Novita, LLC v M&R Hotel Times Sq., LLC
2013 NY Slip Op 32597(U)
October 17, 2013
Supreme Court, New York County
Docket Number: 111303/2009
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

DORIS LING-COHAN J.S.C.

PRESENT: _____ Justice

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

PART 36

Index Number : 111303/2009
GREENWICH INSURANCE
vs.
M&R HOTEL 343 WEST LLC
SEQUENCE NUMBER : 007
DEFAULT JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is ~~is~~ for default judgment by defendant/third-party plaintiff against third-party defendants 1st Class Wrecking Corp. and Tegani Site Construction, Inc. is granted, in accordance with the attached memorandum decision, upon default of such third-party defendants.

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

Dated: 10/17/13

DORIS LING-COHAN 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: IAS PART 36

----------X

NOVITA, LLC and TEAMS MANAGEMENT, LLC,

Plaintiffs,

-against-

M&R HOTEL TIMES SQUARE, LLC, M&R HOTEL 343 WEST LLC, GEMINI 305 WEST 39TH STREET H LLC, GEMINI 305 WEST 39TH STREET 1 LLC, GEMINI 305 WEST 39TH STREET 2 LLC, GEMINI 305 WEST 39TH STREET 3 LLC, GEMINI 305 WEST 39TH STREET 4 LLC, GEMINI 305 WEST 39TH STREET 5 LLC, GEMINI 305 WEST 39TH STREET 6 LLC, GEMINI 305 WEST 39TH STREET 7 LLC, GEMINI 305 WEST 39TH STREET 8 LLC, GEMINI 305 WEST 39TH STREET 9 LLC, GEMINI 305 WEST 39TH STREET 10 LLC, GEMINI 305 WEST 39TH STREET 11 LLC, GEMINI 305 WEST 39TH STREET 12 LLC, GEMINI 305 WEST 39TH STREET 13 LLC, GEMINI 305 WEST 39TH STREET 14 LLC, GEMINI 305 WEST 39TH STREET 15 LLC, GEMINI 305 WEST 39TH STREET 16 LLC, GEMINI 305 WEST 39TH STREET 17 LLC, GEMINI 305 WEST 39TH STREET 18 LLC, GEMINI 305 WEST 39TH STREET 19 LLC, GEMINI 305 WEST 39TH STREET 20 LLC, GEMINI 305 WEST 39TH STREET 21 LLC, GEMINI 305 WEST 39TH STREET 22 LLC, GEMINI 305 WEST 39TH STREET 24 LLC, GEMINI 305 WEST 39TH STREET 25 LLC, GEMINI 305 WEST 39TH STREET 26 LLC, BRISAM TIMES SQUARE LLC, LG-39 LLC, TRITEL CONSTRUCTION COMPANY, URBAN FOUNDATION ENGINEERING LLC, and MIKESAM CONSTRUCTION CORP.,

Defendants.

----------X

MIKESAM CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

1ST CLASS WRECKING CORP. and FEGARI SITE CONSTRUCTION CORP.,

DECISION/ORDER

Action 1
Index No.: 603329/09

Motions Seq. No: 005, 007 008 & 009

Third-Party Index No.: 590393/11

Third-Party Defendants.
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GREENWICH INSURANCE COMPANY, as Subrogee of TEAMS MANAGEMENT, LLC and NOVITA, LLC

Plaintiff,

-against-

M&R HOTEL 343 WEST LLC, TRITEL CONSTRUCTION COMPANY, URBAN FOUNDATION ENGINEERING LLC, M&R HOTEL TIMES SQUARE, LLC and MIKESAM CONSTRUCTION CORP.,

Defendants.
----------X
MIKESAM CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

1ST CLASS WRECKING CORP. and FEGARI SITE CONSTRUCTION CORP.,

Third-Party Defendants.
----------X

Action 2
Index No.: 111303/09

Motion Seq. No.: 007, 009 & 010

Third-Party Index No.: 590392/11

HON. DORIS LING-COHAN, J.S.C.:

In this commercial negligence action (the underlying action)(index number 603329/2009) and the related insurance subrogation action (the subrogation action)(index number 111303/2009), defendants/third-party plaintiffs Mikesam Construction Corp. (Mikesam), move for the entry of default judgments on their two third-party complaints in each of the two actions; several defendants move for summary judgment to dismiss the complaint in the underlying action as against them, and in the subrogation action, plaintiff Greenwich Insurance Company (Greenwich) moves for partial summary judgment on its complaint. The seven (7) voluminous motions are consolidated for disposition, and are decided in accordance with the following decision.

BACKGROUND

Plaintiff Novita, LLC (Novita) is the owner of a building located at 307 West 39th Street (the 307 building) in the County, City and State of New York. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit A (complaint), ¶ 2. Plaintiff Teams Management, LLC (Teams) is the 307 building's managing agent. *Id.*, ¶ 4.

Plaintiffs allege that, from March 2006 through July 2008, defendants Brisam Times Square LLC (Brisam) and M&R Hotel 343 West LLC (M&R 343) were the owners of another building located at 309 West 39th Street (the 309 building) in the County, City and State of New York. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit A (complaint), ¶¶ 9, 11. Plaintiffs also claim that defendant LG-39 LLC (LG) has been the owner of the 309 building since July 2, 2008. *Id.*, ¶ 7. Plaintiffs further allege that, from July 2004 through November 2007, defendant M&R Hotel Times Square, LLC (M&R Times Square) was the owner of another building located at 305 West 39th Street (the 305 building) in the County, City and State of New York. *Id.*, ¶ 63. Plaintiffs claim that the current owners of the 305 building are defendants Gemini 305 West 39th Street H LLC (Gemini H) and defendants Gemini 305 West 39th Street 1through 26 LLC (with the unexplained omission of "23" - collectively, the Gemini defendants). *Id.*, ¶¶ 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61.

Plaintiffs further allege that, in 2006, Brisam and M&R 343 retained defendant Tritel Construction Company (Tritel), as a general contractor to demolish the 309 building and erect a new building on its site, and that Tritel, thereafter, retained defendant Urban Foundation Engineering LLC ("Urban"), as an excavation and shoring contractor. *See* Notice of Motion

(Index No. 603329/09, motion sequence number 005), Exhibit A (complaint), ¶¶ 64-68. Plaintiffs also allege that, in 2006, M&R Times Square retained Mikesam, as a general contractor, to demolish the 305 building and erect a new building on its site. *Id.*, ¶¶ 70-71. M&R Times Square avers that when it acquired the 305 building in 2005, Mikesam had already performed demolition and excavation work for the building's (unnamed) prior owner, by the time M&R Times Square retained it to complete the job. *See* Bundschuh Reply Affirmation (Index No. 603329/09, motion sequence number 009), ¶¶ 9-18.

Plaintiffs assert that, after September 2006, the demolition and excavation work being done on the lots of the 305 and 309 buildings caused serious structural damage to the 307 building, and resulted in the residential tenants of the 307 building having to be evacuated from their apartment units in May 2008. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit A (complaint), ¶¶ 74-77, 97-100.

In its previous motion, M&R 343 stated that it was never an owner of the 309 building, and presented copies of the deeds thereto that reflect that the 309 building was purchased by Brisam on March 30, 2006, and later by LG on July 2, 2008. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Exhibit E; (Index No. 603329/09, motion sequence number 008), Reboh Affirmation, ¶ 10. On September 7, 2011, this court entered an order dismissing the complaint in the subrogation action as against M&R 343 on such ground. *Id.*, (Index No. 603329/09, motion sequence number 007), Exhibit G.

M&R Times Square was deposed via its principal, Samir Gandhi (Gandhi), who acknowledged that M&R Times Square was the owner of the 305 building until November 2007, when it sold the 305 building to the Gemini defendants. *See* Notice of Motion, (Index No.

603329/09, motion sequence number 009), Exhibit N, at 15-16, 19, 22. Gandhi also acknowledged that M&R Times Square had hired Mikesam as its general contractor to perform demolition, excavation and construction of a new building on the 305 building's site, pursuant to an "AIA contract" (the Mikesam general contracting agreement), dated November 23, 2005. *Id.*, ¶¶ 56-57; Exhibit M. The indemnification clause of the Mikesam general contracting agreement provides as follows:

> § 3.18 Indemnification
> § 3.18.1 To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Management Protective Liability insurance purchased by the Contractor [i.e., Mikesam] in accordance with Section 11.3, the Contractor shall indemnify and hold harmless the Owner [i.e., M&R Times Square] ... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to, attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to ... injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Section 3.18.

Id., Exhibit M. Gandhi finally stated that M&R Times Square did not have any input into or perform any of the work at the 305 building site; nor did it have any employees on site other than himself, and that he made occasional visits to monitor the progress of the work. *Id.*; Exhibit N, at 32-36, 41-46, 52-56.

Mikesam alleges that third-party defendants 1st Class Wrecking Corp. (1st Class) and Fegari Site Construction Corp. (Fegari) were the demolition and excavation subcontractors who actually performed work at the 305 building's site. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit D (third-party complaint).

Mikesam was deposed via its project manager, David Lee, and via its president, Mike Lee. *See* Notice of Motion (Index No. 603329/09, motion sequence number 009), Exhibits O, P. David Lee stated that Mikesam was responsible for supervising all of the subcontractors at the 305 building site, and for retaining the site safety inspector. *Id.*, Exhibit O, at 8, 16-17, 25. Mike Lee stated that Mikesam performed demolition and excavation work at the 305 building from 2004 through 2007. *Id.*, Exhibit P, at 46, 66-67.

Brisam acknowledges that it purchased the 309 building via a deed dated March 30, 2006, and later sold it to LG via a deed dated July 2, 2008. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Minero Affirmation, ¶ 7; Exhibit E. Brisam also acknowledges that it retained Tritel as its general contractor, pursuant to an agreement (the Tritel general contracting agreement), dated December 21, 2007, and that Tritel had previously retained Urban as a subcontractor pursuant to an agreement (the Urban subcontracting agreement), dated September 12, 2006. *Id.*, ¶¶ 8-11; Exhibits I, J. The indemnification clause of the Tritel general contracting agreement provides as follows:

> 30.11 Indemnification
> (a) To the fullest extent permitted by law, General Contractor [i.e., Tritel] shall indemnify , defend and hold harmless Owner [i.e., Brisam] Lender and their respective officers, partners, members, affiliates, managers, shareholders, directors, agents, employees, successors and assigns (collectively, "Indemnitees," individually, "Indemnitee") from and against all losses, claims (including, but not limited to, those alleging ... damage to property of third parties), causes of action, lawsuits, costs, damages and expenses arising out of the Work for: (i) any ... loss of or destruction of property (including ... the buildings at the Project site, but excluding the work itself), including the loss of use resulting therefrom sustained at the Project, and (ii) any act or omission of the General Contractor, its employees, Subcontractors, representatives or other persons for whom General Contractor is responsible. Such obligations shall arise regardless of any claimed liability o[n] the part of an indemnified party, provided, however, General Contractor shall not be required to indemnify any Indemnitee to the extent attributable to such Indemnitee's negligence. Such obligation shall not be

construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any Indemnitee.

Id.; Exhibit I. The indemnification clause of the Urban subcontracting agreement provides as follows:

> 4.6 Indemnification
> To the fullest extent permitted by law, the Subcontractor [i.e., Urban] shall indemnify and hold harmless the Owner [i.e., Brisam], Contractor [i.e., Tritel] ... and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to ... injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor ... regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this section 4.6.

Id.; Exhibit J.

Tritel was deposed via one of its employees, James Wu (Wu), who acknowledged that none of Brisam's employees ever performed any physical work at the 309 building. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Exhibit K, at 197.

LG acquired the 309 building from Brisam on July 2, 2008 via a "purchase and assignment contract" (the LG contract). *See* Notice of Motion (Index N. 603329/09, motion sequence number 008), Exhibit E. On the same day, Brisam and LG also executed an "assignment and assumption of general contractor's agreement", whereby Brisam assigned its interest in the Tritel general contracting agreement to LG. *Id.*; Exhibit F.

Greenwich (plaintiffs Novita and Teams' insurer and subrogee), commenced the

subrogation action[1] against defendants M&R 343, Tritel, Urban, M&R Times Square and Mikesam by filing a complaint that sets forth causes of action for: 1) negligence; 2) strict liability (violation of the New York City Building Code); and 3) strict liability (inadequate inspections). *See* Notice of Motion (Index No. 111303/09, M&R Times Square - motion sequence number 009), Exhibit B. Mikesam filed an answer to the subrogation action that included a cross claim against all of the defendants therein for contractual indemnification. *Id.*; Exhibit D. M&R 343 and M&R Times Square filed a joint answer to the subrogation action that included a cross claim against defendants for contractual indemnification. *Id.*; Exhibit C.

Plaintiffs commenced the underlying action asserting causes of action for: 1) negligence (against all defendants); 2) violation of the New York City Building Code (against all defendants); 3) lost profits - i.e., rental income (against all defendants); 4) strict liability (against M&R 343, LG and Brisam); and 5) strict liability (against M&R Times Square and the Gemini defendants). *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit A (complaint). M&R 343, M&R Times Square, the Gemini defendants, Brisam, LG and Tritel filed a joint answer to the underlying action that included cross claims against the remaining defendants for: 1) contractual and/or common-law indemnification; and 2) apportionment. *Id.*; Exhibit C. Mikesam also filed an answer to the underlying action that included a cross claim against the defendants therein for apportionment, contribution, common-law and contractual indemnification and attorney's fees. *Id.*; Exhibit B. .

Thereafter, Mikesam served third-party summonses and complaints (in both the

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[1] For ease of narration, this decision refers to Novita and Teams' action as the underlying action and to Greenwich's action as the subrogation action, even though Greenwich actually commenced the subrogation action first.

underlying and subrogation actions) upon 1st Class and Fegari that set forth causes of action for: 1) contribution; 2) common-law indemnification; and 3) contractual indemnification. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibit D; Notice of Motion (Index No. 111303/09, motion sequence number 005), Exhibit D. Neither 1st Class, nor Fegari, filed answers to the third-party complaints.

DISCUSSION

Mikesam's Motions

Mikesam seeks the entry of default judgments against third-party defendants 1st Class and Fegari, in both the underlying action and the subrogation action, as a result of their failure to submit timely answers to the third-party complaints in both actions. CPLR 3215 (a) provides that:

> When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, ... the plaintiff may seek a default judgment against him. If the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain, application may be made to the clerk within one year after the default... . Where the case is not one in which the clerk can enter judgment, the plaintiff shall apply to the court for judgment.

Here, Mikesam has presented copies of its third-party summonses and complaints, affidavits of service on 1st Class and Fegari, in both actions, and affidavits of merit to support its claims. *See* Notice of Motion (Index No. 603329/09, motion sequence number 005), Exhibits D, E, F; Notice of Motion (Index No. 111303/09, motion sequence number 007), Exhibits D, E, F. Mikesam also correctly notes that, since it effected service on the third-party defendants on May 13, 2011, 1st Class and Fegari had until June 12, 2011 to serve responsive papers, and alleges that neither party has responded. *Id.,* (Index No. 603329/09, motion sequence number 005), Fleming Affirmation, ¶¶ 9, 13; (Index No. 111303/09, motion sequence number 007), Fleming

Affirmation, ¶¶ 9, 13. As such, Mikesam's motions are granted as Mikesam has established entitlement to default judgments against 1st Class and Fegari, in both actions, and an inquest shall be held at the time of trial, or shortly thereafter (with scheduling to be determined at the discretion of the trial judge), assessing damages against the defaulting third-party defendants and judgments shall be entered in accordance therewith, with costs and disbursements.

M&R 343, the Gemini Defendants' and Brisam's Joint Motion

The remaining motions before the court all seek summary judgment. When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003).

In their joint motion, M&R 343 and the Gemini defendants seek summary judgment dismissing the complaint and all cross claims in the underlying action as against them, and Brisam seeks summary judgment on its own cross claims against Tritel and Urban. M&R 343 argues that the complaint in the underlying action should be dismissed as against it because it was never an owner of the 309 building, contrary to plaintiffs' allegations in the complaint. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Minero Affirmation, ¶¶

18, 19. As was previously noted, M&R 343 has presented documentary evidence that Brisam was the sole owner of the 309 building from March 30, 2006 through July 2, 2008. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Exhibit E. M&R 343 has also presented a copy of this court's order dismissing the subrogation action as against it, on the same ground. *Id.* at Exhibit G. Finally, in its reply papers, M&R 343 notes that no party has submitted opposition to its request for dismissal *See* Minero Reply Affirmation, ¶ 15. Thus, there is sufficient evidence to support dismissal of plaintiffs Novita and Teams's complaint as against M&R 343, as well as the cross claims asserted against M&R 343 in the underlying action. Accordingly, this branch of the joint motion is granted.

In the next branch of the joint motion, the Gemini defendants request summary judgment dismissing the complaint in the underlying action as against them, on the ground that they did not acquire their ownership interest in the 305 building until November 1, 2007, whereas the complaint concerns demolition and excavation work that took place from late 2006 through early 2007. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Minero Affirmation, ¶¶ 25-26. The Gemini defendants present a copy of their November 1, 2007 deed to the 305 building, the temporary certificate of occupancy (C of O) that was issued later that month, and the permanent C of O that was issued for the 305 building in 2010. *Id.* Exhibit D. In their reply papers, the Gemini defendants note that no party opposed their motion for summary judgment. *See* Minero Reply Affirmation, ¶ 15. Thus, sufficient grounds have been presented to dismiss Novita and Teams's complaint as against the Gemini defendants, as well as all of the cross claims asserted against the Gemini defendants in the underlying action. Accordingly, this branch of the joint motion is also granted.

In the final branch of the joint motion, Brisam seeks summary judgment on its cross claims against Tritel and Urban for contractual indemnification. In order to sustain a claim for contractual indemnification, a plaintiff must ultimately prove some quantum of negligence on a defendant's part. *See e.g. Knight v City of New York*, 225 AD2d 355 (1st Dept 1996). Regarding this burden, the Appellate Division, First Department, has articulated the general rule as follows:

> It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation [internal citation omitted].

Feder v Tower Air, Inc., 12 AD3d 190, 191 (1st Dept 2004). Here, Brisam argues that, because it is not disputed that Brisam did not perform any physical work at the 309 building, any liability that may be imposed on Brisam would be vicarious to that of Tritel and Urban. *See* Notice of Motion (Index No. 603329/09, motion sequence number 007), Minero Affirmation, ¶ 33. However, significantly lacking is any evidence that Tritel and/or Urban were negligent. Nevertheless, while a determination of contractual indemnification is premature at this time, a conditional judgment is appropriate. A conditional judgment in this instance permits an indemnitee the earliest possible determination as to the extent to which it may expect to be reimbursed. *McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 (1968). Thus, summary judgment is granted in favor Brisam on its contractual indemnification claims against Tritel and Urban, conditioned on a finding of liability against them. *See Rubin v Port Auth. of New York and New Jersey*, 49 AD3d 422, 422-23 (1st Dept 2008).

Additionally, Tritel and Urban's argument that in the absence of proof of their

negligence, the indemnity clause is not triggered, is misplaced, in that it ignores the existence of their broad obligation to defend Brisam. As the Court of Appeals observed in *Seaboard Sur. Co. v Gillette Co.* (64 NY2d 304, 310-311 [1984]):

> Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be. The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions. Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased. Though policy coverage is often denominated as "liability insurance", where the insurer has made promises to defend "it is clear that [the coverage] is, in fact, 'litigation insurance' as well." As such, "[s]o long as the claims [asserted against the insured] may rationally be said to fall within policy coverage, whatever may later prove to be the limits of the insurer's responsibility to pay, there is no doubt that it is obligated to defend [internal citations omitted]."

Here, the Tritel general contracting agreement specifically includes a duty to defend. While the Urban sub-contracting agreement does not specifically mention a duty to defend, Brisam has identified a rider to the Urban subcontracting agreement which states, in pertinent part, as follows:

> Section C Indemnification
> The General Contractor [i.e., Tritel] and all Subcontractors [i.e., Urban] hereby and to the fullest extent permitted by law will indemnify and hold harmless McSam Hotel, LLC and Tritel Construction Group, LLC *and assume the entire liability for defense of and pay and indemnify the Owner* [i.e., Brisam], the Architect, Lender, McSam Hotel, LLC and Tritel Construction Group, LLC against any and all loss, cost, expense, liability or damage (including but not limited to judgments, attorney's fees, court costs and related fees) because of ... or on account of damages to property, including the loss of use, or any claim arising out of, in connection with or as a consequence of the performance of the work and/or acts or omissions of the Contractor or Subcontractors ... as they relate to the scope of the work contractually agreed upon via this contract.

See Minero Reply Affirmation, Exhibit M (emphasis supplied). These document make it clear that Tritel and Urban owe Brisam a contractual duty to defend which, as the Court of Appeals observed in *Seaboard*, "is broader than [their] obligation to indemnify." Thus, the court rejects Tritel and Urban's contention that the instant indemnification clauses are not triggered, as Tritel and Urban owe Brisam a duty to provide a defense; however, whether and how much (if any) indemnification that Tritel and Urban owe to Brisam will have to await a determination at trial as to whether and how much (if at all) Tritel and Urban were negligent. Accordingly, the branch of the joint motion as to Brisam's request for summary judgment on its cross claims against Tritel and Urban is granted to the extent that Tritel and Urban have a duty to defend Brisam in the underlying action and the motion is conditionally granted on the indemnification cross claims, upon a finding of negligence against Tritel and/or Urban.

LG's Motion

In its motion, LG seeks summary judgment to dismiss the complaint in the underlying action as against it, and summary judgment on its cross claims against Tritel and Urban for contractual indemnification. In seeking dismissal of plaintiffs' complaint in the underlying action, LG asserts that it did not purchase the 309 building until July 2, 2008, after the allegedly negligent demolition/construction work was performed. *See* Notice of Motion (Index No. 603329/09, motion sequence number 008), Reboh Affirmation, ¶¶ 12-13. In support, LG presents a copy of its deed to the 309 building and argues that this evidence constitutes prima facie proof that it was not responsible for any alleged negligence, and that it is, therefore, entitled to summary judgment dismissing Novita and Teams's complaint as against it.[2] Id., ¶¶ 28-31;

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[2] LG is not named as a defendant in Greenwich's subrogation action.

Exhibit E. *Significantly*, plaintiffs failed to submit any opposition to LG's motion for summary judgment dismissing the complaint. Accordingly, the portion of LG's motion that seeks dismissal of the complaint in the underlying action as against it is granted.

The balance of LG's motion seeks summary judgment on its cross claims against Tritel and Urban for contractual indemnification, including an award of all legal fees and defense costs incurred by LG to date, in connection with this action. LG specifically refers to the indemnity clauses in the Tritel general contracting agreement and the Urban subcontracting agreement, as the basis for its argument that LG is entitled to contractual indemnification from Tritel and Urban. *See* Notice of Motion (Index No. 603329/09, motion sequence number 008), Reboh Affirmation, ¶¶ 32-32. In opposition, Tritel and Urban argue that the motion should be denied because LG was not a party to either of those agreements, and that the agreements were "not explicitly incorporated" into the LG contract, by which LG took ownership of the 309 building from Brisam. *See* Hourican Affirmation in Opposition, ¶¶ 10-16. LG replies that this argument is unavailing, because it ignores the contemporaneous LG assignment, whereby LG assumed Brisam's rights under the Tritel general contracting agreement, and also ignores the fact that the indemnity clause of the Tritel general contracting agreement specifically lists "assigns" of the owner (i.e., Brisam), among the entities defined as "Indemnitees" under that contract. *See* Reboh Reply Affirmation, ¶¶ 2-8. LG also points out that, under General Obligations Law § 13-101, contracts are freely assignable, and that the onus of proving the validity of an assignment is not upon the party seeking to enforce it to demonstrate that any specific authorizing language was used, but on the party seeking to challenge it to show that a particular duty or obligation was specifically identified and expressly excluded from the assignment. *See e.g. Matter of Stralem*,

303 AD2d 120 (2d Dept 2003). The court agrees with LG.

It is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, the indemnity clause of the Tritel general contracting agreement clearly provides that Tritel owes a duty of contractual indemnification to "Indemnitees," which include the "assigns" of the "Owner." Brisam is clearly identified in that contract as the "Owner," and LG is clearly Brisam's "assign," as evidenced by both the LG contract and the LG assignment. Thus, Tritel owes LG a duty of contractual indemnification, to the extent provided for by that indemnity clause. Although the Urban subcontracting agreement was not also expressly assigned, the effect of the assignment of the Tritel general contracting agreement was to place LG in the shoes of its predecessor, Brisam, as the "Owner" entitled to receive the benefit of contractual indemnification from Tritel's subcontractor (Urban), as well. Urban has certainly failed to identify any language in the Urban subcontracting agreement that purports to exempt the "Owner's" legal assigns from being contractually indemnified by it. Therefore, the court rejects Tritel and Urban's argument. As plaintiffs' complaint has been dismissed as to LG, the portion of LG's motion which seeks summary judgment as to its contractual indemnification claims against Tritel and Urban is moot, except to the extent that LG seeks defense costs from Tritel and Urban. Based upon the above, as it was previously explained, since the duty to defend is broader than the duty to indemnify and

there need not be a determination of negligence, Tritel and Urban are to reimburse LG for the legal fees and costs associated with the defense of the underlying action.

M&R Times Square's Motions

In its motion in the underlying action, M&R Times Square seeks summary judgment on its cross claims against Mikesam, for common-law and contractual indemnity. As was previously noted, in order to sustain a contractual indemnity claim, a plaintiff must ultimately prove some quantum of negligence on the defendant's part. *Knight v City of New York*, 225 AD2d 355. Here, M&R Times Square refers to Gandhi's deposition testimony in which it is stated that M&R Times Square did not perform any of the work at the 305 building site, and argues that any negligence attributable to it would necessarily be vicarious and resulting from Mikesam's acts or omissions. *See* Notice of Motion (Index No. 603329/09, motion sequence number 009), Bundschuh Affirmation, ¶¶ 56-60. Thus, M&R Times Square concludes that, as a result of the valid indemnification clause set forth in the Mikesam general contracting agreement, Mikesam is liable to it for contractual indemnity, and requests a hearing on damages. *Id.*, ¶¶ 54-55, 62-66.

In opposition, Mikesam argues that M&R Times Square's motion should be denied because it is untimely. *See* Memorandum of Law in Opposition to Motion, at 10. M&R Times Square replies that its motion was not untimely, but merely suffered from a procedural noticing defect, that caused the Clerk's office to reject it and required it to be re-served. *See* Bundschuh Reply Affirmation, ¶¶ 4-7. M&R Times Square is correct. It appears that any defect consisted of M&R Times Square's mistakenly initially filing both of its motions under the Index Number of

the subrogation action, rather than filing one motion in each action. The court notes that both motions are identical, and that both were filed within the court's proscribed time period, although the Clerk's office was correct in requiring that each motion be filed under the Index Number of the action in which the corresponding motion was made. In any case, both motions were filed within the court's proscribed time period. *See e.g. Esdaille v Whitehall Realty Co.*, 61 AD3d 435 (1st Dept 2009). Therefore, the court rejects Mikesam's timeliness argument.

Mikesam next argues that M&R Times Square's motion for summary judgment should be denied because it "is not based upon evidentiary proof in admissible form." *See* Memorandum of Law in Opposition to Motion, at 11-13. Mikesam specifically objects to the expert's reports annexed to M&R Times Square's motion (discussed *infra*), which it notes are signed, but unsworn, as a basis for any negligence claim against it. *Id.* at 11; Notice of Motion (Index No. 603329/09, motion sequence number 009), Exhibits T, Z. In its reply papers, M&R Times Square submits a sworn affidavit from the same engineer who prepared the reports annexed to its original motion. *See* Bundschuh Reply Affirmation, Exhibit A. Mikesam correctly notes that the proponent of a summary judgment motion cannot rely on evidence submitted for the first time in its reply papers, to meet its prima facie burden of proof. *See e.g. Those Certain Underwriters at Lloyds, London v Gray*, 49 AD3d 1, 9 (1st Dept 2007). However, inasmuch as the instant report is identical in content to the exhibits that M&R Times Square submitted with its initial motion papers, it cannot be said that M&R Times Square's expert submissions actually appeared "for the first time" in connection with its reply papers. Therefore, the court rejects Mikesam's argument that the motion must be denied due to that evidence was submitted in inadmissible form.

Mikesam also argues in opposition to M&R Times Square's motion for summary

judgment that M&R Times Square has failed to establish all of the elements of its contractual and common-law indemnity claims. Specifically, Mikesam argues that "there was no valid and enforceable written contractual indemnity provision" between it and M&R Times Square. *See* Memorandum of Law in Opposition to Motion, at 14-17. Mikesam argues that the subject excavation work at the 305 building "was completed no later than January 2005," whereas Mikesam and M&R Times Square did not execute the general contracting agreement until November 23, 2005. *Id.* at 15. M&R Times Square responds that, by the time it acquired the 305 building in 2005, Mikesam had already performed some demolition and excavation work for the building's (unnamed) prior owner, and that it continued to do more of such work, during M&R Times Square's term of ownership of the building. *See* Bundschuh Reply Affirmation (Index No. 603329/09, motion sequence number 009), ¶¶ 9-18. M&R Times Square concludes that, because the Mikesam general contracting agreement lists "demolition" and "excavation" among the items of work to be performed, and because some of that work had already been performed, the indemnity clause in that contract should be interpreted as expressing the parties' intent that Mikesam's indemnification obligations would be retroactive. *Id.* The court agrees.

The Appellate Division, First Department, has held that "[a] term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made "as of" [a pre accident date], and that the parties intended that it apply as of that date.'" *Elescano v Eighth-19th Co., LLC*, 13 AD3d 80, 81 (1st Dept 2004); *Pena v Chateau Woodmere Corp.*, 304 AD2d 442, 443 (1st Dept 2003). Here, the Mikesam general contracting agreement refers in several sections to work that has been "completed or partially completed", as of the date the contract was executed. Thus,

it is clear that the parties intended the indemnity provision to apply to those items of work (including demolition and excavation) that were already finished, as well as to the work that remained to be done. Further, in any case, M&R Times Square correctly points out that "there is contradictory testimony as to when excavation was completed on the 305 [building site]." *See* Bundschuh Reply Affirmation (Index No. 603329/09, motion sequence number 009), ¶ 9. Mikesam's president, Mike Lee, stated that Mikesam performed demolition and excavation work at the 305 building from 2004 through 2007. *Id.*, Exhibit P, at 55-56, 66-67. The complaint itself merely states that the excavation work that led to the damage to the 307 building was performed before 2006. *Id.*; Exhibit G (complaint). Thus, the court rejects Mikesam's contention that the indemnity clause in the Mikesam general contracting agreement was not in effect at the time it performed its work.

Mikesam also contends that the indemnity provision in the Mikesam general contracting agreement was not triggered as against it, because M&R Times Square has failed to demonstrate that Mikesam was in any way negligent. *See* Memorandum of Law in Opposition to Motion, at 14-17. As previously indicated, with respect to Brisam's motion for summary judgment, the indemnity clauses may be "triggered" to the extent of imposing a duty to defend, even in the absence of any showing of negligence. However, here, unlike in Brisam's motion, M&R Times Square responds that Mikesam was per se negligent, pursuant to the recent Court of Appeals holding in *Yenem Corp. v 281 Broadway Holdings* (18 NY3d 481 [2012]), which found that contractors who violate the Administrative Code of the City of New York § 27-1031 (b) (1) by excavating deeper than 10 feet below the sidewalk level are strictly liable in negligence. M&R Times Square relies on the report of its engineer, Andrew Osborn (Osborn), to establish that

Mikesam's excavation work at the 305 building exceeded 10 feet in depth. *See* Bundschuh Reply Affirmation, Exhibit A. However, Mikesam presents an affidavit from its own engineer, Solomon Rosenzweig (Rosenzweig), who states that it is unclear that the excavations went that deep. *See* Rosenzweig Affidavit in Opposition. As a result of this disparity of expert opinion, there is an issue of fact as to the depth of the excavation work and as to whether Mikesam was negligent. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002).

As previously discussed, however, the fact that M&R Times Square has not demonstrated such negligence does not mean that the indemnity clause of the Mikesam general contracting agreement has not been "triggered", to the extent of requiring Mikesam to furnish M&R Times Square with a defense in the underlying action, as ordered below. Nor is M&R Times Square's failure to establish that Mikesam was negligent serve, at this juncture, as a basis for dismissing M&R Times Square's contractual indemnity claim. Thus, the court rejects Mikesam's argument.

Mikesam finally argues the portion of M&R Times Square's motion that seeks summary judgment on its contractual and common-law indemnity claims must be denied because "there are triable issues of fact regarding whether Mikesam was negligent." *See* Memorandum of Law in Opposition to Motion, at 22-28. For the reasons discussed previously, the court agrees. However, while a determination of indemnification, is premature at this time, a conditional judgment is appropriate. A conditional judgment in this instance permits an indemnitee the earliest possible determination as to the extent to which it may expect to be reimbursed. *McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 (1968). Thus, summary judgment is granted in

favor M&R Times Square, on its indemnification claims against Mikesam, conditioned on a finding of negligence against Mikesam. *See Rubin v Port Auth. of New York and New Jersey*, 49 AD3d 422, 422-23 (1st Dept 2008). Accordingly, M&R Times Squares' motion for summary judgment in the underlying action on its cross claims against Mikesam is granted to the extent that Mikesam has a duty to defend M&R Times square in the underlying action, and the motion is conditionally granted as to M&R Times Squares' cross claims against Mikesam for indemnification, upon a finding of negligence on the part of Mikesam..

In its second motion, M&R Times Square seeks the same relief against Mikesam as it did in its first motion, however, the second motion is directed to M&R Times Square's cross claims in the subrogation action. Because those cross claims are identical to those asserted in the underlying action, the same result is warranted in the subrogation action. Accordingly, M&R Times Squares' motion for summary judgment in the subrogation action on its cross claims against Mikesam is granted to the extent that Mikesam has a duty to defend M&R Times Square in the underlying action, and the motion is conditionally granted as to M&R Times Squares' cross claims against Mikesam for indemnification, upon a finding of negligence on the part of Mikesam.

Greenwich's Motion

In its motion, Greenwich seeks summary judgment on its claims against Mikesam, Tritel and Urban in the subrogation action. The court notes at the outset that neither Tritel, nor Urban, filed an answer to the subrogation action, and have failed to file opposition to Greenwich's motion. Therefore, Greenwich's motion is granted as against Tritel and Urban, upon their default, and an inquest shall to be held at the time of trial, or shortly thereafter (with scheduling to be

determined at the discretion of the trial judge), assessing damages against to Greenwich's motion. Therefore, Greenwich's motion is granted as against Tritel and judgments shall be entered in accordance therewith, with costs and disbursements.

With respect to Mikesam, Greenwich argues for strict liability, pursuant to the holding of *Yenem Corp. v 281 Broadway Holdings* (18 NY3d at 481), on the ground that Osborn's expert's report establishes that the excavation at the site of the 309 building was more than 10 feet deep. *See* Notice of Motion (Index No. 111303/09, motion sequence number 010), Leavy Affirmation, ¶¶ 4-9. As they did with M&R Times Square's motion discussed above, Mikesam's opposition papers refer to Rosenzweig's expert report, which found that the excavations did not reach that depth. *See* Fleming Affirmation in Opposition, ¶¶ 11-14; Rosenzweig Affidavit. As indicated above, this disparity of expert opinion presents an issue of fact that cannot be appropriately resolved on a summary judgment motion. Accordingly, the court denies this branch of Greenwich's motion for summary judgment.

DECISION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that, in the action bearing Index Number 603329/09, the motion, pursuant to CPLR 3215, of defendant/third-party plaintiff Mikesam Construction Corp. (motion sequence number 005) is granted solely to the extent that said defendant/third-party plaintiff is entitled to the entry of a default judgment against third-party defendants 1st Class Wrecking Corp. and Fegari Site Construction Corp., with the the amount of such judgment to be determined at an inquest to be held at the time of trial, or shortly thereafter (with scheduling to be determined at

the discretion of the trial judge) ; and it is further

ORDERED that, in the action bearing Index Number 603329/09, the motion, pursuant to CPLR 3212, of defendants M&R Hotel 343 West LLC, Gemini 305 West 39th Street H LLC, Gemini 305 West 39th Street 1 LLC, Gemini 305 West 39th Street 2 LLC, Gemini 305 West 39th Street 3 LLC, Gemini 305 West 39th Street 4 LLC, Gemini 305 West 39th Street 5 LLC, Gemini 305 West 39th Street 6 LLC, Gemini 305 West 39th Street 7 LLC, Gemini 305 West 39th Street 8 LLC, Gemini 305 West 39th Street 9 LLC, Gemini 305 West 39th Street 10 LLC, Gemini 305 West 39th Street 11 LLC, Gemini 305 West 39th Street 12 LLC, Gemini 305 West 39th Street 13 LLC, Gemini 305 West 39th Street 14 LLC, Gemini 305 West 39th Street 15 LLC, Gemini 305 West 39th Street 16 LLC, Gemini 305 West 39th Street 17 LLC, Gemini 305 West 39th Street 18 LLC, Gemini 305 West 39th Street 19 LLC, Gemini 305 West 39th Street 20 LLC, Gemini 305 West 39th Street 21 LLC, Gemini 305 West 39th Street 22 LLC, Gemini 305 West 39th Street 24 LLC, Gemini 305 West 39th Street 25 LLC, Gemini 305 West 39th Street 26 LLC and Brisam Times Square LLC (motion sequence number 007) is granted solely to the extent that the complaint in that action is severed and dismissed with respect to defendants M&R Hotel 343 West LLC, Gemini 305 West 39th Street H LLC, Gemini 305 West 39th Street 1 LLC, Gemini 305 West 39th Street 2 LLC, Gemini 305 West 39th Street 3 LLC, Gemini 305 West 39th Street 4 LLC, Gemini 305 West 39th Street 5 LLC, Gemini 305 West 39th Street 6 LLC, Gemini 305 West 39th Street 7 LLC, Gemini 305 West 39th Street 8 LLC, Gemini 305 West 39th Street 9 LLC, Gemini 305 West 39th Street 10 LLC, Gemini 305 West 39th Street 11 LLC, Gemini 305 West 39th Street 12 LLC, Gemini 305 West 39th Street 13 LLC, Gemini 305 West 39th Street 14 LLC, Gemini 305 West 39th Street 15 LLC, Gemini 305 West 39th Street 16 LLC, Gemini 305 West

39th Street 17 LLC, Gemini 305 West 39th Street 18 LLC, Gemini 305 West 39th Street 19 LLC, Gemini 305 West 39th Street 20 LLC, Gemini 305 West 39th Street 21 LLC, Gemini 305 West 39th Street 22 LLC, Gemini 305 West 39th Street 24 LLC, Gemini 305 West 39th Street 25 LLC and Gemini 305 West 39th Street 26 LLC with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the branch of the motion as to Brisam's request for summary judgment on its cross claims against Tritel and Urban for contractual indemnification is granted, to the extent that Tritel and/or Urban have a duty to defend Brisam in the underlying action and contractual indemnification is conditionally granted, upon a finding of liability against Tritel and/or Urban; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in the action bearing Index Number 603329/09, the motion, pursuant to CPLR 3212, of defendant LG-39 LLC (motion sequence number 008) is granted to the extent that the complaint in that action is severed and dismissed with respect to said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the branch of the motion for summary judgment on its cross claims against Tritel and Urban for contractual indemnification is granted, to the extent that Tritel and Urban shall reimburse LG for the legal fees and costs associated with the defense of the underlying action; and it is further; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, in the action bearing Index Number 603329/09, the motion, pursuant to CPLR 3212, of defendant M&R Hotel Times Square, LLC (motion sequence number 009) is granted to the extent that Mikesam has a duty to defend M&R Times square in the underlying

action, and the motion is conditionally granted as to M&R Times Squares' cross claims against Mikesam for indemnification, upon a finding of negligence on the part of Mikesam; and it is further

ORDERED that, in the action bearing Index Number 111303/09, the motion, pursuant to CPLR 3215, of defendant/third-party plaintiff Mikesam Construction Corp. (motion sequence number 007) is granted solely to the extent that said defendant/third-party plaintiff is entitled to the entry of a default judgment against third-party defendants 1st Class Wrecking Corp. and Fegari Site Construction Corp., with the amount of such judgment to be determined at an inquest to be held at the time of trial, or shortly thereafter (with scheduling to be determined at the discretion of the trial judge); and it is further

ORDERED that, in the action bearing Index Number 111303/09, the motion, pursuant to CPLR 3212, of defendant M&R Hotel Times Square, LLC (motion sequence number 009) is granted to the extent that Mikesam has a duty to defend M&R Times square in the subrogation action, and the motion is conditionally granted as to M&R Times Squares' cross claims against Mikesam for indemnification, upon a finding of negligence on the part of Mikesam; and it is further

ORDERED that, in the action bearing Index Number 111303/09, the motion, pursuant to CPLR 3212, of plaintiff Greenwich Insurance Company (motion sequence number 010) is granted solely to the extent that Greenwich Insurance Company is entitled to the entry of a default judgment against defendants Tritel Construction Company and Urban Foundation Engineering LLC, with the issue of the amount of such judgment to be determined at an inquest to be held at the time of trial, or shorting thereafter (with scheduling to be determined at the

discretion of the trial judge) ; and it is further

ORDERED that, within 60 days of entry of this decision/order, Brisam and LG are directed to submit to Tritel and Urban, an accounting of the costs and attorneys' fees incurred in defending the underlying action, by affidavit/affirmation setting forth the hours expended, normal hourly rate charged, years of experience of counsel, etc., and Tritel and Urban are directed to review such accounting and, should they agree with such costs/fees, satisfy such defense costs/fees incurred by the Brisam and LG, within 30 days from receipt of the accounting or, if objecting, then within 30 days of receipt of the accounting, provide to Brisam and LG, by affidavit/affirmation, specific reasons for their disagreement within such accounting . If the parties are unable to agree on the amount of the defense costs/fees owed to Brisam and LG, the parties shall *meet and confer to resolve such issues, initiated by Brisam and LG.* If unable to resolve within 30 days of their meeting, either side shall file a motion to set such costs/fees with a copy of this attached, within 150 days of the date of entry, which, upon final submission, may be referred to a Special Referee to hear and determine[3]; and it is further

ORDERED that, within 60 days of entry of this decision/order, M&R Hotel Times Square is directed to submit to Mikesam, an accounting of the costs and attorneys' fees incurred in defending the underlying and subrogation actions, by affidavit/affirmation setting forth the hours expended, normal hourly rate charged, years of experience of counsel, etc., and Mikesam is directed to review such accounting and, should they agree with such costs/fees, satisfy such defense costs/fees incurred by the M&R Hotel Times Square, within 30 days from receipt of the accounting or, if objecting, then within 30 days of receipt of the accounting, provide to M&R Hotel Times

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[3] Failure to comply may be deemed a waiver or default on this claim, as appropriate.

Square, by affidavit/affirmation, specific reasons for their disagreement within such accounting. If the parties are unable to agree on the amount of the defense costs/fees owed to M&R Hotel Times Square, the parties shall *meet and confer to resolve such issues, initiated by* M&R Hotel Times Square. If unable to resolve within 30 days of their meeting, either side shall file a motion to set such costs/fees with a copy of this attached, within 150 days of the date of entry, which, upon final submission, may be referred to a Special Referee to hear and determine[4]; and it is further

ORDERED that the balance of these combined actions shall continue; and it is further

ORDERED that, within 30 days of entry of this order, plaintiff Greenwich Insurance Company and defendant M&R Hotel 343 West LLC shall serve a copy of this order upon all parties, within notice of entry; and it is further

ORDERED that plaintiff shall serve a copy of this order on the Clerk of the County and the Clerk of Trial Support, who shall amend their records to reflect the above.

Dated: New York, New York
October 17 , 2013

Hon. Doris Ling-Cohan, J.S.C.

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[4] Failure to comply may be deemed a waiver or default on this claim, as appropriate.