| **Rosenblath v RXR 620 Owner II LLC** |
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| 2019 NY Slip Op 30401(U) |
| February 19, 2019 |
| Supreme Court, New York County |
| Docket Number: 152283/2015 |
| Judge: Robert R. Reed |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 43**

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WALTER ROSENBLATH, Index No.: 152283/2015

Plaintiff,

-against-

RXR 620 OWNER II LLC, RXR CONSTRUCTION & DEVELOPMENT LLC and RXR REALTY LLC,

Defendants.

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**ROBERT R. REED, J.:**

This is an action to recover damages for personal injuries allegedly sustained by a worker on July 15, 2014, when, while working on the renovation of a building located at 620 Sixth Avenue, New York, New York (the Premises), he was forced to jump from the lift gate of a truck that he was unloading.

Defendant RXR 620 Owner II LLC (RXR 620) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it.

Plaintiff Walter Rosenblath cross-moves, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendants RXR 620, RXR Construction & Development LLC (RXR Construction) and RXR Realty LLC (RXR Realty).

It should be noted that plaintiff originally brought this action against RXR 620. On or around March 28, 2017, plaintiff's counsel obtained a so-ordered stipulation to amend the caption to add as additional defendants RXR Construction and RXR Realty. However, to date, plaintiff has failed to properly add said parties as defendants, namely failing to serve or file a

supplemental summons and amended answer to add them. Therefore, plaintiff is not entitled to summary judgment as against these additional defendants, and, accordingly, this decision will be addressed in regard to defendant RXR 620 only.

**BACKGROUND**

On the day of the accident, RXR 620 owned the Premises where the accident occurred. Plaintiff was employed by non-party Donaldson Interiors, a subcontractor performing renovation work at the Premises (the Project). Plaintiff testified that, at the time of the accident, he was unloading pallets of acoustical tiles from a flat bed truck to the sidewalk. The pallets were stacked approximately seven feet high and weighed approximately 3,000 pounds. In order to remove the pallets, a pallet jack was utilized. The pallet jack had two steel forks that slid under each pallet and then hydraulically lifted it up. Thereafter, the pallet jack operator would pull the pallet off the truck onto the truck's lift gate. Once the pallet was situated on the lift gate, it was plaintiff's job to turn the pallet around approximately 90 degrees, so that it was in the proper position for unloading.

Plaintiff explained that, at the time of the accident, he was having trouble turning one of the pallets around, which caused his partner to yell at him to straighten it out because "[y]ou have to be careful you [don't] run the pallet off the back of the truck" (plaintiff's tr at 152). Plaintiff testified that then his foot slipped, ultimately causing him to get caught between the pallet jack and the edge of the truck. Plaintiff testified, in pertinent part:

> "[Seconds after slipping,] I lost my footing, I was unable to get - as I pulled the pallet jack towards me, generally I would walk in front of the pallet, so I wasn't putting myself in that situation. So what happened was because I lost my footing, the pallet and the pallet jack actually got closer - too close to the edge of the truck, it got closer than I wanted it to be, closer that I expected. In the interim, I was caught between the pallet jack and the edge of the truck. I had no more room at

> this point. I had to make a decision . . . instinctively, I was afraid if the pallet and the jack came off the edge of the truck, if I fell, I would have pulled the tile on top of myself. I was afraid of that, so I let go of the jack and I jumped back off the truck as far as I could, you know, in case the load came down, it wouldn't fall on top of me"

(*id.* at 164).

When plaintiff was asked what specifically he slipped on, he replied, "I picked up some grease on the bottom of my shoe . . . [w]hen I unloaded the fourth pallet" (*id.* at 153). He also added that he slipped as he "was in the process of making a 90 - degree turn [with the fifth pallet]" (*id.*). Plaintiff further maintained that he first realized that he had picked up the subject grease on the bottom of his shoe "[w]hen [he] backed the fourth pallet off [of the truck] . . . out by the sidewalk on the curb, [and then he] stepped in something . . . [and] wiped [his] foot clean [on the sidewalk] and then just proceeded back to the truck with the pallet jack" (*id.* at 154). When plaintiff was again asked what he stepped in, he stated, "Grease" (*id.*). When asked how he knew the substance to be grease, plaintiff explained:

> "I looked at that area before I went into the building after I fell, I also had to clean off the bottom of my shoe when I got home and clean it off the floor mat of my car"

(*id.* at 155). Plaintiff noted that, before the time of his fall, he had not yet specifically identified the subject substance as grease.

Plaintiff testified that the grease that caused him to slip was left behind by "a garbage company" (*id.*). Plaintiff had "noticed the driver [of the garbage company] servicing some . . . containers" the day before the accident (*id.*). At the time, the driver, who was changing the wheel on one of the garbage containers, "was greasing" the container's wheels," which were "overhanging the curb onto the sidewalk" (*id.* at 156-157).

Plaintiff further testified that, while he was unloading the truck, he was not tied off to anything. Although he did have some fall protection devices in his gang box, those devices were used only when performing interior work on the Project. In any event, there was nothing on the truck to attach such devices to.

Plaintiff also asserted that no one from RXR 620 ever told him how to perform his work. In fact, before he performed any task, he sought the approval of his employer, Donaldson. In addition, the Donaldson truck driver instructed him as to how the pallets were to be unloaded from the truck. Plaintiff noted that he did not unload the truck from the loading dock at the building, because the dock was "for the tenants only, and that's pretty much how it stayed throughout the project" (*id.* at 147).

**DISCUSSION**

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

***The Timeliness of Plaintiff's Cross Motion***

RXR 620 argues that plaintiff is not entitled to summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against it because his cross motion is untimely, in that it was made after the expiration of the court's 60-day deadline for bringing such motions. Plaintiff filed the note of issue on November 20, 2017, and the cross motion was not filed until February 8, 2018, more than 60 days thereafter. However, as plaintiff argues,

> "[a] cross motion for summary judgment made after the expiration of the [60-day] period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion. An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion (CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion"

(*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006] [internal citations omitted]; *see also Guallpa v Leon D. DeMatteis Constr. Corp.*, 121 AD3d 416, 419-420 [1st Dept 2014], citing *Filannino*).

Here, that part of plaintiff's cross motion seeking relief on the Labor Law § 240 (1) claim is "nearly identical" to that raised by RXR 620 in its motion to dismiss said claim against it -- in that it asks the court to scrutinize the same statutory section for the purpose of obtaining summary adjudication. In any event, CPLR 3212[b] empowers the court to search the record and grant summary judgment to *any* party without the necessity of a cross-motion. Therefore, the court will consider plaintiff's arguments and proofs in support of his request for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim against RXR 620.

***The Labor Law § 240 (1) Claim***

Plaintiff cross-moves for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against RXR 620. RXR 620 moves for summary judgment dismissing said claim against it. Labor Law § 240 (1), also known as the Scaffold Law (*Ryan v Morse Diesel*, 98 AD2d 615, 615 [1st Dept 1983]), provides, in relevant part:

> "All contractors and owners and their agents . . . 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 [1st Dept 2001], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]).

> "Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein"

(*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; *Hill v Stahl*, 49 AD3d 438, 442 [1st Dept 2008]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 267 [1st Dept 2007]).

To prevail on a section 240 (1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of the plaintiff's injuries (*Blake v*

*Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Felker v Corning Inc.*, 90 NY2d 219, 224-225 [1997]; *Torres v Monroe Coll.*, 12 AD3d 261, 262 [1st Dept 2004]).

Initially, RXR 620 asserts that the Labor Law § 240 (1) claim against it should be dismissed, because, as plaintiff fell just four feet to the ground from the bed of a tractor trailer, he "was not exposed to an elevation-related risk and his injury did not directly flow from the application of gravity's force. Rather, plaintiff's accident arose from activities and circumstances that arise on a construction site, and are not covered by section 240 (1)'s elevation-differential protections" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 654 [1st Dept 2012] [internal citations omitted]; *Lavore v Kir Munsey Park 020, LLC*, 40 AD3d 711, 712 [2d Dept 2007] [the approximately five-foot elevation between the top of the truck's utility bin where plaintiff was standing and the ground was not considered by the court to be an elevation-related risk for the purposes of the statute]; *Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]).

In support of this argument, RXR 620 puts forth that courts have determined that the activities conducted from trucks are not elevation-related risks within the meaning of Labor Law § 240 (1) (*see Berg v Albany Ladder Co.*, 10 NY3d 902, 904 [2008]; *Toefer*, 4 NY3d at 407-408; *DeRosa*, 96 AD3d at 654; *Landa v City of New York*, 17 AD3d 180, 181 [1st Dept 2005] [the unloading of a truck was not an elevation-related risk within the meaning of Labor Law § 240 (1)]; *Cabezas v Consolidated Edison*, 296 AD2d 522, 523 [2d Dept 2002] [the task of unloading a truck was not an elevation-related risk, but rather, "it was the type of ordinary risk inherent in construction work"]; *Jacome v State of New York*, 266 AD2d 345, 346 [2d Dept 1999] [Court determined that "[t]he task of unloading a truck is not an elevation-related risk simply because there is a difference in elevation between the ground and the truck bed"]).

It is important to note, however, that, "[w]hile falling from the bed of a truck is not the kind of elevation-related hazard contemplated by the statute, Labor Law § 240 (1) can be applied where some risk-enhancing circumstance of the job implicates the protections of the statute" (*Intelisano v Sam Greco Constr., Inc.*, 68 AD3d 1321, 1323 [3d Dept 2009] [where the plaintiff's work of unloading bundles of insulation required him to get on top of bundles and attach a strap around them to a crane, the Court found that the "circumstance[s] constitute[d] an elevation-related risk greater than merely falling from the bed of a trailer"]). For example, in the case of *Flores v Metropolitan Transp. Auth.* (64 AD3d 418, 419 [1st Dept 2018]), where the "plaintiff fell off a flatbed truck after a load of steel beams, without tag lines, was being hoisted above him by a crane," the Court found that Labor Law § 240 (1) applied, nevertheless, because "[t]he risk of the hoisted load or beams without tag lines triggered the protections set forth in [the statute]."

Here, at the time of the accident, plaintiff was in the process of unloading pallets of acoustical tiles, which were stacked approximately seven feet high and weighed approximately 3,000 pounds. This work required sliding two steel forks underneath the pallet, hydraulically lifting it up, pulling it off the truck onto a lift gate, and then turning it 90 degrees, all the while making sure that the rapidly approaching pallet and pallet jack did not get too close to the edge of the truck. As such, plaintiff was subjected to "an elevation-related risk greater than merely falling from the bed of a trailer" (*Intelisano*, 68 AD3d at 1323).

In addition, Labor Law § 240 (1) not only applies to those gravity-related accidents where a plaintiff falls from height, it *also* applies to those accidents that are caused by the lack of a safety device intended to protect the worker from dangers associated with objects that fall from a height. In order to recover damages for a violation of Labor Law § 240 (1) under a falling

objects theory, a plaintiff can demonstrate that the object that fell was in the process of being hoisted or secured, or that it "was 'a load that required securing for the purposes of the undertaking at the time it fell,'" and that defendants failed to provide a proper safety device to protect plaintiff (*Cammon v City of New York*, 21 AD3d 196, 200 [1st Dept 2005] [citation omitted]; *Dedndreaj v ABC Carpet & Home*, 93 AD3d 487, 488 [1st Dept 2012] ["Plaintiff established his prima facie entitlement to summary judgment by showing that defendants' failure to provide an adequate safety device proximately caused a pipe that was in the process of being hoisted to fall and strike him"]).

RXR 620 argues that plaintiff is not entitled to judgment in his favor under Labor Law § 240 (1) under a falling objects theory because plaintiff was never in danger of an object falling and striking him from a height, as required by the statute, but rather, at the time of the accident, he was injured by his attempt to avoid being struck by an object, i.e., the pallet, approaching him from a lateral position (*see Desharnais v Jefferson Concrete Co., Inc.*, 35 AD3d 1059, 1060 [3d Dept 2006] [no Labor Law § 240 (1) liability where the plaintiff was injured when he was struck by a spreader bar that "did not actually fall, but shifted and swung around"; *Tsatsakos v Citicorp*, 295 AD2d 500, 501 [2d Dept 2002] [no Labor Law § 240 (1) liability where a scaffold swung back laterally and struck the plaintiff because the plaintiff, though standing on the 48th floor, was not threatened with or injured by any gravity-related peril]).

While it is true that Labor Law § 240 (1) does not apply to those situations where a plaintiff is struck, or is injured avoiding being struck, by a laterally approaching object, here, plaintiff testified that he was forced to "jump off the truck as far as [he] could . . . in case the load came down, [so] it wouldn't fall down on top of [him]" (plaintiff's tr at 164-165). As the pallet

was ultimately on its way off the edge of the back of the truck, plaintiff was clearly in danger of being struck by a falling load/pallet. Under these circumstances, the subject work posed an elevation-related hazard which called for the provision of a hoisting and/or securing device for the pallet, and none was provided (*Williams v Town of Pittstown*, 100 AD3d 1250, 1251 [3d Dept 2012]; *Skow v Jones, Lang and Wooton Corp.*, 240 AD2d 194, 195 [1st Dept 1997]). Moreover, it does not matter that the pallet had not yet struck plaintiff at the time that he was forced to jump in order to avoid having the pallet fall on top of him. As the Court of Appeals held in the case of *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 604 [2009]), plaintiffs are not deprived of the protection of section 240 (1) merely because they were not struck by the falling objects themselves. Rather, "[t]he relevant inquiry - one which may be answered in the affirmative even in situations where the object does not fall on the worker - is rather whether the harm flows directly from the application of the force of gravity to the object" (*id.*; *see also Skow v Jones, Lang and Wooton Corp.*, 240 AD2d at 195 ["That plaintiff neither fell from a height nor was struck by a falling object does not require dismissal of his section 240 (1) claim, the proof being sufficient to show that his injury was caused by his effort to prevent the pump from falling"]).

Thus, plaintiff is entitled to partial summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against RXR 620, and RXR 620 is not entitled to summary judgment dismissing said claim.

The court has considered the parties' remaining arguments on this issue and finds them to be unavailing.

***The Labor Law § 241 (6) Claim***

RXR 620 moves for dismissal of the Labor Law § 241 (6) claim against it. Labor Law § 241 (6) provides, in pertinent part, as follows:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, [and] equipped . . . as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

Labor Law § 241 (6) imposes a nondelegable duty on "owners and contractors to 'provide reasonable and adequate protection and safety' for workers" (*Ross,* 81 NY2d at 501). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.* at 503-505).

Initially, while plaintiffs assert multiple alleged Industrial Code violations in their bill of particulars, with the exception of Industrial Code section 23-1.7 (d), plaintiff does not oppose their dismissal. Therefore, these unopposed Industrial Code provisions are deemed abandoned (*see Kempisty v 246 Spring St., LLC*, 92 AD3d 474, 475 [1st Dept 2012]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003] [where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned]).

Thus, RXR 620 is entitled to dismissal of those parts of the Labor Law § 241 (6) claim predicated on the abandoned provisions.

***Industrial Code 12 NYCRR 23-1.7 (d)***

Industrial Code 12 NYCRR 23-1.7 (d) provides:

> "(d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing."

Initially, Industrial Code 12 NYCRR 23-1.7 (d) contains specific directives that are sufficient to sustain a cause of action under Labor Law § 241 (6) (*Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Here, plaintiff testified that his accident was caused when his foot slipped on grease that was left behind by the garbage company, causing him to get caught between the pallet jack and the truck and then jump from the truck in order to avoid being struck by the rapidly approaching pallet. While RXR 620 attempts to convince this court that plaintiff's assertion in regard to the source of the grease is speculative, in fact, plaintiff clearly testified that he remembered stepping in the grease just prior to unloading the subject pallet, and then wiping it off on the curb. He also testified that he noticed the grease on the sidewalk before he went back into the building after his fall.

As the sidewalk constitutes a walkway, and as the grease constitutes a foreign substance that should not have been allowed to remain on said walkway, so as to prevent slipping, section 23-1.7 (d) applies to the facts of this case.

It should be noted that, contrary to RXR 620's contention, in analyzing whether section 23-1.7 (d) applies to the facts of this case, it is not necessary that plaintiff be able to state definitively where the grease came from, or how long it was on the sidewalk before he picked it

up on the sole of his shoe. It is also of no consequence that plaintiff did not immediately slip on the sidewalk where he picked up the grease, but rather, that he slipped once he was back on the metal bed of the truck.

Thus, as this section applies to the facts of this case, RXR 620 is not entitled to dismissal of that part of the Labor Law § 240 (1) claim predicated on an alleged violation of section 23-1.7 (d).

***The Common-Law Negligence and Labor Law § 200 Claims***

RXR 620 moves for dismissal of the common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 is a "codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000] [internal quotation marks and citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200 (1) states, in pertinent part, as follows:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor

Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [to support a finding of a Labor Law § 200 violation, it was not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to the contractor, rather than the method of [the] work"]).

It is well settled that, in order to find an owner or its agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no Labor Law § 200 liability where the plaintiff's injury was caused by lifting a beam, and there was no evidence that the defendant exercised supervisory control or had any input into how the beam was to be moved]). Notably, it is not enough to impute liability for these claims by showing that a defendant was generally responsible for site safety at the Premises, as "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [Court dismissed common-law negligence and Labor Law § 200 claims where the deposition testimony established that, while the defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no Labor Law § 200 liability where the

defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

As discussed previously, plaintiff's accident was caused as a result of grease being allowed to be present on the sidewalk where it posed a slipping hazard. Therefore, the accident was not due to any defect inherent in the Premises, but rather, it was the result of the means and methods of the clean-up work at the site.

Here, it is not clear from the record whether RXR 620, or another entity such as a general contractor or other subcontractor, was responsible for keeping the sidewalk clear of slipping hazards while the Project was underway.

A question of fact exists as to whether RXR 620 directed and supervised the clean-up of the sidewalk area during the renovation of the Premises. Thus, RXR 620 is not entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that defendant RXR 620 Owner II LLC's (RXR 620) motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint against it is denied; and it is further

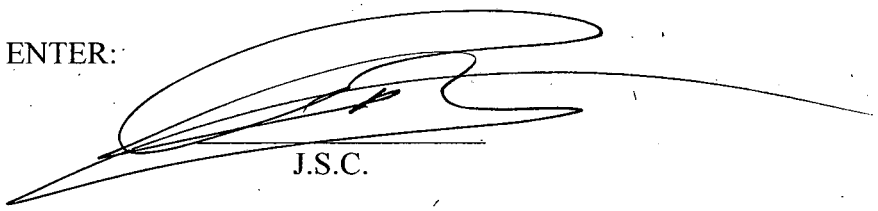
**ORDERED** that plaintiff Walter Rosenblath's cross motion, pursuant to CPLR 3212, for summary judgment in his favor as to liability on the Labor Law § 240 (1) claim as against defendant RXR 620 is granted, and the cross motion is otherwise denied; and it is further

**ORDERED** that the remainder of the action shall continue; and it is further

**ORDERED** that counsel are directed to appear for Early Settlement Conference 1 in Room 422 at 60 Centre Street on March 15, 2019, at 9:30 A.M.

Dated: February 19, 2019

ENTER:



J.S.C.