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SHORT FORM ORDER

INDEX No. 05-14143

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 5-25-11 (#008)
MOTION DATE 6-30-11 (#009 & #010)
MOTION DATE 5-16-12 (#011)
ADJ. DATE 7-12-12
Mot. Seq. # 008-MotD #009-XMD # 010-XMotD
011 -MotD # 012 - MD

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EDWARD HERNANDEZ and DENISE HERNANDEZ,

Plaintiffs,

- against -

CRESCENT ASSOCIATES, LLC, SUMMIT GENERAL CONTRACTORS, LLC, ECKERD CORPORATION, DARR CONSTRUCTION EQUIPMENT CORP., RUSH CONCRETE CORP. and THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Defendants.

SIBEN & SIBEN, LLP
Attorney for Plaintiffs
90 East Main Street
Bay Shore, New York 11706

MCMAHON MARTINE & GALLAGHER
Attorney for Summit General Contractors
55 Washington Street, Suite 720
Brooklyn, New York 11201

HAMMILL, O'BRIEN, CROUTIER, PC
Attorney for Darr Construction & QBE Insurance
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

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SUMMIT GENERAL CONTRACTORS, LLC,

Third-Party Plaintiff,

- against -

AMERICAN STATES INSURANCE COMPANY,

Third-Party Defendant.

LESTER SCHWAB KATZ & DWYER LLP
Attorney for Rush Concrete
120 Broadway
New York, New York 10271

AHMUTY, DEMERS & MCMANUS, ESQS.
Attorney for Stop & Shop Supermarket
200 I.U. Willets Road
Albertson, New York 11507

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THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Second Third-Party Plaintiff,

- against -

AMERICAN STATES INSURANCE COMPANY, QBE INSURANCE COMPANY and NEW YORK MARINE AND GENERAL INSURANCE COMPANY,

Second Third-Party Defendants.

BONNER KIERNAN TREBACH, LLP
Attorney for American States Insurance
Empire State Building, 59th Floor
New York, New York 10118

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Upon the following papers numbered 1 to 109 read on these motions and cross motions for leave to renew, for leave to reargue, for summary judgment, and to strike the answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 45 - 56; 57 - 65 ; Notice of Cross Motion and supporting papers 20 - 38; 39 - 44 ; Answering Affidavits and supporting papers 20 - 38; 39 - 44; 66 - 69; 70 - 74; 75 - 78; 79 - 80; 81 - 99; 100 - 101; 102 - 104 ; Replying Affidavits and supporting papers 105 - 107; 108 - 109 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and cross motions are consolidated for the purpose of determination; and it is further

ORDERED that the motion by defendant/second third-party plaintiff The Stop & Shop Supermarket Company, LLC. (008) pursuant to CPLR § 2221 (e) which, in effect, seeks leave to renew its prior cross motion for summary judgment to the extent that it sought summary judgment dismissing the causes of action asserted against it pursuant to Labor Law § 200 and common law negligence or, in the alternative, summary judgment in its favor on its cross claims against defendant Summit General Contractors, LLC. for indemnification, is granted, and upon renewal, those branches of its prior cross motion are denied; and it is further

ORDERED that the cross motion by the plaintiffs (009) pursuant to CPLR § 3124 and CPLR § 3126 to strike the respective answers of defendants Summit General Contractors, LLC and Rush Concrete Corp. is denied; and it is further

ORDERED that the cross motion by defendant Summit General Contractors, LLC (010) pursuant to CPLR § 2221 (e) which, in effect, seeks leave to renew its prior motion for summary judgment to the extent that it sought summary judgment dismissing the causes of action asserted against it pursuant to Labor Law § 200 and common law negligence is granted and, upon renewal, those branches of its prior motion are denied; and it is further

ORDERED that the motion by defendant Rush Concrete Corp. (011) pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any and all cross claims asserted against it is granted to the extent that it seeks dismissal of the causes of action asserted against it pursuant to Labor Law § 200, § 240 (1) and § 241 (6), and is otherwise denied; and it is further

ORDERED that the motion by defendant/second third-party plaintiff The Stop & Shop Supermarket Company, LLC. (012) pursuant to CPLR § 2221 which, in effect, seeks leave to renew and reargue so much of this Court's prior determination, dated February 15, 2012, as granted the branch of the motion by defendant Darr Construction Equipment Corp. and second third-party defendant QBE Insurance Company which sought dismissal of the second third-party complaint as asserted against QBE Insurance Company, is denied.

In this action, the plaintiffs seek to recover damages for personal injuries sustained by Edward Hernandez (hereinafter the injured plaintiff), and derivatively by plaintiff Denise Hernandez, in a trip and fall incident that occurred on May 25, 2004 at approximately 1:40 p.m., at a shopping center known as the Plainedge Plaza located in Plainedge, New York. On the date of the incident, the injured plaintiff, who was employed by nonparty Fox Glass, was at the shopping center to replace a broken storefront window at Eckerd drug store. On the date of the incident, the shopping center was undergoing construction work, unrelated to the injured plaintiff's work, consisting of work to the facade and excavation of parts of the sidewalk and surrounding areas. The injured plaintiff's accident purportedly occurred when he fell after stepping into an unmarked and uncovered hole, which was present in the sidewalk in front of Eckerd's drugstore.

The property was owned by Crescent Associates, LLC, and leased to The Stop & Shop Supermarket Company, LLC. Stop & Shop, the landlord at the shopping center, leased the premises to Eckerd Corporation. Stop & Shop hired Summit General Contractors, LLC, as general contractor, to perform certain facade work at the premises. Summit subcontracted a portion of the excavation and concrete work to be performed on the project to Darr Construction Equipment Corp. and Rush Concrete Corp.

The plaintiffs commenced this action against defendants Crescent Associates, LLC, Summit General Contractors, LLC and Eckerd Corporation on or about June 10, 2005 pursuant to Labor Law §§ 200, 240 and 241 (6), and common law negligence. The plaintiffs served a supplemental summons and amended complaint in the original action adding defendants Darr Construction Equipment Corp. and Rush Concrete Corp. The amended complaint alleges causes of action against Darr and Rush for violation of Labor Law § 200, 240, 241 (6), and common law negligence. Each of the defendants asserted cross-claims for indemnification against their co-defendants. The plaintiffs commenced a companion action on or about September 18, 2006 against The Stop & Shop Supermarket Company, LLC. By order dated August 16, 2007, the two actions were fully joined. Thereafter, Summit commenced a third-party action against American States Insurance Company and Stop & Shop, filed a notice of impleader and a second third party action against American States Insurance Company, QBE Insurance Company and New York Marine and General Insurance Company, the insurance companies providing coverage to its codefendants.

By prior motions, defendant Rush moved pursuant to CPLR § 3211 to have the action dismissed against it, and such motion was denied by order of this Court dated April 19, 2007. Defendants Crescent and Eckerd moved for summary judgment dismissing the complaint as asserted against them, and such motion was granted by order dated July 22, 2008. Defendant Darr and second third-party defendant QBE moved for summary judgment dismissing the complaint and second third-party complaint as asserted against them, and by order dated February 15, 2012, the Court granted such motion.

In addition, as is relevant to the instant motions, defendant Summit previously moved for summary judgment dismissing the complaint as asserted against it. It argued that (1) it was entitled to dismissal of the plaintiff's causes of action seeking recovery pursuant to Labor Law § 240 and § 241 (6) as asserted against it because the injured plaintiff was not in the class of workers protected by such statute, and (2) it was entitled to dismissal of the plaintiffs' causes of action seeking recovery pursuant to Labor Law § 200 and common law negligence because it neither created nor had notice of the purportedly dangerous condition which caused the accident. In support of this motion, Summit submitted, *inter alia*, the affidavit of Marc Losquadro, the deposition testimony of the plaintiffs, the deposition testimony of James Dalto on behalf of Crescent, the agreement between Summit and Stop & Shop with respect to the subject construction work, the agreement between Summit and Darr with respect to the subject construction work, and the agreement between Summit and Rush with respect to the subject construction work. By cross motion, Stop & Shop also previously moved for summary judgment dismissing the complaint as asserted against it. Stop & Shop relied on the arguments and evidence submitted in support of Summit's motion in chief in support of its cross motion to dismiss the complaint as asserted against it. In the alternative, Stop & Shop's cross motion also sought leave to amend its answer to add a cross complaint against Summit for contractual indemnification, and upon amendment, summary judgment in its favor on its cross complaint against Summit.

By order dated March 16, 2009, the Court granted those branches of the motion by Summit and cross motion by Stop & Shop which sought summary judgment dismissing the causes of action pursuant to Labor Law

§ 240 (1) and § 241 (6) as against those defendants, finding that the injured plaintiff was not a member of the class protected by these statutes, and his accident cannot impart the liability imposed by these provisions on the property owner. The Court denied those branches of the motion and cross motion which sought summary judgment dismissing the causes of action pursuant to Labor Law § 200 and common law negligence based on its finding that there existed questions of fact as to whether Summit and Stop & Shop failed to maintain the construction site in a safe condition. The Court further noted that the plaintiffs were entitled to a reasonable opportunity for disclosure. With respect to Stop & Shop's alternative request for relief on its cross motion, the Court granted this branch of Stop & Shop's motion solely to the extent of granting it leave to amend its answer.

Stop & Shop now moves (008) pursuant to CPLR § 2221 (e) for leave to renew its prior cross motion for summary judgment, and upon renewal, for summary judgment dismissing the plaintiffs' remaining causes of action pursuant to Labor Law § 200 and common law negligence as asserted against it. In the alternative, upon renewal, it seeks summary judgment in its favor on its cross claims against Summit for indemnification. Stop & Shop contends that it is entitled to summary judgment dismissing the causes of action pursuant to Labor Law § 200 and common law negligence as the new evidence submitted in support of its motion demonstrates that it did not create or have notice of the purported defective condition of the sidewalk, did not supervise or control the job site, and was not responsible for safety at the job site. In support of its motion, Stop & Shop relies on, *inter alia*, deposition testimony which was elicited following its prior motion for summary judgment. Specifically, it relies on the deposition testimony of Jeffrey Morgan on behalf of Stop & Shop, Robert McQuaid on behalf of Summit, Roy Cannetti on behalf of Darr, Antonio Palhares on behalf of Rush, Marc Losquadro on behalf of Summit and Scott Hartough on behalf of Summit. Stop & Shop also submits an affidavit by Scott Hartough.

The plaintiffs cross-move (009) pursuant to CPLR § 3124 and CPLR § 3126 to strike the answer of defendants Summit and Rush based on their purported failures to respond to certain notices of discovery, dated December 7, 2010. In support of their cross motion, the plaintiffs submit, *inter alia*, an affirmation of good faith by counsel, notices of discovery dated December 7, 2010, and letters to counsel for Summit and Rush, dated May 29, 2011, indicating that no response had been received to the December 7, 2010 discovery request, and requesting such response.

Summit cross-moves (010) pursuant to CPLR § 2221 (e) for leave to renew its prior motion for summary judgment, and upon renewal for summary judgment dismissing the plaintiff's remaining causes of action pursuant to Labor Law § 200 and common law negligence as asserted against it. It argues that it is entitled to such relief because the new evidence it submitted demonstrates that the hole in the sidewalk which purportedly caused the injured plaintiff's accident was covered by a construction barrel, and that it did not have any notice that such construction barrel had been moved. In support of its cross motion, Summit relies on, *inter alia*, its submissions on its prior motion, the deposition testimony of Marc Losquadro on behalf of Summit, the deposition testimony of Scott Hartough on behalf of Summit, and the affidavit of Kevin B. Farrelly.

Rush moves (011) for summary judgment dismissing the complaint and any and all cross claims asserted against it. Rush contends that it is entitled to such relief because its sole contractual relationship was with Summit, it performed its work in accordance with Summit's specifications, it was not present at the job site at the time of the accident, and Summit assumed and maintained full responsibility and control over the subject holes in the sidewalk at the time of the injured plaintiff's accident. In support of its motion, Rush relies on, *inter alia*, the agreement between itself and Summit, the deposition testimony of Antonio Palhares on behalf of Rush and the deposition testimony of Marc Losquadro on behalf of Summit.

Lastly, Stop & Shop moves (012) pursuant to CPLR § 2221 for leave to reargue and/or renew the prior motion by defendant Darr and second third-party defendant QBE for summary judgment dismissing the complaint and second third-party complaint as asserted against them. Upon reargument and/or renewal, Stop & Shop seeks an order denying such prior motion to the extent that such motion sought summary judgment dismissing its second-third party complaint against QBE for insurance coverage. Specifically, Stop & Shop contends that the second-third party action, which seeks defense and indemnification from QBE based on Stop & Shop's status as an additional insured was improperly dismissed where QBE failed to establish a *prima facie* entitlement to such relief and where, the new evidence now submitted, establishes its entitlement to coverage under the QBE policy.

As is relevant to these motions and cross motions, Jeffrey Morgan testified that he is a senior asset manager for Stop & Shop, and that his duties include overseeing third-party property management and construction. Morgan testified that the sidewalk at issue, which was located in front of an Eckerd Drug Store, was part of ground lease premises which belonged to Stop & Shop. According to Morgan, he had never been to the location of the accident prior to the accident and had no involvement with the construction project at issue. He had no personal knowledge of the relationship between Stop & Shop and Summit and did not know who was responsible for site safety during the subject construction.

During his deposition, Robert McQuaid testified that he was a union carpenter involved in the subject construction project as an employee of Summit. According to McQuaid, Summit had a daily presence at the job site on the date of the accident, including the project superintendent, Mark Losquadro. McQuaid did not know who was responsible for site safety of pedestrians. McQuaid was not aware of whether Summit had daily logs of the work performed, did not know when Darr or Rush performed work at the site, and did not know who created the holes in the sidewalk or why such holes were created. McQuaid testified that he did not know who placed the barrels and why, but testified that someone would check the barrels daily to make sure the holes were covered.

Roy Cannetti, the foreman at the subject job site for Darr, testified that Darr entered into a contract with Summit, the general contractor at the job site, to perform certain work at the subject premises. This work included site demolition, grading and landscaping. According to Cannetti, Darr performed interior building demolition first and removed exterior canopy and support beams along the front of the building and sidewalk, including the sidewalk in front of Eckerds. With respect to sidewalk work, Darr removed the old sidewalk and leveled the ground for a new one. The surface was leveled soil when this task was completed. Cannetti testified that the general contractor and the town inspector both inspected Darr's work after its completion. Cannetti testified that Rush Concrete was to install the new sidewalk. In order to minimize disruption to the shopping center, Rush and Darr worked in conjunction with one another. Darr removed the concrete and set the grade and Rush installed the new concrete. Rush came after Darr to install the concrete. Neither Cannetti nor anyone from Darr had any conversations with anyone regarding installing a new canopy. Similarly, he never had any conversation with anyone from Summit regarding the work that may be required for the installation of the new canopy and sidewalk. He also had no conversation with anyone from Rush about leaving a hole in the sidewalk area. Cannetti testified that he never observed the holes at issue in the sidewalk. Upon observing photographs of the condition which purportedly caused the plaintiff's injuries, Cannetti stated that the sidewalk appeared to be left out for a reason in the areas of the holes. He could not state whether the holes in the ground were similar to those that would be left for a support beam for a canopy because he did not perform that type of work. Cannetti did not have contact with anyone from Stop & Shop at the job site, but reported to Losquadro from Summit. According to Cannetti, Summit was present at the job site, and inspected the job including Darr's work, every day. Cannetti testified that if Summit observed a contractor or subcontractor performing work at the job site in an

unsafe manner, they would say something to that contractor or subcontractor. Cannetti testified that Darr was not present at the job site on the date of the accident and first learned of the injured plaintiff's accident when he received notice of the instant lawsuit. Cannetti admitted that at the time he was leaving the job site Summit asked him to leave some of his barrels behind and he complied. Cannetti did not know what Summit would use the barrels for.

Antonio Palhares, president of Rush, testified that Rush entered a contract with Summit, the general contractor at the job site, to perform concrete work at the subject premises. Rush did not perform any of the demolition work but was to install the curbs and sidewalks in front of the building as well as the bases for the canopies. The bases to be installed were two by two concrete masses, which would support the canopies. Palhares testified that Losquadro instructed Rush, on behalf of Summit, to do the sidewalks first and to leave holes or pockets in the sidewalk for the bases. He performed the work in that order based on the instructions he received from Losquadro and from Stop & Shop. According to Palhares, Rush was instructed to perform the work in this order because the steel for the bases was behind schedule. This was not standard practice and it was the first time that Palhares had performed this type of work in this order. Generally foundations and bases are prepared first and the sidewalk is poured last so that no pockets or holes are generated. In accordance with Summit's instructions, Rush poured the sidewalk with circular tubes placed to form holes in the sidewalk. According to Palhares, he did not do anything to protect these holes prior to leaving the job site. In the past, he had seen holes, such as these, protected with plywood or traffic barrels, depending on the location. Prior to leaving the job site, he had a conversation with the job superintendent about leaving the holes, and was told that Summit was going to protect them. He did not know how Summit was going to protect them and did not actually observe Summit place something over the holes to protect them. He had no personal knowledge of whether Summit actually protected the holes, but assumed that they did after Rush left the job site. Palhares testified that Rush left the job site in early May and did not return until July or August. No one from Rush was on site on the date of the accident. When Rush returned to the job site, they filled the holes in the cement. Palhares testified that the photographs depicting the location of the injured plaintiff's purported accident depicted the holes left in the cement by Rush. Palhares testified that he never had any conversations with anyone from Darr. He also never had any conversations with anyone from Stop & Shop with respect to how to perform his work. Palhares believed that one of Stop & Shop's construction managers might have been around when he was pouring concrete, but general job site safety was the responsibility of Summit.

During his deposition, Marc Losquadro testified that he was employed by Summit and worked at the subject job site, where Summit was acting as general contractor. He was responsible for coordinating the subcontractors and for site safety. According to Losquadro, he was at the job site all the time. It was an operating shopping center, and he was aware that there were customers patronizing the shopping center and that a safe environment needed to be maintained. He testified that it was Summit's policy that site inspections were ongoing and Summit's common practice to perform work in a safe manner. Losquadro testified that his contact with Stop & Shop was limited to a monthly conference call during which he provided an update on the progress of the work. Stop & Shop did not have anyone at the site during the course of the project and noone from Stop & Shop directed or controlled Summit's work at the site. As far as he knew, Stop & Shop also did not direct or control the work of any of the subcontractors performing work at the site, but this was the responsibility of Summit. Losquadro testified that Stop & Shop was not responsible for safety or maintenance of the job site.

Losquadro testified that Summit hired five or six different subcontractors to perform work at the job site, including Darr and Rush. He instructed Darr where to start and finish its work. Darr completed the work it was

hired to perform at the site prior to the time the sidewalks were poured and prior to the time of the accident. Losquadro also instructed Rush with respect to when it should pour the new sidewalk. According to Losquadro, the new sidewalk was poured by Rush approximately two months prior to the date of the accident. The completed sidewalk had pockets or holes about 6 to 8 inches deep and 16 inches in circumference throughout it. Summit directed Rush to leave the holes in the sidewalk. Based on Losquadro's experience, it was custom and practice to have open holes when a new sidewalk with a canopy was being installed. These holes were awaiting the insertion of structural steel and the presence of these holes did not constitute a deviation from usual custom and practice. Losquadro inspected Rush's work and did not have any complaints. Rush was, in effect, told to come back after the steel columns were delivered. Rush was not present at the job site on the date of the accident and had no responsibilities with respect to the subject job site. Rush did not maintain, manage, control, supervise or design the job site. According to Losquadro, he borrowed orange traffic barrels with heavy rubber bases to cover the holes. These barrels were present over every hole after Rush's departure from the job site. He admitted that there was no caution tape placed around the holes or barrels, including the barrel in front of the drug store.

Losquadro testified that both he and Hartough were present at the site daily, five days a week from 7 a.m. to 3:30 p.m., and that they both inspected the job site. Losquadro's duties included walking around the job site and looking for safety deficiencies. Any deficiencies would be corrected as the job site was an operating shopping plaza. Losquadro's duties also included inspecting the work being performed. Losquadro testified that following the time the sidewalk was installed he made an inspection of the subject job site at least once or twice a day. It was his normal custom and practice to do a walk through to ensure all barrels were in the correct place in the morning when he arrived. He had no specific recollection of a barrel being off when he observed them upon his arrival and no recollection of anyone telling him that a hole was uncovered. It was also his general procedure to drive along the job site in the afternoon when he was leaving to make sure everything was protected, and that all of the holes were covered. Based on these procedures, Losquadro testified that every morning and evening the holes in the sidewalk were protected by barrels. Losquadro testified that he was working on the date of the accident, but admitted that he had no specific recollection of such date or of the date prior. He had no particular recollection of what was going on at the site on the date of the accident, and did not learn of the accident until one week later. He did not know the injured plaintiff and did not observe the plaintiff at the job site.

Scott Hartough, a laborer employed by Summit at the time of the accident, testified that he was assigned to the subject job site for the duration of the job. He reported directly to Losquadro who directed his work at the site. His duties included clean up and keeping traffic moving. Hartough testified that a Stop & Shop representative was present at the site at least once a week and that such representative directed and controlled his work and oversaw everything. The representative walked the site on each visit and was often accompanied by Losquadro. According to Hartough, Stop & Shop had responsibility with respect to safety at the job site, including a responsibility to make sure any hazards at the job site were addressed. Hartough testified that holes were present in the sidewalk after Rush poured the concrete, and that these holes were covered with construction barrels. He assumed it was his job to ensure that the holes in the sidewalk were covered since he was the only laborer at the job site employed by Summit. Hartough testified that if work was being done in an area, he would remove the barrels and replace them when the work was finished. Hartough observed Losquadro drive around the shopping center in the morning looking for barrels that needed to be replaced or any other defects. He recalled Losquadro telling him to put a barrel over an uncovered hole at least once a day. Hartough admitted that he had no specific recollection of when, prior to the time of the accident, he last checked to make sure all the holes were covered.

In his affidavit, Hartough avers that, following his deposition, he realized that the Stop & Shop representative that he saw at the job site, was not assigned to the project, but lived nearby. Although such person visited the site he did not do so in his capacity as a Stop & Shop project manager.

In his affidavit, Kevin Farrelly avers that he was working with the injured plaintiff for Fox Glass and witnessed the subject accident. Farrelly averred that after arriving at the job site, they parked their vehicle near the curb in front of the Eckerd's store because there was a lot of construction activity throughout the parking lot and the entire parking lot was covered with debris, dirt and sand. After walking to the store, the injured plaintiff walked back to the truck, and fell in a hole which was approximately two feet in circumference and one foot deep. Farrelly admitted that he observed that orange construction barrels were present near the area of the front entrance of Eckerd's, but averred that there was no barrier, cone or barrel present by the subject hole. Neither he nor the injured plaintiff had removed a barrel from the hole. Following the incident, Farrelly moved a barrel to cover the hole so no one else would be injured.

The branch of Stop & Shop's motion seeking leave to renew its prior cross motion for summary judgment is granted. The deposition testimony relied upon by Stop & Shop in support of the instant motion was not elicited until after the date of the prior order, and thus provides a proper basis for granting leave to renew (*see* ***Blasso v Parente***, 79 AD3d 923, 913 NYS2d 306 [2d Dept 2010]; ***Morales v Coram Materials Corp.***, 64 AD3d 756, 758 883 NYS2d 311 [2d Dept 2009]; *see also* ***Staib v City of New York***, 289 AD2d 560, 735 NYS2d 799 [2d Dept 2001]). Upon renewal, the branch of Stop & Shop's motion seeking summary judgment dismissing the plaintiffs' remaining causes of action against it for violation of Labor Law § 200 and common law negligence, is denied. Labor Law § 200 merely codifies the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*see* ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Dooley v Peerless Importers***, 42 AD3d 199, 837 NYS2d 720 [2d Dept 2007]). When, as here, a worker's injuries result from an unsafe or dangerous condition existing at a work site, the liability of a party will depend upon whether the party had control of the place where the injury occurred, and whether it either created, or had actual or constructive notice of, the dangerous condition (*see* ***Vella v One Bryant Park, LLC***, 90 AD3d 645, 935 NYS2d 31[2d Dept 2011]; ***Cook v Orchard Park Estates, Inc.***, 73 AD3d 1263, 902 NYS2d 674 [3d Dept 2010]; ***Harsch v City of New York***, 78 AD3d 781, 910 NYS2d 540 [2d Dept 2010]; ***Martinez v City of New York***, 73 AD3d 993, 901 NYS2d 339 [2d Dept 2010]). To provide constructive notice, the defect must be visible and apparent and exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646; ***Vella v One Bryant Park, LLC***, *supra*).

The evidence submitted here fails to establish, as a matter of law, that Stop & Shop cannot be held liable pursuant to Labor Law § 200 and common law negligence based on the existence of an unsafe and dangerous condition at the subject job site. Contrary to Stop & Shop's contentions, the evidence submitted was insufficient to demonstrate, as a matter of law, that it did not control the subject job site, did not direct the creation of the purported dangerous condition, and/or had neither actual nor constructive notice of the exitnce of the dangerous condition at issue (*see* ***Vella v One Bryant Park, LLC***, *supra*; *see* ***Urban v No. 5 Times Sq. Dev., LLC***, 62 AD3d 553, 879 NYS2d 122 [1st Dept 2009]). In this regard, the evidence submitted includes Palhares deposition testimony that he was directed to pour the sidewalk, leaving holes present, based on the instructions of both Summit and Stop & Shop. It also includes the testimony of Hartough that a Stop & Shop representative was present at the job site at least once a week, directed and controlled his work, and oversaw everything. Moreover, Hartough testified that the Stop & Shop representative walked the site at each visit and that Stop & Shop had a

responsibility with respect to job site safety to make sure any hazards at the job site were addressed. It is undisputed that the subject holes in the sidewalk existed at the job site for at least two months prior to the injured plaintiff's accident.

In light of Stop & Shop's failure to establish a *prima facie* entitlement to summary judgment dismissing the causes of action for violation of Labor Law § 200 and common law negligence as asserted against it, this branch of its motion must be denied without consideration of the sufficiency of the plaintiffs' opposition papers.

Based on the Court's determination, *supra*, that there exist triable issues of fact as to whether Stop & Shop was negligent in the happening of the accident and the extent of such negligence, Stop & Shop has failed to demonstrate a *prima facie* entitlement to summary judgment on its cross claims against Summit for common law indemnification (*see* ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*; ***Samiani v New York State Elec. & Gas Corp.***, 199 AD2d 796, 605 NYS2d 516 [3d Dept 1993]; *cf.* ***Perez v 347 Lorimer, LLC***, 84 AD3d 911, 923 NYS2d 138 [2d Dept 2011]; *compare* ***Tighe v Hennegan Constr. Co., Inc.***, 48 AD3d 201, 850 NYS2d 417 [1st Dept 2008]). In a similar vein, Stop & Shop failed to demonstrate a *prima facie* entitlement to summary judgment on its cross claim for contractual indemnification against Summit. A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*see* General Obligations Law § 5-322.1; ***Rodriguez v Tribeca 105, LLC***, 93 AD3d 655, 939 NYS2d 546 [2d Dept 2012]; ***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 871 NYS2d 654 [2d Dept 2009]; *see also* ***Picchione v Sweet Constr. Corp.***, 60 AD3d 510, 875 NYS2d 42 [1st Dept 2009]; ***Castilla v K.A.B. Realty, Inc.***, *supra*; ***Linarello v City Univ. of N.Y.***, 6 AD3d 192, 774 NYS2d 517 [1st Dept 2004]; *cf.* ***Armentano v Broadway Mall Props., Inc.***, 70 AD3d 614, 897 NYS2d 113 [2d Dept 2010]). Accordingly, the branch of Stop & Shop's motion, which seeks summary judgment on its cross claims against Summit for indemnification must also be denied without regard to the sufficiency of any opposition papers.

The branch of Summit's cross motion seeking leave to renew its prior motion for summary judgment is granted. The deposition testimony relied upon by Summit in support of such motion was elicited after the date of the prior order, and thus provides a proper basis for granting leave to renew (*see* ***Blasso v Parente***, *supra*; ***Morales v Coram Materials Corp.***, *supra*; *see also* ***Staib v City of New York***, *supra*). However, upon renewal, the branch of Summit's motion seeking summary judgment dismissing the plaintiffs' remaining causes of action against it for violation of Labor Law § 200 and common law negligence, is denied. The evidence submitted is insufficient to establish, as a matter of law, that Summit is not liable for the plaintiff's injuries pursuant to Labor Law § 200 or common law negligence. In this regard, the evidence submitted was insufficient to demonstrate, as a matter of law, that Summit did not control the subject job site, did not direct the creation of the purported dangerous condition, and/or had neither actual nor constructive notice of the purported dangerous condition at issue (*see* ***Vella v One Bryant Park, LLC***, *supra*; *see also* ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*). To the contrary, the evidence submitted raises a triable issue of fact as to these issues. Indeed, Summit does not dispute that Rush left holes throughout the sidewalk of the shopping center, which were about 6 to 8 inches deep and 16 inches in circumference, pursuant to its instructions. Nor does Summit dispute that such holes were in existence for at least two months prior to the injured plaintiff's accident. Although Losquadro testified that construction barrels were present over every hole after Rush's departure from the job site, he admitted that no other precautions were taken to protect such holes despite the fact that the job site was an active shopping center. On such basis, the Court finds an issue of fact exists as to whether the existence of these holes constitutes a dangerous condition for which Summit can be held liable. Likewise, there exists an issue of fact as to whether Summit had actual or constructive notice that the subject hole was not properly protected at the time of the

incident. Farrelly averred that, at the time of the plaintiff's incident, there was no construction barrel present over the subject hole. While Losquadro testified that it was his general practice to inspect the job site every morning to ensure that the barrels were present over the holes, he testified that he had no recollection of doing so on the date of the accident or the date prior to the accident. In a similar vein, Hartough testified that he had no specific recollection of when, prior to the time of the accident, he last checked to make sure all the holes were covered. Moreover, Hartough testified that he recalled Losquadro instructing him to place a barrel over an uncovered hole at least once a day. Hartough also testified that if work was being done in an area, he would remove the barrel and replace it when the work was complete. Under such circumstances, there exists at the very least a triable issue of fact as to whether Summit was free from negligence and fulfilled its obligation to ensure that the subject job site was free from hazards (*see* ***Hernandez v Columbus Ctr., LLC***, 50 AD3d 597, 857 NYS2d 84 [1st Dept 2008]; *compare* ***Burkoski v Structure Tone, Inc.***, *supra*; ***John v Tishman Constr. Corp. of N.Y.***, 32 AD3d 458, 819 NYS2d 475 [2d Dept 2006]).

In light of Summit's failure to establish a *prima facie* entitlement to summary judgment dismissing the causes of action for violation of Labor Law § 200 and common law negligence as asserted against it, this branch of its motion must be denied without consideration of the sufficiency of the plaintiffs' opposition papers.

Rush's motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent that it seeks dismissal of so much of the complaint asserted against it as alleges causes of action for violation of Labor Law §§ 200, 240 (1) and 241 (6). Rush demonstrated a *prima facie* entitlement to summary judgment dismissing the causes of action for violation of Labor Law §§ 200, 240 (1) and 241 (6) as asserted against it. This Court, in its May 16, 2009 order, has previously determined that the injured plaintiff was not a member of the class protected by Labor Law § 240 (1) and § 241 (6) (***Mardkofsky v VCV Dev. Corp***, 76 NY2d 573; *see also* ***Vasquez v Minadis***, 86 AD3d 604, 927 NYS2d 670 [2d Dept 2011]; ***Martinez v City of New York***, *supra*). In any event, the evidence submitted establishes, as a matter of law, that Rush is not a party subject to liability under these provisions. The evidence submitted, likewise establishes that Rush is not subject to liability for the plaintiff's injuries pursuant to Labor Law § 200. Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents." A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the "ability to control the activity which brought about the injury" (***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-64, 798 NYS2d 351 [2005]). To hold a subcontractor liable as a statutory agent for violation of these provisions, there must be a showing that it has been delegated the work in which plaintiff was engaged at the time of his injury, and is therefore responsible for the work giving rise to the duties referred to in and imposed by the statute (***Nasuro v PI Assoc.***, 49 AD3d 829, 858 NYS2d 175 [2d Dept 2008]; ***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 488, 818 NYS2d 546 [2d Dept 2006]; ***Kehoe v Segal***, 272 AD2d 583, 584, 709 NYS2d 817 [2d Dept 2000]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 318, 445 NYS2d 127 [1981]; ***Guclu v 900 Eighth Ave. Condominium, LLC***, 81 AD3d 592, 916 NYS2d 147 [2d Dept 2011]; *cf.*, ***Pino v Irvington Union Free School Dist.***, 43 AD3d 1130, 843 NYS2d 133 [2d Dept 2007]). The evidence submitted in the instant matter demonstrates that Rush was a subcontractor that did not have any authority to supervise or control the injured plaintiff's work (*see* ***Ortiz v I.B.K. Enters., Inc.***, 85 AD3d 1139, 927 NYS2d 114 [2d Dept 2011]; ***Dougherty v O'Connor***, 85 AD3d 1090, 926 NYS2d 635 [2d Dept 2011]; ***Posa v Copiague Pub. School Dist.***, 84 AD3d 770, 922 NYS2d 499 [2d Dept 2011]; ***Poracki v St. Mary's Roman Catholic Church***, 82 AD3d 1192, 920 NYS2d 233 [2d Dept 2011]; ***Martinez v City of New York***, *supra*; *see e.g.* ***Frisbee v 156 R.R. Ave. Corp.***, 85 AD3d 1258, 924 NYS2d 640 [3d Dept 2011]; ***Bell v Bengomo Realty, Inc.***, 36 AD3d 479, 829 NYS2d 42 [1st Dept 2007]). In opposition to the branch of Rush's motion seeking dismissal of the causes of action for violation of Labor Law §§ 200, 240 (1) and 241 (6), the plaintiffs have failed to raise a

triable issue of fact.

However, the branch of Rush's motion seeking summary judgment dismissing so much of the complaint as alleges a cause of action for common law negligence, is denied. Although a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Benavides v 30 Brooklyn, LLC***, __AD3d__ [2d Dept June 20, 2012]), a recognized exception to this rules exists where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm or creates or exacerbates a dangerous condition (*see* ***Petito v City of New York***, 95 AD3d 1095, 944 NYS2d 300 [2d Dept 2012]; ***Gordon v Pitney Bowes Mgt. Servs., Inc.***, 94 AD3d 813, 942 NYS2d 155 [2d Dept 2012]). Thus, courts have found that when a worker's injuries result from an unsafe or dangerous condition existing at a work site, as here, the liability of an allegedly negligent subcontractor depends upon whether they had control of the place where the injury occurred, and whether they either created, or had actual or constructive notice of, the dangerous condition (*see* ***Cook v Orchard Park Estates, Inc.***, *supra*; ***Harsch v City of New York***, *supra*; ***Martinez v City of New York***, *supra*). Moreover, a subcontractor "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (***Ortiz v I.B.K. Enters., Inc.***, *supra*; ***Poracki v St. Mary's Roman Catholic Church***, *supra*). Thus, an award of summary judgment in favor of a subcontractor on a negligence claim is improper where the evidence raises a triable issue of fact as to whether the subcontractor created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries (***Ortiz v I.B.K. Enters., Inc.***, *supra*; ***Poracki v St. Mary's Roman Catholic Church***, *supra*; ***Frisbee v 156 R.R. Ave. Corp.***, *supra*).

Here, the evidence submitted raises a triable issue of fact as to whether Rush created a dangerous and defective condition and/or launched a force or instrument or harm when it created the holes throughout the subject sidewalk (*see* ***Benavides v 30 Brooklyn, LLC***, *supra*; *cf.* ***Petito v City of New York***, *supra*; ***Gordon v Pitney Bowes Mgt. Servs., Inc.***, *supra*; ***Urban v No. 5 Times Sq. Dev., LLC***, *supra*; ***Vasquez v Minadis***, *supra*; ***Lavaud v City of New York***, 45 AD3d 536, 844 NYS2d 719 [2d Dept 2007]; *see e.g.* ***Frisbee v 156 R.R. Ave. Corp.***, *supra*). Contrary to the Rush's contentions, the evidence submitted fails to demonstrate that it would be entitled to summary judgment dismissing the complaint despite the fact that it created a dangerous condition at the job site because it performed its work in conformance with Summit's explicit instructions. A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury (***Ryan v Feeney & Sheehan Bldg. Co.***, 239 NY 43, 46 [1924]; ***Hartofil v McCourt & Trudden Funeral Home, Inc.***, 57 AD3d 943, 871 NYS2d 299 [2d Dept 2008]; ***Gee v City of New York***, 304 AD2d 615, 758 NYS2d 157 [2d Dept 2003]). Here, there exists a triable issue of fact as to whether Summit's instructions on the installation of the sidewalk were so apparently defective that Rush, as an ordinary builder of ordinary prudence, should have been on notice that performing such work in such a manner was dangerous and likely to cause injury (*compare* ***Agosto v 30th Place Holding, LLC***, 73 AD3d 492, 901 NYS2d 593 [1st Dept 2010]; ***Peluso v ERM***, 63 AD3d 1025, 881 NYS2d 489 [2d Dept 2009]; ***Hartofil v McCourt & Trudden Funeral Home, Inc.***, *supra*; ***Gee v City of New York***, *supra*; *see also* ***Petito v City of New York***, *supra*). Indeed, during his deposition, Palhares testified that although Rush was instructed to leave the subject holes in the new sidewalk, this was not standard practice for the installation of new sidewalks and that it was the first time that he had performed this type of work in this order. Palhares testified that generally foundations and bases were prepared first and the sidewalk was poured last so that no holes were generated. In addition, Palhares admitted that he did not do anything to protect these holes prior to leaving the job site. He alleges that he was told that Summit was going to protect the holes, but admits that such holes were not protected at the time Rush left the job

site and that he had no knowledge of how the holes were to be protected.

In light of Rush's failure to establish a *prima facie* entitlement to summary judgment dismissing the cause of action for common law negligence as asserted against it, this branch of its motion must be denied without consideration of the sufficiency of the plaintiffs opposition papers.

The plaintiffs' cross motion pursuant to CPLR § 3124 and CPLR § 3126 to strike the answer of defendants Summit and Rush based on their purported failures to respond to certain notices of discovery, dated December 7, 2010 is denied. The plaintiffs have failed to provide a sufficient affirmation of a good faith effort to resolve the issues raised by the cross motion as required pursuant Uniform Rules for Trial Courts (22 NYCRR) § 202.7 (a). Such an affirmation must indicate the time, place, and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with opposing counsel was held (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [c]; ***Natoli v Milazzo***, 65 AD3d 1309 [2d Dept 2009]; ***148 Magnolia v Merrimack Mut. Fire Ins. Co.***, 62 AD3d 486, 878 NYS2d 727 [1st Dept 2009]). While it appears from the affirmation provided by plaintiffs that there was a single letter sent to counsel for Summit and Rush, this letter does not indicate any effort made to resolve the parties' discovery dispute. Indeed, such letter only appears to advise the defendants' counsel that no response to such discovery requests had yet been received (*see* ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2d Dept 2010]; ***148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.***, *supra*; ***Amherst Synagogue v Schuele Paint Co.***, 30 AD3d 1055, 816 NYS2d 782 [4th Dept 2006]). Accordingly, the Court finds the affirmation inadequate to comply with the requirements of the rule, and that the plaintiffs' cross motion must be denied as procedurally defective.

In any event, the plaintiffs' cross motion must be denied on the grounds that they failed to establish an entitlement to the relief sought. The drastic remedy of striking a pleading must be supported by a clear showing that there was both a failure to comply with discovery demands and that such failure was willful and contumacious (*see* ***Di Mascio v Friedman***, 83 AD3d 993 [2d Dept 2011]; ***Step-Murphy, LLC v B & B Bros. Real Estate Corp.***, 60 AD3d 841, 875 NYS2d 535 [2009]; ***Carabello v Luna***, 49 AD3d 679, 853 NYS2d 663 [2d Dept 2008]; ***Nieves v City of New York***, 35 AD3d 557, 826 NYS2d 647 [2006]; ***Brandes v North Shore Univ. Hosp.***, 22 AD3d 778, 803 NYS2d 204 [2005]; ***Jenkins v City of New York***, 13 AD3d 342, 788 NYS2d 117 [2004]). Here, the plaintiffs have not demonstrated a willful and contumacious failure on the part of either Rush or Summit to comply with a discovery demand (*see* ***Rodriguez v Big Ben Assoc. I***, 95 AD3d 1098, 944 NYS2d 311 [2d Dept 2012]; ***Pezhman v Department of Educ. of the City of New York***, 95 AD3d 625, 944 NYS2d 128 [1st Dept 2012]; ***Prappas v Papadatos***, 38 AD3d 871, 833 NYS2d 156 [2d Dept 2007]; *see also* ***De Socio v 136 E. 56th St. Owners, Inc.***, 74 AD3d 606, 903 NYS2d 45 [1st Dept 2010]).

Lastly, Stop & Shop's motion pursuant to CPLR § 2221, which in effect, seeks leave to renew and reargue this Court's prior determination, dated February 15, 2012, to the extent that such determination granted so much of the motion by defendant Darr Construction Equipment Corp. and second third-party defendant QBE Insurance Company as sought dismissal of the second third-party complaint as asserted against QBE Insurance Company, is denied. A motion for leave to renew must be based upon new facts not offered on the prior motion which would change the prior determination, and the motion must also contain a reasonable justification for the failure to present such facts on the prior motion (*see* CPLR 2221[e]; ***Countrywide Home Loans Servicing, LP v Albert***, 78 AD3d 985, 912 NYS2d 882 [2d Dept 2010]; ***Rappaport v North Shore Univ. Hosp.***, 60 AD3d 1029, 876 NYS2d 125 [2d Dept 2009]; ***Chunqi Liu v Wong***, 46 AD3d 735, 849 NYS2d 84 [2d Dept 2007]). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first

factual presentation," and this Court "lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (***Worrell v Parkway Estates***, 43 AD3d 436, 840 NYS2d 817 [2d Dept 2007], lv dismissed 12 NY3d 892 [2009]; *accord* ***Greene v New York City Hous. Auth.***, 283 AD2d 458, 724 NYS2d 631 [2d Dept 2001]). Stop & Shop has not presented a reasonable justification for its failure to present its purported new facts on the prior motion (*see* ***Saccomagno v City of New York***, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]). Indeed, Stop & Shop did not submit any opposition to the motion it now seeks leave to renew. In any event, renewal would be inappropriate where Stop & Shop failed to establish that the purported new facts would change this Court's prior determination (*see* ***Friel v Papa***, 87 AD3d 1108, 930 NYS2d 39 [2d Dept 2011]; ***Rappaport v North Shore Univ. Hosp.***, *supra*; ***Williams v Nassau County Med. Ctr.***, 37 AD3d 594, 829 NYS2d 645 [2d Dept 2007]). Accordingly, the branch of Stop & Shop's motion seeking leave to renew is denied.

The branch of Stop & Shop's motion seeking leave to reargue is also denied. Upon review, the Court finds that the moving papers fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principles of law in reaching its prior determination (*see* CPLR 2221 (d); ***Mazinov v Rella***, 79 AD3d 979, 912 NYS2d 896 [2d Dept 2010]; ***Saccomagno v City of New York***, *supra*; ***McGill v Goldman***, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]).

Dated: 9/11/13

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION