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At **PART 50** of the Supreme Court in and for the County of Suffolk, at One Court Street, Annex Building, Riverhead, New York, on SEP 30 2015.

PRESENT
HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

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THOMAS E. DOW,

Plaintiff(s)

-against-

HERMES REALTY LLC, 525 REALTY MANAGEMENT CORP., SERES & SCHWARTZ, ESQS., PAUL SERES and JAMES D. SCHWARTZ, individually and as Partners of SERES & SCHWARTZ, ESQS. and STEPHEN HUGHES,

Defendant(s).

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Index No. **254/2012**

Motion seq. **002: MG**
Orig. Date: 2/3/2015
Adj. Date: 2/17/2015

Motion seq. **003: MD**
Orig. Date: 3/24/2015
Adj. Date: 6/2/2015

Motion seq. **004: MD**
Orig. Date: 6/23/2015
Adj. Date: 9/15/2015

ORDER DENYING SUMMARY JUDGMENT

Upon consideration of the notice of cross-motion for an order extending the time to hold an inquest of damages against defendant Stephen Hughes, the affirmation in support, and the affirmation in partial opposition (sequence 002), the notice of motion for an order granting summary judgment in favor of defendants Hermes Realty and 535 Realty Management Corp. [collectively "535 Realty"], the supporting affirmation and exhibits, the affirmation in opposition by defendants Seres & Schwartz, Esqs., Paul Seres and James D. Schwartz, individually, and as partners of Seres & Schwartz, Esqs., [collectively "the Schwartz defendants"], the affirmation in opposition on behalf of the plaintiff Thomas E. Dow ["the plaintiff"], and 535 Realty's reply affirmations (sequence 003), the notice of motion for summary judgment on behalf of the Schwartz defendants, the supporting affirmation and exhibits, and the two affirmations in opposition, and the Schwartz defendants' two reply affirmations (sequence 004), it is now

ORDERED that the motion, denominated as a "cross-motion", for an order extending the time to hold an inquest on damages against the defaulting defendant Stephen Hughes is granted; and it is further

ORDERED that 535 Realty's motion for summary judgment dismissing the plaintiff's complaint against it, and granting summary judgment on its cross-claims for common law and contractual indemnification against the Schwartz defendants is denied; and it is further

ORDERED that the Schwartz defendants' motion for summary judgment dismissing the plaintiff's complaint and 535 Realty's cross-claims against them is denied.

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This is an action for personal injuries arising out of a slip-and-fall accident that occurred on September 19, 2011. The plaintiff, a tenant in a commercial building owned by Hermes Realty LLC and managed by 535 Realty Management Corp., was injured as he was exiting the subject premises. According to the plaintiff's testimony, when he was about three or four feet from the door, his feet went out from under him and he fell landing on his back in a puddle of water sufficiently large enough to wet his "pants, shirt, arms, hands". Plaintiff had no idea where the water came from and did not notice it before he fell.

At all relevant times the defendant James Schwartz was a partner in the defendant law firm of Seres and Schwartz, Esqs. On August 15, 2011, the Schwartz defendants and 535 Realty entered into a lease agreement for office space in the subject premises depicted on the Rental Floor Plan as Suite B9, referred to throughout the lease agreement as "the Demised Premises" or "Premises".

On the day of the accident, Schwartz and a colleague, the defendant Stephen Hughes ["Hughes"], were engaged in moving the law firm's furniture, including a filing cabinet, into the newly leased Suite B9. Apparently Schwartz had received permission from the building's owner to move in over the weekend before the accident. Schwartz's attempt to move in during the weekend was unsuccessful since the access card he was given for the subject premises didn't work. The following day he enlisted the aid of a friend, Hughes, to assist him and the two men together undertook to move in on the next available day, Monday, September 19, 2011. To facilitate the moving of a filing cabinet, Hughes moved a floor mat to the side which had been in place in front of the lobby exit door where the accident occurred. Surveillance video of the accident apparently shows that within seconds after Hughes removed the floor mat, the plaintiff fell where the mat had previously been placed.

Paragraph 23(B) of the lease agreement between the Schwartz defendants and 535 Realty provides:

> "Tenant shall indemnify and save harmless Landlord against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations arising from the conduct or management or from any work or thing whatsoever done (other than by Landlord or its contractors or the agents or employees of either) in and on the Demised Premises during the term of this lease and during the period of time, if any prior to the specified commencement date that tenant may have been given access to the Demised Premises for the purpose of making installations, and will further indemnify and save harmless Landlord against and from any and all claims arising from any condition of the Demised Premises due to or arising from the gross negligence or intentional misconduct of Tenant or any of its agents, contractors, servants, claim or claims or action or proceeding brought thereon; and in case any action or proceeding be brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, agrees that Tenant, at Tenant's expense, will resist or defend

> such action or proceeding and will employ counsel therefor reasonably satisfactory to Landlord."

Mary Hauptmann is the owner and president of 535 Realty. Hauptmann testified that there are established procedures in place governing the moving in of new tenants including notification to building management and supervision by a building employee to ensure that there is no damage to the building, that safety regulations are followed, and that any spills or debris are immediately remedied. According to Hauptmann, "Moving In Rules" explicitly state, inter alia, that the manner of movement of furniture must be approved, that floors are to be covered, that no mats or furniture are to be moved or removed from any lobby, and that a management employee must be present during the move-in process.

Hauptmann further testified that 535 Realty's employee, Bill Bailey, was responsible for maintenance which included checking the building, restrooms, and the cleaners. According to Hauptmann, the floors were wet-mopped at night by "Dino". Dino was instructed to move the safety mats, the underside of which were rubber, dry mop the floor, and then replace the mats after the floor was dry. The subject lobby was wet mopped on the Friday evening before the Monday accident. The evidence on the motion is undisputed that the weather was clear in the several days before the accident. The plaintiff's testimony demonstrates that a nonparty traversed the same area only seconds before the accident without incident. Nevertheless, the plaintiff maintained that he fell in a puddle and that his clothing was wet immediately after the accident.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the alleged hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it" (*Arzola v. Boston Props. Ltd. Partnership*, 63 A.D.3d 655, 656, 880 N.Y.S.2d 352; *see Levine v. Amverserve Assn., Inc.*, 92 A.D.3d 728, 729, 938 N.Y.S.2d 593; *Jackson v. Jamaica First Parking, LLC*, 91 A.D.3d 602, 602–603, 936 N.Y.S.2d 278; *Pryzywalny v. New York City Tr. Auth.*, 69 A.D.3d 598, 892 N.Y.S.2d 181). 535 Realty failed to establish its entitlement to judgment as a matter of law by eliminating an issue of fact that its employee or agent created the condition that caused or contributed to the plaintiff's accident during its mopping/maintenance procedures several days before the accident precluding summary judgment in 535 Realty's favor (*Leibowitz v 2555 East 12th Street Corp.*, 128 A.D.3d 1023, 10 N.Y.S.3d 298 [2d Dept. 2015]). The fact that a water condition was not apparent on the surveillance footage of the accident [1] merely raises a credibility issue which should be left to the trier of fact (*Scaturro v. Moret,* 137 A.D.2d 802, 525 N.Y.S.2d 264 [2d Dept. 1988]).

Moreover, 535 Realty's arguments in reply to the plaintiff's affirmation in opposition

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[1] An authenticated copy of the surveillance video depicting the accident was not provided with the moving papers. The copy provided with 535 Realty's Reply affirmation has not been viewed or considered by the Court (*see David v Bryon*, 56 A.D.3d 413, 414-15, 867 N.Y.S.2d 136 [2d Dept. 2008]).

pointing to alleged gaps in the plaintiff's proof that 535 Realty created a dangerous condition or had constructive notice of a dangerous condition are unavailing. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Mennerich v Esposito*, 4 A.D.3d 399, 400 [2004], *quoting Larkin Trucking Co. v Lisbon Tire Mart*, 185 A.D.2d 614, 615 [1992]).

With respect to so much of 535 Realty's motion seeking summary judgment on its cross-claim for contractual indemnification against the Schwartz defendants, the motion is likewise denied. A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*Mikelatos v Theofilaktidis,* 105 A.D.3d 822, 962 N.Y.S.2d 693 [2d Dept. 2013] [citations omitted]).

With respect to so much of 535 Realty's motion seeking summary judgment on its cross-claim for common law indemnification against the Schwartz defendants, the motion is also denied. To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence, but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the cause of the accident (*see Correia v Professional Data Mgt.*, 259 A.D.2d 60, 65, 693 N.Y.S.2d 596 [1st Dept. 1999]). Since 535 Realty failed to establish, prima facie, its own freedom from any negligence, that branch of its motion which was for summary judgment on its third-party cause of action for common-law indemnification against the Schwartz defendants is denied (*see Amit v Hineni Heritage Ctr.*, 49 A.D.3d 574, 856 N.Y.S.2d 146 [2d Dept. 2008]; *Correia v Professional Data Mgt.*, 259 A.D.2d at 65).

Regarding the Schwartz defendants' motion for summary judgment dismissing the plaintiff's complaint and all cross claims, the motion is denied. The basis of the Schwartz defendants' motion is that defendant Hughes was not an employee of Seres & Schwartz, Esqs. and any imposition of liability cannot be based on a theory of *respondeat superior*.

The Schwartz defendants failed to establish their prima facie entitlement to judgment as a matter of law. Under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency (*see Riviello v. Waldron*, 47 N.Y.2d 297, 302, 418 N.Y.S.2d 300, 391 N.E.2d 1278; *Valdez v. Melba Utica Packing Co.*, 226 A.D.2d 627, 641 N.Y.S.2d 385). A principal-agent relationship may be established by evidence of the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act" (*Maurillo v. Park Slope U–Haul*, 194 A.D.2d 142, 146, 606 N.Y.S.2d 243; *see Time Warner City Cable v. Adelphi Univ.*, 27 A.D.3d 551, 552–553, 813 N.Y.S.2d 114; *Dynas v. Nagowski*, 307 A.D.2d 144, 147–148, 762 N.Y.S.2d 745), even where the agent is acting as a volunteer (*Fils-Aime v Ryder TRS, Inc.*, 40 A.D.3d 917, 837 N.Y.S.3d 199 [2d Dept. 2007]; *see also* RESTATEMENT [SECOND] OF AGENCY § 225). The evidence on the motions demonstrates that questions of fact exist as to whether Hughes was acting as the agent of the Schwartz defendants when the accident occurred precluding summary judgment in favor of the Schwartz defendants as to both the plaintiff's complaint and 535 Realty's cross claims (*see*

Maurillo v. Park Slope U–Haul, supra at 146, 606 N.Y.S.2d 243; *see also Mikelatos v Theofilaktidis,* 105 A.D.3d 822, 962 N.Y.S.2d 693 [2d Dept. 2013]). The absence of an employer/employee relationship between the Schwartz defendants and Hughes, does not preclude an agency relationship upon which vicarious liability may be imposed (*Fils-Aime v Ryder TRS, Inc.*, *supra; Paterno v Strimling*, 107 A.D.3d 1233, 968 N.Y.S.2d 643 [3d Dept. 2013]). The relevant inquiry is the degree of control by the purported principal over another's acts and whether those acts are performed on the purported principal's behalf (*Art Finance partners, LLC v Christie's Inc.*, 58 A.D.3d 469, 870 N.Y.S.2d 331 [1st Dept. 2009]). The evidence presents issues of fact in this regard precluding summary judgment in favor of the Schwartz defendants.

Dated: SEP 30 2015

ANDREW G. TARANTINO, JR., A.J.S.C.

___ FINAL DISPOSITION

XX__NON-FINAL DISPOSITION