[* 1]

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

JONATHAN VOLKEL,

Plaintiff,

-against-

537 WEST 27TH STREET OWNERS, LLC, CHATSWORTH BUILDERS, LLC and W. 27TH STREET RENTAL, LLC,

Defendants.

----------X

537 WEST 27TH STREET OWNERS, LLC, CHATSWORTH BUILDERS, LLC and W. 27TH STREET RENTAL, LLC,

Third-Party Plaintiffs,

-against-

FOUR BROTHERS FENCE, INC. and VERIZON,

Third-Party Defendants.

----------X

537 WEST 27TH STREET OWNERS, LLC, CHATSWORTH BUILDERS, LLC and W. 27TH STREET RENTAL, LLC,

Second Third- Party Plaintiffs,

-against-

RNC INDUSTRIES, LLC,

Second Third-Party Defendants.

----------X

INDEX NO.: 32697/2011
CALENDAR NO.: 201800832OT
MOTION DATE: 3/14/19
MOTION SEQ. NO.: 007 MotD
MOTION SEQ. NO.: 008 MotD
MOTION SEQ. NO.: 009 MD

PLAINTIFF'S ATTORNEYS:
Dell & Dean, PLLC
1325 Franklin Avenue, Suite 100
Garden City, New York 11530

DEFENDANTS' ATTORNEYS:
Baker, Greenspan & Bernstein, Esqs.
Attorneys for Defendants,
Third-Party Plaintiffs and Second
Third-Party Plaintiffs
2099 Bellmore Avenue
Bellmore, New York 11710

Hoffman, Roth & Matlin, LLC
Attorneys for Four Brothers
505 Eighth Avenue, Suite 1704
New York, New York 10018

Westerman, Sheeney, Keenan,
Samaan & Aydelott, LLP
Attorneys for RNC Industries
333 Earle Ovington Boulvard, Suite 702
Uniondale, New York 11553

Upon the following papers numbered 1 to 65 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 33; 34 - 50 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 51 - 53; 54 - 55; 56 - 57; 58 - 59 ; Replying Affidavits and supporting papers 60 - 61; 62 - 63; 64 - 65 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 007) by defendants/third-party plaintiffs/second third-party plaintiffs 537 West 27th Street Owners LLC, Chatsworth Builders LLC, and W. 27th Street Rental, LLC, the motion (motion sequence no. 008) by third-party defendant Four Brothers Fence, Inc., and the motion (motion sequence no. 009) by second third-party defendant RNC Industries, LLC are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants/third-party plaintiffs/second third-party plaintiffs 537 West 27th Street Owners LLC, Chatsworth Builders LLC, and W. 27th Street Rental, LLC for summary judgment dismissing the complaint and all cross claims and counterclaims against them is granted in part and denied in part; and it is further

ORDERED that the motion by third-party defendant Four Brothers Fence, Inc. for summary judgment dismissing the complaint, the third-party complaint, and any cross claims against it is granted in part and denied in part; and it is further

ORDERED that the motion by second third-party defendant RNC Industries, LLC for summary judgment dismissing the complaint, the second third-party complaint, and any cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jonathan Volkel on February 17, 2011, when he slipped and fell on a crushed stone pathway on the premises of a construction site at 537 West 27th Street, New York, New York. The premises was owned by defendants 537 West 27th Street Owners, LLC, and W. 27th Street Rental, LLC. It is unclear from the record whether defendant Chatsworth Builders, LLC had an ownership interest in the premises in addition to its role as general contractor of the construction project. The accident occurred during plaintiff's employ as a field technician for third-party defendant Verizon. Plaintiff asserts claims against defendants for common law negligence and violations of Labor Law §§ 200 and 241 (6). 537 West 27th Street Owners, LLC, W. 27th Street Rental, LLC, and Chatsworth Builders, LLC (collectively "Chatsworth") assert third-party claims against Four Brothers Fence, Inc. ("Four Brothers") and RNC Industries, LLC ("RNC") for common law contribution, indemnification, and failure to procure insurance. By order of this Court dated December 5, 2016, the third-party claims against Verizon were dismissed.

Plaintiff, a field technician for Verizon, testified that on the day of the accident, he was assigned to work at the subject worksite for the first time along with a colleague, Paul Hurley. Plaintiff stated that when he entered the worksite, he safely traversed a 100-foot crushed stone pathway to get to the building in which he was to work. He stated that the pathway was five to seven feet wide and extended from the east gate to the west gate of the premises. Other than the pathway, there was dirt, construction debris, and dumpsters on the ground of the construction site. He described the pathway as "the only passable area." Plaintiff stated that although there

was some old snow on the ground melting, there was no snow on the crushed stone pathway and no precipitation on the day of the accident. After several hours of working, plaintiff and Mr. Hurley left the building at approximately 12:10 p.m. for a lunch break. Plaintiff walked approximately 20 feet on the pathway without difficulty and reached the middle point of the pathway, where he stopped to decide whether to follow Mr. Hurley to the west gate or go towards the east gate to have lunch alone. Plaintiff stated that after approximately five seconds, he decided to follow Mr. Hurley. Plaintiff explained that he "tried to take a step forward" with his left foot and his right foot slid out from beneath him causing him to fall. He testified that as he got up from the ground following the fall, he observed that some of the stones on the pathway were displaced and that there was mud underneath the area where his foot had been. He stated that the depth of stones was insufficient to prevent slipping once melted snow created mud underneath the stones, as the single layer of stones slid across the mud. Plaintiff also testified that the crushed stone did not appear wet at any time before his accident, and that he did not observe any change in the pathway from the time he arrived in the morning until the time of the accident.

Kevin Tolbert, vice president of construction at L&M Builders ("L&M") at the time of plaintiff's accident, testified that L&M and Chatsworth were closely related, as they shared common principals. He stated that the overall project consisted of two buildings, one facing 27th Street and one facing 28th Street, which shared a common courtyard. L&M conducted project management on the subject project and Chatsworth was the general contractor that built the buildings. Mr. Tolbert testified that while it was not his responsibility to do safety inspections, he would inspect project sites for potential safety hazards. Upon discovering a hazard, he would "say something and get involved." Mr. Tolbert testified that there were construction superintendents responsible for the construction and safety of the site, and a safety consultant who performed audits. He explained that the site superintendents, Mark and Scott, had the authority to address unsafe conditions, wherein they would speak to the subcontractor's foreman, who would then instruct his or her worker. He stated that Mark and Scott were responsible for evaluating the stability of a crushed stone pathway, but he did not know if they actually evaluated whether the pathways were stable.

Mr. Tolbert testified that the surface of the courtyard was never dirt, but that the surface area where the old sidewalk was located could have been dirt. He stated that crushed stone pathways were located near the entrance and exits of the building. Mr. Tolbert explained that if the crushed stone pathway was unstable, it would be stabilized by putting more crushed stone on top. Mr. Tolbert testified that no particular contractor was responsible for creating the pathway, and that the superintendents could have asked a contractor on the project to create the pathway. Although Mr. Tolbert testified that gravel was placed continuously during the project, he was unaware as to the last time gravel was added to the pathway. In addition, Mr. Tolbert did not know if Four Brothers installed the crushed stone pathways. However, Mr. Tolbert stated that he saw RNC place gravel on pathways, foundations, and in other areas of the site prior to February

2011. He also testified that RNC's involvement with gravel pertained to excavation, including in front of the West 27th Street premises, and foundation elements of the project.

Hysni Berisha, owner of Four Brothers, testified that Four Brothers was hired by L&M/Chatsworth Builder for the subject construction project to install temporary fencing. Mr. Berisha testified that Four Brothers had nothing to do with creating pathways on the project, and that Chatsworth would never have Four Brothers create a pathway for a relocated fence gate. He stated that his company did not provide general labor for construction sites, and was not responsible for snow cleanup, ice removal, or sand or salt placement. Mr. Berisha did not know who built any sidewalk on the worksite, but knew that Four Brothers did not bring any kind of gravel to the worksite.

Robert Dugan, president and founder of RNC, testified that RNC is in the business of foundation, superstructure, and excavation. He stated that as of February 17, 2011, RNC's work had been completed and it had vacated the construction site. Mr. Dugan stated both that he observed a crushed pathway when the project was in the foundation stage, and that he could not recall if there was a crushed stone pathway on-site. However, Mr. Dugan stated that RNC would not have installed a crushed stone pathway. Mr. Dugan stated that the gravel utilized by RNC was put underneath the slabs of the foundation and that no gravel was used for anything else. He stated that he never laid plywood down and then poured gravel on top to prevent mixing with the substrate. He testified that he did not see anyone creating, shifting, moving, or altering a gravel pathway on the worksite. Mr. Dugan stated that RNC was responsible for removing rocks, dirt, and debris generated by its work by removing it from the site by a truck, but that it never removed debris from any other contractor on-site.

Chatsworth now moves for summary judgment dismissing the complaint and all cross claims and counterclaims against it. Chatsworth argues that there was no dangerous or defective condition that led to the accident; and that, even if such a condition existed, it did not create it or have actual or constructive notice of it. Chatsworth also argues that plaintiff did not sufficiently allege a specific violation of the Industrial Code which proximately caused the accident. Chatsworth submits, among other things, copies of the pleadings, the bill of particulars, and the transcripts of the deposition testimony of plaintiff and Kevin Tolbert. In opposition, Four Brothers Fence argues that it is entitled to indemnification from Chatsworth, as it did not install the pathway and had no duty to maintain the worksite.

Four Brothers seeks summary judgment dismissing the complaint, the third-party complaint, and the cross claims against it, arguing that neither it nor Chatsworth are liable pursuant to Labor Law §§ 200 and 241 (6), and that it is not required to indemnify Chatsworth, as the contractual indemnification provision was not triggered and that the claim is barred by General Obligations Law §5.322.1. It submits, in support of the motion, copies of the pleadings, an order of this Court dated August 10, 2018, the bills of particulars, purchase orders, the

contract between Four Brothers and Chatsworth, and the transcripts of the deposition testimony of plaintiff, Hysni Berisha, Tom Sciotto, and Kevin Tolbert.

RNC also seeks summary judgment dismissing the complaint, the second third-party complaint, and any cross claims against it on the grounds that Chatsworth did not violate the Labor Law, that it was not negligent, and that the contractual indemnification provision was not triggered. RNC submits, among other things, copies of the pleadings, a so-ordered stipulation dated April 20, 2017, an order of this Court dated August 10, 2018, the contract between Chatsworth Builders and RNC, and the transcripts of the deposition testimony of plaintiff, Robert Dugan, and Kevin Tolbert. In opposition, Chatsworth argues that a triable issue of fact remains as to RNC's involvement in the pathway's construction and RNC's obligation to indemnify.

In opposition to the motions, plaintiff argues that Chatsworth had notice of the muddy condition and that such condition was a slipping hazard within the meaning of 12 NYCRR 23-1.7 (d). Plaintiff does not substantively oppose the motions by Four Brothers and RNC. Plaintiff submits, in opposition, the affidavit of Thomas Parisi, P.E.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr., supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr., supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Labor Law §200 is a codification of the common law duty of owners or general contractors to maintain a safe construction site (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; *Wadlowski v Cohen*, 150 AD3d 930, 55 NYS3d 279 [2d Dept 2017]; *McKee v Great Atl. & Pac. Tea Co.*, 73 AD3d 872, 905 NYS2d 601 [2d Dept 2010]). "Cases involving Labor Law §200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Melendez v 778 Park Ave. Bldg. Corp.*, 153 AD3d 700, 702, 59 NYS3d 762 [2d Dept 2017], quoting *Torres v City of New York*, 127 AD3d 1163, 1165, 7 NYS3d 539 [2d Dept 2015]). Where a defective premises condition is alleged, a property owner or contractor may only be held liable for violation of Labor Law §200 or common law negligence if the owner or contractor either created the dangerous condition, or had actual or constructive

notice of its existence (*Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 103 NYS3d 523 [2d Dept 2019]; *Banscher v Actus Lend Lease, LLC*, 132 AD3d 707, 17 NYS3d 774 [2d Dept 2015]; *Pacheco v Smith*, 128 AD3d 926, 9 NYS3d 377 [2d Dept 2015]; *Kuffour v Whitestone Const. Corp.*, 94 AD3d 706, 941 NYS2d 653 [2d Dept 2012]; *La Giudice v Sleepy's Inc.*, *supra*; *Aguilera v Pistilli Const. & Development Corp.*, 63 AD3d 763, 882 NYS2d 148 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 867 NYS2d 123 [2d Dept 2008]; *Ortega v Puccia*, *supra*; *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 835 NYS2d 705 [2d Dept 2007]). "To establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time before the accident to permit defendants' employees to discover and remedy it. The general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's injury" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837, 501 NYS2d 646 [1986]). To establish lack of constructive notice, the defendant must offer some evidence as to when the area at issue was last cleaned or inspected relative to the plaintiff's accident (*Reed v 64 JWB, LLC*, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]; *Radosta v Schechter*, 171 AD3d 1112, 97 NYS3d 664 [2d Dept 2019]; *Quinones v Starret City, Inc.*, 163 AD3d 1020, 81 NYS3d 184 [2d Dept 2018]; *Jeremias v Lake Forest Estates*, 147 AD3d 742, 46 NYS3d 188 [2d Dept 2017]).

Chatsworth failed to make a *prima facie* case of entitlement to summary judgment dismissing the Labor Law §200 cause of action. Here, plaintiff's accident arose from an alleged dangerous condition at the worksite. Chatsworth failed to establish that it neither created nor had actual or constructive notice of the alleged dangerous condition (*see Caiazzo v Mark Joseph Contr., Inc.*, 119 AD3d 718, 990 NYS2d 529 [2d Dept 2014]; *White v Village of Port Chester*, 92 AD3d 872, 940 NYS2d 94 [2d Dept 2012]; *Colon v Bet Torah, Inc.*, 66 AD3d 731, 887 NYS2d 611 [2d Dept 2009]; *Aguilera v Pistilli Const. & Dev. Corp.*, *supra*). Chatsworth failed to offer sufficient proof as to the last time it inspected the pathway or otherwise demonstrate that the slippery condition could not have been discovered upon a reasonable inspection (*see Bessa v Anflo Indus., Inc.*, 148 AD3d 974, 51 NYS3d 102 [2d Dept 2017]). As Chatsworth failed to meet its *prima facie* burden on the Labor Law §200 cause of action, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, *supra*).

Labor Law §241 "[i]mposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed" (*Mitchell v Caton on the Park, LLC*, 167 AD3d 865, 866, 90 NYS3d 316 [2d Dept 2018]; *see Rizzuto v L.A. Wenger Contr. Co.*, *supra*; *Mendez v Vardaris Tech, Inc.*, *supra*; *Jones v City of New York*, 166 AD3d 739, 87 NYS3d 631 [2d Dept 2018]; *Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982, 999 NYS2d 848 [2d Dept 2014]). "A plaintiff asserting a cause of action under Labor Law §241 (6) must demonstrate a violation of a rule or

regulation of the Industrial Code, which gives a specific, positive command, and is applicable to the facts of the case" (*Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 958, 951 NYS2d 54 [2d Dept 2012]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Jones v City of New York*, *supra*; *Simmons v City of New York*, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; *Aragona v State of New York*, 147 AD3d 808, 47 NYS3d 115 [2d Dept 2017]). The particular provisions relied upon by a plaintiff must mandate compliance with concrete specifications and not simply declare general safety standards or reiterate common-law principles (*Misicki v Caradonna*, 12 NY3d 511, 882 NYS2d 375 [2009]). Furthermore, a plaintiff must show that the violation of the regulation was a proximate cause of his or her accident (*Seaman v Bellmore Fire Dist.*, 59 AD3d 515, 873 NYS2d 181 [2d Dept 2009]).

Chatsworth established a *prima facie* case of entitlement to summary judgment dismissing plaintiff's Labor Law §241 (6) claim as to some of the alleged violations of the Industrial Code. Some of the Industrial Code regulations cited by plaintiff are inapplicable to the case at bar or reference mere general safety standards (*see Simmons v City of New York*, *supra*; *Honeyman v Curiosity Works, Inc.*, 154 AD3d 820, 62 NYS3d 183 [2d Dept 2017]; *Carrillo v Circle Manor Apts.*, 131 AD3d 662, 15 NYS3d 463 [2d Dept 2015]; *Palacios v 29th Street Apts, LLC*, 110 AD3d 698, 972 NYS2d 615 [2d Dept 2013]). 12 NYCRR 23–1.7 (e)(1) and (2), which requires owners and general contractors, *inter alia*, to keep all passageways and working areas free of debris which could cause tripping, is inapplicable, as no tripping hazard was alleged (*see Raffa v City of New York*, 100 AD3d 558, 955 NYS2d 9 [1st Dept 2012]; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677, 951 NYS2d 736 [2d Dept 2012]; *Cooper v State of New York*, 72 AD3d 633, 899 NYS2d 275 [2d Dept 2010]). 12 NYCRR 23-2.1 (a), which sets forth requirements for material or equipment storage and disposal of debris, is inapplicable under the circumstances of this case (*see Gargan v Palatella Saros Builders Group, Inc.*, 162 AD3d 988, 78 NYS3d 415 [2d Dept 2018]; *Thompson v BFP 300 Madison II, LLC*, 95 AD3d 543, 943 NYS2d 515 [1st Dept 2012]; *Zamajtys v Cholewa*, 84 AD3d 1360, 924 NYS2d 163 [2d Dept 2011]; *Cody v State of New York*, 82 AD3d 925, 919 NYS2d 55 [2d Dept 2011]). Plaintiff's claim predicated on 12 NYCRR 23-2.1 (b) fails as a matter of law, as it has been consistently held that this provision lacks the specificity required to support a cause of action under Labor Law §241 (6) (*see Longo v Long Is. R.R.*, 116 AD3d 676, 983 NYS2d 579 [2d Dept 2014]; *Parrales v Wonder Works Constr. Corp.*, 55 AD3d 579, 866 NYS2d 227 [2d Dept 2008]). In addition, it is well established that violations of Occupational Safety and Health Administration ("OSHA") standards do not provide a basis for liability under Labor Law §241 (6) (*Marl v Liro Engineers, Inc.*, 159 AD3d 688, 73 NYS3d 202 [2d Dept 2018]; *Shaw v RPA Assoc., LLC*, 75 AD3d 634, 906 NYS2d 574 [2d Dept 2010]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Due to plaintiff's testimony that he slipped on the gravel pathway due to mud beneath the crushed stones, a triable issue of fact remains as to whether Chatsworth violated 12 NYCRR 23-1.7 (d). The regulation states that "[e]mployers 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." Courts have interpreted a passageway to mean "a defined walkway or pathway used to traverse between discrete areas as opposed to an open area" (*Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1250, 961 NYS2d 634 [4th Dept 2013]; *see Quigley v Port Auth. of N.Y. & N.J.*, 168 AD3d 65, 90 NYS3d 156 [1st Dept 2018]). Triable issues of fact remain as to whether the gravel pathway constituted a passageway or walkway, or an open area (*cf. Passantino v Made Realty Corp.*, 121 AD3d 957, 996 NYS2d 53 [2d Dept 2014]; *Velasquez v 795 Columbus LLC*, 103 AD3d 541, 959 NYS2d 491 [1st Dept 2013]; *Lawyer v Hoffman*, 275 AD2d 541, 711 NYS2d 618 [3d Dept 2000]; *Jennings v Lefcon Partnership*, 250 AD2d 388, 673 NYS2d 85 [1st Dept 1998]).

In opposition to Chatsworth's *prima facie* case of entitlement to summary judgment dismissing the Labor Law §241 (6) cause of action pursuant to 12 NYCRR 23-1.7 (e) and 12 NYCRR 23-2.1, plaintiff failed to raise a triable issue of fact (*see Passantino v Made Realty Corp., supra*). Therefore, Chatsworth's application for summary judgment dismissing plaintiff's Labor Law §241 (6) claim is granted to the extent of dismissing plaintiff's reliance on OSHA regulations, 12 NYCRR 23-1.7 (e) and 12 NYCRR 23-2.1, and is otherwise denied.

With regard to the branch of Chatsworth's motion for summary judgment dismissing any cross claims and counterclaims against it for contractual or common law indemnification, the existence of triable issues as to whether Chatsworth's negligence, if any, caused or created the alleged dangerous condition precludes any judgment in its favor on those claims at this juncture (*see Ginter v Flushing Terrance, LLC*, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; *McAllister v Construction Consultants L.I. Inc.*, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; *Martinez v City of New York*, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]; *Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 906 NYS2d 284 [2d Dept 2010]).

The Court now turns to Four Brothers' summary judgment motions seeking dismissal of the complaint, the third-party complaint and cross claims against it. At the outset, Four Brothers' request to dismiss the complaint against Chatsworth is denied, as it failed to offer sufficient proof as to the last time Chatsworth inspected the pathway or otherwise demonstrate that the slippery condition could not have been discovered upon a reasonable inspection (*see Bessa v Anflo Indus., Inc., supra*). In addition, Four Brothers failed to demonstrate that Chatsworth did not violate 12 NYCRR 23-1.7 (d), as a triable issue of fact remains as to whether the subject pathway is subject to such regulation (*cf. Passantino v Made Realty Corp., supra*).

The mere happening of an accident, in and of itself, does not establish the liability of a defendant (*Scavelli v Town of Carmel*, 131 AD3d 688, 15 NYS3d 214 [2d Dept 2015]). To establish a *prima facie* case of negligence under the common law, a plaintiff must demonstrate the existence of duty owed by defendant to plaintiff, a breach of that duty, and resulting injury which was proximately caused by the breach (*Pasternack v Laboratory Corp. of Am. Holdings*,

27 NY3d 817, 825, 37 NYS3d 750 [2016]; *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 934 NYS2d 43 [2011]; *Mendez-Canales v Agnelli Macchine S.R.L.*, 165 AD3d 646, 85 NYS3d 188 [2d Dept 2018]). A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120 [2002]; *Castillo v Port Auth. of New York*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; *Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v Melville Snow Contrs.*, *supra*, at 140 [internal quotation marks and citations omitted]).

Four Brothers established that as a third-party contractor, it owed no duty to plaintiff (*see Parrinello v Walt Whitman Mall, LLC*, 139 AD3d 685, 30 NYS3d 692 [2d Dept 2016]; *Mavis v Rexcorp Realty, LLC*, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]). Through its submissions, Four Brothers demonstrated that it was an independent contractor hired by Chatsworth for the limited purpose of installing and maintaining fencing around the construction site. Four Brothers also demonstrated that it did not launch a force or instrument of harm, that plaintiff did not detrimentally rely on its contractual duties, and that it did not displace the property owner's duty to safely maintain the premises (*see Espinal v Melville Snow Contrs.*, *supra*; *Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co.*, 1 AD3d 578, 768 NYS2d 18 [2d Dept 2003]). Even assuming, arguendo, that Four Brothers had a duty to plaintiff, its submissions demonstrated that it did not perform any work on the gravel pathway (*see Igneri v Triumph Constr. Corp.*, 166 AD3d 737, 88 NYS3d 212 [2d Dept 2018]; *Lewis v City of New York*, 82 AD3d 1054, 919 NYS2d 351 [2d Dept 2011]; *Flores v City of New York*, 29 AD3d 356, 815 NYS2d 48 [1st Dept 2006]).

A party can establish *prima facie* entitlement to summary judgment dismissing a cause of action for common law indemnification and contribution asserted against it by demonstrating that it was not negligent and that it did not have authority to direct, supervise, or control the work giving rise to the injury (*Cutler v Thomas*, 171 AD3d 860, 98 NYS3d 230 [2d Dept 2019]; *Fedrich v Granite Bldg. 2, LLC*, 165 AD3d 754, 86 NYS3d 566 [2d Dept 2018]; *Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1402, 82 NYS3d 535 [2d Dept 2018]; *State of New York v Defoe Corp.*, 149 AD3d 889, 49 NYS3d 897 [2d Dept 2017]). In this case, as Four Brothers was not negligent and did not have authority to direct, supervise, or control plaintiff's work, it made a *prima facie* case of entitlement to summary judgment dismissing the third-party claims and cross claims against it for common law indemnification and contribution (*see Charles v William Hird & Co., Inc.*, 102 AD3d 907, 959 NYS2d 506 [2d Dept 2013]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 846 NYS2d 211 [2d Dept 2007]).

"The right to contractual indemnification depends upon the specific language of the contract" (*Poalacin v Mall Props., Inc.*, 155 AD3d 900, 909, 64 NYS3d 310 [2d Dept 2017]; *see Roldan v New York Univ.*, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]; *Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 949 NYS2d 141 [2d Dept 2012]), and will not be enforced "unless the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492, 549 NYS2d 365 [1989]; *see De Souza v Empire Tr. Mix, Inc.*, 155 AD3d 605, 63 NYS3d 473 [2d Dept 2017]; *Cuellar v City of New York*, 139 AD3d 996, 32 NYS3d 292 [2d Dept 2016]).

Four Brothers submitted Mr. Berisha's testimony and 10 purchase orders detailing its work performed at the subject worksite, mostly involving installation, maintenance, and removal of fencing and gates. The indemnification agreement between Chatsworth and Four Brothers provides, in pertinent part, as follows:

> Without limitation of any other right or remedy available to [Chatsworth] hereunder at law, [Four Brothers] shall indemnify and hold harmless to the fullest extent promised by law, [Chatsworth] . . . and any and all affiliates, lenders, agents, employees . . . ("Indemnified Parties") against any and all liabilities, including without limitation, any economic loss suffered by any and all Indemnified Parties, obligations, losses, claims, causes of action, suits, proceedings, judgments, damages, penalties, costs and expenses (including without limitation, attorneys' fees and expenses and insurance deductible payments and self-insured retention payments), and potential claims and losses whether real or alleged ("Claims") arising from any act, omission, negligence, breach of this Purchase Order, of or by [Four Brothers], its subcontractors, material suppliers and other agents or personnel of [Four Brothers] including, without limitation, those resulting from injury to [Four Brothers'] employees or employees of [Four Brothers'] subcontractors during the performance of the Purchase Order.

In this case, the indemnification agreement was not triggered. It is clear that the indemnification clause is only intended to provide Chatsworth with indemnification for claims arising from the act, omission, negligence, or breach of the purchase orders. As plaintiff's injury did not arise from the act, omission, negligence, or breach of the purchase orders, his injury was beyond the scope of the indemnification clause (*see Toldeo v Long Is. Jewish Med. Ctr.*, 309 AD2d 921, 766 NYS2d 105 [2d Dept 2003]; *Castelli v KDI, Atl. Foods*, 281 AD2d 505, 726 NYS2d 431 [2d Dept 2001]; *Calandro v Avalon Bay Communities, Inc.*, 44 Misc 3d 1230(A), 3

NYS3d 284 [Sup Ct, Nassau County 2014]). Therefore, as the indemnification agreement was not triggered, Four Brothers met its *prima facie* burden that it is not obligated to contractually indemnify Chatsworth.

To recover damages for a breach of contract, a plaintiff must show the existence of a contract with defendant, plaintiff's performance under the terms of the contract, defendant's breach of the contractual obligations, and damages resulting from such breach (*Legum v Russo*, 173 AD3d 998 [2d Dept 2019]; *Arnell Constr. Corp. v NY City Sch. Constr. Auth.*, 144 AD3d 714, 715, 41 NYS3d 101 [2d Dept 2016]; *PFM Packaging Mach. Corp. v ZMY Food Packing, Inc.*, 131 AD3d 1029, 16 NYS3d 298 [2d Dept 2015]). An agreement to procure insurance is distinct from an agreement to indemnify or hold harmless (*Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d 777, 2019 NY Slip Op 05760 [2d Dept 2019], citing *Kinney v Lisk Co.*, 76 NY2d 215, 557 NYS2d 283 [1990]; *see Kennelty v Darlind Constr.*, 260 AD2d 443, 688 NYS2d 584 [2d Dept 1999]; *Spencer B.A. Painting Co.*, 224 AD2d 307, 638 NYS2d 37 [1st Dept 1996]). The purpose of an indemnification agreement is to relieve the promisee of liability, whereas an agreement to procure insurance requires the promisee's "continued responsibility for its own negligence for which the promisor is obligated to furnish insurance" (*Kinney v Lisk Co.*, *supra* at 218). A party seeking summary judgment based on a claim of failure to procure insurance naming that party as an additional insured must establish that a contract provision required such insurance and that the provision was not complied with (*Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 759 NYS2d 107 [2d Dept 2003]). In this case, Four Brothers met its *prima facie* burden on the branch of its motion seeking dismissal of the third-party claims against it for failure to procure insurance as Mr. Berisha testified that Four Brothers provided insurance naming Chatsworth as an additional insured in compliance with their agreement (*see Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

In opposition, plaintiff does not substantively oppose Four Brothers' motion and no other papers are submitted in opposition. Therefore, the motion by Four Brothers Fence is granted to the extent of dismissing the third-party claims and cross claims against it.

The Court now turns to RNC's motion for summary judgment dismissing the second third-party complaint and the cross claims against it. At the outset, RNC's request to dismiss the complaint against Chatsworth is denied, as it failed to offer sufficient proof as to the last time Chatsworth inspected the pathway or to otherwise demonstrate that the slippery condition could not have been discovered upon a reasonable inspection (*see Bessa v Anflo Indus., Inc.*, *supra*). In addition, RNC failed to demonstrate that Chatsworth did not violate 12 NYCRR 23-1.7 (d), as a triable issue of fact remains as to whether the subject pathway is subject to the regulation (*cf. Passantino v Made Realty Corp.*, *supra*).

RNC failed to establish that it was not negligent as it failed to demonstrate that, as a third-party contractor, it owed no duty to plaintiff. Through its submissions, RNC demonstrated that it was an independent contractor hired by Chatsworth for the limited purpose of excavation, foundation, and superstructure work. However, RNC failed to establish that it did not launch an instrument of harm, as Mr. Tolbert testified that he saw RNC place gravel on pathways prior to February 2011 (*cf. Marasco v C.D.R. Electronics Sec. & Surveillance Sys. Co.*, *supra*). With regard to the branch of RNC's motion for summary judgment dismissing all third-party claims and cross claims for common law or contractual indemnification, the existence of triable issues as to whether RNC's negligence, if any, caused or created the alleged dangerous condition precludes any judgment in its favor on those claims at this juncture (*see Ginter v Flushing Terrance, LLC*, *supra*; *McAllister v Construction Consultants L.I. Inc.*, *supra*; *Martinez v City of New York*, *supra*; *Erickson v Cross Ready Mix, Inc.*, *supra*).

RNC also failed to meet its *prima facie* burden on the branch of its motion seeking dismissal of the third-party claims against it for failure to procure insurance, as it failed to submit evidence demonstrating that it complied with the insurance provision of its contract with Chatsworth (*see Ginter v Flushing Terrance, LLC*, *supra; Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 980 NYS2d 489 [2d Dept 2014]). As RNC did not meet its *prima facie* burden, its motion for summary judgment must be denied regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*).

Accordingly, the motion by Chatsworth for summary judgment is granted to the extent of dismissing plaintiff's reliance on 12 NYCRR 23-1.7 (e) and 12 NYCRR 23-2.1, and is otherwise denied. Furthermore, the motion by Four Brothers Fence for summary judgment is granted to the extent of dismissing the third-party complaint and cross claims against it. In addition, the motion by RNC Industries for summary judgment is denied.

Dated: January 17, 2020

HON. PAUL I. BAISLEY, JR.

J.S.C.