

**Costa v Merrill Lynch/WFC/L. Inc.**

2014 NY Slip Op 32411(U)

September 9, 2014

Sup Ct, NY County

Docket Number: 158127/2012

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS Part 8

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Daniel Costa and Karen Costa,  
Plaintiffs,

-against-

Merrill Lynch/WFC/L. Inc., Bank of  
America Corporation, Nomura Holding  
America, Inc., Nomura Securities International, Inc.,  
Nomura Securities North America, LLC, and ABM  
Janitorial Services, Inc.,  
Defendants.

**DECISION AND ORDER**  
Index Number: 158127/2012  
Motion Seq. No.: 001

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**KENNEY, JOAN M., J.**

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion  
to dismiss.

<b>Papers</b>	<b>Numbered</b>
Notice of Motion, Affirmation, and Exhibits	1-20
Plaintiff's Opposition Affirmation, and Exhibits	21-24
Co-defendant's Opposition Affirmation, and Exhibits	25-28
Reply Affirmation, Exhibits	29-30

In this personal injury action, defendants, Nomura Holding America, Inc., Nomura Securities International, Inc., Nomura Securities North America, LLC (collectively "Nomura"), move for an Order, pursuant to CPLR §3212, for summary judgment dismissing the plaintiff's complaint.

Defendants also move for an Order, pursuant to CPLR §3212, granting them judgment on its contractual indemnification claim against co-defendant ABM Janitorial Services, Inc., as well as an award for attorney's fees.

**Factual Background**

On October 25, 2011, plaintiff Daniel Costa slipped and fell while working in the freight elevator lobby on the 22<sup>nd</sup> floor of 2 World Financial Center, Building B, in New York, New York. Plaintiff alleges that at approximately 11:12pm, during the course of his employment with Penguin Maintenance, he slipped and fell on a wet and slippery floor that was the result of leakage of contents

from the dumpsters located on the 22<sup>nd</sup> floor freight elevator lobby. According to plaintiff, he realized that the floor was wet and noticed that liquid was dripping from the bottom of the dumpster after his fall.

Nomura leased and occupied floors 6, 7, 17 through 22, and 25 of 2 World Financial Center, Building B from Merrill Lynch/Bank of America. On August 1, 2005, Nomura entered into a Janitorial Services Contract (the contract) with ABM for the performance of janitorial services, including the cleaning of all freight areas and the removal of all trash from the freight landings on the 17th-22nd floors. The contract, which was in effect on the day of the accident, obligated ABM to defend and indemnify Nomura from any injury caused in whole in part by ABM's acts or omissions. ABM provided two porters, who were assigned to remove the dumpsters from the freight elevator lobbies on floors 1 through 44, during the 5pm to 12:30am shift. ABM also provided another employee who was responsible for mopping the freight elevator lobby during that same shift. The porters would take the dumpsters down to the C-1 level where they would empty and hose them off before returning the dumpsters to their respective floors.

Nomura also contracted with Guardsmark, LLC, a security guard company. Guardsmark was on site 24 hours, 7 days per week. Guardsmark security guards would regularly walk through the freight elevator lobbies at least twice during the overnight shift, from 4pm to midnight. If there were any unsafe conditions during their security walk-throughs, the guard would report it.

Mohamed Mohamed, a foreman for ABM overseeing the work at 2 World Financial Center, Building B, in October 2011, testified that the dumpsters used by ABM were owned by the building and provided to ABM for cleaning purposes. He further testified that ABM employee Frank Cona, was assigned to mop and clean the floors of the 22<sup>nd</sup> floor freight elevator lobby during the 5pm to 13:30am shift in October 2011.

Mark Vara, vice president of the corporate real estate division of Nomura Securities International, Inc., who in 2011 was part of the team that handled the day-to-day operations of the Nomura facility at 2 World Financial Center, testified that he would do daily inspections of the Nomura space at different times of the day at varied locations. He performed weekly inspections of the freight elevator lobbies on different days of the week. He would check the freight elevator lobby for debris and make sure that the entryway to the freight was clear and unobstructed. Mr. Vara would report any deficiencies to ABM supervisors, Val Kaja or Paul Fegely. Mr. Vara worked from 9am to 5pm Monday through Friday. He testified that no one employed by Nomura would inspect or keep track of ABM's work from 5pm to 12:30am. Mr. Vara did receive notification of the accident by email from a Guardsmark security guard on October 26, 2011 at 1:23am. The email indicated that Mr. Costa had slipped on a wet surface outside the 22<sup>nd</sup> floor freight area, and that he hurt his left arm and lower back, but did not seek medical attention. Mr. Vara did not respond to this email, nor did he contact ABM regarding this incident.

### Arguments

Defendants maintain that they are entitled to summary judgment as against plaintiff because they did not create and/or had no actual or constructive notice of the alleged dangerous condition. Defendants also contend that they are entitled to summary judgment seeking contractual indemnification as against ABM pursuant to the terms of janitorial services contract.

Plaintiff contends that the within motion must be denied because defendants had constructive notice of the alleged dangerous condition and there are triable issues of fact to be considered.

ABM contends that there are material issues of fact which preclude the granting of summary judgment in Nomura's favor.

### Discussion

Pursuant to CPLR 3212(b), “a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision ‘c’ of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.”

The rule governing summary judgment is well established: “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.” (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1<sup>st</sup> Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged. (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept. 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition. (*Aviles v 2333 1<sup>st</sup> Corp.*, 66 AD3d 432 [1<sup>st</sup> Dept. 2009]; *Baez-Sharp v New York City Tr. Auth.*, 38 AD3d 229 [1<sup>st</sup> Dept. 2007]). To constitute constructive notice, a defect

must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. (see *Strowman v Great Atl. & Pac. Tea Co., Inc.*, 252 AD2d 384 [1998]). A personal injury plaintiff may satisfy the burden of showing a landowner's constructive notice of hazardous condition by evidence that an ongoing and recurring dangerous condition existed in the area of accident. (see *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106 [1996]).

A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence (*Manning v. Americold Logistics, LLC*, 33 A.D.3d 427, 822 N.Y.S.2d 279 [2006]). Once defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof (*Kesselman v. Lever House Rest.*, 29 A.D.3d 302, 303-304, 816 N.Y.S.2d 13 [2006]).

Here, defendants established their entitlement to summary judgment. Nomura did not create the alleged wet and slippery floor since the janitorial services, including the cleaning of all freight areas and the removal of all trash from the freight landings on the floors it occupied, was provided by ABM. Nomura did not own the leaky dumpster and was not responsible for maintaining it, emptying it or cleaning it. Furthermore, the record is devoid of evidence that there was any dangerous condition which caused the plaintiff to fall and that defendants knew or should have known of any such condition.

In his deposition testimony, plaintiff stated that it was not until after he fell that he noticed that the floor was wet and that he saw liquid dripping from the bottom of the dumpster.

Additionally, defendants submitted the deposition testimony of Mr. Vara, indicating that when Guardsmark's monitored the floors, they did not see any wet and slippery conditions, nor were there any issues of leaking dumpsters. There were no prior complaints that the floor was wet before plaintiff's slipping. Plaintiff has not submitted any evidence that there was liquid on the floor for a sufficient length of time prior to the accident so as to charge the defendant with constructive notice of a dangerous condition (see *Segretti v. Shorenstein Co., E.*, 256 A.D.2d 234, 235, 682 N.Y.S.2d 176 [1998]). Plaintiff's assertion that an email sent by Guardsmark security to Nomura *after* plaintiff's fall put Nomura on notice of the accident does not constitute constructive notice under the circumstances. Plaintiff attempts to explain that defendants may have known about the alleged dangerous condition that caused him to slip and fall because ABM was on site performing garbage removal and mopping in the freight elevator lobbies. However, this is insufficient to rebut Nomura's claim of lack of actual or constructive notice.

"When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence." (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265 [2007]). "Parties can enter into agreements to indemnify one party for his or her negligence and the indemnity clause need not contain express language referring to the negligence of the indemnitee, but merely that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." (*Margolin v NY Life Ins. Co.*, 32 NY2d 149 [1973]).

Here, the agreement between Nomura and ABM provides that ABM shall defend, indemnify, and hold Nomura harmless for all claims, actions, demands, loss and cases of action arising from injury, including death, to any person, or damage to any property, when such injury

or damage results, in whole or in part, from defective goods/services and/or ABM's acts or omissions (including those of ABM's employees, agents, subcontractors, representatives, or assigns), except for damages caused by Nomura's gross negligence.

ABM contends that the contract only applies to services performed by ABM employees on floors 22, 21, 20, 19, 18, 17, Street Level Mail Room and C-2 Level. ABM submitted deposition testimony of Jose Rivera, an ABM porter assigned to the 25<sup>th</sup> floor, indicating that he witnessed an accident on the 25<sup>th</sup> floor. Mr. Rivera testified he was working on the 25<sup>th</sup> floor during his shift on October 25, 2011, when he witnessed plaintiff walking towards the freight elevator and fall backwards. After the fall, Mr. Rivera noticed a small circle of clear substance on the floor, which he had not observed at any time that evening prior to the accident. ABM argues that if indeed the accident occurred on the 25<sup>th</sup> floor as Mr. Rivera's testimony suggests, ABM is not required to indemnify Nomura because the Janitorial Services Agreement does not include the 25<sup>th</sup> floor.

However, Nomura, for the first time in its reply papers, submits a "Seventh Amendment to Agreement of Sublease" entered into on February 10, 2010, expanding Nomura's lease to include the 25<sup>th</sup> floor. The Amendment provides that landlord, Merrill Lynch/Bank of America would provide cleaning services for the 25<sup>th</sup> floor. Cleaning services for the 25<sup>th</sup> floor were provided by ABM pursuant to a General Services Agreement between ABM and Bank of America, to which Nomura claims that it was an intended third-party beneficiary. Nomura is now arguing for the first time that as a third-party beneficiary, it is entitled to the protections of the General Services Agreement between ABM and Bank of America. Because this argument is being raised in the reply papers for the first time, ABM did not have the opportunity to properly

rebut Nomura's contention. Accordingly, it is

ORDERED, that the part of moving defendants' summary judgment motion dismissing plaintiff's complaint against it, is denied, to the extent that it is unclear whether the accident occurred on the 22<sup>nd</sup> or 25<sup>th</sup> floor and, therefore, the argument set forth asserting lack of notice of a defective condition on the 22<sup>nd</sup> floor did not address lack of notice of a defective condition existing on the 25<sup>th</sup> floor, if applicable; and it is further

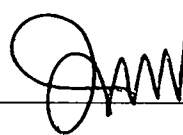
ORDERED that the part of moving defendants' summary judgment motion declaring that ABM Janitorial Services, Inc., must defend and indemnify moving defendants, is denied; and it is further

ORDERED that moving defendants' application for attorney's fees and costs, is denied; and it is further

ORDERED that the parties proceed to mediation/trial forthwith.

Dated: September 9, 2014

ENTER:

A handwritten signature in black ink, appearing to read 'JMK', is written over a horizontal line.

Joan M. Kenney, J.S.C.