STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

CHERYL CORNING and EDWIN CORNING,

Plaintiff,

-against-

PRICE CHOPPER OPERATING CO., INC., THE GOLUB CORPORATION, M & H CLEANING SERVICES, INC., KIMCO FACILITIES SERVICE CORPORATION a/k/a KIMCO CORPORATION, and COMPASS GROUP USA, INC.,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0363-12 Index No. 237817

Appearances: LaMarche Safranko Law, PLLC
Attorneys For Plaintiffs
1539 Crescent Road
P.O. Box 5437
Clifton Park, NY 12065

Gordon & Silber, P.C.
Attorneys For Defendant
Kimco Corporation and
Compass Group USA, Inc.
355 Lexington Avenue
7th Floor
New York NY 10017-6603

Corrigan, McCoy & Bush, PLLC
Attorneys For Defendant
M&H Cleaning Services, Inc.
220 Columbia Turnpike
Rensselaer, NY 12144

DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiffs in the above-captioned action seek damages resulting from injuries

sustained by plaintiff Cheryl Corning ("plaintiff") on April 24, 2009 when she slipped and fell inside a supermarket owned and/or operated by The Golub Corporation and Price Chopper Operating Co. Inc. (collectively referred to as "Price Chopper"). According to her pre-trial deposition testimony, the plaintiff arrived at the supermarket, located in the Town of Brunswick, Rensselaer County, at approximately 6:50 a.m. At some point shortly thereafter she attempted to enter Aisle 15. As she turned to enter the aisle her right foot went out from under her. She grabbed onto a shelving unit with both hands in an attempt to prevent her from falling. As she did this she stepped up onto the bottom shelf of the shelving unit. She then stepped off of the shelf, left foot first. Because of the slippery condition of the floor surface, she fell forward onto the floor.

Price Chopper had previously contracted with defendant Kimco Corporation ("Kimco") to provide maintenance services at this supermarket location. Kimco, in turn, subcontracted the floor maintenance work to defendant M & H Cleaning Services, Inc. ("M & H"). As it happened, M & H had washed and waxed Aisle 15 between approximately 12:00 a.m. and 6:30 a.m. of that day.

Defendants Price Chopper, Kimco, Compass Group USA, Inc., ("Compass") and M & H have made separate motions pursuant to CPLR 3212 for summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Vega v Restani Construction Corp., 18 NY3d 499 [2012]; Ferluckaj v Goldman Sachs & Co., 12 NY3d 316 [2009]; Smalls v AJI Industries, Inc., 10 NY3d 733 [2008] Zuckerman v City of NY, 49 NY2d 557,

562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Ayotte v Gervasio, 81 NY2d 1062 [1993]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v AJI Industries, Inc.,supra, citing Alvarez v Prospect Hosp., supra). Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to submit evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of NY, supra; Alvarez v Prospect Hosp., supra). The Court's function is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact outstanding (see Simpson v Simpson, 222 AD2d 984, 986 [3rd Dept., 1995]; Boyce v Vazquez, 249 AD2d 724, 726 [3rd Dept., 1998]).

"It is well settled that a landowner has a duty to exercise reasonable care in maintaining his [or her] own property in a reasonably safe condition under the circumstances" (Galindo v Town of Clarkstown, 2 NY3d 633, 636 [2004]; Noble v Pound, 5 AD3d 936, 937-938 [3d Dept., 2004]; Freese v Bedford, 112 AD3d 1280 [3d Dept., 2013]). "The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property" (Galindo v Town of Clarkstown, supra, citations omitted).

Price Chopper's Motion For Summary Judgment Dismissing Plaintiff's Complaint

The Court first observes that it is well settled that "'a cause of action for negligence against a building owner cannot be based upon allegations that a floor is slippery because of its smoothness or polish in the absence of proof that some foreign substance existed on the floor or wax was negligently applied'" (Pechtel v Gould, 9 AD3d 653, 654 [3d Dept., 2004], quoting Keller v 800 N. Pearl St. Assoc., 277 AD2d 775, 776 [2000] (other citations omitted); Petrilli v. Federated Dept. Stores, Inc., 40 AD3d 1339, 1341, footnote 1 [3d Dept., 2007]).

In this instance, however, it is undisputed that Aisle 15 had been waxed between 12:00 a.m. and 6:30 a.m. on the morning of April 24, 2009. The plaintiff, while acknowledging that the floor was not wet where she fell, described the floor as being "slippery" and "tacky". Non-Party witness Jenny O'Connor testified at her pre-trial deposition that she was present on the morning of April 24, 2009 and witnessed plaintiff's accident. Ms. O'Connor testified that prior to plaintiff fall, Ms. O'Connor herself slipped twice: once near the beginning of Aisle 15 and again, approximately 15 feet down the same Aisle. Ms. O'Connor described the floor surface of the area where she had slipped as "slick", "slippery" and "sticky". Jonathan Mahr, Price Chopper's Assistant Night Manager at the time of the accident, was also present that morning, although he did not witness the accident. He testified during his pre-trial deposition that he inspected Aisle 15 at approximately 6:30 a.m. and determined that it was "ready to go". According to Mr. Mahr, at that point in time all caution tape and warning cones had been removed from the ends of

the Aisle. While indicating that he observed no problems with the floor surface, and there were no wet spots, he acknowledged that the surface was "tacky" and/or "sticky". After determining that the Aisle was safe to walk on, he proceeded to restore floor displays to the aisle, which had been removed prior to commencement of the cleaning/waxing operation. Mr. Mahr testified that he encountered no problems as he and another employee placed the floor displays in the Aisle. He further testified that if he had discovered wet wax in the Aisle he would have blocked the area off.

The Store Manager, Brian Russ, was not present when the accident occurred, but arrived at the store later that morning. He testified at his pre-trial deposition that if a recently waxed floor was in a "tacky" condition, that this would mean that the floor had not completely dried.[1] He indicated that if that were the case, a warning device should be used. He further testified that during the washing/waxing operation, the aisle would be cordoned off with caution tape to prevent anyone from entering the aisle. Price Chopper had a policy of having yellow cones put out, as a warning to customers, when cleaning work was being done in an aisle. The cones would not be removed until the floor was dry.

In the Court's view there is evidence in the record from which it could reasonably be inferred that the recently-waxed floor of Aisle 15, due to its "sticky" or "tacky" surface, was not completely dry at the time plaintiff slipped and fell, and as such constituted a dangerous condition. The fact that upon inspection Jonathan Mahr had found the floor to

---

[1]In contradistinction, witness Gilvan Miranda, a principal of M & H testified during his pre-trial deposition that if a freshly waxed floor was sticky, that does not mean that the floor was not dry.

be tacky or sticky creates an inference he had actual and/or constructive notice of the potentially dangerous condition. Mr. Mahr's testimony further establishes that he, and through him Price Chopper, had ultimate control of when Aisle 15 was reopened to the public.

The Court finds that there is a triable issue of fact with regard to whether the floor wax in Aisle 15 had sufficiently dried before the aisle was re-opened to members of the public; and whether the alleged unsafe condition of Aisle 15 was a proximate cause of plaintiff's fall. For this reason, Price Chopper's motion for summary judgment dismissing plaintiff's complaint must be denied.

Kimco's Motion For Summary Judgment

Kimco's Motion To Dismiss Plaintiff's Complaint

Kimco maintains that while it had a contractual relationship with Price Chopper, it owed no duty to the plaintiff. In Duffy v Wal-Mart Stores, Inc. (24 AD3d 1156) [3d Dept., 2005]), plaintiff slipped on a wet, waxed floor in a Wal-Mart store. Wal-Mart had contracted with an entity known as Floor Management for floor maintenance. Floor Management subcontracted the work to an entity called Crystal Clear. Plaintiff brought an action against Wal-Mart and Floor Management for personal injuries sustained in her fall. The Court granted summary judgment to Floor Management, holding that it was not liable to the plaintiff. The Court stated: "[a]s a general rule, no duty is owed by the employer of an independent contractor to an unintended third-party beneficiary, such as plaintiff here, and

the risk of loss is equitably placed on the independent contractor because of the employer's lack of control of the performance of the work" (see Duffy v Wal-Mart Stores, Inc., supra, at 1157, citing Kleeman v Rheingold, 81 NY2d 270, 273-274 [1993]). For this reason, the Court finds that plaintiff's complaint fails to state a cause of action against Kimco, and the complaint must be dismissed as to said defendant.

Kimco's Motion To Dismiss The Cross-Claims of Price Chopper

Price Chopper has interposed two cross-claims against Kimco: one for contribution; and one for contractual indemnification. With regard to the issue of contribution, there is no evidence that Kimco had any involvement in the floor cleaning/floor waxing process at the Price Chopper supermarket on April 24, 2009. It is undisputed that Kimco's subcontractor, M & H performed all of the work. In this respect, Kimco is not a tortfeasor with respect to plaintiff's injuries. In addition, Kimco may not be held vicariously liable for the acts of M & H (see Duffy v Wal-Mart Stores, Inc., supra). As such, Kimco may not be held liable in contribution to Price Chopper. For this reason, Price Chopper's cross claim for contribution must be dismissed.

Turning to the issue of contractual indemnification, article V of the contract between Price Chopper and Kimco, entitled "Indemnification" recites, in part, as follows:

> "A. General
>
> The Contractor hereby agrees to indemnify and safe harmless Price Chopper Agent and Owner from and against all liability claims and demands on account of injury to persons including death resulting therefrom, losses, damages, expense (including attorney's fee), claims, demands, payments, recoveries,

> judgments and damage to property *arising out of or caused in any manner by the performance or the failure to perform any work under this Agreement* by the Contractor, its employees, representatives, subcontractors or agents or Contractor's materials, equipment or supplies. Contractor will, at his or its own expense, defend any and all actions at law brought against the Owner, Price Chopper or Agent where and to the extent that liability is assessed and determined against Owner, Price Chopper or Agent based upon the Contractor's performance or failure to perform any work under this Agreement and will pay all attorney's fees and all other expenses, and promptly discharge any judgments arising therefrom.
>
> "B Employees and Equipment of Price Chopper
>
> Contractor's responsibility for damage to property or injury or death of persons includes, without limitation, damage, injury or death caused in whole or in part by any machine, tools, equipment owned or furnished by Price Chopper or Owner and used by Contractor or its subcontractors in the performance of the Agreement, or caused by act of any employees of Price Chopper where such employee is acting under the direction or control of Contractor or its subcontractors and carrying out for it any Janitorial Services under this Agreement." (emphasis supplied)

Although Kimco itself clearly did not perform any floor work at the Price Chopper Supermarket on the morning in question, its subcontractor, M & H did. Kimco could be held liable for indemnification to Price Chopper for injuries "arising out of or caused in any manner by the performance or the failure to perform any work under this Agreement" (see article V, paragraph A of the Price Chopper-Kimco agreement, supra). During Mr. Mahr's pre-trial deposition, he was questioned concerning an accident report prepared on the day of the accident, which was approved by Store Manager John Russ. It contained the following statement: "Any additional comments? The floor crew (Kimco) had taken down the wet floor caution tape down (sic) because they felt that the floor was dry. The floor was

not wet - there was no wet spots (sic)". At his pre-trial deposition, after Jonathan Mahr mentioned that he had inspected Aisle 15, he was questioned with regard to the accident report.

> "Q. Do you know when in relation to this incident the cleaning guy or guys took down the caution tape or cones?
>
> A. It was – it was before this.
>
> Q. Do you know...
>
> A. Whether it was before we got the go-ahead to walk on it to rebuild displays or afterwards I don't remember.
>
> Q. In terms of minutes, do you have any estimate as to the amount of minutes it was that the cones or caution tape were taken down prior to this incident occurring?
>
> A. Piecing it together from this [the accident report], they could not have been up past 6:30, I imagine."

Subsequently in the same deposition, Jonathan Mahr, in further discussing the accident report, gave the following testimony:

> "Q. Where you see any additional comments, the last sentence says the floor was not wet, there was no wet spots?
>
> A. Yes.
>
> Q. That's something you told Mr. Russ after your inspection. Is that correct?
>
> A. Yes.
>
> Q. The sentence before it says: The floor crew had taken down the wet floor caution tape down before because they felt that the floor was dry (sic). Is that just an assumption on your part? I mean, did you actually speak to the cleaning crew?

A. It's difficult talking to the crew.

Q. Let me ask you this. This is a statement that you made to Mr. Russ. Is that correct?

A. Maybe dry was one could walk on to build the displays.

Q. I'm just asking what the basis for your comment was to him.

A. I got the indication that I would not be causing trouble for anybody by walking on it at this point in time and was –"

The point here is that there is testimony that the cleaning crew may have taken down the caution tape and safety cones protecting Aisle 15; and more importantly, that the cleaning crew had given the "go head" that Aisle 15 was ready for use. If this authorization was given prematurely by employees of M &H, before the Aisle was completely dry, then it is arguable that plaintiff's injuries arose out of the work performed by M & H. If that were the case, it would trigger application of the provisions for contractual indemnification found in the Price Chopper - Kimco contract. Thus, for purposes of Price Chopper's claim for contractual indemnification against Kimco (which includes reimbursement for the costs of a defense), the Court finds that there is a triable issue of fact, which precludes summary judgment. In addition, Kimco has not presented evidence to demonstrate that it acquired liability insurance on Price Chopper's behalf as also provided in the Price Chopper-Kimco contract. In this latter respect, Kimco failed to satisfy its burden of proof on the motion.

Kimco and M & H both argue that the actions of Assistant Night Manager Jonathan Mahr in reopening Aisle 15, after his personal inspection of the aisle, constituted an intervening and superseding act which severed the causal connection between any

negligence on the part of M & H employees and plaintiff's injuries. The Court first observes that this is a principle generally applied in the field of tort law, not contract law. The Court further notes however, that "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed." (Derdiarian v Felix Contractor Corp., 51 NY2d 308 [1980], at 315). "If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (id., citations omitted). Ordinarily, this is a question for the fact finder to resolve (id.). When viewed in this light, assuming that the principal of law would have any application, it is difficult to conclude, as a matter of law, that the actions of Jonathan Mahr, in opening up Aisle 15 constituted an unforeseeable act; that is, one that was independent of, and far removed from the cleaning / waxing operation in Aisle 15. In other words, if Aisle 15 had been left in a dangerous condition by M & H employees, the Court could not conclude on these facts that the actions taken by Jonathan Mahr severed the causal connection between the acts of M & H employees and plaintiff's injuries.

In summary, the Court finds that Kimco has not satisfied it's burden of proof of establishing that plaintiff's injuries did not arise out of the work of M & H employees. The Court concludes that Kimco's motion for summary judgment dismissing the cross-claim of Price Chopper for contractual indemnification must be denied.

Kimco's Motion To Dismiss The Cross-Claim of M & H

M & H's cross-claim sounds in contribution and indemnification. Because there is no evidence that Kimco is a tortfeasor with respect to plaintiff's injuries, M & H has no claim for contribution against Kimco. Nor is there a factual basis in support of a claim for contractual indemnification of M & H by Kimco, since there is no such provision for indemnification of M & H in the Kimco - M & H agreement. To the extent that it might be argued that M & H has asserted a claim for common law indemnification, "[c]ommon law indemnification is generally available 'in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer'" (McCarthy v Turner Construction, Inc., 17 NY3d 369, [2011], quoting Mas v Two Bridges Assoc., 75 NY2d 680, 690 [1990]). That is not the case here, since Kimco clearly has no culpability with respect to plaintiff's fall. The Court finds that Kimco demonstrated, prima facie, that it is entitled to a grant of summary judgment dismissing M & H's cross-claim. In the absence of a triable issue of fact, Kimco's motion must be granted.

M & H's Motion For Summary Judgment

M & H's Motion For Summary Judgment Against Plaintiff

It is well settled that "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v Melville Snow Contrs., 98 NY2d 136, 138 [2002]). As stated in Espinal, there are three recognized exceptions to the foregoing rule:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the

> contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v Melville Snow Contrs., 98 NY2d at 140 [internal quotation marks and citations omitted]).

The first exception comes into play "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (Church v Callanan Indus., 99 NY2d 104 [2002], at 111; see Torosian v Bigsbee Village Homeowners Assn., 46 AD3d 1314, 1315 [3d Dept., 2007]; Husted v Central New York Oil and Gas Company, LLC, 68 AD3d 1220, 1223 [3rd Dept., 2009]). In this instance, as noted, there is evidence in the record from which a fact finder could infer that the employees of M & H left Aisle 15 in a more dangerous condition than what existed prior to commencement of their work: by waxing the floor, and then failing to make sure the wax was completely dry. The only evidence given on behalf of M & H is the pre-trial deposition testimony of it's principal, one Gilvan Miranda, who was not present at the Price Chopper Supermarket on April 24, 2009. Thus, said individual possessed no personal knowledge with regard to the work that was performed by M & H employees that morning, and specifically, no personal knowledge with regard to the condition in which M & H employees left Aisle 15 when they completed their work. In this respect, M & H has not demonstrated, prima facie, that it did not create a dangerous condition in Aisle 15. Under the circumstances, the Court finds that M & H failed to satisfy its burden of proof on the motion.

M & H's Motion For Summary Judgment Dismissing the Cross-Claim of Price Chopper

A party's burden on a motion for summary judgement is not satisfied by merely pointing to gaps in its adversary's proof. To succeed, there must be affirmative evidentiary proof demonstrating the movant's right to judgment as a matter of law. Until that condition is met, the strength of the opponent's proof is immaterial (see Antonucci v Emeco Industries, Inc., 223 AD2d 913, 914 [3rd Dept., 1996]; Rothbard v Colgate University, 235 AD2d 675, 678 [3rd Dept., 1997]; Clark v Globe Business Furniture Inc., 237 AD2d 846, 847 [3rd Dept., 1997]; Moffett v Harrison and Burrowes Bridge Contractors Inc., 266 AD2d 652, 654 [3rd Dept., 1999]). "'[A] movant's failure to satisfy his or her burden on a summary judgment motion requires denial of the motion, regardless of the sufficiency of the opposing papers'" (Ames v Paquin, , 40 AD3d 1379 [3rd Dept., 2007], quoting Serrano v Canton, 299 AD2d 703, 705 [2002]).

The Court finds that M & H failed to demonstrate that it was not negligent in the performance of the floor cleaning / floor waxing work that morning. Nor, as noted, has it demonstrated that the actions of Jonathan Mahr in inspecting and opening Aisle 15 constitute an intervening or superseding cause of plaintiff's injuries. For this reason the Court finds that M & H failed to establish, prima facie, the absence of merit of Price Chopper's cross-claim for contribution.

With regard to Price Chopper's claim for contractual indemnification against M & H, M & H failed to present evidence in admissible form to establish that Price Chopper has no claim for contractual indemnification against it. For this reason, the motion for summary judgment must be denied.

M & H's Motion For Summary Judgment Dismissing the Cross-Claim of Kimco

Kimco's first cross-claim is one for contribution against M & H. Because Kimco may not be held directly liable to plaintiff for her injuries, the Court finds that no claim for contribution lies against M & H. As to this cross-claim, the motion must be granted.

Kimco's second cross claim is for contractual indemnification arising out of the Kimco- M & H subcontract. The pertinant privision of that contract recites as follows:

> "10. Indemnification
>
> You [M & H] agree to indemnify and hold the customer, KIMCO, its affiliates, executives and staff harmless from and against any and all liability (including workers comp), damage, expense or loss of service (including litigation costs and attorney's fees) arising out of or relating to your acts or omissions or acts or omissions of your Representatives, in connection with your duties and/or activities under this Agreement or incurred by us in successfully enforcing any provisions of this Agreement. ALL INDEMNITIES AND OBLIGATIONS TO DEFEND IN PARAGRAPH 10 OF THIS CONTRACT SHALL BE ENFORCED TO THE FULLEST EXTENT PERMITTED BY LAW, REGARDLESS OF WHETHER THE CLAIMS ARE GROUNDLESS, FRAUDULENT, AND FALSE OR RESULT IN A SETTLEMENT."

As noted, the only evidence presented was through the testimony of Gilvan Miranda, a principal of M & H, who was not present and had no personal knowledge of the work performed on the morning of April 24, 2009. As such, M & H has presented no evidence with regard to how its employees performed their work that day. Again, M & H has failed to satisfy its burden of proof on the motion.

Kimco's third cross-claim is for breach of contract by reason of the failure of M &

H to procure insurance on behalf of Kimco, as required under the Kimco - M & H Subcontract. Inasmuch as M & H has not addressed this issue in its moving papers, that portion of the motion must also be denied.

Motion for Summary Judgment of Compass Group USA, Inc.

Compass maintains that it is entitled to summary judgment by reason that it is merely the parent corporation of Kimco, its subsidiary. As stated in Goodspeed v Hudson Sharp Mach. Co. (105 AD3d 1204 [3d Dept., 2013),

> "Liability of a parent company for the torts of a subsidiary does not arise from the mere ownership of a controlling shareholder interest. Rather 'there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored" (id., at 1205, quotations and citations omitted)

Here, Compass has submitted and affidavit of James William, its Director of Claims, who indicates that Kimco is a subsidiary of Compass, but that Compass had no operational involvement with Kimco's business operations in 2009 including its operations with Price Chopper Supermarkets. The Court finds that Compass demonstrated, prima facie, that it is not liable for the acts of Kimco. In the absence of a triable issue of fact, the Court finds that the motion of Compass for summary judgment must be granted, and the complaint and all cross-claims against Compass must be dismissed.

Accordingly, it is

ORDERED, that the motion of Price Chopper Operating Co., Inc. and Golub

Corporation for summary judgment dismissing plaintiffs' complaint is denied; and it is

ORDERED, that the motion of Kimco Facilities Service Corporation for summary judgment dismissing plaintiff's complaint is granted, and plaintiff's complaint is dismissed as to said defendant; and it is further

ORDERED, that the motion of Kimco Facilities Service Corporation for summary judgment dismissing the cross-claims of Price Chopper Operating Co. and The Golub Corporation is granted to the limited extent that the cross-claim of Price Chopper Operating Co. and The Golub Corporation for contribution is dismissed, but that the motion is otherwise denied; and it is further

ORDERED, that the motion for summary judgment of Kimco Facilities Service Corporation for summary judgment dismissing the cross-claim of M & H Cleaning Services, Inc. is granted, and said cross-claim is dismissed as against Kimco Facilities Service Corporation; and it is further

ORDERED, that the motion of M & H Cleaning Service, Inc. for summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED, that the motion of M & H Cleaning Service, Inc. for summary judgment dismissing the cross-claims of Price Chopper for contribution and contractual indemnification is denied; and it is

ORDERED, that the motion of M & H Cleaning Service, Inc. for summary judgment against Kimco Facilities Service Corporation (1) is granted with regard to Kimco's first cross-claim for contribution, which is hereby dismissed; (2) is denied with respect to Kimco's second cross-claim for contractual indemnification; and (3) is denied with respect

to Kimco's third cross- claim for breach of contract to provide insurance coverage and a defense; and it is further

ORDERED, that the motion of Compass Group USA, Inc. for summary judgment dismissing plaintiff's complaint and all cross-claims be and hereby is granted in all respects and the complaint and all cross-claims are hereby dismissed.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the plaintiff. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: February 24, 2014
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated October 31, 2013 of defendant Price Chopper Operating Co., Inc. and The Golub Corporation, Supporting Papers and Exhibits
2. Notice of Motion dated October 30, 2013 of defendant M&H Cleaning Service Inc., Supporting Papers and Exhibits
3. Affirmation of Scott W. Bush, Esq., sworn to October 30, 2013 and Exhibits
4. Notice of Motion dated October 30, 2013 of defendants Kimco Facilities Service Corporation a/k/a Kimco Corporation and Compass Group USA, Inc. and Exhibits
5. Affirmation in Opposition of George E. Lamarche, III, Esq., dated November 14, 2013 and Exhibits (Addressed to Price Chopper Motion)
6. Affirmation in Opposition of George E. Lamarche, III, Esq., dated November 14, 2013 and Exhibits (Addressed to Kimco Motion)

7. Affirmation in Opposition of George E. Lamarche, III, Esq., dated November 14, 2013 and Exhibits (Addressed to M & H Motion)
8. Affidavit of Scott W. Bush, Esq., sworn to November 18, 2013
9. Reply Affirmation of Jon D. Lichtenstein, Esq., dated November 21, 2013
10. Reply Affirmation To Plaintiff of John D. Lichtenstein, Esq. dated November 27, 2013
11. Affidavit of Alaina K. LaFerriere, Esq. sworn to November 15, 2013
12. Affidavit of Alaina K. LaFerriere, Esq. sworn to November 15, 2013