

**Jackson v Riverdale Towers Hous. Dev. Fund Co.,
Inc.**

2009 NY Slip Op 32290(U)

October 5, 2009

Supreme Court, Richmond County

Docket Number: 100577/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:100577/09
Motion No.:001 & 002**

**HARRISON JACKSON *and*
BARBARA JACKSON**

Plaintiffs

against

**RIVERDALE TOWERS HOUSING
DEVELOPMENT FUND COMPANY, INC.,
OSBORNE TOWERS HOUSING DEVELOPMENT
FUND COMPANY, INC.,
BROWNSVILLE GOURMET DELI CORP.,
LIVONIA BEAUTY SUPPLY INC.,
WING LUCK RESTAURANT CORP.,
ASSOCIATED FOOD STORES, INC.,
ASSOCIATED FOOD STORES, L.L.C.,
THE PAY-O-MATIC CORP.,
PAY-O-MATIC CHECK CASHING CORP., *and*
NAPOLI PIZZERIA,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to amend plaintiff's complaint and to dismiss:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1, 5
Answering Affidavits	2,3,6,7,8,9
Replying Affidavits	4. 10
Exhibits	Attached to Papers

This court grants plaintiffs' motion for leave to amend their complaint pursuant to the New York Civil Practice Law and Rules ("CPLR") §§ 305, 3025, and 2001 in order to correct misnomers in the names of parties, dismiss the action as against a party, add parties, and amend the caption to reflect those changes. The defendants Pay-O-Matic Corp. and Pay-O-Matic Check Cashing Corp. (Pay-O-Matic's) motion to dismiss pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) is also granted in its entirety.

Facts

This is a negligence action for personal injuries allegedly sustained by plaintiff Harrison Jackson on October 7, 2007 when he tripped and fell in the alleyway and/or driveway located in the rear of the strip mall located at 250-256 Livonia Avenue, Brooklyn.¹ The strip mall includes retail stores owned, operated and/or leased by the named defendants.

Discussion

Pursuant to CPLR § 3025(b), leave shall be freely given to a party to amend its pleading absent a showing of prejudice. In this case, the plaintiffs seek to (1) discontinue the action as against Associated Food Stores, Inc. and Associated Food Stores, L.L.C. (“Associated”), (2) add as parties “M.A.S. Food Stores Corp.” and “Riverdale Osborne Towers Housing Associates, L.L.C.,”(3) correct the name of Defendant Napoli Pizzeria, so as to amend it to “Perugia Corp.d/b/a Napoli Pizza,” and (4) amend the caption and pleadings to reflect these changes.

In support of their motion to add as a party Riverdale Osborne Towers Housing Associates L.L.C. (“Riverdale Osborne”), the plaintiffs submit documentation indicating that Riverdale Osborne acquired Riverdale Towers Housing Development Fund Company, Inc. (“Riverdale Towers”) and Osborne Towers Housing Development Fund. Inc. (“Osborne Towers”) on December 18, 2007.² The plaintiffs’ motion is partially unopposed by Riverdale Towers and Osborne Towers, who request to be replaced by “Riverdale Osborne,” and discontinue the action against them. Given that the plaintiffs have not chosen to discontinue the action against Riverdale Towers and Osborne Towers, the court will not dismiss the action against them at this juncture.

¹ Plaintiffs’ complaint at 2.

² Plaintiffs’ exhibit E.

Also, the plaintiffs seek to dismiss their action against Associated after receiving proof indicating that the supermarket located in the strip mall is “M.A.S. Food Stores Corp.” (“M.A.S. Food Stores”). In support of this motion, the plaintiffs attach an affidavit from Associated’s Secretary providing that Associated neither operates, manages, or controls the supermarket located in the subject strip mall.³ The affidavit further explains that the banner “Associated” is part of a voluntary agreement with independent supermarket M.A.S. Food Stores, where the latter purchases products manufactured and labeled by Associated.⁴ In other words, Associated only supplies products to M.A.S. Food Stores in exchange for a fee. Further, Associated’s counsel introduces a copy from the New York Department of State evincing that M.A.S. Food Store Corp. is a registered corporation with an address at 256 Livonia Avenue, Brooklyn, New York.⁵

Motion to Dismiss

To establish a prima facie case of negligence, the plaintiff must demonstrate that: (1) the defendant owed a reasonable duty of care and breached that duty of care and (2) the plaintiff suffered an injury as a direct and proximate cause of the defendant’s breach.⁶ An owner or tenant in possession of realty owes a duty of reasonable care to maintain the property in a reasonably safe condition when it possesses and/or controls the subject area.⁷ The issue of possession or control may be determined by documentary evidence or actions taken by the owner or tenant and may be an issue of fact if not acknowledged by the proper party of their correct legal name.

³ Plaintiff’s exhibit F.

⁴ *Id.*

⁵ Associated’s exhibit A.

⁶ *Abdul-Azim v. RDC Commercial Center, Inc.*, 210 AD2d 191 [2d Dept 1994].

⁷ *Id.*

In accordance with CPLR § 3211(a)(1), a party may move to dismiss a complaint on a defense founded on documentary evidence.⁸ A motion based on CPLR § 3211(a)(1) can only be granted when the documentary evidence “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.”⁹

A dismissal of a complaint can also be based on CPLR § 3211(a)(7) for plaintiff’s failure to state a cause of action. In evaluating this motion, the court must accept the facts in the complaint as true, and the plaintiff must be afforded the benefit of every favorable inference.¹⁰ Here, “the court’s function is to determine only whether the facts as alleged fit within any cognizable legal theory.”¹¹

Defendant Pay-O-Matic brings before this court a copy of its lease agreement with landlord Osborne Towers. The contract includes two articles that, read in conjunction, establish that Pay-O-Matic was only responsible for the maintenance and repair of the sidewalks that surround the strip mall. Article 4 of the Lease Agreement, entitled “Repairs,” establishes the following:

Owner shall maintain and repair the public portions of the building
. . . Tenant shall, throughout the terms of this lease, take good care
of the demised premises and the fixtures and appurtenances
therein, and the sidewalks adjacent thereto, and at its sole cost and
expense, make all non-structural repairs thereto as an when need to
preserve them in good working order and condition, reasonable
wear and tear, obsolescence and damage from the elements, fire or

⁸ See also *United States Trust Co. v. Gill & Duffus, Inc.*, 189 AD2d 655 [1st Dept 1993] citing *Greenwood Packing Corp. v. Associated Telephone Design, Inc.*, 140 AD2d 303 [2d Dept 1988].

⁹ *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314 [2002].

¹⁰ *Martin v. New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2006].

¹¹ *Id.*

other casualty, excepted.¹²

Along with the lease agreement, a rider specifies the duty of the tenant in relation to the aforementioned sidewalks. Article 52 of the rider states:

The Tenant shall, at its sole cost and expense, maintain and repair the sidewalk in front of and adjacent to the demised premises (“adjacent” meaning any and all sidewalk area near the demised premises).

The lease agreement provides that Pay-O-Matic was solely responsible for maintaining the premises it rented from Osborne Towers and the adjoining sidewalks. No evidence has been presented to demonstrate that Pay-O-Matic was in possession or control of the alleyway and/or driveway and was under the duty to maintain it.¹³ Nor did any party submit evidence raising an issue of fact that Pay-O-Matic created the condition that caused the injured plaintiff’s accident.¹⁴ The evidentiary submissions introduced by Pay-O-Matic in accordance with CPLR §§ 3211(a)(1) and 3211(a)(7) demonstrate that it had no obligation to perform repairs to the driveway/alleyway. Thus, Pay-O-Matic’s motion to dismiss the plaintiffs’ complaint insofar as it is asserted against it should be granted.

¹² Pay-O-Matic’s exhibit B.

¹³ *Id.*; *Millman v. Citibank*, 216 AD2d 278 [2d Dept 1995].

¹⁴ *Id.*

Accordingly, it is hereby:

ORDERED, that the caption shall be amended to read:

**HARRISON JACKSON *and*
BARBARA JACKSON**

Plaintiffs,

against

**RIVERDALE OSBORNE TOWERS HOUSING
ASSOCIATES, LLC,
RIVERDALE TOWERS HOUSING
DEVELOPMENT FUND COMPANY, INC.,
OSBORNE TOWERS HOUSING DEVELOPMENT
FUND COMPANY, INC.,
M.A.S. FOOD STORES CORP.,
BROWNSVILLE GOURMET DELI CORP.,
LIVONIA BEAUTY SUPPLY INC.,
WING LUCK RESTAURANT CORP., *and*
PERUGIA CORP. *d/b/a* NAPOLI PIZZA**

Defendants,

and it is further;

ORDERED, that Pay-O-Matic Corp. and Pay-O-Matic Check Cashing Corp.’s motion to dismiss the complaint against them is granted in its entirety; and it is further,

ORDERED, that the plaintiffs shall serve an amended verified complaint on the added defendants within 20 days from receipt of this order.

ENTER,

DATED: October 5, 2009

Joseph J. Maltese
Justice of the Supreme Court