Torres v Merrill Lynch Purchasing

2011 NY Slip Op 34069(U)

June 9, 2011

Supreme Court, Bronx County

Docket Number: 25001/2003

Judge: Lucindo Suarez

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[* 1]
FILED Jul 15 2011 Bronx County Clerk

NEW YORK SUPREME COURT - COUNTY OF BRONX 7/15/11

Mot. Seq. 17 Mot. Seq. 18
Mot. Seq. 19 Mot. Seq. 20
Mot. Seq. 21 Mot. Seq. 22

PART 19

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:
--X

TORRES, SHAIRIN

Index Nº. **25001/2003** 7/15/11

Hon. **LUCINDO SUAREZ**,

Justice.

- against -

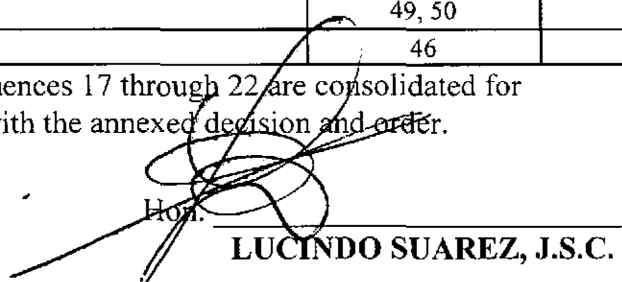
MERRILL LYNCH PURCHASING, et al
--X
and third-party actions.

The following papers numbered 1 to 11 read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #17)**, noticed on **February 25, 2011** and duly submitted as No. 57 on the Motion Calendar of **April 7, 2011**, and the following papers numbered 12 to 19 read on this motion, **AMEND PLEADINGS (Motion Sequence #18)**, noticed on **March 3, 2011** and duly submitted as No. 56 on the Motion Calendar of **April 7, 2011**, and the following papers numbered 20 to 23 read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #19)**, noticed on **March 2, 2011** and duly submitted as No. 59 on the Motion Calendar of **April 7, 2011**, and the following papers numbered 24 to 31 read on this motion, **SUMMARY JUDGMENT (Motion Sequence #20)**, noticed on **March 2, 2011** and duly submitted as No. 58 on the Motion Calendar of **April 7, 2011**, and the following papers numbered 32 to 42 read on this motion, **SUMMARY JUDGMENT (Motion Sequence #21)**, noticed on **February 25, 2011** and duly submitted as No. __ on the Motion Calendar of **April 7, 2011**, and the following papers numbered 39 to 40 and 43 to 50 read on this motion, **SUMMARY JUDGMENT (DEFENDANT) (Motion Sequence #22)**, noticed on **March 3, 2011** and duly submitted as No. 60 on the Motion Calendar of **April 7, 2011**

	PAPERS NUMBERED	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #17)	1, 2, 3	
Answering Affidavit and Exhibits	5, 6, 7, 8	
Replying Affidavit and Exhibits	10, 11	
Memoranda of Law	4, 9	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #18)	12, 13, 14	
Answering Affidavit and Exhibits	16, 17	
Replying Affidavit and Exhibits	18, 19	
Memoranda of Law	15	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #19)	20, 21, 22	
Supplemental Affidavits and Exhibits	23	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #20)	24, 25, 26, 27	
Answering Affidavit and Exhibits	28, 29	
Replying Affidavit and Exhibits	30, 31	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #21)	32, 33, 34	
Answering Affidavit and Exhibits	35, 36, 37, 38, 39, 40	
Replying Affidavit and Exhibits	41, 42	
Notice of Motion - Exhibits and Affidavits Annexed (Motion Sequence #22)	43, 44, 45	
Answering Affidavit and Exhibits	39, 40, 47, 48	
Replying Affidavit and Exhibits	49, 50	
Memoranda of Law	46	

Upon the foregoing papers, Motion Sequences 17 through 22 are consolidated for decision herein and disposed of in accordance with the annexed decision and order.

Dated: **06/09/2011**



Hon. **LUCINDO SUAREZ, J.S.C.**

[* 2]

FILED Jul 15 2011 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
--X

SHAIRIN TORRES,

Plaintiff,

- against -

MERRILL LYNCH PURCHASING, COLLIERS ABR, BROOKFIELD FINANCIAL PROPERTIES, ABM JANITORIAL, MERRILL LYNCH/WFC/L, INC., AMERICAN BUILDING MAINTENANCE CO. and ABM ENGINEERING SERVICES,

Defendants.
--X

DECISION AND ORDER

Index No. 25001/2003

MERRILL LYNCH/WFC/L, INC. and BROOKFIELD FINANCIAL PROPERTIES,

Third-Party Plaintiffs,

- against -

ABM ENGINEERING SERVICES,

Third-Party Defendant.
--X

Third-Party Index No. 84509/2005

MERRILL LYNCH/WFC/L, INC. and BROOKFIELD FINANCIAL PROPERTIES,

Second Third-Party Plaintiffs,

- against -

COMMERZBANK AKTIENGESELLSCHAFT,

Second Third-Party Defendant.
--X

Third-Party Index No. 84813/2005

PRESENT: Hon. Lucindo Suarez

As to Motion Sequence #17: upon the notice of motion dated January 31, 2011 of second

FILED Jul 15 2011 Bronx County Clerk

third-party defendant Commerzbank Aktiengesellschaft and the affirmation, memorandum of law and exhibits submitted in support thereof; the affirmation in opposition dated February 14, 2011 of defendant and second third-party plaintiff Merrill Lynch/WFC/L, Inc. and the exhibits submitted therewith; the affirmation in opposition dated March 8, 2011 and the exhibits and memorandum of law submitted therewith; movant's affirmation in reply dated April 5, 2011 and the exhibits submitted therewith;

As to Motion Sequence #18: upon the notice of motion dated February 4, 2011 of defendant Colliers ABR and the affirmation, exhibits and memorandum of law submitted in support thereof; the affirmation in opposition dated March 23, 2011 of second third-party defendant Commerzbank Aktiengesellschaft and the exhibits submitted therewith; movant's reply affirmation dated April 4, 2011 and the exhibit submitted therewith;

As to Motion Sequence #19: upon the notice of motion dated January 31, 2011 of defendant Merrill Lynch Purchasing and the affirmation and exhibits submitted in support thereof; movant's supplemental affirmation dated April 6, 2011; there being no opposition to the application;

As to Motion Sequence #20: upon the notice of motion dated February 3, 2011 of defendant and second third-party defendant Merrill Lynch/WFC/L, Inc. and the affirmation, affidavit and exhibits submitted in support thereof; the affirmation in opposition dated March 23, 2011 of second third-party defendant Commerzbank Aktiengesellschaft and the exhibits submitted therewith; movant's reply affirmation dated April 5, 2011 and the exhibit submitted therewith;

As to Motion Sequence #21: upon the notice of motion of defendant American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial and defendant third-party defendant ABM Engineering Services dated February 4, 2011 and the affirmation and exhibits submitted in support thereof; the affirmation in opposition of defendant Merrill Lynch Purchasing

FILED Jul 15 2011 Bronx County Clerk

and defendant and third-party plaintiff Merrill Lynch/WFC/L, Inc. dated March 4, 2011 and the exhibits submitted therewith; the affirmation in opposition of defendant Colliers ABR dated March 23, 2011 and the exhibits submitted therewith; the undated affirmation in opposition of plaintiff and the exhibits submitted therewith; movants' affirmation in reply dated April 6, 2011 and the exhibits submitted therewith;

As to Motion Sequence #22: upon the notice of motion dated February 7, 2011 of defendant Colliers ABR and the affirmation, exhibits and memorandum of law submitted in support thereof; the affirmation in opposition dated February 15, 2011 of defendants Merrill Lynch Purchasing and Merrill Lynch/WFC/L, Inc. and the exhibits submitted therewith; the undated affirmation in opposition of plaintiff and the exhibits submitted therewith; the affirmation in reply dated April 5, 2011 of defendant Colliers ABR and the exhibits submitted therewith;

and upon due deliberation; the court finds:

Plaintiff, an employee of second third-party defendant Commerzbank Aktiengesellschaft ("Commerzbank"), slipped and fell on water near the toilet in the third stall of the women's restroom on the thirty-first floor of the building leased by defendant Merrill Lynch/WFC/L, Inc. ("ML"). Commerzbank subleased part of the thirty-first floor of the building from ML; the restroom was not part of the space that Commerzbank leased and was contained within the common area of the floor. ML contracted with defendant Colliers ABR ("Colliers") for management of the building; ML contracted with defendant American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial ("ABMJ") for janitorial services; and ML contracted with defendant and third-party defendant ABM Engineering Services ("ABME") for engineering maintenance. ML also occupied part of the building.

ABMJ and ABME (Motion Sequence #21) and Colliers (Motion Sequence #22) move for

summary judgment dismissing the complaint and all cross-claims. ML moves for summary judgment on its third-party claims against Commerzbank for contractual defense and indemnity (Motion Sequence #20). Colliers, claiming to be an agent of ML for contractual purposes, moves for leave to assert a claim against Commerzbank for contractual indemnification and for summary judgment on such claim (Motion Sequence #18). Commerzbank moves for summary judgment dismissing the third-party complaint on the ground that the circumstances of the accident do not require its indemnification of ML (Motion Sequence #17). Merrill Lynch Purchasing moves for dismissal of all cross-claims against it (Motion Sequence #19). Motion Sequences #17 through #22 are consolidated for decision herein because of common questions of law and fact.

Plaintiff testified that at 10:30 a.m. on the day of her accident, she was informed by her supervisor, Karin Rapaglia ("Rapaglia"), that "something was wrong" with the women's restroom and was told to call Commerzbank's facilities department to report it. Rapaglia did not elaborate and plaintiff did not inquire further. Within a few minutes thereafter, plaintiff relayed, by telephone, Rapaglia's message to Leo Biala ("Biala"), a Commerzbank employee in the facilities department, and did nothing else with respect to the message. Thereafter, at approximately 1:30 p.m., plaintiff took two steps into the third of five stalls in the women's room and slipped and fell. She did not notice any water on the floor before her fall, and knew that the toilet was not overflowing. After her fall she noticed clear water on the floor in front of the toilet and toward the back on both the left and right sides of the toilet, approximately three inches away from the toilet.

Plaintiff had worked in the building since 1996, when she started with Commerzbank, and had been working on the thirty-first floor for approximately one year before the accident. She had never noticed water on the restroom floor prior to her accident and had not had any discussions with coworkers regarding the condition of the restroom within the preceding six months. She could not

recall having to contact the Commerzbank facilities department regarding the restroom in the six months prior to the accident, although Rapaglia mentioned to her three times that "something was wrong" with the restroom. On none of those occasions did Rapaglia elaborate further or plaintiff inquire further.

Rapaglia testified that she noticed water on the floor in front of the second or third stall in the restroom at approximately 10:30 a.m. She thereafter told plaintiff to call facilities because of "a mess" in the restroom. She did not recall having to ask plaintiff to call facilities to report a restroom condition at any other time, was not aware of any ongoing restroom condition and had no complaints regarding the restroom.

Robert Vassallo ("Vassallo"), Commerzbank's Vice President of Property, Purchasing and Telecommunications, testified that he oversaw the Commerzbank facilities department, and that its policy/procedure after receiving a complaint regarding a common area outside of Commerzbank's leased space was to immediately notify the building manager by calling a main number, because while Commerzbank was responsible for the maintenance of its own space, the managing agent would have been responsible for maintenance of a common area such as the thirty-first floor women's restroom. In general, the extent of the facilities department's follow-up after a call to the building manager to report a common area condition would consist of eventually checking to see that the complained-of condition had been resolved after the building's response. Biala submitted an affidavit in support of ML's motion in which he averred that he has no recollection of speaking to plaintiff and does not recall relaying any complaint to the building manager that day.

Nicole Acosta ("Acosta"), Colliers' assistant property manager assigned to the building, testified that Colliers performed its services pursuant to a facilities management agreement covering the entire building. Colliers maintained all common areas (also called "base building"). Colliers

FILED Jul 15 2011 Bronx County Clerk

was the facilities manager for ML and all ML-occupied space, but as all tenants had their own facilities departments to communicate with Colliers, Colliers acted more as a property manager with respect to the tenants. Tenant complaints were handled by a central help desk staffed by ML employees who used property management software to generate computerized work tickets directly to the relevant trade. Although Colliers would occasionally receive complaint calls directly from tenants, tenants were urged to direct their complaints to the central help desk. In addition to the ticket, the trades could be notified of the need for a repair by telephone.

Colliers supervised the work of the in-house contracted vendors, including defendant ABMJ, who provided cleaning services including restroom maintenance, and defendant ABME, who provided physical plant maintenance services including plumbing. ABMJ and ABME had their own schedules of daily maintenance. Acosta testified to a work order generated on the date of plaintiff's accident which indicated that Biala called in a plumbing request (regarding "clogs") at 12:42 p.m. to an employee known by her to have staffed the help desk, and that a plumber responded at 1:30 p.m. Acosta was also asked to interpret various records of plumbing repair, which included repairs made to the women's restroom on March 14, 2002, May 14, 2002 and June 17, 2002.

ABME Assistant Chief of Engineering Michael Lynch ("Lynch") testified that on the date of plaintiff's accident, his office, on the tenth floor of the building, received notification by telephone call and/or work ticket between 12:00 noon and 12:30 p.m., but in any event during the lunch hour (between 12:00 noon and 1:00 p.m.), of a clogged toilet in the thirty-first floor women's restroom. He and the plumber responded as soon as soon as they received the call. Upon entering the restroom, he saw that one of the toilets in the middle of the row was clogged, and the plumber unclogged it with a plunger. The call required five to ten minutes of their time. There was no water on the floor when they entered or when they left, but because there was water on the seat of the

toilet as a result of the plumber's operations, Lynch telephoned ABMJ to send someone to clean it.

ABMJ employee Maria Vargas ("Vargas") testified that the thirty-first floor was one of the sixteen floors assigned to her for maintenance of women's restrooms, and that her duties were to keep the restrooms clean, supplied and free of water on floors. In general, she would make three passes daily through each restroom. While she tended to start at the lowest floor and progress higher, she varied the order in which she attended to her assigned floors. If she encountered water on the floor of a restroom, she would mop it and call her foreman, who would then report it to the building. If she noticed water leaking from a toilet or a clog, she would clean the floor, close and lock the stall door and report it to her foreman. Engineers, and not she, would be involved in repairs, but she could be called to clean up after engineers' repairs. She noticed a leak behind a toilet in the subject restroom approximately five times in the year prior to plaintiff's accident, and reported it to her foreman each time. At no time did she see the leak accompanied by clogging. Vargas' foreman, Andrew Leto, testified that he did not have a recollection of Vargas informing him of a problem with the subject restroom and that he had no knowledge of problems with the subject restroom prior to plaintiff's accident. He did not recall receiving a call from ABME's assistant engineer on the day of plaintiff's accident.

ABMJ's and ABME's Motion for Summary Judgment (Motion Sequence #21)

ABMJ and ABME move for summary judgment dismissing the complaint and all cross-claims on the grounds that they owed no duty to plaintiff, that they were not responsible for a recurrent condition routinely left unaddressed and that they did not have notice of the subject condition.

A contractor ordinarily owes no duty of care to a non-contracting third party. *See Espinal v. Melville Snow Contrs., Inc.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S.2d 120 (2002).

Nevertheless,

> A duty of care to noncontracting third parties, however, may arise out of a contractual obligation or the performance thereof in three sets of excepted circumstances, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract . . . first, "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;" second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation," and third, "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely.'"

Timmins v. Tishman Constr. Corp., 9 A.D.3d 62, 66, 777 N.Y.S.2d 458, 461-62 (1st Dep't 2004) (internal citations omitted), *rearg denied*, 2004 N.Y. App. Div. LEXIS 10845 (1st Dep't Sept. 16, 2004); *see also Powell v. HIS Contrs., Inc.*, 75 A.D.3d 463, 905 N.Y.S.2d 161 (1st Dep't 2010); *Ragone v. Spring Scaffolding, Inc.*, 46 A.D.3d 652, 848 N.Y.S.2d 230 (2d Dep't 2007).

Given the respective roles of ABME, ABMJ and Colliers, and Colliers' retention of primary responsibility for premises maintenance, neither ABME nor ABMJ performed work pursuant to a contract which was so comprehensive and exclusive as to find a duty under the third exception to the general rule. *See Corrales v. Reckson Assoc. Realty Corp.*, 55 A.D.3d 469, 868 N.Y.S.2d 2 (1st Dep't 2008); *cf. Brown v. Simone Dev. Co., L.L.C.*, 2011 N.Y. App. Div. LEXIS 3062 (1st Dep't Apr. 19, 2011). Nor is there any evidence of plaintiff's detrimental reliance upon either ABME's or ABMJ's continued performance of their respective contractual obligations, and plaintiff was unaware of them. *See Espinal, supra*; *Lenti v. Initial Cleaning Servs., Inc.*, 52 A.D.3d 288, 860 N.Y.S.2d 42 (1st Dep't 2008). The question is therefore whether ABME and/or ABMJ "while engaged affirmatively in discharging a contractual obligation, create[d] an unreasonable risk of harm to others, or increase[d] that risk." *See Timmins, supra.*

Liability in tort may arise under this exception where "the putative wrongdoer has advanced

to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896, 898 (1928). The contracting party cannot be held liable where he merely fails to make conditions safer than they already were, *see Church v. Callanan Indus.*, 99 N.Y.2d 104, 782 N.E.2d 50, 752 N.Y.S.2d 254 (2002), but must be engaged in affirmative conduct, *see Gadani v. Dormitory Auth. of State of N.Y.*, 43 A.D.3d 1218, 841 N.Y.S.2d 709 (3d Dep't 2007). "There must be some evidence that the contractor left the premises in a condition more dangerous [than] the one it found." *Aquino v. City of New York*, 2011 N.Y. Misc. LEXIS 1991, at *16 (Sup. Ct. N.Y. County Apr. 28, 2011), *citing Foster v. Herbert Slepoy Corp.*, 76 AD3d 210, 905 N.Y.S.2d 226 (2d Dep't 2010). "Application of this principle requires plaintiff to show not only that defendant undertook to provide a service and did so negligently, but also that its conduct in undertaking the service somehow placed plaintiff in a more vulnerable position than he would have been had defendant never taken any action at all." *Jansen v. Fidelity & Casualty Co.*, 165 A.D.2d 223, 226, 566 N.Y.S.2d 962, 964 (3d Dep't 1991), *affirmed*, 79 N.Y.2d 867, 589 N.E.2d 379, 581 N.Y.S.2d 156 (1992).

There is no allegation or proof that ABME or ABMJ created the condition upon which plaintiff slipped. *See Abbattista v. King's Grant Master Assn., Inc.*, 39 A.D.3d 439, 833 N.Y.S.2d 592 (2d Dep't 2007). ABMJ's execution of its contractual duties did not increase the risk of harm posed by the condition alleged to have caused the accident, as it did not worsen the condition. *See Tamhane v. Citibank, N.A.*, 61 A.D.3d 571, 877 N.Y.S.2d 78 (1st Dep't 2009). Furthermore, plaintiff's bill of particulars alleged that the condition was caused by a leak emanating from behind one of the toilets in the restroom, and ABMJ's contractual duties did not extend beyond reporting plumbing issues to repairing such a leak or unclogging toilets. *See Martinez v. White Cottage*

FILED Jul 15 2011 Bronx County Clerk

Enters., 2 A.D.3d 506, 768 N.Y.S.2d 500 (2d Dep't 2003). Plaintiff presented no competent evidence to demonstrate that ABMJ's performance of its duties increased an already extant risk of harm to plaintiff.

With respect to ABMJ, its negligence, if at all, lies "merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good," which is an insufficient basis on which to impose liability, *Church*, 99 N.Y.2d at 112, 782 N.E.2d at 53, 752 N.Y.S.2d at 257; *Bauerlein v. Salvation Army*, 74 A.D.3d 851, 905 N.Y.S.2d 215 (2d Dep't 2010), notice notwithstanding, *see Baulieu v. Ardsley Assoc, LP*, 2010 N.Y. Misc. LEXIS 4948 (Sup. Ct. N.Y. County Oct. 12, 2010). Plaintiff's citation to cases regarding questions of fact as to an owner's actual or constructive notice are inapplicable; plaintiff's opposition otherwise fails to raise a question of fact with respect to this facet of the motion. ABMJ's contract was not the type of comprehensive agreement contemplated by *Palka v. Servicemaster Management Servs. Corp.*, 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994). *See Fairclough v. All Serv. Equip. Corp.*, 50 A.D.3d 576, 857 N.Y.S.2d 92 (1st Dep't 2008).

With respect to ABME, while the evidence of prior repairs undertaken by ABME does not prove conclusively that it serviced the particular stall in which plaintiff alleges to have fallen, *see Sciscente v. Lill Overhead Doors, Inc.*, 78 A.D.3d 1300, 910 N.Y.S.2d 248 (3d Dep't 2010), ABME has failed to affirmatively demonstrate that its prior repairs of the toilets in the women's restroom did not increase a risk of harm, nor that it had no notice of a recurrent condition. *See Altamirano v. Door Automation Corp.*, 48 A.D.3d 308, 851 N.Y.S.2d 508 (1st Dep't 2008); *Collins v. J.P. Morgan Chase & Co.*, 72 A.D.3d 729, 899 N.Y.S.2d 306 (2d Dep't 2010). The motion is accordingly granted as to ABMJ and denied as to ABME.

Contrary to ML's argument, the reliance upon unsigned deposition transcripts was not fatal,

inasmuch as the transcripts were certified as accurate and no party challenged their accuracy. *See Zabari v. City of New York*, 242 A.D.2d 15, 672 N.Y.S.2d 332 (1st Dep't 1998); *see also White Knight Ltd. v. Shea*, 10 A.D.3d 567, 782 N.Y.S.2d 76 (1st Dep't 2004).

ML and Colliers oppose dismissal of their cross-claims for contractual defense and indemnification against the ABM defendants. Even where a contractor is found to have no duty toward the injured plaintiff, it may still be liable on a cross-claim for contractual indemnification if it has "breached the relevant contract by failing to perform one or more of the services for which it was retained." *Abramowitz v. Home Depot USA, Inc.*, 79 A.D.3d 675, 677, 912 N.Y.S.2d 639, 641 (2d Dep't 2010). ABMJ and ABME failed to establish the terms of their contracts and therefore failed to establish *prima facie* entitlement to summary judgment dismissing the cross-claims. *See Guerra v. St. Catherine of Sienna*, 79 A.D.3d 808, 913 N.Y.S.2d 709 (2d Dep't 2010). It is nevertheless apparent that both ABME and ABMJ, in their respective contracts with ML, agreed to "indemnify, defend and hold harmless [ML] . . . and . . . Colliers . . . against any and all . . . claims . . . for . . . injury to any person . . . in any manner arising out of the acts or omissions of [ABMJ or ABME, as appropriate]."

ABME and ABMJ argue for the first time in reply that the indemnification provisions violate General Obligations Law § 5-322.1(1), and the court declines to entertain the argument. *See Ritt v Lenox Hill Hosp.*, 182 A.D.2d 560, 582 N.Y.S.2d 712 (1st Dep't 1992). The court would note, however, that inasmuch as ABMJ and ABME did not establish ML's negligence, *see Brown v. Two Exchange Plaza Partners*, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dep't 1989), *affirmed*, 76 N.Y.2d 172, 556 N.E.2d 430, 556 N.Y.S.2d 991 (1990), they have not established that the statute bars the indemnification provisions. *See Marku v. 222 Broadway, LLC*, 2008 WL 2882069 (Sup Ct N.Y. County Jul. 18, 2008). While Vargas testified that she would have "policed" the restroom up

to three times in one day, she also testified that she varied the order in which she policed her assigned floors, and it would therefore be speculation to conclude when or if there had been any "policing" of the restroom and/or reporting of plumbing conditions prior to plaintiff's accident. Further, the time discrepancies between the testimony of Lynch and the details of the subject work ticket, together with evidence of prior repairs for the condition complained of, present questions of fact as to whether ABME adequately performed under its contract.

As the complaint against ABMJ is being dismissed, the cross-claims against it asserted by ML and Colliers for contractual indemnification and defense are converted to a third-party action under the primary index number. *See e.g. Cole v. Mraz*, 77 A.D.3d 526, 909 N.Y.S.2d 708 (1st Dep't 2010).

Colliers' Motion for Summary Judgment (Motion Sequence #22)

Colliers moves for summary judgment dismissing the complaint and all cross-claims on the grounds that it neither created nor had notice of the subject condition, and that it cannot be held liable for nonfeasance as a managing agent not in complete and exclusive control of the building.

Liability cannot be imposed upon a managing agent for nonfeasance absent a showing of exclusive control of the premises. *See Mangual v. U.S.A. Realty Corp.*, 63 A.D.3d 493, 880 N.Y.S.2d 637 (1st Dep't 2009); *Gardner v. 1111 Corp.*, 286 A.D. 110, 141 N.Y.S.2d 552 (1st Dep't 1955), *affirmed*, 1 N.Y.2d 758, 135 N.E.2d 55, 152 N.Y.S.2d 303 (1956). Of course, a managing agent is liable for its own affirmatively negligent acts. *See German v. Bronx United in Leveraging Dollars, Inc.*, 258 A.D.2d 251, 684 N.Y.S.2d 541 (1st Dep't 1999).

Under the Facilities Management Agreement between ML and Colliers, Colliers' hiring and/or retention of its employees and the compensation of its employees required ML's prior approval, although ML had "no right or obligation to supervise or direct" Colliers employees. ML

set the business hours of the property manager and assistant property manager and could request changes to the business hours. ML developed the criteria for maintenance of the property and required that Colliers employees adopt and follow ML's "Guidelines for Business Conduct." Items of work in excess of two thousand five hundred dollars ($2,500.00) and not included in the operating or capital budgets approved by ML required ML's prior approval, unless required in the case of emergency, and changes to the capital and operating budgets required ML's approval. Also requiring ML's prior approval was the entry into union contracts binding ML and contracts exceeding five thousand dollars ($5,000.00). ML's prior consent was required for the retention of environmental consultants or the conduct of environmental reviews. ML was to coordinate with Colliers to develop and maintain a preventative maintenance schedule for all equipment and to develop a five year infrastructure engineering/development plan.

ML could direct Colliers in obtaining written competitive bids for all services, and reserved the rights to approve or disapprove of contractors and to direct pre-qualification of bidders on contracts. ML was to be notified by Colliers of: "material" tenant complaints; personal injury or property damage and all legal documents received relating to liability; accidents, casualty, condemnation, proceedings, lawsuits and material defects in the property; assessments, tax bills and increases in such assessments or tax bills; default notices and building occupants in default of their obligations under their leases or agreements; and noncompliance, actual or potential, with hazardous materials laws. ML possessed the right of final approval of tenants' proposed alterations and improvements. Although Colliers was to respond to tenant inquiries and manage tenant audits, only ML possessed the authority to conclude tenant inquiries, disputes and audits.

Colliers has failed to establish that these reservations of power and control in ML's favor were such as to encroach upon Colliers' obligations regarding maintenance and repair of the

building in safe condition, and nothing in the agreement reserved duties of maintenance or repair to ML. *Cf. Clark v. Kaplan*, 47 A.D.3d 462, 851 N.Y.S.2d 10 (1st Dep't 2008), *appeal denied*, 11 N.Y.3d 701, 894 N.E.2d 652, 864 N.Y.S.2d 388 (2008). There is accordingly a question of fact as to the extent of Colliers' control over the property which precludes summary judgment in Colliers' favor. *See Ortiz v. Gun Hill Mgt., Inc.*, 81 A.D.3d 512, 916 N.Y.S.2d 590 (1st Dep't 2011).

Assuming exclusive control of the premises, Colliers would still need actual or constructive notice of the condition to be liable. *See Pueng Fung v. 20 W. 37th St. Owners, LLC*, 74 A.D.3d 635, 903 N.Y.S.2d 392 (1st Dep't 2010). Colliers possessed apparently unrestricted access within its own office to the automated tenant complaint system which it was obligated by ML to utilize and upon which it relied in fulfilling its contractual obligations to address tenant complaints. The Facilities Management Agreement variously required Colliers to "process tenant service requests," "respond to tenant complaints and requests," "develop follow-up procedures to ensure tenant satisfaction," "respond to all Merrill Lynch Tenant Service Requests and complaints," "respond promptly but in no event later than the next business day to complaints and requests from tenants of the Property" and immediately address "observed deficiencies ... through the Building Service Center." Although the Building Service Center ("help desk") may have provided a convenience to Colliers by routing complaints to the relevant trades, a question of fact exists as to whether Colliers received notice under these circumstances, regardless of whether it availed itself of the content of the notice.

<u>Motions Relating to the Third-Party Claims (Motion Sequences #17, #18 and #20)</u>

ML moves for summary judgment on its third-party claims against Commerzbank for contractual defense and indemnity (Motion Sequence #20). Colliers, claiming to be an agent of ML for contractual purposes, moves for leave to assert a claim against Commerzbank for contractual

FILED Jul 15 2011 Bronx County Clerk

indemnification and for summary judgment on such claim (Motion Sequence #18). Commerzbank moves for summary judgment dismissing the third-party complaint on the ground that the circumstances of the accident do not require its indemnification of ML (Motion Sequence #17).

Section 18.02 of the lease between ML and Commerzbank contained the following indemnification provision:

> Subject to the terms, conditions and limitations contained in section 9.05 hereof, Tenant shall indemnify and hold harmless Landlord and its partners, directors, officers, agents and employees, from and against any and all claims (including claims by Superior Lessors) arising from or in connection with
>
> (a) the conduct or management of the Premises or of any business therein, or any work or thing whatsoever done, or any condition created (other than by Landlord or its Affiliates) in the Premises during the term of this lease;
>
> (b) any act, omission or negligence of Tenant or any of its subtenants or licensees or its or their partners, directors, officers, agents, employees or contractors (in connection with any claim by a Superior Lessor other than an Affiliate of Landlord), or any negligent or wrongful act or omission of Tenant or any of its subtenants or licensees or its or their partners, directors, officers, agents, employees or contractors (in connection with any claim by Landlord or an Affiliate of Landlord);
>
> (c) any accident, injury or damage whatever, unless and to the extent caused by the negligence or wilful misconduct of any Superior Party, Landlord or an Affiliate or Landlord or their respective agents, employees or contractors occurring in, at or upon the Premises; and
>
> (d) any breach or default by Tenant in the full and prompt payment and performance of Tenant's obligations under this lease;
>
> together with all reasonable costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon, including, without limitation, all reasonable attorneys' fees and expenses but excluding consequential damages (including damages resulting from the termination of the Overlease).
>
> The lease also required Commerzbank to maintain insurance as follows:
>
> Tenant, at its expense, shall maintain at all times during the term of this lease
>
> (a) "all risk" property insurance covering all Tenant's Property and all improvements

FILED Jul 15 2011 Bronx County Clerk

> and betterments located in the Premises and provided by or on behalf of Tenant, including, without limitation, the Initial Tenant Work (collectively hereinafter referred to as "Tenant's Improvements") to a limit of not less than the full replacement cost thereof, and
>
> (b) commercial general liability insurance, including a contractual liability endorsement, and personal injury liability coverage, in respect of the Premises and the conduct or operation of business therein, with limits of not less than Five Million ($5,000,000) Dollars combined single limit for bodily injury and property damage liability in any one occurrence . . .

ML argues that it is entitled to indemnification from Commerzbank under any of the four conditions in § 18.02. Colliers asserts that it is entitled to indemnification under subsections 18.02(a) and (b).

With respect to Colliers' motion for leave to assert the cross-claim, Commerzbank does not contest Colliers' assertion that Colliers is ML's agent, and there is no true dispute that in delegating property management duties to Colliers, ML created an agency relationship. Regardless of the fact that the Facilities Management Agreement states at paragraph 1.1 that the relationship is that of an independent contractor, and regardless of whether "managers" are generally understood to be "agents," *see Isbrandtsen Co. v. Lenaghan*, 128 F. Supp. 662 (S.D.N.Y. 1954), it is the actual relationship in its applied practice that controls. "A principal-agent relationship may be established by evidence of the 'consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act.'" *5015 Art Fin. Ptnrs, LLC v. Christie's, Inc.*, 58 A.D.3d 469, 471, 870 N.Y.S.2d 331, 333 (1st Dep't 2009), *citing Fils-Aime v. Ryder TRS, Inc.*, 40 A.D.3d 917, 837 N.Y.S.2d 199 (2d Dep't 2007).

ML and Colliers argue that they are entitled to indemnification under § 18.02(a) because plaintiff's presence in the restroom arose out of her employment with Commerzbank and thus out of the conduct of Commerzbank's business. At least in the context of additional insured clauses in insurance policies, "[t]he phrase 'arising out of' has been interpreted by [the Court of Appeals] to

"'mean originating from, incident to, or having connection with,'" and requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided.'" *Worth Constr. Co., Inc. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 415, 888 N.E.2d 1043, 1045, 859 N.Y.S.2d 101, 103 (2008); *see also Hunter Roberts Constr. Group, LLC v. Arch Ins. Co.*, 75 A.D.3d 404, 904 N.Y.S.2d 52 (1st Dep't 2010).

For Workers' Compensation purposes, the fact that an employee left her post to use a restroom did not "constitute such an interruption of employment" as to find that an incident occurring while she was in the restroom did not occur during employment. *See Gutierrez v. Courtyard By Marriott*, 46 A.D.3d 1241, 848 N.Y.S.2d 744 (3d Dep't 2007); *see also Capizzi v. Southern Dist. Reporters, Inc.*, 61 N.Y.2d 50, 459 N.E.2d 847, 471 N.Y.S.2d 554 (1984) (employee who slipped and fell in bathroom of hotel while out of town on business trip sustained compensable injury). In the construction context, employees' accidents while using or exiting restroom facilities at a job site have been deemed to arise out of the work of the employer. *See Turner Constr. Co. v. Pace Plumbing Corp.*, 298 A.D.2d 146, 748 N.Y.S.2d 356 (1st Dep't 2002); *Lehr Const. Co. v. Continental Cas. Co.*, 2010 WL 3285638 (Sup Ct N.Y. County Aug. 13, 2010). Where a student was injured while opening a classroom window, the injury was deemed to have arisen from the school's "operations." *See Landpen Co. L.P. v. The Maryland Casualty Co.*, NYLJ, Feb. 24, 2005, at 20, col. 1 (SDNY, Holwell, J.).

However, a customer's injury, incurred while assisting another customer exit a snow-filled parking space in the parking lot abutting a business did not arise out of the business. *See Panariello v. Martin*, 2011 N.Y. Misc. LEXIS 1512 (Sup. Ct. Nassau County Apr. 12, 2011). When a picketer protesting the business of a pharmacy which licensed space within a grocery store entered the store to use the restroom and fell in an area outside the licensed space, a hold-harmless agreement

applicable only to accidents "arising 'directly or indirectly' from the operation of the pharmacy" was held to be "so ambiguous as to frustrate application" "relative to the circumstances of the accident," and the licensee was granted summary judgment. *See Quinones v. Waldbaum's, Inc.*, 98 A.D.2d 674, 675, 469 N.Y.S.2d 743, 744 (1st Dep't 1983), *appeal dismissed*, _ A.D.2d _, 62 N.Y.2d 646 (1984).

The analysis must, however, begin with the contractual language. Although "rules of construction are only to be applied to interpret language of ambiguous or doubtful meaning," *Parochial Bus Systems, Inc. v. Board of Education*, 91 A.D.2d 13, 17, 457 N.Y.S.2d 285, 288 (1st Dep't 1983), *affirmed*, 60 N.Y.2d 539, 458 N.E.2d 1241, 470 N.Y.S.2d 564 (1983), "[i]t is the rare writing that requires no interpretation," *Bensons Plaza v. Great Atl. & Pac. Tea Co., Inc.*, 44 N.Y.2d 791, 792-93, 377 N.E.2d 477, 478, 406 N.Y.S.2d 33, 34 (1978). Thus, while contractual ambiguity generally prevents the granting of summary judgment to either party, *see Gray v. Pashkow*, 79 N.Y.2d 930, 591 N.E.2d 1171, 582 N.Y.S.2d 985 (1992); *Eden Music Corp. v. Times Square Music Publications Co.*, 127 A.D.2d 161, 514 N.Y.S.2d 3 (1st Dep't 1987), the court may resolve ambiguity when such may be accomplished by resort to the contract as a whole, *see Hudson-Port Ewen Assoc., L.P. v. Chien Kuo*, 165 A.D.2d 301, 566 N.Y.S.2d 774 (3d Dep't 1991), *affirmed*, 78 N.Y.2d 944, 578 N.E.2d 435, 573 N.Y.S.2d 637 (1991), together with "the general circumstances of the relation between the parties, including the subject matter of the agreement," *Bensons Plaza*, 44 N.Y.2d at 793, 377 N.E.2d at 478, 406 N.Y.S.2d at 34.

Here, viewing the contract as an integrated whole, and considering the contexts in the lease in which the notion of Commerzbank's conduct of its business appears, *see e.g.* §§ 8.01, 14.01(a), 15.09, 15.10, 16.03, 19.01(c), 19.02, 12.02, 35.09 and 35.23, together with ML's express assumption of responsibility for maintenance of common areas and systems supporting "core

FILED Jul 15 2011 Bronx County Clerk

lavatory," "the conduct . . . of [Commerzbank's] business therein" is not ambiguous and in this usage does not refer to acts occurring beyond the leased space which are wholly collateral to the conduct of Commerzbank's business within the leased space. The other instances of the mention of Commerzbank's conduct of its business all appear to refer to Commerzbank's ability to carry on its business functions within the leased space. Furthermore, the phrase "any work or thing whatsoever done" refers to an affirmative act undertaken which brings about the occurrence from which the claim derives and as such is of no avail to ML or Colliers. *See e.g. Sheridan v. Very, Ltd.*, 2008 N.Y. Misc. LEXIS 9341 (Sup Ct N.Y. County Dec. 2, 2008).

Colliers argues in the alternative that Biala's failure to timely relay plaintiff's telephone call regarding the restroom constitutes "the conduct or management . . . of any business therein" from which plaintiff's claim arises or with which her claim is connected. Aside from the tenuousness of this unsupported argument, given Lynch's testimony that the condition had been remedied within the lunch hour and that the floor was free of water when he and the plumber left the restroom, neither ML nor Colliers has established as a matter of law that Biala's alleged failure to promptly notify ML of the condition bears any causal relationship to the accident.

ML argues that it is entitled to indemnification under § 18.02(b) and (d), and Colliers argues for indemnification under § 18.02(b), because of Biala's failure to promptly relay plaintiff's 10:30 a.m. telephone call, assuming that the 12:42 p.m. work order testified to by Acosta corresponded to the complaint made by plaintiff on Rapaglia's behalf. Under § 13.02(b) of the lease, "Tenant shall give Landlord prompt notice (which may be oral or written) of any defective condition of which Tenant has knowledge in any plumbing, heating, air-conditioning or ventilation system or electrical lines located in, servicing or passing through the Premises." As there is no dispute that the subject restroom was not "located in" Commerzbank's leased space, and neither ML nor Colliers has made

any attempt to demonstrate that the plumbing system "passed through" Commerzbank's space, indemnification would depend on whether the plumbing system in question "serviced" Commerzbank's space.

Unambiguous contract terms not otherwise contractually defined must be given their plain and ordinary meaning, *see Broad St., LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 832 N.Y.S.2d 1 (1st Dep't 2006), and courts commonly refer to dictionaries to determine such plain meaning, *see Bianco v. Bianco*, 36 A.D.3d 490, 830 N.Y.S.2d 21 (1st Dep't 2007). "[W]here a word has attained the status of a term of art and is used in a technical context (here, a lease), the technical meaning is preferred over the common or ordinary meaning." *Madison Ave. Leasehold, LLC v. Madison Bentley Assoc., LLC*, 30 A.D.3d 1, 811 N.Y.S.2d 47 (1st Dep't 2006) (citation omitted), *affirmed*, 8 N.Y.3d 59, 861 N.E.2d 69, 828 N.Y.S.2d 254 (2006). However, where no contractual ambiguity is at issue, the "assertion that a 'contract must be construed according to the custom and use prevailing in a particular trade' is inapt." *News Am. Mktg. v. Lepage Bakeries, Inc.*, 16 A.D.3d 146, 791 N.Y.S.2d 80 (1st Dep't 2005), *citing Edison v. Viva International, Ltd.*, 70 A.D.2d 379, 421 N.Y.S.2d 203 (1st Dep't 1979).

To "service" may be defined as "to provide with a service" or "to supply with something." *See* Oxford English Dictionary, second edition, 1989; online version March 2011, <http://www.oed.com:80/Entry/176678>, accessed April 23, 2011. Appurtenances such as driveways and elevators by their nature may be said to "serve" or "service" adjacent areas of which they do not necessarily form a part. *See e.g. Campbell v. Gordon Floral Realty Corp.*, 2010 N.Y. Misc. LEXIS 2193 (Sup Ct Nassau County May 4, 2010); *National Airlines, Inc. v. Port of New York Authority*, 207 Misc. 1073, 142 N.Y.S.2d 518 (Sp Term N.Y. County 1955). In the context of utilities in commercial leases, however, common usage indicates that a plumbing or other system

FILED Jul 15 2011 Bronx County Clerk

"services" a premises when the benefit of the system is derived *within* that premises. *See e.g. Mini Mint, Inc. v. Citigroup, Inc.*, 2010 N.Y. Misc. LEXIS 4257 (Sup Ct N.Y. County Aug. 31, 2010); *Spaeth Design, Inc. v. Friedland*, 2010 N.Y. Misc. LEXIS 2785 (Sup Ct N.Y. County Jun. 16, 2010).

Accordingly, the plumbing system in question serviced the restroom, which was not within the demised premises. This is borne out by the usage of the words "serving" and servicing" elsewhere in the lease between ML's predecessor and Commerzbank. The lease contains, for example, the following provision at section 13.01:

> Tenant, at its expense, shall be responsible for the repair, maintenance and replacement of all horizontal portions of the systems and facilities of the Building within and exclusively servicing the Premises ... including without limitation the sanitary and electrical fixtures and equipment therein.

and the following provision at section 13.02(a):

> Landlord, at its expense, shall keep, repair and maintain (or shall cause to be kept, repaired and maintained) ... (ii) the systems and facilities of the of the Building serving the Premises (excluding all horizontal portions of the systems and facilities of the Building located within and exclusively serving the Premises) in good working order and repair . . .

The restroom was not exclusively for the use of Commerzbank, and Commerzbank had access to other restrooms in the building. While the proximity of the restroom may have provided a convenience and benefit to Commerzbank employees, to say that the plumbing system serviced the physical premises occupied by Commerzbank thereby would be an attenuation of the term as used in this context. Furthermore, given Lynch's testimony that the condition had been remedied within the lunch hour and that the floor was free of water when he and the plumber left the restroom, ML and Colliers have not established as a matter of law that Biala's alleged failure to promptly notify ML of the condition bears any causal relationship to the accident.

ML next argues that because plaintiff was injured in a restroom adjacent to Commerzbank's space which was available for Commerzbank's use, plaintiff's accident occurred within the premises, and that it is entitled to indemnification under § 18.02(c). ML's reliance on the definition of "in or about" in *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 366 N.E.2d 263, 397 N.Y.S.2d 602 (1977) is misplaced, as that is not the language contained in the parties' contract. Phrases approximating "in or about" appear elsewhere in the lease, *see e.g.* §§ 8.01, 13.02(a), 16.04, 17.01 and 18.01, but not in the provision at issue. "In, at or upon" has been construed more narrowly than the "expansive definition" urged by ML. Summary judgment sought under an indemnification clause containing the "in, at or upon" language has been denied to a lessor where although the accident occurred in an area regularly used by the tenant, the lessor failed to prove that the area was "part of the premises leased" by the tenant. *See DiGirolamo v. ABM Janitorial Servs., Inc.*, 2011 N.Y. Misc. LEXIS 21 (Sup Ct N.Y. County Jan. 3, 2011). Similarly, summary judgment sought under an identical clause was denied to a lessor and managing agent where the accident occurred "outside of [the tenant's] demised premises." *See Metcalf v. Commerce Bank*, 2007 WL 3234740 (Sup Ct N.Y. County Oct. 23, 2007). Here there is no dispute that the restroom was not contained within Commerzbank's leased space. Accordingly, regardless of ML's negligence or lack thereof, this provision does not entitle it to indemnification from Commerzbank.

As above, contrary to ML's arguments, Commerzbank's reliance upon unsigned deposition transcripts was not fatal, inasmuch as the transcripts were certified as accurate and no party challenged their accuracy. *See Zabari, supra*; *see also White Knight Ltd., supra*. Given the foregoing, ML and Colliers failed to establish *prima facie* entitlement to summary judgment, the merit of Colliers' proposed cross-claim was not established and the court searches the record and grants summary judgment to Commerzbank. *See* CPLR 3212(b).

FILED Jul 15 2011 Bronx County Clerk

Merrill Lynch Purchasing's Motion for Summary Judgment (Motion Sequence #19)

Plaintiff discontinued the action against defendant Merrill Lynch Purchasing ("MLP") by stipulation dated January 28, 2011. As the stipulation was silent as to cross-claims, MLP moves to dismiss all cross-claims asserted against it. It is apparent from the affirmation of plaintiff dated August 24, 2004, submitted during the course of prior motion practice, that MLP did not own the subject property. The motion is not opposed and is granted.

Accordingly, it is

ORDERED, that the motion of second third-party defendant Commerzbank Aktiengesellschaft for summary judgment dismissing the second third-party complaint is granted (**Motion Sequence #17**); and it is further

ORDERED, that the motion of defendant Colliers ABR for leave to assert a cross-claim for contractual indemnification against second third-party defendant Commerzbank Aktiengesellschaft and for summary judgment on such cross-claim is denied (**Motion Sequence #18**); and it is further

ORDERED, that the motion of defendant Merrill Lynch Purchasing for summary judgment dismissing the cross-claims against it interposed by Colliers ABR, ABM Engineering Services Company s/h/a ABM Engineering Services and American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial is granted, on default and without opposition (**Motion Sequence #19**); and it is further

ORDERED, that the motion of defendant and second third-party plaintiff Merrill Lynch/WFC/L, Inc. for summary judgment on its claims against second third-party defendant Commerzbank Aktiengesellschaft is denied (**Motion Sequence #20**); and it is further

ORDERED, that the motion for summary judgment of defendant and third-party defendant ABM Engineering Services Company s/h/a ABM Engineering Services and defendant American

FILED Jul 15 2011 Bronx County Clerk

Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial is granted to the extent of dismissing plaintiff's complaint insofar as asserted against defendant American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial (**Motion Sequence #21**); and it is further

ORDERED, that the cross-claims against defendant American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial interposed by defendant Merrill Lynch/WFC/L, Inc. and defendant Colliers ABR for contractual indemnification and defense are converted to a third-party action under the primary index number; and it is further

ORDERED, that the caption of the action shall be amended to reflect the conversion of such cross-claims to a third-party action as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19
---X

SHAIRIN TORRES,

Index No. 25001/2003

Plaintiff,

- against -

MERRILL LYNCH PURCHASING, COLLIERS ABR, BROOKFIELD FINANCIAL PROPERTIES, ABM JANITORIAL, MERRILL LYNCH/WFC/L, INC., AMERICAN BUILDING MAINTENANCE CO. and ABM ENGINEERING SERVICES,

Defendants.
---X

[Caption continued on next page]

---X

COLLIERS ABR and MERRILL LYNCH/WFC/L, INC.,

Third-Party Plaintiffs,

- against -

AMERICAN BUILDING MAINTENANCE CO. d/b/a
ABM JANITORIAL SERVICES s/h/a ABM JANITORIAL,

Third-Party Defendant.

---X

MERRILL LYNCH/WFC/L, INC. and BROOKFIELD
FINANCIAL PROPERTIES,

Third-Party Index No.

84509/2005

Third-Party Plaintiffs,

- against -

ABM ENGINEERING SERVICES,

Third-Party Defendant.

---X

MERRILL LYNCH/WFC/L, INC. and BROOKFIELD
FINANCIAL PROPERTIES,

Third-Party Index No.

84813/2005

Second Third-Party Plaintiffs,

- against -

COMMERZBANK AKTIENGESELLSCHAFT,

Second Third-Party Defendant.

---X

and it is further

ORDERED, that the motion for summary judgment of defendant Colliers ABR is denied (**Motion Sequence #22**); and it is further

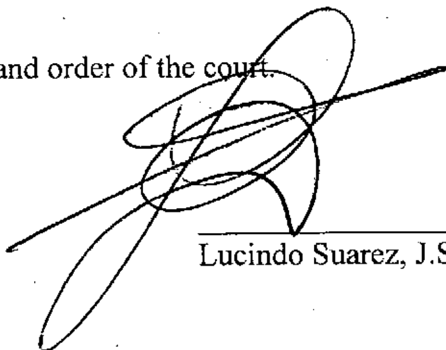
ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Merrill Lynch Purchasing dismissing the cross-claims against it interposed by Colliers ABR, ABM Engineering Services Company s/h/a ABM Engineering Services and American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial; and it is further

ORDERED, that the Clerk of the court is directed to enter judgment in favor of defendant American Building Maintenance Co. d/b/a ABM Janitorial Services s/h/a ABM Janitorial dismissing plaintiff's complaint against it; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of second third-party defendant Commerzbank Aktiengesellschaft dismissing the second third-party complaint.

This constitutes the decision and order of the court.

Dated: June 9, 2011



Lucindo Suarez, J.S.C.