reliance on the Inducement Letter does not run contrary to the Special Referee's finding of proximate cause.

Second, the Prince Defendants argue that the award of out-of-pocket costs incurred after December 2, 2006 (the majority of these damages) should be rejected because on that day, Prince informed Revelations that he would not give interviews for the launch party nor would he provide a single photograph for the press release. (Amended Complaint, ¶ 29). Thus, the Prince Defendants argue that as of December 2, 2006, the day after the License Agreement and Inducement Letter were executed, Revelations knew that Prince's prior promises to promote the fragrance were fraudulent and it could not have relied on these representations in its decision to incur millions of dollars in out-of-pocket expenses to develop and market the fragrance.

However, the fraud committed by the Prince Defendants was not fully manifest on December 2, 2006 and the Prince Defendants continued to send mixed messages to Revelations regarding Prince's commitment to promoting the fragrance. For example, it was not until January 2007, when Couey met again with Prince, that Prince informed him that he did not want his name to appear on the fragrance bottle or carton. (Findings of Fact, ¶ 46). Then, in late February 2007, Prince represented to Revelations that he would commit to appear on the Oprah Winfrey Show prior to the launch of the fragrance, which was scheduled in July 2007 at a Macy's department store in Minneapolis, MN. (Amended Complaint, ¶ 31-32). However, this appearance never occurred. Prince also promised Revelations that he would incorporate any promotion of the fragrance into his scheduled concert tour, including distributing samples of the product. (Amended Complaint, ¶ 43). However, the defendants cancelled the US tour. (*Id.*). Furthermore, defendant UMPG continued to assure Revelations that they would work on getting the necessary approvals from Prince and at no point did UMPG state that Revelations would never get approval for using Prince's image on the fragrance or that Prince would never make any personal appearances to promote the brand after the July 2007 launch. (Findings of Fact, ¶¶ 79-80).

Based on the continued misrepresentations by the Prince Defendants and the assurances of defendant UPMG, Revelations never gave up on trying to convince Prince to change his mind. For example, Couey knew that Revelations could put Prince's image on the packaging at the very last minute. Couey also believed that the personal appearances and promotions Prince promised in connection with his tour, including the appearance on Oprah, would have compensated for the deficiencies in the bottle or packaging. Based on this evidence, the Special Referee properly concluded that the fraud committed by the Prince Defendants was "continuous, not limited to one sole event in

August 2006." (Conclusions of Law, ¶ 21).

Third, the Prince Defendants argue that the doctrine of avoidable consequences bars the recovery of Revelations' out-of-pocket costs. The Prince Defendants' argue that Prince's tortious conduct was apparent no later than December 2, 2006, at which point Revelations should have refused to go forward with the relationship. Instead, Revelations spent millions of dollars to develop and market the fragrance.

The doctrine of avoidable consequences provides that "a tort defendant is not liable for consequences preventable by action that reason requires the plaintiff to take." (*Federal Ins. Co v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 [2d Cir. 1986] [citing to *Ellerman Lines, Ltd v. The Steamship President Harding*, 288 F.2d 288, 290 (2d Cir. 1961)]). The burden of showing that a plaintiff unreasonably failed to minimize damages rests with the wrongdoer. *(Id.*). The test applied to the plaintiff's conduct is whether the action "was reasonable under the circumstances" and the plaintiff can recover despite the existence of another reasonable course of action that may have avoided some of the plaintiff's damages. (*Id.* at 350-351).

As described above, the misrepresentations by the Prince Defendants were continuous and not limited to the sole event in August 2006. The Prince Defendants continued to give mixed signals to Revelations regarding Prince's commitment to market the fragrance and defendant UMPG continued to assure Revelations that they would work on getting approval from Prince. Based on this, the Special Referee properly credited Couey's testimony "that he took a course to recovery (sic) as much profit as possible in order to cover the costs of the product while at the same time pressing defendants Prince to perform as promised." (Conclusions of Law, ¶ 39). Thus, the Prince Defendants fail to demonstrate that the doctrine of avoidable consequences bars recovery.

Finally, the Prince Defendants argue that Revelations is not entitled to its out-of-pocket costs because it did not exhaust all of the remedies in the License Agreement and the Inducement Letter. In particular, the Prince Defendants argue that the Inducement Letter permitted Revelations to add Prince as a party to the License Agreement and thus make Prince responsible for everything that is represented in the License Agreement. However, Referee Crespo properly found this argument "ridiculous" because even assuming *arguendo* that the Prince Defendants can assert a contract-based defense, the evidence showed that adding Prince as a party to the License Agreement would not have "procured any performance by defendants, and merely electing to make them parties to the

License Agreement was of no real moment [.]" (Conclusions of Law, ¶¶ 30-31).

Regarding Revelations' claim for lost profit damages, Referee Crespo found that the testimony of the plaintiff's expert witness Wayne Hoeberlein was not credible because it was premised on the documents and the assumptions generated by Revelations without any independent research or investigation confirming the veracity or the reasonableness of this information. (Conclusions of Law, ¶¶ 54-57). Plaintiff argues that Referee Crespo ignored the most salient evidence of the reliability of Hoeberlein's testimony, which is the actual sales performance of the fragrance for a few months following the launch. However, Revelations cannot rely on such a short time period of sales of a new product to project sales of the 3121 fragrance, as well as two other fragrances that were never released, for five years into the future. (*Zink v. Mark Goodson Productions Inc.*, 261 A.D.2d 105, 106 [1st Dep't 1999]). Accordingly, Referee Crespo properly found that the plaintiff's lost profit damages are speculative and should be denied.

Finally, Referee Crespo's finding that the plaintiff is not entitled to punitive damages is confirmed. There is simply no evidence to support the plaintiff's argument that the Prince Defendants acted with malicious intent. (*Munoz v. Puretz*, 301 A.D.2d 382, 384-45 [1st Dep't 2003]).

Accordingly, it is

ORDERED that this motion and cross-motion is denied in part and granted in part; and it is further

ORDERED that Referee Crespo's report and recommendations are confirmed in all respects; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this action is severed and continued as to the remaining defendant Universal Music Publishing Group; and it is further

ORDERED that the remaining parties are directed to appear for a status conference on May 22 at 10:00 am.

Dated: _____ _____

J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**