To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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MARIO MARIN,

DECISION & ORDER

Plaintiff,

Index No.:55240/2017
Sequence Nos. 6 &7

-against-

SALSCO, INC., WILFRED MACDONALD, INC.
Defendant.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 175-205, 210-294, were read in connection with the motion for summary judgment of defendant Salsco, Inc. ("Salsco"), which seeks an order dismissing plaitniff's complaint with prejudice pursuant to CPLR 3212, and to dismiss cross-claims for common law indemnification and contribution of Wilfred MacDonald Inc., ("MacDonald") (Seq 7); and MacDonald's motion to dismiss cross-claims for common law indemnification and contribution of Salsco (Seq 6).

Plaintiff commenced this action to recover personal injuries as a result of an accident allegedly caused by a greens rolling machine, on October 16, 2015, at approximately 10:45 AM at or near the 17th hole of the Quaker Ridge Golf Club in Scarsdale ("Quaker Ridge").

NOW based upon the foregoing, the motions are decided as follows:

It is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320,

324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Here, plaintiff claims that he was injured while operating an allegedly defectively designed and manufactured Salsco Electric Greens Roller QC Model 09054 ("the machine") to perform greens rolling duties on the green at the 17th hole at the Quaker Ridge Country Club's

golf course. The machine lost power causing both plaintiff and the machine to go into a bunker with the machine overturning on top of plaintiff.

According to the complaint, as amplified by the verified bill of particulars, MacDonald, which sold the machine to Quaker Ridge, negligently marketed, distributed, sold, leased, serviced and repaired the machine as well as placing it into interstate commerce in New York. It was also alleged that the machine had a dangerously defective design due to an inadequate, deficient and/or unsafe braking system; the design of the machine allowed for free rolling of the right roller and driveshaft was inadequate to stop the machine; the design was also improper as the purpose and parking brake adjustment know was not adequately described; the machine was improperly tested; there was no operator's manual and the machine was not equipped with a roll bar; the parking brake system was not in compliance with American National Standard for Commercial Turf Care ("ANSI") standards; and that during a power cutoff the regenerative braking system was non-functional.

Plaintiff testified at his deposition that he had been given instruction on the use of the machine by his superiors at the golf course a long time ago, and he was experienced in the use of the machine. On the day of the accident, he was rolling the 17th green when he heard a clicking sound that indicated the power to the machine had cut off, which made the foot pedal unresponsive but did not affect the steering wheel. Plaintiff did not know what caused the power to cut out. After the power cut out the machine continued to roll down towards the front to the green, he pulled the hand brake, but the machine did not slow down or change direction and went into a bunker.

Salvatore Rizzo, the chief executive officer of Salsco testified that Salsco manufactured and assembled the machine at the Salsco plant, and after it was assembled it was tested 100% before it left the Salsco plant in Connecticut, to ensure it was functioning. When Salsco shipped the machine, it was assembled except that the buyer needed to attach the steering wheel. Salsco did not publish or provide an operator's manual with the machine. Salsco shipped the machine to Macdonald on July 7, 2008. He was not aware of any prior complaints or lawsuits regarding the loss of electrical power for the machine.

Michael Pelrine, president of MacDonald testified that MacDonald sold the machine to the Quaker Ridge Golf Course in the summer of 2008, and the only function that it performed was to attach the steering wheel to the machine, and put the wheels on the trailer. In addition, through his affidavit, Pelrine attests that MacDonald did not design or manufacture the machine, not did it provide any maintenance for the machine.

Non-Party, Angel Ruiz testified that he has been employed as the course mechanic for Quaker Ridge since late 2014. He would perform maintenance and repairs for the mechanical equipment owned by Quaker Ridge, including the machine. He checked the fluid levels for the machine's batteries as well as the brakes on a weekly basis and he would adjust the parking brake on a monthly basis. The disks for the parking brake were replaced by Mr. Ruiz on or about March 30, 2015, less than 7 months prior to plaintiff's accident.

Non- Party Xavier Vasconez, through his affidavit, states that he worked at Quaker Ridge as a member of the groundskeeping crew from 2004 to 2014. He attests that he regularly used the Salsco electric greens rollers on numerous occasions during the years from 2008 to 2014. From the time the machines were delivered in the summer of 2008, he experienced numerous

times during greens rolling when machine had sudden power cut offs, the machine would continue to roll at operating speed, he pulled the hand brake to stop the machine and the machine kept rolling for may feet toward and sometimes off the edge of the green. When this happened he would let the mechanic know about it and he told him that he would check out the machine but the problem was never resolved since it happened again and again (Ex 8).

In support of its motion for summary judgment to dismiss the complaint against it, Salsco argues that the sudden power loss could not be related to any negligent design or construction, and the machine complies with the American National Standard for Commercial Turf Care Equipment ("ANSI"). Instead, plaintiff's negligent operation of the machine or improper maintenance was the cause of the accident.

In further support that plaintiff's own conduct was the proximate cause of the accident, Salsco offers the Affidavit of William J. Meyer, a professional engineer, who on July 31, 2018, traveled to the Quaker Ridge and inspected the subject accident site. He opines that if there was in fact a power "cut off " on the machine as plaintiff claims, it did not result from any design malfunctioning or construction defect, but rather would have resulted from improper maintenance or modification of the machine, and/or plaintiff's improper operation. Meyer cites that plaintiff's expert disclosure does not specify any design, manufacturing or construction defects that would render the machine susceptible to power loss. Meyer also claims that plaintiff's expert misrepresents certain features offered by the machine (ie a fail-safe parking brake and ROPS systems) and misrepresents an industry standard. Meyer states:

> "...it is my opinion that the subject accident and injury to Mr. Marin did not rest from any defect or deficiency in the design or construction of the involved greens roller. In my opinion, the incident greens roller, as originally designed and

> constructed by Salsco, was safe and suitable for its intended function and did not violate any known applicable code or standard relevant to the subject event. Any alleged deficiency that was causal to the subject accident was the result of improper maintenance and the failure to exercises reasonable care while operating the machine" (*see Meyer Expert Affidavit, Salsco Ex J, par. 13)* .

The expert also opines that a significant contributing factor to this accident was the manner in which plaintiff was operating the machine, insofar he was rolling the green perpendicular to the short dimension of the narrow strip of the green between the two bunkers, which can result in the machine falling off the edge of the green into one of the bunkers. Plaintiff should have been aware of his proximity to a bunker, and should have adjusted his speed and/or direction prior to getting too close.

In opposition to Salsco's motion, plaintiff argues that its expert establishes a prima facie case in strict products liability for design defect, since defendants designed, manufactured, marketed and distributed and electric greens roller that was not reasonably safe. Plaintiff also claims that the machine presented a substantial likelihood of harm as a result of the deficiencies and condition based upon the subject accident and the numerous previous accidents with the machine experienced by his fellow co-workers.

To support this, plaintiff offers the expert report of Chris Shiver, mechanical engineer, who performed an engineering inspection. Shiver refers to the American National Standard on safety applicable to Salsco electric greens rollers in Section 6.4.3.2, which provides specific stopping performance criteria for parking brake systems on those machines. He bases his opinion partly on the sworn testimony by multiple employees whom validate that an unexpected loss of power to the drive system was occurring off and on since the time the machine was received in

2008; the power cut offs which prevents operators to control the motion of machines moving down an incline had occurred numerous times at Quaker Ridge.

The expert concludes that plaintiff's accident occurred because there was a power cut off in the machine on an incline that resulted in his inability to stop the machine despite acutation of the parking brake.

In order "[to] establish a prima facie case in strict products liability for design defects, a plaintiff must show that the manufacturer marketed a product that was not reasonably safe in its design, that it was feasible to design the product in a safer manner, and that the defective design was a substantial factor in causing the plaintiff's injury." (Guzzi v City of New York, 84 AD3d 871, 872-873 [2011]). A defectively designed product is one which, "at the time it leaves the sellers hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use' and "'whose utility does not outweigh the danger inherent in its introduction into the stream of commerce" (Hoover v New Holland North America, Inc., 23 NY3d 41, 53-54 [2014]). In strict products liability, plaintiff need only prove that "the product was defective as a result of either a manufacturing flaw, improper design, or a failure to provide adequate warnings regarding the use of the product and that the defect was a substantial factor in bringing about the injury" (Godoy v Abamaster of Miami, Inc., 302 AD2d 57, 60 [2d Dept 2003]). To recover on this basis, a plaintiff must establish that the product, as designed, must have been a substantial factor in causing an injury and "the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable" (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 532 [1991]).

A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public (Voss v Black & Decker Mfg. Co., 59 N.Y.2d 102, 107 [1983]).

A fair reading of both Salsco's expert's report and plaintiff's expert's report, show that each one is detailed, well reasoned, and include photographs of the machine. However, due to the conflicting opinions of the parties' experts, and the question of proximate cause, the court denies those branches of Salsco's motion for summary judgment dismissing the complaint .

Common Law Indemnification and Contribution

The principle of common-law, or implied, indemnification permits "a party who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party" (Arrendal v Trizechahn Corp., 98 AD3d 699 [2d Dept 2012]). A party can establish its prima facie entitlement to judgment as a matter of law dismissing a cause of action for common-law indemnification and contribution asserted against it by establishing that it was not at fault in the happening of the subject accident (Cutler v Thomas, 171 AD3d 160 [2d Dept, 2019]). With respect to common-law indemnification, "[i]ndemnity ... involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss" (Morris v Home Depot USA, 152 AD3d 669, 672 [2d Dept 2017]). To sustain a cause of action for common-law indemnification, the party seeking indemnity must prove not only that it was not negligent, but must also prove that the proposed indemnitor's negligence contributed to the cause of the accident (Morris v Home Depot USA, 152 AD3d at 673. Arising from the principle that

"every one is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought to be have been paid by the wrongdoer, they may be recovered from him" (Raquet v Braun, 90 NY2d 177, 183 [1997]).

Here, MacDonald argues that the Dealer Delivery Report, which is a preprinted document prepared by Salsco, merely states that MacDonald prepared the machine for delivery, provided the Salsco's manuals to Quaker Ridge as purchaser, and explained the operation and maintenance of the machine to the Quaker Ridge. In fact, plaintiff was well versed in the operation of the machine, and that Quaker Ridge knew how to maintain the machine, and that any allegation that MacDonald failed to instruct Quaker Ridge on the operation and maintenace of the machine is baseless. MacDonald continues that the testimony of Mr. Rizzo clearly demosntrates that the design, manufacture and assembly of the machine was performed solely by Salsco. Additonally, the affidavit of the president of Maconald, Michael Pelrine, states that MacDonald did not modify, service or maintain the machine.

Salscc counters that MacDonald is far from an innocent seller of the machine. Macdonald was obligated and agreed to provide instruction to the end-user regarding the operation of the machine in accordance with the Dealer Delivery Report executed by a representative from MacDonald and Quaker Ridge.

The Dealer Delivery Report which was executed by MacDonald,, as dealer, and Quaker Ridge as purchaser, states that:

> "The undersigned dealer warrant that the above-described machine was carefully inspected, adjusted and prepared for delivery before delivery to the purchaser; that both the operation and maintenance for the machine were explained to the purchaser; and that a copy of the Owner's Instruction Manual

were given to the purchaser and his attention called to Our Warranty and any operating instructions included in the manual and caution notes".

Similarly, the individual on behalf of Quaker Ridge certified:

> "The undersigned purchaser certifies that the operation and maintenance of the above-described machine have been explained to him; acknowledges receipt of a copy of the Owner's Instruction Manual and Our Warranty Policy printed in said Instruction Manual and Caution Notes. I also understand that is my responsibility to explain and make Salsco manual available to new operators (See, Dealer Delivery Report, Ex N to Salsco papers").

Salsco argues that this document shows that the safety hazards or risks of injury were explained by MacDonald to Quaker Ridge and the parts manual was provided; and upon the completion of the sale, MacDonald assumed all liability to plaintiff's employer Quaker Ridge and therefore MacDonald, not Salsco, owed a duty to plaintiff; the Dealer Delivery Report, makes MacDonald the responsible entity as Salsco is not even mentioned in the document. Salsco further asserts should it be found liable to plaintiff, it is because of MacDonald's failure to adequately inspect the rolling machine, and explain the parts manual as well as safety and operating instructions and warnings to Quaker Ridge before competing the delivery of the subject machine or because MacDonald failure regarding maintenance of the machine, as MacDonald replaced numerous parts of said machine before plaintiff's incident.

Thus, Salsco argues that it is entitled to common law indemnification and/or contribution from MacDonald should Salsco be found liable to plaintiff. Nothing in the record suggests that the machine was defective at the time of delivery, and thus, Salsco is not negligent; and MacDonald was required to adjust the machine on delivery, provide instruction about how to use the machine, and maintain the roller. As such, to the extent the accident resulted from any

negligence other than that on the part of plaintiff it was likewise caused by MacDonald failure to provide proper instruction or maintenance.

The court finds that it cannot conclude that either defendant is completely free of negligence as a matter of law. Since there is a question of fact as to fault for the subject accident, and there has not been a finding that the machine was defective, no party is entitled to common law indemnification at this juncture. Hence, each defendant has failed to demonstrate, prima facie, that it was not negligent in connection with the injured plaintiff's accident.

Turning next to contribution cross claims, "a party seeking contribution must show that the party from whom contribution is sought owes a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries" (Crimi v Black, 219 AD2d 610, 611. Pursuant to CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury ... may claim contribution among them" (CPLR 1401). As there are issue of facts as to who was responsible for the accident, an award of summary judgment dismissing the contribution causes of action is not appropriate here (Aragundi v Tishman Realty & Const. Co., 68 AD3d 1027, 1030 [2d Dept 2009]).

All matters not specifically addressed are herewith denied.

This constitutes the Decision and Order of the Court.

Accordingly, it is hereby

ORDERED, that Wilfred MacDonald's motion #6 is **denied**; and it is further

ORDERED, that Salsco, Inc's motion #7 is **denied**; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part on July 30th, 2019 at 9: 15 A.M., in CourtRoom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: **June 24, 2019**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF