SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** 35

Index Number : 158564/2012
DEGANGI, CARL
vs
REGUS BUSINESS MANAGEMENT LLC
Sequence Number : 002
DISMISS

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

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

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence *002* is decided under motion sequence *001*.
Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion *sequence 001* by defendant Regus Business Management, LLC pursuant to CPLR 3211 (a)(7) to dismiss the complaint of plaintiff Carl Degangi as against it is granted in its entirety and plaintiff's *third* cause of action for negligence, the *sixth* cause of action for gross negligence, and the *ninth* cause of action for negligent infliction of emotional distress against Regus are dismissed; and it is further

ORDERED that the motion *sequence 002* by defendants Rhino Trading LLC and Michael Schilling pursuant to CPLR 3211 (a)(7) to dismiss the complaint of plaintiff Carl Degangi as against them is granted in its entirety, and plaintiff's *first* cause of action for assault and the *tenth* cause of action for negligent infliction of emotional distress against defendant Michael Schilling, and the *second* cause of action for negligence, the *fifth* cause of action for gross negligence, the *seventh* cause of action for negligent supervision, and the *eighth* cause of action for *respondeat superior* against defendant Rhino Trading LLC, are dismissed; and it is further

ORDERED that counsel for defendant Regus Business Management LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: 3/28/13

_____, J.S.C.

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

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

CARL DEGANGI,

Plaintiff,

-against-

REGUS BUSINESS MANAGEMENT, LLC, RHINO TRADING LLC, and MICHAEL SCHILLING,

Defendants.

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Index No.: 158564/2012

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION[1]

Defendants Regus Business Management, LLC ("Regus"), Rhino Trading LLC ("Rhino"), and Michael Schilling ("Schilling"), (collectively, "defendants"), move for an order, pursuant to CPLR 3211 (a)(7), dismissing the complaint of plaintiff Carl Degangi ("plaintiff").

Background Facts

Regus provides office space equipped with communication and technological services to businesses at various locations. At all relevant times, Regus was an owner and operator of certain commercial property at 260 Madison Avenue, New York, New York. Rhino, a trading company, was one of Regus's clients, occupying office space located at 77 Water Street, New York, New York.

Plaintiff was employed by Regus as a Center Manager at its 260 Madison Avenue location from December 9, 2009 through January 16, 2012, when he was transferred to the 77 Water Street location. According to plaintiff, after his transfer, Rhino's managing member

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[1] Motion sequence 001 and motion sequence 002 are consolidated for purposes of this decision and decided herein.

Schilling began abusing him on a daily basis by "screaming vulgarity, berating, physical intimidation and abusive e-mail" (Complaint, ¶ 16). Schilling's alleged outbursts generally involved complaints about inadequate air-conditioning, unmounted television sets, slow internet speed, incorrect invoices, computer wiring and the lack of paper cups. Plaintiff alleges that Regus was aware of Rhino and Schilling' s abuse toward Regus's employees long before plaintiff began working at the 77 Water Street location, because the employees frequently complained about it to Regus's management. The occurrence of a certain violent physical attack on another Regus employee was recorded on an audiotape (*id.*, at ¶¶ 41- 44; 45). In response to these complaints, Regus entered into a "give-back agreement," pursuant to which Rhino agreed, in exchange for $30,000, "not to be publicly abusive" (Complaint, ¶36).

It is also alleged that prior to 2009, when Regus moved its central operations to Dallas, Regus Area Managers had the authority to expel abusive clients from its offices. However, after 2009, Regus allowed such clients to remain at the New York offices (*id.*, at ¶¶ 41–44; 45).

According to plaintiff, on February 24, 2012, Schilling's actions "escalated," when Schilling "stormed" to the door of plaintiff's office and began screaming at plaintiff from several feet away (*id.*, ¶24-25), which "physically intimidated" plaintiff and made him fear for his safety (*id.*). Plaintiff "retreated behind his desk to avoid the physical confrontation," while Schilling "continued to scream a profane and vulgar tirade" (*id.*, ¶ 26). During the incident, plaintiff called his supervisor Ola Ellis ("Ellis") into the office (*id*, ¶27).

Following the incident, on February 29, 2012, plaintiff voluntarily resigned from Regus and filed this complaint alleging, *inter alia*, claims for *negligence*, *gross negligence* and *negligent infliction of emotional distress* against Regus (third, sixth and ninth causes of action);

assault and *negligent infliction of emotional distress* against Schilling (first and tenth causes of action); and *negligence, gross negligence, negligent supervision* and *respondeat superior* against Rhino (second, fifth, seventh and eighth causes of action).

All defendants now move to dismiss plaintiff's complaint.

In motion *sequence 001*, Regus argues that plaintiff's claims for negligence and gross negligence against it should be dismissed because Regus cannot be held liable for torts committed by Schilling, who is an employee of Rhino. Regus had no duty to control Schilling, and no special circumstances existed that would have placed Regus, as opposed to Rhino, in the position to protect plaintiff from the alleged risk of harm.

Further, plaintiff does not allege any extreme or outrageous conduct by Regus to support his claim for emotional distress. And in any event, to listen to complaints and resolve the issues of Regus's services was plaintiff's job responsibility.

In motion *sequence 002*, Rhino and Schilling also move for dismissal, arguing that plaintiff fails to state any causes of action against them.

First, mere words, however violent, do not amount to an *assault*. And, plaintiff does not allege a requisite element of intent, *i.e.*, that Schilling intended "to inflict personal injury or to arouse apprehension of harmful or offensive bodily contact." Rather, the complaint alleges that Schilling remained several feet away from plaintiff. And, plaintiff's allegations of unspecified physical conduct consist of bare legal conclusions (*see, e.g.*, Complaint ¶¶ 25, 26 & 48).

Second, plaintiff's claim for *respondeat superior* must also be dismissed. First, since the assault claim against Schilling fails, there is no basis for Rhino's vicariously liability for Schilling's alleged conduct. And second, Schilling's alleged conduct was beyond the scope of

his employment, *i.e.*, it was not in furtherance of Rhino's interests.

Next, plaintiff's *negligence* claims also fail because Rhino owed plaintiff, a third party, no duty, which was allegedly breached. Under New York law, in the absence of a special relationship, Rhino has no duty to protect plaintiff from acts of third parties occurring outside of its premises. There is no special relationship between plaintiff, an employee of Regus, and Rhino, the tenant, occupying a portion of the building serviced by Regus. Thus, Rhino had no duty to control Shilling's conduct, or to protect plaintiff from being yelled at, as alleged by plaintiff. And in any event, the negligence claim is duplicative of the negligent supervision claim against Rhino.

Further, argue Rhino and Schilling, plaintiff fails to state a *negligent supervision* claim against Rhino. Rhino had no duty to control Schilling's conduct so as to prevent him from harming plaintiff and did not know of any of Schilling's propensities for violence. Yelling or screaming vulgarities [without more] is not an evidence of violence or danger. Furthermore, the alleged conduct did not occur on Rhino's premises, since it is alleged that Schilling remained in the doorway of plaintiff's office.

In opposition to Regus's motion (sequence 001), plaintiff concedes the dismissal of the ninth cause of action for *negligent infliction of emotional distress* against Regus[2] and only opposes the dismissal of the third cause of action for *negligence* and the sixth cause of action for *gross negligence* against Regus.

Plaintiff argues that, as a property owner, Regus had a duty to control the conduct of

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[2] Based on this, the court deems the ninth cause of action for *negligent infliction of emotional distress* against Regus abandoned and dismissed.

those permitted to enter on its property and therefore, Regus had a duty to plaintiff to remedy Schilling's conduct. Regus permitted Rhino and Schilling to continue using its offices, even after the alleged violent confrontation between Schilling and plaintiff. Notably, Regus previously exercised its authority and managed abusive behavior of its clients by expelling them from the property. Prior to 2009, it had a policy in place that all clients and their employees were required to maintain professional behavior at all times, subject to immediate removal from the Regus's property.

Furthermore, Regus was aware of the necessity to control Schilling's conduct because plaintiff informed his superiors of Schilling's abusive conduct and profane tirades (*id.* 22). Notably, Regus entered into a "give-back agreement," pursuant to which Regus paid $30,000 to Rhino for containing (Schilling's) abuse of Regus's employees to "private" areas of the center, so as not to embarrass Regus in the common or "public" areas (Complaint, ¶36). However, Regus failed its duty of protecting plaintiff from the foreseeable harm.

In opposition to Rhino and Schilling's motion (sequence 002), plaintiff only opposes the dismissal of its claims for *assault* against Schilling (first cause of action), *negligent supervision* and *respondeat superior* against Rhino (seventh and eighth causes of action), and concedes the dismissal of the balance of its claims against Schilling and Rhino.[3]

Plaintiff argues that the cause of action for *assault* against Schilling should stand because Schilling placed plaintiff in "apprehension of imminent harmful or offensive contact." In addition to verbal assault, Schilling exhibited intimidating physical conduct toward plaintiff,

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[3] Based on this, the court deems plaintiff's second cause of action for *negligence* and fifth cause of action for *gross negligence* against Rhino, and the tenth cause of action for *negligent infliction of emotional distress* against Schilling abandoned and dismissed.

requiring plaintiff to hide behind his desk.

Further, the claim of *respondeat superior* should stand because Schilling [verbally] attacked and berated plaintiff, with the purpose of advancing Rhino's business interests, *i.e.*, Regus's providing office services to Rhino.

For a claim of *negligent supervision*, New York law only requires a showing that the defendant knew of the employee's propensity to commit the tortious act. Rhino breached its duty to plaintiff because it knew of Schilling's dangerous propensities and failed to prevent Schilling's violent and dangerous conduct against plaintiff. Rhino received prior complaints about Schilling's inappropriate behavior toward another Regus's Center Manager at Rhino's prior location at 80 Broad Street (Complaint, ¶ 33) and entered into a "give-back agreement" with Regus to prevent such conduct.

Furthermore, plaintiff is not required to show that the alleged tortious conduct occurred on the employer's premises. And in any event, while [at the time of the alleged wrong] Schilling stood in the doorway of plaintiff's office, the unique situation of Regus as the provider of the office space and other office services to its clients, made the space a mixed office, where both Rhino and Regus co-existed.

In reply, Regus argues that it cannot be liable for an alleged tort of an employee of another company. Plaintiff is attempting to enlarge the scope of Regus's duty; however, Regus had no requisite control or authority over Schilling. As an owner of the corporate real estate, it merely leased the space to various businesses and had no involvement in day-to-day operations of its clients'/tenants' businesses. Thus, Regus cannot be liable for torts committed by third parties on its premises, where said third parties are directly controlled and employed by another

company.

Regus also argues that, from a public policy perspective, if the court permits plaintiff's negligence claims to proceed against Regus, it would effectively subject owners of corporate realty to liability for intentional torts committed by employees of other companies, resulting in a flood of litigation not contemplated by current case law, and will have a negative effect on the entire commercial real estate industry.

In their reply, Rhino and Schilling reiterate that plaintiff's complaint does not sufficiently allege assault. That Schilling remained standing in the doorway is inconsistent with his intent to cause bodily harm to plaintiff.

Neither can Rhino be vicariously liable for Schilling's conduct because the alleged assault, if any, was not in furtherance of Rhino's business, even if it was arguably related to resolving issues with Regus's [purportedly inadequate] building services.

With respect to the negligent supervision claim, Rhino had no duty to prevent plaintiff from the alleged assault because it was unaware of any Schilling's dangerous propensities for violence; and the settlement agreement between Rhino and Regus is standard in the commercial industry non-disparagement agreement for the purpose of resolving Rhino's complaints about Regus's services.

Furthermore, even assuming Rhino's offices constituted a "mixed" space, the conduct that forms the basis of the Complaint allegedly took place in Regus' offices, which were not shared with Rhino (see Complaint ¶15).

Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable

inference, and determine only whether the facts as alleged fit into any cognizable legal theory (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). Thus, defendants as movants have the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Leon v Martinez,* 84 NY2d at 87-88, 614 NYS2d 972 [1994]; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Salles v Chase Manhattan Bank,* 300 AD2d 226, 228, 754 NYS2d 236 [1st Dept 2002]). The court's inquiry is limited to determining whether the complaint states any cause of action, not whether there is evidentiary support for it (*Rovello v Orofino* Realty Co., 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]).

Assault Claim against Schilling

An assault is the intentional placing of another in apprehension of imminent harmful or offensive contact (*Tom v Lenox Hill Hosp.*,165 Misc 2d 313 [Supreme Court New York County 1995], *citing* PJI 3:2; *Bunker v Testa,* 234 AD2d 1004 [4th Dept1996]). Thus, to plead a cause of action for assault, plaintiff must allege "intentional physical conduct placing plaintiff in imminent apprehension of harmful contact" (*see Holtz v Wildenstein & Co.*, 261 AD2d 336, 693 NYS2d 516 [1st Dept 1999]; *Jaffe v National League for Nursing*, 222 AD2d 233, 635 NYS2d 9 [1st Dept 1995][a "hard slap on [plaintiff's] backside," during an outburst of rage by the individual defendant, met the criteria of offensive and intentional bodily contact in stating, *inter alia*, a cause of action for assault]). "An action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff" (*Gould v Rempel,* 99 AD3d 759, 951 NYS2d 677 [2d Dept 2012]).

However, it has been held that words, without some menacing gesture or act

accompanying them, are insufficient to state a cause of action alleging assault (*Gould v Rempel,* 99 AD3d 759 [plaintiff's allegations that defendant entered her hotel room uninvited and started screaming at her to stay away from another coworker and to do her work, held insufficient to plead assault], *citing Carroll v New York Prop. Ins. Underwriting Assn.*, 88 AD2d 527, 527, 450 NYS2d 21 [1st Dept 1982][holding that threats, standing alone, do not constitute an assault]; *Collom v Incorporated Village of Freeport, NY*, 691 FSupp 637 [EDNY 1988][threats alone, no matter how violent, do not constitute an assault]; *Pawlicki v City of Ithaca*, 993 FSupp 140 [NDNY1998][allegations by arrestee that arresting officer had, during course of arrest, placed his hand on his gun belt several times and exclaimed "If you try to leave, I will hunt you down," even if true, did not convey imminent or reasonable threat of harmful contact, as required to support a claim for assault under New York law]; see also 14 NYPrac, New York Law of Torts § 1:4 [mere words without an overt, unequivocal action or gestures, are not actionable as an assault]).

The court finds that plaintiff's allegations, even if true, fail to state a cause of action for assault.

Plaintiff alleges that Schilling "physically confronted" him, when he "out of control with anger, stormed to the door of [plaintiff's] office [and] started screaming at [plaintiff], who was several feet away," without claiming that Schilling made some menacing gesture or an act accompanying the screaming. Such allegations do not sufficiently plead that Schilling's conduct, however discourteous and unprofessional, placed plaintiff in "imminent apprehension" of harmful contact, as to constitute assault (*see Gould v Rempel,* 99 AD3d 759, *supra; Hayes v Schultz*, 150 AD2d 522, 541 NYS2d 115 [2d Dept 1989]).

And, plaintiff's conclusory allegations that at the time of the alleged wrong, "physical

intimidation escalated" and that he retreated and did not speak "to avoid an otherwise imminent physical attack," are likewise insufficient. "Although on a motion to dismiss [plaintiff's] allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 920 NE2d 328 [2009]).

Therefore, the first cause of action for assault against Schilling is dismissed.

Claims against Rhino

Plaintiff's failure to plead assault, requires the dismissal of the remaining claims against Rhino and Regus on this ground alone. Nevertheless, as discussed below, additional grounds exist for the dismissal of such claims.

A. Respondeat Superior

Pursuant to the doctrine of *respondeat superior*, an employer will not be vicariously liable for its employee's alleged assault "where the assault was not within the scope of the employee's duties, and there is no evidence that the assault was condoned, instigated or authorized by the employer" (*Milosevic v O'Donnell*, 89 AD3d 628, 934 NYS2d 375 [1st Dept 2011], *citing Yeboah v Snapple, Inc.*, 286 AD2d 204, 204–205, 729 NYS2d 32 [2001]; *see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251–252, 739 NYS2d 348 [2002]; *Kawoya v Pet Pantry Warehouse, Inc.*, 3 AD3d 368, 771 NYS2d 86 [1st Dept 2004]). Furthermore, the employer may be liable when the employee acts negligently or intentionally, only when the tortious conduct is reasonably foreseeable and a natural incident of the employment (*Ramos v Jake Realty Co.*, 21 AD3d 744, 801 NYS2d 566 [1st Dept 2005], *citing Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300 [1979]).

As noted, to the extent that plaintiff's claim against Rhino on the theory of *respondeat superior* is based on Schilling's alleged assault, it must fail, in light of plaintiff's failure to sufficiently plead the underlying tort. And in any event, while the Complaint alleges that Schilling's prior "abusive conduct" "became a daily pattern" of "screaming, berating, vulgarity, physical intimidation and abusive e-mail," there is no allegation or indication that, at the time of the alleged wrong, Schilling was carrying out his duties enjoined upon him by Rhino.

Moreover, even assuming that the alleged assault was precipitated by a work-related issue, there is no indication or allegation that Rhino "condoned, instigated or authorized the alleged assault" or any prior assaultive behavior, or that Schilling's alleged assaultive conduct was "reasonably foreseeable and a natural incident of the employment" (*Ramos v Jake Realty Co.*, 21 AD3d 744, *citing Riviello v Waldron*, 47 NY2d 297, *supra*).

Thus, the eighth cause of action for *respondeat superior* against Rhino is dismissed.

B. Negligent Supervision

It is settled law, that "where an employer cannot be held vicariously liable for an employee's torts, the employer can still be held liable under theories of negligent [. . .] supervision" (*State Farm Ins. Co. v Central Parking Systems, Inc.*, 18 AD3d 859, 796 NYS2d 665 [2d Dept 2005]). "No statutory requirement exists that negligent supervision claims be plead with specificity but 'bare legal conclusions and/or factual claims flatly contradicted by documentary evidence should be dismissed pursuant to CPLR 3211(a)(7)'" for failure to state a cause of action *(see Krystal G. v Roman Catholic Diocese of Brooklyn*, 933 NYS2d 515, 522, 933 NYS2d 515 [Sup Ct, Kings County, 2011]), *citing Kenneth R. v Roman Catholic Diocese*, 654 NYS2d 791, 794 [2d Dept 1997]).

A necessary element of a negligent supervision claim, however, requires a showing that

the defendant knew of the employee's propensity to commit the tortious act, or should have known of such propensity (*N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 719 NYS2d 60 [1st Dept 2001], *mod on other grounds* 97 NY2d 247, 251–252, 739 NYS2d 348 [2002]), and that the alleged negligent supervision was a proximate cause of plaintiff's injury (*Gray v Schenectady City School Dist.*, 86 AD3d 771, 927 NYS2d 442 [3d Dept 2011]).

Here, plaintiff's conclusory allegations that Rhino "knew or should have known of SCHILLING's propensity for the conduct which caused plaintiff's injuries" (Complaint ¶95), do not allege that Rhino was aware of Schilling's propensity for *violent* behavior (*see Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 815 NYS2d 107 [2d Dept 2006]; *cf. Kenneth R. v Roman Catholic Diocese*, 654 NYS2d 791[the allegation that defendants employers received actual or constructive notice of the co-defendant priest's propensity to sexually abuse minors through alleged complaints made to the co-defendant Diocese, if true, would sustain a cause of action sounding, *inter alia*, in negligent supervision]).

Even assuming Rhino was aware of Schilling's alleged unprofessional conduct in resolving the office services issues by way of "profane and vulgar tirades," the court finds these allegations insufficient as a matter of law to constitute notice to Rhino that there was a danger of Schilling assaulting plaintiff (*see Steinborn v Himmel*, 9 AD3d 531, 780 NYS2d 412 [3d Dept 2004]).

Furthermore, nothing in the alleged "give-back" agreement between Regus and Rhino indicates that Rhino (and Regus) knew of Schilling's propensity for *violence*. The agreement states in pertinent part:

> "Each Party hereby acknowledges and agrees not to disseminate critical, negative or disparaging remarks about the other Party, including, but not limited to, comments about Regus or the Regus Parties with regard to any service provided by Regus to Client prior

to February 1, 2012."
(Exhibit A to Matthew S. Haskell, Esq.'s Affirmation).

Thus, plaintiff's seventh cause of action against Rhino for negligent supervision is also dismissed.

Claims against Regus

Negligence and Gross Negligence

To state a cause of action for negligence, plaintiff must allege the existence of a duty, breach of that duty, injury to plaintiff resulting therefrom and damages (*see Benjamin v City of New York*, 99 AD2d 995 [1st Dept 1984]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide (*De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Gross negligence is the failure to use even slight care or involves conduct that is so careless as to demonstrate a complete disregard for the rights of others (*Greenwood v Daily News, L.P.*, 8 Misc 3d 1002 [Sup Ct, New York County 2005] *citing Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992] and *Matter of Coniber v Hults*, 15 AD2d 252 [4th Dept 1962]). Plaintiff's claims must "indicate a reckless disregard for the rights of others or smack of intentional wrongdoing such as would constitute gross negligence" (*Fiorenza v A & A Consulting Engineers, P.C.*, 77 AD3d 569, 909 NYS2d 356 [1st Dept 2010]).

The court holds that plaintiff's allegations are insufficient to withstand the dismissal of the negligence claims against Regus.

Plaintiff argues that, both as a property owner, and as plaintiff's employer, Regus had a

duty to control Schilling's conduct because Regus was aware of Schilling's "dangerous propensity"; and that Regus breached its duty, allowing SCHILLING to abuse and attack [plaintiff]" (Complaint, ¶¶60-63).

A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control (*D'Amico v Christie*, 71 NY2d 76, 518 NE2d 896 [1987]; *Pulka v Edelman*, 40 NY2d 781, 358 NE2d 1019 [1976]; *see generally*, Restatement [Second] of Torts §§ 314, 315). A duty to control the conduct of others arises only where a special relationship exists, either "between defendant and a third person whose actions expose plaintiff to [the alleged harm]; or a relationship between the defendant and plaintiff requiring defendant to protect the plaintiff from the conduct of others" (*Avins v Federation Employment and Guidance Service, Inc.*, 52 AD3d 30, 857 NYS2d 550 [1st Dept 2008]; *Pulka v Edelman*, 40 NY2d 781).

While an employer may be liable for acts of its employees in the course and scope of employment (*D'Amico v Christie*, 71 NY2d 76, *supra, citing Riviello v Waldron*, 47 NY2d 297 [1979] and *Johnson v Daily News*, 34 NY2d 33 [1974]), there are no allegations here that the relationship between Regus and Rhino (tenant), or between Regus and Shilling (employed by Rhino), fell into a known exception of "special relationship" [of master-servant] or otherwise warranted deviation from the general rule (*see Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 535 NYS2d 275 [3d Dept1988], *citing D'Amico v Christie*, 71 NY2d 76). While an employer-employee relationship exists between Regus and plaintiff, Regus had nothing to do with the supervision of Rhino's employees, so as to impose a duty on Regus with respect to acts of the non-employees such as Schilling (*see Pulka v Edelman*, 40 NY2d at 874 [holding that a duty to prevent [the tortious act] should not be imposed on one who does not control the

tortfeasor]; *Jonathan A. v Board of Educ. Of City of New York*, 8 AD3d 80, 779 NYS2d 3 [1st Dept 2004]).

Neither did Regus owe a duty to plaintiff based on his status as the lessor of the office property to Rhino.

While Regus, like any owner or possessor of land has a common-law duty to maintain the public areas of the property in a reasonably safe condition for those who use it (*Williams v Citibank, N.A.*, 247 AD2d 49, 677 NYS2d 318 [1st Dept 1998] *citing Nallan v Helmsley–Spear, Inc.*, 50 NY2d 507, 519, 429 NYS2d 606 [1980]), as a general rule, an owner of property has no duty to control the conduct of a tenant for the benefit of third parties absent knowledge of the need for such control and an opportunity to exercise it (*Toma v Charbonneau*, 186 AD2d 846, 588 NYS2d 219 [3d Dept 1992], *citing Mangione v Dimino*, 39 AD2d 128 [4th Dept 1972]). Furthermore, it has been held that an "owner or possessor is not an insurer of the safety of those who use the premises and cannot be held to a duty to take protective measures unless it is shown that he knows or, from past experience, has reason to know that there is a likelihood of third-party conduct likely to endanger the safety of those using the premises" (*Williams citing Nallan, supra*, at 519, 429 NYS2d 606 and Restatement [Second] of Torts § 344, comment f.). It is that knowledge, actual or constructive, that creates the duty to take reasonable precautions for the safety of those lawfully using the premises (*Milosevic v Owen O'Donnell*, 28 Misc 3d 1229(A), 958 NYS2d 61 (Table)[Sup Ct, New York County 2010], *aff'd* 89 AD3d 628, 934 NYS2d 375 [1st Dept 2011]).

As noted above, there is no allegation or indication that Regus was aware that Schilling had a propensity to commit assaultive behavior in any manner. Schilling's "profane and vulgar tirades," while deplorable tactics of resolving a business office issue, are not a known "dangerous

condition or instrumentality" on the property, requiring Regus to protect plaintiff from the conduct of Schilling (*see Jonathan A. v Board of Educ. Of City of New York*, 8 AD3d 80, 82 779 NYS2d 3,7]). And, even assuming Regus was aware of Schilling's prior angry outbursts toward plaintiff, "foreseeability of harm is not enough. A specific duty to control must exist" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]; *D'Amico v Christie*, 71 NY2d 76, 87 [1987]). Thus, absent a duty, Regus cannot be liable to plaintiff for negligence.

Finally, plaintiff's claims for *gross negligence* also fails.

The Complaint's allegations that Regus "failed to use even slight care or engaged in conduct that is so careless as to demonstrate a complete disregard for the rights and safety of [plaintiff] and acted "in so reckless manner of failed to act in circumstances where an act is clearly required; [and] was motivated by malice or desire to benefit itself at Plaintiff's expense" are entirely conclusory and as such, are insufficient to state a cause of action alleging gross negligence (*Crystal Clear Development, LLC v Devon Architects of New York, P.C.*, 97 AD3d 716, 949 NYS2d 398 [2d Dept 2012], *citing Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 611 NE2d 282 [1993]).

Accordingly, the third cause of action for *negligence* and the sixth cause of action for *gross negligence* against Regus are likewise dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion *sequence 001* by defendant Regus Business Management, LLC pursuant to CPLR 3211 (a)(7) to dismiss the complaint of plaintiff Carl Degangi as against it is granted in its entirety and plaintiff's *third* cause of action for negligence, the *sixth* cause of action for gross negligence, and the *ninth* cause of action for negligent infliction of emotional

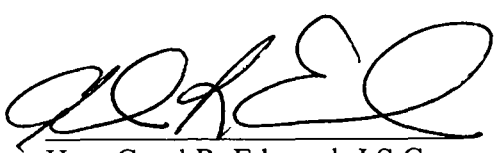
distress against Regus are dismissed; and it is further

ORDERED that the motion *sequence 002* by defendants Rhino Trading LLC and Michael Schilling pursuant to CPLR 3211 (a)(7) to dismiss the complaint of plaintiff Carl Degangi as against them is granted in its entirety, and plaintiff's *first* cause of action for assault and the *tenth* cause of action for negligent infliction of emotional distress against defendant Michael Schilling, and the *second* cause of action for negligence, the *fifth* cause of action for gross negligence, the *seventh* cause of action for negligent supervision, and the *eighth* cause of action for *respondeat superior* against defendant Rhino Trading LLC, are dismissed; and it is further

ORDERED that counsel for defendant Regus Business Management LLC shall serve a copy of this order with notice of entry upon all parties within 20 days of this order.

This constitutes the decision and order of the court.

Dated: March 28, 2013



Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD