At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of February, 2016.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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DIGITAL PRINTS, INC.,

Plaintiff,

- against -

Index No. 502137/12
(2012 Action)

SOUND AROUND, INC., ALL-TECH HOME IMPROVEMENT, LLC,

Defendants.

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DIGITAL PRINTS, INC.,

Plaintiff,

- against -

Index No. 500379/15
(2015 Action)

ZIGMOND BRACH, 63RD STREET REALTY II, LLC f/k/a and as successor in interest to 63RD STREET REALTY INC., AND 63RD STREET REALTY INC.,

Defendants.

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The following papers numbered 1 to 11 read herein:

	Papers Numbered 2012 Action	2015 Action
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	1-2	7-8 9-10
Opposing Affidavits (Affirmations)	3	10 11
Reply Affidavits (Affirmations)	4	11 5-6
Sur-Reply Affidavit[1] (Affirmation)	5-6	

[1] The September 25, 2015 sur-reply affidavit of Marcelo Klajnbart, listed above as document No. 6, was not considered by the Court.

Upon the foregoing papers in the 2012 Action, defendant Sound Around, Inc. (Sound) moves for an order: (1) pursuant to CPLR 3212 (b), dismissing the July 27, 2012 complaint of the plaintiff, Digital Prints, Inc. (Digital) and all cross claims asserted against Sound and (2) awarding Sound attorneys' fees and costs.

In the 2015 Action, defendants, Zigmond Brach (Brach) and 63rd Street Realty II, LLC (63rd Street Realty II), incorrectly sued herein as "63rd Street Realty II LLC f/k/a and as successor in interest to 63rd Street Realty Inc. and 63rd Street Realty Inc.," move for an order: (1) pursuant to CPLR 3212 (b), dismissing Digital's January 12, 2015 complaint and (2) awarding Brach and 63rd Street Realty II attorneys' fees and costs.

Digital cross-moves in the 2015 Action for an order, pursuant to CPLR 3212 (b), granting it summary judgment against Brach and 63rd Street Realty II.

The foregoing summary judgment motions and cross motion in the 2012 and 2015 Actions, which are based on the same background, are hereby joined for a single disposition.

Background

These property damage actions concern a fire at the 60,000 square foot commercial property located at 1638 63rd Street (Block 5538, Lot 7) in Brooklyn, the address of which is referred to in the record as "1600," "1638" and "1640" 63rd Street (Property). The Property has a two-tier roof with two exit doors: (1) a metal door which is only accessible from the third-floor rental space occupied by Digital, and (2) a metal door leading to the roof from the common staircase.

From 1992 through January 13, 2014, 63rd Street Realty Inc. (63rd Street Realty), a company in which Brach held a 100% ownership interest, owned the Property. The record reflects, however, that 63rd Street Realty was dissolved by the Secretary of State on January 26, 2011 for its failure to pay franchise taxes.

At all relevant times, the majority of the Property was occupied by Sound, an electronics manufacturer also owned by Brach. The Property had a handful of commercial tenants, including: Digital, an electronics company owned by Eugene Klein (Klein), on the third floor since 2009, and Pathways, a company owned by Jim Ebert (Ebert), which occupied a portion of the Property's second floor.

Brach's son-in-law, Sam Wiesner (Wiesner), a W-2 employee of Sound, was the onsite managing agent of the Property. Wiesner was authorized and responsible for negotiating leases, dealing with tenants, collecting rent and hiring contractors to perform repairs at the Property on behalf of Brach and 63rd Street Realty.

In January 2012, Ebert complained to Wiesner about water leaking into Pathway's space on the second floor. Wiesner, contacted All-Tech Home Improvement, LLC (d/b/a "All-Tech Roofing & Construction, LLC") (All-Tech), which had been referred to him by Schwartz, a friend, and had previously performed a roofing repair job involving the gutters at Brach's residence.

All-Tech assessed the problem on the roof and submitted a January 23, 2012 "PROPOSAL" to Wiesner for the "JOB SITE" at 1600 63rd Street, proposing that:

"WE PROPOSE TO DO THE FOLLOWING AT THE ABOVE LOCATION
1. SWEEP AND CLEAN THE ENTIRE ROOF AREA
2. CUT ALL BUBBLES, BUILT UP WHERE NEE[D]ED
3. OPEN THE AREA OF THE ROOF AROUND THE DRAIN, WATERPROOF THE DRAINS PROPERLY
4. INSTALL A NEW LAY OF APP-180 GRANULATED FIRESTONE ROOFING MATERIAL OVER THE EXISTING ROOF
5. FLASH THE WALLS WITH THE SAME ROOFING MATERIAL ALL THE WAY UP
6. APPLY HEAVY DUTY FLASHING CEMENT AROUND ALL PENETRATIONS SUCH AS PIPES, VENTS, SKYLIGHTS, AS WELL AS ALL AROUND THE EDGES
7. REMOVE ALL GARBAGE FROM THE ROOF

THE JOB HAS 10 (ten) YEARS GUARANTEE . . ."[2]

The heading of the All-Tech proposal states "**ALL - TECH ROOFING** LICENSED / INSURED HIC LIC # 1147972" (Tosca Affirmation, Exhibit E [bold in original]).

Wiesner hired All-Tech to repair and replace a 72 foot by 12 foot portion of the roof near the south wall of the third floor (near the metal door leading to Digital's rental space), pursuant to a January 30, 2012 roofing contract between 63rd Street Realty and All-Tech (2012 Roofing Contract). The 2012 Roofing Contract contains the following "CONTRACT DESCRIPTION" regarding the scope of All-Tech's work:

"WE'LL SWEEP AND CLEAN THE ROOF AREA WHERE NEW ROOF IS TO BE INSTALLED. LOWER THE AREA AROUND THE DRAINS, WATERPROOF. CUT ALL BUBBLES. INSTALL A NEW LAY OF APP-180 WHITE (72 ft x 12 ft area) FIRESTONE ROOFING MATERIALS OVER THE EXISTING ROOF. FINISH THE WALL WITH RUBBER TOO.

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[2]A copy of All-Tech's January 23, 2012 "Proposal" is collectively annexed with All-Tech's January 30, 2012 roofing contract as Exhibit E to the May 12, 2015 affirmation of Eric O. Tosca, Esq. in support of Brach and 63rd Street Realty II's summary judgment motion in the 2015 Action (Tosca Affirmation).

APPLY HEAVY DUTY FLASHING AROUND ALL PENETRATIONS. REMOVE ALL GARBAGE. THE JOB HAS 10 (ten) YEARS GUARANTEE."[3]

The heading of the 2012 Roofing Contract STATES "**ALL-TECH ROOFING & CONSTRUCTION, LLC** . . . FULLY LICENSED / INSURED HIC LIC # 1147972" (Tosca Affirmation, Exhibit E [bold in original]). Under the 2012 Roofing Contract, 63rd Street Realty was required to pay All-Tech a $1,100.00 deposit and a final payment of $1,100.00 when the job was completed.

Although 63rd Street Realty had previously been dissolved, Wiesner nevertheless executed the 2012 Roofing Contract on behalf of 63rd Street Realty and paid All-Tech a $1,100.00 deposit by issuing a January 30, 2012 bank check from 63rd Street Realty using Brach's signature stamp.[4]

The next day, on January 31, 2012, All-Tech's principal and sole employee, Fatos Kaferi (Kaferi), undertook to repair the roof at the Property. Unbeknownst to Brach and Wiesner: (1) Kaferi used a propane blow torch to apply tar to the roof, and (2) Digital stored flammable materials, including cardboard boxes and merchandise, in the hallway against the inside of the metal door.

When Kaferi torched the roof near the metal door leading to Digital's rental space Digital's merchandise caught fire from sparks under the door. Kaferi was unable to

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[3]Tosca Affirmation, Exhibit E.

[4] Tosca Affirmation, Exhibit F and Exhibit G (Brach's September 19, 2014 Deposition Transcript at 122:11-123:2).

extinguish the fire because the metal door to the roof was locked. According to Klein, the metal door to the roof of the Property had been locked from the time Digital took occupancy in 2009. Kaferi called the Fire Department.

After the Fire Department extinguished the fire, a Fire Marshall from the New York Fire Department's Bureau of Fire Investigation issued a January 31, 2012 "FIRE INCIDENT REPORT (FACT SHEET)" (Fire Incident Report), which indicates that: (1) Kaferi was arrested; (2) the "Cause of Fire" was "Incendiary - Torch - Illegal Use of, and (3) the "Description" was "Illegal use of torch on combustible roof."[5] Under the heading "ORIGIN AND EXTENSION," The Fire Incident Report states:

> "Examination showed fire originated outside the subject premises, on the roof of the 2-story setback, against the south wall of the 3rd floor, approximately 60 feet from the east edge of the roof, approximately 15 feet from the south edge of the roof (entrance to the 3rd floor store room), in the vapors of flammable gas (propane). Fire extended north through the door frame. Fire further extended to the entire contents of the 3rd floor store room (paper & plastic envelopes, boxed merchandise). Fire was thereto confined and extinguished" (Aboulafia Affirmation, Exhibit D).

Digital, on or about July 27, 2012, commenced the 2012 Action against Sound as the alleged owner of the Property and All-Tech seeking $1.622 million in uninsured losses. Digital asserted its First Cause of Action against All-Tech for negligence/breach of contract. Digital alleged that "Sound is/was the owner/landlord of the [Property]" and asserted its

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[5] *See* Exhibit D to the July 7, 2015 affirmation of Matthew S. Aboulafia, Esq., in support of Digital's cross motion and in opposition to Brach and 63rd Street Realty II's summary judgment motion in the 2015 Action (Aboulafia Cross-Moving Affirmation).

Second and Third Causes of Action against Sound for negligence and negligent hiring, respectively.[6]

Specifically, Digital's Second Cause of Action alleges that "the use of a fire torch by Defendant All-Tech created a clear and dangerous condition" which "Sound, its agents, servants . . . and/or employees had actual and/or constructive notice of . . ." and that Sound was negligent "in failing to keep its [P]roperty in a safe condition . . ." (Bilbao Affirmation [2012 Complaint at ¶¶ 10-14]). Digital's Third Cause of Action for negligent hiring alleges that "Defendant Sound failed to perform its due diligence prior to retaining Defendant All-Tech . . ." and that Sound "knew or should have should have known that Defendant All-Tech's roof-repair practices did not meet acceptable industry standards" (*id.* at ¶¶ 17-20).

Sound, on or about August 31, 2012, answered Digital's complaint,[7] denying the material allegations therein and asserting twelve affirmative defenses, including failure to join all necessary parties and that "[p]laintiff's injuries, if any, were caused by the culpable conduct of parties other than the answering defendants and over wh[om] defendant had no control" (Bilbao Affirmation, Exhibit B [2012 Answer at 2-6]). Sound also asserted cross claims against All-Tech for indemnification and contribution.

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[6] *See* Digital's 2012 Complaint at ¶ 4, a copy of which is annexed as Exhibit A to the April 6, 2015 affirmation of Cesar O. Bilbao, Esq. in support of Sound's summary judgment motion in the 2012 Action (Bilbao Affirmation).

[7] All-Tech failed to respond to Digital's complaint in the 2012 Action.

Kaferi was deposed in the 2012 Action and testified that: (1) when an owner wants a cheaper repair, he uses a propane torch to "burn[ ] the rubber over the existing [roof]" as opposed to the "cold tar process," which is more expensive; (2) the torch method is illegal for concrete and corrugated metal roofs and is dangerous to use with wood because "you cannot go with the torch close by" and it causes sparks to fly two to three feet; (3) he incorporated "All-Tech Home Improvement, LLC," which performed "handyman" work on residential homes from 2005 through January 2012 without any employees; and (4) from 2005 through January 2012, Kaferi only did 5-10% roofing for residential, wood-framed houses using the "small experience" he had from former jobs, and had no commercial roofing jobs or the need to use the torch method.[8]

Importantly, with respect to All-Tech's 2012 Roofing Contract, Kaferi testified that: (1) he was hired to repair a small section of roof at the Property after "the supervisor from the building" contacted him and said "fix me this area for the cheapest way . . ."; (2) he did not tell the supervisor that the cheapest way would involve the use of a blow torch and did not suggest the cold tar method because he feared that "if I give the owner the higher price, maybe he [is] not going to hire me"; (3) before proposing a price for the job, he met the "supervisor" at the Property, who took him to the roof using the common stairs, pointed to a 800 to 1,000 square foot area on the roof and said "in this area I have a leak, give me the price to fix this area"; (4) he observed that the Property had a flat rubber roof on top of

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[8] *See* Tosca Affirmation, Exhibit I (Kaferi Deposition Transcript at 26:2-31:10, 31:11-16, 32:5-33:22, 34:6-19, 35:8-18, 44:7-53:22 and 55:4-23).

concrete; (5) after inspecting the roof, he told the "supervisor" that he could "do rubber over the existing - - this area to stop the leaks" and that he would put a new roof on the small section that was leaking; (6) when All-Tech was hired, he was not asked whether All-Tech was insured, how much prior roofing experience he had or for references; (7) on the day of the fire, he applied a torch near a metal door on the roof while waterproofing the stucco and concrete walls, after which smoke appeared under and around the metal door; and (8) he was unable to stop the fire with his fire extinguisher because the metal door was locked from the inside, so he called the Fire Department.[9]

Brach, who was deposed as the owner of Sound, testified that: (1) 63rd Street Realty was the owner of the Property and continually maintained control over the Property; (2) he has owned 100% of 63rd Street Realty since 1992; (3) he was not familiar with the construction or repair of roofing; (4) Wiesner was responsible for managing the Property on behalf of 63rd Street Realty, including hiring contractors to make repairs; (5) Wiesner was authorized to hire All-Tech and executed the 2012 Roofing Contract on behalf of 63rd Street Realty; (6) Wiesner was authorized to issue All-Tech a check for the $1,100.00 deposit under the 2012 Roofing Contract using a signature stamp with Brach's signature; (7) Wiesner was Sound's W-2 employee with an office in the rental space occupied by Sound who got "paycheck[s] from Sound . . ."; (8) Sound guaranteed 63rd Street Realty's mortgage on the Property because it had a "credit line at the bank"; and (9) after the fire, he learned that a

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[9] *id.* at 56:20-60-25, 63:4-67:13, 67:18-68:20, 68:25-69:12, 72:18-23, 74:9-14, 75:7-14, 76:20-22, 82:10-11, 91:5-99:15, 99:15-100:8, 103:2-18, 104:9-14, 108:5-17, 117:15-22 and 125:23-126:7.

door leading to the roof in Digital's rental space was locked and "a bunch of boxes piled against the door . . . created the fire to catch."[10]

When Brach was asked under what circumstances rent checks from tenants at the Property would "go into any other account, other than owned by 63rd Street Realty," Brach responded:

> "If it's a - - if it's a - - *if its one ownership a lot of companies, it wouldn't make a difference*. If something happens, its not the end of the world. It didn't go - - I'm not sure if it went, but being an owner which owns many corporations" (*id.* at 108:11-109:9 [emphasis added]).

Similarly, when asked who was responsible for keeping the roof at the Property in good repair, Brach responded that "[i]t would be 63rd Street [Realty] or sometimes Sound . . .would also do repairs" (*id.* at 109:16-110:7).

When asked whether Sound had an interest in the fire insurance claim, Brach responded that "[i]f it's - - if it's the same ownership, the same hundred percent ownership, wouldn't make a difference where the check would be made" (*id.* at 131:14-132:18). While Brach insisted that Sound did not have an interest in the fire insurance proceeds (*id.* at 132:23-133:6), he admitted that a $185,000.00 insurance check payable to Sound and the mortgagee of the Property, Merrill Lynch, was deposited into Sound's bank account because Sound had been paying the mortgage on the Property since it "had the deep pockets to pay up the mortgage" (*id.* at 133:7-134:10, 134:11-135:12).

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[10] *See* Tosca Affirmation, Exhibit G (Brach September 2014 Deposition Transcript at 16:4-6-17:6, 45:14-22, 62:6-9, 62:24-63:3, 63:8-17, 76:10-15, 86:13-15, 88:5-24, 92:24-93:20, 103:5-24, 107:2-5, 119:20-120:5, 121:15-123:17 and 147:19-24 and Brach October 2014 Deposition Transcript at 181:6-182:15, 189:23-192:23 and 193:18-19).

Wiesner provided consistent deposition testimony that: (1) he was employed as the operations manager of Sound for ten years with an office on the second floor of the Property where "Sound . . . has its operations"; (2) he oversees the Property on behalf of 63rd Street Realty and Brach by addressing structural repairs, tenant disputes and maintaining rental records; (3) other than hiring contractors, he did not supervise or manage repairs at the Property; (4) he was generally unfamiliar with the construction and repair of roofing; (5) he hired All-Tech to repair the roof at the Property on behalf of 63rd Street Realty based on a referral from his friend, Schwartz, and All-Tech's prior work on the gutters at Brach's home; (6) All-Tech agreed to repair the roof without providing Wiesner with any specifics about how the leak would be resolved; (7) Wiesner signed his name to All-Tech's 2012 Roofing Contract on behalf of 63rd Street Realty and was authorized to hire All-Tech on behalf of 63rd Street Realty and Brach; (8) Wiesner did not know that All-Tech intended to use a blow torch to repair the roof; and (9) Wiesner was unaware that Digital stored anything in the hallway behind the metal door leading to the roof.[11]

After the fire – and while the 2012 Action was pending – Brach transferred the Property from 63rd Street Realty to his newly formed holding company, 63rd Street Realty II 63rd Street Realty purportedly owned the Property from August 20, 1991[12] until it transferred

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[11] Tosca Affirmation, Exhibit H (Wiesner Deposition Transcript at 7:19-8:19, 9:16-22, 11:10-14:18, 16:2-17:7, 19:14-18, 23:24-24:8, 25:25-26:5, 40:11-48:12, 51:13-52:19, 60:13-61:18, 64:8-25, 79:23-80:10, 82:10-25, 85:9-19, 98:12-99:8, 102:16-103:2 and 138:16-21).

[12] 63rd Street Realty Inc.'s August 20, 1991 deed for the Property from Rose Trading Inc. is annexed to the Tosca Affirmation as Exhibit J.

the Property to defendant 63rd Street Realty II, pursuant to a January 13, 2014 warranty deed that was executed by Brach in his capacity as President of 63rd Street Realty (2014 Deed).[13] The 2014 Deed expressly provides that "**[t]his conveyance is made with the unanimous consent of all the shareholders of the party of the first part in accordance winding up the affairs of the corporation**" (Tosca Affirmation, Exhibit K [bold in original]).

The 2015 Action

The following year, on January 12, 2015, Digital commenced the 2015 Action against Brach and 63rd Street Realty II (as successor in interest to 63rd Street Realty) by filing a summons and complaint alleging that 63rd Street Realty II is a "business entity" located at the Property and that defendants Brach and 63rd Street Realty II "was/is the owner/landlord/ manager of the [Property]" (Tosca Affirmation, Exhibit A [2015 Complaint at ¶¶ 1, 3 and 4]).

The 2015 Complaint alleges that Brach and 63rd Street Realty II entered into the 2012 Roofing Contract with All-Tech and that "in the performance of its duties on behalf of [them], All-Tech caused a fire on the roof of the subject premises by utilizing a fire torch during the course of performing the roof repairs for which it was retained" which "created a clear and dangerous condition" (*id.* at ¶¶ 6-7).

The 2015 Complaint asserts four causes of action against Brach and 63rd Street Realty II for: (1) negligence "in having either actual or constructive knowledge of the acts of All-Tech which led to the fire [and] in failing to keep its [P]roperty in a safe condition . . ." (*id.* at ¶¶ 5-14); (2) negligent hiring and retention of All-Tech (*id.* at ¶¶ 15-19); (3) negligence

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[13] *See* Tosca Affirmation, Exhibit K.

based on defendants' alleged violation of New York State and City Codes and Statutes, including but not limited to the 2008 New York City Fire Code (*id.* at ¶¶ 20-23); and (4) breach of Digital's lease, the terms of which allegedly require defendants "to maintain the subject premises in a safe condition, and to protect others from hazardous, dangerous and/or defective conditions" (*id.* at ¶¶ 24-27).

Brach and 63rd Street Realty II, on February 20, 2015, answered Digital's complaint, denying the allegations therein and alleging that "63RD STREET REALTY [ ] is an inactive domestic business corporation that at one time owned property located at 1600 63rd Street . . ." (Tosca Affirmation, Exhibit B [Answer at ¶ 2]). Brach and 63rd Street Realty II asserted nine affirmative defenses, including: (1) Digital's injuries "were caused by the culpable conduct of parties other than the answering defendant . . ." and (2) failure to include a necessary party (*id.* at ¶¶ 16-24). Brach and 63rd Street Realty II asserted a counterclaim and a cross claim against Digital for indemnification based on its lease (*id.* at ¶¶ 25-26).

Digital, on February 25, 2015, answered defendants' counterclaim and cross claim, denying the allegations therein (Tosca Affirmation, Exhibit C).

Sound's Summary Judgment Motion In The 2012 Action

Sound, on April 7, 2015, moved for summary judgment dismissing Digital's complaint in the 2012 Action because "SOUND did not operate, control, maintain, or repair [the Property] at any time prior to, and including January 31, 2012 . . ." based on "documentary evidence and testimony establishing [Sound] did not own, lease, control, maintain, repair, or hire anyone to repair the [Property]" (Bilbao Affirmation at ¶¶ 52-53).

Sound contends that Digital's allegation that it owns the Property is unsupportable since it produced public documents demonstrating that 63rd Street Realty owned the Property, including Digital's lease with 63rd Street Realty and 63rd Street Realty's deed to the Property (*id.* at ¶ 56 and Exhibits H and J). Sound also relies on All-Tech's 2012 Roofing Contract with 63rd Street Realty, a copy of the deposit check from 63rd Street Realty to All-Tech and Wiesner's deposition testimony to evidence that Wiesner hired and paid All-Tech on behalf of 63rd Street Realty (*id.* at ¶ 57 and Exhibits L, M and P).

Sound contends that as a tenant at the Property it cannot be held liable because: (1) it "had no duty to maintain or repair, nor did it cause or create the condition leading to the accident . . ." (*id.* at ¶ 54); (2) "the roof was a common area that was in the custody and control of 63rd Street Realty" (*id.* at ¶ 55); (3) it "did not hire ALL-TECH, nor did SOUND oversee or supervise Mr. Kaferi's actions while on the roof" (*id.* at ¶ 59); (4) "no employee, agent, or representative of SOUND knew that there were boxes and other combustible material behind the metal door leading into DIGITAL's space" (*id.*); and (5) "Wiesner testified [that] he was not told by Mr. Kaferi or anyone else from ALL-TECH that a torch would be used to repair the roof" (*id.* at ¶ 63).

Sound contends that there could be no liability even if it did hire All-Tech because All-Tech was an independent contractor and Sound "did not direct or control the work of ALL-TECH and was not aware that a torch was even going to be used" (*id.* at ¶ 66).

Sound's counsel also argues that Sound and 63rd Street Realty are not alter egos because "it is undisputed [that] neither SOUND nor 63rd Street Realty . . . is a subsidiary of

one another, both corporations engage in a different line of business, each maintains separate bank accounts, and file separate tax returns" (*id.* at ¶ 70). Regarding the fire insurance proceeds, defense counsel explains that "SOUND is the policy holder and 63rd Street Realty . . . is a named insured; therefore SOUND was eligible to accept the insurance proceeds. . ." (*id.*).

Digital's Opposition

Digital, in opposition, submitted an attorney affirmation arguing that there are questions of fact that preclude summary judgment,[14] including the issue of whether or not Wiesner hired All-Tech on behalf of Sound:

> "Although Sound . . . did not own the [Property] . . . it is undisputed that its employee, Samuel Wiesner, was responsible for the collection of rents and the repair/maintenance at the subject premises, and as such, it is undoubtedly a question of fact if he hired Defendant All-Tech on behalf of Defendant Sound" (Aboulafia Opposition Affirmation at ¶ 5).

Digital relies on Wiesner's deposition testimony and argues that "in his capacity as an employee and/or agent of Defendant Sound . . . Wiesner testified that his job duties are geared towards managing the [Property]" including collecting rent, handling tenant complaints, negotiating leases and hiring contractors (*id.* at ¶ 7 and Exhibit C [Wiesner's deposition transcript at 10:15-12:14, 21:12, 13:2-14:10]). Digital also relies on Brach's deposition testimony that 63rd Street Realty *or* Sound were responsible for keeping the roof in good repair (*id.* at Exhibit F [Brach Deposition Transcript at 109:16-110:7]).

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[14] *See* the June 26, 2015 affirmation of Matthew S. Aboulafia, Esq. in opposition to Sound's summary judgment motion in the 2012 Action (Aboulafia Opposition Affirmation).

Digital claims that it was "an apparent impossibility" for Wiesner to have hired All-Tech on behalf of 63rd Street Realty because in January 2012 63rd Street Realty was dissolved, according to information retrieved from the New York State Department of State, Division of Corporations, website (*id.* at ¶ 9 and Exhibit G). A printout from the Department of State reflects that 63rd Street Realty's "Current Entity Status" (through June 23, 2015) was "INACTIVE - Dissolution by Proclamation / Annulment of Authority (Jan. 26, 2011)" (*id.* at Exhibit G). Digital contends that "at the very least, with 63rd Street Realty . . . having been dissolved over a year prior to the fire, there exists an issue of fact as to whether Defendant Sound - through Mr. Wiesner - was the managing agent and supervisor of the [Property], and therefore, would have been responsible for hiring Defendant All-Tech to repair the roof" (*id.* at ¶ 9). Essentially, Digital argues that Sound should be held liable "because it is the alter ego of 63rd Street Realty . . . for the purposes of managing the [Property]" (*id.* at ¶ 29).

Digital thus argues that Sound was "more than a 'tenant'" at the Property, since it admittedly paid the mortgage and was a named insured on the Property's insurance policy (*id.* at ¶ 10 and Exhibits F [Brach's Deposition Transcript at 87:12-88:24] and H [Insurance Policy No. H-630-3958P29A-COF-12]). Digital submits copies of the Declaration Pages from the Property's Insurance Policy, which reflect that Sound was the named insured (*id.* at Exhibit H). Digital also submits Sound's "SWORN STATEMENT IN PROOF OF LOSS," reflecting that Sound claimed $281,271.00 in damages to the Property and $20,471.26 for lost rental income and subsequently received an April 30, 2012 insurance check for $185,265.00 (*id.* at Exhibit I). Brach confirmed that he deposited the insurance

proceeds into Sound's bank account since Sound "had the deep pockets to pay up the mortgage" (*id.* at Exhibit F [Brach's Deposition Transcript at 164:23-165:12]).

Digital contends that Sound should be held liable, even if All-Tech was an independent contractor, because it was negligent in hiring and retaining All-Tech in the performance of inherently dangerous work:

> "Although Defendant Sound is accurate in restating the general rule that shields a principal from the negligence of its independent contractor, in this instance, Defendant Sound should be held liable for the negligence of Defendant All-Tech under the theory of negligent hiring and retention and because Defendant All-Tech undertook work that was inherently dangerous, leading to Plaintiff's injuries" (*id.* at ¶ 12).

Digital contends that "the courts in this State have held that an issue of fact exists as to whether use of a propane torch to repair a roof constitutes an inherently dangerous work activity, which imposes liability on a principal for the negligent work of its independent contractor," citing to the Appellate Division, Second Department, decision in *Flaherty v Fox House Condo.*, 299 AD2d 448 [2002]). Digital argues that "Wiesner either knew or should have known about the equipment (i.e., propane torch) that was going to be used since he asked Mr. Kaferi to do the job as cheaply as possible" (*id.* at ¶ 25 and Exhibit E [Kaferi Deposition Transcript at 74:9-75:6]).

Digital further argues that Sound could be held liable for negligently hiring All-Tech on the grounds that "Sound never inquired into All-Tech's qualifications, the manner in which the repairs would be accomplished, nor did it conduct even a minimal background check . . ." (*id.* at ¶ 17).

Sound's Reply

Sound, in reply, submitted an attorney affirmation contending that "plaintiff's conclusory remarks that Sam Wiesner hired All-Tech are not borne out by the evidence."[15] Sound's reply includes a copy of Brach's April 3, 2014 affidavit, which was previously filed as part of Sound's unsuccessful summary judgment motion in 2014 (2014 Brach Affidavit).[16] The 2014 Brach Affidavit attests that: (1) Sound is a tenant at the Property and did not have an ownership interest in the Property; (2) Sound did not retain All-Tech; (3) Sound did not direct, supervise or control All-Tech; and (4) Sound did not perform any work on the roof or cause a fire (*see* Tosca Reply Affirmation, Exhibit A [2014 Brach Affidavit at ¶¶ 3-9]).

Sound contends that "the proof unequivocally demonstrates that . . . Wiesner retained All-Tech on behalf of 63rd Street Realty for the work that plaintiff alleges was negligently performed"; "[t]he testimony is uncontroverted that Sam Wiesner was working for 63rd Street Realty as owner of the [P]roperty"; and "[a]t no time did Mr. Wiesner state that he managed the [P]roperty . . . as a managing agent for Sound . . ." (Tosca Reply Affirmation at ¶¶ 6-7).

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[15] *See* the August 26, 2015 reply affirmation of Eric P. Tosca, Esq., submitted in further support of Sound's summary judgment motion in the 2012 Action (Tosca Reply Affirmation) at ¶ 3.

[16] This Court denied Sound's 2014 summary judgment motion "with leave to renew at the completion of discovery" (Tosca Affirmation, Exhibit U).

Sound argues that "[t]he fact that Mr. Wiesner was informally paid [by Sound] does not change his status handling management and coordinating the repairs . . . on behalf of his father-in-law's corporation 63rd Street Realty" (*id.* at ¶ 7).

Sound further contends that "[t]here is no basis for the finding of an alter ego relationship between 63rd Street Realty and Sound . . ." because "[t]he two entitles are separate in both structure and function" (*id.* at ¶ 8). Sound argues that its receipt of the insurance proceeds "is not indicative of ownership" (*id.* at ¶ 10).

According to Sound, "even if there were any evidence in admissible form to demonstrate that Sound . . . hired All-Tech, there is no basis to find vicarious liability" because neither Brach nor Wiesner knew that All-Tech, an independent contractor, intended to use a blow torch to repair the roof and "All-Tech's workers decided on their own the means and methods of the work" (*id.* at ¶ 13).

Brach and 63rd Street Realty II's
Summary Judgment Motion In The 2015 Action

Brach and 63rd Street Realty II, on May 12, 2015, moved for an order granting them summary judgment dismissing the 2015 Action and awarding them attorneys' fees and costs. Brach and 63rd Street Realty II contend that they cannot be held liable for All-Tech's negligence because All-Tech was an independent contractor and "neither Mr. Wiesner nor Mr. Brach oversaw, supervised, or controlled Mr. Kaferi's work in any way prior to the fire" (Tosca Affirmation at ¶ 27).

Brach and 63rd Street Realty II further contend that they "exercised reasonable care in hiring Mr. Kaferi . . ." because they "relied on Mr. Kaferi's expressed qualifications, good character, and prior work experience [and] could not have anticipated misconduct or negligence on the part of Mr. Kaferi, nor does the law require them to do so" (*id.* at ¶ 32). Defendants "relied on ALL-TECH's representation [in its proposal that] it was fully licensed and capable of performing the minor repair safely and properly" (*id.* at ¶ 33).

Brach and 63rd Street Realty II submit deposition testimony from Brach, Kaferi and Wiesner in the 2012 Action as evidence that "Kaferi never discussed the use of a torch to perform the roof repair . . ." (*id.* at ¶ 34 and Exhibits G, H and I). Defendants also note that All-Tech's proposal and 2012 Roofing Contract did not mention the use of a blow torch and that they "are not experts in roof repair" and had no reason to know that Kaferi intended to use a blow torch (*id.* at ¶ 34 and Exhibit E).

Brach and 63rd Street Realty II also argue that Brach cannot be held personally liable for 63rd Street Realty to the extent that Digital seeks to pierce the corporate veil because Brach did not exercise complete dominion and control over the corporation. Specifically, defense counsel contends that "[w]hile it is undisputed that Mr. Brach is the sole shareholder of 63rd Street Realty . . . he delegated duties and responsibilities to other individuals in the lease negotiations, day to day operation, and the hiring of contractors" (*id.* at ¶ 41). As an example, defendants note that Wiesner, rather than Brach, negotiated the roof repair and hired All-Tech on behalf of 63rd Street Realty (*id.* at ¶ 43).

Although Brach admittedly executed the 2014 Deed transferring the Property from 63rd Street Realty to 63rd Street Realty II after the fire (*id.* at Exhibit K), defendants contend that 63rd Street Realty II is not a successor in interest to 63rd Street Realty because "there is no evidence" that 63rd Street Realty II intended to acquire 63rd Street Realty's assets and liabilities (*id.* at ¶ 48).

Digital's Opposition And Cross Motion For Summary Judgment In The 2015 Action

Digital, on July 7, 2015, submitted an attorney's affirmation in opposition to defendants' summary judgment motion and in support of its cross motion for summary judgment in the 2015 Action.

Notably, Digital's counsel admits – based on the Fire Incident Report – that the fire was caused by All-Tech's "illegal use of a propane or acetylene torch . . . while working on a combustible roof while in close proximity to combustible materials" (Aboulafia Cross-Moving Affirmation at ¶ 3 and Exhibit D). Digital's counsel also admits that Brach, 63rd Street Realty II and their agent, Wiesner, were unaware that Kaferi of All-Tech intended to repair the roof using a propane torch:

> "except for asking about the cost of performing the job, *Mr. Kaferi was never asked about any specifics relating to the job, including the type of equipment that was going to be utilized, and most importantly, whether a propane torch was going to be used.* Because Mr. Wiesner never inquired into All-Tech's qualifications, the manner in which the repairs would be accomplished, nor did he conduct even a minimal background check. Mr. Wiesner never learned of the foregoing information even though he clearly should have known about same since it was 63rd Street Realty . . . and Mr. Brach's responsibility and duty to carry out repairs at the [Property] and to do so without causing injury to its tenants" (*id.* at ¶ 16 [emphasis added] [citations omitted]).

While Digital's counsel admits that "the general rule is that a principal is shielded from liability for the negligence of his independent contractor[,]" he contends that "in this case, there are several exceptions to this rule which have been triggered . . ." (*id.* at ¶ 9).

Specifically, Digital contends that "in hiring . . . All-Tech, Mr. Wiesner failed to follow his own internal hiring guidelines and criteria, and as a result, retained an inexperienced and incompetent roofer who ultimately caused Plaintiff damages" (*id.* at ¶ 17). According to Digital, "Wiesner failed to obtain a single referral from Mr. Kaferi, although it was Mr. Wiesner's general protocol and practice to ask a contractor for references" (*id.* at ¶ 20). Digital argues that "it seems clear that Mr. Wiesner was indifferent and did not care to inquire about Mr. Kaferi's qualifications for roof repair work" (*id.* at ¶ 19). Digital contends that "the record is clear that the cause of the fire loss was due to *both* Mr. Kaferi's lack of skill and experience, and his inattention or carelessness, and Mr. Wiesner was or should have been aware of both" (*id.* at ¶ 27 [emphasis added]).

Digital's counsel cites to the unreported findings of fact and conclusion of law issued after a bench trial by a Pennsylvania court in *Eagle Truck Servs., LLC v Wojdalski*, (2013 WL 10573670 [Pa. Com. Pl.]), and describes it as "a case identical to the one herein [where] the court thereat held that the manager of a commercial building acted negligently in retaining an inexperienced roofing contractor who caused a fire loss through his use of a propane torch" (Aboulafia Cross-Moving Affirmation at ¶ 23). Digital's counsel admits, however, that the Superior Court of Pennsylvania reversed and remanded the case for a new trial in *Hart Trucking Repair v Robb H* on the ground that "Appellees did not meet their burden of

establishing their [Restatement (Second) of Torts] Section 411 negligent hiring claim . . ." (*id.* at ¶¶ 23-27 and Exhibit I at 5).

Alternatively, Digital contends that defendants can be held liable for All-Tech's negligence "since All-Tech was retained to perform work that is inherently dangerous" (*id.* at ¶ 31). Although Digital cross-moves for summary judgment (implying that there are no material issues of triable fact), it nevertheless cites to the Second Department's holding in the *Flaherty* case and contends that "[t]he courts of this State have held that an issue of fact exists as to whether use of a propane torch to repair a roof constitutes an inherently dangerous work activity, thereby imposing liability on a principal for the negligent work of its independent contractor" (*id.* at ¶ 33). Digital argues that "Wiesner either knew or should have known about the equipment (i.e. propane torch) that was going to be used since he asked Mr. Kaferi to do the job as cheaply as possible" (*id.* at ¶ 34). Digital contends that Kaferi's lack of qualifications and experience "creat[ed] a condition that was inherently dangerous to the Plaintiff and his property" (*id.* at ¶¶ 33-34).

Digital also argues that defendants, as landlords, "have a non-delegable duty to keep their premises free from defects" under the New York City Administrative Code § 27-301.1 and that "Defendants' failure in its management and supervision of the subject premises played a major role in allowing the fire to spread . . ." (*id.* at ¶¶ 36-39). Specifically, Digital contends that "the door leading out of Plaintiff's space and to the roof at the subject premises - where Mr. Kaferi was performing his work - was unlawfully and illegally locked [so]

Kaferi was unable to put out the fire that was spreading behind the door . . ." and the Property lacked a working sprinkler system to prevent the fire from spreading (*id.* at ¶¶ 37 and 39).

Finally, Digital contends that the "limited evidence before the Court" demonstrates that 63rd Street Realty II succeeded 63rd Street Realty, "assumed some of its assets, and *potentially* assumed its liabilities as well" (*id.* at ¶ 41 [emphasis added]). Digital asserts that "questions arise" regarding the assumption of 63rd Street Realty's liabilities "including liability for All-Tech's negligence - due to the fact that Defendant 63rd Street transferred ownership to the subject premises to 63rd Street II . . ." (*id.* at ¶ 42). Digital states that it "is unable to present any documentary evidence relating to the express assumption . . ." because it did not have "the opportunity to conduct any meaningful discovery . . ." (*id.* at ¶ 42).

Although Digital specifically identified several issues of fact in its motion papers, its counsel nevertheless contends that "it is clear that there are no issues of fact that should prevent Summary Judgment from being granted for the Plaintiff" (*id.* at ¶ 43).

Brach and 63rd Street Realty II's Reply
And Opposition To Digital's Cross Motion

Brach and 63rd Street Realty II, in reply and in opposition to Digital's cross motion, submit an attorney affirmation contending that the two exceptions to the general rule of non-liability (i.e., negligent hiring and inherently dangerous work) are inapplicable in this case.[17]

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[17] *See* the August 26, 2015 affirmation of Eric P. Tosca, Esq., in further support of Brach and 63rd Street Realty II's summary judgment motion and in opposition to Digital's cross motion for summary judgment in the 2015 Action (Tosca Opposition Affirmation).

Defense counsel contends that "the property owner is not obliged to undertake an exhaustive background check to determine the competency of the contractor to perform work" and "[t]here were no prior bad acts to alert anyone that All-Tech was not competent" (Tosca Opposition Affirmation at ¶ 5). Defendants contend that "Kaferi was not only experienced for the work he was asked to perform, but there were no prior incidents or poor work reports that should alert the Defendants of incident" (*id.* at ¶ 10).

Defendants assert that "[t]here was no reason for Mr. Wiesner to expect that All-Tech would not perform the work properly" since All-Tech was recommended by Mr. Schwartz and it had previously performed satisfactory work on the roof of Brach's home (*id.* at ¶ 13). Essentially, defendants argue that "no standard of reasonable care was violated in the choice of All-Tech to perform the subject work on the roof" because "the alleged claim that the torch started the fire arises from ordinary negligence and not a pattern or history of prior incompetent work" (*id.* at ¶¶ 15 and 17).

Defendants also contend that Digital's reliance on the inherently dangerous exception to impose liability is "misplaced" because "[t]he scope of work was a limited roof repair, which did not entail any extraordinary danger to the public in the absence of negligence" (*id.* at ¶ 18). Defendants assert that they were not aware that a torch would be used, and thus, "there is no basis to find that the work anticipated by the Defendants was inherently dangerous" (*id.* at ¶ 19).

According to defendants, "Digital offers no substantive argument regarding the liability of either Zigmond Brach or of 63rd Street Realty II . . ." (*id.* at ¶ 27). Although

defense counsel admits that 63rd Street Realty "was informally dissolved due to an issue with the payment of franchise taxes" and that Brach "executed a deed transferring the property after the fire," he assert that [t]here is no basis to find 63rd Street Realty II to be a successor in interest to 63rd Street Realty" (*id.* at ¶¶ 27-28).

Regarding Digital's cross motion, defendants contend that "Digital bears comparative fault, which alone, precludes its cross-motion for summary judgment against any defendants. Not only does Digital fail to meet its burden to demonstrate that it was free from negligence in the cause of the fire, but the countervailing evidence demonstrates that the fire resulted from an ignition source in its rented space" (*id.* at ¶ 10). Defendants submit a copy of Digital's 2008 lease with 63rd Street Realty and contend that "Digital was under an obligation to install and maintain all equipment and appliances to comply with codes[,]" including the installation of a sprinkler system (*id.* at ¶ 24 and Exhibit A). Defense counsel contends that "[t]he holdings in the cases cited by the plaintiff do not grant plaintiff's summary judgment, but rather find issues of fact warranting a trial" (*id.* at ¶ 21).

Digital's Reply And Sur-reply

Digital, in response, submitted an attorney affirmation reiterating Digital's contentions regarding Kaferi's roofing experience "perform[ing] minor jobs on residential homes – unrelated to the roofing work herein and with limited use of a torch."[18] Digital argues that "Kaferi was a ticking time bomb as he was an unlicensed and inexperienced roofer who felt

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[18] *See* ¶ 6 of the September 25, 2015 affirmation of Matthew S. Aboulafia submitted as a sur-reply in the 2012 Action and a reply in further support of Digital's cross motion for summary judgment in the 2015 Action (Aboulafia Sur-reply Affirmation).

forced to perform a job that he was not qualified to perform . . .” (Aboulafia Sur-reply Affirmation at ¶ 7).

Discussion

"Summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2011]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

If it is determined that a party has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). In considering a summary judgment motion, the evidence must be viewed in the light most favorable to the opponent of the motion (*Vega v Restani Constr. Corp,* 18 NY3d 499, 503 [2012]).

Defendants' Summary Judgment Motions In The 2012 And 2015 Actions

Sound seeks summary judgment in the 2012 Action dismissing Digital's Second and Third Causes of Action for: (1) negligence based on its alleged "ownership, operation, maintenance and control of the [Property]" and (2) negligent hiring because it allegedly

"failed to perform its due diligence prior to retaining Defendant All-Tech to perform roof repairs at the [Property]" (Bilbao Affirmation, Exhibit A [2012 Complaint at ¶¶ 15 and 17]).

Brach and 63rd Street Realty II also seek summary judgment in the 2015 Action dismissing Digital's claims for: (1) negligence based on their alleged "ownership, operation, maintenance and control of the [Property]"; (2) negligent hiring because they allegedly "failed to perform its due diligence prior to retaining All-Tech to perform roof repairs at the [Property]"; (3) negligence based on violations of State and City Codes and Statutes; and (4) breach of Digital's lease "by failing to maintain the [Property] in a safe condition . . ." (Tosca Affirmation, Exhibit A [2015 Complaint at ¶¶ 13, 14, 16 and 26]).

Notably, Digital's claims in the 2012 and 2015 Actions are premised on the allegations that Sound, Brach and/or 63rd Street Realty II "is/was the owner/landlord . . ."; "entered into a contract with Defendant All-Tech . . ."; and "fail[ed] to keep its property in a safe condition" (2012 Complaint at ¶¶ 4, 5 and 14; 2015 Complaint at ¶¶ 4, 5 and 13). Apparently, Digital seeks to pierce 63rd Street Realty's corporate veil and/or impute liability to Sound, Brach and/or 63rd Street Realty II.

A. Piercing The Corporate Veil In The 2012 Action Against Sound

Digital seeks to pierce 63rd Street Realty's corporate veil and impute liability to Sound based on its alleged ownership of the Property and retention of All-Tech. "To state a veil piercing claim, the plaintiff is required to show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such

domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [2015] [internal citations and quotation marks omitted]). "In addition, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (*Fernbach, LLC v Calleo*, 92 AD3d 831, 832 [2012] [internal citations and quotation marks omitted]).

"Generally considered are such factors as whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form . . . such that one of the corporations is a mere instrumentality, agent and alter ego of the other" *John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 540, 541 [2006] [quoting *Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 893-94 (2003)]). "The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil" (*Goldman v Chapman*, 44 AD3d 938, 939 [2007]).

Digital argues that Sound was the alter ego of 63rd Street Realty and seeks to pierce its corporate veil in the 2012 Action. Digital contends that Sound is not entitled to summary judgment because there are material issues of fact, including the issue of whether or not Wiesner hired All-Tech on behalf of Sound.

Defendants contend that Sound is entitled to summary judgment based on deposition testimony and documentary evidence proving that: (1) 63rd Street Realty was the owner of the Property at the time of the fire and continually maintained control over the Property; (2) Wiesner managed the Property on behalf of 63rd Street Realty, including the retention of contractors; and (3) Wiesner retained All-Tech and executed the 2012 Roofing Contract on behalf of 63rd Street Realty.

Digital, in response, contends that it was "an apparent impossibility" for Wiesner to hire All-Tech on behalf of 63rd Street Realty in January 2012 because 63rd Street Realty was previously dissolved. In addition to records retrieved from the Department of State website, Digital relies on Brach's deposition testimony that; (1) rent checks from tenants were not necessarily deposited into 63rd Street Realty's bank account; (2) *either* 63rd Street Realty or Sound were responsible for maintaining the roof of the Property; (3) $185,000.00 in fire insurance proceeds were paid to Sound and deposited into Sound's bank account; (4) Sound paid the mortgage on the Property; and (5) Wiesner was a W-2 employee of Sound and maintained his office in Sound's rental space at the Property.

Here, Sound failed to establish its prima facie entitlement to judgment as a matter of *law*. Evidentiary submissions failed to eliminate all triable issues of fact as to whether it exercised complete domination and control over 63rd Street Realty, and if so, whether it exercised such domination and control to commit a wrong or injustice against Digital and whether it was an alter ego of 63rd Street Realty.

B. Brach's Potential Liability In The 2015 Action Based On 63rd Street Realty's 2011 Dissolution

"Pursuant to Tax Law § 203-a, the Secretary of State may dissolve a corporation by proclamation for the nonpayment of franchise taxes. Upon dissolution, the corporation's legal existence terminates and *it is prohibited from carrying on new business*" (*80-02 Leasehold, LLC v CM Realty Holdings Corp.*, 123 AD3d 872, 873 [2014] [emphasis added]; *see also Long Oil Heat, Inc. v Polsinelli*, 128 AD3d 1296, 1297 [2015] [holding that "a dissolved corporation is precluded from engaging in new business and has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs"). Importantly, the Appellate Division, Second Department, has held that "[a] person who purports to act on behalf of a dissolved corporation is personally responsible for the obligations incurred" and "[p]ersonal liability is not limited to the person who executes a contract on behalf of a dissolved corporation, but extends to the officers of the dissolved corporation" (*80-02 Leasehold*, 123 AD3d at 874 [citations omitted]).

Here, there is no dispute that 63rd Street Realty was dissolved well before All-Tech was hired for roof repair at the Property. Digital demonstrated that 63rd Street Realty was dissolved on January 26, 2011, by annexing uncontroverted documentary evidence from the New York State Department of State, Division of Corporations, website (Aboulafia Opposition Affirmation, Exhibit G). Defense counsel, however, contends that Brach, a "corporate principal" bears no personal responsibility:

> "As to Mr. Brach, he bears no personal liability for this accident. He is a corporate principal. While *63rd Street Realty was informally dissolved due to*

> *an issue with the payment of franchise taxes*. Mr. Brach testified that he was not even aware of the dissolution until after the fire. The corporation at all times continued to operate as a corporate entity with a bank account and with ownership of the property. The corporation executed a deed transferring the property after the fire. We reiterate out arguments that Mr. Brach does not bear liability for any activities he undertook in furtherance of the corporate enterprise" (Tosca Reply Affirmation at ¶ 28 [emphasis added]).

Defendants' contention that Brach cannot be held personally liable simply because 63rd Street Realty "continued to operate as a corporate entity . . ." is inconsistent with controlling appellate authority. On the contrary, Brach is not protected from personal liability based on 63rd Street Realty's retention of All-Tech because Brach continued to conduct business under the auspices of 63rd Street Realty subsequent to its dissolution. Defendants' contention that Brach did not exercise complete dominion and control over 63rd Street Realty – and delegated the retention of All-Tech to Wiesner – is entirely irrelevant. The mere fact that Wiesner, rather than Brach, was authorized to hire All-Tech on behalf of 63rd Street Realty does not change the fact that Brach continued to conduct new business on behalf of 63rd Street Realty after the company was dissolved. Consequently, Brach, the sole principal and 100% owner of 63rd Street Realty, can be held personally liable for 63rd Street Realty's negligence, as a matter of la

C. 63rd Street Realty II's Potential Successor Liability In The 2015 Action

"Generally, a corporation is not liable for the torts of its predecessor unless (1) it expressly or impliedly assumed the predecessor's liability, (2) there was a consolidation or merger of the two corporations, (3) the second corporation was a mere continuation of the

first, or (4) the transaction was fraudulently executed to escape liability" (*Hansen v Filtron Mfg. Co.*, 282 AD2d 433, 434 [2001] [citing *Delgado v Matrix-Churchill Co.*, 205 AD2d 575, 576 (1994)]). "The second and third items are based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased. This is consistent with the desire to ensure that a source remains to pay for the victim's injuries" (*Grant-Howard Associates v Gen. Housewares Corp.*, 63 N.Y.2d 291, 296-97 [1984]).

New York courts have held that a successor company has not satisfied its burden of demonstrating its entitlement to summary judgment dismissing claims asserted against it if it "fail[ed] to address all potential bases for the imposition of liability against it as a successor . . ." (*Meadows v Amsted Indus., Inc.*, 305 AD2d 1053, 1054 [2003]; *see also Morales v City of New York*, 18 Misc 3d 686, 688 [Sup Ct Kings County 2007] [same]). "As a general rule, a party cannot establish its entitlement to summary judgment merely by pointing to gaps in the opponent's proof" (*Falah v Stop & Shop Companies, Inc.*, 41 AD3d 638, 639 [2007]).

Here, defendants contend that 63rd Street Realty II is not a successor to 63rd Street Realty based on the Property transfer because "there is no evidence" that 63rd Street Realty II intended to acquire 63rd Street Realty's assets and liabilities. Defendants are not entitled to summary judgment dismissing the complaint in the 2015 Action against 63rd Street Realty II because they fail to mention, or even address, the other established legal grounds for successor liability.

D. Digital's Negligence Claims

Even assuming that Sound, Brach and/or 63rd Street Realty II can be held liable for the allegedly tortious conduct of 63rd Street Realty subsequent to its dissolution, there are multiple issues of fact regarding their liability for All-Tech's alleged negligence that preclude summary judgment.

"We begin with the basic proposition that liability in negligence is normally premised on a defendant's own fault, not the wrongdoing of another person. The doctrine of vicarious liability, which imputes liability to a defendant for another person's fault, rests in part on the theory that – because of an opportunity for control of the wrongdoer, or simply as a matter of public policy loss distribution – certain relationships may give rise to a duty of care, the breach of which can indeed be viewed as the defendant's own fault" (*Feliberty v Damon*, 72 NY2d 112, 117-118 [1988]).

Applying that reasoning, "[t]he general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" (*Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 668 [1992]). "Although several justifications have been offered in support of this rule, the most commonly accepted rationale is based on the premise that one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor" (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]).

There are exceptions, however, "[f]or reasons of public policy, the employer's duty is sometimes held to be nondelegable and, though blameless, it is liable for the independent

contractor's negligence" (*Rosenberg*, 79 NY2d at 668). The Court of Appeals has held that common law exceptions to the general rule "fall roughly into three basic categories: negligence of the employer in selecting, instructing or supervising the contractor; employment for work that is especially or 'inherently' dangerous; and, finally, instances in which the employer is under a specific nondelegable duty" (*Kleeman*, 81 NY2d at 274 [citations omitted]). Put another way, the Appellate Division, Second Department, has held that "[e]xceptions include situations where the party has assumed a specific duty by contract, is under a statutory duty to perform or control the work or a duty to keep the premises safe, and has assigned work to an independent contractor which the party knows or has reason to know involves inherently dangerous work" (*Flaherty v Fox House Condo.*, 299 AD2d 448, 448-449 [2002]).

The Court of Appeals has held that "the inherently dangerous exception cannot be applied *unless a risk inherent in the nature of the procedures is apparent or contemplated* by the employer" (*Rosenberg*, 79 NY2d at 670 [emphasis added]). Thus, "the exception does not apply if 'the danger is not one that is inherent in the nature of the contract work'" (*MacDonald v Heuer*, 253 AD2d 795, 796 [1998] [quoting *Rosenberg,* 79 NY2d at 669]).

"Whether work is inherently dangerous, and thus an exception to the general rule that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts, is normally a question of fact to be determined by the jury" (*Montano v O'Connell*, 186 AD2d 461, 461 [1992]; *see also Rosenberg*, 79 NY2d at 670

["[w]hether the work is inherently dangerous is normally a question of fact to be determined by the jury"]).

In *Flaherty*, a factually analogous case, the Appellate Division, Second Department, upheld the denial of summary judgment to a property owner and manager who claimed that they "could not be held liable because their independent contractor . . . caused the fire by using a propane torch to resurface the roof" (299 AD2d at 448). The Second Department held that the trial court properly denied defendants' motions for summary judgment because there were issues of fact regarding their potential liability for the contractor's negligence, including "whether [they] assigned work which they knew *or should have known* was inherently dangerous" (*id.* [emphasis added]).

Here, as in *Flaherty*, there are issues of fact that preclude summary judgment.

"To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury" (*Bellere v Gerics*, 304 AD2d 687, 688 [2003]).

"Since an employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part, the employer is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor *unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified*

to undertake the work" (*Maristany v Patient Support Servs., Inc.*, 264 AD2d 302, 303 [1999] [emphasis added]).

Here, Digital asserts that defendants negligently hired All-Tech "since the Defendants and Sam Wiesner knew or in the exercise of reasonable care - might have ascertained that All-Tech was not properly qualified to perform the work contracted for . . ." (Aboulafia Sur-reply Affirmation at ¶ 3). Specifically, Digital contends that defendants can be held liable because they failed to: (1) follow their internal procedures and protocols prior to retaining All-Tech, including the request for referrals; (2) inquire about All-Tech's qualifications for commercial roofing work; (3) inquire about the manner in which All-Tech intended to repair the roof; and (4) conduct a background check before retaining All-Tech, which would have disclosed that All-Tech and Kaferi were unlicensed and uninsured for roofing repairs.

Defendants, in opposition, contend that they cannot be held liable because they hired All-Tech based on a recommendation by Schwartz and All-Tech's prior work on Brach's home. Consequently, there are issues of fact as to whether defendants, in the exercise of reasonable care, might have ascertained that All-Tech was unlicensed and Kaferi was not properly qualified to undertake the roof repair.

Digital's Cross Motion For
Summary Judgment In The 2015 Action

Digital is not entitled to summary judgment in the 2015 Action and its cross motion is denied because – as Digital's counsel explicitly recognizes – and as discussed herein, there are material issue of triable fact that preclude summary judgment. Accordingly, it is

ORDERED that the branch of Sound's motion in the 2012 Action seeking an order, pursuant to CPLR 3212 (b), summarily dismissing Digital's 2012 Complaint is denied; and it is further

ORDERED, that the branch of Sound's motion in the 2012 Action seeking an order awarding it attorneys' fees and costs is denied; and it is further

ORDERED that the branch of Brach and 63rd Street Realty II's motion in the 2015 Action for an order, pursuant to CPLR 3212 (b), summarily dismissing Digital's 2015 Complaint is denied; and it is further

ORDERED that the branch of Brach and 63rd Street Realty II's motion in the 2015 Action for an order awarding them attorneys' fees and costs is denied; and it is further

ORDERED that Digital's cross motion in the 2015 Action for an order, pursuant to CPLR 3212 (b), granting it summary judgment against Brach and 63rd Street Realty II is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

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