Tomasino v New York Ladder & Scaffold Corp.
2021 NY Slip Op 30257(U)
January 27, 2021
Supreme Court, Kings County
Docket Number: 500904/2018
Judge: Edgar G. Walker
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At an IAS Term, Part 90 of the Supreme Court of the State of New York, County of Kings, on the 27th day of January, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,

Justice.

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JUSTIN TOMASINO,

Index No. 500904/2018

Plaintiff,

- against -

Mot. Seqs. 4, 5, 6, 7

NEW YORK LADDER & SCAFFOLD CORPORATION, NEWPORT LEASING LIMITED PARTNERSHIP, KNS BUILDING RESTORATION, INC., AND ALL CITY RESTORATION, INC.,

Defendants.

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The following e-filed papers read herein:	NYCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	89-105, 107-127, 129-151, 158-175
Opposing Affidavits (Affirmations)	106, 182-184, 128, 152-153, 154-155, 186-187, 178, 180-181, 179, 185
Reply Affidavits (Affirmations)	156-157, 190-192, 193, 188, 189

Upon the foregoing papers, defendants All City Restoration, Inc. (All City), New York Ladder and Scaffold Corporation (New York Ladder), KNS Building Restoration, Inc. (KNS) and Newport Leasing Limited Partnership (Newport) (collectively defendants), move (in motion sequence [mot. seq.] four, five, six and seven, respectively), for orders, pursuant to CPLR 3212, granting them summary judgment dismissing this action and all cross claims against them. Newport also specifically moves for summary judgment (1) granting its cross claim against KNS for contractual and common law indemnification, and (2) dismissing the cross claim by KNS and New York Ladder against it for common law indemnification and contribution.

Background

Plaintiff Justin Tomasino (Tomasino or Plaintiff) brings this personal injury action arising out of a September 8, 2017 trip and fall over a mudsill[1] that was underneath a column for a scaffold[2] at 444 Avenue X in Brooklyn (the subject location). Newport owns the building at the subject location.

The Contracts and Subcontracts

By Master Construction Agreement entered into on June 7, 2013, Newport

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[1] Mudsills are wood blocks that act as levelers when erecting a scaffold on a sidewalk.

[2] In their papers, the parties use the terms "scaffolding" and "sidewalk shed" interchangeably. The court uses the term "scaffold" or "scaffolding" herein.

retained KNS as general contractor to perform construction work on the façade of the building at the subject location. Pursuant to a subcontract dated July 26, 2017, KNS retained All City to perform the exterior façade renovation work at the subject location. By its terms, the KNS-All City subcontract specifically excluded "permits," "sidewalk protection," and "site fencing" from the scope of All City's work.

KNS also subcontracted the work of building the scaffolding, as well as temporary lighting underneath it, to New York Ladder. A "Shed Proposal and Agreement" dated May 11, 2017 reflects this subcontract. In subsection four of the agreement, entitled "Customer's Duties," KNS acknowledged its responsibility to keep the equipment in good, safe and effective working condition and in conformity with all laws and ordinances. KNS also agreed not to "alter or modify" the equipment in any way or permit anyone to damage or remove any part thereof. Further, the agreement stated that New York Ladder "shall have no responsibility, direction or control over the manner of operation of equipment by [KNS], unless specifically retained in writing for such additional services." A maintenance log submitted by the parties, entitled "Sidewalk Shed Inspection Maintenance Log (Part I – Initial Inspection)" states that the scaffold was installed by New York Ladder for KNS, the permit number for the job, and notes the date of installation as June 8, 2017.

Deposition Testimony

A. Plaintiff

Plaintiff testified that between approximately 10:30 p.m. and 11:00 p.m. on the evening of the incident, he left his home to walk to Rite Aid to buy milk. It was misty/rainy that evening, and plaintiff remembers the lighting "being very dark" at the time (Plaintiff tr at 23). Plaintiff was familiar with the area because he lived in that area his entire life and the incident took place about a block and half from his home. Prior to the incident, plaintiff walked the same route once or twice a week. Plaintiff testified that just prior to the accident:

"A. I was coming - - I guess I was going West on the sidewalk and when I got to the end of the scaffolding, still part of where the building was, there were bushes that you can see in the other picture and it sticks out.

MR. GILBERG: What sticks out?

THE WITNESS: The bushes stick out into like the walkway. Being that they were wet, I didn't want to brush up against it so I kind of leaned more to where the scaffolding was and that's when I tripped over the wood that would hold up the scaffolding." (id. at 16).

Plaintiff further testified:

"Q. That wood piece is what caused your accident, correct?

A. Yes.

Q. To you knowledge, did anything else cause your accident?

A. No." (id. at 59).

With respect to the lighting at the subject location, plaintiff did not recall if the light was on over the scaffold, but believes that there were streetlights illuminating a portion of the sidewalk as well as the other side of the street. Plaintiff further testified:

"Q. Could you see the sidewalk underneath the scaffolding as you are walking through it on the night of the loss?

A. I don't know, I remember it being dark. I saw a tunnel basically and I saw the opening, that's where I was headed.

Q. So, essentially you couldn't see the ground or anything in front of your feet as you were walking through the scaffolding?

A. There was lights but I don't -- like if -- if they're high and your vision is and you can't -- you know what I'm saying? If you're walking in some place dark and there's lights above you—

MR. GILBERG:--you're looking straight ahead?

THE WITNESS: Straight ahead, yeah.

Q. Is it fair to say that it would be difficult to see the sidewalk when you were walking through the scaffolding on the day –

A. -- no, I could see the sidewalk and the path I need go through but it's not like it's illuminated. In other words, you see the outline of where you need to go. If you're

underneath the overhang, it's lit up on the outside and it's like you're in a tunnel and you see the light; that's the way I was going.

Q. So, there was more lighting on the portion of the sidewalk that was not covered by the scaffolding?

A. Right.

Q. Why didn't you walk on the portion of the sidewalk that had more lighting?

A. You couldn't.

Q. Looking at Defendant's Exhibit C, we can see that there is a portion of the sidewalk that is not covered by the scaffolding –

A. -- I'm coming from this way (indicating), there's a tree in the way." (id. at 83-85).

Plaintiff testified that he had the option to leave the portion of the sidewalk that had the scaffolding, but it went into the street, and that he did not want to walk into the street. At his deposition, plaintiff was shown photographs of the subject location. The photographs, submitted in support of defendants' motions, show multiple mudsills supporting the scaffolding placed at regular intervals. One of the photographs also depicts the bushes in front of the building that plaintiff testified were wet and sticking out into the walkway. The space between the bushes and the mudsills is also evident in the photograph. Plaintiff testified that there was an exit through the opening under the

scaffold before he got to the subject mudsill, but that it was dark and that he did not see it. The exit was after the tree depicted in the photos.

Plaintiff testified that he did not know who owned the building at the subject location, who erected the scaffolding, or who was responsible for maintaining the sidewalk where he fell.

B. KNS

Tamir Kaldas, a project manager/estimator for KNS testified that as part of its business, KNS subcontracted the work of constructing the scaffolding. Kaldas testified that KNS was hired by the LeFrak Organization, who are also known as Kings and Queens3 to perform façade work at the subject location. KNS then retained New York Ladder to provide the scaffolding.

According to Kaldas, All City was responsible for checking the scaffolding on a daily basis to make sure that it was safe. All City performed daily visual inspections of the scaffolding and the lighting underneath. KNS also conducted visual inspections while onsite. All City was responsible for letting KNS know if the lights under the scaffolding went out, and Kaldas would make a written record of it. Kaldas recalled that there were no issues raised regarding the scaffold construction and no written records of

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[3] These organizations are apparently related to Newport.

any complaints or calls for maintenance. Kaldas confirmed that per the KNS-All City subcontract, All City was not responsible for sidewalk protections, fencing, or obtaining permits. To Kaldas's knowledge, however, All City would not have been excluded from responsibility for inspecting and maintaining the scaffolding. Kaldas's understanding that All City was responsible for maintaining and inspecting the scaffolding was based on the section of the subcontract that states:

> "Subcontractor will protect (including cleanup and dust reduction/control) existing construction while performing the work. Any work performed by others, previous, existing, and/or new, that is damaged by this Subcontractor or its employees or agents shall be the responsibility of this Subcontractor to replace at no additional cost. This shall be determined at the sole discretion of the Contractor."

(KNS-All City subcontract ¶ 32). Kaldas further testified that New York Ladder was not responsible for day-to-day maintenance of the scaffolding, but would only respond to KNS if KNS inspected the site and determined that maintenance was required.

Kaldas testified that there was lighting under the scaffolding about every 15-20 feet. Generally, KNS and All City would be responsible for making sure that the lights were on at all times. If there was a time period where All City was not working, because they were not always working there, Kaldas went to the site from time to time to perform inspections. Kaldas personally observed All City perform inspections when he was at the subject location once or twice every two weeks. If a bulb went out, KNS was responsible for replacing it. However, if it were an electrical issue and not just a bulb,

New York Ladder would be responsible.

Kaldas testified that usually, the building provides the electricity for the scaffolding. The electrician hired by New York Ladder would tap into the electricity of the building at the subject location. The building does not connect to the lighting, but owns the electricity and the panels in the buildings, so building maintenance can disconnect the power to the lights if it so desired.

Kaldas testified that once New York Ladder finished erecting the scaffolding, they provided an inspection, initial report or an inspection log. Kaldas does not recall there ever being a complaint about the scaffolding or the lighting.

C. New York Ladder

John Carretta, a sales estimator for New York Ladder, testified that he met with Kaldas one time at the subject location to measure and price out the scaffold and to show New York Ladder's installers what needed to be done. When Carretta visited the site, he did not make any suggestions to anyone at KNS or otherwise regarding alterations to the physical appearance of the area where scaffold was built. Carretta testified that if he had seen something that he thought would interfere with the erection and safe use of the scaffold it was his job to bring it to Kaldas's and KNS's attention.

Carretta testified that New York Ladder was only responsible for the build and installation of the scaffold and had to ensure that it was built correctly pursuant to the

engineer's drawings. According to Carretta, New York Ladder was not responsible for maintaining the scaffolding after it was installed. Rather, KNS was responsible its day-to-day maintenance after it was built. Carretta inspected the scaffold after it was erected. During that inspection, performed during the day, Carretta observed that the lights were operational. Carretta was never at the subject location at night to observe the effect of the lighting under the scaffold.

Carretta testified that no one ever complained to New York Ladder about the lighting, the position of legs or mudsills on the sidewalk, or how close bushes were to one side of the scaffold. New York Ladder also never received any notice of violation from any city agency regarding the condition of the sidewalk, scaffold or the mudsills. According to Carretta, New York Ladder never had anything to do with trimming the bushes at the subject location.

D. All City

Edwin Morales, vice president of All City, testified that in August of 2017, All City commenced exterior restoration work on the building at the subject location and that Kaldas was the site supervisor. Morales, who negotiated and executed the subcontract on All City's behalf, was never told by KNS that All City would in any way be responsible for inspecting or maintenance of the scaffolding. Morales notes that the subcontract specifically excluded permits, sidewalk protection and site fencing. Morales discussed the exclusions with KNS, informing them that All City would not be

involved with the installation of the scaffolding, and that they would not be fixing anything else; that would be KNS's responsibility.

While onsite, Morales inspected of the scaffold lights because his responsibility was to check if something was wrong and to let KNS know. However, according to Morales, All City was not responsible for fixing the lights, but merely for reporting any problem. Morales testified that All City's work at the site ended at 4:30 p.m. and All City was not responsible for what happened at the site between then and the next morning. Morales did not recall observing any problems with the scaffold or the lighting. Morales was only responsible for checking the lights under the scaffolding.

E. Newport

Alfred Nokaj, superintendent of the building at the subject location, testified that he was responsible for cleaning and repairs inside the building. Nokaj testified that he had nothing to do with erecting the scaffold or façade work to the building at the subject location and that his only duty with respect to the scaffold was sweeping. With respect to the bushes at the front entrance of the building, Nokaj testified:

"Q. Did you have anything to do with maintaining the bushes?

A. Just the top and just to cut, twice a year.

Q. Cut them back?

A. Just to make it look good nothing else.

Q. You said cut them back twice a year?

A. Something like that.

Q. Do you remember when during the year you would cut the bushes back?

A. Usually we do it in May.

Q. And then again?

A. And October.

Q. Do you recall anyone ever complaining to you that the bushes were getting too big or were protruding onto the sidewalk?

A. No." (Nokaj tr at 13-14).

Nokaj testified that the scaffold lights were on "24/7," and that he never saw a time that the lights under the scaffold were off. He also testified that no one ever complained about the scaffold or the lights under the scaffold.

Plaintiff's Complaints and Defendants' Cross Claims

On January 16, 2018, plaintiff filed a complaint against KNS, Newport and New York Ladder under this index number alleging that the defendants failed to uphold their

duty of keeping and maintaining the sidewalk in good repair and safe condition, causing the premises to become unsafe and dangerous to pedestrians, and thus in their negligence, caused plaintiff to fall and sustain injury (see Complaint, NYSCEF Doc No. 2, ¶¶ 42-43). The complaint further alleges that these defendants caused or permitted the sidewalk to be encumbered with construction material, scaffolding and parts, wood beams and other loose parts; that the sidewalk was uneven, holey, raised or not smooth; that the sidewalk was dangerous and defective and constituted a nuisance and a trap; that the sidewalk was obstructed; and that defendants failed to warn the public of the sidewalk's condition. KNS, Newport and New York Ladder filed answers and cross-claimed against each other.

On January 18, 2019, plaintiff then filed a separate complaint in this court against All City under index Number 501329/2019, containing the same allegations in the complaint against Newport, New York Ladder and KNS. All City filed an answer, but did not assert any cross claims. By order dated June 21, 2019, the court consolidated both actions for all purposes under this index number. After the actions were consolidated, KNS, New York Ladder asserted cross claims against All City for common law and contractual indemnification and contribution.

Defendants' Summary Judgment Motions Seeking
Dismissal Of Plaintiff's Complaints

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in

admissible form to demonstrate the absence of any material factual issues (see CPLR 3212 [b]; Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Korn v Korn, 135 AD3d 1023, 1024 [3d Dept 2016]). Failure to make this prima facie showing requires denial of the motion (see Alvarez, 68 NY2d at 324; Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (see CPLR 3212; Alvarez, 68 NY2d at 324; Zuckerman, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (Banco Popular North America v Victory Taxi Management, Inc., 1 NY3d 381, 383 [2004] [internal quotations omitted]). The court must view the totality of evidence presented in the light most favorable to the nonmoving party and accord that party the benefit of every favorable inference (see Fortune v Raritan Building Services Corp., 175 AD3d 469, 470 [2d Dept 2019]; Emigrant Bank v Drimmer, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (Sillman v Twentieth Century-Fox Film Corp, 3 NY2d 395, 404, rearg denied 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to

determine whether material factual issues exist, not resolve such issues'" (Ruiz v Griffin, 71 AD3d 1112, 1115 [2d Dept 2010], quoting Lopez v Beltre, 59 AD3d 683, 685 [2d Dept 2009]).

A. Defendants' Duty of Care to Plaintiff

In order to establish negligence, a plaintiff must prove the existence of a duty, a breach of that duty, and that such breach was a substantial cause of the resulting injury (see Atkins v Glens Falls City School Dist., 53 NY2d 325, 333 [1981]; Baptiste v New York City Tr. Auth., 28 A.D.3d 385, 385 [1st Dept 2006], citing Palsgraf v Long Is. R.R. Co., 248 NY 339 [1928]). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]; see also Palka v Servicemaster Management Services Corp., 83 NY2d 579, 584-585 [1994]). "[T]he existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations" (Espinal, 98 NY2d at 138; see also Palka, 83 NY2d at 585). An evaluation of whether a duty exists "necessitates an examination of an injured person's reasonable expectation of the care owed and the basis for the expectation and the legal imposition of a duty" (Palka, 83 NY2d at 585).

As a matter of public policy, a contractual obligation, standing alone, generally does not give rise to tort liability in favor of a third party (see Espinal, 98 NY2d at 138-139; Palka,

83 NY2d at 586; Thayer v Community Services for the Mentally Retarded, Inc., 184 AD3d 889, 891 [2d Dept 2020]; Sperling v Wyckoff Heights Hospital, 129 AD3d 826, 826 [2d Dept 2015]; Glover v John Tyler Enterprises, Inc., 123 AD3d 882, 882 [2d Dept 2014]) because imposing liability under such circumstances may render a contracting party liable to an indefinite number of potential third-party beneficiaries (see Espinal, 98 NY2d at 138-139; Palka, 83 NY2d at 586). However, under some circumstances, a contracting party assumes a duty of care to certain persons outside the contract (see Espinal, 98 NY2d at 139). For example, if the parties to a contract intended to confer a direct benefit on a third-party beneficiary, third-party beneficiary status may be inferred from the surrounding circumstances and need not be expressly stated in the contract (see Vargas v Crown Container Co., Inc., 155 AD3d 989, 992 [2d Dept 2017]; Aievoli v Farley, 223 AD2d 613, 613 [2d Dept 1996]).

In Espinal, the Court of Appeals identified three situations in which a contracting party may be said to assume a duty, and therefore, be potentially liable in tort, to a third party: (1) where the contracting party, in failing to exercise reasonable care in performing its duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the contracting party's continuing performance of its duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see Espinal, 98 NY2d at 140; Thayer, 184 AD3d at 890-891; Sperling, 129 AD3d at 826).

While some cases have held that in order to meet their burden, defendants are only obligated to negate those exceptions that were expressly pleaded by the plaintiff or expressly set forth in his bill of particulars (see Hagan v City of New York, 166 AD3d 590, 592 [2d Dept 2018]; Barone v Nickerson, 140 AD3d 1100, 1101-1102 [2d Dept 2016]; Sperling, 129 AD3d at 827; Foster v Herbert Slepoy Corp., 76 AD3d 210, 214 [2d Dept 2010]), other cases have looked to whether the pleadings, viewed in the light most favorable to the plaintiff, asserted the applicable Espinal exceptions (see Santos v Deanco Services, Inc., 104 AD3d 933, 934 [2d Dept 2013]; Shaw v Bluepers Family Billiards, 94 AD3d 858, 860 [2d Dept 2012]; Rubistello v Bartolini Landscaping, Inc., 87 AD3d 1003, 1004 [2d Dept 2011]). Once a defendant makes its prima facie showing, the burden shifts to the plaintiff to come forward with evidence sufficient to raise a triable factual issue as to the applicability of one or more of the Espinal exceptions (see Foster, 76 AD3d at 214).

(1) Parties' Contentions

All City, KNS and New York Ladder contend that as contractors and subcontractors performing work at the subject location, they did not owe a duty to of care to plaintiff, a third party to the contracts, and that they are entitled to summary judgment on this ground.

KNS, All City and New York Ladder contend that, with respect to the first Espinal exception, they did not launch a force or instrument of harm. In that regard, All City

argues that it did not fail to exercise reasonable care, and did not undertake to render services and then negligently created or exacerbated a dangerous condition. All City and New York Ladder submit that there is no indication that the mudsill was defective. New York Ladder states that the mudsills were used in accordance with approved New York Department of Building plans and conformed to industry standards.

All City also contends that there is no evidence of its affirmative negligence. To that end, All City claims that it had nothing to do with plaintiff's accident because it is undisputed that: (1) it did not install the scaffolding, mudsill or lighting but rather KNS hired New York Ladder to do so; (2) the scaffolding, including the lighting, was inspected by New York Ladder and KNS upon installation; (3) All City was only hired to do façade restoration work; (4) sidewalk protection was explicitly excluded from All City's contract with KNS; (5) All City only inspected the lighting under the scaffold when it was on site; (6) All City was not responsible for maintaining the shrubbery; and (7) All City inspected the lighting on he sidewalk bridge prior to leaving the site on the day of the accident and found that the light was on.

In addition, All City contends that there is no triable issue of fact as to whether it launched a force or instrumentality of harm because its subcontract with KNS explicitly excluded "sidewalk protection." New York Ladder contends that its work at the subject location was completed two months prior to plaintiff's accident and that its employees were not required to return to the site, and therefore it did not cause plaintiff's injury.

KNS argues that the scaffolding was installed solely by New York Ladder employees and that plaintiff cannot show that KNS altered the scaffolding, mudsills or lighting. KNS highlights the subcontract between it and New York Ladder prohibiting KNS from altering the scaffolding, and requiring KNS to notify New York Ladder if it observed any issues. KNS further notes that there was no reason for it to make any alterations, because no issues with the scaffolding, mudsills or lighting were ever observed, and no violations were ever received for the subject location.

With respect to the second Espinal exception, All City and KNS contend that plaintiff has not proven that he detrimentally relied on their continued performance and maintenance at the subject location. All City notes that plaintiff was not even aware of All City's existence or the contractual relationship between All City and KNS.

With respect to the third Espinal exception, All City, New York Ladder and KNS argue that it did not entirely displace Newport's duty to maintain the premises and/or the adjacent sidewalks. In that regard, All City submits that it was only hired to perform façade restoration work, and not to maintain the premises. New York Ladder contends that in accordance with the terms of its proposal with KNS, KNS retained the duty to maintain and inspect the scaffolding and the lighting. In addition, New York Ladder submits that the KNS and All City witnesses testified that these entities also performed maintenance of the sidewalk, scaffolding and lighting. In addition, New York Ladder contends that its work on the scaffold was completed two months prior to plaintiff's

accident, and that it was never required to the return to the subject location to perform maintenance work.

New York Ladder also contends that plaintiff has failed to establish that the mudsill was defective or was the proximate cause of his accident. In that regard, New York Ladder submits an affidavit from its expert, Jeffrey Schwalje, a professional engineer. Mr. Schwalje opines that New York Ladder installed the scaffolding pursuant to approved plans from the New York Department of Buildings and in compliance with the Building Code. Schwalje also opines that the mudsills used to erect the scaffold were industry standard. Schwalje further opines that there was no reason that plaintiff should have tripped over the mudsill, as there was sufficient space to exit from under the scaffold and because the lighting was adequate. According to Schwalje, plaintiff's action of leaning more toward the column with the mudsill in order to avoid the wet bushes either caused or contributed to his accident. Schwalje submits that the photographs demonstrate that there was "more than adequate" space for plaintiff to walk without contacting and tripping over the mudsill. Schwalje believes that plaintiff's claim about improper lighting under the scaffold is without merit because, as seen in photographs and as testified to by the witnesses, the lights were "on 24/7" and provided sufficient illumination for persons to properly observe the sidewalk surface, including the mudsill. Schwalje concludes that no act or omission by New York Ladder caused or contributed to plaintiff's accident.

KNS contends that the fact that it did not entirely displace Newport's duty to maintain the subject location is evidenced in Nokaj's testimony that he, rather than KNS, was responsible for sweeping the sidewalk where plaintiff fell. KNS also notes that the contract between it and New York Ladder did not allow KNS to maintain or repair the scaffolding, and that KNS was required to notify New York Ladder if it noticed that a portion of the sidewalk scaffolding became unsafe or in a state of disrepair. In addition, KNS points to Morales' testimony that he and All City were responsible for ensuring the lights were operational while onsite as evidence that KNS did not entirely displace Newport. KNS further highlights Carretta's testimony that he performed a site inspection on New York Ladder's behalf after completing the work to ensure that its installation in accordance with the blueprints.

In opposition, plaintiff contends that All City, KNS and New York Ladder have not established the inapplicability of the Espinal exceptions. With respect to the "launch a force or instrument of harm" exception, plaintiff argues that All City, New York Ladder and KNS has not established that it was not negligent in creating and/or exacerbating the dangerous condition of the mudsill. In that regard, plaintiff claims that the issue is not merely whether the mudsill, in and of itself was dangerous, but whether its placement adjacent to the allegedly overgrown bushes constituted a tripping hazard, limited access to the passageway under the scaffold, and caused plaintiff to trip over the mudsill. Plaintiff also argues that these defendants have not eliminated all questions of fact as to

whether the lights under the scaffold were on at the time of the accident, or that the lighting conformed to DOB specifications. Plaintiff contends that the parties' passive omissions may be considered in addition to any affirmative negligence.

Plaintiff further contends that there is an issue of fact as to whether the plans that New York Ladder relied on to install the scaffold were defective, given how close the subject mudsill was in relation to the overgrown bushes. Plaintiff argues that even if the Department of Buildings plans were proper, there is no evidence that New York Ladder actually followed the plans or that the DOB inspected the work and approved the scaffold as constructed.

With respect to the "entirely displace" exception, plaintiff argues that All City, KNS and New York Ladder have not eliminated all questions of fact as to whether the lights under the scaffolding were properly installed and working at the time of plaintiff's accident. Plaintiff asserts that New York Ladder and All City have not established that they did not entirely displace any duty by KNS to maintain the lighting in good working order. Plaintiff also argues that KNS has not established as a matter of law that it did not entirely displace Newport's or any other entity's duty maintain the lighting. Plaintiff notes that while Carretta testified that that the installation of the lighting was subcontracted to Vass, there is no evidence as to what Vass's obligations were under the subcontract and whose responsibility it was to ensure that the lights were installed properly and were functioning. Plaintiff also notes that Morales testified that it was All

City's responsibility to inspect the lighting and to notify KNS of any problems, and that Kaldas testified that it was All City's responsibility to replace any burned out bulbs. In addition, plaintiff notes that as general contractor, KNS had primary responsibility to ensure that the work was performed properly, and that the master contract between KNS and Newport also raises questions as to whether KNS displaced Newport's duty as owner.

Plaintiff also argues that KNS has not established that its responsibility for checking the lighting did not displace any duty by Newport or any of the other defendants to maintain the lighting. Plaintiff contends that while Kaldas testified that KNS was not responsible for erecting or inspecting the scaffold or the lighting underneath it, he conceded that KNS was the general contractor with primary responsibility of ensuring that the work was performed properly by the subcontractors.

(2) Discussion

In the instant matter, plaintiff does not contend that he is a direct beneficiary or express beneficiary of the contracts and subcontracts between the defendants. Therefore, the court proceeds to evaluate whether New York Ladder, KNS and All City have met their prima facie burden of negating the applicability of Espinal exceptions.

With regard to the "detrimental reliance" Espinal exception, viewed in the light most favorable to plaintiff, the pleadings do not assert that he detrimentally relied on the contracting parties' continuing performance of their duties (see Santos, 104 AD3d at 934;

Shaw, 94 AD3d at 860; Rubistello, 87 AD3d at 1004). Nor does plaintiff proffer any argument about this exception in his opposition to defendants' motions. Accordingly, New York Ladder, KNS and All City need not negate the applicability of this exception (id). Even if the pleadings did contain allegations from which it can be inferred that plaintiff detrimentally relied on the parties' continuing performance of their duties, such claim would fail, because plaintiff testified that he did not know who the defendant entities were, who was responsible for erecting or maintaining the scaffold and mudsill, or who was responsible for maintaining the lighting and bushes (see Foster v Herbert Slepoy Corp., 76 AD3d 210, 215 [2d Dept 2010] [detrimental reliance argument unavailing when plaintiff had no knowledge who was responsible for maintenance services at the premises]).

The pleadings do, however, assert the "launch a force or instrument of harm" Espinal exception (see Shaw, 94 AD3d at 860; Rubistello, 87 AD3d at 1004). KNS, All City and New York Ladder have demonstrated the inapplicability of this exception. "[A] defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury" (Espinal, 98 NY2d at 141-142). "Launch is an action verb, requiring by definition evidence that the contractor affirmatively left the premises in a more dangerous condition than it was found" (Santos v Deanco Servs., Inc., 142 AD3d 137, 142 [2d Dept 2016]).

There is no evidence that KNS, All City or New York Ladder negligently created

or exacerbated any dangerous condition at the subject location such that they would be liable for plaintiff's injuries. Rather, the evidence demonstrates the scaffold was erected pursuant to plans that were approved by the New York City Department of Buildings. Contrary to plaintiff's allegations, there is no evidence that the scaffold or the mudsills were improperly installed. There is also no evidence that the scaffold was improperly installed too close to the bushes, as plaintiff does not submit any evidence of any regulations governing how wide the walkway must be between scaffolding and bushes in front of buildings. Defendants' witnesses all testified that they did not receive any complaints regarding the scaffold, the mudsill, the lighting or the bushes at the subject location, and plaintiff did not submit any evidence of such complaints. Additionally, plaintiff did not testify that the lighting underneath the scaffolding was out, defective, or inadequate. Plaintiff specifically testified that there was light, but that it was dark out because it was approximately 11:00 p.m., and that he fell not because it was too dark but because he swerved to avoid wet bushes and tripped on the mudsill. Moreover, the photographs depicting the subject location demonstrate that there was ample room for pedestrians to walk between the bushes and the subject mudsill.

Even if the light bulbs under the scaffoldings were out or if the bushes were overgrown due to them not being trimmed for a few months (as plaintiff contends may have been the case but for which there is no evidence), the failure to replace a light bulb or trim bushes is an omission of failing to perform a duty and does not constitute the

launching of a force or instrument of harm (see Robles v Taconic Management Company, LLC, 173 AD3d 1089, 1093 [2d Dept 2019]; Trombetta v G.P. Landscape Design, Inc., 160 AD3d 677, 678 [2d Dept 2018]). There was no evidence, for example, that these defendants improperly installed or replaced a defective light bulb, improperly installed the scaffold, trimmed the bushes in a manner as to obstruct the sidewalk – actions which may constitute a launching a force for harm (see Calderon v Cruzate, 175 AD3d 644, 647 [2d Dept 1019]; Levin v G.F. Holding, Inc., 139 AD3d 910, 911 [2d Dept 2016]).

With respect to the third Espinal exception, the evidence demonstrates that All City, New York Ladder and KNS did not have exclusive control over the subject premises so as to "entirely displace" Newport's or another defendant's duty to safely maintain the sidewalk. Indeed, plaintiff is unable cite any provision in the relevant contracts between (1) KNS and Newport, (2) KNS and All City, and (3) KNS and New York Ladder "that imposes any obligation approaching a 'comprehensive and exclusive' duty of inspection and maintenance" so as to hold KNS, All City or New York Ladder liable in tort (Timmins v Tishman Const. Corp., 9 A.D.3d 62, 67 [1st Dept 2004]; see also Thayer, 184 AD3d at 891).

The subcontract between KNS and All City demonstrates that All City was hired solely to perform façade restoration work at the subject location, and not to maintain the scaffold, the lighting under the scaffold, lighting or the bushes. Moreover, the fact that the subcontract specifically excluded "sidewalk protection," "permits," and "site fencing"

from the scope of All City's work demonstrates that All City did not have exclusive control over the sidewalk.

The subcontract between KNS and New York Ladder demonstrates that while New York Ladder was hired to erect the scaffold, KNS retained its duty to keep the equipment in good, safe and working order in accordance with all laws and ordinances. The subcontract further provided that New York Ladder had no responsibility, direction or control over the manner of operation of equipment by KNS. Yet, this subcontract also prohibited KNS from altering or modifying the sidewalk in any way. Therefore, this subcontract demonstrates the interrelationship between KNS's and New York Ladder's duties with respect to the subject location.

In addition, testimonial evidence demonstrates that both KNS and All City shared responsibility for inspecting the lighting. In that regard, Morales testified on behalf of All City that it was only his duty to inspect the lights when he was on site until 4:30 p.m., but that if they were defective, his duty was merely to report to KNS and KNS was responsible for fixing the lights. Kaldas testified on behalf of KNS that KNS was also responsible for making sure that the lights were on at all times, that he performed site inspections to ensure compliance, and that it was KNS's duty to replace any burned out bulbs.

Kaldas also confirmed Carretta's testimony on behalf of New York Ladder that New York Ladder was not responsible for day-to-day maintenance of the scaffolding, but

that KNS would respond only if it found that maintenance was required during one of his inspections. Finally, Nokaj, on behalf of Newport, testified that he was only responsible for trimming the bushes twice a year to make sure that they looked good.

In sum, the testimony, combined with the subcontracts, demonstrate that no defendant had exclusive control over inspection and maintenance of the sidewalk at the subject location so as to entirely displace Newport or another party's obligation. Thus, All City, New York Ladder and KNS have made their prima facie showing of demonstrating the inapplicability of this Espinal exception.

In opposition, plaintiff has failed to raise a triable issue of fact regarding the applicability of the Espinal exceptions that would preclude granting All City, New York Ladder and KNS summary judgment as a matter of law. With respect to the "launching a force" exception, the cases cited by plaintiff are inapposite, as they involve scenarios where, unlike here, the location of plaintiff's accident was obviously obstructed so that a court may find that there is a question of fact that a defendant or other entity launched a force for harm [see e.g. Ryan v Gordon L. Hayes, Inc., 22 AD2d 985 [3d Dept 1964] [ladder used in attaching overhanging sign to a building obstructed two-thirds of the sidewalk and pieces of wire and mechanics' tools were strewn on the sidewalk, which was also irregular and depressed]; Coulton v City of New York, 29 AD3d 301 [1st Dept 2005] [defendant narrowed the sidewalk, which already contained breaks and irregularities, by erecting plywood cover around the building, which increased risks of

pedestrians tripping over broken and uneven portion of the sidewalk]; Hunter v City of New York, 23 AD3d 223, 224 [1st Dept 2005] [defendant erected plywood construction fence which encroached on sidewalk at demolition site and limited the pedestrian passageway to a portion of the sidewalk abutting a subway grating]; Stolzman v City of New York, 146 AD3d 531 [1st Dept 2017] [sidewalk narrowed due to affirmative placement of Christmas tree pile in sidewalk]).

Plaintiff also failed to raise an issue of fact as to whether any of the defendants' contracts were so entirely comprehensive and exclusive so as to entirely displace the landowner's responsibility for the subject premises. Hence, All City's, KNS's and New York Ladder summary judgment motions warrants being granted in its entirety on this ground.

B. Dangerous or Defective Condition

Newport contends that it is entitled to summary judgment because the subject location was safe and because it did not create any dangerous condition that caused plaintiff's accident. New York Ladder, KNS and All City also argue that even if they did have a duty to plaintiff (which they deny), they are also entitled to summary judgment on this ground.

In a trip-and-fall case, in order to demonstrate prima facie entitlement to summary as a matter of law, a defendant must establish that it maintained the premises in

reasonably safe condition and did not create a dangerous or defective condition on the property or have actual or constructive notice of the dangerous or defective condition for a sufficient length of time to remedy it (see Schubert-Fanning v. Stop & Shop Superm. Co., LLC, 118 A.D.3d 862, 863 [2d Dept 2014]).

While "[a] landowner has a duty to maintain its premises in a reasonably safe condition," "[t]here is, however, no duty to protect or warn against conditions that are open and obvious and not inherently dangerous" (Hayward v Zoria Housing, LLC, 187 AD3d 997, 997-998 [2d Dept 2020]; see also Benjamin v Trade Fair Supermarket, Inc., 119 AD3d 880, 881 [2d Dept 2014] ["there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous"]). Open and obvious conditions are that those that are readily observable by the reasonable use of one's senses (see Costidis v City of New York, 159 AD3d 871, 871 [2d Dept 2018]). "Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury" (Hayward, 187 AD3d at 998; Bissett v 30 Merrick Plaza, LLC, 156 AD3d 751, 751 [2d Dept 2017]). "Similarly, whether a condition is open and obvious depends on the circumstances of the case, and something that ordinarily would be readily observable may be obscured by inadequate illumination" (Bissett, 156 AD3d 751). However, "a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear

and undisputed evidence" (Gerner v Shop-Rite of Uniondale, Inc., 148 AD2d 1122, 1123 [2d Dept 2017], quoting Tagle v Jakob, 97 NY2d 165, 169 [2001] [citations omitted]).

"Apart from the duty to warn of dangerous conditions on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it" (Cupo v Karfunkel, 1 AD3d 48, 51 [2d Dept 2003]). Proof that a dangerous condition is open and obvious does not preclude a finding of liability for failure to maintain a property in safe condition (see Russo v Home Goods, Inc., 119 AD3d 924, 925 [2d Dept 2014]). A hazard that is open and obvious may become a trap for the unwary where the condition is obscured or where the plaintiff is distracted (id.). Whether a condition is inherently dangerous or is reasonably safe depends on the totality of the specifics of each case (id. at 925-926).

(1) Parties' Contentions

Defendants contend that the mudsill plaintiff tripped over was open and obvious and not inherently dangerous, and therefore, defendants are not liable. All City argues that there is no duty to protect or warn against an open and obvious condition that a person reasonably using his or her senses could observe. It submits that a reasonable person would not only notice the mudsills when walking under a scaffold, but would also

expect them.

New York Ladder contends that the mudsill was neither defective nor the proximate cause of plaintiff's accident, relying on Schwalje's expert affidavit and witness deposition testimony.

KNS initially notes plaintiff's testimony that it was the mudsill, rather than any other condition, that caused his accident, and contends that any argument made by plaintiff to the contrary directly contradicts his testimony. Next, KNS argues that the mudsill was not a dangerous and defective condition. In that regard, KNS contends that plaintiff cannot establish that the mudsill violated any laws or code or deviated from any norms, as the blueprints were approved by the New York City Department of Buildings. Moreover, according to KNS, there is no code or regulation regarding the dimensions of a mudsill, but that the mudsill here conformed to industry standards.

With respect to the lighting, KNS contends that plaintiff cannot establish that the lighting at the subject location was dangerous or defective, relying on the affidavit of John Whitty, its structural engineering expert, as well as on the blueprints for the installation of the lights, and on witness' testimony. KNS argues that plaintiff even testified that "there were lights" at the time of his accident.

In his affidavit, Whitty opines that the scaffold was properly installed pursuant to properly obtained NYCB and Electrical permits and in accordance with NYCB

requirements. Whitty states that the scaffold build met the appropriate design, height, lighting, avoid interference, construction materials and other Building Code requirements, as noted on the permit application. Whitty concludes that the subject location was visually inspected by multiple entities; that the mudsill placement was proper; that there was lighting; that there were no defects or flaws observed by KNS or All City during the course of work; that no defects or flaws were reported by the building's landlord or any other entity; that there was nothing defective about the scaffold installation that KNS should have inspected or observed after installation that would have necessitated a modification.

KNS notes that the specification for the installation of the lights in the blueprints mirrors the language of the New York City Building Code section regarding lighting requirements, and notes that the blueprints were approved and permits issued. KNS also points to Carretta's testimony that he inspected the site after the lights were installed and confirmed that they conformed to the blueprints and therefore, to the Building Code. KNS also notes the fact that the lights were operable was included in Carretta's June 8, 2017 inspection report.

Newport contends that the mudsill was an open and obvious condition and not inherently dangerous. Newport argues that plaintiff's testimony demonstrates that he walked past the subject location previously, and could reasonably anticipate the mudsills. In addition, Newport further submits that an inspection maintenance log produced by

New York Ladder shows that at least three months prior to the incident, the lights were working and the base plate mudsills were secure. Newport claims that this conclusion is supported by deposition testimony of KNS, Newport's, New York Ladder's and All City's witnesses that no problems with the sidewalk, mudsills or lighting was observed, and no complaints were received.

In opposition, plaintiff contends that defendants failed to establish that the mudsill was an open and obvious condition, given the location of the scaffold and the time of day that the accident occurred. Plaintiff argues that the mudsill was a trap for unwary given it was below eye level and given the limited sidewalk space. Plaintiff also argues that his testimony that, to his knowledge, nothing beside the mudsill caused his accident, is not conclusive evidence that improper lighting did not contribute to the accident. In that regard, plaintiff states that he testified that he did not recall whether the lights were on under the scaffold, that he remembered it being dark, that he guessed street lights were on but he was not sure, that he saw a tunnel and the sidewalk where he had to walk but it was not like it was illuminated. Plaintiff contends that, contrary to KNS's contention, plaintiff did allege that the lighting was inadequate and contributed to his accident. Plaintiff argues that there may be more than one proximate cause of an accident, and it is for a trier of fact to determine issues of proximate causation.

Plaintiff also contends that while All City allegedly inspected the lights on a daily basis, there is no evidence as to whether the lighting was inspected on the day of the

accident or when the lighting was last inspected.

In addition, plaintiff argues that proof that a dangerous condition is open and obvious merely negates a defendant's obligation to warn of the condition, but does not preclude a finding of liability against a landowner for failure to safely maintain the premises. Plaintiff contends that a hazard that is open and obvious may be rendered a trap for the unwary where the plaintiff's attention is distracted. Plaintiff argues that, moreover, whether a dangerous or defective condition exists depends on the particular circumstances of each case and is a question of fact for a jury. Plaintiff contends that while the mudsill may not have been dangerous in and of itself, the fact that it was dark and that he was forced to walk close to the scaffold's legs in order to avoid wet overgrown bushes, coupled with the fact that the mudsill was below eye level, there is an issue of fact as to whether the scaffold was safe and not otherwise inherently dangerous.

Additionally, plaintiff contends that while New York Ladder claims that it followed approved DOB plans, plaintiff argues that there is no evidence that the plans were actually followed. Plaintiff further argues that New York Ladder's expert affidavit should be rejected as speculative and conclusory. In that regard, while the expert alleged that the mudsills complied with industry standards, the expert did not set forth any industry standards, and in any event, does not protect against liability.

(2) Discussion

Here, defendants have eliminated all triable issues of fact as to whether the condition that caused plaintiff to fall was open and obvious and not inherently dangerous (Bissett, 156 AD3d 751). The color photographs submitted in support of defendants' motions, as well as the deposition testimony, demonstrate that the mudsill was open and obvious and not inherently dangerous (see Hayward, 187 AD3d at 998 [defendants demonstrated that mudsill was open and obvious condition and was not inherently dangerous, absent a defective condition such as potentially faulty lighting]; Matthews v Vlad Restoration Ltd., 74 AD3d 692, 692-693 [1st Dept 2010] [defendants met their burden by demonstrating scaffold was open and obvious as a matter of law, and not inherently dangerous]).

Hayward, a recent Second Department decision reversing a grant of summary judgment in favor of a landowner in a trip and fall over a mudsill case, is instructive. In Hayward, the Second Department agreed with the lower court's finding that the landowner established its prima facie entitlement to summary judgment as a matter of law by demonstrating that the mudsill was open and obvious and not inherently dangerous (see Hayward, 187 AD3d at 998). The court further noted that having demonstrated that the mudsill was open and obvious and not inherently dangerous, the defendants were not required to make a prima facie showing that they lacked notice of the alleged defect (id.). However, relying on plaintiff's testimony at a hearing held

pursuant to General Municipal Law § 50-h and the testimony of an alleged eyewitness, the court held that plaintiff raised a triable issue of fact as to the lighting under the scaffold (id.). At the hearing, the plaintiff testified that while she was able to see where she was going, the area underneath the sidewalk shed was dim and that some of the light fixtures were missing bulbs (id.). When asked why she tripped on the mudsill, plaintiff stated that she did not understand the question and that she did not know why she tripped on the mudsill (id.). Further, the witness averred that plaintiff told her that she tripped on the mudsill because she did not see it, as the lighting conditions under the scaffold were poor, and plaintiff's statements were admissible under the excited utterance exception to the hearsay rule (id.). The court held that under those circumstances, triable issues of fact existed as to whether the site of the accident was adequately illuminated and whether the mudsill was open and obvious and not inherently dangerous (id.).

In contrast to the facts in Hayward, here, plaintiff testified that his accident occurred not because of inadequate lighting but because he wanted to avoid brushing up against wet bushes in front of the building at the subject location (Plaintiff tr at 16 ["The bushes stick out into like the walkway. Being that they were wet, I didn't want to brush up against it so I, kind of leaned more to where the scaffolding was and that's when I tripped over the wood that would hold up the scaffolding."]). Indeed, plaintiff's testimony leaves no question of fact as to whether there was functional lighting under the

scaffolding. While plaintiff testified that it was nighttime and "very dark" out (id. at 23), and initially testified that he could not recall whether the lights were on over the scaffold, he later testified that there were lights above him (id. at 84 ["[t]here was lights but I don't -- like if -- if they're high and your vision is and you can't -- you know what I'm saying? If you're walking in some place dark and there's lights above you—"]). Importantly, plaintiff denied having difficulty seeing the sidewalk on under the scaffolding (id. at 84 ["no, I could see the sidewalk and the path I need go through but it's not like it's illuminated. In other words, you see the outline of where you need to go. If you're underneath the overhang, it's lit up on the outside and it's like you're in a tunnel and you see the light; that's the way I was going."].

Plaintiff also confirmed that it was the mudsill, and not anything else, that caused his accident (id. at 59). In absence of defective lighting or any other dangerous condition causing plaintiff to trip on the mudsill, a mudsill, in and of itself, in an open and obvious and not inherently dangerous condition (see Hayward, 187 AD3d at 998).

In addition, there is no support in the record for plaintiff's argument that the scaffolding and/or bushes were placed in such a way as to create a dangerous condition of narrowing the sidewalk for pedestrians, causing a tripping hazard or a trap for the unwary. The evidence demonstrates that permits for the scaffold and the lighting were obtained based on the blueprints. Carretta testified that the he inspected the site after the lights

were installed and confirmed that they conformed to the blueprints and the Building code, as documented in Carretta's inspection report. In addition, the lights were operable at the time the report was completed. A subsequent inspection log also documented that the scaffold and the lighting underneath it was in working order.

Moreover, the color photographs depicting the scaffolding, the mudsills and the bushes in relation to the mudsill demonstrate that plaintiff had adequate space to walk on the sidewalk between the bushes and the mudsill (see Bellamy v Starrett City, Inc., 135 AD3d 678, 679 [2d Dept 2016] [photographs constitute evidence for the purposes of determining whether a condition is open and obvious and not inherently dangerous]). Plaintiff does not point to any laws, regulations or standards regarding the distance that bushes on a sidewalk need to located from the placement of a scaffold or a mudsill, and there is no evidence that the placement here was improper. Nor does plaintiff submit any expert testimony opining that the distance between the bushes and the mudsills was improperly narrow. By contrast, defendants' experts, who reviewed the photographs of the subject location as well as blueprints, permits and applicable codes, opined that the scaffold and the lighting were completed in compliance with the applicable codes, and that the scaffold, mudsills and lighting were properly placed and not dangerous. Plaintiff has not submitted any evidence rebutting the expert conclusions. Further, there is no basis to hold, as plaintiff argues, that the experts' affidavits are conclusory.

There is also no testimony or photographic evidence that the bushes were

overgrown. Plaintiff merely testified that they were wet because it had been misty and/or rainy that night, and that is why he swerved to avoid them. Additionally, Nokaj testified that he trimmed the bushes approximately twice a year to make them look good. The defense witnesses also testified that they did not receive any complaints about the scaffold, mudsills, lighting or bushes. Nor did plaintiff produce any such complaints. In sum, there are no questions of fact raised as to whether the bushes constituted a dangerous condition such that would preclude summary judgment in favor of defendants.

Moreover, a plaintiff's unsubstantiated claim that the scaffold did not comply with industry custom and practice does not create an issue of fact precluding summary judgment (see Matthews, 74 AD2d at 693).

Finally, plaintiff testified that he lived about a block and a half from the accident location and that he passed that location about twice a week, suggesting that the plaintiff was familiar with the location and that the location of the bushes in relation to the scaffold and mudsills was known to him (see Genefar v Great Neck Park District, 156 AD3d 762, 763 [2d Dept 2017).

Having made a prima facie showing of entitlement to summary judgment as a matter of law by demonstrating that the mudsill and the bushes were open and obvious conditions and not inherently dangerous, defendants were not required to make a prima facie showing that they lacked notice of the alleged defects (see Hayward, 187 AD3d at 998).

Hence, defendants' summary judgment motions dismissing plaintiff's cause of action warrant being granted in their entirety. As plaintiff's cause of action is dismissed, the court also dismisses defendants' cross claims. The court has considered the parties' remaining contentions and finds them without merit. Accordingly, it is

ORDERED that defendants' motions, mot. seq. four, five, six and seven, for an order granting them summary judgment and dismissing all claims and cross claims against them, is granted.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.