

**Spector v Cushman & Wakefield**

2010 NY Slip Op 30172(U)

January 22, 2010

Supreme Court, New York County

Docket Number: 104607/2007

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

*Justice*

Index Number : 104607/2007

**SPECTOR, LINDA**

vs.

**CUSHMAN & WAKEFIELD**

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

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

MOTION DATE 11/19/09

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

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

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

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

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

**FILED**

JAN 27 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequences 007, 008, 009 and 010 are decided in accordance with the accompanying Memorandum Decision. It is hereby

**ORDERED** that Golden Plow, LLC' motion for summary judgment (**motion sequence number 007**) is granted and the complaint and cross complaint are severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

**ORDERED** that One Source Facility Services Inc.'s motion for summary judgment (**motion sequence number 008**) dismissing the complaint and cross complaint is granted and complaint and cross complaint are severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

Dated: \_\_\_\_\_

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**ORDERED** that Citibank's motion for summary judgment (**motion sequence number 009**) is granted and the complaint is severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

**ORDERED** that Outdoor Installation LLC, d/b/a Spring Scaffolding's motion for summary judgment (**motion sequence number 010**) is granted and the complaint is severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

**ORDERED** that counsel for Golden Plow, LLC shall serve a copy of the Order with notice of entry within twenty (20) days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

**FILED**  
JAN 27 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated 1/22/10

ENTER: [Signature] J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
LINDA SPECTOR and PAUL SPECTOR,

Plaintiffs,

Index No.: 104607/07

-against-

DECISION AND ORDER

CUSHMAN & WAKEFIELD, INC., CITIBANK,  
R.S. STUART, OUTDOOR INSTALLATION LLC,  
d/b/a SPRING SCAFFOLDING, ONE SOURCE  
FACILITY SERVICES INC. and GOLDEN  
PLOW LLC,

Defendants.

-----x  
CITIBANK, NA,

Third-Party Plaintiff,

-against-

ONE SOURCE FACILITY SERVICES, INC.,

Third-Party Defendant.

-----x  
ONCE SOURCE FACILITY SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

GOLDEN PLOW, LLC,

Second Third-Party Defendant.

-----x  
CAROL ROBINSON EDMEAD, J.:

**FACTUAL BACKGROUND**

Motion sequence numbers 007, 008, 009, and 010 are  
consolidated for disposition.

In motion sequence number 007, defendant, second third-party

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JAN 27 2010  
NEW YORK  
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defendant Golden Plow, LLC (Golden Plow) moves, pursuant to CPLR 3212, for summary judgment, dismissing all claims, including the third-party action claims for common-law and contractual indemnification, as against it. In motion sequence number 008, defendant, third-party defendant, second third-party plaintiff One Source Facility Services Inc. (One Source) moves, pursuant to CPLR 3212, for summary judgment, dismissing all claims as against it, including second-party action claims for common-law and contractual indemnification. In motion sequence number 009, defendant, third-party plaintiff Citibank, NA (Citibank) moves, pursuant to CPLR 3212 for summary judgment.<sup>1</sup> In motion sequence number 010, defendant Outdoor Installation LLC. d/b/a Spring Scaffolding (Outdoor) moves, pursuant to CPLR 3212, for summary judgment. Summary judgment dismissing the action as against defendant Cushman & Wakefield was previously granted by this court on July 28, 2008.

This is an action for personal injuries allegedly suffered by plaintiff Linda Spector (Spector) on February 14, 2006, at approximately 8:15 A.M., when she slipped and fell on "black ice" on the sidewalk abutting a Citibank branch located at 1512 First Avenue in New York, New York. Citibank owns the property that

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<sup>1</sup> The claims for common-law and contractual indemnification, and breach of contract, stem from arguments that One Source failed to provide insurance coverage for Citibank, and that Golden Plow failed to provide insurance coverage for One Source and Citibank. However, based on this decision, these arguments are rendered moot.

abutted the sidewalk.

Cushman & Wakefield manages Citibank's commercial properties, but was not responsible for maintaining the exterior portions of the properties. One Source was hired to perform exterior maintenance of the Citibank properties, including snow and ice removal. According to the terms of the contract between Citibank and One Source, One Source is required to render reports to Citibank, Citibank is to monitor One Source's performance, and Citibank may request services in addition to those specified in the contract. Citibank Motion, Ex. J. One Source sub-contracted with Golden Plow for snow removal duties at the subject Citibank location.

At the time of the alleged accident, Outdoor leased a sidewalk shed and erected scaffolding to the florist shop adjacent to the Citibank branch for an exterior maintenance project. This shed extended onto the Citibank property.

According to its contract, Outdoor only installed the shed, and erected the scaffolding, and all maintenance of the shed and scaffolding is the responsibility of the lessee. Pursuant to its lease agreement, when notified by the lessee, Outdoor returns to the area to remove the shed and scaffolding equipment, and the lessee is responsible for any damage caused by construction work, because Outdoor does not control the equipment while it is in the possession of the lessee. Outdoor Motion Ex. N.

[\* 6]

According to reports of the National Weather Service submitted by plaintiff, a major snowstorm fell on New York City starting on February 11, 2006, and continuing until about 4 P.M. on February 12, 2006. Approximately 27 inches of snow fell during this period, but there was no precipitation from 4 P.M. on the 12<sup>th</sup> until the alleged accident on the 14<sup>th</sup>.

In her opposition to the instant motions, Spector provides the affidavit of Howard Altschule (Altschule), a certified meteorologist, who states that, in his opinion, a melting and freezing process occurred during the afternoon and evening of February 13, 2006, which caused new areas of ice to form, and such ice formation would have occurred within the two hours preceding the accident in question. However, defendants point out that Altschule did not have any data specific to the location of the accident, nor was Altschule able to identify the source of the black ice.

According to Spector's testimony at her examination before trial (EBT), she only noticed the ice, which she describes as a 10 by seven inch patch of "black ice," i.e., ice that is not readily visible, after she fell. EBT, at 15. She further testified that she did not observe any other patches of ice in the area, and that the snow that had previously fallen had been removed from the sidewalk and pushed into the street. *Id.* at 20-22. In addition, Spector stated that she walks by this area

every day, and that, in the month preceding the accident, she had not observed any ice patches on the sidewalk abutting the Citibank branch. *Id.* at 56-57. Spector said that she had no idea as to the source of the "black ice." *Id.* at 65. After she fell, Spector got to her feet and banged on Citibank's door, where she saw lights but no people, but no one answered. *Id.* at 17-18. Some passers-by went to the building next to the bank, where they were able to call an ambulance for Spector. *Id.* at 18-19.

Michael Yorio (Yorio), Citibank's financial center manager, inspected the sidewalk where plaintiff had her accident on the day of the accident, and testified that he did not notice any ice on any portion of the sidewalk. Yorio Deposition, at 19-20. Further, Yorio testified that no one had reported ice patches on the sidewalk on either February 14 or February 15, 2006. *Id.* at 20-21. Spector argues that there is no indication as to when on February 14, 2006, Yorio actually inspected the sidewalk.

Pursuant to its contract with One Source, Golden Plow would only perform snow removal outside the Citibank branch in question when it received a call from One Source, and One Source would then inspect the work performed by Golden Plow. Golden Plow Ex. P.

No evidence has been presented that any snow, ice or water fell from Outdoor's sidewalk shed or scaffolding onto the

[\* 8]

sidewalk where Spector fell. Furthermore, according to its contract, Outdoor is not responsible for, nor did it perform, any maintenance of the area in which its equipment is placed.

#### **DISCUSSION**

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Defendants' motions for summary judgment are granted.

"To impose liability for a slip and fall upon a landowner, there must be evidence that the defendant knew or, in the exercise of reasonable care, should have known that icy conditions existed and nonetheless failed to exercise due care to correct the situation within a reasonable time after the cessation of the storm or temperature fluctuations which created the dangerous condition. Indeed, constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendants to discover it and take corrective action, and a general awareness that snow or ice might

accumulate is insufficient [internal quotation marks and citations omitted]."

*Wimbush v City of Albany*, 285 AD2d 706, 706-707 (3d Dept 2001).

Spector stated that she did not notice the ice until after she had fallen, that she did not notice any other patch of ice in the area, and that the patch of "black ice" upon which she slipped was only seven by 10 inches. Additionally, there is no evidence that Citibank received any complaints regarding an icy patch on its abutting sidewalk. Furthermore,

"[t]here is no evidence as to whether the ice upon which plaintiff slipped resulted from a snow accumulation two days earlier or was the later product of a thaw/freeze cycle reflected in the meteorological data, and plaintiff's contention that defendant had notice of the ice condition or that it was the result of improper snow removal is speculative [emphasis added]."

*Disla v City of New York*, 65 AD3d 949, 949 (1<sup>st</sup> Dept 2009); *Wylie v Brooks/Eckerd Pharmacy*, 49 AD3d 533 (2d Dept 2008).

The evidence submitted indicates that the ice could have formed within two hours, or even just moments, prior to the alleged accident, before Citibank was open, and such a short period would be an insufficient amount of time for Citibank to have remedied the situation. *Lenti v Initial Cleaning Services, Inc.*, 52 AD3d 288 (1<sup>st</sup> Dept 2008).

Citibank has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not create the alleged icy condition or have actual or constructive

notice of it. *Gershfeld v Marine Park Funeral Home, Inc.*, 62 AD3d 833 (2d Dept 2009).

A contractor for snow removal, such as One Source and Golden Plow, is generally not liable to third persons in tort except

"(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [internal quotation marks and citations omitted]."

*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 (2002).

In the case at bar, there is no evidence or allegation that either One Source or Golden Plow "launched a force or instrument of harm" that caused the ice to form, nor has Spector alleged that she detrimentally relied on their performance. Further, since Citibank retained oversight in the snow removal process, as indicated in its contract with One Source referenced above, it cannot be held that One Source or Golden Plow entirely displaced Citibank's duty to maintain a safe abutting sidewalk. Therefore, One Source and Golden Plow have demonstrated their *prima facie* entitlement to summary judgment as a matter of law. *Lehman v North Greenwich Landscaping, LLC*, 65 AD3d 1291 (2d Dept 2009); *Borden v Wilmorite, Inc.*, 271 AD2d 864 (3d Dept 2000).

"Similarly, the conclusion reached by the plaintiffs' expert was also insufficient to raise a material issue of fact since a close reading of the affidavit reveals

that it merely addressed general conditions in the vicinity rather than the origin of the specific ice on which the plaintiff [alleges that [s]he] fell [internal quotation mark and citation omitted].”

*Robinson v Trade Link America*, 39 AD3d 616, 616 (2d Dept 2007);  
*Wimbush v City of Albany*, 285 AD2d 706, *supra*.

The court notes that the parties have provided a copy of a decision issued by the United States District Court for the Eastern District of New York, dated August 25, 2005,<sup>2</sup> that involved a similar slip and fall on ice at another location owned by Citibank, which contracted for snow and ice removal at that location with One Source, which in turn subcontracted such maintenance to Golden Plow. In addition, that plaintiff’s meteorological expert was the same as the one engaged in the instant litigation.

In the federal litigation, summary judgment was granted in favor of One Source and Golden Plow, for reasons similar to those stated above. However, summary judgment was denied with respect to Citibank. The evidence presented indicated that the ice had formed at least 12 hours before the accident, that the patch alleged to have caused the fall was approximately three by four feet, considerably larger than the ice patch in the instant matter, that the ice patch was visible, and that snow had not been removed from the area in which the plaintiff fell.

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<sup>2</sup> *Occhino v Citigroup, Inc., and Citicorp, One Source Facility Services, Inc., and Golden Plow, LLC d/b/a Golden Plow*, Index No.: CV-03-5259 (CPS).

Furthermore, the accident in the federal case occurred around noon time, when the bank had been open for several hours. None of these factors appear in the case at bar.

For the reasons stated above, Citibank's, One Source's and Golden Plow's motions for summary judgment are granted.

Similarly, Outdoor's motion for summary judgment is granted, since no evidence whatsoever has been presented indicating any negligence on its part.

#### **CONCLUSION**

Based on the foregoing, it is hereby

**ORDERED** that Golden Plow, LLC' motion for summary judgment (motion sequence number 007) is granted and the complaint and cross complaint are severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

**ORDERED** that One Source Facility Services Inc.'s motion for summary judgment (motion sequence number 008) dismissing the complaint and cross complaint is granted and complaint and cross complaint are severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said

defendant; and it is further

**ORDERED** that Citibank's motion for summary judgment (motion sequence number 009) is granted and the complaint is severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

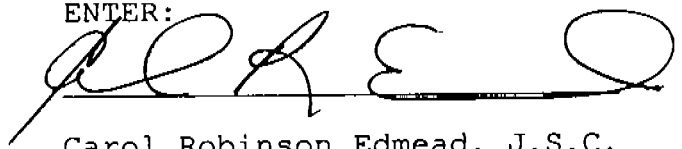
**ORDERED** that Outdoor Installation LLC, d/b/a Spring Scaffolding's motion for summary judgment (motion sequence number 010) is granted and the complaint is severed and dismissed as against it, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

**ORDERED** that counsel for Golden Plow, LLC shall serve a copy of the Order with notice of entry within twenty (20) days of entry on all counsel; and it is further

**ORDERED** that the remainder of the action shall continue.

Dated: January 22, 2010

ENTER:



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**FILED**

JAN 27 2010

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