

Wrubel v Rose Boutique II, Inc.

2005 NY Slip Op 30175(U)

April 1, 2005

Supreme Court, New York County

Docket Number:

Judge: Leland G. DeGrasse

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

PRESENT: LELAND DeGRASSE

PART 25

0104259/2001

Justice

WRUBEL, EVELYN
VS
ROSE BOUTIQUE II

INDEX NO. _____

MOTION DATE DEC 16 2004

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 3

OTHER RELIEFS

The following papers, _____ nis motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with
accompanying Memorandum Decision.*

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

Dated: APR 01 2005

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

-----X
EVELYN WRUBEL and GEORGE WRUBEL,

Plaintiffs,

-against-

Index No. 104259/01

ROSE BOUTIQUE II, INC., et al

Defendants.

-----X

DeGrasse, J.:

Defendant Rose Boutique II, Inc. moves for judgment dismissing the complaint pursuant to CPLR 4401 and an order pursuant to CPLR 4404 (a) setting aside the verdict. Defendant Kostas & Michael Realty Corp. cross-moves for an order pursuant to CPLR 4404 directing the entry of judgment in its favor in the sum of \$20, 307. 67 on its cross claims against Rose Boutique. Plaintiff Evelyn Wrubel was injured in a fall down an interior stairway on premises leased from Kostas & Michael and operated as a flower shop by Rose Boutique. The jury found liability on Rose Boutique's part and the court dismissed plaintiffs' claims against Kostas & Michael. The jury awarded Evelyn Wrubel \$200, 000 for past pain and suffering and \$125, 000 future pain and suffering. Plaintiff George Wrubel was awarded \$50, 000 for past loss of services and \$25, 000 for future loss of services.

Rose Boutique asserts that plaintiffs have failed to make out a prima facie case of negligence because jury heard no proof regarding the cause of the accident. In affirming the denial of Rose Boutique's motion for summary judgment, the Appellate Division found sufficient proof to

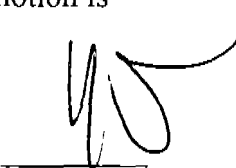
permit a finding of causation based on factors which include the following: configuration of the store interior, with shelving hung immediately adjacent to the stairway; placement of the merchandise on a shelf directly above the top step of the stairs; the unprotected nature of the entrance to the staircase; and the employee's directing of plaintiff to the location in question without any warning about the stairs (13 AD3d 264, 265 [2004]). The proof before the jury was sufficient to warrant a determination of liability based upon any of the aforementioned factors. Rose Boutique also argues that the awards of future damages are not supported by the evidence. The argument has merit inasmuch as the jury heard no evidence that the effects of plaintiff's injury would continue (*see Fenocchi v City of Syracuse*, 216 AD2d 864, 865 [1995]).

Post-accident photographs of the store's interior were offered into evidence as plaintiffs' exhibits 3 and 3A. The photographs were viewed by counsel and received without objection after a warning sign regarding the stairway was redacted therefrom. The jury requested the photographs during their deliberations. Counsel again checked the photographs before they were delivered to the jury room. Subsequently, the jury sent a note which reads as follows: "The Sign in Exhibit 3A, plaintiff was not truly redacted. The reflection is visible and part of our discussions." The note refers to a reflection of the sign on the glass door of the store's refrigerator case. Thereafter the court instructed the jury that the sign should not be part of their discussions and was not to be given any consideration. Rose Boutique argues that the jury's consideration of the sign's wording constituted misconduct. The argument lacks merit because the reflection of the sign, although overlooked by everyone but the jury, was not extraneous but part of an exhibit received in evidence. Moreover, there is no reason to believe that the court's immediate curative instruction was insufficient to dispel any attendant prejudice. Rose

Boutique's remaining arguments have been considered and lack merit. Kostas & Michael's claims for contractual and common-law indemnification are academic in light of the dismissal of the complaint against it at the conclusion of plaintiffs' case (*see Cardozo v Mayflower Ctr.*, _____ AD2d _____, 2005 NY Slip Op 02209 [2nd Dept, Mar. 21, 2005]).

For the foregoing reasons Rose Boutique's motion is granted to the extent that the jury's awards of \$125,000 for future pain and suffering and \$25,000 for future loss of services are vacated pursuant to CPLR 4401 and 4404 (a). In all other respects Rose Boutique's motion is denied. Kostas & Michael's cross motion is denied. **Settle judgment and order.**

Dated: April 1, 2005



J. S. C.