

Johnson v Lord & Taylor

2004 NY Slip Op 30188(U)

July 14, 2004

Supreme Court, New York County

Docket Number: 0112535/2002

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

NERISSA JOHNSON,
Plaintiff,

INDEX NO. 112535/2002

- v -

MOTION DATE 5/4/2002

MOTION SEQ. NO. 002

LORD & TAYLOR, a division of THE MAY DEPARTMENT STORES COMPANY,
Defendant.

MOTION CAL. NO. _____

LORD & TAYLOR, a division of THE MAY DEPARTMENT STORES COMPANY,
Third-Party Plaintiff.

- v -

BELL SECURITY,
Third-Party Defendant.

FILED
JUL 27 2004
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
_____	_____
_____	_____
_____	_____

Cross-Motion: Yes No

Upon the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: 7/14/04

WALTER B. TOLUB, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

-----x
NERISSA JOHNSON,
Plaintiff,

Index No. 112535/02
Mtn Seq. 001

- against -

LORD & TAYLOR, a division of THE
MAY DEPARTMENT STORES COMPANY,
Defendant.

-----x
LORD & TAYLOR, a division of THE
MAY DEPARTMENT STORES COMPANY,
Third-Party Plaintiff,

- against -

BELL SECURITY,
Third-Party Defendant.

-----x
WALTER B. TOLUB, J.:

Defendants Lord & Taylor, a division of the May Department Stores Company (hereinafter, "Lord & Taylor") and Defendant Bell Security (hereinafter, "Bell") move for summary judgment, dismissing Plaintiff's complaint, pursuant to CPLR 3212. Defendants claim that the facts stated in this litigation are insufficient to establish a prima facie case of racial discrimination pursuant to N.Y. Executive Law (Human Rights Law) Sec. 296. Defendant Lord & Taylor, as a Third-Party Plaintiff, also claims that it is not responsible for the conduct of Third-Party Defendant Bell. Plaintiff Nerissa Johnson has submitted an affirmation in opposition and supplemental affidavit in

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opposition to the motions, which the Court has considered in conjunction with the complaint in rendering its decision.

Plaintiff alleges a single civil rights claim stemming from an incident that took place on June 11, 2001 at the Lord & Taylor store located on 5th Avenue in Manhattan. Plaintiff, an African American woman, was lawfully shopping at the store when she exited the store less than two feet behind a Caucasian woman and passed through the sensormatic detection devices placed at the exit. The detection alarm sounded and a security guard employed by Bell and supervised by Lord & Taylor, who was stationed at the exit, failed to halt the Caucasian woman, but asked the Plaintiff to return to the store. Plaintiff claims that the security guard was motivated by race when he stopped her and that the actions of the Defendants denied the Plaintiff "the accommodations, advantages, facilities and privileges of the use of Defendant's store with the meaning of section 296 of the Human Rights Law." (Amended Complaint, para. 20). Additionally, Third-Party Plaintiff Lord & Taylor, cross-claims in order to redirect liability to Defendant Bell.

Facts

Plaintiff was a long term and regular customer of Lord & Taylor, having shopped there and having had an active Lord & Taylor credit card for the past thirty years. During the six-

month period before the incident, she visited the store once or twice per week.

At approximately 7:00PM on June 11, 2001, Plaintiff was exiting the store through the 5th Avenue exit. She exited through a revolving door less than two feet behind a Caucasian woman. The sensoromatic alarm at the door sounded immediately as the Caucasian woman passed it, at which point the Plaintiff made eye contact with the security guard posted at that exit and stopped for a moment. The Caucasian woman proceeded through the revolving door and the Plaintiff followed her. As soon as the Plaintiff got into the revolving door, the security guard held the door as to prevent her from exiting the store or to get her attention and asked her to come back into the store. Plaintiff came back in and, as she passed through the sensor device, the alarm did not sound. The guard did not ask to look in her bag, search her, or otherwise detain her.¹ Plaintiff asked the guard why he had asked her to come back in and he responded that he thought the sensor went off because of her bag.

Nonetheless, Plaintiff immediately sought to speak to the guard's supervisor. The guard called a supervisor and Mr.

¹Here the Court notes a discrepancy between the verified bill of particulars and the Plaintiff's EBT (deposition). In the bill of particulars, Plaintiff claims that she "was not assaulted but was stopped and searched by employees of the defendant" and that "a store employee ... allowed the white woman to exit, then stopped the revolving door and told the Plaintiff that he had to check her bag." In the Plaintiff's EBT she states that nobody looked in her bag or took merchandise from her bag.

Millikin, the store's Senior District Manager, came down to the site of the incident. Plaintiff asked Mr. Millikin what was the proper procedure when two persons passed through the alarm causing it to sound, and Mr. Millikin responded that both persons should be searched. Plaintiff told Mr. Millikin that she wished to make a formal complaint, and Mr. Millikin stated that he did not believe anyone was in the office. Upon Plaintiff's insistence, Mr. Millikin then directed Plaintiff to the office in the back of the store. During his deposition, Mr. Millikin confirmed that the security guards manning the exits were employees of Bell working under the direct supervision of Lord & Taylor.

Prior to the June 11th incident, Plaintiff had experienced difficulty with sensors accidentally being left on merchandise she had purchased and going off as she walked through the door. She testified that this happened on an average of two to three times per year during the last five years. During these occasions, the security personnel would ask to check her bags, and the Plaintiff would then proceed on her way after some discussion. Plaintiff claimed that she knew that on June 11th her merchandise had not caused the sensor machine to go off because she had asked the sales personnel to remove the sensors.

Plaintiff testified to two prior incidents involving department stores. In the early 1980's, plaintiff brought a

claim against Macy's when a salesperson mistakenly accused plaintiff of having stolen a bag, which she had paid for but chose to use while still in the store. The Macy's incident was settled for \$6,000. More recently, plaintiff confronted a Lord & Taylor store detective for allegedly following her.

Plaintiff denied any prior racial bias at Lord & Taylor. After the incident, Plaintiff continued to shop at the same Lord & Taylor store on a regular basis and retained her Lord & Taylor credit card. Plaintiff has not experienced racial bias at Lord & Taylor after the June 11th incident.

Plaintiff did not seek any medical, psychiatric or psychological treatment attributed to the June 11th incident. Two weeks after the incident, Plaintiff, distressed over the incident, informally spoke once with a friend who is a psychiatrist about what happened. Plaintiff did not seek any further treatment.

On June 5, 2002, Plaintiff commenced the instant action against Defendant Lord & Taylor claiming that Defendant's employee was racially motivated when he stopped plaintiff while a similarly situated Caucasian female was permitted to leave without examination of her belongings. Plaintiff alleges that Defendant violated Section 296 of the Human Rights Law thereby depriving plaintiff of the right to the accommodations, advantages, facilities, and privileges of the use of Defendant's

store. On July 1, 2003, Plaintiff's attorney amended the complaint to include Defendant Bell, the entity hired by Lord & Taylor that is responsible for security detail at its flagship Fifth Avenue store. On July 9, 2003, Defendant Lord & Taylor commenced a third-party action against Bell Security asserting that liability, if any, should be assigned to Defendant Bell.

Defendants argue that based upon Plaintiff's testimony, there is no evidence that the Defendants treated Plaintiff differently on account of her race.

Discussion

On a motion for summary judgment, the court's task is to determine whether there is an issue of fact to be tried and not to try such issues (In re Estate of Nelson, 105 Misc. 2d 747 at 748 [1980]). "If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment" (Esteve v. Abad, 271 A.D. 725 at 727 [1st Dept. 1947]). See also Yahudah v. Metro North Riverview House, 129 A.D.2d 429 [1st Dept. 1987]). It is "the proponent of a summary judgment who must make an initial prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ... Failure to make such showing requires denial of the motion, regardless of

the sufficiency of the opposing papers" (Pirrelli v. Long Island R.R., 226 A.D.2d 166 at 166 [1st Dept. 1996]).

In this case, Plaintiff, an African-American woman, was exiting a Lord & Taylor department store less than two feet behind a Caucasian woman when she was stopped by a security guard after a sensormatic alarm sounded. Plaintiff contends that the security guard's decision to allow the Caucasian woman to leave the store while only stopping her was based solely on her race. Plaintiff's deposition, coupled with defendant's statement of the facts, indicate that the guard did not follow Lord & Taylor's policy for searching customers. This raises a question of fact as to whether the guard's decision to stop the plaintiff was racially motivated.

Executive Law 296(2) provides in relevant part as follows:

"it shall be an unlawful discriminatory practice for any person, being the owner, . . . agent or employee of any place of public accommodation . . . because of the race . . . directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof . . ."

It is well accepted in New York that courts construe Executive Law 296 liberally (N.Y. Executive Law, § 300; see also, D'Amico v. Commodities Exch., 235 A.D.2d 313 [1st Dept. 1997]). Viewing the facts in the light most favorable to plaintiff, and drawing all reasonable inferences in favor of the nonmoving party (Del Costello v. Delaware & Hudson Ry. Co., 274 A.D.2d 19 at 24 [3rd

Dept. 2000]), the security guard's actions were sufficiently hostile to the plaintiff - albeit not an actual deprivation of the right to the use of the public accommodation (Holly v. Pennysaver Corp., 98 A.D.2d 570 [2nd Dept. 1984]) - to successfully establish an actionable claim for discrimination under the New York Human Rights Law.

Defendant Lord & Taylor contends that under Section 218 of the General Business Law it is entitled to stop and question the Plaintiff. Section 218 of the General Business Law states that:

In any action for . . . invasion of civil right, brought by any person by reason of having been detained on or in the immediate vicinity of the premises of (a) a retail mercantile establishment for the purpose of investigation or questioning as to criminal possession of an anti-security item . . . or as to the ownership of any merchandise . . . it shall be a defense to such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by . . . the owner of the retail mercantile establishment . . . his authorized employee or agent and that such officer, owner, employee or agent had reasonable ground to believe that the person so detained was committing or attempting to commit larceny on such premises of such merchandise.

A statute's interpretation and application in a given case are questions of law (See, St. Vincent's Hosp. and Med. Ctr. of N.Y. v. Tax Comm'n of City of N.Y., 463 N.Y.S.2d 362 [1983]).

Questions concerning whether a statute was applied in a discriminatory manner are questions of fact. Defendants have the right to stop and question persons whom the store has a reasonable basis to believe may be shoplifting (General Business

Law §218). However, to decide whether the Defendant has exercised his right in a discriminatory manner involves mixed questions of law and fact which preclude summary judgment (Teachers Ins. & Annuity Ass'n. v. Rogers, 41 A.D.2d 1020 at 1021 [4th Dept. 1973]).

Furthermore, Defendants failed to articulate a legitimate, nondiscriminatory reason for stopping the Plaintiff and not the Caucasian customer. In Scott v. Citicorp Services Inc., defendants in a race discrimination action moved for summary judgment and met their burden of rebutting the prima facie case of discrimination by setting forth evidence of an independent, nondiscriminatory reason for terminating Plaintiff's employment. Plaintiff failed to raise a question of fact and the Defendant's motion for summary judgment was properly granted (Scott v. Citicorp Servs., 91 N.Y.2d 823 [1997]).

In the instant case, Defendants argue that based on Plaintiff's testimony, "there is simply no evidence that the Defendants treated Plaintiff differently on account of her race or racial malice," that Plaintiff was stopped because the alarm sounded when she exited, and that there is no evidence that the security guard saw the Caucasian woman. Taking the facts in the light most favorable to the non-moving party, once the security guard was aware that the two customers were exiting the store, his orders were to stop both; the fact that he chose to address

only the African-American customer raises questions of fact as to whether the guard's behavior was discriminatory.

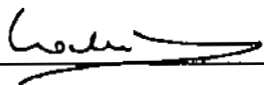
Accordingly it is

ORDERED that inasmuch as plaintiff has raised questions of fact concerning whether the guard's actions were discriminatory, summary judgment at this juncture must be, and is, denied.

ORDERED that, whereas the damages on this case are clearly *de minimis*, this matter is transferred to the Civil Court of the City of New York for immediate trial pursuant to CPLR 325-d.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/14/04



HON. WALTER B. TOLUB, J.S.C.

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