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| <b>Merrill Lynch/WFC/L, Inc. v Continental Cas. Co.</b>                                                                                                                                                                          |
| 2012 NY Slip Op 31761(U)                                                                                                                                                                                                         |
| July 2, 2012                                                                                                                                                                                                                     |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 116605/07                                                                                                                                                                                                         |
| Judge: Martin Shulman                                                                                                                                                                                                            |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

**PRESENT:** MARTIN SHULMAN  
J.S.C.  
Justice

PART 1

Index Number : 116605/2007  
MERRILL LYNCH  
vs.  
CONTINENTAL CASUALTY  
SEQUENCE NUMBER : 004  
REARGUMENT/RECONSIDERATION

INDEX NO. 116605/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion reargument  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits A-F [No(s)] 1  
Answering Affidavits — Exhibits \_\_\_\_\_ [No(s)] 2  
Replying Affidavits \_\_\_\_\_ [No(s)] 3

Upon the foregoing papers, It is ordered that this motion is decided in accordance  
with the attached decision and order.

**FILED**  
JUL 06 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: July, 2012

MARTIN SHULMAN J.S.C.  
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

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

Index No. 116605/07

Plaintiffs,

- against -

CONTINENTAL CASUALTY COMPANY, AIU  
INSURANCE COMPANY, AMERICAN BUILDING  
MAINTENANCE CO., and ABM ENGINEERING  
SERVICES COMPANY (pertaining to the action entitled  
Shairin Torres v. Merrill Lynch/WFC/L, Inc., et al. and  
third party action),

Defendants.

----- X  
MARTIN SHULMAN, J.:

**D**  
JUL 06 2012  
X NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Merrill Lynch/WFC/L, Inc. ("Merrill") moves (i) for an order clarifying the prior decision and order of this court dated January 26, 2012 ("Prior Decision"), or (ii) In the alternative, pursuant to CPLR 2221 granting reargument of the underlying motion ("Prior Motion") and, upon reargument deciding the issue of American Building Maintenance Co.'s ("ABM") liability for the deductible under its commercial general liability policy. The motion is denied.

In the Prior Motion, Merrill argued that ABM breached the "Janitorial Agreement" requiring it to obtain a minimum of \$3 million in commercial general liability coverage naming Merrill as an additional insured, which coverage was to be primary and not contributory. Instead, ABM allegedly obtained only a \$1 million commercial general liability policy that was subject to a \$500,000 deductible in breach of the Janitorial Agreement.

As damages, Merrill sought a "conditional judgment" in the amount of \$2 million, based on the \$2 million deductible on its general liability policy with a non-party insurer.

This amount allegedly includes legal fees, costs and expenses that Merrill has incurred in the defense of an underlying personal injury action, as well as any liability to the plaintiff in the underlying action that Merrill would be directly obligated to pay.

In the Prior Motion, Merrill sought summary judgment on its fourth cause of action against ABM for failure to obtain general commercial liability insurance naming it as an additional insured. This court denied the motion and, in so doing, stated:

The motion is premature in that Merrill is seeking judgment on its "alternative" claim contained in the fourth cause of action that, according to the Complaint, will come into play only if a court or jury should find that ABM: (1) did not cause CNA or AIU to add Merrill as an additional insured to the CNA Policy or the AIU Policy; (2) did not procure primary-layer, first dollar insurance coverage for Merrill's benefit; and (3) otherwise acted or failed to act in a manner that prejudices Merrill's rights to coverage for the Torres Action under the CNA Policy or the AIU Policy. Only then, the Complaint indicates, will Merrill seek a determination that ABM breached the ABM Agreements entitling Merrill to defense and indemnity for the costs and fees paid in the Torres Action that are adjudged not to be fully covered by the CNA or AIU Policies. *There are issues of fact as to whether ABM or one of the insurers is liable for the defense costs in the Torres Action (emphasis added).*

(Prior Decision, at 7-8). Thus, the Prior Decision resolved the underlying motion and provided a rationale for that determination.

By this motion, Merrill is not challenging the denial of its Prior Motion. It seeks "clarification" as to "the final holding and disposition" of the issue of the \$500,000 deductible. Merrill states that, to the extent that the Prior Decision did not dispose of the issue concerning the \$500,000 deductible, it seeks reargument.

Clarification is unnecessary because the Prior Decision addressed the issue of the \$500,000 deductible, determining that the deductible is an expense that is to borne by ABM, not by Merrill. Reargument is also denied because Merrill has not

demonstrated that the court overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (*Spinale v 10 W. 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]).

As stated in the Prior Decision, the deductible is an expense to borne by ABM, not by Merrill. However, the court did not direct the entry of a judgment as to the deductible and award damages, expressly stating: "[A]lthough ABM is responsible for any financial costs to Merrill resulting from the deductible, there are issues of fact as to whether ABM or one of the insurers is liable for the defense costs in the Torres Action" (Prior Decision, at 11). The Prior Decision also stated: "Here, however, Merrill is not presently seeking judgment against either of the insurer defendants. Because ABM is not an insurer, 'its duty to defend its contractual indemnitee is no broader than its duty to indemnify' (citations omitted)" (*id.*, at 8) and "[t]he contingent nature of the fourth cause of action would render an order requiring ABM to defend or indemnify Merrill premature (citations omitted)" (*id.*, at 9). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1<sup>st</sup> Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 1005, *rearg denied* 81 NY2d 782 [1993]).

Even if ABM procured the requisite insurance without any deductible, Merrill would still have incurred defense costs in the underlying action because the insurers have denied coverage. As discussed in the Prior Decision and mentioned above, the fourth cause of action is against Continental Casualty Company and AIU Insurance

Company, and against ABM only in the alternative, in the event that certain findings are made, the findings of which have not been rendered.

Moreover, in *Hoverson v Herbert Constr. Co, Inc.* (283 AD2d 237 [1<sup>st</sup> Dept 2001]), cited by Merrill in support of its motion for reargument, the court stated: "Forest concedes that it is obligated to indemnify the additional insureds for any covered liability within the deductible and to bear additional insureds' costs of defending such claims while such insurance is in effect" (*id.* at 238; *see also Structure Tone, Inc. v Burgess Steel Prods. Corp.*, 249 AD2d 144, 145 [1<sup>st</sup> Dept 1998] [subcontractor conceded that it is obligated to bear the cost of defending any insured]). Merrill has not shown this to be the case here. Accordingly, it is hereby

ORDERED that the motion for clarification and reargument is denied.

Counsel for the parties are directed to appear for a status conference on July 31, 2012, at 9:30 a.m. at 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York  
July 2, 2012

**FILED**  
JUL 06 2012  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. MARTIN SHULMAN, J.S.C.