Doino v RPS Corp.
2016 NY Slip Op 31279(U)
July 6, 2016
Supreme Court, New York County
Docket Number: 157452/2013
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 29

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Michael Doino,

Plaintiff,

Index Number:

-against-

157452/2013

RPS Corp., Three Boroughs LLC., and Bradford N. Swett Management LLC,

Defendants.

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Robert D. Kalish, J.:

The Defendants Three Boroughs and Bradford's motion (collectively the "Moving Defendants") for summary judgment pursuant to CPLR §3212 dismissing the Plaintiff's action as against the Moving Defendants is hereby granted as follows:

Underlying Allegations

The following recitation of facts includes only those fact that are directly relevant to the Moving Defendants' instant motion for summary judgment dismissing the underlying action as against them. The underlying action arises from an injury that the Plaintiff allegedly sustained while working as an employee of a non-party DS Waters of America ("DS Waters" currently known as DS Services) at a premises owned by Three Boroughs and leased to DS Waters. Bradford is the management company under which Three Boroughs operates, and both are represented by the same attorney in the underlying action. The Plaintiff alleges in sum and substance that he was injured while operating a "GTX Ride-On Floor Scrubber" (the "Floor Scrubber") due to defects in both the Floor Scrubber and the premises.[1] Specifically, the Plaintiff alleges that his accident was caused due to a hazardous "loading dock leveler"

[1] Plaintiff's causes of action for product liability as to the Floor Scrubber are alleged against the Defendant RPS and not the Moving Defendants. Plaintiff's causes of action against the Defendant RPS are not before the Court in the instant motion.

and that the Moving Defendants had a duty to maintain and repair said leveler. The Plaintiff's fifth, sixth and seventh causes of action are alleged specifically against Three Boroughs and Bradford:

- Plaintiff alleges in his fifth cause of action that the Plaintiff's accident was directly caused by Three Boroughs and Bradford's negligence in failing to maintain the premises. Specifically, that the loading dock levelers were in a state of disrepair and constituted a hazardous condition due to the Moving Defendants' negligence;

- Plaintiff alleges in his sixth cause of action that the Plaintiff's accident was the direct result of the Moving Defendants' failure to provide Plaintiff with required "fall protection" devices, said failure being in violation of applicable laws statutes and/or codes; and

- Plaintiff alleges in his seventh cause of action that the Plaintiff's accident was the direct result of the Moving Defendants' violation of the New York Labor Laws, Specifically Labor Law §§ 200, 240 and 241.

The Moving Defendants now move for summary judgement dismissing the Plaintiff's fifth, sixth and seventh causes of action as against them. The Plaintiff and the Defendant RPS Corp. ("RPS") oppose.

Parties' Contentions

In support of their motion for summary judgment dismissing the underlying action as against them, the Moving Defendants present four substantive arguments.

The Moving Defendants' first argument is that they are an out-of-possession landlord that did not have any contractual obligation to maintain or repair the mechanical loading dock levelers in the subject warehouse. The Moving Defendants argue that according to the terms of the lease between Three Boroughs (as the landlord) and DS Waters (as the tenant), Three Boroughs did not have any duty to maintain and/or repair nonstructural conditions within the premises. The Moving Defendants further argue that such "nonstructural conditions" include the mechanical loading dock leveler where the Plaintiff's accident allegedly occurred.

The Moving Defendants' second argument is that in the absence of any contractual duty on their part to maintain the mechanical loading dock levelers, the Plaintiff cannot establish that the Moving Defendants are liable for the Plaintiff's accident as an out-of-possession landlord. Specifically, the Moving Defendants argue that Plaintiff cannot establish that the Moving Defendants retained a right of reentry into the property pursuant to the lease and that the alleged defective condition pertained to a structural defect in violation of a specific Administrative Code provision. The Moving Defendants argue that the lease between Three Boroughs and DS Waters as well as the deposition testimonies confirm that DS Waters is solely responsible for maintaining and repairing the mechanical loading dock levelers. The Moving Defendants argue that mechanical devices such as the mechanical loading dock levelers are not structural in nature and as such liability cannot be imputed upon the Moving Defendants as out-of-possession landowners.

The Moving Defendants' third argument is that the loading dock was properly designed and constructed. The Moving Defendants distinguish the "loading dock" and the mechanical loading dock levelers. The Moving Defendants argue in sum and substance that the "loading dock" consists of two parts, a cement loading dock floor and two mechanical loading dock levelers that are set into the cement floor. The Moving Defendants argue, as per the Plaintiff's claim, that the accident occurred while the Plaintiff was getting out of the Floor Scrubber that was stopped and entirely on top of one of the mechanical loading dock levelers, not the cement loading dock floor. Further, the Moving Defendants argue that the entire purpose of the mechanical loading dock levelers is to move up and down in order to create a "slope" for delivery trucks to move to the loading dock. As such, the "slope" of the mechanical loading dock levelers is in keeping with their intended function. The Moving Defendants attach with their moving papers an expert affidavit by one Jean G. Miele, AIA in support of their argument that the mechanical loading dock levelers were properly designed, constructed in accordance with all applicable

construction and building codes, and are in no way defective.

The Moving Defendants' fourth argument for summary judgment is that the New York Labor Law is inapplicable to the underlying action. The Moving Defendants argue that the Labor Law was designed to protect construction workers and that the Plaintiff was not a construction worker, was not performing construction work, nor was he performing any activities covered under Labor Law §§ 200, 240(1) and/or 241(6). Specifically, the Moving Defendants argue that Plaintiff's Labor Law §200 claim fails as no defect existed in the mechanical loading dock leveler, nor did the Moving Defendants supervise, control or direct the routine cleaning of the floor performed by the Plaintiff at the time of his accident. The Moving Defendants further argue that Labor Law §240(1) is also inapplicable to the underlying action as a matter of law since the Plaintiff was engaged in routine cleaning of the floors at the time of the accident and was not engaged in any activity that falls within the purview of the Labor Law or involving height related hazards. Finally, the Moving Defendants argue that Labor Law §241(6) is also inapplicable since the Plaintiff was not engaged in construction, excavation or demolition related activity as defined by the Industrial Code.

In opposition to the instant motion, the Plaintiff concedes that Labor Law §241(6) is inapplicable to the underlying action. However, the Plaintiff argues that his premise liability claim and claims made pursuant to Labor Law §§ 200 & 240(1) are all viable.

The Plaintiff argues that according to the terms of the lease, the Moving Defendants had both the right of reentry (with notice) to the premises and a duty to maintain and repair all structural elements of the warehouse. The Plaintiff further argues that based upon a provision of the lease referring to the Moving Defendants' duties "prior to DS Waters' occupancy", (Plaintiff's opposition papers p. 8 paragraph 26), there is an issue of fact as to whether or not the parties to the lease intended for the mechanical loading dock levelers to be treated as structural elements of the warehouse, which the

Moving Defendants had a responsibility to maintain and repair pursuant to the lease. Specifically, the Plaintiff refers to a section of the lease stating that prior to DS Waters' occupancy, the Moving Defendants were required to "[e]nsure all building systems and elements (mechanical, plumbing, HVAC, electrical, doors etc [.]) are delivered in good working order at Lease Commencement" and to "warranty all mechanical and halide lighting for first six (6) months of the Lease". The Plaintiff argues that the use of the term "mechanical" in this section of the lease creates an issue of fact as to whether or not the mechanical loading dock levelers were to be treated as structural elements of the warehouse, which the Moving Defendants had a responsibility to maintain and repair pursuant to the lease.

The Plaintiff further argues that the mechanical loading dock levelers were in a dangerous condition and that the Moving Defendants had or should have had notice of said dangerous condition based upon Mr. Boyle's (employed by the Defendant Bradford) role as the commercial manager of the premises and his walk through of the warehouse prior to DS Waters taking possession of the premises.

The Plaintiff further argues that the Plaintiff was not engaged in "routine cleaning" at the time of the accident, but instead was engaged in an "extensive cleaning project of the warehouse floor in preparation of an up coming inspection by DS Waters executives" (Plaintiff's opposition papers p. 24 paragraph 73). The Plaintiff distinguishes said "cleaning project" from routine cleaning in that the "cleaning project" took several days pursuant to direct orders from the Plaintiff's superiors. The Plaintiff argues that said "cleaning project" is distinct from routine cleaning and further that the Plaintiff's accident involved an elevation risk. As such, the Plaintiff argues that his accident falls within the purview of Labor Law §240(1).

Finally, the Plaintiff argues that he also has a viable Labor Law §200 claim against the Moving Defendants on the basis that the Plaintiff's accident was caused by the hazardous condition of the mechanical loading dock levelers and that the Moving Defendants had or should have had actual knowledge of said hazardous condition. The Plaintiff attaches with his opposition papers an expert report by one Stanley H. Fein, P.E. in support of his argument that the mechanical loading dock levelers constituted a hazardous condition.[2]

In reply to the Plaintiff's opposition, the Moving Defendants reiterate their arguments for summary judgment. The Moving Defendants emphasize that they had no duty under the lease to maintain or repair the mechanical loading dock levelers. They further argue that the section of the lease referring to their responsibility to repair mechanical devices only refers to mechanical lighting and to work that the Moving Defendants were responsible for completing prior to DS Waters taking possession of the warehouse, not after. The Moving Defendants argue that said section of the lease does not give the Moving Defendants a right of reentry after DS Waters took possession of the warehouse. The Moving Defendants reiterate that the Labor Law is not applicable to the underlying action as the Plaintiff was engaged in routine cleaning at the time of his accident.

[2] The Defendant RPS Corp. joins the Plaintiff's opposition.

Oral Argument

On May 24, 2016, the Parties appeared before this Court for oral argument on the underlying motion. The Moving Defendants' attorney reiterated the argument that the Moving Defendants are an out-of-possession landlord and that the Plaintiff's accident allegedly occurred due to the condition of the mechanical loading dock leveler. The Moving Defendants' attorney emphasized that the mechanical loading dock levelers are mechanical in nature and not structural elements of the warehouse. Defense counsel emphasized that under the terms of the lease, the Moving Defendants did not have any contractual obligation to repair or maintain the mechanical loading dock levelers. Defense counsel further argued that the terms of the lease were between the Moving Defendants and DS Waters and that the Plaintiff could not make an argument for third-party liability under the lease terms. Defense counsel further argued the use of the term "mechanical" in the section of the lease referring to the Moving Defendants' duties prior to DS Waters taking possession of the warehouse referred to mechanical lighting. Specifically, Defense counsel argued that under the lease, the Moving Defendants were only required to warranty mechanical lighting for the first six months of the lease, not all "mechanicals" such as the mechanical loading dock levelers.

Defense counsel also reiterated the arguments that the mechanical loading dock leveler was not improperly designed and the Plaintiff's underlying action did not fall within the scope of Labor Law §240(1). Specifically, Defense counsel argued that the Plaintiff was engaged in routine cleaning at the time of the accident, which does not fall within the scope of Labor Law §240(1).

In opposition , the Plaintiff's attorney argued for the first time at oral argument that Plaintiff was a third-party beneficiary to the lease agreement between the Moving Defendants and DS Waters based upon the Moving Defendants' contractual obligation to deliver the mechanical loading dock levelers in working order. In particular, Plaintiff's counsel referred to the provision of the lease, which Plaintiff's counsel argued required the Moving Defendants to warranty all mechanical elements of the warehouse for the first six months of occupancy. Plaintiff's counsel argued that, based upon Plaintiff's status as third-party beneficiary to the lease, the Moving Defendants were liable to the Plaintiff for breach of the six month warranty provision of the lease. Plaintiff's counsel further argued that the mechanical loading dock levelers were not in working order when DS Waters and Three Boroughs entered into the lease. Plaintiff's counsel further reiterated the argument that repairs to the mechanical loading dock leveler were "structural repairs" under the lease, and as such the Moving Defendants were responsible for repairing the mechanical loading dock levelers pursuant to the lease. Plaintiff's attorney further reiterated the arguments presented in the Plaintiff's opposition as to why the Plaintiff's accident fell within the scope of Labor Law §240(1) and why the Plaintiff was not engaged in routine cleaning at the time of the accident. Plaintiff's attorney argued that the Moving Defendants owed a duty to the Plaintiff based upon the Moving Defendants' right of reentry into the warehouse and the fact that the condition of the mechanical loading dock levelers violated Labor Law §240(1).

Deposition Testimonies

Plaintiff's Testimony

The Plaintiff appeared for deposition June 10, 2015 and testified that he has worked as a warehouse manager for DS Waters since January of 2011 (Plaintiff's Deposition pp. 17-18). He further testified that DS Waters is located at 1160 Commerce Avenue., and that it is a warehouse with offices and a backyard for parking (Plaintiff's Deposition p. 24). The Plaintiff testified that his duties as warehouse manager included opening the building, checking out trucks and their loads, checking inventory, counting products and ordering products (Plaintiff's Deposition pp. 26-27).

The Plaintiff further testified that the Floor Scrubber is similar to a "Zamboni" machine, and that said Floor Scrubber cleans the floor by wetting the floor down with soap and water and then vacuuming it up. The Plaintiff testified that prior to working for DS Waters, he had not operated a Floor Scrubber (Plaintiff's Deposition p. 29). He further testified that DS Waters did not train him to operate the Floor Scrubber and that no license or certification was required to operate the Floor Scrubber. The Plaintiff testified in sum and substance that DS Waters just read him the manual, left the manual with him to read, and that learning to operate the Floor Scrubber was mostly "hands on" (Plaintiff's Deposition p. 30).

The Plaintiff testified that he was hired a few weeks after the building opened and that at the time of the accident, the person in charge of the building was Frank Comaianni. Plaintiff testified that Comaianni was the operations manager and the Plaintiff's immediate supervisor (Plaintiff's Deposition pp. 31-33). The Plaintiff testified that there are two loading docks attached to the warehouse located on the front of the building and that he worked primarily inside the warehouse (Plaintiff's Deposition pp. 33-34, 41). He further testified that DS Waters occupied one third of the warehouse, sharing it with two other companies, "Allied" and "IA Acoustical" and that the warehouse portion is partitioned according

to the companies (Plaintiff's Deposition pp. 43-45).

The Plaintiff testified that the accident occurred on April 6, 2011 at 1160 Commerce Avenue in the course of Plaintiff's employment with DS Waters (Plaintiff's Deposition p. 57). He further testified that the accident happened on the loading dock just after the Plaintiff had pulled up to the loading dock on the Floor Scrubber (Plaintiff's Deposition p. 59). He further testified that he was on the Floor Scrubber for approximately one hour prior to the accident (Plaintiff's Deposition pp. 59-60). The accident occurred as the Plaintiff had pulled the Floor Scrubber up on to one of the mechanical loading dock levelers to drain one of the Floor Scrubber's tanks of soap and water (Plaintiff's Deposition p. 73, pp. 91-92). Plaintiff testified that prior to the accident he had operated the Floor Scrubber five to ten times for his employer and that he had used the Floor Scrubber on the day before the accident (Plaintiff's Deposition pp. 62-63). He further testified that cleaning the warehouse with the Floor Scrubber was done on a daily basis mostly by another individual (Plaintiff's Deposition p. 64). The Plaintiff testified that he had backed up the Floor Scrubber onto a loading dock leveler and brought it to a stop. He started to exit the vehicle, when the Floor Scrubber went backwards and went off the dock (Plaintiff's Deposition pp. 105-107). Plaintiff testified that he fell off of the side of the loading dock leveler onto the "street level" below the loading dock (Plaintiff's Deposition pp. 110-112).

The Plaintiff testified that for minor maintenance issues such has fixing a toilet he would contact "Chris Boyle" who worked as a managing agent for Bradford (Plaintiff's Deposition p. 126). He further testified that he would call Boyle for issues such as plumbing back ups and roof leaks (Plaintiff's Deposition p. 127).

The Plaintiff testified that he was using the Floor Scrubber on the date of the accident instead of "Henry" (the individual who normally used the Floor Scrubber) because the vice-presidents of DS Waters were coming for a visit and he was ordered to use the Floor Scrubber to clean up the warehouse for "inspection" (Plaintiff's Deposition p. 133). The Plaintiff testified that Henry came in the afternoon and operated the Floor Scrubber in the afternoon, but the Plaintiff was told to operate the scrubber that morning so that it could be operated twice a day (Plaintiff's Deposition pp. 133-134).

The Plaintiff testified that prior to the accident, he had no problem with the cement portion of the loading docks not being level, but did have a problem with the mechanical loading dock levelers (Plaintiff's Deposition pp. 142-143). The Plaintiff testified that he had complained to Frank Comaianni that the loading dock leveler where the accident occurred was not working properly (Plaintiff's Deposition p. 143). He further testified that following the accident, the loading dock leveler was replaced (Plaintiff's Deposition p. 146). The Plaintiff testified that the Floor Scrubber was entirely on the loading dock leveler prior to the accident and that there was a slight decline in the dock leveler prior to the accident (Plaintiff's Deposition pp. 167-168).

Deposition of Christopher Boyle on behalf of Moving Defendants

Christopher Boyle appeared for deposition on September 10, 2015 and testified that he was the commercial manager for Bradford at the time of the Plaintiff's accident (Boyle's Deposition p.8). He further testified that he had an ownership interest in 1160 Commerce Avenue as a member of Three Boroughs (Plaintiff's Deposition Boyle's Deposition pp. 8-9). Boyle testified that 1160 Commerce Avenue is owned by Three Boroughs and that Bradford is a management company under which Three Boroughs operates (Boyle's Deposition pp. 12-14). He testified that his duties included negotiating leases with potential tenants, overseeing the day to day physical upkeep of the property and acting as a liaison with tenants (Boyle's Deposition p. 14).

Boyle testified that at the time of the accident, the tenants of the property were DS Waters, Industrial Acoustics and Alliance Distribution (Boyle's Deposition pp. 27-28). He further testified that as per the lease, Three Boroughs understood that DS Waters would be using the loading docks to have trucks pull up, and that there were no restrictions placed on DS Waters' use of the loading docks (Boyle's Deposition pp. 40-41). Boyle testified that the loading docks were already there when the Three Boroughs bought the warehouse and that he did not think that Three Boroughs did any work on the loading docks when it first bought the warehouse (Boyle's Deposition pp. 42-44). He further testified that it was understood that when DS Waters lease began they could use the levelers for he purpose of loading and unloading trucks and the that after the tenancy ended the levelers would remain with the loading docks (Boyle's Deposition p. 63). Boyle testified that he was not a witness to the accident and that Three Boroughs does not generate incident reports based upon calls from tenants (Boyle's Deposition p. 47, 52).

Boyle described the mechanical loading dock levelers as square diamond plate metal that adjust to a given truck's height for loading and unloading (Boyle's Deposition p. 58). He further testified that on the date of the accident, DS Waters had one loading dock with two truck spaces (Boyle's Deposition p. 58). He further testified that the mechanical loading dock levelers were set into the floor of the loading dock, and that there were concrete cutouts where the metal mechanisms were placed (Boyle's Deposition p. 65). He further testified that the mechanical loading dock levelers measure approximately six feet by eight feet (Boyle's Deposition p. 66).

Boyle testified that he would do a weekly drive-by of the property and that he physically went inside the property approximately once a month (Boyle's Deposition pp. 60-61). He further testified that he did a walkthrough of the warehouse with DS Waters prior to DS Waters signing the lease and that Three Boroughs retained a right of reentry into the property "with notice" (Boyle's Deposition pp. 67-68). He testified that prior to entering the lease, Three Boroughs was not aware of any damage or issues with regard to the mechanical loading dock levelers nor any complaints or issues that the mechanical loading dock levelers were on any sort of incline or decline with the surrounding cement (Boyle's Deposition pp. 69-70). Boyle further testified that prior to Three Boroughs and DS waters entering the lease, he was not aware of any issues with regards to the operating mechanism on either of the two mechanical loading dock levelers (Boyle's Deposition p. 71).

Boyle did recall that at some point, either prior to or following the accident, Chris Kirby of DS Waters contacted him to ask if Three Boroughs would fix one of the mechanical loading dock levelers, and that he informed Kirby that according to the lease DS Waters would have to repair the loading dock lever themselves (Boyle's Deposition p. 72). He further testified that Three Boroughs did not undertake any work on the mechanical loading dock levelers after said conversation (Boyle's Deposition p. 74).

Boyle testified that the lease did not indicate that Three Boroughs or Bradford would provide any machinery, cleaners or forklifts to the tenant DS Waters (Boyle's Deposition p. 81). He further testified that anything mechanical on the property, once a tenant takes possession was the tenant's responsibility to maintain (Boyle's Deposition p. 82). He further testified that he understood the term "structural" as used in the lease to mean the walls, roof and foundation of the property (Boyle's Deposition pp. 93-94) and that changes to the cement base of the loading dock and the mechanical loading dock levelers were the tenant's responsibility (Boyle's Deposition p. 97). Boyle testified that no one from Three Boroughs or Bradford operated either of the mechanical loading dock levelers prior to DS Waters' tenancy

(Boyle's Deposition p. 111).

Deposition of Non-Party Witness Chris Kirby

Chris Kirby appeared for deposition on May 3, 2015 and testified that at the time of the accident he was employed as an area manager by DS Waters (Kirby's Deposition p.11). He further testified that the Plaintiff is the warehouse manager in the Bronx at 1160 Commerce Avenue (Kirby's Deposition p. 17). Kirby further testified that when he was in the warehouse, he would inspect it to see if it was clean and had proper supplies, not to see if things were properly maintained (Kirby's Deposition p. 19).

He further testified that the warehouse had two loading docks and that DS Waters loads trucks and accepts product at the warehouse (Kirby's Deposition pp. 25-26). Kirby testified that he did not inspect the warehouse before the lease was signed and never inspected or examined the loading docks (Kirby's Deposition pp. 32-34).

Kirby further testified that the Plaintiff was responsible for supervising the condition of the warehouse including making sure it was clean (Kirby's Deposition pp. 38-39). Kirby did not know if there was an inspection of the mechanical loading dock levelers prior to DS Waters moving into the warehouse and he never had a talk with anyone as to the mechanical loading dock levelers prior to or following the accident (Kirby's Deposition pp. 41-44). He further testified that he approved the pricing to get the loading dock levers replaced, which was done (Kirby's Deposition p. 69).

Kirby testified that two people used the Floor Scrubber around the time of the accident, the Plaintiff and Henry (Kirby's Deposition p. 85). Kirby further testified that he was not aware of any accidents involving the Floor Scrubber before or after the Plaintiff's accident (Kirby's Deposition p. 87).

He further testified that he was present at the warehouse on the date of the accident, but did not see the accident. He was told that the Plaintiff had fallen off the loading dock, he saw the Floor Scrubber on its back against the loading dock leveler and the Plaintiff laying on the ground (Kirby's Deposition p. 97).

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment" (id.). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)). In deciding the motion, the Court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (See Branham v Loews Orpheum Cinemas, Inc., 8 NY3d 931 (NY 2007); Dauman Displays, Inc. v Masturzo, 168 AD2d 204, 205 (NY App Div 1st Dept 1990), lv dismissed 77 NY2d 939 (NY 1991)). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied"

(Sommer v Federal Signal Corp., 79 N.Y.2d 540, 555 (NY 1992)).

The Moving Defendants' instant motion to dismiss the Plaintiff's underlying action against them hinges upon three questions: first whether or not the Moving Defendants had a contractual duty to maintain/repair the mechanical loading dock levelers, second whether the Moving Defendants have established that they are an out-of-possession landlord with no duty to the Plaintiff as to the condition of the warehouse; and third whether or not the Plaintiff was engaged in an activity that fell within the scope of Labor Law §240(1).

The Moving Defendants have established prima facie that they were out-of-possession landlords with no contractual duty to maintain the mechanical loading dock levelers, and the Plaintiff has failed to create an issue of fact on this point.

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Moving Defendants have established prima facie that they are an out-of-possession landlord as to the warehouse and had no specific contractual obligation under the lease to repair or maintain the mechanical loading dock levelers. It is undisputed that Three Boroughs leased the warehouse to DS Waters.

Article 44 of the rider to the lease agreement entitled Amendments to Article 4 (Repairs) reads in relevant part as follows:

> Owner shall maintain and repair all exterior, structural, and public portions of the Premises, including without limitation, all exterior and underground utilities, structural walls and beams, foundation, roof, and common areas.
>
> Tenant shall make all non-structural repairs to the demised premises and to the Buildings in which they are located but shall not be not obligated to make any structural repairs to the demised premises or the Building, except such repairs as are made necessary by the negligence, carelessness, misconduct or fault of Tenant or its agents, assignees or invitees. Structural repairs are defined solely as those repairs that are necessary to assure the integrity of the Building's foundation, separating walls enclosing the demised premises (excluding the store front, including but not limited to roll down gates, doors and/or shutters, and all parts and mechanisms thereof) and all parts of the roof, including without limitation vertical supporting beams and horizontal supporting beams. The aforesaid items are to be maintained, repaired and replaced by the Owner at its own cost and expense, as expeditiously as possible, and the Tenant agrees to cooperate with

> Owner's contractor for access to such repairs at reasonable times...
>
> Tenant shall, at its own cost and expense, make all non-structural repairs necessary to keep the demised premises in good condition including without limitation such repairs as are necessary to maintain in good condition the store front (including but not limited to roll down gates, doors and/or shutters, and all parts and mechanisms thereof) and ceilings of the demised premises.

Upon a plain reading of the lease terms, the Court finds that the Moving Defendants had no duty under the lease as per Article 44 to specifically maintain or repair the mechanical loading dock levelers. The lease specifically indicates that the Moving Defendants were only required to maintain and repair "all exterior, structural, and public portions of the Premises". The lease also solely defines structural repairs as "those repairs that are necessary to assure the integrity of the Building's foundation, separating walls enclosing the demised premises". As described by the Parties, the mechanical loading dock levelers are mechanical objects fitted into the cement dock floors, and therefore do not fall within the "exterior, structural, and public portions of the Premises". The lease further indicates that DS Waters, as the tenant, was responsible for all non-structural repairs. Upon review of the submitted papers, including a plain reading of the lease, the Court finds that the Moving Defendants have established prima facie that DS Waters was responsible for maintaining and repairing mechanical loading dock levelers as tenants pursuant to the lease.

The Court further finds that the Plaintiff has failed to create an issue of fact on this point. Although the Plaintiff points to Exhibit D of the lease as proof that the mechanical loading dock levelers were "elements of the building", Exhibit D to the lease reads in relevant part as follow:

> Landlord to complete the following work prior to Tenant's occupancy;
>
> 1) Ensure all building systems and elements (mechanical, plumbing, HVAC, electrical, doors etc [.]) are delivered in good working order at Lease Commencement. Landlord to warranty all mechanical and halide lighting for first six (6) months of the Lease.

"A 'written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'. In searching for the intent of the parties, our goal must be to accord the words of the contract their 'fair and reasonable meaning'. In other words, 'the aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'. Further, "a 'contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (Greenwich Capital Fin. Prods., Inc. v Negrin, 74 AD3d 413, 415 (NY App Div 1st Dept 2010) citing Lipper Holdings, LLC v. Trident Holdings, LLC, 1 A.D.3d 170 (N.Y. App. Div. 1st Dept 2003)).

By its clear and unambiguous terms, this section of the lease only refers to the Moving Defendants' duties prior to the DS Waters' occupancy. There is nothing within the clear terms of this section of the lease to suggest that the parties intended that a section specifically addressing the Moving Defendants' duties prior to DS Waters' occupancy would transform the mechanical loading dock levelers from a non-structural element into a structural element of the warehouse. Given the fact that the Amendments to Article 4 (Repairs) includes a definition of "structural repairs" that by its terms does not include repairs to the mechanical loading dock levelers, re-defining the nature of the mechanical loading dock levelers based upon a section of the lease specifically addressing the Defendants' duties prior to the Tenant's occupancy would be contrary to the reasonable expectations of both Three Boroughs and DS Waters as the parties to the lease.

Further, the Court finds that the use of the term "mechanical" as being included in the "building systems and elements" does not created an issue of fact as to whether or not the repairs to the mechanical loading lock levelers were considered "structural repairs" for which the Moving Defendants were responsible. The lease clearly and specifically defines "structural repairs" as:

> "solely as those repairs that are necessary to assure the integrity of the Building's foundation, separating walls enclosing the demised premises (excluding the store front, including but not limited to roll down gates, doors and/or shutters, and all parts and mechanisms thereof) and all parts of the roof, including without limitation vertical supporting beams and horizontal supporting beams."

As previously stated, by its clear and unambiguous terms this section of the lease does not include repairs to the loading dock levers within the definition of "structural repairs". The Moving Defendants' responsibilities prior to DS Waters taking possession included ensuring that "all building systems and elements" were in good working order, which included mechanicals such as the loading dock leveler. However, the fact that the mechanical loading dock levelers were treated by the lease as a part of "all building systems and elements" in describing the Moving Defendant's duties prior to DS Waters taking possession of the warehouse, does not transform repairs to the loading dock levelers into "structural repairs", where "structural repairs" were specifically defined not to include mechanical repairs such as repairs to the loading dock levelers. As previously stated, re-defining the nature of the mechanical loading dock levelers based upon a reference to a section of the lease specifically addressing the Defendants' duties prior to the Tenant's occupancy would be contrary to the reasonable expectations of both Three Boroughs and DS Waters as the parties to the lease.

As such, the Court finds that the Moving Defendants were an out-of-possession landlord with no contractual obligation under the lease to repair the mechanical loading dock levelers.

The Court will now address the question of whether or not, in the absence of a contractual obligation to maintain/repair the mechanical loading dock levelers, the Moving Defendants could still be potentially liable to the Plaintiff as an out-of-possession landlord.

There are two lines of reasoning that are applied in determining when an out-of-possession landlord owes a duty of care as to a subject premises absent a contractual duty.

Upon review of the relevant case law, there appear to be two lines of reasoning that are applied in determining whether or not an out-of-possession landlord owes a duty of care to third-parties injured in a subject premises in the absence of specific contractual duty. The first line of reasoning stems from the Court of Appeals' decision in Gronski v County of Monroe (18 NY3d 374, 379 (NY 2011)) and centers upon the question of how much "control" the out-of-possession landlord had over the subject premises. Under this analysis, whether or not an out-of-possession landlord had a right of reentry onto the premises is only one factor to be considered in determining if the out-of-possession landlord "controlled" the subject premises. If the out-of-possession landlord controlled the premises then it would be potentially liable for third-party injuries on said premises.

The second line of reasoning stems from First Department cases where leave to appeal was denied by the Court of Appeals subsequent to the Court of Appeals' decision in Gronski v County of Monroe (18 NY3d 374, 379 (NY 2011)). Under this second line of reasoning, an out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord (1) has a contractual obligation to maintain the premises, or (2) a contractual right to reenter in order to inspect or repair, and the defective condition is "a significant structural or design defect that is contrary to a specific statutory safety provision" (Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (NY App Div 1st Dept 2012) lv denied 19 NY3d 815 (NY 2012) quoting Ross v Betty G. Reader Revocable Trust, 86 AD3d 419 (NY App Div 1st Dept 2011); see also DeJesus v Tavares, 2016 NY Slip Op 04332 (NY App Div 1st Dept June 7, 2016); Vasquez v Rector, 40 A.D.3d 265 (NY App Div 1st Dept 2007)).

Upon review of the relevant case law, submitted papers and arguments presented at oral argument, the Court finds that the Moving Defendants cannot be held liable to the Plaintiff as an out-of-possession landlord under either of these standards. The Court will first address the "control" standard described in Gronski v County of Monroe (18 NY3d 374, 379 (NY 2011) and then address the "right to reenter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" standard applied by the First Department.

The Moving Defendants had a right of reentry for the purpose of repairing/maintaining the mechanical loading dock levelers under the lease, however, they lacked the level of "control" necessary over the premises to impart premises liability.

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition. That duty is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others'. Indeed, '[i]t has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property'. Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property. Control is both a question of law and of fact." (Gronski v County of Monroe, 18 NY3d 374, 379 (NY 2011) citing Peralta v Henriquez, 100 NY2d 139 (NY 2003); Butler v Rafferty, 100 NY2d 265 (NY 2003); Chapman v Silber, 97 NY2d 9 (NY 2001); Basso v Miller, 40 NY2d 233 (NY 1976); Ritto v Goldberg, 27 NY2d 887 (NY 1970)).

"Premises liability, as with liability for negligence generally, begins with duty. The existence and extent of a duty is a question of law" (Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 13 (NY App Div 2nd Dept 2011) (internal citations omitted)). "Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally. The scope of any such duty of care varies with the foreseeability of the possible harm" (Tagle v Jakob, 97 NY2d 165,

168 (NY 2001)).

> "Historically, as explained in Park W. Mgt. Corp. v Mitchell, the law viewed a lease of premises as akin to a sale, and the landlord therefore had, at most, minimal duties to the tenant and others on the premises. By transferring possession and control of the property to a tenant, the landowner also transferred the responsibility for dangerous conditions, at least those arising after the transfer, to the tenant. The view that a lease is akin to a sale, and its consequent limitation on a landlord's duty, have eroded slowly, both by statute, and by further development of the common law, but it still exists to a significant extent. As the Court of Appeals explained in Rivera v Nelson Realty, LLC, a landowner's common-law duty to a lessee remains limited, even after Basso: 'Basso did not abrogate the common-law rule that, with some exceptions, a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair the premises is imposed by statute, by regulation or by contract'" (Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 14-15 (NY App Div 2nd Dept 2011) (internal citations omitted)).

Upon review of the lease, the Court finds that the Moving Defendants did have a broad right of reentry into the warehouse for the purpose of making nonstructural repairs, which would have included repairs to the mechanical loading dock levelers. Article 13 of the lease reads in relevant part as follows:

> 13. Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building, or which Owner may elect to perform in the demised premises after Tenant's failure to make repairs, or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with the laws, regulations and other directions of government authorities... If Tenant is not present to open and permit an entry into the demised premises, Owner or Owner's agent may enter the same whenever such entry may be necessary or permissible by master key or forcibly, and provided reasonable care is exercised to safeguard Tenant's property, such entry shall not render Owner or its agents liable therefor, nor in any event shall the obligations of the Tenant hereunder be affected.

Article 50 of the rider to the lease agreement entitled Amendments to Article 13 (Access to Premises) reads as follows:

> Notwithstanding anything contained in Article 13 to the contrary, Tenant shall be in sole charge of the demised premises except that Landlord, its agents and employees, shall always have the right to enter upon the demised premises in the event of an emergency and otherwise during normal business hours upon reasonable advanced telephonic notice.

Based upon said articles of the lease, the Moving Defendants did have a right of reentry to the premises. Further, Article 13 specifically indicates that said right of reentry may be exercised for the purpose of

performing "any work which Tenant is obligated to perform under this lease" which would include non-structural repairs/maintenance as defined by the lease. Said non-structural repairs/maintenance would include repairs/maintenance to the mechanical loading dock levelers.

However, said right of reentry under the lease does not in anyway imply that the Moving Defendants were contractually bound under the lease to repair/maintain non-structural elements such as the mechanical loading dock levelers. The terms of the lease gave the Moving Defendants the right of reentry for the purpose of repairing/maintaining nonstructural elements (including the mechanical loading dock levelers) if they so chose, which is not the equivalent to creating a contractual obligation to do so.

Further, merely possessing a "right of reentry" is not in and of itself sufficient to establish that the Moving Defendants possessed the level of "control" necessary to create a duty to the Plaintiff as to the condition of the mechanical loading dock levelers. "[W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, we look not only to the terms of the agreement but to the parties' course of conduct — including, but not limited to, the landowner's ability to access the premises — to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law." (Gronski v County of Monroe, 18 NY3d 374, 380-381 (NY 2011) citing Butler v Rafferty, 100 NY2d 265 (NY 2003)). The question before this Court is whether or not the Moving Defendants have established prima facie that they "relinquished complete control" over the subject warehouse such that their duty to maintain the warehouse in a reasonably safe condition was extinguished as a matter of law (See Gronski v County of Monroe, 18 NY3d 374, 379 (NY 2011); Yehia v Marphil Realty Corp., 130 A.D.3d 615 (NY App Div 2nd Dept 2015); Wagner v Waterman Estates, LLC, 128 AD3d 1504 (NY App Div 4th Dept 2015)).

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Moving Defendants have established prima facie that they relinquished complete control over the warehouse to DS Waters, and further that the Moving Defendants had no control over DS Water's day-to-day use of the warehouse. Specifically, there was nothing in the Plaintiff's testimony nor the testimony of Christopher Boyle to suggest that the Moving Defendants supervised any of DS Waters' actions at the warehouse in general, nor as to the mechanical loading dock levelers in particular. The Plaintiff testified in sum and substance that he was (and still is) an employee of DS Waters, and that he performs his duties in accordance with the direction and supervision of DS Waters. The Plaintiff specifically testified that his immediate superior was an operations manager employed by DS Waters, and at no point did the Plaintiff testify that the Moving Defendants regulated or controlled DS Waters' activities within the warehouse. Specifically, the Plaintiff made no indication that the Moving Defendants in any way regulated and/or controlled the mechanical loading dock levelers.

Further, Mr. Boyle testified in sum and substance that the Moving Defendants were not in any way involved in DS Waters' day to day operations nor overall operations in the warehouse. At most the Moving Defendants' only involvement was to make monthly inspections and weekly "drive bys". Mr. Boyle specifically testified that the Moving Defendants did not inspect the warehouse for general maintenance issues and that they did not inspect the mechanical loading dock levelers.

Furthermore, the Moving Defendants' lack of control over DS Waters' activities, including DS Waters' use of the mechanical loading dock levelers was entirely consistent with the terms of the lease, which indicated that it was DS Waters' duty, as a tenant in possession of the warehouse, to maintain nonstructural machinery including the mechanical loading dock levelers. As such, having considered the terms of the lease between the Moving Defendants and DS Waters and the testimony as to the Moving Defendants' "course of conduct" in connection to the warehouse, this Court finds that the Moving

Defendants have established prima facie that they "relinquished complete control" over the subject warehouse to DS Waters such that the Moving Defendants' duty to maintain the warehouse in a reasonably safe condition was extinguished as a matter of law.

In opposition, the Plaintiff has failed to establish that the Moving Defendants exercised any control over DS Waters' general procedures, the Plaintiff's actions as an employee of DS Waters or the mechanical loading dock levelers in particular. Although the Moving Defendants had the right to reenter the premises for the purpose of maintaining/repairing nonstructural elements (such as the mechanical loading dock levelers) if they so chose, there is nothing from the deposition testimony, the submitted papers nor the arguments presented at oral argument to suggest that the Moving Defendants actually exercised said right of reentry for the purpose of repairing the mechanical loading dock levelers. Finally, there is nothing from the deposition testimony, the submitted papers nor the arguments presented at oral argument to suggest that the Moving Defendants exercised any control over DS Waters' use of the warehouse in general or the mechanical loading dock levelers in particular.

Despite the fact that the Moving Defendants did have a right to reenter to the premises to make nonstructural repairs if they so chose, the Court finds that the Moving Defendants did not exercise said right of reentry nor did they exercise any control over the premises in general nor the mechanical loading dock levelers in particular sufficient to create a duty of care towards the Plaintiff. As such, the Moving Defendants cannot, as a matter of law, be held liable for the Plaintiff's injuries as an out-of-possession landlord under the "control" standard.

The Court will now address the First Department standard for determining whether or not an out-of-possession landlord can be held liable for a third party's (i.e. individuals that were not parties to the lease) injuries.

The alleged defects to the mechanical loading dock levelers do not constitute a significant structural or design defect in violation of Labor Law §240(1). As such, the Moving Defendants cannot be held liable for the Plaintiff's alleged injuries regardless of the Moving Defendants' right to reentry

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to reenter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (NY App Div 1st Dept 2012) lv denied 19 NY3d 815 (NY 2012) quoting Ross v Betty G. Reader Revocable Trust, 86 AD3d 419 (NY App Div 1st Dept 2011); see also DeJesus v Tavares, 2016 NY Slip Op 04332 (NY App Div 1st Dept June 7, 2016); Vasquez v Rector, 40 A.D.3d 265 (NY App Div 1st Dept 2007)).

As previously stated in the instant decision, under the lease the Moving Defendants were under no contractual obligation to maintain/repair the mechanical loading dock levelers. However, the Moving Defendants did possess the right to reenter the warehouse to make nonstructural repairs (including repairs to the mechanical loading dock levelers) if they so chose. As such under the First Department standard the Moving Defendants would be potentially liable for the Plaintiff's injuries if the alleged defect in the mechanical loading dock levelers constituted "a significant structural or design defect that is contrary to a specific statutory safety provision" (Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (NY App Div 1st Dept 2012) lv denied 19 NY3d 815 (NY 2012) quoting Ross v Betty G. Reader Revocable Trust, 86 AD3d 419 (NY App Div 1st Dept 2011)).

As previously stated, the Plaintiff has conceded that Labor Law §241(6) is inapplicable to the underlying action. Further, given the Plaintiff's concession that Labor Law §241(6) is not applicable to the underlying action, the only remaining specific statutory violation plead by the Plaintiff against the Moving Defendants is a violation of Labor Law §240(1).[3] In point of fact, in opposition to the Moving Defendants' motion, the Plaintiff attaches an expert report which only indicates that the allegedly hazardous condition of the loading dock levers was in violation of Labor Law §240(1). Said report does not refer to any other specific statutory provisions. As such, the only "specific statutory safety provision" that the Plaintiff alleges was violated by the Moving Defendants (due to the condition of the loading dock levelers) was Labor Law §240(1) (See Bing v 296 Third Ave. Group, L.P., 94 AD3d 413, 414 (NY App Div 1st Dept 2012)).

Upon review of the submitted papers, deposition testimonies and arguments presented at oral argument, the Court finds that the Moving Defendants have established prima facie that the loading dock levelers were not in violation of Labor Law §240(1). Specifically, the Court finds that the Plaintiff was not engaged in an activity that fell within the scope of Labor Law §240(1).

[3] The Court notes that Labor Law §200 is a codification of common law negligence, and as such does not constitute an allegation of a specific statutory violation apart from common law negligence.

Labor Law § 240(1), also known as the Scaffold Law (Ryan v Morse Diesel, 98 AD2d 615, 615 (NY App Div 1st Dept 1983), provides, in relevant part:

> "All contractors and owners ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"'Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person'" (John v Baharestani, 281 AD2d 114, 118 (NY App Div 1st Dept 2001) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)). "The contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured." (Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 (NY 1991)).

The Court of Appeals has held that this duty to provide safety devices is nondelegable (Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 (NY 1993)), and that absolute liability is imposed where a breach has proximately caused a plaintiffs injury (Bland v Manocherian, 66 NY2d 452, 459 (1985)). "The extraordinary protections of Labor Law § 240(1) extend only to a narrow class of special hazards, and do 'not encompass any and all perils that may be connected in some tangential way with the effects of gravity'" (Nieves v. Five Boro Air Conditioning & Refrigeration Corp., 93 NY2d 914, 915-916 (NY 1999) quoting Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501 (NY 1993)).

Further, Courts have reasonably applied Labor Law § 240(1) to types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site (Soto v. J. Crew Inc., 21 N.Y.3d 562, 568 (NY 2013). As used in Labor Law § 240(1) "cleaning" is expressly afforded protection under section 240(1) "whether or not incidental to any other enumerated activity" (Broggy v Rockefeller Group, Inc., 8 N.Y.3d 675, 680 (NY 2007).

"To recover, a plaintiff must have been engaged in 'the erection, demolition, repairing, altering, painting, **cleaning** or pointing of a building or structure'. An activity cannot be considered 'cleaning' under the statute if it: '(1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project'. The factors are to be considered as a whole, and the ''presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other'" (Torres v St. Francis Coll., 129 AD3d 1058, 1059-1060 (NY App Div 2d Dept 2015) citing Labor Law § 240(1); Soto v J. Crew Inc., 21 NY3d 562, 566, 568 (NY 2013); Rocovich v Consolidated Edison Co., 78 NY2d 509, 513 (NY 1991); Collymore v 1895 WWA, LLC, 113 AD3d 720, 721 (NY App Div 2d Dept 2014); Pena v Varet & Bogart, LLC, 119 AD3d 916 (NY App Div 2d Dept 2014)).

Applying said factors, the Court finds that the Moving Defendants have established prima facie that the Plaintiff was not engaged in the type of "cleaning" activity that falls within the scope of Labor Law §240(1). Specifically, upon review of the submitted papers and the arguments presented at oral argument, the Court finds that at the time of the accident the Plaintiff was engaged in routine cleaning of the warehouse unrelated to any ongoing construction, renovation, painting, alteration or repair project. The Plaintiff testified in sum and substance that he was operating the Floor Scrubber to clean the warehouse as he had done on previous occasions. Further, there was nothing in the Plaintiff's testimony to suggest that the Plaintiff's use of the Floor Scrubber was in any way related to ongoing construction, alteration or renovation of the warehouse. In particular, there is no indication that the Plaintiff's operation of the Floor Scrubber had any effect upon the daily business and procedures of the warehouse and/or DS Water's routine business at the warehouse.

Further, the Plaintiff has failed to create an issue of fact as to whether or not he was engaged in routine cleaning. The fact that the Plaintiff was in effect cleaning the warehouse more than was regularly done for the purpose of preparing for a visit by the vice presidents of DS Waters does not transform a routine cleaning into a non-routine cleaning. Neither does the fact that someone else, not the Plaintiff, used the Floor Scrubber to regularly clean the warehouse transform what was at most an extension of a routine cleaning procedure into a construction/renovation related cleaning. Nothing in the Plaintiff's testimony suggested that there was any construction or renovation work going on in the warehouse. The Plaintiff was simply using the Floor Scrubber in order to clean the warehouse as he had done in the past and as had been regularly done. The fact that the Plaintiff was operating the scrubber more than usual in order to get the warehouse "cleaner" prior to the vice presidents of DS Waters' visit to the premises does not transform a routine cleaning procedure into a non-routine cleaning.

As such, the Plaintiff's accident did not fall within the scope of Labor Law §240(1) as a matter of law. Therefore, the alleged defective condition in the mechanical loading lock levelers cannot, as a matter of law, constitute "a significant structural or design defect that is contrary to a specific statutory safety provision" and cannot form a basis for holding the Moving Defendants liable for the Plaintiff's alleged injuries as an out-of-possession landlord under the First Department standard.

Accordingly, the Moving Defendants have established that they cannot be held liable for the Plaintiff's injuries as an out-of-possession landlord under either the "control" standard or the First Department standard. As such, the Moving Defendants are entitled to summary judgment dismissing the Plaintiff's common law negligence claim and Labor Law §200 claim, which is the codification of common-law negligence (See Comes v N.Y. State Elec. & Gas Corp., 82 NY2d 876, 877-878 (NY 1993)).

The Moving Defendants are also entitled to summary judgment dismissing the Plaintiff's Labor Law §240(1) claim

For the reasons stated in the prior section of the instant decision, the Moving Defendants are also entitled to summary judgment dismissing the Plaintiff's Labor Law §240(1) claim against them. Specifically, at the time of the Plaintiff's accident he was not engaged in the type of "cleaning" that falls within the scope of Labor Law §240(1).

The Plaintiff's claim that he is a third-party beneficiary to the lease between Three Boroughs and DS Waters was not properly plead in the underlying action, nor presented before this Court. Further, the Plaintiff has failed to establish that he was a third-party beneficiary to the lease between Three Boroughs and DS Waters.

Before addressing the substance of the Plaintiff's argument that he is a third-party beneficiary to the lease, the Court finds that the Plaintiff has not plead a cause of action against the Moving Defendants for breach of contract as a third-party beneficiary to the lease between Three Boroughs and DS Waters. The Plaintiff's complaint does not allege that the Plaintiff was a third-party beneficiary to the lease, nor does the complaint allege a cause of action against the Moving Defendants for breach of contract based upon the Plaintiff's alleged status as a third-party beneficiary to the lease. Similarly, the Plaintiff's opposition to the Moving Defendants' motion is devoid of any argument that the Plaintiff is a third-party beneficiary to the lease. Plaintiff's counsel presented said claim before this Court for the first time at oral argument on the instant motion.

As such, the Plaintiff has not made a claim for breach of contract against the Moving Defendants as a third-party beneficiary to the contract, and any of the Plaintiff's arguments on this point are not properly before this Court in the underlying action.

Even assuming arguendo that the Plaintiff had properly plead a claim for breach of contract against the Moving Defendants as a third-party beneficiary to the lease, the Court would still find that the Plaintiff was not a third-party beneficiary to the lease.

"'[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party'. 'Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him or her from physical injury'." (Kotchina v Luna Park Hous. Corp., 27 AD3d 696, 697 (NY App Div 2d Dept 2006) quoting Espinal v Melville Snow Contrs., 98 NY2d 136 (NY 2002); Bernal v Pinkerton's, Inc., 52

AD2d 760 (NY App Div 1st Dept 1976) affd 41 NY2d 938 (NY 1977); see also Ramirez v Genovese, 117 AD3d 930, 931 (NY App Div 2d Dept 2014)).

There is nothing in the lease agreement between the Moving Defendants and DS Waters to indicate that either the Moving Defendants or DS Waters intended to confer a direct benefit on the Plaintiff to protect him from physical injury. Nothing within the plain language of the lease in any way suggests that either the Moving Defendants or DS Waters intended to make the protection of any of DS Waters' employees (including the Plaintiff) subject to the terms of the lease. Specifically, there is nothing within the plain language of the lease indicating that the Moving Defendants' would be in any way liable for injuries to DS Waters' employees, or otherwise providing for any contractual remedies on the part of DS Waters' employees. As such, the Plaintiff has failed to create any basis for the Court to determine that he was a third-party beneficiary to the lease between the Moving Defendants and DS Waters.

In particular, the Court finds that the six month warranty provision in the lease between the Moving Defendants and DS Waters does not reflect a clear intention on the part of the Moving Defendants and/or DS Waters to protect any of DS Waters' employees under the terms of the lease. This provision by its express language requires "the Landlord [The Moving Defendants] to warranty all mechanical and halide lighting for first six (6) months of the Lease". This warranty provision speaks solely to the Moving Defendant's (as landlord) responsibility to DS Waters to warranty "all mechanical and halide lighting" for the first six months of the Lease. There is nothing in the language of the warranty provision that in any way reflects an intention to protect DS Waters' employees from injury, or to give them a remedy against DS Waters and/or the Moving Defendants under the lease. Said reading of the warranty provision is entirely consistent with the rest of the lease, which is also devoid of any indication that either the Moving Defendants or DS Waters had any intention of giving the Plaintiff

third-party beneficiary rights under the lease.

As such, whether the six month warranty provision of the lease between the Moving Defendants and DS Waters referred to "mechanical" (which the Plaintiff argued includes the mechanical loading dock levelers) or if it only referred to "mechanical lighting" (as argued by the Moving Defendants) is of no issue since the Plaintiff was not a third-party beneficiary to the lease and has no basis to claim for breach of said warranty provision.

Whether or not the Moving Defendants breached any obligation that they may have owed to DS Waters under the lease as to the condition of the warehouse is an issue between the Moving Defendants and DS Waters as the parties to the lease. Said issue is not before this Court in the instant matter, and the Plaintiff, having failed to establish that he was a third-party beneficiary to the lease, has no grounds for a breach of contract claim against the Moving Defendants based upon his alleged injuries.

Conclusion

Accordingly, and for the reasons so stated, it is hereby

ORDERED that the Moving Defendants' motion for summary judgment dismissing the Plaintiff's causes of action as against the Defendants Three Boroughs LLC. and Bradford N. Swett Management LLC is hereby granted in its entirety and the Plaintiff's causes of action against the Defendants Three Boroughs LLC. and Bradford N. Swett Management LLC are hereby dismissed.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: July 6, 2010

ENTER:

HON. ROBERT D. KALISH J.S.C.