**Spector v Cushman & Wakefield, Inc.**

2011 NY Slip Op 33431(U)

December 16, 2011

Sup Ct, NY County

Docket Number: 104607/07

Judge: Carol R. Edmead

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SCANNED ON 12/27/2011

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Linda Spector

INDEX NO. 104607/07

MOTION DATE

- v -

MOTION SEQ. NO. 011

Cushman & Wakefield, Inc. etc.

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 | |

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

It is hereby

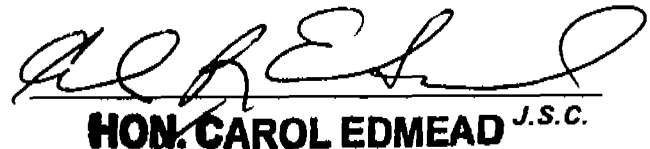
ORDERED that the relief sought herein has been granted. On October 12, 2011, this court stayed all proceedings related to this action pending this court's resolution of Motion Sequence 012. Said decision was rendered on December 16, 2011. And it is further

ORDERED that the stay is hereby lifted and the parties shall proceed to Part 40 for trial as scheduled on December 20, 2011 at 9:30 a.m.

FILED

DEC 20 2011

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 12.16.2011

HON. CAROL EDMEAD J.S.C.

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 35

---------------------------------------------------------------X

LINDA SPECTOR and PAUL SPECTOR,

Plaintiffs,

-against-

Index No. 104607/07

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-

Third-Party
Index No. 590275/08

ONE SOURCE FACILITY SERVICES, INC.,

Third-Party Defendant.

---------------------------------------------------------------X

ONE SOURCE FACILITY SERVICES, INC.,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 590616/08

GOLDEN PLOW, LLC,

Second Third-Party Defendant.

---------------------------------------------------------------X

**HON. CAROL R. EDMEAD, J.S.C.:**

**MEMORANDUM DECISION**

In this action for personal injuries, plaintiff Linda Spector (plaintiff or Spector) alleges that she was injured on February 14, 2006 at about 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 Manhattan (the premises).

In motion sequence number 011, defendant/third-party defendant/second third-party plaintiff OneSource Facility Services, Inc. (OneSource) moves, by order to show cause, for an order staying the trial of this action pending the outcome of its motion for summary judgment, or alternatively, for an order adjourning the trial of this action to allow the motion to be heard and decided on the merits. On October 12, 2011, the court stayed all proceedings related to this action pending the hearing of the motion, and scheduled oral argument on the motion for December 20, 2011.

In motion sequence number 012, OneSource moves for an order: (1) pursuant to CPLR 3212, for leave to make a late motion for summary judgment; (2) pursuant to CPLR 2221 (e) (2) and (3), for leave to renew the court's decision and order dated January 22, 2010 (the prior decision); (3) pursuant to CPLR 3025, for leave to amend its answer to assert the defenses of *res judicata* and collateral estoppel; and (4) upon said leave being granted, for summary judgment dismissing the third-party complaint and all claims and cross claims asserted against it and for summary judgment on its second third-party complaint.

Defendant/third-party plaintiff Citibank, NA (Citibank) cross-moves, pursuant to CPLR 3212, for summary judgment on its cross claims and third-party claims for contractual indemnification and failure to procure insurance against OneSource.

This decision only addresses motion sequence number 012 and the cross motion.

## BACKGROUND

Familiarity with the facts of this case, as set forth in the court's prior decision, is

[* 4]

presumed.

Spector alleges that she was injured while on her way to work on the morning of February 14, 2006. Citibank is the owner of the premises. OneSource was hired to perform exterior maintenance of Citibank's premises, including snow and ice removal. OneSource subcontracted its snow removal duties at the subject location to defendant/second third-party defendant Golden Plow, LLC (Golden Plow).

On April 2, 2008, Citibank commenced a third-party action against OneSource, asserting the following claims: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) breach of contract for failure to procure insurance.[1] Subsequently, on July 10, 2008, OneSource brought a second third-party action against Golden Plow, also seeking: (1) contractual indemnification; (2) common-law indemnification; (3) contribution; and (4) damages for failure to procure insurance.[2]

As relevant here, Citibank, OneSource, and Golden Plow moved, *inter alia*, for summary judgment dismissing the complaint and all claims asserted against them.[3]

On January 22, 2010, the court granted Citibank's motion, noting that there was no evidence that Citibank had actual notice of the ice and that "[t]he evidence submitted indicates

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[1]Citibank's answer to the amended complaint also contains cross claims for indemnification and failure to procure insurance (Citibank's Answer to Amended Complaint, Second and Third Cross Claims).

[2]OneSource's answer to the amended complaint asserts cross claims for indemnification and breach of contract (OneSource's Answer to Amended Complaint, Second and Third Cross Claims).

[3]On July 28, 2008, the court granted summary judgment to defendant Cushman & Wakefield, Inc.

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" (*Spector v Cushman & Wakefield, Inc.*, 2010 WL 363266 [Sup Ct, NY County 2010], *revd* 87 AD3d 422 [1st Dept 2011]). Additionally, OneSource and Golden Plow were also granted summary judgment dismissing the complaint as against them. The court wrote that "there is no evidence or allegation that either OneSource 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 OneSource referenced above, it cannot be held that OneSource or Golden Plow entirely displaced Citibank's duty to maintain a safe abutting sidewalk" (*id.*, citing *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Thus, the court determined that the claims for common-law and contractual indemnification and breach of contract were rendered moot as a result of the dismissal of the complaint and dismissed the cross complaints against them (*id.*, n 1 and order).

The First Department subsequently reversed the grant of summary judgment to Citibank, with one dissent, explaining that:

> "Citibank failed to make a *prima facie* showing of entitlement to judgment as a matter of law. The injured plaintiff allegedly slipped on a patch of black ice on the sidewalk abutting Citibank's premises. Because Citibank did not refute plaintiffs' contention that the dangerous condition existed, it was required to establish that it did not cause or create the condition or have actual or constructive notice of it (*see Lebron v Napa Realty Corp.*, 65 AD3d 436, 437, 884 NYS2d 37 [2009]). Citibank has failed to meet its burden with respect to actual or constructive notice of the ice because it proffered no affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalk's condition before the accident. This Court has employed similar reasoning with respect to other summary judgment motions made under analogous facts (*see De La Cruz v Lettera Sign &*

[* 6]

> *Elec. Co.*, 77 AD3d 566, 909 NYS2d 448 [2010]; *Lebron* at 437, 884 NYS2d 37). . . Unlike a contractor, an owner, such as Citibank, has a statutory, nondelegable duty to maintain the sidewalk abutting its premises (*see* Administrative Code of the City of New York § 7-210; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448, 858 NYS2d 117 [2008])"

(*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]).

OneSource now argues that it has "good cause" for the delay in moving for summary judgment on the third-party claims. According to OneSource, the instant motion could not have been made on *res judicata*, collateral estoppel, and law of the case grounds until the First Department's decision and until Citibank advised that it intended to pursue its third-party claims against it. Alternatively, OneSource contends that the court's prior decision should be renewed because the third-party claims became relevant after the First Department reversed the award of summary judgment to Citibank.

Additionally, OneSource asserts that Citibank is barred from asserting common-law and contractual indemnification and breach of contract claims based on *res judicata* and collateral estoppel, since that portion of the court's prior decision was never appealed by any party. OneSource further contends, with respect to Citibank's common-law indemnification, contractual indemnification, and contribution claims, that it is the law of the case that plaintiff's accident did not arise out of OneSource's work at the subject site and that Citibank cannot show its freedom from negligence. In any event, OneSource asserts that Citibank is not entitled to contractual indemnification for two reasons: (1) the indemnification clause in its contract with Citibank is void and unenforceable under General Obligations Law § 5-322.1; and (2) there is no proof that Spector's accident arose out of or was caused by the execution of the work, i.e., the implementation of snow removal. Finally, OneSource argues that Citibank has no valid breach

of contract claim because it named Citibank as an additional insured on its commercial general liability insurance policy.

With respect to the second third-party claims, OneSource moves for contractual indemnification for costs, expenses, and attorneys' fees from Golden Plow. OneSource also seeks summary judgment on its failure to procure insurance claim against Golden Plow.

In opposition to OneSource's motion, and in support of its cross motion, Citibank[4] argues that *res judicata* and law of the case do not apply because the court dismissed all claims and cross claims against OneSource only because Citibank was dismissed from the case as a party, and Citibank is now a party. Citibank asserts that OneSource's motion is late as a matter of law and that there is no basis to renew and/or reargue. According to Citibank, the court should decide the issues that were not decided in the prior decision. OneSource breached its contract, Citibank argues, because it failed to procure the amount and type of insurance required by its contract. Furthermore, Citibank maintains that it is entitled to contractual indemnification from OneSource since it is clear that Spector's accident "arose out of" its contract with OneSource. Citibank also seeks reasonable attorneys' fees from OneSource or from OneSource's insurer for its failure to defend it in this action.

In opposing OneSource's motion, Golden Plow argues the following: (1) OneSource is barred from asserting contractual indemnification and breach of contract claims based on *res judicata*, collateral estoppel, and law of the case; (2) the indemnification provision in the Master Subcontract Agreement is void and unenforceable under General Obligations Law § 5-322.1; (3) Golden Plow did not independently perform snow removal services, and thus, OneSource cannot

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[4]Plaintiffs also join in Citibank's opposition to OneSource's motion.

prove that it was not negligent as a matter of law; (4) indemnification is not triggered because there is no evidence that Spector's accident was caused by a breach of its contract or failure to act; and (5) OneSource has no valid breach of contract claim because the declaratory judgment action brought by OneSource against Golden Plow's insurer, *OneSource Facility Servs., Inc. v Golden Plow, LLC*, Index No. 115764/09, has settled, and in any event, Golden Plow did not agree to purchase insurance for OneSource's benefit, and even if it did breach its contract, the measure of damages is the difference in insurance premiums.

**DISCUSSION**

Initially, the court must consider whether OneSource and Citibank are entitled to make a second motion for summary judgment. "While generally successive motions for summary judgment not supported by new factual assertions and proofs are precluded, such a motion is permitted where 'sufficient cause' for making the second motion is shown" (*Forte v Weiner*, 214 AD2d 397, 398 [1st Dept], *lv dismissed* 86 NY2d 885 [1995] [citation omitted]). The doctrine of the law of the case[5] provides that, once an issue is judicially determined, "that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes*, 37 NY2d 162, 165, *rearg denied* 37 NY2d 817 [1975]). However, "[t]he doctrine of the law of the case is 'not an absolute mandate on the court,' since it may be 'ignored' in

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[5]OneSource and Golden Plow argue that the indemnification and breach of contract claims are barred by the doctrines of *res judicata* and collateral estoppel. Nonetheless, these doctrines do not apply because these claims were not dismissed in a prior action or proceeding (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Therefore, OneSource is not entitled to amend its answer to assert the defenses of *res judicata* and collateral estoppel, because the proposed amendments are clearly devoid of merit (CPLR 3025 [b]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]).

'extraordinary circumstances' vitiating its effectiveness as a rule fostering orderly convenience . . . The error sought to be corrected must, however, be so 'plain . . . [that it] would require [the] court to grant a reargument of a cause'" (*Foley v Roche*, 86 AD2d 887 [2d Dept], *lv denied* 56 NY2d 507 [1982] [citations omitted]; *see also National Mtge. Consultants v Elizaitis*, 23 AD3d 630 [2d Dept 2005]; *Welch Foods v Wilson*, 262 AD2d 949, 950 [4th Dept 1999]).

Here, OneSource and Citibank have shown "sufficient cause" for their second motions for summary judgment as to the contractual indemnification and breach of contract claims. In the prior decision, the court found that OneSource and Golden Plow did not owe a duty of care to Spector. The court also stated that the contractual indemnification and breach of contract claims[6] were moot as a result of the dismissal of the complaint. Upon further review, the court finds that this statement was inaccurate. The contractual indemnification provisions at issue do not condition indemnification based upon the negligence of either OneSource or Golden Plow, and thus, could be triggered even in the absence of negligence by either contractor (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990] [where indemnification clause provided for indemnification of any claim "arising out of, in connection with or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor," subcontractor was required to indemnify contractor even though there was no evidence of negligence on the subcontractor's part]). Moreover, although the complaint was dismissed against OneSource and Golden Plow, the breach of contract claims were not academic (*see Natarus v Corporate Prop. Invs., Inc.*, 13 AD3d 500, 501 [2d Dept 2004] [issue of whether third-party defendant procured

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[6]Citibank and OneSource also appear to have abandoned their common-law indemnification and contribution claims against OneSource and Golden Plow.

contractually-mandated insurance coverage was not academic notwithstanding dismissal of the underlying complaint]; *see also Hajdari v 437 Madison Ave. Fee Assoc.*, 293 AD2d 360, 361 [1st Dept 2002]).

"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 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the party opposing the motion 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 [1st Dept 2006]). The court's function on a motion for summary judgment is only to determine whether any triable issues of fact exist, not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003]).

**A. Citibank's Claims Against OneSource**

1. *Contractual Indemnification*

Paragraph 27 of the contract between Citibank and OneSource provides as follows:

> "The Contractor [OneSource] hereby agrees to indemnify, defend and hold harmless the Bank, Agent, and their affiliates . . . from and against all claims, losses, liabilities and expenses (including fees and disbursements of counsel) suffered or incurred by the foregoing indemnities or any of them on account of or in connection with this Agreement and/or any injury to persons, including but not limited to death . . . *arising out of or in connection with the performance of this Agreement by the Contractor [OneSource]*, or its employees, agents or subcontractors, *or any acts of omission or commission of the Contractor [OneSource]*, or its employees, agents, or subcontractors, including but not limited to claims, liabilities, losses and expenses resulting from the loss or the improper use of keys or card access devices to the Premises given to the Contractor [OneSource], its employees, agents or subcontractors. Claims and demands which may arise out of the sole negligence of the Agent, or any of its subsidiaries, are not the responsibility of the Contractor

[OneSource]. These conditions shall also apply to any subcontracted operations" (Marris Affirm. in Support, Exh. R [emphasis added]).

Schedule E- Snow Removal also contains the following indemnification provision:

> "The Contractor [OneSource] shall indemnify and hold harmless the Owner and Architect against any and all claims and demands for damage to the property of any person, firm or individual or for personal injuries (including death) *arising out of, or suffered while engaged in, or caused, in whole or in part, by the execution of the work*; Contractor [OneSource] shall well and truly defend the Owner and pay all monies awarded for such damages or injuries (including death) as may be sustained, all costs including attorneys' fees and shall obtain a full acquittance and release in favor of the Owner and Architect"

(*id.* [emphasis supplied]).

Although OneSource argues that only the second indemnification provision applies here, the plain language of the first indemnification provision also requires OneSource to indemnify Citibank for any claim for personal injury arising out of or in connection with the performance of the contract by OneSource or any act or omission by OneSource.

OneSource argues that the indemnification provisions are void and unenforceable under the General Obligations Law. General Obligations Law § 5-322.1 provides that:

> "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 . . . 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 . . . ."

Thus, an indemnification agreement is void and unenforceable to the extent that such agreement contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, *rearg denied* 90 NY2d 1008

[1997]; *see also Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [1st Dept 2004] [snow removal contract]). However, an indemnification clause which provides for partial indemnification to the extent that the party to be indemnified was not negligent does not violate the General Obligations Law (*see Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210-211 [2008] [indemnification "to the fullest extent permitted by law" contemplated partial indemnification and was permissible under the statute]). Even if the clause does not contain the savings language "to the fullest extent permitted by law," it may nevertheless be enforced where the party to be indemnified is found to be free of any negligence (*Brown*, 76 NY2d at 179; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408 [1st Dept 2010]). Here, the indemnification provisions in OneSource's contract do not contain the savings language "to the fullest extent permitted by law," but may be enforceable if the jury finds that Citibank was not negligent.

Furthermore, contrary to OneSource's assertion, there are issues of fact as to whether indemnification is triggered in this case. Schedule E of OneSource's contract with Citibank states that "*[s]idewalks*, walkways and parking lots *are to be maintained free of* snow and *ice at all times to prevent hazard to public* and personnel" (Marris Affirm. in Support, Exh. R [emphasis added]). Spector claims that she slipped and fell on a seven by 10 inch patch of black ice on the sidewalk abutting Citibank's property (Plaintiff EBT, at 15, 21). Thus, it is for the jury to determine whether Spector's accident "[arose] out of or in connection with the performance of this Agreement by [OneSource] . . . or any acts of omission or commission of [OneSource]" or "[arose] out of, or suffered while engaged in, or caused, in whole or in part, by the execution of [OneSource's] work" (*see Trzaska v Allied Frozen Stor., Inc.*, 77 AD3d 1291, 1293 [4th Dept 2010] [where plaintiff was injured while stepping off snow pile, there were issues of fact as to

whether plaintiff's accident arose out of contractor's performance or failure to perform its duties under the contract where contractor was required to "clear snow from all drives and parking areas" and to "keep the property clear of snow"]; *Baratta v Home Depot USA*, 303 AD2d 434, 435 [2d Dept 2003] [issue of fact as to whether snow removal contractor breached its contract by failing to perform services]; *cf. Kogan v North St. Community, LLC*, 81 AD3d 429, 430-431 [1st Dept 2011]).

Accordingly, the part of OneSource's motion for summary judgment which seeks dismissal of Citibank's contractual indemnification claims is denied. The part of Citibank's cross motion which seeks summary judgment on its contractual indemnification claims against OneSource is also denied. Because there are questions of fact as to whether the indemnification provision will be triggered, Citibank's request for reasonable attorneys' fees is denied without prejudice to renewal after trial.

2. *Failure to Procure Insurance*

It is well established that an agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]). Where there is a breach of an agreement to procure insurance, the breaching party is responsible for all "resulting damages, including the liability [of the general contractor and the site owner] to [the] plaintiff" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999] [internal quotation marks and citation omitted]).

Paragraph 17 of the contract between Citibank and OneSource states that "[t]he Contractor will, throughout the duration of this Agreement, at its expense, carry and renew . . . (iii) Comprehensive General Liability ("CGL") insurance in the amount of $1,000,000 combined

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single limit covering both bodily injury and property damage, including but not limited to coverage for its indemnities to the Agent under this Agreement" (Marris Affirm. in Support, Exh. R). "The Bank, Agent and their affiliates, including Citigroup, shall be additional insureds under the Contractor's CGL policy with respect to liability arising out of any act or omission pertaining to the performance of this Agreement" (*id.*). Furthermore, the contract states that "[i]f the Contractor's CGL policy includes a self-insured retention, the certificate of insurance shall so indicate, including the amount thereof" (*id.*).

The insurance policy issued by American Home Assurance Company to OneSource for the period June 30, 2005 through June 30, 2006 contains a general aggregate limit of $1,500,000 and each occurrence limit of $1,500,000 (*id.*, Exh. S). The policy contains an endorsement which states that:

> "Section II – Who Is an Insured, 1., is amended to add:
>
> f. Any person or organization to whom you become obligated to include as an additional insured under this policy, as a result of any contract or agreement you enter into, excluding contracts or agreements for professional services, which requires you to furnish insurance to that person or organization of the type provided by this policy, but only with respect to liability arising out of your operations or premises owned by or rented to you. However, the insurance provided will not exceed the lesser of:
>
> 1. The coverage and/or limits of this policy, or
> 2. The coverage and/or limits required by said contract or agreement"

(*id.*).

The policy also contains a self-insured retention endorsement, which states that:

> "Section I- COVERAGES, COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY, 1. – INSURING AGREEMENT, paragraph a. is deleted in its entirety and replaced with the following:

> a. We will pay on behalf of the Insured those sums in excess of the 'Retained Limit' that the Insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. We will have the right but not duty to defend any 'suit' seeking those damages"

(*id.*). The retained limit is $500,000 per occurrence or offense (*id.*).

Citibank has shown that OneSource was required to purchase an insurance policy with a limit of $1,000,000 each occurrence. OneSource obtained a policy with an each occurrence limit of $1,500,000 and aggregate limit of $1,500,000. The policy also contains a $500,000 self-insured retention. As pointed out by OneSource, the contract does not expressly prohibit self-insured retentions. However, considering the reasonable expectations of the parties (*see Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [1st Dept 2010]), the court finds that OneSource breached its obligation to procure insurance naming Citibank as an additional insured for liability "arising out of any act or omission pertaining to the performance of [the] Agreement," with a limit of $1,000,000. The policy requires OneSource to pay out $500,000 before the policy pays any benefit. It is well settled that "self-insurance is not insurance but an assurance – an assurance that judgments will be paid" (*Guercio v Hertz Corp.*, 40 NY2d 680, 684 [1976]; *see also Roldan v New York Univ.*, 81 AD3d 625, 629 [2d Dept 2011]). Therefore, Citibank is entitled to partial summary judgment on its failure to procure insurance claims against OneSource.[7]

**B. OneSource's Claims Against Golden Plow**

1. *Contractual Indemnification*

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[7]While Citibank asserts that OneSource's insurer has breached its duty to defend, the policy states that the insurer has the "right but not the duty to defend any 'suit' seeking those damages" (Marris Affirm. in Support, Exh. S).

Paragraph 14 of the Master Subcontract Agreement between OneSource and Golden Plow provides as follows:

> "Master Subcontractor [Golden Plow] agrees to defend, hold harmless and unconditionally indemnify OneSource Management, Inc. and its affiliates, directors, officers, employees and representatives and the OneSource customers where Master Subcontractor [Golden Plow] is providing services and the customer's affiliates, directors, officers, employees and representatives ["Indemnified Parties"] for and against all liabilities, costs, expenses, including attorneys' fees and expenses of investigation, claims, judgments fines and damages which the Indemnified Parties may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries, including injuries resulting in death, either to persons or property or both, of Master Subcontractor [Golden Plow] or the Indemnified Parties or to any other parties, in any manner *caused by or resulting from Master Subcontractor's [Golden Plow's] breach of this Agreement or acts or failures to act by Master Subcontractor [Golden Plow]* or its employees or agents in the performance of this Agreement; provided, however that such indemnification and hold harmless will not apply to claims for loss, damage, injury or death to the extent caused by the sole negligence of OneSource"

(Marris Affirm. in Support, Exh. T [emphasis added]).

Upon a search of the record (CPLR 3212 [b]), the court finds that there is no evidence that Spector's accident was "caused by . . . [Golden Plow's] breach of [the] Agreement or acts or failures to act by [Golden Plow]" (Marris Affirm. in Support, Exh. T). As noted previously, on February 14, 2006, Spector allegedly slipped and fell on a seven by 10 inch patch of black ice on the sidewalk adjacent to Citibank's property (Plaintiff EBT, at 15, 21). It is undisputed that a major snowstorm fell on New York City starting on February 11, 2006, and continued until about 4 P.M. on February 12, 2006; however, there was no precipitation from that point until Spector's accident on February 14th (Marris Affirm. in Support, Exh. U). Golden Plow's representative, Jason Dufek, testified that Golden Plow only performed snow removal outside the Citibank branch when it received a call from OneSource (Dufek EBT, at 29). Spector testified that she

usually took the same route to work every day, and did not notice any patches of ice at any time before her accident (Plaintiff EBT, at 21). According to Spector, the snow was pushed into the street (*id.*). Michael Yorio, a Citibank employee, testified that he inspected the sidewalk on the date of the accident, and did not observe any ice patches on that date (Yorio EBT, at 19-20). Accordingly, Golden Plow is entitled to dismissal of OneSource's contractual indemnification claim against it (*see Kogan*, 81 AD3d at 430; *Kearsey v Vestal Park, LLC*, 71 AD3d 1363, 1366-1367 [3d Dept 2010] [contractor had no indemnification obligation where it performed snow removal and salting as required by contract, did not know about dangerous condition, and was not under an obligation to constantly monitor property for such conditions]).

2. *Failure to Procure Insurance*

Paragraph 18 of the Master Subcontract Agreement between OneSource and Golden Plow states that "[f]or the purpose of this Agreement, Master Subcontractor will carry the types of insurance in at least the limits, which may be a combination of primary and excess coverage, specified in appended Schedule 18" (Marris Affirm. in Support, Exh. T). Schedule 18 – Master Subcontractor Insurance Requirements provides that:

> "General Liability and Excess Liability MUST be combined limited of $2,000,000, be Blanket contractual cover, broad form property damage, personal injury liability, products/completed operations and independent contractors.
>
> ***
>
> The endorsement appearing in the Description of Operations box on the [Certificate of Insurance] must read as follows:
>
> OneSource Management, Inc. and its affiliates, directors, officers, employees and representatives and the OneSource customers where Insured is providing services, as their interests may appear, are named as Additional Insureds. All policies are primary and non-contributory. All policies have a waiver of subrogation endorsement as to additional insureds. This certificate supercedes any and all prior

certificates issued to Holder"

(*id.*).

In *Crespo v Triad, Inc.* (294 AD2d 145, 148 [1st Dept 2002]), the First Department held that "[t]he Owners were properly granted partial summary judgment on their cross claim against Bozell for breach of contract for failure to procure insurance where the lease between them required each to procure insurance naming the other as an additional insured, and, in response to the motion, Bozell failed to tender an insurance policy" (*see also Chaehee Jung v Kum Gang, Inc.*, 22 AD3d 441, 443 [2d Dept 2005], *lv denied* 7 NY3d 703 [2006] [summary judgment on breach of contract claim for failure to procure insurance properly granted where company failed to produce any evidence of its compliance with insurance procurement clause]; *Taylor v Gannett Co.*, 303 AD2d 397, 399 [2d Dept 2003] [same]).

While Golden Plow asserts that the declaratory judgment action brought by OneSource against its insurer has settled, it appears that Golden Plow's insurer has not conceded that OneSource is an additional insured under the policy. Indeed, a draft settlement agreement indicates that the insurer denied any obligation to provide coverage to OneSource and/or defend or indemnify OneSource as a result of any liability in this action (Marris Affirm. in Reply, Exh. A). Further, OneSource has shown that Golden Plow was required to purchase an insurance policy naming it as an additional insured pursuant to the Master Subcontract Agreement. Golden Plow has failed to tender an insurance policy in response to OneSource's motion. Thus, OneSource is entitled to partial summary judgment on its failure to procure insurance claim against Golden Plow (*see Crespo*, 294 AD2d at 148). However, since OneSource has its own insurance policy, its potential recovery from Golden Plow is limited to its out-of-pocket expenses

not covered by its own insurance (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111, 114 [2001]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]).

**CONCLUSION**

Accordingly, it is hereby

ORDERED that that portion of the court's decision and order dated January 22, 2010 which dismissed (1) defendant Citibank, NA's cross claims for contractual indemnification and failure to procure insurance against defendant OneSource Facility Services, Inc. and (2) defendant OneSource Facility Services, Inc.'s cross claims for contractual indemnification and failure to procure insurance against defendant Golden Plow, LLC, is vacated; and it is further

ORDERED that the motion (sequence number 012) of defendant/third-party defendant/second third-party plaintiff OneSource Facility Services, Inc. is granted to the extent of granting it summary judgment on the issue of liability on its second third-party claim for failure to procure insurance against second third-party defendant Golden Plow, LLC, and is otherwise denied; and it is further

ORDERED that the second third-party claim for contractual indemnification is dismissed; and it is further

ORDERED that the cross motion of defendant/third-party plaintiff Citibank, NA for summary judgment is granted on the issue of liability on its cross claim and third-party claim for failure to procure insurance against defendant/third-party defendant OneSource Facility Services, Inc., and is otherwise denied.

Dated: December 16, 2011

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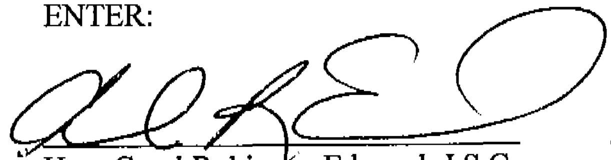

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD