

<b>Fama v Cityspire, Inc.</b>
2010 NY Slip Op 30890(U)
April 14, 2010
Supreme Court, New York County
Docket Number: 105370/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
J.S.C.  
Justice

PART 10

Jama, Gary

INDEX NO. 105370/07

- v -

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

Reckson, Assoc

MOTION SEQ. NO. 01

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

**FILED**  
APR 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: APR 14 2010

[Signature]  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
GARY FAMA and DIANE FAMA, his wife,

Plaintiffs,

-against-

CITYSPIRE, INC., RECKSON ASSOCIATES  
REALTY CORP., TISHMAN SPEYER  
PROPERTIES, L.P., and ONE SOURCE FACILITY  
SERVICES, INC., s/h/a ONE SOURCE  
MANAGEMENT, INC.,

Defendants.  
-----X

**DECISION/ ORDER**  
Index No.: 105370/07  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

CITYSPIRE, INC. and TISHMAN SPEYER  
PROPERTIES, L.P.,

Third-Party Plaintiffs,

-against-

GLOBEOP FINANCIAL SERVICES, LLC,

Third-Party Defendant.  
-----X

Third-Party  
Index No.: 590354/08

**FILED**  
APR 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Cityspire/Tishman's n/m ( § 3212) w/DIW affirm, exhs	1
Def One Source's x/m ( § 3212) w/SJM affirm	2
3PA's partial opp/support (Cityspire/Tishman) w/APP affirm	3
Pltf Fama's opp (Cityspire/Tishman) w/CMC affirm, exhs	4
Pltf Fama's opp to x/m (One Source) w/CMC affirm	5
Cityspire/Tishman's reply (Globeop) w/DIW affirm, exhs	6
Cityspire/Tishman's reply (Fama) w/DIW affirm	7
Def One Source's reply (Cityspire/Tishman) w/SJM affirm	8

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff, Gary Fama ("Plaintiff"), to recover monetary damages for the personal injuries he allegedly sustained as a result of defendants' negligence. Cityspire, Inc. ("Cityspire") and Tishman Speyer Properties, L.P. ("Tishman") have commenced a third party action for contribution, breach of contract, indemnification, and failure to procure insurance. Cityspire and Tishman are owner and managing agent, respectively, of the property located at 156 West 56<sup>th</sup> Street, New York, New York (the "Property"). Defendant, One Source Facility Services, Inc. s/h/a One Source Management, Inc. ("One Source"), was hired to provide janitorial services at the Property pursuant to a written contract between Cityspire and One Source. Cityspire and Tishman now move, and One Source cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Issue has been joined by each moving defendant and discovery is complete. The Note of Issue was filed June 5, 2009. These motions were brought timely (within 120 days of the note of issue being filed), therefore they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

### **Arguments**

Plaintiff claims that he slipped and fell on wet paper towels on the floor of the 6<sup>th</sup> floor men's restroom of the Property on May 3, 2005 at approximately 1 p.m. Plaintiff was an employee of third-party defendant, GlobeOp Financial Services, LLC ("GlobeOp"), who subleased the entire 6<sup>th</sup> floor of the Property from non-party, Thomson Financial, Inc. Cityspire is the owner/landlord of the Property. Plaintiff

asserts three causes of action against defendants in his verified complaint: (1) defendants were negligent in maintaining the bathroom floor and defendants had notice of a dangerous condition; (2) plaintiff was an intended and/or foreseeable third party beneficiary of the lease/maintenance/cleaning agreements between defendants and its tenants; and (3) plaintiff's wife, Diane Fama, sustained loss of consortium, companionship, and services of her injured husband.

Cityspire and Tishman contend that Plaintiff cannot establish his *prima facie* case of negligence because there is no evidence establishing that Cityspire and/or Tishman created or had notice of the dangerous condition alleged. According to Cityspire and Tishman, they were out of possession landlords that did not occupy, control, or have any special use of the 6<sup>th</sup> floor. Cityspire and Tishman argue that GlobeOp, as a full floor tenant, was responsible for the ongoing maintenance and upkeep of the cleanliness of its restrooms. Alternatively, Cityspire and Tishman contend that even if there was a wet paper towel on the floor, there is no evidence as to how it ended up on the floor or how long it was there.

Cityspire and Tishman argue that if their motion for summary judgment dismissing Plaintiff's complaint is denied, they are entitled to a conditional judgment on their claim for contractual indemnification against GlobeOp, based on Tishman's lease with GlobeOp. Cityspire and Tishman contend that GlobeOp has a contractual obligation to indemnify and hold them harmless from any claims arising from the use of the premises, or any portion thereof.

Cityspire entered into a Standard Contract for Provision of Services on February 1, 2005 ("service agreement") that was in effect on the date of the accident. The

service agreement is with One Source, who agreed to provide "all labor, material and equipment necessary" to perform the services set forth in the agreement. The service agreement provides that One Source, as contractor, shall be responsible for providing:

all phases of building cleaning services throughout the premises, including but not limited to the entrances, lobbies, sidewalks, public areas and/or building corridors, stairways, freight areas, loading docks, fire towers, roof setbacks and courtyards, lavatories, passageways, motor and fan rooms and elevator cabs.

...

Routine nightly cleaning shall not commence until 6:00 PM, Monday through Friday, with completion not later than 7:00 AM daily.

The porter and matron services provision of the service agreement provides:

**BASE BUILDING CLEANING SPECIFICATIONS**

...

**PORTER AND MATRON SERVICES**

...

CONTRACTOR agrees to furnish a sufficient number of day porters and matrons . . . these personnel shall be assigned at the direction of the OWNER'S AGENT to perform the following duties only and shall not provide service to any tenant except as may be specifically directed by the OWNER'S AGENT. . .

**B. Day Porter Duties and Assignments**

...

7. Police all core Men's rest rooms and lavatories, keeping them in clean condition, as required. This includes basement levels.

8. Replace toilet tissues, soap hand/toilet tissues towels if required on all public floors. OWNER'S AGENT to supply toilet tissue and sanitary napkins on all floors. Tenant to supply hand towels and soap on full tenant floors (nonpublic floors).

...  
**TENANT OFFICE CLEANING SPECIFICATIONS**

**NIGHTLY**

B. Lavatories:

1. Sweep, rinse, scrub and/or wash and dry all flooring, using appropriate disinfectant solution using spray tank method to remove all spills, urine stains, smears, scuff marks and tracks throughout.  
...

5. Hand dust and clean all partitions, tile walls, dispensers and receptacles in lavatories and restrooms.

6. Empty paper receptacles and remove waste paper.  
...

8. Provide and install all necessary toilet tissue, towels, soap, toilet seat liners and sanitary napkin disposal liners on multiple tenant floors, and all toilet tissue and toilet seat liners on full tenant floors.

9. During the course of performing their duties, CONTRACTOR'S employees shall report all . . . general damage to OWNER'S AGENT.  
...

**ADDITIONAL TENANT SERVICES**

It is agreed that CONTRACTOR may perform special additional services to Tenants in the Building from time to time. Such special day or night services shall be invoiced directly to the Tenants, as approved and authorized by the OWNER'S AGENT. Building cleaning personnel shall not be used for Tenant Services.

Discovery has been completed. Plaintiff served a Verified Bill of Particulars dated August 27, 2007. Plaintiff; Denise Wokas ("Wokas"), Property Manager for Tishman; Susan Choinski ("Choinski"), Associate Director for GlobeOp; and Richard

Neary ("Neary"), Day Foreman for One Source were each deposed.

Plaintiff testified at his deposition that he was employed by GlobeOp beginning in 2005 as Director of Human Resources. Plaintiff stated on the date of the accident "I entered the men's room. I walked towards the stall. I used the stall. And then I walked towards the sink and I washed my hands and as I stepped to get paper towels, I slipped . . . my head struck the counter top first and then the back of my head hit the floor."

Plaintiff testified that there had been complaints about the condition of the bathroom, specifically that "it was filthy . . . the floor was wet . . . there was urine on the floor and things of that nature." Plaintiff testified that some complaints were made to him but that most were made to Ira Rosenbaum, Chief Operating Officer of GlobeOp. Plaintiff also stated that whenever possible, GlobeOp's Associate Director (Choinski) would be notified of the complaints, since she was responsible for the facilities. According to Plaintiff, Choinski would then relay these complaints to "the building." Plaintiff stated that the bathroom was cleaned each day at around 5 p.m.

Wokas testified at her deposition that she is the Property Manager for Tishman and has been employed in that capacity since 2001. She stated that her duties include overseeing the engineering, cleaning, and security departments. Wokas testified that Choinski was her tenant contact and that Choinski would tell her about some of the complaints, specifically that the men's restroom had a lot of activity and was messy. Wokas also testified that since GlobeOp was a full floor tenant, it "would be responsible for anything above general policing, which during the daytime is really just a day porter going up there maybe once or twice a day just to make sure there [are] paper towels, soap, and to pull the trash if there is trash, and that type of thing, but anything beyond

that would be the tenant's responsibility." Wokas also stated that when Tishman did receive general complaints about the building's cleanliness, the complaints were relayed to One Source so they could be addressed. She further stated that when she received complaints from Choinski regarding the men's restroom, she would contact One Source so they could dispatch a porter to take care of the problem. If additional porters were needed more than once or twice a day, then Wokas would bill the tenant for those additional services. Wokas testified that Tishman did not require full floor tenants to have a supplemental services contract with One Source nor did Tishman have to approve of any additional services contract that a tenant might wish to enter into.

Choinski testified at her deposition that as the Associate Director for GlobeOp, her duties include managing human resources and overseeing the facilities, including maintenance. According to Choinski, the bathrooms were not cleaned during the day and One Source cleaned them once at night. One Source also cleaned the floors, washed the toilets, filled the supplies, and cleaned the sinks. Choinski testified that she did not know whether there was a separate janitorial contract between GlobeOp and One Source. She only knew about the contract between One Source and the building. Choinski testified that GlobeOp was not required to hire someone to perform regular cleaning. Choinski also stated that, prior to plaintiff's accident, she would receive "several [complaints] a week" about "paper towels overflowing, the garbage not being emptied, the floor, the toilet overflowing, just general untidiness, I had a lot of complaints, so when I would get a complaint, I would notify the building." Choinski stated that she would notify either the building manager or the office manager within the

building so that they could rectify the situation. Choinski also testified that prior to the incident, she had conversations with Plaintiff regarding the condition of the men's restroom. She stated that she had an ongoing conversation with Plaintiff about how they were unhappy with the condition in the men's restroom and that "it was a constant frustration to Globeop employees that it wasn't kept clean." Choinski also stated that she did not make any verbal or written complaints to One Source concerning the condition of the 6<sup>th</sup> floor men's restroom.

Neary testified at his deposition that at the time of the incident he worked as a Day Foreman for One Source. He testified that his responsibilities included overseeing the day porter and the day matron, who were responsible for bathroom cleaning, outside cleaning, and other cleaning at the request of a contractor. Neary stated that as a Day Foreman, he was also in charge of tenant complaints and that if a full-floor tenant complained, the tenant would notify the building office, and then someone from the building office would notify him. Neary stated that he needed permission from Tishman before handling any complaint from a full-floor tenant, since that would entail billable work not expressly under the service agreement. Neary testified that he does not recall receiving any complaints from Tishman regarding the 6<sup>th</sup> floor prior to the date of the incident.

The Plaintiff has also provided the affidavit of Herbert Braunstein ("Braunstein"), a licensed professional engineer. Braunstein opines that, "the condition of the bathroom including the maintenance, repair, inspection and general cleaning methods of the bathroom were unsanitary and unsafe" and there were inadequate urinals, water closets, and sinks for the number of employees using the restroom.

## Discussion

### Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). Only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

#### I. **One Source's Cross-Motion for Summary Judgment**

##### A. *The Duty to Plaintiff*

A necessary element of a negligence action is a legal duty to the injured party. "In the absence of a duty, there is no breach and without a breach, there is no liability." Pulka v. Edelman, 40 N.Y.2d 781 *rearg den* 41 N.Y.2d 901 (1977). Where, as here, a contractor has a contractual duty to provide lavatory cleaning services under a service

agreement, that contractual duty does not give rise to a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2d Dept. 2002).

However, there are three exceptions to this broad rule of law that will expose the contractor to liability because it has assumed a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d at 139 (citing Palka v. Service Master Mgt. Svcs. Corp., 83 N.Y.2d 579, 585-6 [3d Dept. 1990]). The exceptions are where (1) the contractor "launches a force or instrument of harm," by first undertaking a task, but then negligently creating or exacerbating a dangerous condition resulting in an injury; (2) the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and (3) the contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. Espinal v. Melville Snow Contractors, Inc., *supra*.

It is unrefuted that One Source had a contractual obligation with Cityspire to clean the lavatories in the building. Thus, One Source owed no duty of care to Plaintiff unless One Source assumed a duty of care by either launching a "force of harm" and/or by completely displacing and absorbing the owner's obligation to maintain a safe premises.

The facts do not lend themselves to an argument for force of harm, as there are no allegations that One Source deliberately placed wet paper towels on the restroom floor or exacerbated a dangerous condition. Also, the parties have not raised an issue concerning whether the contractual obligations induced detrimental reliance on continued performance of those obligations. Therefore, the Court will look solely at the

issue of exclusivity.

1) "Exclusivity"

In deciding whether One Source assumed duties so broad that it displaced the owner's duty to maintain a safe premises, the court first turns to the service agreement. It provides that the owner's agent (i.e. Tishman) shall "oversee performance of the Services and determine whether the Services are being performed in . . . a first class and workmanlike manner, and may give such instructions as, in its discretion, may be necessary to correct any deficiencies."

Although the service agreement provides that One Source is to perform its duties in accordance with the owner's procedures and direction, in fact, One Source actually controlled the method and manner that the cleaning services were provided throughout the building. They did not look to Cityspire or Tishman to make schedules or direct the scope of the cleaning services they were otherwise obligated to provide under the contract. Cityspire and Tishman did not dominate these obligations, such that One Source would be exempted from liability to Plaintiff.

One Source is the only company responsible for cleaning the Property and the service agreement is an exclusive, all-encompassing contract. Pursuant to the service agreement, One Source was solely responsible for cleaning and maintaining the lavatories, including the 6<sup>th</sup> floor men's restroom. The cleaning specifications included washing and drying the floors nightly and stated that routine nightly cleaning shall not commence until 6 p.m. However, the testimony shows that One Source would clean the 6<sup>th</sup> floor bathroom an hour earlier, at approximately 5 p.m. Plaintiff testified that he worked from 8 a.m. until 7 p.m. during the week, which makes it possible that users of

the men's restroom could have dropped paper towels on the floor after 5 p.m. but before the contractually agreed to cut off time of 6 p.m. One Source decided what time they would clean the restrooms, despite the contractual language. Such flexibility belies any argument that they were subject to Cityspire and Tishman's control.

Additionally, pursuant to the service agreement, One Source undertook the task of "policing" the restrooms and keeping them in "clean condition." Even assuming that One Source sufficiently cleaned the 6<sup>th</sup> floor men's restroom at 5 p.m. nightly, the testimony shows that there were frequent complaints about the condition in the men's restroom, and that all complaints regarding the building's cleanliness would be relayed to One Source. This creates the issue of whether One Source failed to monitor the restrooms during the day, inadequately washed and dried the floor, cleaned the floor at the wrong time of day, improperly policed the restroom, and was therefore negligent in maintaining the 6<sup>th</sup> floor men's restroom. These actions are sufficient to raise triable issues of fact and defeat One Source's cross-motion for summary judgment.

*B. Third Party Beneficiary*

Plaintiff separately contends that although he is not a party to the contract between Cityspire and One Source, he is the third party beneficiary of it. To establish a *prima facie* claim as a third party beneficiary of a contract, the following elements must be present: "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." State of California Public Employees' Retirement System v. Sherman & Sterling, 95 N.Y.2d 427, 435 (1st

Dept. 2000); Edge Management Consulting, Inc. v. Blank, 25 A.D.3d 364 (1st Dept. 2006). The service agreement is for the benefit of the property owner who has to maintain a safe premises. At best, Plaintiff is an incidental beneficiary of the service agreement, but not a third party beneficiary. As set forth above, however, while One Source has no duty arising from a strict analysis of third party beneficiary law, there is a duty to Plaintiff arising under the Espinal doctrine.

## II. **Cityspire and Tishman's Motion for Summary Judgment**

### A. *Plaintiff's Complaint*

Cityspire is the owner of the Property in which Plaintiff slipped and fell. A landowner is under a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 A.D.2d 402 (1st Dept. 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 (1st Dept. 2000). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, supra. A party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. Mas v. Two Bridges Associates by Nat. Kinney Corp., 75 N.Y.2d 680, 687 (1st Dept. 1990); Ortiz v. Fifth Ave. Bldg. Assocs., 251 A.D.2d 200 (1st Dept. 1998).

On their motion for summary judgment, Cityspire and Tishman have the burden

of proving their defenses. Thus, Cityspire and Tishman must prove that they did not create the dangerous condition alleged nor did they have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (see Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 [1984] *aff'd* 64 N.Y.2d 670 [1984]; see, Mercer v. City of New York, 223 A.D.2d 688, 689 [1996] *aff'd* 88 N.Y.2d 955 [1996]).

Cityspire and Tishman have not established lack of notice. According to Plaintiff, he made various complaints about the condition of the men's restroom to GlobeOp, which would in turn, notify the building. Wokas (for Tishman) even testified that GlobeOp would tell her about some of the complaints, specifically that the men's restroom had a lot of activity and was messy. Wokas further stated that when she received complaints regarding the men's restroom, Tishman would dispatch a One Source porter to take care of the issue. This is constructive, if not actual, notice of a dangerous condition. (See Corrales v. Reckson Associates Realty Corp., 55 A.D.3d 469 (1st Dept. 2008).

Even if Cityspire and Tishman did not have notice of a dangerous condition, there are disputed triable issues of material fact whether Cityspire and Tishman exercised reasonable care in how they maintained the Property. Although Cityspire and Tishman are not insurers of plaintiff's safety, a property owner or possessor may be liable if they have failed to properly maintain the premises for its anticipated use (Schmerz v. Salon, 26 A.D.2d 691 *aff'd* 19 N.Y.2d 846 [1966]). The restrooms were only cleaned once a day at 5 p.m. and there were "several [complaints] a week." There are facts from which a trier of fact could conclude that Cityspire and Tishman knew that

One Source was not properly fulfilling its duties. Cityspire and Tishman had an obligation to address any deficiency in their contractor's execution of services. Given the amount of people and activity in the building, there are triable issues of fact whether Cityspire and Tishman used reasonable care in maintaining the restrooms.

As the moving party, Cityspire and Tishman have a greater burden to produce evidentiary facts than their adversary (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (Ugarriza v. Schmieder, 46 N.Y.2d 471 [1979]). Here, not only have Cityspire and Tishman failed to meet their burden of proof, but there are triable issues of fact requiring the denial of their motion (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 N.Y.2d 223 [1978]). The determination of whether Cityspire and Tishman were negligent is for the trier of fact to decide (Ugarriza v. Schmieder, *supra*).

*B. The Third Party Action*

Cityspire and Tishman, alternatively, seek a conditional judgment on their claim for contractual indemnification against GlobeOp, based on Cityspire's lease with GlobeOp. Cityspire and Tishman contend that GlobeOp has a contractual obligation to indemnify and hold them harmless from any claims arising from the use of the premises, or any portion thereof.

Under the Sublease Agreement, dated June 23, 2003, GlobeOp is obligated to indemnify and hold Cityspire harmless from any claims arising from its use of the

Property. The indemnity provision of the Sublease Agreement provides that GlobeOp, as sublessee, shall hold harmless and shall indemnify Cityspire, as sublessor, from any and all liability arising from injury to any person within the sublet space, regardless of cause, except to the extent any loss or damage is caused by the negligence or willful misconduct of Cityspire or its employees, contractors, etc.

Cityspire and Tishman argue that they are entitled to contractual indemnification from GlobeOp based on GlobeOp's failure to take steps to remedy the dangerous condition. Alternatively, Cityspire and Tishman argue that they are entitled to a conditional judgment on their claim for contractual indemnity.

Generally, a party seeking contractual indemnification must "prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." Cava Construction Co., Inc. V. Gealtec Remodeling Corp., 58 A.D.3d 660 (2d Dept. 2009). However, where a question of fact exists regarding the owner's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature and where there are triable issues of fact as to whose negligence, if any, caused the plaintiff's accident, it is premature to conditionally grant a third-party plaintiff's motion for summary judgment on that cause of action. Bellefleur v. Newark Beth Israel Medical Center, 66 A.D.3d 807 (2d Dept. 2009).

Here, the Sublease Agreement entitles Cityspire and Tishman to contractual indemnification, however, their motion for summary judgment against GlobeOp is premature. The Sublease Agreement provides that Cityspire and Tishman are not entitled to receive contractual indemnification they or any of their contractors (i.e. One

Source) are found to be negligent.

The issue of whether Cityspire, Tishman, and/or One Source were negligent still remains to be decided at trial. Until then, the indemnification provision found in the Sublease Agreement is not triggered. Therefore, Cityspire and Tishman's motion for summary judgment on its contractual indemnification claim against GlobeOp is denied; as is Cityspire, Tishman, and One Source's motion for summary judgment against Plaintiff dismissing the complaint.

Although Cityspire and Tishman "seek" summary judgment on their fourth cause of action for failure to procure insurance, the only time it is mentioned is in the "wherefore" clause of Daniel I. Winter's July 28, 2009 affirmation. No documents or arguments are otherwise made. This relief is therefore denied at this time.


### Conclusion

Defendants' motion for summary judgment is denied as it has not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial. Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 14, 2010

So Ordered:

  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
APR 16 2010  
NEW YORK  
COUNTY CLERK'S OFFICE