

**Smith v 550 Madison Ave. Trust Ltd.**

2007 NY Slip Op 33380(U)

September 4, 2007

Supreme Court, New York County

Docket Number: 0121144/2003

Judge: Emily Jane Goodman

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

PRESENT: **EMILY JANE GOODMAN**

PART 17

Index Number : 121144/2003

SMITH, WINSTON

vs  
550 MADISON AVENUE TRUST LTD.

Sequence Number : 002

SUMMARY JUDGMENT

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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*

*per attached*

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

**FILED**  
SEP 18 2007  
NEW YORK  
COUNTY CLERKS OFFICE

Dated: 9/4/07

*[Signature]*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**EMILY JANE GOODMAN**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK; PART 17

-----x  
WINSTON SMITH,

Plaintiff,

-against-

Index No.: 121144/03

550 MADISON AVENUE TRUST LTD., SONY  
MUSIC ENTERTAINMENT, INC., SONY  
CORPORATION OF AMERICA, ABM JANITORIAL  
NORTHEAST, INC., individually and f/k/a  
INITIAL CONTRACT SERVICES, INC., ABM  
JANITORIAL, INC., individually and f/k/a  
INITIAL CONTRACT SERVICES INC., CB  
RICHARD ELLIS REAL ESTATE SERVICES, INC.,  
individually and f/k/a INSIGNIA/ESG INC.,  
and INSIGNIA/ESG,

Defendants.

-----x

**FILED**  
SEP 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**EMILY JANE GOODMAN, J.S.C.:**

In this slip and fall case, plaintiff Winston Smith commenced the instant action in November 2003, by filing a complaint against 550 Madison Avenue Trust Ltd. (the Trust), landlord of a commercial building located at 550 Madison Avenue, New York City (the Building), Sony Music Entertainment, Inc. and Sony Corporation of America (collectively, Sony), tenant of the Building. Thereafter, in May 2005, plaintiff amended his complaint to add the following defendants: ABM Janitorial Northeast, Inc., individually and f/k/a Initial Contract Services, Inc., and ABM Janitorial, Inc., individually and f/k/a Initial Contract Services Inc. (collectively, Initial), as well as CB Richard Ellis Real Estate Services, Inc., individually and

f/k/a Insignia/ESG Inc. and Insignia/ESG (collectively, CBRE). The record reflects that Initial is the provider of cleaning, janitorial and policing services for the Building, and CBRE is the provider of property management services for the Building.

After the parties concluded discovery, the Trust moves for summary judgment dismissing the complaint, and Sony and CBRE (Sony/CBRE) move for conditional summary judgment as to their cross claim against Initial based on contractual indemnification (Motion Sequence Number 002). On the other hand, Initial moves for summary judgment dismissing the complaint and the cross claim of Sony/CBRE (Motion Sequence Number 003). The motions are consolidated herein for disposition.

#### Background

Plaintiff alleges that the slip and fall incident occurred at approximately 6:45 A.M., on November 14, 2002, when he was working as a security guard at the Building. In his amended complaint,<sup>1</sup> plaintiff alleges that his injury happened in a service elevator (designated as elevator #3) within the Building. Specifically, plaintiff alleges that while he was exiting the elevator, he slipped on some greasy substance on the elevator floor, and as he tried to grab onto the protective padding that was hung on the elevator wall to break his fall, the

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<sup>1</sup> Unless otherwise specified, the complaint and the amended complaint are referred to hereinafter simply as the Complaint.

padding popped off the supporting rings. As a result, he alleges that he fell to the elevator floor injuring his left knee, which has required two surgeries subsequent to the accident.

The record reflects that the Building is a high-rise office building with several restaurants located on its premises, and that elevator #3 (and other service elevators) have been used frequently by the restaurants and Building employees to transport garbage and miscellaneous items from Level A to Level B of the Building, where the trash compactors are located. The Complaint alleges, among other things, that defendants were negligent in the ownership, management and maintenance of the Building and elevators, and that defendants have actual or constructive notice of the purportedly unsafe condition affecting the elevators (i.e. existence of a "recurrent condition" that leaves oily and greasy substances on the elevator floors), which caused plaintiff to slip and fall, thus sustaining bodily injuries.

Defendants deny plaintiff's allegations. While the Trust and Initial separately move for summary judgment dismissing the complaint, Sony/CBRE moves for partial summary judgment on their cross claim against Initial based on indemnification.

#### Discussion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320,

324 [1986]], the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Following the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment as well as the facts and circumstances of each case to determine whether relief may be granted. See *Giandana v Providence Rest Nursing Home*, 32 AD3d 126, 148 (1<sup>st</sup> Dept 2006) (because entry of summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues"); *Martin v Briggs*, 235 AD2d 192, 196 (1<sup>st</sup> Dept 1997) (in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion"). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez*, *supra*, 68 NY2d at 324-325. Moreover, summary judgment is generally granted in favor of the movant if there are no material

[\* 6]  
and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2<sup>nd</sup> Dept 1988).

Summary Judgment Should Be Granted In Favor Of The Trust

The law is well settled that an out-of-possession landlord or lessor "is not liable to third parties injured on demised premises unless said lessor has retained control over or is contractually obligated to make repairs or maintain the premises [citations omitted]." *Canela v Foodway Supermarket*, 188 AD2d 416, 416 (1<sup>st</sup> Dept 1992). *Accord Negron v Helmsley Spear, Inc.*, 280 AD2d 305, 306 (1<sup>st</sup> Dept 2001). However, if a landlord reserves a right to re-enter the leased premises for the general purpose of inspections related to health and safety, the landlord may be held liable for injuries occurring on the premises "only if there is a specific statutory violation and the injuries were caused by a significant structural or design defect [citations omitted]." *Burns v Gazda*, 16 AD3d 1057, 1057 (4<sup>th</sup> Dept 2005); *see also Canela*, 188 AD2d at 416; *Hakim v 65 Eighth Ave., LLC.*, 2007 NY Slip Op 06169 (1st Dept July 19, 2007).

In the instant case, almost a year before the alleged accident, the Trust, as lessor of the Building, entered into a triple-net lease agreement with Sony, as lessee. A copy of the lease, dated December 13, 2001, is attached as Exhibit "J" to Ryan Sestack's affirmation in support of the Trust's motion for summary judgment (Sestack Affirmation). Specifically, pursuant

to section 2.1 of the lease, the Trust demised and leased to Sony, during the lease term, all of its right, title or interest in and to the Building. Pursuant to section 4.1, Sony agrees to pay all costs, expenses and obligations relating to the Building, and to assume the sole responsibility for the condition, use, operation, maintenance and management of the Building. Further, pursuant to section 17.1, although the Trust has the right to inspect the Building and related maintenance records, such inspection right can be exercised only twice a year, and must be conducted during normal business hours.

Plaintiff does not address the rule of law that an out-of-possession landlord is liable to third parties for bodily injury only if there is a statutory violation, and the injury was caused by a significant structural or design defect of the leased premises. Instead, plaintiff argues that the Trust has a "non-delegable duty to keep the premises reasonably safe," and that the Trust should not be absolved of such duty by contracting with an independent cleaning company to perform cleaning services at the premises. Michael Fitzpatrick's affirmation in opposition to summary judgment (Fitzpatrick Affirmation), page 15. Plaintiff's argument is without merit, not only because it is unsupported by applicable law, but also because of the fact that it was Sony, through its agent and property manager CBRE, and not the Trust, that entered into a service contract with Initial to provide

cleaning services at the Building (the Service Contract), as more fully discussed below.

Also, plaintiff's allegation that the Trust and other defendants have violated various building codes of New York City is equally without merit. The alleged violations stated in plaintiff's verified bill of particulars were Administrative Code § 7-210, § 27-354 and § 27-2040. These code sections do not deal with "significant structural or design defect" of the Building. Instead, § 7-210 deals with sidewalk maintenance, § 27-354 deals with design and location of means of egress from buildings, and § 27-2040 deals with lighting for entrances and courtyards of multiple dwellings. These code sections are not applicable to the instant case. Simply put, plaintiff's allegation is that defendants failed to clean up the greasy spot on the elevator floor (not a structural or design defect), which purportedly caused him to slip and fall. Thus, any allegation of a statutory violation is unsustainable as a matter of fact and law.

Furthermore, plaintiff's allegation that the Trust has actual or constructive notice of the greasy spot that caused the accident, or that the Trust has notice of a purported recurrent condition that causes greasy spots to be left on elevator floors due to the transport of garbage in the elevators, is conclusory and not supported by any evidence. Hence, such allegation is without merit, particularly in light of the fact that the Trust,

[\* 9 ]  
pursuant to its lease arrangement with Sony, only has limited inspection rights of the Building.

Because there is no material and triable issue of fact, and in light of the applicable law and documentary evidence, the Trust's motion for summary judgment dismissing the Complaint should be granted as a matter of law.

The Complaint Against Initial Should Be Dismissed

In opposition to Initial's motion for summary judgment dismissing the Complaint, plaintiff argues that because Initial is contractually responsible for cleaning the Building and the elevators, and because Initial has actual or constructive notice of the purported recurrent condition of greasy spots in elevators that precipitated his injury, Initial was negligent either in omitting to clean the subject elevator the night before the accident or in failing to clean the elevator properly.

The Court of Appeals has identified limited situations in which a party who entered into a contract to provide services may become liable, in tort, for injuries sustained by a third party. In *Espinal v Melville Snow Contractors, Inc.*, (98 NY2d 136 [2002]), the plaintiff sued the contractor for negligently removing snow from a landowner's premises, which caused plaintiff to slip and fall. The Court stated that the contractor might be said to "have assumed a duty of care" and thus became liable in the following situations: (1) the contractor failed to exercise

reasonable care in the performance of its duties and "launche[d] a force or instrument of harm"; (2) the plaintiff detrimentally relied on the contractor's continued performance; and (3) the contractor has "entirely displaced the other [contracting] party's duty to maintain the premises safely." *Id.* at 140. In the context of analyzing whether the defendant contractor has "launched a force or instrument of harm," the Court explained that "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Id.* at 141-142.

Under the Service Contract that Initial entered into with CBRE (as agent and property manager of Sony with respect to the Building), a copy of which is attached as Exhibit "K" to the Sestack Affirmation, Initial is required to provide cleaning services for the Building, including the elevators, according to certain schedules and specifications. With respect to the first situation noted in *Espinal*, which is whether Initial's alleged negligence in cleaning the subject elevator "launched a force or instrument of harm" causing plaintiff's injury, it cannot be disputed that no evidence exists that Initial negligently created or exacerbated a dangerous condition. Indeed, plaintiff has not alleged that the purported recurrent condition (greasy spots on elevator floors) was negligently created or exacerbated by Initial. Thus, the first situation described in *Espinal* is not

[\* 1 ]

applicable to the facts of this case. See *Devalle-Store v Ultimate Serv., Inc.*, 33 AD3d 652 (2d Dept 2006).

With respect to the second situation in *Espinal*, the allegation that "plaintiff relied on the services of Initial to keep the elevators clean," Fitzpatrick Affirmation, page 14, and that Initial's failure to perform under the Service Contract caused plaintiff's injury, is not supported by any evidence. Other than the attorney's conclusory statement, plaintiff has not pointed to any evidence indicating how he changed his actions or behavior as a result of his general knowledge that Initial provided cleaning services.

With respect to the third situation, plaintiff argues that Initial is liable for his injury because Initial's role in providing cleaning services "was a comprehensive one" and that no other cleaning company was utilized at the time of the accident. Fitzpatrick Affirmation, page 15. This argument is unpersuasive. Although Initial's role in providing cleaning services might have been comprehensive, the test articulated in *Espinal* is whether the contractor has "entirely displaced the other [contracting] party's duty to maintain the premises safely." *Id.* at 140. Indeed, in affirming the grant of summary judgment in favor of the defendant contractor, the Court of Appeals explained that: "[a]lthough Melville undertook to provide snow removal services under specific circumstances, Miltope at all times retained its

landowner's duty to inspect and safely maintain the premises." *Id.* at 141. Because the Court found the contractor did not "entirely displace" the landowner's duty to maintain safety, the plaintiff could not recover against the contractor. Here, the Service Contract neither displaced nor relieved Sony/CBRE, the other contracting party, of the duty as operator/property manager of the Building, to inspect the premises and elevators for health and safety concerns. Accordingly, the third situation described in *Espinal* is also inapplicable to this case.

Because Initial owed no legal duty to plaintiff under the rule of law articulated in *Espinal*, Initial's motion for summary judgment dismissing the Complaint should be granted.

Sony/CBRE's Cross Claim Against Initial

Although the Complaint should be dismissed as against Initial for the reasons stated above, Initial may be liable to Sony/CBRE on the cross claim, if Sony/CBRE is found liable to plaintiff. As noted, Sony/CBRE's cross claim against Initial, as contractor, is based on contractual indemnity. Specifically, paragraph IX of the Service Contract provides that: "[t]o the fullest extent permitted by law, the CONTRACTOR shall indemnify and hold harmless [Sony/CBRE] from and against all claims ... arising out of ... the performance of this work, provided that any such claim ... is attributable to bodily injury [and] is caused in whole or in part by any negligent act or omission of

the CONTRACTOR." Based on this, Sony/CBRE seeks conditional summary judgment against Initial on the cross claim.

Under § 5-322.1 of New York's General Obligation Law, an agreement or promise is void and unenforceable (as against public policy), if it purports to "indemnify or hold harmless the promisee against liability for damage[s] arising out of bodily injury to persons ... caused by the negligence of the promisee, his agents or employees ... whether such negligence be in whole or in part." Construing the statute as rendering void a promise or agreement where the promisee is fully indemnified for its own negligence, the courts have affirmatively upheld agreements that contemplate only partial indemnification of the promisee. See *Dutton v Charles Pankow Builders Ltd.*, 296 AD2d 321 (1<sup>st</sup> Dept 2002) (indemnity agreement prefaced by clause "to the fullest extent permitted by applicable law" was held enforceable and permitted partial indemnification of indemnitee for bodily injuries to third parties partially caused by indemnitee's negligence); accord *Landgraff v 1579 Bronx River Ave., LLC*, 18 AD3d 385 (1<sup>st</sup> Dept 2005). Here, because the indemnity provision of the Service Contract between Sony/CBRE and Initial contains the qualifying clause "to the fullest extent permitted by law," construing the provision as calling for only partial indemnity of Sony/CBRE by Initial does not run afoul of the prohibition of GOB § 5-322.1. In light of *Dutton* and *Landgraffe*, among others, this

construction is sound and permissible.

Without addressing the indemnity provision as allowing for partial indemnification, Initial nonetheless opposes the request of Sony/CBRE for conditional summary judgment with respect to the cross claim. First, Initial argues that Sony/CBRE cannot now seek contractual indemnity because in their answer to the Complaint, Sony/CBRE only asserted a cross claim based on common law contribution and indemnification. Such argument is without merit. CPLR 3019 (d) states that a cause of action contained in a cross claim shall be treated as if it were contained in a complaint, and CPLR 3026 states that pleadings or complaints shall be liberally construed and defects shall be ignored "if a substantial right of a party is not prejudiced." In the instant case, Initial's substantial right has not been prejudiced, because Initial has been (and is) fully aware of Sony/CBRE's indemnity cross claim, whether it is based on contract or common law.

Initial also argues that, even if Sony/CBRE is allowed to assert a contractual indemnity claim, Initial should not be liable on the claim because it did not cause or contribute to plaintiff's injury, nor did it have actual or constructive notice of the alleged greasy substance in the subject elevator. Initial further argues that it was not contractually required to clean the elevators until after 7:00 A.M. (but the alleged accident

occurred at 6:45 A.M.), and it owed no legal or contractual duty to Sony/CBRE or plaintiff. In this regard, Initial seeks summary judgment dismissing the indemnity cross claim.

Whether Initial was negligent in cleaning the elevator or whether it had actual or constructive notice of the alleged greasy spot is an issue of fact that the parties dispute. Although Initial correctly notes that no evidence exists indicating that it created the condition, Initial has failed to meet its burden to show that it did not have actual or constructive notice of the recurring condition of garbage in the elevator, or, that it did not have sufficient time to remedy it. Plaintiff testified that he made prior complaints to his supervisors about garbage refuse in the elevators such as lettuce, grease and food particles (Plaintiff Tr at 66-67). It is also undisputed that elevator #3 (and other service elevators) were used frequently by the restaurants and Building employees to transport garbage and miscellaneous items from Level A to Level B of the Building, where the trash compactors are located, and, there is a reasonable inference that Initial, the cleaning contractor onsite on a daily basis, would know this. Accordingly, Initial has not meet its burden to demonstrate that the condition of garbage in the elevator was not frequent, ongoing and customary, and that it did not have actual or constructive notice of this allegedly recurring condition. See

*Brown v Linden Plaza Housing Co., Inc.*, 36 AD3d 742 (2d Dept 2007). Although the condition here which allegedly caused plaintiff to fall was grease, plaintiff need not prove that the defendant knew of the exact item of debris which caused the fall, if defendant knew or should have known of the condition of garbage. See *Bido v 876-882 Realty, LLC.*, 41 AD3d 311 (1st Dept 2007).

Initial further maintains that it had no duty to clean the elevators until after 7:00 A.M., and because the accident allegedly occurred at 6:45 A.M., it could not have been negligent. However, the Service Contract (Attachment "A") indicates that an Initial day porter was to begin his shift at 6:30 A.M., and his duties included, but were not limited to, "cleaning/policing of all floors with open access coffee stations." In lieu of addressing this provision, Initial submitted an affidavit of a porter who stated that, on the day of the alleged accident, Initial only had one porter on duty prior to 7:00 A.M., and his duty was limited to the exterior sidewalk of the Building. Nor does Initial address the provision in the Service Contract under the heading Daily General which provides for policing and maintaining "elevator cabs, including floors as required." Further, under the General Conditions of the Service Contract, Initial was required to perform cleaning services for all areas of the building, including the elevators. Accordingly, Initial's

argument that it owed no duty Sony/CBRE under the Service Contract to discover and remedy the condition at issue, is unsupported. However, whether Initial was negligent is an issue of fact, and the dispute over such and other facts precludes summary dismissal of the cross claim. *Zuckerman v New York*, 49 NY2d 557 (1980) (summary judgment is inappropriate when a material issue of fact exists).

Finally, as discussed, the indemnity provision at issue provides indemnification of Sony/CBRE only to the extent of the loss caused by the negligent act or omission of Initial and is, thus, enforceable under GOB § 5-322.1. The courts have upheld the granting of conditional summary judgment as to such indemnity claims, pending a determination of the extent of the indemnifying party's responsibility, if any, for the loss. *Kowalewski v North General Hospital*, 266 AD2d 114 (1<sup>st</sup> Dept 1999). Thus, granting conditional summary judgment as to Sony/CBRE's indemnity cross claim against Initial is proper under the circumstance.

Accordingly, it is

ORDERED that the motion for summary judgment by 550 Madison Avenue Trust Ltd. seeking dismissal of the Complaint (sequence number 002) is hereby granted, and the Clerk of the Court is directed to enter judgment and sever Madison Avenue Trust Ltd. from the remainder of this action; and it is further

ORDERED that the motion for summary judgment by ABM

Janitorial Northeast, Inc., individually and f/k/a Initial Contract Services, Inc., and ABM Janitorial, Inc., individually and f/k/a Initial Contract Services Inc. (collectively, Initial), seeking dismissal of the Complaint (sequence number 003) is hereby granted; and it is further

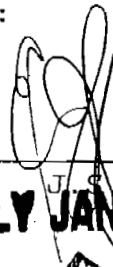
ORDERED that the motion for conditional summary judgment by Sony Music Entertainment, Inc., Sony Corporation of America, CB Richard Ellis Real Estate Services, Inc., individually and f/k/a Insignia/ESG Inc., and Insignia/ESG, with respect to the indemnity cross claim against Initial (sequence number 002) is hereby granted, and the cross motion by Initial for summary judgment dismissing the cross claim (sequence number 003) is hereby denied; and it is further

ORDERED that the remainder of this action shall continue.

**This constitutes the Decision and Order of the court.**

Dated: September 4, 2007

ENTER:



J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
SEP 18 2007  
NEW YORK  
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