

**Medina v We're Assoc., Inc.**

2010 NY Slip Op 31388(U)

May 26, 2010

Supreme Court, Suffolk County

Docket Number: 06-29113

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH F. COSTELLO  
Justice of the Supreme Court

MOTION DATE 2-2-10 (#005)  
ADJ. DATE 2-10-10 (#006)  
Mot. Seq. # 005 - MD  
# 006 - MG; CASEDISP

-----X

LUIS MEDINA, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 WE'RE ASSOCIATES, INC. and :  
 HUNTINGTON QUADRANGLE 2, LLC, :  
 :  
 Defendants. :  
-----X

WE'RE ASSOCIATES, INC., and :  
 HUNTINGTON QUADRANGLE 2, LLC, :  
 :  
 Third-Party Plaintiff, :  
 :  
 - against - :  
 :  
 HENRY SCHEIN, INC., :  
 :  
 Third-Party Defendant. :  
-----X

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Upon the following papers numbered 1 to 50 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 16; Notice of Cross Motion and supporting papers (006) 17-32; Answering Affidavits and supporting papers 33-42; 43-44; Replying Affidavits and supporting papers 45-46; 47-48; 49-50; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (005) by the third-party defendant, Henry Schein, Inc., for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint as asserted against the defendants/third-party plaintiffs We're Associates, Inc. and Huntington Quadrangle 2, LLC, is denied, and the third-party complaint is dismissed based upon dismissal of the complaint in motion (006); and it is further

**ORDERED** that this cross-motion (006) by the defendants, We're Associates, Inc. and Huntington Quadrangle 2 LLC, pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint is granted and the complaint is dismissed, and that part of the motion for contractual indemnification against Henry Schein has been rendered academic by dismissal of the complaint and third-party complaint.

This is an action sounding in negligence wherein the plaintiff, Luis Medina, seeks to recover damages

for injuries sustained when he tripped and fell due to an allegedly defective and unsafe hole in the floor of a fourth floor office suite located at the premises of 2 Huntington Quadrangle, Melville, New York on July 27, 2005. By way of the bill of particulars, the plaintiff claims he was at work when the accident occurred at the desk/cubicle in the office suite assigned to Henry Schein, Inc. (Schein), the plaintiff's employer. It is claimed that We're Associates, Inc., and its agents or employees, created the access hole for the purpose of operating Schein's electrical devices, and obscured and disguised the hole under a desk or other office furniture, and that the defendants had actual and constructive notice of the condition complained of.

In the third-party complaint, We're Associates and Huntington Quadrangle assert that prior to the date of loss, the third-party defendant, Schein, entered into an agreement with We're Associates in which it agreed to be responsible for the premises it leased and that it would indemnify and hold, third-party plaintiff, We're Associates, harmless against all claims arising from third-party defendant's negligence.

In motion (005), the third-party defendant, Henry Schein, Inc., seeks an order granting summary judgment dismissing the plaintiff's complaint as asserted against the defendants/third-party plaintiffs We're Associates, Inc. (We're) and Huntington Quadrangle 2, LLC (Huntington Quadrangle) on the basis the defendants/third party plaintiffs did not have actual or constructive notice of the condition; and an out-of-possession landlord cannot be held liable. Henry Schein is represented by the Law Office of Lawrence, Worden, Rainis & Bard. The defendants/third party plaintiffs, We're and Huntington Quadrangle, are represented by the Law Office of Brody, O'Connor & O'Connor, Esq. Henry Schein, Inc., which has asserted a cross-claim in its third-party answer against We're and Huntington Quadrangle for contribution and common law and contractual indemnification, and has not demonstrated that its counsel has been retained to act on behalf of the defendants/third-party plaintiffs in seeking the requested relief to dismiss the complaint in the main action as asserted against We're and Huntington Quadrangle.

In cross-motion (006), the defendants/third-party plaintiffs, We're and Huntington Quadrangle, seek summary judgment dismissing the plaintiff's complaint on the basis that the defendants did not have actual or constructive notice of the alleged dangerous condition complained of by the plaintiff; the defect that allegedly caused the accident was open and obvious and not inherently dangerous as a matter of law; Huntington Quadrangle 2 is an out-of-possession landlord and has no responsibility to maintain the area where the plaintiff's accident occurred; and that the third-party defendant, Henry Schein is contractually obligated pursuant to its lease agreement with Huntington Quadrangle to indemnify and hold harmless Huntington Quadrangle against and from any/all claims arising from the third-party defendant's negligence with respect to the real property, the building and the demised premises.

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 to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]. The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, supra. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2<sup>nd</sup> Dept 1989], and must assemble, lay bare and reveal his proof in order to establish that the

Medina v We're et al  
Index No. 06-29113  
Page No. 3

matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]. Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of motion (005) the third-party defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's verified bill of particulars; copies of the third-party summons and complaint and answer; amended third-party complaint and answer; copies of the transcripts of the examinations before trial of Lorraine Franzese dated June 2, 2009 and Bruce Fry dated July 31, 2009; and a copy of an accident/witness report dated November 26, 2007.

In support of motion (006) the defendants/third-party plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's verified bill of particulars; copies of the third-party summons and complaint and answer; copy of the lease agreement entered into between We're (as landlord) and Schein (as tenant); copies of the transcripts of the examinations before trial of Luis Median dated February 19, 2008, Robert Bloom dated March 28, 2008, Norman Brett dated March 11, 2009, Anthony Falco dated March 28, 2008, Joseph Lanzetta dated August 25, 2008 and Diane Pavese dated June 17, 2008; and the affidavits of Robert Bloom and Norman Brett.

In opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the transcripts of the examinations before trial of Luis Median dated February 19, 2008, Diane Pavese dated June 17, 2008, Robert Bloom dated March 28, 2008, Norman Brett dated March 11, 2009, Anthony Falco dated March 28, 2008, copies of photographs; copy of the lease agreement entered into between We're (as landlord) and Schein (as tenant).

Luis Medina testified to the effect that he was employed by Henry Schein from February 2005 until August 2005. On July 27, 2005, he sustained an injury while working at his cubicle in the fourth floor office located at Huntington Quadrangle in Melville when he tripped in a hole in the floor. The hole was located approximately six to eight inches from the edge of his desk, under his desk. He rolled his chair backwards, and as he was getting up from his chair to leave the desk area, he took a step forward when his left foot got caught into the hole. He then lunged across the cubicle and fell onto a rolling chair, slid into the floor and stopped when hitting a metal file cabinet four or five feet to the right of his desk. The desk was bolted to the floor. He had been working at this same desk since he started working for Schein and saw the hole around the time he started. He stated it looked like there were electrical wires in the hole, but he did not know where they came from, but he had two computers and a phone at his desk and he thought the wires were for any one of them. There was no plastic covering the hole and he thought that at one time it had a piece of carpeting over it. The hole was about a foot to two feet wide and about a foot or a foot and a half long. He knew his foot got caught in the hole, but he did not know if his foot got caught on the wires in the hole. He was not aware if there was more than one hole under his desk. He never removed any covering from the hole. He told Terry White, his supervisor, about the hole when she was sitting in his cubicle with him and she actually saw the hole. He stated that anything related to cosmetics was shaken off because they were going to be relocating soon. The hole in the floor came up again in conversation with her, but he did not remember when, and indicated it was before the accident. He noticed a hole in one of the offices as well but did not know where. After he fell, Joey Falco and Joseph Lanzetta came to help him as they were concluding a conversation and were nearby.

Diane Pavese testified to the effect that she had worked for Harry Schein from January 2002 until the fall of 2002, and then February 2005 through August 2005, and while she was employed there, Luis Medina was her

manager. On July 27, 2005, she was in her cubicle diagonally across from Mr. Medina's cubicle. She heard a thud and heard him scream and ran over to him and saw him in his chair holding his head and his leg. She thought Nina Pajonas, who sat across from him, came over as well. When they asked him what happened, he said his foot got stuck in the hole under his desk and he hit his head on the bar at the top of the cubicle. She stated the hole was an ongoing joke in the office because it was always there and it was a really big hole. Everyone has holes under their desks for the wires to go through into the floor, but his was about four times the size. She testified her foot got stuck in it one time when she had to do something on his computer. The typical hole is about five by five (inches), but this hole was fifteen to twenty inches long. It was about two feet under from the edge of the desk. She never saw the landlord or owner of the building performing any work there. She was not aware of anyone making a complaint about the hole to the landlord or owner. She noticed the hole about six to eight weeks after Mr. Medina began his employment. It was not covered with carpet and there was no plastic cover over it. The hole contained the computer and phone wires. She stated that she had asked what was with the hole under his desk and he told her that he reported it but they were moving soon. She did not know who "them" referred to. From the time that she started working there, they were supposed to be moving but the new space was not completed and it was always another four weeks. She thought they were moving in June, but the move did not occur until August 2005. She never made any complaints about the hole. She knew of no other holes in the floor. She thought Terry White, Mr. Medina's supervisor, knew about the hole prior to Mr. Medina's accident and said "we're aware of it but we're moving."

Anthony Falco testified to the effect that he has been employed by Henry Schein for ten years and was a project manager on July 27, 2005 on the fourth floor of 2 Huntington Quadrangle. He worked in about three or four cubicles over the years. There were wires extending from his computer and phone to the floor but he could not remember if there was a hole in the floor or a box on the floor of the particular cubicle that the wires went in to, or if the wires were just on the floor under his desk. When he moved to his second cubicle, he had phone and computer wires that went to the floor under the desk. There was carpeting under the desk. He was not aware of a hole in the floor for either the computer or phone wires. He occupied that cubicle for about four years and then moved to another cubicle for two years. This third cubicle had carpet on the floor under the desk. There were wires that extended from his computer to the phone down to the floor which went into an open square hole, about a foot or a foot and a half long, and maybe two and a half feet wide, with no cover, but the carpet extended to the edge of the hole. He stated he would really have to extend himself a bit for any portion of his feet to reach the hole. During the two years he was at this cubicle, he never got his foot or any portion of his leg stuck in the hole and his foot never came in contact with the hole. He did not recall whether or not there was a covering over the hole or a piece of carpet covering the hole. He never complained to anyone at Schein or We're Associates or anyone at Huntington Quadrangle 2 about the hole under his desk. He worked in cubicle three for about one and a half to two years. When he moved to his fourth cubicle, and when Luis Medina started working there as a sales manager, Mr. Medina moved into Falco's third cubicle. At no time did he point out the hole under the desk to Luis Medina. Prior to his incident, Luis Medina never pointed out the hole at his cubicle and he never pointed it out to him. He saw no other holes on the fourth floor and no one told him of other holes. Neither Diane Pavicci nor the other Diane from management ever told him about there being holes in the floor of their offices. Henry Schein had IT people to repair or work with the computers if there was a problem and someone to work with the phones if there was a problem. He never heard Luis Medina or anyone else make complaints to Terry White or anyone else about the hole under his desk. He witnessed the accident of July 27, 2005.

Joseph Lanzetta testified to the effect that he is employed since 2001 as a sales consultant for Henry Schein and that he worked with Luis Medina at 2 Huntington Quadrangle. Medina, he stated, was a sales manager one level higher than he was. Luis Medina was assigned to the former cubicle which had been

occupied by Tony Falco. When Falco left that cube, he did not take his computer or chairs or furniture and everything was left in place. During the three to four years that Falco occupied that cubicle, he had occasion on a daily basis to consult with Falco at Falco's cubicle and never observed a hole under the desk and Falco never told him about any holes in the floor in his cubicle. His own cubicle was about ten to fifteen feet from Falco's, the third cubicle to his left. The lines from his computer and phone ran down into a small hole in the floor under his desk with a round cover over the hole which had the circumference of a coffee cup. His feet could not reach the hole and he would have had to stretch out his feet to reach it. If his chest were touching the desk, the hole would be more than ten inches away and he never reached it with his feet. At no time did Luis Medina, or anyone else, ever tell him about the hole under Medina's desk, or that the cover was missing.

Robert Bloom testified to the effect that he is the assistant vice president of operations since the late 1980's with We're Associates, Inc. managing office buildings, including 2 Huntington Quadrangle. We're entered into a lease agreement with Henry Schein for space including the fourth floor of the building at 2 Huntington Quadrangle. At the date of the accident, the building was owned by Huntington Quadrangle 2, LLC, which had assumed the interests of We're Associates, or it may have been We're Associates Company to 2 Huntington Quadrangle Number 2 Company which was changed and formed into an LLC prior to July 27, 2005. Huntington Quadrangle 2 was the owner and We're Associates performed the maintenance and repair work. The principals and owners of Huntington Quadrangle 2 were Bennett Rechler, Gary Wechsler, and Tony Fromer. We're's responsibilities included maintaining the main building's electrical systems, mechanical plant equipment, and HVAC, and maintenance in various tenant spaces pursuant to lease agreements with their tenants. He believed that the electrical work would have been done by a contractor but he did not know who the contractor was. He did not inspect the premises before Schein took over the space. Mr. Bloom visited the fourth floor of the Schein premises about once or twice a year but did not remember when and did not observe any holes in the floor. Any inspection he did would have been pursuant to a specific service request and he did not recall any requests concerning the flooring on the fourth floor. He was unaware of any repairs to the floor. If Schein needed work done, they would call and a We're's dispatcher would find someone to address the problem. We're Associates did not have any policy with regard to inspections of the flooring in the fourth floor Schein premises, and was unaware of any inspections performed by We're Associates concerning the same. He stated that there were no inspections conducted by Huntington Quadrangle 2, LLC. He was unaware of any complaints either verbally or in writing concerning the holes in the flooring of the fourth floor Schein premises. We're Associates did not set up the cubicles in the Schein space and did not provide IT services to Schein. He did not believe We're retained any contractors for the phone system or the computers. He was not aware of Schein performing any alterations to the flooring in the fourth floor premises.

Bennet Rechler set forth in his affidavit that he is the manager of Huntington Quadrangle 2, LLC, which is the successor in interest to We're Associates, the original owner. We're Associates was hired by Huntington Quadrangle 2 to act as its managing agent as it does not have any employees. He sets forth that Henry Schein was responsible for maintenance and upkeep of its own space and neither Huntington Quadrangle 2 nor We're Associates had any responsibility to perform inspections of the space. He states that Huntington Quadrangle 2 had no physical presence at the Huntington Quadrangle 2 location at any time prior to plaintiff's accident and did not maintain any records concerning the premises.

In order to establish a prima facie case of negligence, a plaintiff has to demonstrate either that the defendants created the dangerous or defective condition which caused the accident, or that they have actual or constructive notice of the condition, Dima v Breslin Realty, Inc. et al, 240 AD2d 359 [2<sup>nd</sup> Dept 1997]. To prove a prima facie case of negligence in a slip and fall case a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition,

see, Bradish v Tank Tech Corp., 216 AD2d 505 [2<sup>nd</sup> Dept 1995]. The defendant, as the movant, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law, see, Kucera v Waldbaums Supermarkets, 304 AD2d 531 [2<sup>nd</sup> Dept 2003]; Dwoskin v Burger King Corp., 249 AD2d 358 [2<sup>nd</sup> Dept 1998]. Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition, Piacquadio v Recine Realty Corp. 84 NY2d 967 [1994]. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it, Moons v Wade Lupe Construction Company, Inc. 24 AD3d 1005 [3<sup>rd</sup> Dept 2005].

While landowners have a duty to prevent the occurrence of foreseeable injuries on their premises, they are not obligated to warn against a condition on the land that could be readily observed by the use of one's senses, Moriello v Stormville, 271 AD2d 664 [2<sup>nd</sup> Dept 2000]; Groom v Village of Sea Cliff, et al., 50 AD3d 1094 [2<sup>nd</sup> Dept 2008]. To be entitled to summary judgment in a premises liability context, a defendant is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that poses a foreseeable risk of injury to persons expect to be on the premises, Gradwohl et al v Stop & Shop Supremarket Company, LLC, 70 AD3d 634 [2<sup>nd</sup> Dept 2010].

Generally, an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair; constructive notice is found where an out-of-possession landlord reserves the right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists, Davis v HSS Properties Corporation et al., 257 AD2d 500 [1<sup>st</sup> Dept 1999]; see also, Lopez v 1372 Shakespear Avenue Housing Development Fund Corporation et al., 214 AD2d 489 [1<sup>st</sup> Dept 2002].

Here the adduced testimonies and admissible evidence establishes prima facie entitlement by the defendants/third-party plaintiffs, We're Associates and 2 Huntington Quadrangle, to summary judgment dismissing the complaint as a matter of law, on the basis they were not negligent in creating or causing the claimed defect; they had no notice of the claimed defect; at the time of the final walk through, all the access holes were covered by access lids and carpet was in place over the raised floor; the defendants were responsible for maintaining and repairing the mechanical, plumbing, electrical, and HVAC and Schein was responsible for maintaining the premises; Schein was responsible for installing all computer cables and telephone lines under the raised flooring and maintaining their own computers and phones; and the lease agreement did not provide for the defendants/third-party plaintiffs to reenter the premises for the purpose of inspecting it or maintaining it except as provided by the agreement. The plaintiff has failed to raise a triable issue of fact to preclude summary judgment.

The agreement entered into on March 27, 1998 between We're Associates as landlord, and Henry Schein, Inc. as tenant, terminating November 30, 2005, provides, in part, for a lease for the fourth floor office space in the premises known as the Huntington Quadrangle No. 2. Paragraph 42 of the agreement provides the covenants, conditions and agreements contained in the lease shall bind and inure to the benefit of landlord and tenant and their respective heirs, distributees, executors, administrators, successors, and, except as otherwise provided in this lease, their respective assigns. The agreement between the parties does not provide for the landlord or owner to maintain the floor coverings. The agreement at 7A. provides in pertinent part that "during working hours, the landlord, at its sole cost and expense will replace, repair and provide the maintenance for all plumbing and mechanical, electrical and HVAC systems of or servicing the building." Section 12 of the agreement provides that the tenant shall take good care of the demised premises and subject to the provisions of Article 7, shall make as and when needed all repairs in and about the demised premises necessary to preserve

the demised premises in good order and condition. It is further provided that "Anything herein contained to the contrary, notwithstanding, Landlord, at its sole cost and expense, shall make repairs in the demised premises if, and to the extent, that the need therefor arises out of the act or omission of landlord." Here it is established that any right of the landlord and owner to enter the fourth floor premises occupied by Schein was for the purpose of maintaining the mechanical, plumbing, electrical and HVAC systems and that no work was conducted on the electrical system or the floors on behalf of Schein after the final walk through and that Henry Schein was responsible for maintaining the demised premises.

It has been demonstrated that there was no need for the landlord to enter the premises as it has been established that all of the access coverings were in place on the access holes at the time of the final inspection and when Schein took possession of the fourth floor space. Thus, it has been established *prima facie* that there was no act or omission of the landlord as the flooring and access holes and covers were in a reasonably safe condition. Schein, who had started to run phone and computer cables under the raised flooring at the time of the final inspection, was to continue its own installations of cable and phone lines under the raised flooring after the final inspection. Further, pursuant to the lease agreement, Schein was to maintain the premises. It has been established that the defendants/third-party plaintiffs did not create a dangerous or defective condition or turn the premises over to Schein in a dangerous or defective condition.

It has been further demonstrated that the defendants/third-party plaintiffs did not have actual or constructive notice of the condition complained of as they were given no notice of the claimed defect by Schein. Although employees of Schein were aware of the hole under Mr. Medina's desk, there is no evidentiary support to establish that the defendants/third-party plaintiffs were ever notified of the claimed defective condition by Schein or anyone else. The out-of-possession landowner, 2 Huntington Quadrangle and We're Associates were not to be responsible for maintenance or repair of the premises except as set forth above, and under the terms of the lease, the defendants/third-party plaintiffs were permitted to enter the premises for the purpose of inspection and maintenance or repair of the mechanical, plumbing, electrical and HVAC systems. Thus they did not retain the right to inspect the premises and were not responsible for maintaining the premises.

The adduced testimonies establish that at the time of the final walk through of the fourth floor premises at 2 Huntington Triangle, that the raised flooring was in place, all the lid covers for the access holes for the electrical outlets, telephone and computer wires, were in place. The electrical lines were run and the electrical outlets were all in place. There were no missing covers for the access holes when Henry Schein took possession of the fourth floor premises in September, 1998. Prior to Schein taking possession of the fourth floor premises, Norman Brett, who was employed by We're Associates as a construction manager, was involved in the final inspection for the fourth floor of 2 Huntington Quadrangle before Henry Schein brought in his own contractors to continue their installation of whatever work was necessary for them to perform their business. Craig Gluf, who represented the tenant for the construction and moving of the space, was present during the final inspection which it is believed took several hours.

Mr Brett testified that the electrical outlets placed in the floor of the fourth floor Schein space were to be covered by trim described as a plastic access door, eight inches by eight inches, a frame with a hinged lid and a one-inch diameter hole to allow for all wiring to pass through the access door covering. The lid was not attached to the electrical outlet and an approximate one-inch lip went down into the hole to prevent it from being easily kicked out of its location. There were 100 electrical outlet holes on the fourth floor. Some cubicles shared an outlet hole. The floor construction was that of a raised floor; electrical outlets were fastened to the building floor creating a cavity between the finished floor and the building floor, and within that cavity were the electrical outlets.

Mr. Brett stated Henry Schein ran phone and data wiring or cable routed underneath the raised floor cavity as that was Schein's responsibility. Raised Computer Floors Inc. performed alterations to the raised floor and either they or We're employees relocated pre-cut panels in order to place the access doors where Schein wanted them to be placed to have the holes match up with the location where Schein wanted the furniture and in which the electrical outlets would be placed. We're Associates was responsible for placing the plastic access doors over each electrical outlet on the fourth floor and pursuant to the invoice, Raised Flooring was to furnish and install. Any time the panel was moved, the access door was kept in place where the hole would be. At the final walk-through, the cubicles and furniture were not in place, and all the access lids and carpet were in place.

During Mr. Brett's final inspection he believed he viewed each and every electrical outlet and plastic outlet door covering the electrical outlet on the fourth floor and he did not observe any uncovered electrical outlets and all of the plastic access doors were on top of the electrical outlets. He noticed no damage to any of the plastic access doors for any of the electrical outlets. When the plastic access door was in place on top of the hole, there was no portion of the hole still exposed. At the time of the final walk through, Schein had already begun routing some of the phone and data cables. We're Associates had no responsibility concerning the routing of Schein's cables. Mr. Brett established that at the time of the final walk through, the carpet extended all the way to the edge of where the holes were cut out in the raised flooring and there was no carpet missing or not going all the way to the plastic access doors. He was not aware of any carpet covering the electrical outlet holes which measured eight by eight inches.

After the final walk through, We're no longer had any responsibilities concerning construction at the premises. Neither Mr. Gluf nor anyone at Henry Schein had any complaints during the final walk through. We're employees maintain the property as far as mechanical, heating and plumbing, and there may have been some We're employees that might have gone on hot calls, cold calls, and plumbing issues, but electricity was not their responsibility. If there was a problem with an outlet, however, Mr. Brett stated he would have been contacted. If there was a problem with damage to a plastic access door cover, that would have been Schein's responsibility as the plastic access door is a furnishing just like carpet and it would be up to Schein to maintain the access doors. If Mr. Brett received a call about a plastic access door, there would be a charge for the part and labor; however, Henry Schein never requested either verbally or in writing the need for any plastic access doors for the fourth floor premises and never sent a notice to cure or notice of defect. After the final walk through until July 2005, We're did not perform any alterations to the electrical outlets on the fourth floor premises. Raised Computer Floors Incorporated was to install the Lexan lids for both the purchased flooring and the existing flooring. The Lexan lid, or access doors, measured eight inches by twelve inches.

Based upon the foregoing, it is determined that the defendants/third-party plaintiffs have established prima facie entitlement to summary judgment. The plaintiff has failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, motion (006) is granted and the complaint is dismissed. In that the gravamen of the third-party action is based upon indemnification from Schein, the third-party complaint is also dismissed.

Dated: May 26, 2010

Kathleen J. Corbett  
 J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION