

Vizcaino v Western Beef, Inc.
2013 NY Slip Op 33983(U)
June 4, 2013
Supreme Court, Bronx County
Docket Number: 301814/12
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 11

Index No. 301814/12
Motion Calendar No.
Motion Date:

YOLANDA VIZCAINO

Plaintiffs,

-against-

WESTERN BEEF, INC., WESTERN BEEF
RETAIL, INC., CACTUS HOLDINGS, INC.,
and 1564 SOUTHERN BOULEVARD
Defendant.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

On November 22, 2009, plaintiff was involved in an accident in a grocery store operated by the Western Beef defendants. Specifically, while completing the purchase of several items from the store at a check out counter, boxes containing candy canes that were situated near the counter fell onto plaintiff, knocking her to the ground. Plaintiff subsequently commenced this action to recover damages against the Western Beef defendants and the owner of the property.

Plaintiff moves under CPLR 3124 to compel defendants to provide certain information that plaintiff previously demanded. Plaintiff essentially seeks four things by this motion: (1) an exemplar of the candy cane boxes or an affidavit from someone with personal knowledge describing the boxes, (2) the name and contact information of the cashier who completed plaintiff's transaction at the store and assisted her immediately after the accident occurred, (3) the names, last known addresses and other information of all employees who were working at the store at the time the accident occurred, and (4) the deposition of an employee of the Western Beef defendants who is knowledgeable about the video surveillance system in the store, preferably an employee named "Saudi."

Defendants oppose the motion, arguing that they have responded to these demands to the best of their ability, and that plaintiff is attempting to engage in a fishing expedition by pursuing the information covered by the demands. The court will examine each request in turn.

Information regarding the description of the candy cane boxes, which struck plaintiff and knocked her to the ground, is material and necessary to the prosecution of this action (see Allen v. Crowell-Collier Pub. Co., 21 NY2d 403 [1968]). The store manager was deposed and described the boxes, but the description was only a general one. To enable plaintiff to identify the boxes that struck her, defendants must provide an exemplar of the boxes, if they have one. If they do not have one, defendants must provide to plaintiff all orders, receipts and invoices regarding candy canes purchased for the subject store between August 22, 2009 and November 22, 2009.¹ If defendants are unable to produce either an exemplar or orders, receipts and invoices, then they must provide affidavits(s) detailing the efforts they made to locate an exemplar and orders, receipts and invoices.

One of the most important pieces of information sought by this motion is the identity of the clerk who assisted plaintiff both with her transaction at the store and immediately after the boxes struck her. The receipt plaintiff received for her transaction indicated that the clerk was "Wanda," but there is some confusion as to who exactly this person was. Plaintiff testified that she used the "express counter" to complete her transaction and gave a physical description of "Wanda." Moreover, plaintiff produced the receipt of the transaction.

¹Although plaintiff asked for an affidavit from and someone with personal knowledge describing the boxes, the court concludes that relevant orders, receipts and invoices would lead to the information that plaintiff seeks, a method that will reduce the likelihood of a disagreement between the parties as to the sufficiency of such an affidavit.

In light of this information, defendants should be able to identify "Wanda" with modest diligence. The court also notes that, based on the testimony of the store manager, defendants may be able to identify "Wanda" by examining the user "ID" and password entered into the register at the express counter before the accident occurred.

An accurate list of the employees on duty at the time the accident occurred is also material and necessary to the prosecution of this action. Defendants did provide a list, based on information from an employee time-keeping system, but that list is apparently inaccurate. That was the suggestion of the store manager during his deposition on that issue. Therefore, defendants must provide another list of employees present in the store at the time of the accident, and that list should be prepared using any appropriate records, including those of the Western Beef defendants' human resources department. With that new list, defendants must submit an affidavit from the person preparing the list outlining the information he or she used to produce the list.

Lastly, information regarding the video surveillance system in the store is relevant to this action. According to the store manager, video surveillance cameras were positioned in the area where the accident occurred, and these cameras and the footage potentially captured by them were maintained by the Western Beef defendants' Loss Prevention Department. Footage from the cameras could show how and why the accident occurred as well as who witnessed it. In their responses to disclosure demands, defendants have maintained that no such footage exists. But that position is not easy to reconcile with the store manager's testimony regarding the existence and set-up of the video surveillance system. Therefore, the deposition of "Saudi," a member of the Loss Prevention Department identified by the store manager as someone who

may have personal knowledge of the store's video surveillance system, is directed (see Aronson v. Im, 81 Ad3d 577 [2011] [further deposition may be allowed where it is demonstrated that employee who had already been deposed had insufficient knowledge, or was otherwise inadequate, and that employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case]). Two potential subjects on which Saudi may have relevant information are the Western Beef defendants' video surveillance retention policy and their video surveillance preservation techniques (see generally Suazo v. Linden Plaza Associates, L.P., 102 AD3d 570 [2013]; Voom HD Holdings LLC v. EchoStar Satellite, LLC., 93 AD3d 33 [2012]). If Saudi is no longer employed by Western Beef defendants, then they must designate another employee from the Loss Prevention Department with sufficient knowledge of the store's video surveillance system.

Accordingly, it is hereby **ordered** that the motion is granted to the extent indicated above; and it is further,

Ordered that defendants, within 60 days of the date of service on them of a copy of this order with notice of entry thereof, must provide to plaintiff an exemplar of the subject candy cane boxes, if they have one, and, if they do not have one, defendants must provide to plaintiff all orders, receipts and invoices regarding candy canes purchased for the subject store between August 22, 2009 and November 22, 2009. If defendants are unable to produce either an exemplar or orders, receipts and invoices, then they must provide affidavit(s) detailing the efforts they made to locate an exemplar and orders, receipts and invoices; and it is further,

Ordered that defendants, within 60 days of the date of service on them of a copy of this order with notice of entry thereof, must provide to plaintiff the name and last known address of the cashier who completed plaintiff's transaction at the store and assisted her immediately after

the accident occurred; and it is further,


Ordered that defendants, within 60 days of the date of service on them a copy of this order with notice of entry thereof, must provide to plaintiff a list of employees present in the store at the time of the accident with an affidavit from the person preparing the list outlining the information he or she used to produce the list; and it is further,

Ordered that defendants, within 30 days of the date of service on them of a copy of this order with notice of entry thereof, must produce for deposition the Western Beef employee named "Saudi" who works in the Western Beef Loss Prevention department. If "Saudi" is no longer employed by the Western Beef defendants, they must designate another employee from the Loss Prevention department with sufficient knowledge of the store's video surveillance system; and it is further,

Ordered that a status conference will be held in Part 11, Room 711 of this courthouse at 9:30 a.m., on September 16, 2013 to determine whether there has been compliance with this order.

Dated: 6-4-13

Bronx, New York



Hon. Laura Douglas, J.S.C.