

<b>Gabriel v Flatbush Caton LLC</b>
2021 NY Slip Op 30453(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 512926/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**GABRIEL JAMES,**

**Plaintiff(s),**

**DECISION/ORDER**

**-against-**

**Index No. 512926/2019**

**Motion Seq. No. 2, 3**

**FLATBUSH CATON LLC and  
ADOLLAR JUNCTION INC.,**

**Date Submitted: 12/10/2020**

**Defendant(s).**

X

**FLATBUSH CATON LLC,**

**Third-Party Plaintiff,**

**-against-**

**FLATBUSH DISCOUNT, INC.,**

**Third-Party Defendant.**

X

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to amend his pleadings and the third-party defendant's cross motion to dismiss***

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>21-27</u>
Notice of Cross Motion, Affirmation, Affidavit and Exhibits Annexed.....	<u>30-39</u>
Reply Affirmation.....	<u>                    </u>

**Upon the foregoing cited papers, the Decision/Order on this application is  
as follows:**

In this personal injury action, plaintiff moves in MS #2 to amend his complaint to add a new party defendant, 815 Flatbush Management LLC, and to add as a direct defendant the third-party defendant Flatbush Discount Inc., pursuant to CPLR §§ 3025, 1001, and 1002. Flatbush Discount Inc. has appeared in this matter and has answered the third-party complaint.

Third-party defendant Flatbush Discount Inc. opposes plaintiff's motion to add it as a direct defendant and cross-moves, in MS #3 to dismiss the third-party complaint as against it. Flatbush Discount's motion is unopposed. It supports the motion to dismiss with an affirmation of counsel, an affidavit from Basit Motiwala, who states that he is the President of Flatbush Discount, that they sold the business to Adollar Junction in 2017, that their business is "defunct", and the complaint should be dismissed. He annexes various items as proof of the sale, including the contract of sale and the closing statement, and avers that it had no duty to plaintiff on the date of plaintiff's accident.

Plaintiff filed a summons and complaint on June 11, 2019 against defendant Flatbush Caton LLC, the property owner, and Adollar Junction Inc., the ground-floor commercial tenant, for injuries which allegedly arose from a slip and fall accident which occurred on February 20, 2019 at the premises, which are located at 815 Flatbush Avenue, Brooklyn, NY 11226. Defendant Flatbush Caton LLC answered on October 15, 2019 (NYSCEF # 5). Defendant Adollar Junction Inc. did not answer. On March 18, 2020, defendant Flatbush Caton filed a third-party complaint against Flatbush Discount, Inc. (NYSCEF # 17). On May 22, 2020, the court issued a default order against Adollar Junction Inc. in response to plaintiff's motion (MS #1).

Plaintiff's proposed amended complaint (NYSCEF #20) simply applies the same cause of action for negligence which is asserted against the two existing defendants to the proposed two new defendants, by changing the caption to add them. There is no red-lined copy provided, but it does not seem that there are any other changes (compare NYSCEF Doc # 1 with Doc # 26).

A motion pursuant to CPLR 3025(b) to amend or supplement the pleading is typically "freely given upon such terms as may be just, such as including a grant of

costs or a continuance, and shall be "accompanied by the proposed amended or supplemented pleading clearly showing the changes or additions." Leave to amend is often granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (see *Davis v South Nassau Communities Hospital*, 26 NY3d 563, 580, 26 N.Y.S.3d 231, 46 N.E.3d 614 [2015]).

As there is no opposition to the branch of the plaintiff's motion to add 815 Flatbush Management LLC as a defendant, and no indication of any possible prejudice or surprise, this branch of the motion is granted.

Turning to Flatbush Discount's motion to dismiss the third-party complaint and deny plaintiff's motion to add it as a direct defendant, the court finds that the motion should also be granted. Movant has established that it sold its assets and assigned its lease to the commercial space to Adollar Junction in 2017. Thus, it cannot be responsible for plaintiff's 2019 slip and fall accident.

Accordingly, it is ORDERED that the plaintiff's motion to amend his complaint to add 815 Flatbush Management LLC as a defendant is granted, but the plaintiff's motion to add third-party defendant Flatbush Discount Inc. as a direct defendant pursuant to CPLR 3025 must be denied; it is further

ORDERED that plaintiff file via NYSCEF a Supplement Summons and Amended Complaint that reflects this Decision and Order within ten (10) days, and that such revised amended complaint be deemed served upon defendants Flatbush Caton LLC and Adollar Junction Inc. at that time; it is further

ORDERED that the clerk of the court is directed to amend the caption as follows:

\_\_\_\_\_X

**GABRIEL JAMES,**  
**Plaintiff,**

**-against-**

**FLATBUSH CATON LLC, ADOLLAR JUNCTION INC.**  
**and 815 FLATBUSH MANAGEMENT LLC,**

**Defendants.**

\_\_\_\_\_X

It is further ORDERED that plaintiff is granted sixty (60) days to serve the Supplemental Summons and Amended Complaint on the new defendant; and it is further

ORDERED that the third-party complaint is dismissed, without opposition.

Plaintiff shall serve a copy of this order with notice of entry upon the other parties within ten (10) days.

This constitutes the Decision and Order of the court.

Dated: February 16, 2021

**ENTER :**



\_\_\_\_\_  
**Hon. Debra Silber, J.S.C.**