At an IAS Term, Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8th day of January, 2026.

P R E S E N T:
HON. HEELA D. CAPELL,
Justice.

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JOHN VILLANO,

Plaintiff,

-against-

Index No.: 523117/2023

Motion Sequences: 1, 2

MCDONALD CENTER, L.L.C, NYC SHOPRITE ASSOCIATES, INC., ACTION CARTING ENVIRONMENTAL SERVICES INC., AND GLASS GARDENS, INC.

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	27-45; 46-47
Affirmations in Opposition and Exhibits Annexed	49-51
Reply Affirmations and Exhibits Annexed	52

In this personal injury action commenced by plaintiff John Villano ("Plaintiff") against defendants McDonald Center L.L.C. ("McDonald"), NYC ShopRite Associates, Inc. ("ShopRite"), Action Carting Environmental Services Inc. ("Action"), and Glass Gardens, Inc. ("Glass Gardens"), alleging negligence, McDonald, ShopRite, and Glass Gardens move (in motion [mot.] sequence [seq.] 1), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against them. Action

cross-moves (in mot. seq. 2), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against it. Plaintiff opposes both motions.

Background

This action arises out of an incident that occurred on September 1, 2020, at approximately 6:00 a.m., when the Plaintiff allegedly sustained injuries while making a delivery at a ShopRite Supermarket located within a shopping center at 1080 McDonald Avenue in Brooklyn, New York ("the Premises") (Villano tr at 30, lines 14-16; 31, lines 3-6). McDonald is the owner of the Premises, a portion of which is leased to ShopRite to operate a supermarket.[1] ShopRite leased a commercial dumpster from Action which was located in the outdoor receiving area of the ShopRite store (O'Donnell tr at 7, lines 6-12; 20, lines 5-11). The subject dumpster is an 8 cubic yard container with a solid steel bar across the back of the container, which is capped by steel washers on either end, designed for rear-loading garbage trucks (*id.* at 16, lines 19-25; 17, lines 2-19; 19, lines 7-23).

At the time of the incident, the Plaintiff was employed by non-party Bimbo Bakeries USA as a route sales representative delivering Entenmann's bakery products (Villano tr at 14, lines 10-17; 31, lines 7-14; 107, lines 21-23). Although it was not part of his regular route, he was assigned to deliver to the ShopRite store the day of the accident (*id.* at 32, lines 6-11).

[1] According to the New York City Department of Finance "ACRIS" Database, McDonald Center, LLC was conveyed the property by deed dated May 23, 1994, and then leased a portion to NYC ShopRite Associates, Inc., by lease dated December 18, 1995, as amended August 9, 1996, August 15, 2002, and January 1, 2005.

In the receiving area at the rear of the store, there were six loading bays for delivery vehicles and one receiving ramp (Vazquez tr at 17, lines 4-9; *see also* exh 1 to aff of Pavia Jr, NYSCEF Doc No. 50). The receiving ramp was the only method used by vendors to make their deliveries to ShopRite (Villano tr at 122, lines 6-14; Vazquez tr at 22, lines 15-24). Plaintiff described the light that morning as "still dark, but the sun was coming up" (Villano tr at 32, lines 20-23). Plaintiff testified that the presence of other vehicles in the receiving area limited his visibility of the area and his access to the receiving ramp (*id.* at 32, line 24 - 33; 123, lines 4-8). During his deposition, he recalled that at least two other delivery vehicles with long tractor-trailers were blocking the area (*id.* at 118, lines 4-25). Plaintiff backed his truck into the receiving area and parked behind a ShopRite trailer that was in a bay, leaving enough space to use his liftgate (*id.* at 34, lines 23-25; 117, lines 15-20).

After parking, Plaintiff walked through the front entrance of the store to complete his pre-delivery duties inside (*id.* at 113, lines 5-11), brought in the product returns, and exited through the receiving door headed back towards his vehicle (*id.* at 36:19-21, 37: 8-16). Plaintiff then began placing the product onto the two concept racks inside the vehicle (*id.* at 38, lines 2-9). After lowering the two racks onto the ground, Plaintiff observed that there was no direct path to the receiving ramp from the back of his vehicle (*id.* at 38:16-21, 39:2-9). The shortest route to the receiving ramp would have been along the rear of the truck; however, because of the way the other vehicles were parked, the only available path required him to walk around the front of the truck (*id.* at 119, lines 3-19). Once in front of

his truck with the first product rack, he had to push the rack through a narrow space between the front of the tractor-trailers and the subject dumpster to reach the receiving ramp (*id.* at 120, lines 7-14). Plaintiff estimated that the width of the path and the width of the rack were "pretty close to almost the same size" (*id.* at 120, lines 15-19). He further testified that there was no alternative route to the receiving ramp other than this narrow space (*id.*).

Plaintiff walked the first rack around to the front of his vehicle and placed it by the receiving ramp (*id.* at 39, lines 2-9). He then returned to the vehicle for the second rack and began pushing it towards the receiving ramp (*id.* at 39, lines 12-14). Wearing company-issued cloth work gloves (*id.* at 111, lines 4-12), Plaintiff positioned his right hand on the front bar of the rack and his left hand at the end, pushing it forward (*id.* at 42, lines 14-18). The dumpster remained in the same location and angle between his first and second trip (*id.* at 110, lines 4-11). As Plaintiff pushed the second rack along the same path, his pinky finger on his left hand became caught on one of the circular metal washers protruding from the side of the dumpster (*id.* at 40, lines 13–17). Plaintiff testified that he did not see the washer until after his injury (*id.* at 114, lines 19-25). There was no other person in the receiving area who witnessed the incident (*id.* at 34, lines 17-20).

Plaintiff subsequently commenced the within action against defendants McDonald, ShopRite, Action and Glass Gardens, alleging negligence. McDonald, ShopRite and Glass Gardens jointly interposed a Verified Answer, dated September 7, 2023, and asserted cross-claims against Action for common-law indemnification and contribution. Action interposed an Answer on or about September 29, 2023, and asserted common-law

indemnification and contribution cross-claims against its co-defendants. In his bill of particulars, Plaintiff alleges that the moving defendants failed to maintain the pathway to the delivery receiving area and its appurtenances (the dumpster) in a reasonably safe and proper condition, and that they were negligent in causing, allowing and permitting an obstruction to Plaintiff's path during his delivery on the Premises (NYCSEF Doc Nos. 14-15).

Applicable Law

On a motion for summary judgment, the moving party bears the initial burden of proof that there are no triable issues of material fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Only once established does the burden shift to the non-moving party to rebut the movant's showing such that a trial of the action is required or raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A movant's failure to make a prima facie showing of their entitlement to summary judgment requires denial of the motion regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). Considering the evidence in the light most favorable to the moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), the court's function is to determine "whether material factual issues exist, not to resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395 [1957] [clarifying the court's role on summary judgment is "issue-finding, rather than issue-determination."]).

A prima facie case of negligence requires showing that the defendant owed a duty of reasonable care to the plaintiff and their breach of that duty was the proximate cause of the resulting injury to the plaintiff (*see Palka v Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 584 [1994]; *Boltax v Joy Day Camp*, 67 NY2d 617 [1986]; *Dugue v 1818 Newkirk Management Corp.*, 301 AD2d 561 [2d Dept 2003]). A property owner, or a party in possession or control of the real property, has a continuing, non-delegable duty to maintain the premises in a reasonably safe condition (*see Octobre v Soiefer*, 240 AD3d 503, 505 [2d Dept 2025]). "In the absence of ownership, occupancy, control, or special use, a party generally cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*id.* at 505 [internal citations omitted]; *see Henry v Hamilton Equities, Inc.*, 34 NY3d 374, 379 [2011], citing *Gronski v County of Monroe,* 18 NY3d 374, 379 [2011]). A defendant property owner moving for summary judgment in a personal injury action arising from alleged defective condition on the property has the initial burden of establishing that it neither created the alleged hazardous condition nor had actual or constructive notice of it for a sufficient time to discover and remedy it (*see Mowla v Wu*, 195 AD3d 706, 707–08 [2d Dept 2021], citing *Vargas v Lamberti*, 186 AD3d 1572, 1573 [2d Dept 2020]; *Gordon v Am. Museum of Nat. History*, 67 NY2d 836 [1986]); *Rogers v Bloomingdale's, Inc.*, 117 AD3d 933 [2d Dept 2014]).

Discussion

McDonald, ShopRite, and Glass Gardens (collectively, the "ShopRite Defendants") move for summary judgment dismissing the complaint as against them, contending that no viable claim or triable issue of fact exists.

Plaintiff's Claims as Against McDonald

As to McDonald., the owner of the shopping center where ShopRite is located, the ShopRite Defendants contend the complaint should be dismissed because McDonald was an out-of-possession owner of the shopping center with no duty to maintain or repair the dumpster rented by ShopRite or any control over the receiving area of the store. An out-of-possession landlord is generally not responsible for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to maintain or repair the alleged hazardous condition (*see Deerr'Matos v Ulysses Upp, LLC*, 52 AD3d 645 [2d Dept 2008]; *Kane v Port Auth. of N.Y. & N.J.*, 49 AD3d 503, 503-504 [2d Dept 2008]; *Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 [2d Dept 2006]).

Here, however, the ShopRite Defendants offer only conclusory assertions and submit no evidence supporting their claim that McDonald was an out-of-possession landlord that had relinquished complete possession and control of the premises to ShopRite so as to eliminate any duty owed to Plaintiff. Accordingly, the ShopRite Defendants have failed to meet their burden of demonstrating entitlement to summary judgment as a matter of law dismissing the claims against McDonald on this ground.

Plaintiff's Claims as Against Glass Gardens

As to Glass Gardens, the ShopRite Defendants argue that it is an improper party as the entity did not own, operate, maintain, or control the dumpster or the premises where the accident occurred. The ShopRite Defendants, however, failed to submit any competent evidence establishing that Glass Gardens had no ownership interest in, or control over, the premises or the dumpster area where Plaintiff was allegedly injured. Further, nothing in the record indicates Glass Gardens' role or its relationship to the other parties. The mere assertion that Glass Gardens was an improper party, unsupported by documentary proof, affidavits from individuals with personal knowledge, corporate records, or a lease or management agreement delineating responsibility for the subject location, is insufficient to warrant dismissal at this juncture. To the contrary, the deposition testimony of Andrew Vazquez that he was employed by "ShopRite of Glass Gardens" as the assistant store manager at the time of the incident (Vazquez tr at 12, lines 12-18) raises a triable issue regarding the nature of Glass Gardens' involvement with the store's operations and its potential control over the area where the accident occurred. The ShopRite Defendants have not clarified the corporate relationship, if any, between ShopRite and Glass Gardens. Accordingly, they have failed to meet their burden of demonstrating, prima facie, that Glass Gardens was an improper party to this action.

Plaintiff's Claims as Against ShopRite and Action

In further support of their motion, the ShopRite Defendants argue that the alleged conditions which caused Plaintiff's injuries were open and obvious and neither inherently dangerous nor defective; that they lacked actual or constructive notice of it; and that

Plaintiff was the sole proximate cause of his injuries (aff of Konstantatos, NYSCEF Doc No. 28). In support of its cross motion, Action adopts the facts and arguments set forth in the ShopRite Defendants' motion, arguing that it is likewise entitled to summary judgment dismissing Plaintiff's complaint and all cross-claims against it (aff of Keenan, NYSCEF Doc No. 47).

Open and Obvious, Inherently Dangerous Condition

The ShopRite Defendants and Action (collectively, "Defendants") have failed to establish, prima facie, that the alleged conditions (the placement of the dumpster in the pathway at the receiving area and the protruding bent metal washers) were open and obvious and neither inherently dangerous nor defective under the circumstances in which the accident occurred.[2]

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[2] The ShopRite Defendants' reliance on *Riley v Lake Road Condominiums* (47 AD3d 697 [2d Dept 2008]) is misplaced. In *Riley*, the Second Department held that the defendant established, prima facie, that a metal drainage grate was not a dangerous or defective condition, and the plaintiff failed to raise a triable issue of fact. The decision, however, does not describe the evidence supporting that prima facie showing, and the circumstances are not comparable to those presented here. Defendants' analogy to *Shater v Alzubaidi* (17 AD3d 443 [2d Dept 2005]) is likewise unavailing. In *Shater*, the infant plaintiff's finger was pinned by a dumpster that had moved from its location outside a candy store. Summary judgment was affirmed because the defendants established, prima facie, the absence of negligence, lack of notice, and the unforeseeability of the accident. The decision does not set forth the evidentiary basis for those findings, and aside from the involvement of a dumpster, the case bears no meaningful similarity to the present matter. Accordingly, neither *Riley* nor *Shater* supports Defendants' motion.

It is well settled that a landowner's general duty to maintain their property in a reasonably safe manner does not extend to "an open and obvious condition that, as a matter of law, is not inherently dangerous" (*Robbins v 237 Ave. X., LLC*, 177 AD3d 799, 799 [2d Dept 2019]; *see Butler v NYU Winthrop Hosp.*, 225 AD3d 658, 659 [2d Dept 2024], quoting *Williams v E&R Jamaica Food Corp.*, 202 AD3d 1028, 1029 [2d Dept 2022]; *Johnson v 1451 Assoc., L.P.*, 225 AD3d 752, 753 [2d Dept 2024]; *Clayton v Marcy Supermarket & Deli Corp.*, 191 AD3d 842, 843 [2d Dept 2021]). An open and obvious condition is one that is "readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident" (*Robbins,* 177 AD3d at 800). Whether a given condition is open and obvious, or inherently dangerous is fact-specific (*see Karpel v Nat'l Grid Generation, LLC*, 174 AD3d 695, 695 [2d Dept 2019], citing *Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977 [1997]). The court will examine "all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury'" (*Karpel*, 174 AD3d at 696).

Here, the Defendants assert that the conditions could not have been hazardous because Plaintiff "successfully walked the exact path three times prior to the incident" (aff of Konstantatos, NYSCEF Doc No. 28 ¶ 61; *see also* aff of Keenan, NYSCEF Doc No. 47 ¶ 7). The record, however, does not support this characterization. Plaintiff testified that he pushed the first rack to the receiving ramp, walked back to the delivery vehicle to retrieve the second rack, and was injured while attempting to push the second rack past the

dumpster (Villano tr at 39–40). Although Plaintiff made three trips between the delivery vehicle and the receiving ramp in total, he passed the dumpster with a product rack only once before the accident. Defendants' reliance on the total number of trips overstates the testimony; navigating the area while pushing a product-filled rack through a narrow space is materially different from passing it while empty-handed. Additionally, Defendants' conclusory statement that the condition was not inherently dangerous does not eliminate the question of fact to be decided by the jury.

The Defendants further argue that the metal washers were not inherently dangerous because they reflect a standard design for rear-loading garbage containers. In support, Defendants cite the testimony of Michael O'Donnell, Action's director of operations for over nine years, who stated that he was familiar with the types of dumpster containers used by the company (O'Donnell tr at 6, lines 15–19). He identified that the dumpster depicted in the deposition photograph was an Action owned 8-yard container with a standard metal bar and washer configuration (*id.* at 16:19–25, 17:2–19, 18:4–12, 19:10–17, 32:12–20). Mr. O'Donnell acknowledged, however, that he had never visited the premises or personally inspected the site (*id.* at 14, lines 17–19).

The Defendants have failed to eliminate triable issues of fact as to whether, under the circumstances presented, the alleged defective conditions were open and obvious, readily observable by the reasonable use of one's senses, and not inherently dangerous. Contrary to Defendants' contentions, Mr. O'Donnell's testimony that the bent washers appeared consistent with standard industry design (*id.* at 23, lines 5–7) does not resolve

whether their condition at the time of the accident was dangerous or defective, particularly given the visible wear and bent deformation of the washers described in the record.

In addition, Plaintiff's deposition testimony raises further factual questions bearing on whether the condition was open and obvious or inherently dangerous. In this regard, Plaintiff testified (1) that the accident occurred during early-morning darkness; (2) that he was relatively unfamiliar with the premises because it was not part of his usual route; (3) that multiple tractor-trailers were present in the receiving area, requiring him to park behind another delivery truck and leaving only a narrow pathway to the receiving ramp; (4) that he was required to keep his hands on the outside bars of the rack to maneuver it due to its weight; and (5) that although he noticed the dumpster, he did not see the metal washers protruding from it until after the incident (Villano tr at 109, lines 19–21; 114, lines 15–25). These circumstances collectively raise triable issues of fact as to whether the condition that allegedly caused Plaintiff's injury was open and obvious or inherently dangerous. Accordingly, that branch of the ShopRite Defendants' motion and Action's cross motion seeking summary judgment on this ground is denied.

Constructive Notice of Alleged Dangerous Conditions

Defendants have also failed to established, as a matter of law, that they lacked constructive notice of the alleged conditions causing Plaintiff's accident. A defendant has constructive notice of a dangerous condition when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it (*see Gordon v Am. Museum of Nat. History*, 67 NY2d at 837–

838; *see e.g., Alkon v Shore Towers Apts. Inc.*, 185 AD3d 765, 766-767 [2d Dept 2020] [evidence that door was inspected daily, had been replaced two months before the incident, received no complaints of malfunction prior to the incident, and functioned per industry standards was prima facie evidence that the door was not defective, and plaintiffs failed to raise a triable issue of fact]; *Lezama v 34-15 Parsons Blvd, LLC,* 16 AD3d 560, 560-561 [2d Dept 2005] [evidence that superintendent had inspected the door a year before the accident and had not observed any problems or received any complaints was prima facie evidence that the door was not defective, and plaintiffs failed to raise a triable issue of fact]). To meet its initial burden on the issue of lack of constructive notice of an alleged defective condition, the defendant must offer some evidence as to when the subject area was last inspected relative to when the incident occurred (*see Guzman v 787 Holdings, LLC*, 228 AD3d 628, 629 [2d Dept 2024]; *Mermelstein v Campbell Fitness NC, LLC*, 201 AD3d 923, 924 [2d Dept 2022]).

Here, none of the Defendants have provided any evidence as to when the subject area was last inspected relative to when the incident occurred to meet their initial burden of showing lack of constructive notice of any defects pertaining to the placement of the subject dumpster and the protruding bent metal washers (*see Fortune v Western Beef, Inc.*, 178 AD3d 671 [2d Dept 2019]; *Radosta v Schechter*, 171 AD3d 1112,1113 [2d Dept 2019]).

As to ShopRite, Mr. Vazquez, ShopRite's assistant store manager at the time of the accident, testified that the dumpster was owned, maintained and serviced by Action

(Vazquez tr at 20, lines 2-11; 43, lines 11-23). He further testified that ShopRite's maintenance workers typically placed recycling materials in the dumpster (*id.* at 37, lines 16–24), and that Action was the only entity that moved the dumpster when emptying it into their truck, after which they returned it to the same general area, though sometimes at a slightly different angle (*id.* at 38, lines 2-19). Mr. Vazquez further testified that ShopRite never instructed Action on how to position the dumpster (*id.*). Mr. Vazquez testified that ShopRite used the subject dumpster for its recycling materials (*id.* at 37, lines 16-24) but he was not aware of any complaints about its condition prior to the accident (*id.* at 43, lines 11-13).

With regard to the pathway to the receiving area, the record indicates that ShopRite did not have nor enforce any policy about where delivery vehicles should park in the receiving area. Mr. Vazquez described the receiving area protocol from ShopRite's perspective: a delivery truck that arrived at the premises when all six loading bays were occupied should wait for one to open (*id.* at 17, lines 10-14; 24, lines 15-16). He observed that delivery trucks would park in front of or behind another truck already in the bay (*id.* at 18:4-7, 19:21-25, 24:17-21). Despite this expectation, Mr. Vazquez testified that ShopRite did not have any personnel stationed outside to direct delivery drivers to wait for an open bay before parking, nor was he aware of any ShopRite policy requiring same (*id.* at 17:23-25, 18:2-11, 32:25, 33:2-6). At his deposition Mr. Vazquez was presented with a scenario mirroring the circumstances of his accident (namely, a delivery truck arriving while all bays were occupied, parking behind a truck in the bay, and unloading). Mr.

Vazquez acknowledged that the delivery vendor would have to walk near the dumpster to access the receiving ramp (*id.* at 31, lines 15-24). Mr. Vazquez also testified that he would not frequent the receiving area as part of his regular duties unless asked to do so, and neither would receivers or the general store manager (*id.* at 34, lines 7-14; 35, lines 10-24).

Accordingly, the ShopRite Defendants have not met their prima facie burden of establishing that they lacked constructive notice of the alleged hazardous conditions (the pathway obstruction or the protruding washers on the dumpster). Although ShopRite's employees used the dumpster to dispose of recyclables, the ShopRite Defendants failed to submit any evidence of the subject area's last inspection prior to the incident (*see Guzman,* 228 AD3d at 629; *Mermelstein,* 201 AD3d at 924).

Action has likewise failed to establish, as a matter of law, that it lacked constructive notice of the alleged dangerous condition. Mr. O'Donnell, the director of operations for Action, testified that he was aware of prior incidents (approximately three to five) where an Action employee or crew person was injured by the metal washers on the same type of container as the one utilized by ShopRite, with a laceration injury being the common result (O'Donnell tr at 27-28; 30, lines 9-16). He further testified that Action would replace a dumpster upon a customer's or driver's request, but did not testify about the condition or last inspection of the subject dumpster (*id.* at 36, lines 9-14). Accordingly, Action has not met its prima facie burden of demonstrating that the alleged hazardous condition was unknown, not visible and apparent, or that it did not exist for a sufficient period of time to permit its discovery and correction.

Factual Dispute Regarding the Dumpster's Location

In addition, the court notes that issues of fact exist as to which entity was responsible for the dumpster's general location and its relative distance from the receiving area. Mr. Vazquez testified that the dumpster was typically positioned at the back of the receiving area and was in that location at the time of Plaintiff's accident in September 2020 (Vazquez tr at 24, lines 6-9; 38, lines 7-11) (*see* exh 2 to aff of Pavia, Jr., NYSCEF Doc No. 51). According to Mr. Vazquez, only Action personnel moved the dumpster during garbage pick-up three times a week, at which point the angle positioning of the dumpster varied slightly (*id.* at 38, lines 4-15; 40, lines 4-7; 42, lines 3-19). Mr. Vazquez was not aware of any written agreement establishing where to place the dumpster (*id.* at 41, lines 19-25). Mr. Vazquez explained that Action had placed the subject dumpster in the receiving area of ShopRite's store, and it remained there when he began working at the Premises in 2020 (*id.* at 13, lines 8-12; 20, lines 17-22; 21, lines 10-18).

Contrastingly, Mr. O'Donnell testified that he believed that ShopRite determined the location of the subject dumpster (O'Donnell tr at 13, lines 3-8). Mr. O'Donnell also had no personal knowledge of any written agreement between Action and ShopRite regarding the garbage removal services at the Premises (*id.* at 7:22-25, 8:2-5). Accordingly, a triable issue of fact exists regarding which entity was responsible for the placement and positioning of the dumpster, precluding summary judgment on that issue.[3]

[3]Action's additional contention that Plaintiff could not recall the cause of his hand laceration is contradicted by the record. In both the pleadings (*see* Verified Bill of Particulars,

Whether Plaintiff's Conduct was the Sole Proximate Cause

Lastly, Defendants have failed to establish, as a matter of law, that Plaintiff's own negligence was the sole proximate cause of his injuries. Defendants rely on Plaintiff's testimony and a disciplinary notice issued by his employer (exh P to aff of Konstantatos, NYSCEF Doc No. 45). The Bimbo Bakeries USA Associate Disciplinary Action Notice, dated September 30, 2020, states that Plaintiff "cut [his] finger while pushing a 35" rack with [his] hands on the outside of the rack," and notes that Plaintiff "admitted this was an unsafe act." The notice also bears a handwritten notation indicating that Plaintiff refused to sign it (*id.*). No testimony or affidavit is provided from the supervisor or manager who prepared or signed the document.

During his deposition, Plaintiff testified that he did not recognize the document and refused to sign it because of union representation (Villano tr at 104, lines 5–7). According to plaintiff, at the time of the accident, his hands were on the outside of the rack because he was turning toward the receiving ramp, which was an appropriate use of the rack (*id.* at 122, lines 3-5). Given the questions of material fact and lack of probative evidence submitted with their moving papers, the Defendants have not established, as a matter of law, that Plaintiff was the sole proximate cause of his injuries.

Conclusion

NYSCEF Doc Nos. 14–15) and his deposition testimony, Plaintiff identified the round metal piece protruding from the dumpster (the washer) as the component on which his finger caught, causing his injuries (Villano tr at 40, lines 13-17; 69, lines 22-23).

Accordingly, it is

ORDERED that the motion (mot. seq. 1) by defendants McDonald Center, L.L.C., NYC ShopRite Associates, Inc., and Glass Gardens, Inc. for summary judgment dismissing the complaint and all cross-claims asserted against them and for an award of costs and fees is denied in its entirety; and it is further

ORDERED that the motion (mot. seq. 2) by defendant Action Carting Environmental Services Inc. for summary judgment dismissing the complaint and all cross-claims asserted against it is denied.

Any relief not expressly granted herein has been considered and is denied.

This constitutes the Decision and Order of this Court.

E N T E R

Hon. Heela D. Capell
J.S.C.