

**Miller v Home Depot USA, Inc.**

2010 NY Slip Op 30630(U)

March 11, 2010

Supreme Court, Nassau County

Docket Number: 10675/08

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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SYLVIA MILLER,  
  
Plaintiff,  
  
- against -  
  
HOME DEPOT USA, INC.,  
  
Defendant.

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TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 10675/08  
Motion Seq. No.: 01  
Motion Date: 09/08/09

**The following papers have been read on this motion:**

	<u>Papers Numbered</u>
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition, Affidavit and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:

Plaintiff moves, pursuant to CPLR § 3124, for an order compelling defendant to produce outstanding discovery as demanded by plaintiff and moves, pursuant to CPLR § 3126, for costs involved in compelling plaintiff to make this motion and sanctions against the defendant for unreasonable and willful failure to provide discovery. Defendant opposes said motion.

This matter arises out of a trip and fall accident that occurred at the Home Depot retail store located at 2000 Hempstead Turnpike, East Meadow, New York. It is alleged that on April 28, 2007, while a customer in the aforementioned store, plaintiff tripped and fell over molding that was protruding into the aisle where she was walking causing her to fracture her left patella.

Summons and Verified Complaint were filed on or about May 22, 2008. Issue was joined on or about July 18, 2008. Plaintiff's Demand for a Verified Bill of Particulars was served on or about July 27, 2008. Depositions of all parties took place on June 1, 2009 and plaintiff's Demand for Discovery and Inspection was served on or about June 4, 2009.

Plaintiff is now asking the Court to compel defendant to produce specific items of outstanding demanded discovery. The Court will address the seven specified items individually.

Plaintiff has requested from defendant the identity of the front end manager on duty at the time of the accident, whether this individual was present at the time of plaintiff's accident and the production of said individual for a deposition. Defendant submits that the identity of the front end supervisor was revealed on the General Liability Claim Worksheet which was provided to plaintiff's counsel prior to the deposition of Home Depot Assistant Store Manager John Negri. *See* Exhibit D of Plaintiff's Motion. Defendant also asserts that the identity of the front end supervisor was again revealed at the deposition of Mr. Negri. Defendant submits that the front end supervisor, Donna Burton, was not working at the time of plaintiff's accident. Defendant offers the affidavit of Angela Rice, a litigation paralegal in the Litigation Department of Home Depot U.S.A., Inc., in support of the fact that Ms. Burton was not working at the time of plaintiff's accident. Defendant adds that Mr. Negri testified that he was the only manager on duty at the time of said accident. Plaintiff contends that "since by defendant's own admission there is no designation on the worksheet of a front end manager that was working at the time of the accident and Mr. Negri could not provide said information, plaintiff called for the identity of the front end manager at the time of the accident. If there was no front end manager on duty at the time of the accident then defendant should so state, instead of pointing to what was already

known i.e., that Donna Burton was not on duty at the time of the accident. The sole issue is whether or not there was a front end manager on duty or not. Only the defendant can answer this question. If there was a front end manager then the identity of said individual should be revealed and a deposition should be permitted.” While the Court feels that defendant responded to plaintiff’s demand for this information in a manner which defendant thought was appropriate and sufficient, for purpose of complete clarity and to put an end to this issue, the Court is ordering that defendant state definitively if any Home Depot employee working in the capacity of front end manager was working on April 28, 2007 at the time of plaintiff’s accident. If such person does exist, defendant is to provide the name of same to plaintiff and an address where that person could be presently located. If there was no front end manager working at that time and place, defendant should confirm that information in writing.

Plaintiff has requested the identity of the employee assigned to the self check out area at the time of the accident, whether this individual was present at the time of plaintiff’s accident and, if so, the production of said individual for a deposition. Defendant states that it has “no information that such a person witnessed plaintiff’s incident or has any knowledge concerning the customer’s molding involved in plaintiff’s accident....If such an employee was a witness to the incident or had knowledge concerning the customer’s cart with the molding, such information would have been turned over. Any and all witnesses known to Home Depot were listed in the General Liability Claim Worksheet or identities provided in written discovery. Should Home Depot become aware of any other witnesses employed by Home Depot not listed in the General Liability Claim Worksheet or not provided through discovery to date, of course, it will provide the name and/or names of these employees. Without any evidence that the Home

Depot Employee witnessed or has knowledge necessary or material to plaintiff's case, plaintiff's request is nothing more than a fishing expedition and should be denied." Once again, while the Court feels that defendant responded to plaintiff's demand for this information in a manner which defendant thought was appropriate and sufficient, for purpose of complete clarity and to put an end to this issue, the Court is ordering that defendant state definitively if any Home Depot employee working in the capacity of the designated self checkout monitor was working on April 28, 2007 at the time of plaintiff's accident, and if such person does exist, provided the name of same to plaintiff and an address where that person could be presently located. If there was no employee working as self checkout monitor at that time and place, defendant should confirm that information is writing.

Plaintiff has requested a copy of the written statements and/or reports prepared by John Negri, the defendant's assistant manager, and Steve Sedgwick, following the accident. Defendant states that "[r]egarding plaintiff's request for Mr. Negri and Mr. Sedgwick's written statements, Home Depot recently provided these statements, which are confidentiality, per the Stipulation of Confidentiality entered into by the parties." The Court is thereby satisfied that defendant has complied with these demands.

Plaintiff has requested that the Court compel defendant to conduct a search at its home office in Atlanta for the entire video and/or CD-ROM discs which show the footage of the accident location before plaintiff's accident. Defendant states that said request was responded to twice before and that defendant has turned over the only video it has concerning plaintiff's accident. Both the store where the incident occurred and Home Depot's office in Atlanta performed a search for any further pre-accident footage, but no such video exists. Plaintiff replied that "[d]efendant has finally addressed the issue of the video tape to plaintiff's

satisfaction in finally acknowledging that the entirety of the video was not forwarded to home office in Atlanta and that there is no additional footage available. Accordingly, no further discovery issues concerning the video tapes remain outstanding.” This therefore makes said request in plaintiff’s motion moot.

Plaintiff has requested a copy of the store manual issued to all store employees including but not limited to the section dealing with safety at the premises and any safety handouts and employee video safety tapes as testified to by Steve Sedgwick at this deposition on August 14, 2009. The Court had been advised via letter from plaintiff’s counsel faxed to chambers on December 8, 2009, that “[o]n November 30, 2009, we received the enclosed responses to our demands. The responses to both the Store Manual and the Safety Handouts are heavily redacted. We have no way of determining whether the redacted information is relevant or not and are therefore requesting that the Court order the defendant to provide the Court with unredacted documents for an *in camera* inspection in order to determine their content and relevancy.” Defendant’s counsel faxed a reply letter to chambers on December 10, 2009, which stated “[a]s for the training video, after conferring with our client, since there is a Confidentiality Agreement in place with plaintiff’s counsel, we are mailing a copy of the confidential un-redacted training video to plaintiff’s counsel, pursuant to the Confidentiality Agreement. Regarding the redacted portions of Exhibit ‘A’ and Exhibit ‘B’ attached to defendant’s responses to plaintiff’s 5<sup>th</sup> Notice for Discovery & Inspection, defense counsel has no objection to Your Honor reviewing these materials un-redacted *in camera*.” The Court therefore requests un-redacted copies of the Store Manual and the Safety Handouts, Exhibit ‘A’ and Exhibit ‘B’ attached to defendant’s responses to plaintiff’s 5<sup>th</sup> Notice for Discovery & Inspection, so it can conduct an *in camera* inspection of same and rule accordingly.

Plaintiff had requested an inspection of the accident location by the plaintiff's expert. Defendant states that "[a]s for plaintiff's request for an expert inspection of the Home Depot store using a palate and molding, Home Depot objected to such an informal letter request for proper reasons. At the outset, the accident was captured on CCTV, a copy of which was provided to plaintiff's counsel some time ago. Plaintiff's unnamed and not designated expert can conduct the accident reconstruction at another location utilizing not only the details provided by the deposition testimony of plaintiff, Mr. Negri and Mr. Sedgwick, but the video of the accident. In fact, plaintiff's moving papers fail to set forth why the accident reconstruction must take place at the Home Depot as opposed to somewhere else such as the expert's facilities...Also this is a straight forward negligence claim not a products liability action. An expert inspection is not material or necessary to a trip and fall negligence claim. Notably, plaintiff's moving papers do not set forth the necessity of conducting an inspection and fail to set forth any particulars surrounding such an expert inspection." As plaintiff has not set forth the necessity of conducting the requested inspection nor has plaintiff provided any specifics with respect to the details of said inspection, the Court is denying plaintiff's application for it to order defendant to comply with said demand.

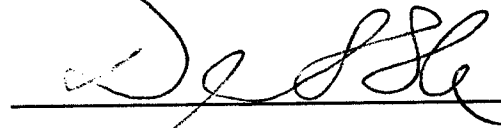
Finally, plaintiff moves, pursuant to CPLR § 3126 for costs involved in compelling plaintiff to make this motion and sanctions against the defendant for unreasonable and willful failure to provide discovery.

Pursuant to CPLR §3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." The court may certainly impose sanctions or strike pleadings where a party fails to

provide disclosure pursuant to an order. Siegel, Practice Commentaries, 3126:5. If a CPLR sanction motion is addressed to a mere notice to disclose, as opposed to an order, it must be shown that the disobedience was "willful." The Court finds that defendant has complied with many of the demands for discovery and inspection and anticipates that defendant will abide by the discovery rulings set for in this decision and order. Defendant's counsel's affirmation in opposition adequately sets forth that, in responding to or attempting to respond to plaintiff's discovery demands, defendant's behavior was not willful nor contumacious and plaintiff has failed to demonstrate how it could be characterized as such. Therefore, the Court finds that sanctions, as well as costs, are unwarranted and plaintiff's request for same is denied.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
March 11, 2010

**ENTERED**  
MAR 22 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE