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SHORT FORM ORDER

INDEX No. 11-18922
CAL. No. 17-00119OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 2-8-17 (007)
MOTION DATE 3-9-17 (009)
MOTION DATE 1-18-18 (010)
MOTION DATE 4-17-18 (012)
MOTION DATE 5-17-18 (013)
ADJ. DATE 5-17-18
Mot. Seq. # 007 - MD # 012 - MG
009 - MD # 013 - MD
010 - MG

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ADAM CIOLKOWSKI,

Plaintiff,

- against -

MOTIVA ENTERPRISES, LLC and SHELL OIL COMPANY, and 52 QUICK STOP, INC.,

Defendants.

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MOTIVA ENTERPRISES, LLC and SHELL OIL COMPANY,

Third-Party Plaintiffs,

- against -

ISLAND PUMP & TANK CORPORATION,

Third-Party Defendant.

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Upon the following papers numbered 1 to 80 read on these motions for summary judgment/renewal/preclusion : Notice of Motion/ Order to Show Cause and supporting papers 1 -16; 17 - 23; 24 - 37; 38 - 54; 55 - 63 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 64 - 65; 68 - 70; 71 - 73 ; Replying Affidavits and supporting papers 74 - 76; 77 - 80 ; Other Memoranda of Law ; it is,

ORDERED that the motion (007) by third-party defendant Island Pump & Tank Corporation, the motions (009 & 013) by defendants/third-party plaintiffs Motiva Enterprises and Shell Oil Company, the motion (010) by plaintiff Adam Ciolkowski, and the motion (012) by defendant 52 Quick Stop, Inc., are consolidated for the purpose this determination; and it is further

ORDERED that the motion (010) by plaintiff Adam Ciolkowski for partial summary judgment in his favor on the issue of liability as against defendants Motiva Enterprises and Shell Oil Company is granted; and it is

ORDERED that the motion (012) by defendant 52 Quick Stop, Inc. for summary judgment dismissing the complaint and cross claims against it is granted; and it is

ORDERED that the motion (009) by defendants/third-party plaintiffs Motiva Enterprises and Shell Oil Company for, inter alia, conditional summary judgment on their third-party contractual indemnification claim against Island Pump is denied; and it is

ORDERED that the motion (007) by third-party defendant Island Pump for leave to renew the branch of its prior motion for summary judgment, which sought dismissal of the contractual indemnification claim against it, is denied; and it is further

ORDERED that the motion (013) by defendants/third-party plaintiffs Motiva Enterprises and Shell Oil Company for, inter alia, an order precluding plaintiff from offering any evidence at trial based on his failure to comply with certain outstanding discovery demands is denied, without prejudice.

Plaintiff Adam Ciolkowski commenced this action to recover damages for personal injuries he allegedly sustained on August 24, 2009, while performing renovations at the Shell gas service station located at 700 Commack Road, Commack, New York. Plaintiff allegedly was injured when a fuel pump being hoisted onto a flatbed truck swung and struck the ladder on which he was standing, causing him to fall to the surface of the truck. At the time of the accident, plaintiff was an employee of third-party defendant Island Pump & Tank Corporation ("Island Pump"), a subcontractor hired to remove and replace existing gas tanks and gas dispensers at the gas station. Defendant/third-party plaintiff Motiva Enterprises ("Motiva"), which held a long-term lease of the premises, was the alleged owner of the gas station. At the time of the accident, Motiva was jointly owned by defendant/third-party plaintiff Shell Oil Company ("Shell") and nonparty Saudi Refining, Inc. Defendant 52 Quick Stop, Inc. ("Quick Stop") was the licensed operator of the gas station at the time of the accident. By way of his complaint, plaintiff alleges causes of action against the defendants based upon common law negligence and violations of Labor Law §§ 200, 240 (1), and 241(6). Quick Stop joined the action, denying plaintiff's claims and asserting a cross claim against Shell and Motiva for contribution, indemnification, and breach of

contract. After joining the action, Shell and Motiva brought a third-party action alleging identical claims against Island Pump.

After Motiva and Shell submitted evidence of Island Pump's failure to join the third-party complaint, this Court granted their unopposed motion for a default judgment against it. However, by Order dated December 17, 2014, the Court granted a motion by Island Pump to vacate the default judgment against it. Thereafter, Island Pump moved for summary judgment in its favor dismissing the third-party complaint against it. By Order dated November 20, 2015, this Court granted the motion only to the extent that the third-party common law indemnification and contribution claims against Island Pump were dismissed. However, the Court denied the remainder of the motion, finding that a triable issue existed as to whether the parties intended that contractual indemnification and insurance provisions from a pre-existing, long-term service agreement between them be incorporated into the purchase order agreement in place at the time of the underlying accident.

Island Pump now moves to renew the later portion of the November 20, 2015 Order, arguing that the Court's determination was based on a misreading of the reference numbers printed on both documents. Island Pump asserts that the reference number printed on the 2009 purchase order (NA122004MJJ2) differs from the reference number on the 2004 service agreement (NA122204MJJ2), and that no other provision in the purchase order purports to incorporate the insurance and indemnification provisions contained therein. As a result, Island Pump asserts no basis exists to find that the insurance and indemnification provisions were incorporated into the 2009 purchase order. With respect to the purchase order agreement, Island Pump argues that the indemnification and insurance provisions contained therein are inapplicable, because the purchase order was not executed or delivered until after plaintiff's accident, and was not even mentioned in the third-party complaint.

Motiva opposes the motion and cross-moves for summary judgment on its third-party contractual indemnification claim against Island Pump on the grounds the reference numbers on the service agreement and the purchase order differ only to the extent that the latter (NA122204MJJ2) includes the specific month, day, and year of the memorialization of the 2004 service agreement, while the reference number (NA122004MJJ2) printed on the former includes only the month and year of the execution of the service agreement. Motiva argues that the minor differences in the reference numbers do not negate the otherwise obvious relation between both agreements, that the service agreement was the only existing blanket agreement between the parties, and that language in the purchase order mandated that "[w]here a [purchase order] . . . is issued under the terms of an existing contract, the terms of that existing contract shall prevail." Additionally, Motiva asserts that Island Pump accepted amendments modifying safety guidelines in the long term service agreement in 2008, that it applied those guidelines to work performed under the 2009 purchase order agreement, and that such conduct is evidence that Island Pump was aware that the terms of the service agreement applied to its work at the subject gas station. As to Motiva's alleged failure to deliver the purchase order to Island Pump before the date of plaintiff's accident, Motiva asserts that during his deposition hearing Island Pump's principal admitted that it was not unusual for Island Pump to receive a purchase order from Motiva after the commencement of its work, and that the unsigned purchase order, though dated after the start of Motiva's work, applied to the subject renovation project.

By way of a separate motion, plaintiff moves for partial summary judgment in his favor on the issue of liability with respect to his common law negligence and Labor Law claims against Shell and Motiva. Plaintiff argues that Shell and Motiva should be considered owners for the purposes of the Labor Law, since they were leaseholders of the subject gas station, they hired Island Pump to perform renovations to the premises, and they retained the authority to insist that proper safety practices were followed during the project. Plaintiff asserts that Shell and Motiva violated Labor Law § 240 (1) by failing to ensure he was provided with a secured ladder or some other adequate safety device designed to prevent or break his fall. Plaintiff further contends that Shell and Motiva violated Labor Law § 241 (6) when they failed to comply with NYCRR 23-1.21 (e) (3) and 23-9.4, which require, respectively, that ladders be placed on a firm level footing, and that loads lifted by backhoes be raised in a vertical manner to prevent them from swinging while they are being hoisted. With respect to his common law negligence and Labor Law § 200 claims, plaintiff argues that Shell and Motiva are liable because they possessed the authority to control the means and method of his work, and they failed to ensure such work was done in a safe manner. Plaintiff's submissions in support of the motion includes an expert affidavit by Joseph Cannizzo, P.E.

Shell and Motiva oppose the motion on the basis a triable issue exists as to whether plaintiff fell, not while he was on the ladder in question, but while he was standing on the surface of the flatbed truck, which rocked when the added weight of the gas pump was lowered onto it. In addition, Shell and Motiva argue that plaintiff was not engaged in any activity covered by the statute at the time of the accident, and that he failed to identify the violation of any applicable sections of the industrial code in support of his Labor Law § 241 (6) claim prior to the making of the instant motion. Shell and Motiva further assert that the motion should be denied on the grounds it was not supported by an affidavit of someone with personal knowledge of the facts of the case, and that the copies of the pleadings and the transcripts of the parties' deposition testimony included in the moving papers were neither signed nor verified.

Although Quick Stop did not oppose plaintiff's motion, it moves for summary judgment dismissing the complaint and cross claims against it on the grounds it was not an owner, contractor, or agent for the purposes of the Labor Law, it never contracted for the work giving rise to plaintiff's accident, and it neither played any role in performing the work nor possessed the authority to supervise or control how it was performed. Neither plaintiff nor any of the codefendants have submitted papers in opposition to Quick Stop's motion.

In another motion, dated April 24, 2018, Island Pump moves, pursuant to CPLR 3042, for an order precluding plaintiff from offering any evidence at trial based on his alleged failure to comply with certain outstanding discovery requests, including, among others, requests for HIPPA and Arons compliant authorizations permitting Island Pump to interview plaintiff's treating physicians and physical therapists, for certain medical reports and records, and for plaintiff's employment and tax records. In opposition to the motion, plaintiff submits a copy of a letter, dated January 17, 2017, in which he purports to have complied with Island Pump's demands for authorizations. Plaintiff asserts, among other things, that the motion should be denied for the additional reason that Island Pump failed to make any good faith attempt to resolve the alleged discovery dispute prior to making the instant motion.

Initially, the Court notes the transcripts of the parties' deposition testimony submitted by plaintiff in support of his motion are in admissible form. Though unsigned, the transcripts of plaintiff's depositions submitted in support of his motion are admissible, since they were submitted by plaintiff himself, who, by so doing, has acknowledged their accuracy (*see* ***Gallway v Muintir, LLC***, 142 AD3d 948, 38 NYS3d 28 [2d Dept 2016]; ***Vetrano v J. Kokolakis Contr., Inc.***, 100 AD3d 984, 954 NYS2d 646 [2d Dept 2012]). The unsigned transcripts of the deposition testimony by Pete Pugnale and Frank DiAndrea are likewise in admissible form, since they have been certified by the court reporter, and have not been challenged as inaccurate (***Pavane v Marte***, 109 AD3d 970, 971 NYS2d 562 [2d Dept 2013]; ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]). As to the transcript of the deposition testimony by nonparty Carlos Contreras, Shell and Motiva failed to challenge its accuracy by citing to such testimony in their own opposition papers, and have submitted a letter, dated May 10, 2016, indicating they requested that Contreras sign the transcript. Where, as in this case, evidence exists that the deponent has failed to sign and return the transcript within 60 days of such request, CPLR 3116 (a) permits use of the transcript as if it was fully signed (*see* ***Franzese v Tanger Factory Outlets Ctrs.***, 88 AD3d 763, 930 NYS2d 900 [2d Dept 2011]; ***Chisholm v Maloney***, 302 AD2d 792, 756 NYS2d 314 [3d Dept 2003]). To the extent that the affirmation of plaintiff's attorney is accompanied by documentary evidence such as the aforementioned deposition transcripts, the court deems it sufficient to meet the requirements of CPLR 3212 (b) that a motion for summary judgment be supported by an affidavit of a person with personal knowledge of the facts of the case (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 598, 427 NYS2d 925 [1980]; *see also* ***First Interstate Credit Alliance v Sokol***, 179 AD2d 583, 579 NYS2d 653 [1st Dept 1992]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***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]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (***Zuckerman v City of New York***, *supra*).

Generally, "Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their 'agents'" (***Guclu v 900 Eighth Ave. Condominium, LLC***, 81 AD3d 592, 593, 916 NYS2d 147 [2d Dept 2011]). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'" (***Zaher v Shopwell, Inc.***, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], *quoting* ***Copertino v Ward***, 100 AD2d 565, 566, 473 NYS2d 494 [2d Dept 1984]). While a lessee may be deemed an owner if the lessee contracts for the work at issue or otherwise has authority to control the work may be deemed an owner (*see* ***Zaher v Shopwell, Inc.***, *supra* at 339-340), a lessee that does not so contract or otherwise have authority to supervise or control the work, is not an owner or agent under Labor Law §§ 200, 240 (1) or 241 (6) (*see* ***Ferluckaj v Goldman Sachs & Co.***, 12 NY3d 316, 880 NYS2d 879 [2009]). Indeed, the key criterion in determining whether a lessee should be held

liable under the statute is whether it had the authority to insist that the plaintiff follow proper safety procedures while performing his work (*see* ***Ferluckaj v Goldman Sachs & Co.***, 12 NY3d 316, 880 NYS2d 879 [2009]; ***Seferovic v Atlantic Real Estate Holdings, LLC***, 127 AD3d 1058, 7 NYS3d 458 [2d Dept 2015]; ***Alfonso v Pacific Classon Realty, LLC***, 101 AD3d 768, 956 NYS2d 111 [2d Dept 2012]; ***Guclu v 900 Eighth Ave. Condominium, LLC***, *supra*).

Labor Law § 240 (1) provides protection to employees engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*see* ***Esposito v New York City Indus. Dev. Agency***, 1 NY3d 526, 770 NYS2d 682 [2003]). Labor Law § 241 (6) extends coverage where the alleged injury occurs in the context of a construction, demolition or excavation project (*see* ***Nagel v D & R Realty Corp.***, 99 NY2d 98, 101, 752 NYS2d 581 [2002]). Moreover, it is well established that work constituting an alteration of a building or structure is covered under both Labor Law §§ 240 (1) and 241 (6) (*see* ***Joblon v Solow***, 91 NY2d 457, 465, 672 NYS2d 286 [1998]). As distinguished from mere routine maintenance, which typically involves the replacement of worn out component parts necessitated by normal wear and tear (*see* ***Konaz v St. John's Preparatory Sch.***, 105 AD3d 912, 963 NYS2d 337 [2d Dept 2013]), alteration involves work that effectuates a significant change to the configuration, dimension, or composition of a building or structure (*see* ***Saint v Syracuse Supply Co.***, 25 NY3d 117, 8 NYS3d 229 [2015]; ***Panek v County of Albany***, 99 NY2d 452, 758 NYS2d 267 [2003]). In determining whether a project falls within the definition of "altering," the court must examine the totality of the work done on the project (*see* ***Aguilar v Henry Mar. Serv.***, 12 AD3d 542, 543, 785 NYS2d 95 [2004]), and be careful not to isolate the moment the plaintiff was injured. Rather, the courts must consider whether the plaintiff was a member of a team that undertook an enumerated activity, and whether he was performing duties ancillary to the covered activity at the time of the accident (*see* ***Prats v Port Auth. of N.Y. & N.J.***, 100 NY2d 878, 878, 768 NYS2d 178 [2003]).

Labor Law § 240 (1) requires that safety devices, such as scaffolds, ladders, harnesses, or hoists be so "constructed, placed and operated as to give proper protection to a worker" (***Klein v City of New York***, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). The statute was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person (*see* ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 501, 601 NYS2d 49 [1993]), and will be liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices . . . on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 513, 577 NYS2d 219 [1991]). To prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see* ***Bland v Manocherian***, *supra*; ***Sprague v Peckham Materials Corp.***, *supra*). Where an employee has been provided with an elevation-related safety device, it is usually a question of fact as to whether the device provided proper protection (*see* ***Beesimer v Albany Ave/Rte. 9 Realty***, 216 AD2d 853, 629 NYS2d 816 [3d Dept 1995]), "except in those instances where the unrefuted evidence establishes that the device collapsed, slipped or otherwise failed to perform its function of supporting the worker" (***Briggs v Halterman***, 267 AD2d 753, 754-755, 699 NYS2d 795 [3d Dept 1999]; *see* ***Gordon v Eastern Ry. Supply***, 82 NY2d 555, 562, 606 NYS2d 127 [1993]). Thus,

"[i]t is sufficient for purposes of liability under [Labor Law § 240 (1)] that adequate safety devices to prevent [a] ladder from slipping or to protect a plaintiff from falling were absent" at the time of a the accident (***McCarthy v Turner Constr., Inc.***, 52 AD3d 333, 859 NYS2d 648 [1st Dept 2008]; ***Orellano v 29 E. 37th St. Realty Corp.***, 292 AD2d 289, 290-291, 740 NYS2d 16 [1st Dept 2002]).

Here, plaintiff established, *prima facie*, that Shell and Motiva violated Labor Law § 240 (1) by failing to ensure that the A-frame ladder on which he was standing was properly placed or secured, or that he was provided with some other safety device designed to prevent or break his fall (*see* ***Morocho v Plainview-Old Bethpage Cent. Sch. Dist.***, 116 AD3d 935, 984 NYS2d 120 [2d Dept 2014]; ***Durmiaki v International Bus. Machines Corp.***, 85 AD3d 960, 925 NYS2d 628 [2d Dept 2011]; ***Mooney v PCM Dev. Co.***, 238 AD2d 487, 656 NYS2d 655 [2d Dept 1997]; ***Quinlan v Eastern Refractories Co.***, 217 AD2d 819, 629 NYS2d 819 [3d Dept 1995]). Significantly, plaintiff testified that it was his task to detach the chain holding the gas pump from the bucket of backhoe that was used to hoist the device onto the surface of a flatbed truck, that the ladder was the only safety equipment provided to him, and that the accident occurred shortly after he signaled for the gas pump to be lowered so the chain attached to it would loosen. According to plaintiff's testimony, he observed the gas pump swing towards him as it was lowered, and he felt the device strike the ladder causing both himself and the ladder to fall to the surface of the bed of the truck. Plaintiff further testified that there was no requirement that he use a safety harness or have a spotter assist him whenever he used the ladder, that there was no one steadying the pump with a rope or some other means as it was being moved, and that there was no rule requiring him to climb off the ladder whenever the backhoe was being used within his vicinity.

In opposition, Shell and Motiva failed to raise a triable issue warranting denial of the motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). It is noted that Shell and Motiva do not dispute that they should be treated as 'owners' for the purposes of the statute as it is undisputed that they leased the premises, contracted for the work, and retained supervisory authority over the safety procedures employed during its execution, (*see* ***Ferluckaj v Goldman Sachs & Co.***, *supra*; ***Seferovic v Atlantic Real Estate Holdings, LLC***, *supra*; ***Bart v Universal Pictures***, 277 AD2d 4, 5, 715 NYS2d 240 [1st Dept 2000]). Shell and Motiva also failed to establish that plaintiff was engaged in mere routine maintenance at the time of the accident. Rather, the adduced evidence indicates that the work, which involved, among other things, excavation and the removal and replacement of gas tanks, gas lines, and gas dispensers, was incidental to a larger renovation project and, at the very least, was an alteration meant to effectuate significant changes to the structures comprising the gas station (*see* ***Saint v Syracuse Supply Co.***, *supra*; ***Cabri v ICOS Corp. of Am.***, 240 AD2d 456, 658 NYS2d 646 [2d Dept 1997]; *cf.* ***Konaz v St. John's Preparatory Sch.***, *supra*).

Additionally, Shell and Motiva failed to raise triable issues as to plaintiff's possible contributory negligence or whether his conduct was the sole proximate cause of the accident. Plaintiff's accident is distinguishable from those in cases involving falls from secured ladders where a worker merely loses his balance and falls (*see* ***Spenard v Gregware Gen. Contr.***, 248 AD2d 868, 669 NYS2d 772 [3d Dept 1998]; ***Gange v Tilles Inv. Co.***, 220 AD2d 556, 632 NYS2d 808 [2d Dept 1995]). Where, as in this case, a safety device failed to fulfill its safety function or was inadequate, a plaintiff's alleged contributory negligence is no defense (*see* ***Blake v Neighborhood Hous. Servs. of N.Y. City***, 1 NY3d

280, 290, 771 NYS2d 484 [2003]; ***Fanning v Rockefeller Univ.***, 106 AD3d 484, 964 NYS2d 525 [1st Dept 2013]; ***Valensisi v Greens at Half Hollow, LLC***, 33 AD3d 693, 823 NYS2d 416 [2d Dept 2006]). The Court further rejects Shell and Motiva's submission of a copy of Island Pump's expert disclosure for the purpose of defeating plaintiff's *prima facie* showing, since the accompanying expert affidavit, which simultaneously purports that plaintiff did not fall from the ladder and that he did not hold on to it tightly enough, is unsworn, contradictory, and replete with speculation (*see* ***Laskowski v 525 Park Ave. Condominium***, 93 AD3d 822, 941 NYS2d 201 [2d Dept 2012]; ***Verma v City of New York***, 62 AD3d 863, 879 NYS2d 540 [2d Dept 2009]; ***Leggio v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2012]). Accordingly, the branch of plaintiff's motion seeking partial summary judgment on his Labor Law § 240 (1) claim against Shell and Motiva is granted. To the extent plaintiff has been granted partial summary judgment on the issue of liability with respect to his Labor Law § 240 (1) claim against Shell and Motiva , the Court denies, as academic, the remaining branches of his motion seeking similar relief on his Labor Law §§ 241 (6) and 200 claims (*see* ***DaSilva v Everest Scaffolding, Inc.***, 136 AD3d 423, 25 NYS3d 141 [1st Dept 2016]; ***Yost v Quartararo***, 64 AD3d 1073, 883 NYS2d 630 [3d Dept 2009]; ***Nudi v Schmidt***, 63 AD3d 1474, 882 NYS2d 731 [3d Dept 2009]; ***Argueta v Pomona Panorama Estates, Ltd.***, 39 AD3d 785, 835 NYS2d 358 [2d Dept 2007]). Plaintiff's damages are the same under any of the theories of liability and he can only recover once, rendering such a discussion academic (*see* ***Auriemma v Biltmore Theatre, LLC***, 82 AD3d 1, 917 NYS2d 130 [1st Dept 2011]).

However, the Court grants the unopposed motion by defendant Quick Stop for summary judgment dismissing the complaint against it. Quick Stop submitted undisputed evidence that it was a sublessee of Shell and Motiva , and that it neither contracted for the work performed by plaintiff at the time of the accident nor possessed the supervisory authority to control such work or the safety procedures employed during its execution (*see* ***Ferluckaj v Goldman Sachs & Co.***, *supra*; ***Guclu v 900 Eighth Ave. Condominium, LLC***, *supra*; ***Seferovic v Atlantic Real Estate Holdings, LLC***, *supra*; ***Alfonso v Pacific Classon Realty, LLC***, *supra*). In particular, Quick Stop submitted a copy of Motiva's long-term lease for the premises, a copy of Motiva's agreement retaining Island Pump to perform the subject renovation of the gas station, and a copy of Quick Stop's own sub-lease, which contained a clause granting Motiva the right to enter the premises for the purpose of performing work which altered, modernized, or reconstructed the gas station. Additionally, Quick Stop submitted deposition testimony by its office manager, Hasan Bayraktar, stating that Quick Stop merely operated the gas station, that it neither contracted for the work performed by Island Pump nor possessed any supervisory authority over its execution, and that Motiva erected a barrier fencing-off the renovation project from the convenience store operated by Quick Stop on the premises. As none of the other parties to the action submitted papers in opposition, no triable issues were raised warranting denial of Quick Stop's motion (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr***, *supra*).

As to the motion by Shell and Motiva for summary judgment on the third-party contractual indemnification claim against Island Pump, it is noted that by Order dated November 15, 2015, this Court denied a prior summary judgment motion by Island Pump which sought dispositive relief on the same issue. After considering the motion, as well as opposition papers submitted by Shell and Motiva, the Court determined triable issues existed as to whether the terms of the parties' 2004 blanket agreement continued to govern all of their subsequent agreements and, if so, whether the unsigned 2009

purchase order retaining Island Pump to perform the subject renovation work incorporated the indemnification obligations set forth in the earlier blanket agreement. Inasmuch as the motion by Shell and Motiva seeks summary judgment on the very same contractual indemnification claim, requiring the Court to reconsider issues that were previously decided on the merits, the Court finds that it is precluded by the law of the case doctrine (*see* ***Pastrana v Cutler***, 115 AD3d 725, 983 NYS2d 33 [2d Dept 2014]; ***Romagnolo v Pandolfini***, 75 AD3d 632, 906 NYS2d 76 [2d Dept 2010]; ***Gualano v Abington Sq. Condominium Assn.***, 69 AD3d 793, 894 NYS2d 453 [2d Dept 2010]). "[T]he law of the case doctrine addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment. Once a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on the court as well. A grant of summary judgment establishes the law of the case as to the issues essential to that determination" (***Dukett v Wilson***, 31 AD3d 865, 869, 818 NYS2d 337[3d Dept 2006], *quoting* ***People v Evans***, 94 NY2d 499, 502, 706 NYS2d 678 [2000]; *see* ***RPG Consulting, Inc. v Zormati***, 82 AD3d 739, 917 NYS2d 897 [2d Dept 2011]).

Even if the Court declined to apply the law of the case doctrine, a review of the adduced evidence reveals that triable issues of fact and credibility exist which would warrant a denial of the motion (*see* ***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]). Although the Court agrees that the minor differences in the reference numbers on the 2004 blanket agreement and the 2009 purchase order do not negate the otherwise obvious relation between both agreements, it still finds that triable issues of fact exist which preclude an award of summary judgment in favor of Shell and Motiva (*see* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 795 NYS2d 491 [2005]; ***Murphy v Eagle Scaffolding, Inc.***, 129 AD3d 799, 11 NYS3d 218 [2d Dept 2015]; ***Tullino v Pyramid Cos.***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Auchampaugh v Syracuse Univ.***, 67 AD3d 1164, 889 NYS2d 706 [3d Dept 2009]). In particular, the Court notes deposition testimony by Island Pump's principal, Frank Di Andrea, that the unsigned 2009 purchase order – which was not delivered until after plaintiff's accident – was a complimentary agreement containing its own indemnification provision, and was not meant to incorporate the indemnification provision contained in the earlier 2004 Blanket agreement. Since any determination of whether the unsigned 2009 purchase order was meant to incorporate the indemnification obligations of the 2004 blanket agreement requires the Court to go beyond the parties' written agreements and rely upon on the parties' past course of conduct and their understanding of said agreements, any finding as to whether Island Pump is contractually required to indemnify Motiva and Shell must be left to the trier of fact (*see* ***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 795 NYS2d 491 [2005]; ***Zalewski v MH Residential 1, LLC***, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]; ***Barrett v Magnetic Constr. Group Corp.***, 149 AD3d 1022, 53 NYS3d 350 [2d Dept 2017]; ***Murphy v Eagle Scaffolding, Inc.***, 129 AD3d 799, 11 NYS3d 218 [2d Dept 2015]).

The motion by Island Pump to renew its motion for summary judgment dismissing the third-party contractual indemnification claim against it also is denied. Although denominated as a motion to renew, the motion is essentially a motion to reargue as it was not based on any newly discovered facts that were unavailable to Island Pump at the time of the original motion (*see e.g.* ***Tokio Marine & Fire Ins. Co. v Borgia***, 11 AD3d 603, 783 NYS2d 629 [2d Dept 2004]; *see also* ***Swedish v Beizer***, 51 AD3d 1008, 859

NYS2d 668 [2d Dept 2008]; ***Matter of Weinberg***, 132 AD2d 190, 210, 522 NYS2d 511 [1st 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]). Indeed, Island Pump does not dispute that the reference numbers printed on the 2004 long-term service agreement and the 2009 purchase order retaining its services of the subject renovation were available to it at the time of the original motion. Rather, it erroneously purports, as discussed above, that the Court's determination that triable issues existed which precluded an order granting it summary judgment was based solely on its misreading of the reference numbers printed on the parties' 2004 service agreement and the 2009 purchase order. Furthermore, even construing the motion as one to reargue, the belated motion, made more than one year after service of the order determining the prior motion (*see* CPLR 2221 (d) (3); ***Selletti v Liotti***, 45 AD3d 668, 845 NYS2d 816 [2d Dept 2007]), failed to show that material relevant facts were overlooked or misapprehended, or that controlling law was misapplied when determining the motion (*see* CPLR 2221 (d) (2); ***Pryor v Commonwealth Land Title Ins. Co.***, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]).

Finally, the motion by Island Pump for an Order, pursuant to CPLR 3042, precluding plaintiff from offering any evidence at trial based on his alleged failure to comply with ceratin outstanding discovery demand is denied, without prejudice. The Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR § 202.7 [c]). Here, Island Pump failed to provide a sufficient affirmation of a good faith detailing its efforts to resolve the issues raised by the motion (*see* 22 NYCRR § 202.7 [a]). The affirmation it provided merely recites its previous discovery demands rather than any communication between the parties evincing a diligent effort to resolve the alleged discovery dispute (*see* 22 NYCRR § 202.7 [c]; ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; ***148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.***, 62 AD3d 486, 878 NYS2d 727 [1st Dept 2009]; ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; ***Amherst Synagogue v Schuele Paint Co. Inc.***, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]).

Dated: December 3, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION