

**Jefferson v Magic Johnson Theatres Ltd.  
Partnership**

2012 NY Slip Op 31167(U)

April 26, 2012

Supreme Court, New York County

Docket Number: 100634/2011

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
*Justice*

PART 11

Jefferson, Langston

INDEX NO.: 100634/11

Plaintiff,

MOTION DATE: 1/12/12

- v -

Magic Johnson Theatres, et al.

MOTION SEQ. NO.: 602

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to ~~for~~ amend + cross motion  
to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes [ ] No

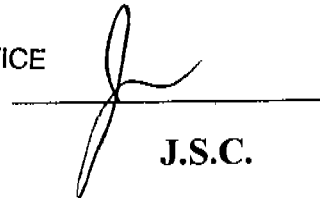
Upon the foregoing papers, it is ordered that this motion is decided in  
accordance with the annexed Memorandum Decision + order

**FILED**

MAY 02 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 26, 2012

  
J.S.C.

Check one: [ ] FINAL DISPOSITION  NON-FINAL DISPOSITION

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

-----X  
LANGSTON JEFFERSON,

Plaintiff

INDEX #: 100634/2011

- against -

MAGIC JOHNSON THEATRES LIMITED PARTNERSHIP,  
HUSA OPERATING CO., LLC, HUSA MANAGEMENT CO.,  
LLC, GRID PROPERTIES, INC., COMMONWEALTH LOCAL  
DEVELOPMENT CORP., RKO CENTURY WARNER  
THEATERS, INC., and CINEPLEX ODEON CORPORATION,

Defendants.

**FILED**

**MAY 02 2012**

NEW YORK  
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-----X  
JOAN A. MADDEN, J

In this personal injury action arising from a slip and fall on an icy sidewalk, plaintiff Langston Jefferson ("Jefferson") moves to amend the summons and complaint to add RKO Century Warner Theaters, Inc. ("RKO") and Cineplex Odeon Corporation ("Cineplex") as defendants. Defendant MJJ opposes the motion and cross-moves to dismiss the complaint against it for failure to state a cause of action. Plaintiff and HUSA Operating Co. LLC ("HUSA") oppose the cross-motion.

**Background**

On December 22, 2008, at approximately 3:45 pm, Jefferson sustained personal injuries when he slipped and fell on an icy condition on the sidewalk adjacent to 2309 Frederick Douglas Boulevard, New York, New York ("the building"). The building is a movie theater that is leased by Magic Johnson Theatres Limited Partnership ("MJJ") from HUSA Operating Co. LLC ("HUSA"). Defendant Grid Properties, LLC is a member of HUSA.

In response to a discovery request by Jefferson, defendants provided Jefferson with copies of leases and assignments relating to the building. These documents include an initial lease for the building that was entered into between HUSA, as landlord, and RKO, as tenant, on August 21, 1996.

Cineplex Odeon guaranteed RKO's performance under the lease, and various amendments to the lease. By agreement dated June 29, 2000, RKO assigned its rights under the lease to Cineplex Odeon and MJP. On March 28, 2003, a Fifth Amendment to the lease was executed between HUSA and MJP, naming MJP as the only tenant, as Cineplex Odeon was undergoing bankruptcy reorganization. The demised premises does not include sidewalks or any other exterior space, nor did it require MJP to repair or maintain the sidewalks or any exterior portion of the building.

Jefferson now moves for leave to serve a supplemental summons and amended complaint on Cineplex Odeon and RKO, and asserting that the request is timely as the motion was made prior to the expiration of the applicable statute of limitations, and that there will be no prejudice to the any existing party since depositions have not yet been held.

Leave to amend a pleading should be freely given (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise. Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). However, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted. Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not palpably insufficient or clearly devoid of merit. MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). In addition, [o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007).

Here, there are no allegations of prejudice or surprise. However, the motion to amend should be denied as there is no basis for adding RKO and/or Cineplex Odeon as defendants. The record shows

that RKO assigned its rights under the lease to Cineplex Odeon on June 29, 2000, and on March 28, 2003, a fifth amendment to the lease made MJP the sole tenant of the demised premises. Furthermore, an assignor of a lease may be liable for obligations under the lease based on privity between the landlord and assignor. South Bay Center, Inc. v. Butler, Herrick & Marshall, 43 Misc.2d 269, 271 (Sup. Ct. Nassau Co. 1964) ; Halbe v. Adams, 176 AD 588 (1<sup>st</sup> Dept 1917); In re Euro-Swiss International Corp. 33 BR 872, 889 (Bank S.D. NY 1983).<sup>1</sup> However, this continuing liability based on privity of contract does not inure to the benefit of third-persons like Jefferson to whom the assignor owes no duty. See generally Palka v. Servicesmaster Management Services Corp., 83 NY2d 579 (1994). In addition, as MJP was the sole tenant of the demised premises for almost six years prior to the accident, it cannot be said that any act or omission by RKO and/or Cineplex Odeon was a proximate cause of Jefferson's injuries. Accordingly, the motion to amend to add RKO and Cineplex Odeon as defendants is denied.

The remaining issue is whether MJP is entitled to dismiss the complaint against it based on provisions in the lease which MJP argues establish that areas outside the theater, including the sidewalk where Jefferson allegedly fell on snow and ice, were not part of the demised premises and that the landlord agreed to maintain these areas.

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, [i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference. Morgenthau & Latham v. Bank of New York Company, Inc.,

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<sup>1</sup> Consistent with this law, under the agreement, RKO agreed "[n]otwithstanding [the] assignment, ... that it will not be released or discharged from any liability whatsoever under the lease and will continue to be liable with the same force and effect as though no assignment has been made."

305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff d. 94 NY2d 659 (2000). In such cases, the criterion becomes whether the proponent has a cause of action, not whether he has stated one. Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result only where it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it. Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

Here, defendant has not shown that the complaint fails to state a cause of action. Moreover, a motion to dismiss based on documentary evidence is premature. While the lease contains provisions under which the landlord agreed to be responsible for maintaining the sidewalks, discovery may show that MJF nonetheless undertook to clean the sidewalk. Furthermore, the lease does not unambiguously establish the extent of the demised premises and, in any event, dismissal should not be granted absent Jefferson's sworn testimony identifying the exact accident location and the circumstances surrounding the accident, so that it can be determined whether any condition within the demised premises caused or contributed to his injuries or whether MJF was otherwise responsible for the accident.

Conclusion

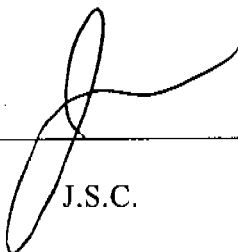
In view of the above, it is

ORDERED that the motion to amend is denied; and it is further

ORDERED that the cross motion to dismiss is denied; and it is further

ORDERED that the parties shall appear in Part 11, room 351, 60 Centre Street, on May 17, 2012 at 9:30 am for a preliminary conference.

DATED April 26, 2012

  
 \_\_\_\_\_  
 J.S.C.

**FILED**

**MAY 02 2012**

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