

Gell-Tejada v Macy's Retail Holding Inc.

2012 NY Slip Op 32179(U)

August 14, 2012

Supreme Court, New York County

Docket Number: 111235/2010

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 111235/2010
GELL-TEJEDA, NATALIA
VS.
MACY'S RETAIL HOLDING
SEQUENCE NUMBER : 004
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ | No(s) 1
Answering Affidavits -- Exhibits _____ | No(s) 2
Replying Affidavits _____ | No(s) 3

Upon the foregoing papers, It is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE


_____, J.S.C.
HON. EILEEN A. RAKOWER

Dated: 8/14/12

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
NATALIA GELL-TEJADA, as mother and natural
Guardian of and on behalf of MAXLEE TEJADA,
an infant, and NATALIA GELL-TEJADA,
individually,

Index No. 11235/2010

Plaintiffs,
-against-

DECISION and ORDER
Mot. Seq.004

MACY'S RETAIL HOLDING INC., MAINCO
ELEVATOR & ELECTRICAL CO. and
THYSSENKRUPP ELEVATOR CORPORATION,

FILED

Defendants.

-----X

AUG 20 2012

HON. EILEEN A. RAKOWER:

NEW YORK
COUNTY CLERK'S OFFICE

This action arises out of an accident that occurred on July 2, 2010 when plaintiff Natalia Gell-Tejada's infant's finger was severed on an escalator at a Macy's department store located in Herald Square. Defendant Macy's Retail Holding, Inc. ("Macy's") moves for an Order pursuant to CPLR §3103 for a protective order denying the deposition sought by plaintiffs of Allen Westenberger and John Harper. Macy's moves alternatively for an Order pursuant to CPLR §3107 denying plaintiffs' notice of deposition of Allen Westenberger and John Harper as procedurally defective.

Plaintiffs oppose and cross move for an Order allowing plaintiffs to amend the complaint to add as named defendants, Macy's East Inc., and Macy's Inc., and to strike Macy's answer for failure to comply with Orders and other discovery demands.

A. Macy's Motion for a Protective Order

Macy's has produced Christopher McCrossen, a Loss Prevention Manager, who had responded to the scene of the accident for a deposition. As per the Court's

April 17, 2012 Order, Macy's was to produce three additional witnesses for deposition or provide their last known addresses if they were no longer employed. Thurman Brown, a Visual Security Officer, who responded to the accident was deposed on May 2, 2012. Randy Czyewski, the Director of Safety for the Macy's Herald Square store, was deposed on June 27, 2012. Macy's provided plaintiffs' counsel with the last known address of Gary Novello, who is no longer employed by Macy's. Thereafter, on or about June 29, 2012, plaintiffs served an undated Notice for Deposition on Macy's seeking a deposition of Alan Westenberger, the Director of Facilities Management at the Macy's Herald Square store, and of John Harper, the President of Operations of Macy's.

Macy's opposes plaintiffs' request to take the additional depositions of Allen Westenberger and John Harper on the basis that Macy's has already produced three witnesses for a deposition and that plaintiffs have not demonstrated any showing that the prior three depositions were insufficient. Macy's states that "plaintiffs have not asserted what additional areas of information they hope to obtain from either witness or that either witness has any discoverable knowledge necessary to this case. Both individuals are further removed from the facts surrounding the subject accident than [sic] any of the other witnesses already deposed."

In opposition, plaintiffs contend that Macy's has only produced one witness who knew of any details of the accident - that of Thurman Brown, the security guard who responded to the scene of the accident. Plaintiffs claim that they "simply seek witnesses with knowledge of the escalators" and that "[n]ot one witness produced knew anything of the operation of the escalators, the contract between Macy's and Thyssenkrupp and/or Mainco or have anything to do with the decision making that leads to information relevant to this action." As such, plaintiffs requested the deposition of Alan Westbrook, the facilities manager for Herald Square and serves as the liason with Thyssenkrupp, and Josh Harper, an executive who oversees operations, security and facilities.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." However, CPLR §3103(a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a

protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998])

“Only when the plaintiff establishes that the knowledge of the proffered official is insufficient to produce testimonial and documentary evidence ‘material and necessary’ to the prosecution of the action, as provided in CPLR 3101(a), may the court grant a motion for the production of additional witnesses.” *Colicchio v. New York*, 181 A.D. 2d 528 (1st Dept 1992). “Further, a party seeking to depose additional witnesses must make a detailed showing of the necessity for taking such depositions.” (*Id.*). Here, Macy’s has satisfied its burden and is entitled to a protective order as plaintiffs have failed to provide any detailed showing of the necessity for taking the additional depositions of Allen Westenberger and John Harper in their action.

B. Plaintiffs’ Cross Motion

Plaintiffs cross move for an Order allowing plaintiffs to amend the complaint to add as named defendants Macy’s East Inc. and Macy’s Inc. Macy’s oppose and contend that plaintiffs fail to “articulate a good faith basis why Macy’s East, Inc.[,] an inactive corporation before the accident, or Macy’s Inc. which is simply the parent of Macy’s Retail Holdings, Inc. should be named as defendants.”

Pursuant to CPLR 3025(b), “A party may amend his pleading . . .at any time by leave of court.... Leave shall be freely given upon such terms as may be just . . . Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” “CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice,

leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Here, plaintiffs failed to attach a copy of the proposed amended pleading as required under CPLR 3025 and plaintiffs' motion to amend is therefore denied. The Court need not consider the merits of the proposed amendment.

Plaintiffs also cross move for an Order to strike the answer of defendant Macy's Retail Holding Inc. for failure to comply with Orders and other discovery demands. Plaintiffs' claim is general, vague and conclusory and not sufficient to warrant the sanction of striking a party's answer. Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanction of striking a party's answer is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416[1st Dept. 1987]). Here, plaintiffs have failed to demonstrate facts which warrant this extreme sanction. Accordingly, plaintiffs' motion to strike is denied.

Wherefore, it is hereby,

ORDERED that defendant Macy's Retail Holding's motion for a protective order denying the deposition sought by plaintiffs of Allen Westenberger and John Harper is granted; and it is further

ORDERED that plaintiff's cross-motion is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 8/14/12

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE


EILEEN A. RAKOWER, J.S.C.