[* 1]

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

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 104356/2008

WINICK, FAWN

VS

335 MADISON AVENUE

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 _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

OCT 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 10/7/2011
which disposes of motion sequence(s) no. 002

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

Dated: 10/7/11

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

FAWN WINICK,

Plaintiff,

-against-

335 MADISON AVENUE, LLC

Defendant.

----------X

335 MADISON AVENUE, LLC

Defendant/Third-Party Plaintiff,

-against-

ONESOURCE, INC.,

Third-Party Defendant.

----------X

DECISION AND ORDER

Index No.: 104356/2008

Third-Party Index No.:
590725/2008

For Plaintiff:
Law Offices of Vessa Wilensky PC
626 Rexcorp Plaza
Uniondale, NY 11556

For Defendant/Third-Party Plaintiff 335 Madison Avenue, LLC:
Hoey, King & Epstein
55 Water Street, 29th Floor
New York, NY 10041

For Third-Party Defendant OneSource, Inc.:
Gallo Vitucci & Klar
90 Broad Street, 3rd Floor
New York, NY 10004

Papers considered in review of these motions for summary judgment and cross motion to dismiss:

Notice of Motion 1
Notice of Motion 2
Notice of Cross Motion 3
Affs in Opp 4,5,6
Replies 7,8

HON. SALIANN SCARPULLA, J.:

This personal injury action arises out of plaintiff Fawn Winick's ("Winick") alleged slip and fall as a result of water on the floor of the building in which she worked, located at 335 Madison Avenue. Winick commenced an action first against defendant/third-party plaintiff 335 Madison Avenue, LLC ("335 Madison"), and then later added third-party defendant OneSource, Inc. ("OneSource"). 335 Madison commenced a third-party action against OneSource asserting claims of common-law and contractual indemnification, contribution and failure to procure insurance.

Motion sequences 002 and 003 are hereby consolidated for disposition. In motion sequence 002, OneSource moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing both Winick's claim and the third-party action, as well as any cross claims as against it. In motion sequence 003, 335 Madison moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing Winick's complaint asserted against it, as well as dismissing all cross claims asserted against it. 335 Madison seeks summary judgment over OneSource on the grounds of contractual and common-law indemnification, and, as a result, also requests a hearing to determine attorneys' fees allegedly owed to it.

Winick cross-moves, pursuant to CPLR 3211(b), for an order dismissing certain of defendants' affirmative defenses.

Background and Factual Allegations

Winick alleges that, at approximately 11:30 P.M. on July 26, 2006, she sustained personal injuries at the premises located at 335 Madison Avenue. 335 Madison owns the commercial building where Winick's accident occurred. 335 Madison contracted with OneSource to provide janitorial services for the building. Winick slipped and fell on water that allegedly leaked from an overhead air conditioning duct that had dripped onto the floor. She had just taken the elevator down from her office to the atrium level of her building and exited the elevator bank when she slipped. As a result of her fall, Winick claims to have sustained serious injuries.

Winick claims that there were small puddles of water on the floor, which she did not notice until after she fell. As she was lying on the floor, Winick noticed liquid dripping from "the air conditioning vent on the ceiling." Winick states that, despite telling the front attendant Charles Gnahore ("Gnahore") about the water, it was still there the next day when she returned to work. Gnahore was employed by OneSource.

The contract between 335 Madison and OneSource (the "contract) states that OneSource is obligated to report to 335 Madison any "damage, breakage, and/or apparent plumbing or electrical problems." Staff from OneSource also conducted "nightly services," which included, among other things, dusting the floor, vacuuming and cleaning the elevators. In the contract, the "cleaning day" is defined as a 24-hour day. In fact, there were at least 33 nightly cleaners that were to be provided pursuant to the contract.

OneSource was required to turn in a nightly report which would, at a minimum, confirm attendance of the OneSource employees and a review of all the areas cleaned. Additionally, with respect to the atrium, the contract indicates that the "[a]trium work must be completed after hours. [OneSource] will be held responsible for damages to interior surfaces as a result of water and/or cleaning solutions dripping down the atrium walls."

Pursuant to the contract, OneSource was also expected to obtain insurance coverage which added 335 Madison as an additional insured. The insurance policy, according to the contract, was supposed to be shown to 335 Madison before OneSource was allowed to commence its work.

The contract contains an indemnification provision which requires OneSource to indemnify 335 Madison if OneSource is negligent in performing its janitorial duties or breaches the contract in some way. The contract provides the following, in pertinent part, with regard to indemnification:

> To the fullest extent permitted by applicable law, [OneSource] shall defend, indemnify, and hold harmless [335 Madison] ... from and against any and all liabilities, obligations, claims, demands, causes of action, losses, expenses ... and attorneys' fees incident thereto, arising out of, based upon, or occasioned by or in connection with:
> (a) [OneSource's] performance of (or failure to perform) the Contract Duties;
> (b) a violation of any laws of any negligence, gross negligence or willful misconduct by Service Contractor of its affiliates, subcontractors, agents or employees during performance of the Contract Duties; and/or
> (c) a breach of this Agreement by Service Contractor or any of its affiliates, subcontractors, agents or employees.

> The aforesaid obligation of indemnity shall be construed as to extend to all legal, defense and investigation costs, as well as other reasonable costs, expenses and liabilities incurred by the party indemnified, from and after the time at which the party indemnified receives notification (whether verbal or written) that a claim or demand is to be made or may be made.

OneSource is also required to indemnify 335 Madison even if 335 Madison itself is found to be negligent. As set forth in the contract,

> Except as may be otherwise provided by applicable law or any governmental authority, Owner's or Agent's right to indemnification under this section shall not be impaired or diminished by any act, omission, conduct, misconduct, negligence or default (other than gross negligence or willful misconduct) of Owner or Agent or any employee of Owner or Agent who contributed or may be alleged to have contributed thereto.

Nicholas Cluess ("Cluess"), the Property Manager of the building, testified that, prior to Winick's accident, he was not aware of a "condensation problem" or of condensation dripping onto the floor from the air conditioner. Cluess had never received complaints of this issue in the past. Cluess explained that it was extremely humid on the day of Winick's accident, and that the diffusers in the ceiling had apparently "sweated." After Winick's accident, Cluess testified that nothing was found to be wrong with the equipment and that personnel were asked to watch out for the condensation.

Chuck Croce ("Croce"), the building's chief engineer, who is employed by 335 Madison, testified that his duties are to "maintain the building's HVAC, all heating, ventilation and air conditioning." Croce explained that the HVAC system was installed in 1981 and that, prior to Winick's accident, there had never been a complaint about condensation build-up. When asked about any newer HVAC systems, Croce testified that

these newer systems may have a "dehumidification system" in them to handle condensation. Croce also stated that, only after the Winick's accident, did the building start using fans in the atrium to assist with the humidity condition. However, while being deposed a year later, Croce testified that, prior to Winick's accident, when it was humid, alarms would go off in the building which would begin to run the "purge fans."

Gnahore, the attendant on duty the night of Winick's accident, testified that after Winick's accident, he called the building engineer on duty. Gnahore claims that this building engineer blamed the air conditioner vent for the leakage.

In her complaint, Winick alleges that, "by reason of the negligence, carelessness and recklessness" of 335 Madison, she was "caused to slip and/or trip and/or fall on a slippery and/or otherwise defective floor ... ." Winick also alleges that 335 Madison permitted a dangerous condition to occur, and that it should have remedied this condition or warned Winick of the danger. Winick further alleges that OneSource was "responsible for the maintenance of the premises" and that OneSource's negligence caused her to slip.

OneSource, in seeking summary judgment, argues that it did not create the dangerous condition, nor did it have actual or constructive notice of the condition. OneSource further contends that, being an independent contractor, it owed no duty of care to Winick.

In addition, OneSource maintains that 335 Madison is not entitled to contribution from it because OneSource does not owe 335 Madison a duty of care outside of the

contractual obligation, nor does it owe Winick a duty of care. OneSource also contends that the contractual indemnification provision is unenforceable. In particular, OneSource argues that the language of the indemnification provision is contrary to General Obligations Law § 5-322.1. OneSource contends that, even if the language were valid, OneSource would not be required to indemnify 335 Madison because, among other things, Winick's accident was not the result of OneSource's performance or nonperformance of janitorial duties.

In opposition to OneSource's motion, 335 Madison contends that it was not negligent in any way. As such, according to 335 Madison, even if it is found liable as the building's owner, OneSource will not relieved of its duty to indemnify. 335 Madison further alleges that the language in the indemnity provision is enforceable. Moreover, according to 335 Madison, contribution is warranted in this situation.

In opposition, Winick maintains that both defendants' motions should be denied.[1] She alleges that OneSource had constructive notice of the defective condition of the recurring build-up of condensation in the air conditioning units. Winick attaches several expert opinions in support of her allegation that defendants did not properly maintain the air conditioning unit in question. Winick further alleges that the doctrine of res ipsa loquitur should apply.

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[1] Winick claims that OneSource and 335 Madison are "united in interest" and therefore "joined at the hip" for purposes of notice of a defective condition. However, Winick submits no evidence to support this claim.

335 Madison seeks to dismiss Winick's complaint and also seeks judgment over OneSource on the ground of common-law and contractual indemnification, and for contribution. 335 Madison claims that Winick cannot establish that 335 Madison had actual or constructive notice of the dangerous condition, or that it created the condition. 335 Madison also argues that OneSource must also indemnify 335 Madison for its legal fees, as this is written into the indemnification provision.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept 2007), citing *Winegrad v. New York University Medical Canter*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dept 2008), quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Grasso,* 50 A.D.3d at 544, citing *Marine Midland Bank v. Dino and Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 630 (1997).

OneSource's Motion for Summary Judgment Dismissing Winick's Action

In general, independent contractors, such as OneSource, are not liable in tort or for breach of contract for injuries sustained by a third party. *Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002) (*"Espinal"*). However, there are three exceptions:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] 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 citations omitted].

As OneSource correctly argues, even if Winick's injury occurred in part due to OneSource's failure to properly perform its janitorial duties, OneSource nevertheless may not be held liable to Winick in tort under the circumstances presented here. There is no indication that OneSource "launch[ed] an instrument of harm" which caused Winick's injuries. There is no evidence showing that OneSource created the drips of condensation which allegedly caused Winick to fall. In fact, OneSource was not involved in the installation or maintenance of the HVAC system.

Further, Winick did not "detrimentally rely" on OneSource's janitorial services, as she was unaware that the building had even contracted with OneSource for its services. As such, the second exception does not apply.

Finally, OneSource did not "entirely absorb [335 Madison's] duty as a landowner to maintain the premises safely." *Id.* Although the contract between the parties required OneSource to clean the premises, the contract did not displace 335 Madison's common-

law duty as property owner to safely maintain the building, including the area where Winick slipped. *See Thomassen v. J & K Diner*, 152 A.D.2d 421, 424 (2d Dept. 1989)

Based on the parties' submission, the Court holds that OneSource did not owe Winick a duty of care and OneSource's actions do not fall into any of the three exceptions upon which tort liability could be based. Accordingly, OneSource's motion for summary judgment is granted with respect to Winick's claims against it.

335 Madison's Motion for Summary Judgment Dismissing Winick's Action

A property owner such as 335 Madison "is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk." *Perez v. Bronx Park South Associates*, 285 A.D.2d 402, 403 (1st Dept 2001).

In a slip and fall case, the plaintiff must present evidence that the landowner defendant either created the defective condition which caused the accident, or that defendant had actual or constructive notice of it. *Mullin v. 100 Church LLC,* 12 A.D.3d 263, 264 (1st Dept 2004). "In order 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 allow the owner to discover and remedy it." *Perez v. Bronx Park South Associates,* 285 A.D.2d at 403, citing to *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986).

335 Madison argues that Winick provides no evidence as to whether the water existed on the floor for minutes, seconds or hours prior to the fall. However, on a defendant's motion for summary judgment, it is not plaintiff's burden to establish that the building owner had actual or constructive notice of the dangerous condition. It is the building owner's burden, as a matter of law, to establish the lack of notice. As the Court held in *Giuffrida v. Metro North Commuter R.R. Co.* (279 A.D.2d 403, 404 [1st Dept 2001]), "[w]here the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed." *See also Smith v. Costco Wholesale Corporation*, 50 A.D.3d 499, 500 (1st Dept 2008) ("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").

Here, 335 Madison has not established as a matter of law that it did not create the hazardous condition or that it lacked actual or constructive notice of the hazardous condition. 335 Madison claims that its property manager inspected the floors every morning and afternoon. There is no indication that the floor was inspected in the evening. Therefore, any contention that the water could have been created just seconds prior to Winick's accident is speculative. As the Court held in *Lebron v. Napa Realty Corp.* (65

A.D.3d 436, 437 [1st Dept 2009]), the defendant could not prove lack of notice because its manager had no "personal knowledge of the condition of the sidewalk at the time of the accident or in the hours immediately preceding it" nor could the manager establish that its employees could not have noticed the ice in time to clean it.

In terms of the HVAC system, the documents and deposition testimony show that the building did have fans in place to work on extremely humid days in order to remove condensation. It is unclear as to whether or not the HVAC system alleviated the condensation on the date of Winick's accident. Croce's testimony seemed to contradict itself -- at first he stated that no fans were in place prior to Winick's accident, but later testified that the building had fans and an alarm set up in response to extremely humid days, prior to the accident. Regardless, even if no one had ever observed any condensation prior to this incident, it may have occurred on the eve of Winick's accident for the first time. 335 Madison had discussed the potential problem for condensation on humid days. As such, issues of fact remain as to whether 335 Madison knew or should have known about the condition which allegedly led to the leaking water.

Issues of fact remain as to where the wet condition came from, whether or not the HVAC systems were working properly, and whether or not the water, wherever it came from, should have been noticed and cleaned prior to Winick's accident. Accordingly, 335 Madison's motion for summary judgment dismissing Winick's complaint is denied.

Winick's Cross-Motion Dismissing Defendants' Affirmative Defenses

Winick moves to dismiss 335 Madison's first, second and sixth affirmative defenses, and OneSource's first, second and fifth affirmative defenses. As stated above, the Court is dismissing Winick's complaint against OneSource. Therefore Winick's request to have OneSource's affirmative defenses dismissed is moot.

335 Madison's first affirmative defense is that any injuries Winick sustained were the result of her own culpable conduct. "Comparative negligence is a jury question in all but the clearest cases [internal quotation marks and citations omitted]." *Sokolovsky v. Mucip, Inc.*, 32 A.D.3d 1011, 1012 (2d Dept 2006), thus Winick's motion to dismiss this defense is denied.

335 Madison's second defense is that the injuries were caused by persons who 335 Madison did not control. 335 Madison, as the building owner, has nondelegable duties to maintain a safe premises. Winick properly argues that, "whenever the general public is invited into stores, office buildings ... [t]he owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises ... ." *Thomassen v. J & K Diner*, 152 A.D.2d 421, 424 (2d Dept 1989). 335 Madison may also be held liable, in certain circumstances, "for a defect in construction caused by an independent contractor." *Id.* at 425. Accordingly, WInick's motion to dismiss 355 Madison's second defense is granted.

335 Madison's sixth defense, that Winick assumed the risk of her own injuries, is also dismissed. There are no "usual risks inherent" in walking across a floor. *See generally Finn v. Barbone*, 83 A.D.3d 1365, 1365 (3d Dept 2011).

Defendants' Motions for Summary Judgment on Indemnification

Common-Law Indemnification

335 Madison argues that, if Winick is able to recover from 335 Madison as a result of her injuries, 335 Madison is entitled to common-law indemnification from OneSource. According to 335 Madison, any alleged injuries were caused by OneSource's negligence in maintaining the premises.

The Appellate Division, First Department has explained that "[c]ommon-law indemnification is available to one who has committed no wrong but is held liable to the injured party because of some relationship with the tortfeasor or obligation imposed by law [internal quotation marks and citations omitted]." *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 366 (1st Dept 2006). The right to indemnification may be implied by common law to "prevent an unfair result or the unjust enrichment of one party at the expense of the other." *Richter v. Hunter's Run Homeowner's Association*, 14 A.D.3d 601, 602 (2d Dept 2005).

OneSource was contractually obligated to perform janitorial and cleaning services, which included keeping the floors dry and clean. If Winick is successful in recovering against 335 Madison for negligent failure to keep the floors clean and safe, OneSource

"may be required to indemnify [335 Madison] since there are questions of fact as to whether the accident resulted from its alleged failure to fulfill its obligations pursuant to the terms of the ... contract." *Id.*

OneSource argues that it was not responsible for the water which leaked onto the floor, and that it did not have notice of this water. However questions of fact still remain as to the whether Winick's injuries were due to inaction on the part of OneSource to fulfill its obligations to 335 Madison with regards to its janitorial services contract. Credibility issues are "properly left for the trier of fact." *Yaziciyan v. Blancato*, 267 A.D.2d 152, 152 (1st Dept 1999).

Because common-law indemnification is premised on "vicarious liability without actual fault," the "party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted]." *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d at 367. As with OneSource, as a question of fact remains as whether 335 Madison was negligent, 335 Madison's motion for summary judgment seeking judgment over OneSource for common-law indemnification is also denied.

Contractual Indemnification

OneSource argues that 335 Madison is not entitled to contractual indemnification, because, among other aspects to be addressed below, the contract's indemnification language runs "afoul of General Obligations Law § 5-322.1." Specifically, OneSource

claims that there is no "saving language" in the indemnification clause. OneSource argues that the language in the contract which provides that OneSource is to indemnify 335 Madison, even if 335 Madison is found to be negligent, should be void and unenforceable as against public policy. OneSource also maintains that it is free from negligence and, therefore, the indemnification provision should not be triggered.

General Obligations Law 5-322.1 (1) states the following, in pertinent part:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable ... .

OneSource alleges that the indemnification provision should be considered void and unenforceable because, as it is written, OneSource is expected to indemnify 335 Madison, even if 335 Madison is negligent. OneSource's arguments are without merit and the indemnification provision will be valid if triggered. Clauses which purport to indemnify a party for its own negligence do not violate the General Obligations Law "if the provision authorizes indemnification to the fullest extent permitted by law ... ." *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 671 (2d Dept 2007). OneSource's allegation that the indemnification provision contains no savings provision,

is mistaken. The first sentence in the indemnification provision begins with "[t]o the fullest extent permitted by applicable law."

Moreover, an indemnification provision allegedly indemnifying a party for its own negligence may also be enforced if the party is found to be "free of any negligence, and its liability is merely imputed or vicarious." *Id.* Thus if 335 Madison is not found to be actively negligent, but only liable for dangerous conditions as the building owner, and OneSource is found negligent or in breach of the contract, then 335 Madison will be indemnified.

According to the contract, 335 Madison is entitled to indemnification if OneSource's negligence was a cause of Winick's accident, or if OneSource breached its contract with 335 Madison. At this point, a question of fact remains as to whether or not OneSource's negligence in performing its janitorial duties was a cause of Winick's accident.

As such, issues of fact remain with respect to the parties' negligence which require a trial. Accordingly, it would be premature to grant summary judgment on 335 Madison's claim for contractual indemnification. *See e.g. Cuervas v. City of New York*, 32 A.D.3d 372, 374 (1st Dept 2006) (holding that conditional indemnification was premature since party did not establish its own "freedom from negligence"). Likewise, OneSource's motion for summary judgment dismissing this claim from the third-party action is denied.

Failure to Procure Insurance

335 Madison alleges that OneSource failed to procure insurance coverage. As such, if any judgment is entered against 335 Madison, 335 Madison claims that it is entitled to judgment based on failure to procure an insurance policy, which should have been provided pursuant to the contract. Although the contract between the parties indicates that OneSource was not allowed to commence its work before showing proof of insurance, in response to this motion, OneSource has offered no proof of an insurance policy. Accordingly, 335 Madison is granted summary judgment on its claim against OneSource for failure to procure insurance. However, because 335 Madison has its own insurance policy, 335 Madison's potential recovery from OneSource for this breach of contract is limited to 335 Madison's "out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums." *Lima v. NAB Construction Corp.*, 59 A.D.3d 395, 398 (2d Dept 2009). *See also Inchaustegui v. 666 5th Avenue Ltd. Partnership,* 96 N.Y.2d 111, 114 (2001).

Contribution

Although 335 Madison seeks summary judgment on its contribution claim, it appears to have abandoned this claim. In any event, 335 Madison is not entitled to contribution from OneSource. To successfully plead a claim for contribution, "a third-party plaintiff is required to show that the third-party defendant owed it a duty of

reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiff as injured parties and that a breached of that duty contributed to the alleged injuries." *Guerra v. St. Catherine of Sienna*, 79 A.D.3d 808, 809 (2d Dept 2010).

The Court has already held that OneSource did not have an independent duty of care to Winick. Nor did OneSource owe 335 Madison a duty of care outside of its contractual obligations. 335 Madison nevertheless maintained a nondelegable duty as owner of the premises. The duty to keep the premises safe was not "solely within the province" of OneSource. *Id.* at 809. Accordingly 335 Madison is denied summary judgment on the claim for contribution and OneSource is granted judgment dismissing this claim as against it.

Attorneys' Fees

Pursuant to the contract, 335 Madison is entitled to attorneys' fees arising out of OneSource's breach of contract or negligence. Because, at this time, questions of fact remain as to whether or not the indemnification provision will be triggered, 335 Madison's request for a hearing to calculate attorneys' fees for this action is denied without prejudice to renewal after trial.

In accordance with the foregoing, it is hereby

ORDERED that OneSource, Inc.'s motion for summary judgment dismissing Fawn Winick's complaint, the third-party complaint, and all cross claims as against it is granted only with respect to dismissing Fawn Winick's claims against it, and dismissing

335 Madison Avenue, LLC's claims for contribution and attorneys' fees, and is otherwise denied; and it is further

ORDERED that 335 Madison Avenue, LLC's motion for summary judgment is granted only with respect to the claim against OneSource, Inc. for failure to procure insurance, and is otherwise denied in its entirety; and it is further

ORDERED that Fawn Winick's motion to dismiss 335 Madison Avenue, LLC's affirmative defenses is granted only with respect to the second and sixth affirmative defenses and is otherwise denied; and it is further

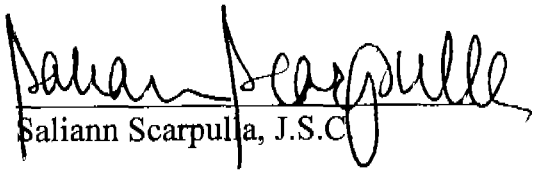
ORDERED that the complaint is hereby severed and dismissed as against third-party defendant OneSource, Inc., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that all remaining claims, cross claims and counter claims shall continue.

This constitutes the decision and order of the Court.

Dated: New York, NY
October 7, 2011

ENTER:



Saliann Scarpulla, J.S.C.