

Okerblom v Macy's E., Inc.

2011 NY Slip Op 31394(U)

May 12, 2011

Supreme Court, Suffolk County

Docket Number: 06-17181

Judge: Emily Pines

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SHORT FORM ORDER

INDEX No. 06-17181
CAL. No. 10-01273OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY**PRESENT:**Hon. EMILY PINES
J. S. C.MOTION DATE 12-20-10 (#003)MOTION DATE 1-18-11 (#004)ADJ. DATE 1-18-11

Mot. Seq. # 003 - MD

#004 - XMD

X

MARGARET OKERBLOM,

Plaintiff,

- against -

MACY'S EAST, INC., MACY'S EAST an RETAIL
HOLDINGS, INC. and MACY'S RETAIL HOLDINGS, INC.,

Defendants.

XMACY'S EAST, INC., MACY'S EAST an
UNINCORPORATED DIVISION OF MACY'S RETAIL
HOLDINGS, INC. and MACY'S RETAIL HOLDINGS, INC.,

Third-Party Plaintiffs,

- against -

NORTH AMERICAN BUILDING SERVICES d/b/a
LASHELLDA MAINTENANCE CORPORATION, INC. and
EASTCO,

Third-Party Defendants.

XButtafuoco & Associates, LLP
144 Woodbury Road
Woodbury, New York 11797Lester Schwab Katz & Dwyer, LLP
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New York, New York 10271-0071O'Connor, O'Connor, Hintz & Deveney, LLP
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Upon the following papers numbered 1 to 35 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24; Notice of Cross Motion and supporting papers 25 - 31; Answering Affidavits and supporting papers 32 - 33; Replying Affidavits and supporting papers 34 - 35; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Macy's East, Inc., Macy's East An Unincorporated Division of Macy's Retail Holdings, Inc. and Macy's Retail Holdings, Inc., for an order directing a nonparty

witness, Gary Gorospe, to appear for a deposition or holding him in contempt for failure to appear is denied; and it is further

ORDERED that this cross motion by plaintiff Margaret Okerblom for an order quashing the subpoena duces tecum et ad testificandum served by defendants Macy's East, Inc., Macy's East An Unincorporated Division of Macy's Retail Holdings, Inc. and Macy's Retail Holdings, Inc. is denied, as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiff Margaret Okerblom as a result of a slip and fall accident on September 1, 2005. The accident allegedly occurred when plaintiff slipped and fell on a wet, slippery substance near the cash register in the junior girl's department of a Macy's store in Bay Shore, New York. Thereafter, defendants Macy's East, Inc., Macy's East An Unincorporated Division of Macy's Retail Holdings, Inc. and Macy's Retail Holdings, Inc. (hereinafter collectively referred to as Macy's) interposed an answer to plaintiff's complaint and then commenced a third-party action against third-party defendant North American Building Services, d/b/a LaShellda Maintenance Corporation (hereinafter "LaShellda"), for indemnity based upon breach of contract, negligence, and a hold harmless agreement.

Thereafter, on May 27, 2008, plaintiff served a notice on Macy's to disclose the names and addresses of employees, managers, assistant managers, and security personnel working in the junior girl's department of Macy's Bay Shore store at the time of plaintiff's incident. On August 14, 2008, Macy's served a response to the notice to produce, stating that they were conducting a search of their records for the names and addresses of those employed in their Bay Shore store when plaintiff's incident occurred. In that response, Macy's also objected to the production of the names and addresses of security personnel, but stated that they still were conducting a search of their records and if the information was obtained they would supplement their response. On August 25, 2008, in response to the preliminary conference order, Macy's stated that they were conducting a search of the names and addresses of all employees and their titles, including security personnel and managers that were working on the day of the subject accident. Subsequently, on April 8, 2010, Macy's served a supplemental response containing the same objections as those stated in their August 14, 2008 response. On April 22, 2010, Macy's served a further supplemental response to plaintiff's notice to produce, which provided the names and addresses of the employees in the junior girl's department on the date of plaintiff's accident. On June 10, 2010, the note of issue and certificate of readiness were filed by plaintiff's counsel. Following production of the further supplemental response, plaintiff's counsel obtained four nonparty witness statements, including the affidavit of Gary Gorospe, dated August 18, 2010.

After receiving notification from plaintiff, dated August 25, 2010, of Gary Gorospe's affidavit, Macy's requested an interview with Mr. Gorospe. After Mr. Gorospe allegedly refused to be interviewed

by Macy's, it served a subpoena directing him to appear for a deposition. Macy's now seeks an order compelling nonparty witness Gary Gorospe to appear for a deposition and holding him in contempt if he fails to appear at such deposition. Third-party defendant LaShellda supports Macy's motion on the basis that the information sought from Mr. Gorospe may be relevant to the issues pending in the matter. Plaintiff opposes the motion on the ground that Macy's has failed to demonstrate the existence of unusual or unanticipated circumstances that would allow them to obtain additional pretrial discovery after the filing of the note of issue and certificate of readiness.

CPLR 3101 (a) states, in pertinent part, that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*see Cirale v 80 Pine Street Corp.*, 35 NY2d 113, 359 NYS2d 1 [1974]). This provision has been liberally construed to provide disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). The test is one of usefulness and reason, and permits discovery of testimony that is sufficiently related to the issues in the litigation (*see Allen v Crowell-Collier Pub. Co.*, *supra*). However, if the information is sought from a person who is not a party to the action, then more stringent requirements are placed upon the disclosure, and it must be shown that the information sought cannot be obtained from sources other than the nonparty (*Kooper v Kooper*, 74 AD3d 6, 6, 901 NYS2d 312 [2d Dept 2010]; *see Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 80 AD3d 199, 912 NYS2d 798 [3d Dept 2010]). Of course, if the information sought is privileged, then it is not subject to disclosure, no matter how strong the showing of need or relevancy (*see CPLR 3101 [b]*; *see also Cirale v 80 Pine Street Corp.*, *supra*). It is left to the sound discretion of the trial court to determine what is material and necessary information (*see Andon v 302-304 Mott St Assocs.*, 94 NY2d 740, 709 NYS2d 873 [2000]).

Macy's application for an order directing nonparty witness Gary Gorospe to appear for a deposition is denied. The Uniform Rules of Trial Courts provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (*see* Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). Here, Macy's has failed to include an affirmation of good faith with the moving papers. Further, Macy's sought to depose Gary Gorospe approximately three months after he refused to submit to an interview by Macy's. However, Macy's has not stated what, if any, communications have transpired between the parties that would evince a diligent effort by it to resolve the issues raised in the instant motion. Therefore, summary denial of the motion is required (*see Mironer v City of New York*, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; *Natoli v Milazzo*, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]; *Walter B. Melvin, Architects, LLC v 24 Aqueduct Lane Condominium*, 51

AD3d 784, 857 NYS2d 697 [2d Dept 2008]).

Additionally, the filing of the note of issue denotes the completion of discovery, not the occasion to launch another phase of it. While interviews may still take place after the filing of the note of issue, at that juncture in the litigation any further pretrial proceedings are only allowed upon a showing of “unusual or unanticipated circumstances” and “substantial prejudice” (*see* 22 NYCRR §202.21 (d); *Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345 [2007]; *Jones v Grand Opal Constr. Corp.*, 64 AD3d 543, 883 NYS2d 253 [2d Dept 2009]; *James v New York City Tr. Auth.*, 294 AD2d 471, 742 NYS2d 855 [2d Dept 2002]). Here, Macy’s failed to demonstrate the existence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue, which requires additional pretrial proceeding to prevent substantial prejudice to its case (*see Wigand v Modlin*, __ AD3d __, 2011 NY Slip Op 02654 [2d Dept 2011]; *Owen v Lester*, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]). Gary Gorospe was an employee of Macy’s at the time of plaintiff’s accident, and he remained in their employ until two years after the subject accident. However, Macy’s neither sought to interview Mr. Gorospe during his employment with them, nor did it seek to depose him between the time he left their employ and the filing of the note of the issue on June 10, 2010. Macy’s assertion that they now seek to depose Mr. Gorospe due to information obtained from other sources, in the belief that his deposition testimony will contradict his affidavit, does not represent unusual or unanticipated circumstances (*see e.g. Filippazzo v Kormoski*, 75 AD3d 618, 905 NYS2d 276 [2d Dept 2010]; *Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). Thus, Macy’s has failed to produce any evidence that would justify relieving it of the consequences of its failure to conduct a timely interview or deposition of Mr. Gorospe (*see Owen v Lester, supra; Singh v City of New York*, 68 AD3d 1096, 890 NYS2d 333 [2d Dept 2009]; *Audiovox Corp. v Benyamini, supra*).

Moreover, Macy’s request to depose a nonparty witness is impermissible absent a showing that the disclosure sought is “material and necessary” to the prosecution of the action (*see Kooper v Kooper, supra; Mendelovitz v Cohen*, 49 AD3d 612, 852 NYS2d 795 [2d Dept 2008]), or that the information sought is unable to be obtained from any other source (*see Smith v Moore*, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; *compare Cespedes v Kraja*, 70 AD3d 622, 892 NYS2d 884 [2d Dept 2010]). More than mere relevance and materiality is necessary to obtain disclosure from a nonparty witness (*see e.g. Tannenbaum v Tenenbaum*, 8 AD3d 360, 777 NYS2d 769 [2d Dept 2004]; *Dioguardi v St. John’s Riverside Hosp.*, 144 AD2d 333, 533 NYS2d 915 [2d Dept 1988]). Macy’s proffered statement in its notice on the face of the subpoena as to the reason why they seek to depose Gary Gorospe amounted to nothing more than the information sought would be relevant and material and necessary in their defense of the case. Indeed, Macy’s was in possession of their junior girl’s department’s employee list and only provided plaintiff’s counsel with said list on April 22, 2010. Therefore, had Macy’s taken time to review their own list of employees and to ascertain whether any of the employees may have had relevant information, the need to

serve a subpoena on a nonparty may have been obviated (*see* CPLR 3101[a][4]; *Matter of Lutz v Goldstone*, 31 AD3d 449, 819 NYS2d 66 [2d Dept 2006]). Also, Macy's has not demonstrated that there has been any conflict in statements between plaintiff and nonparty witness Gary Gorospe to warrant a deposition of Mr. Gorospe (*compare* *Abbadessa v Sprint*, 291 AD2d 363, 736 NYS2d 881 [2d Dept 2002]).

Finally, Macy's failed to include with its motion papers a copy of the subpoena actually served on Gary Gorospe. Pursuant to CPLR 3101(a)(4), where the disclosure is sought from a nonparty, such nonparty shall be given notice stating the circumstances or reasons such disclosure is sought or required (*see* *Tenore v Tenore*, 45 AD3d 571, 844 NYS2d 704 [2d Dept 2007]). The purpose of such requirement is to afford a nonparty, who has no idea about the subject matter of the litigation, the opportunity to decide how to respond to said request (*see* *Matter of American Express Prop. Cas. Co v Vinci*, 63 AD3d 1055, 881 NYS2d 484 [2d Dept 2009]; *Wolf v Wolf*, 300 AD2d 473, 751 NYS2d 425 [2d Dept 2002]). The subpoena was improperly issued merely for the purposes of discovery and to ascertain whether nonparty witness Gary Gorospe would contradict himself at the deposition (*see* *Humphrey v Kulbaski*, 78 AD3d 786, 911 NYS2d 138 [2d Dept 2011]; *Garnot v LaDue*, 45 AD3d 1080, 845 NYS2d 555 [3d Dept 2007]). In addition, Macy's has not submitted proof that the notice of deposition was served upon all the other parties to the action (*see* CPLR 3101 [a][4]), or that the subject motion was served upon nonparty witness Gary Gorospe.

In view of the Court's denial of Macy's application for an order directing nonparty witness Gary Gorospe to appear for a deposition, plaintiff's cross motion for an order quashing the subpoena duces tecum is denied, as moot.

Dated: May 12, 2011
Riverhead, New York



EMILY PINES
J. S. C.

NON FINAL [x]

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