

**Ferluckaj v Goldman Sachs & Co.**

2006 NY Slip Op 30543(U)

August 17, 2006

Supreme Court, New York County

Docket Number: 120760/04

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA  
*Justice*

PART 61

Index Number : 120760/2002

FERLUCKAJ, MILIHA

vs  
GOLDMAN SACHS

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

otion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

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

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

PAPERS NUMBERED  
1,2(A-D), 3,4  
5,6(A-E), 7,8  
9,10,11(A-P), 12(A), 13,14

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

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

**FILED**

AUG 24 2006

COUNTY CLERK'S OFFICE  
NEW YORK

SO ORDERED

*[Signature]*

Dated: 8/18/06

ROLANDO T. ACOSTA  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK PART 61**

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Miliha Ferluckaj,

Plaintiff,

– against –

Goldman Sachs & Co., and Henegan  
Construction Co., Inc.,

Defendants.

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Goldman Sachs & Co.,

Third-Party Plaintiff,

– against –

American Building Maintenance Co.

Third-Party Defendant.

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The following documents were considered in reviewing the parties' motions for summary judgment pursuant to CPLR §3212:

<b>Papers</b>	<b>Numbered</b>
<b>Ferluckaj's Amended Notice of Motion, Affirmation</b>	<b>1, 2 (Ex. A-N)</b>
<b>Henegans Affirmation In Opposition</b>	<b>3</b>
<b>Goldman Sachs' Affirmation In Opposition</b>	<b>4</b>

**DECISION/JUDGMENT**

Index No. 120760/04

Motion Seq. 3

**Present:**

**Hon. Rolando T. Acosta**  
Supreme Court Justice

**FILED**  
AUG 24 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

<b>Goldman Sachs' Notice of Motion, Affirmation and</b>	<b>5, 6 (Ex. A-K)</b>
<b>Memorandum of Law</b>	<b>7</b>
<b>Ferluckaj's Affirmation In Opposition</b>	<b>8</b>
<b>Goldman Sachs' Reply Affirmation</b>	<b>9</b>
<b>Henegan's Notice of Motion, Affirmation In Support</b>	<b>10, 11 (Ex. A-P)</b>
<b>Ferluckaj's Reply Affirmation</b>	<b>12 (Ex. A)</b>
<b>Henegan's Reply Affirmation</b>	<b>13</b>
<b>ABM's Affirmation in Partial Opposition</b>	<b>14</b>

Plaintiff Miliha Ferluckaj, an employee of American Building Maintenance Co. ("ABM"), initiated this action for personal injuries she allegedly sustained on March 22, 2001 while cleaning the windows on the 29<sup>th</sup> floor of defendant Goldman Sachs & Co. ("Goldman") offices located at 32 Old Slip Road, New York, New York ("the building"). ABM was hired by the Paramount Group, the owner of the building, to provide basic office cleaning and janitorial services. Plaintiff alleges that at the time of the accident she was cleaning windows on Goldman's 29<sup>th</sup> floor offices when she slip and fell off a desk on which she was standing on to reach the windows, resulting in physical injuries. Plaintiff also claims that at the date of the accident, construction was being undertaken by

defendant Henegan Construction Co., Inc. (“Henengan”) on behalf of Goldman to renovate Goldman’s office space on the 29<sup>th</sup> floor. In the instant motion, plaintiff seeks summary judgment against defendants Goldman Sacs & Co. and Henegan Construction Co., Inc. pursuant to CPLR § 3211, on the grounds that she is a covered person under Labor Law § 240(1) inasmuch as she was engaged in cleaning incidental to the construction project. Moreover, plaintiff argues that it was defendants Goldman and Henegan’s failure to properly supervise her and provide her with the appropriate safety equipment which resulted in her injury.

Defendant/third-party plaintiff Goldman also moves for summary judgment arguing that at the time of the accident, plaintiff was not engaged in any cleaning incidental to the construction work being done on its 29<sup>th</sup> floor offices. Rather, Goldman urges that construction to the office was completed the day before, and plaintiff was therefore engaged in her regular janitorial services as an employee of ABM.

Defendant Henegan Construction Co., Inc. likewise moves for summary judgment dismissing plaintiff’s complaint against it as well as any cross-claims against it on the grounds that the accident was not incidental to the construction work it was performing, and did not supervise or control the work being performed by plaintiff. That is, Henegan argues that construction of the premises

was completed prior to plaintiff's alleged accident and thus her Labor Law claims should be dismissed in their entirety as plaintiff was performing her janitorial tasks pursuant to her employment with ABM.

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (C.P.L.R. §3212[b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. Bush v. St. Claire's Hospital, 82 N.Y.2d 738, 739 (1993); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985). This standard requires that the proponent of the motion "tender[] sufficient evidence to eliminate any material issues of fact from the case," id., "by evidentiary proof in admissible form." Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions." C.P.L.R. §3212(b).

Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. Vermette v. Kenworth Truck Company, 68 N.Y.2d 714, 717

(1986); Zuckerman v. City of New York, *supra*, 49 N.Y.2d at 560, 562. Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist. *Id.*, at 562. In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, affording them the benefit of all reasonable inferences that can be drawn. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

In the instant action, material questions of fact exist as to whether or not plaintiff Miliha Ferluckaj was engaged in her regular course of employment on the date of her alleged accident or whether or not the cleaning work she was undertaking was incidental to the construction work being performed by defendant Henegan Construction Co. Inc. in renovating defendant Goldman Sachs & Co. 29<sup>th</sup> floor offices. For instance, all the parties concede that while Paramount Group executed a cleaning contract with American Building Maintenance Co., Goldman contracted directly with ABM for additional cleaning services. Plaintiff, pursuant to her employment with ABM, was assigned to clean parts of the 8<sup>th</sup> floor and the entire 24<sup>th</sup> floor. Plaintiff testified at her deposition that the only time she was involved in cleaning the 29<sup>th</sup> floor offices of Goldman was on the night of her alleged slip and fall. None of the parties have provided admissible evidence as to

whether the decision to have plaintiff posted on the 29<sup>th</sup> floor was the result of Goldman's extended cleaning contract or based upon a decision by her employer, ABM, to have her reassigned on the night of her slip and fall. Moreover, plaintiff alleges that on the night in question there was dust throughout the 29<sup>th</sup> floor, construction tools scattered, and apparent "touchup" work which needed to be done. However, plaintiff has failed to provide any proof in admissible form of the "touchup" work which needed to be done, or any conditions which would suggest that construction was still being done. Zuckerman, supra. Conversely, neither Goldman nor Henegan provide any admissible evidence which unequivocally demonstrates that construction work was completed. Indeed, there lies an issue of fact as to whether or not the week of March 22<sup>nd</sup>, 2001 to March 28, 2001 which included billing for construction of the 29<sup>th</sup> floor, included construction done on the 29<sup>th</sup> floor that week, as plaintiff suggests, or whether or not it related to the dumping of construction materials used in the construction of the 29<sup>th</sup> floor which was completed prior to plaintiff's accident, as Henegan and Goldman urge. Henegan and Goldman also both counter plaintiff's allegation that they were negligent in supervising her work by pointing to the fact that plaintiff was directed by her supervisor, also an employee of ABM, to clean the windows on the 29<sup>th</sup> floor and was never ordered or directed by either Goldman or Henegan to clean

the windows on the 29<sup>th</sup> floor. Accordingly, based upon the foregoing, it is hereby

ORDERED that plaintiff Miliha Ferluckaj's motion for summary judgment pursuant to CPLR § 3212 is DENIED; and it is further

ORDERED that defendant Henegan Construction Co. Inc.'s motion for summary judgment pursuant to CPLR §3212 is DENIED; and it is further

ORDERED that defendant/third-party plaintiff Goldman Sachs & Co.'s motion for summary judgment pursuant to CPLR §3212 is DENIED.

This constitutes the Decision and Order of the Court.

Dated: August 17, 2006

ENTER

SO ORDERED



ROLANDO ACOSTA  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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**FILED**  
AUG 24 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

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