

DeRose v Bloomingdale's, Inc.

2013 NY Slip Op 33641(U)

January 17, 2013

Supreme Court, New York County

Docket Number: 104884/11

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

JORDAN DEROSE,
Plaintiff,

Index No.: 104884/11

Motion Date: 06/18/12

- v -

Motion Seq. No.: 01

BLOOMINGDALE'S, INC.,
Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____
Sur Replying Affidavits - Exhibits _____
Sur Sur Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1

2

3

FILED

JAN 25 2013

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers,

The court shall deny plaintiff's motion for summary judgment on the second cause of action in the complaint alleging violations of Labor Law 240 (1).

Plaintiff's affidavit in support of the motion and deposition testimony, submitted in opposition and reply to the motion, establish that plaintiff was directed to utilize a ladder in a manner which was inadequate to protect against the elevation-related hazards which caused plaintiff's fall leading to plaintiff's damages. As stated by the Court

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

[*2]

Pursuant to Labor Law § 240 (1), owners and contractors are required to construct, place and operate elevation-related safety devices to provide workers with proper protection from risks inherent in elevation-related work sites. Whether the provided safety device afforded proper protection to a worker within the meaning of Labor Law § 240 is ordinarily a question of fact. However, where the device collapses, slips or otherwise fails to perform its function of supporting the worker a prima facie entitlement to partial summary judgment is established. Here, plaintiff's deposition testimony that the unsecured aluminum extension ladder slipped out from underneath him while he was painting established plaintiffs' prima facie entitlement to partial summary judgment on liability under Labor Law § 240 (1), thereby shifting the burden to defendant to demonstrate the existence of a triable issue of fact. Importantly, defendant did not refute plaintiff's testimony or submit any evidence that the ladder was adequate and properly placed or that plaintiff's conduct was the sole proximate cause of the injuries. Accordingly, plaintiffs' motion should have been granted.

Dowling v McCloskey Community Services Corp., 45 AD3d 1232, 1233-1234 (3d Dept 2007).

However, plaintiff initially made this motion before his deposition was taken. The defendant's initial opposition to the motion was served before the plaintiff's deposition. Although the parties apparently conducted the plaintiff's deposition following the submission of defendant's initial opposition papers and then apparently among themselves agreed to allow defendant to submit supplemental opposition papers, this procedure is contrary to the CPLR. CPLR 3214 provides that all discovery is stayed by a summary judgment motion "unless the court orders otherwise." No party asserts that the court lifted the statutory stay.

Moreover, plaintiff appended his deposition transcript to his papers for the first time in his reply. As stated in Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 (1st Dept 1992), "As we view it, the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion."

Thus, based upon the initial motion papers filed, plaintiff's motion is premature as there were facts in the possession of the plaintiff, as evidenced by the deposition transcript, that defendant was entitled to discover in order to properly oppose the motion. See Bustillo v Tuckahoe Development, LLC, 300 AD2d 272, 273 (2d Dept 2002).

Accordingly, it is

ORDERED that plaintiff's motion is DENIED without prejudice as premature pursuant to CPLR 3212 (f).

This is the decision and order of the court.

Dated: January 17, 2013

ENTER:

JAN 25 2013

FILED

NEW YORK COUNTY CLERK'S OFFICE

Debra A. James
J.S.C.

DEBRA A. JAMES