Calle v Saltru Assoc. Joint Venture
2021 NY Slip Op 30947(U)
March 19, 2021
Supreme Court, Kings County
Docket Number: 517392/17
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of March, 2021.

PRESENT:
HON. PAMELA L. FISHER
Justice.

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Lorgio Calle,

Plaintiff,

- against -

Index No. 517392/17

Saltru Associates Joint Venture,

Defendant.

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Saltru Associates Joint Venture,

Third-Party Plaintiff,

- against -

212 Services LLC,

Third-Party Defendant.

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The following e-filed papers read on this motion:

	E-filed Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	72-86, 94-97, 99-101
Opposing Affidavits (Affirmations)	104
Reply Affidavits (Affirmations)	102, 108-110
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Lorgio Calle (plaintiff) moves (in motion seq. no. 5) for an order, pursuant to CPLR 3212, granting partial summary judgment as to liability on his Labor Law § 241 (6) claim against defendant/third-party plaintiff Saltru Associates Joint Venture (Saltru), and for a further order, pursuant to CPLR 3211(b), dismissing Saltru's affirmative defenses as to plaintiff's culpable conduct. Saltru cross-moves (in motion seq. no. 6) for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint, and summary judgment in its favor on its third-party contractual indemnity claim against third-party defendant 212 Services LLC (212 Services).[1] 212 Services cross-moves (in motion seq. no. 7) for partial summary judgment dismissing Saltru's contractual indemnity third-party claim against it.

Factual Background

This is an action to recover monetary damages for personal injuries allegedly sustained by the plaintiff on March 22, 2017, while he was performing asbestos abatement work at premises located at 8973 Bay Parkway, Brooklyn, New York (the "job site" or "premises"). Saltru was the owner of the premises at the time of the accident, and had contracted with 212 Services for the latter to perform asbestos abatement work. At the time of the incident, plaintiff was employed by 212 Services.

During his deposition, the plaintiff testified that his supervisor at 212 Services was Samura Koroma, and his foreman was a man named Juan. Plaintiff only took directions from Koroma and Juan as to his work assignments. On the day of the accident, the plaintiff arrived at the job site at approximately 5 p.m. and began working on the removal of floor tiles covered in asbestos shortly thereafter. Plaintiff worked with a group of approximately seven other coworkers. He explained that 212 Services' workers initially assembled a decontamination unit/room at the work site which was comprised of five chambers/sections. The first chamber consisted of the dirty room, which is where the workers removed their jumpsuits/clothing after they

completed their abatement work for the day. The dirty room was followed by an air lock room, followed by a shower room, and then a second air lock room. The clean room was the last and final chamber of the decontamination unit. The dirty room and the air lock rooms were each three feet by five feet in size. The shower room was approximately three feet by three feet. The chambers were separated by opaque/solid plastic curtains. Upon completion of their abatement work for the day, the workers were required to go through the decontamination unit's five chambers in order to clean the asbestos off of themselves and their clothing. Plaintiff testified that the accident occurred after he had finished work for the day and had proceeded to the decontamination unit. He first entered the dirty room at which point he took off his jumpsuit. He then proceeded through the first air lock room into the shower area. As plaintiff exited the shower and headed into the second air lock room, he tripped on a water filter and fell to the ground. Plaintiff claimed that the water filter was on the floor in front of the shower unit's exit, and that he could not see it through the opaque plastic curtains. Plaintiff claimed he sustained various injuries as a result of his fall.

Samura Koroma's Deposition Testimony

Samura Koroma testified on behalf of 212 Services. Koroma was the field supervisor for 212 Services which was retained to perform asbestos abatement work at the premises. The work included the removal of floor tiles covered in asbestos. Koroma explained that 212 Services' employees assembled the five chamber decontamination unit just days before the incident occurred. According to Koroma, when the decontamination unit is being set up, it is his responsibility to ensure that there were no tripping hazards in the whole area. He further testified that when workers come from the abatement work area, they must all pass through the decontamination unit, starting with the dirty room before getting to the shower area. Koroma testified that the plaintiff was alone in the shower unit when the incident occurred, while he was still in the dirty room. Koroma did not see the plaintiff trip and fall, but claimed he observed the plaintiff come out with

his nose bleeding after it occurred. Koroma admitted that he was the one who placed the water filter in front of the shower's exit, which was technically in the second air lock room, and that one of its hoses was connected to the shower and in use at the time. Although Koroma acknowledged that the plastic curtains used to separate each "chamber" in the decontamination unit were opaque such that one could not see through them, he did not think the placement of the water filter in front of the shower exit was a tripping hazard because he believed all of the workers knew the filter was there. Koroma further testified that, based upon the location of the other workers in the decontamination unit, he did not believe any of them witnessed the plaintiff's accident.

Plaintiff subsequently commenced an action on or about September 8, 2017, seeking to recover for personal injuries he allegedly sustained as a result of the accident, alleging violations of Labor Law §§ 240 (1), 241 (6), 200, as well as common-law negligence. Saltru joined issue with the service of an answer with affirmative defenses on or about December 8, 2017. Saltru subsequently commenced a third-party action against 212 Services, seeking common-law indemnity, contribution, contractual indemnification and breach of contract to procure insurance. On or about November 1, 2018, 212 Services interposed an Answer to the third-party complaint. The parties engaged in discovery and, the Note of Issue and Certificate of Readiness was filed on May 27, 2020. The following motion and cross motions ensued.

Discussion

Plaintiff seeks partial summary judgment as to liability on his Labor Law § 241 (6) claim as based upon Industrial Code sections 23-1.7 (e) (1), (2), and 23-2.1 (a) (1). Saltru opposes plaintiff's motion and seeks summary judgment dismissing said claim.

It is well settled that "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 demonstrate the absence of

any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). However, once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety for workers without regard to direction and control (*see Romero v J & S Simcha, Inc.*, 39 AD3d 838 [2d Dept 2007]). In order to prevail under this section of the Labor Law, a plaintiff must establish that specific safety rules and regulations of the Industrial Code promulgated by the Commissioner of the Department of Labor were violated (*see Ross v Curtis–Palmer Hydro–Elec. Co.*, 81 NY2d 494 [1993]; *Ares v State of New York*, 80 NY2d 959 [1992]). The rule or regulation alleged to have been breached must be a specific, positive command and be applicable to the facts of the case (*see Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616, 619 [2d Dept 2008]; *Jicheng Liu v Sanford Tower Condominium, Inc.*, 35 AD3d 378, 379 [2d Dept 2006]).

Sections 23-1.7 (e) (1) and (2)

In support of his motion, plaintiff argues that the evidence establishes that Saltru violated Industrial Code sections 23-1.7 (e) (1) and (2), and that such violations were a proximate cause of his injuries.

Section 23-1.7 (e), entitled Tripping and other hazards states the following:

> (1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Plaintiff argues that both of these provisions apply in that the decontamination unit, in which the shower was located, was both a passageway for the workers, as well as a work area at the end of their work day, and that Saltru violated same by allowing the water filter to be left in the direct path of the shower's exit, thereby creating a tripping hazard over which the plaintiff fell. Plaintiff points out that 212 Services' field supervisor, Koroma, admitted that it was his responsibility to set up and install the water filter, which he did and then admittedly placed in front of the shower's exit. Koroma further admitted that the water filter was left in the path of the exit such that if one were to walk straight out of the shower, he would immediately encounter it. Plaintiff also relies upon the deposition testimony of his coworker, Herman Cabrera, who claims to have witnessed the plaintiff's accident. Cabrera testified that the water filter was not supposed to be at the shower's exit in the air lock room, and that it created a tripping hazard for the plaintiff. Thus, plaintiff maintains that Saltru's violations of sections 23-1.7 (e) (1) and (2) were a proximate cause of his injuries.

In opposition, and in support of its cross motion, Saltru argues that sections 23-1.7 (e) (1) and (2) are not applicable to the facts of this case as the subject water filter was an "integral" part of the asbestos abatement work. In support of this contention, Saltru refers to Part 56 of the Industrial Code (Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["12 NYCRR Part 56"]), which concerns asbestos abatement procedures in New York. It specifically cites to Subpart 56-7, entitled "Phase II a. Work Area Preparation," which sets forth the regulations required concerning personal and waste decontamination system enclosures. Saltru points out that the personal decontamination system that was

assembled at the premises was required pursuant to the regulations, and notes that subpart 56-7.5b (9) defines the term "Shower Room" as follows:

> A multi-staged filtering system containing a series of several filters with progressively smaller pore sizes shall be used to avoid rapid clogging of the filtering system by larger particles. Filtered wastewater shall be discharged in accordance with the applicable codes. Contaminated filters shall be disposed of as asbestos contaminated waste.

Thus, Saltru contends that the water filter, which was connected to the decontamination unit's shower, was required pursuant to the above-referenced regulations and was integral and necessary in aiding the removal of excess asbestos from 212 Services workers' bodies. Therefore, Saltru argues that sections 23-1.7 (e) (1) and (2) do not apply herein. Further, Saltru contends that it is irrelevant whether or not the placement of the water filter was negligent and constituted a tripping hazard since it was an integral part of plaintiff's work.

In addition, Saltru argues that a factual dispute exists as to whether or not the accident did occur in the manner in which the plaintiff claims, and whether the water filter was actually a tripping hazard. In this regard, Saltru refers to Koroma's testimony that the water filter was not a tripping hazard because all of the workers knew it was placed in front of the shower's exit.

In response, plaintiff argues that the issue is whether the placement of the water filter was an integral and necessary part of his work, which he claims it was not, rather than the work of his employer, 212 Services. Plaintiff contends there is no evidence in the record that he personally set up, installed, hooked up or placed the water filter in the shower area. Instead, he notes that it is undisputed that 212 Services' field supervisor, Koroma, was the one who placed the water filter in front of the shower unit's exit, thereby creating a tripping hazard. Plaintiff contends that his assignment and work at the site merely consisted of abating and removing floor tiles covered in asbestos. Furthermore, plaintiff notes that his coworker, Cabrera, testified that the installation of the water filter was not the responsibility of 212 Service workers, but rather the foreman or

supervisor's responsibility. Thus, plaintiff argues that the water filter as not an integral part of *his own* work at the site, and thus sections 23-1.7 (e) (1) and (2) are applicable herein. Plaintiff further argues that Saltru cannot avail itself of the "integral part of the work" defense where there were other locations the water filter could have been placed. In this regard, plaintiff notes that Koroma testified that he could have placed the filter in a different location for the shower (Koroma tr at 116-117). Thus, plaintiff contends that placing the water filter in the pathway of the shower's exit was not "integral" or "necessary" to his work, or to the functioning of the water filter, the shower, or the decontamination unit.

As an initial matter, the court notes that sections 23-1.7 (e) (1) and (2), are both sufficiently specific to support a claim pursuant to Labor Law § 241 (6) and arguably applicable (*see Aragona v State of New York*, 147 AD3d 808 [2d Dept 2017]; *Mugavero v Windows By Hart, Inc.*, 69 AD3d 694, 696 [2d Dept 2010]; *McDonagh v Victoria's Secret, Inc.*, 9 AD3d 395, 396 [2d Dept 2004]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [2d Dept 2003]; *see also Jara v New York Racing Ass'n, Inc.*, 85 AD3d 1121, 1123 [2d Dept 2011]). However, it is well settled that a party is not entitled to recovery under Labor Law § 241 (6) based on a violation of 12 NYCRR 23-1.7 (e) (1) or (e) (2) where the object he or she tripped over was an integral part of the construction (*see O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805, 806 [2006]; *Aragona v State*, 147 AD3d at 809; *Aragona v State*, 147 AD3d at 809 ["a party is not entitled to recovery under Labor Law § 241 (6) based on a violation of 12 NYCRR 23-1.7 (e) (1) where the object he or she tripped over was an integral part of the construction"]; *Galazka v WFP One Liberty Plaza Co., LLC*, 55 AD3d 789, 790 [2d Dept 2008]; *Salinas v Barney Skanska Constr. Co.*, 2 AD3d 619, 622 [2d Dept 2003]; *Harvey v Morse Diesel Intl.*, 299 AD2d 451, 453 [2d Dept 2002]).

Here, the area where the accident occurred could arguably be construed as both a passageway and a work area within the meaning of sections 23-1.7 (e) (1) and (2) in that the deposition testimony of the parties

reveals that the plaintiff and his fellow coworkers were required to pass through the decontamination room, including the second air lock area (where the filter was placed), as a final phase of their daily asbestos abatement work (*see Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446, 447 [1st Dept 2016]; *Aragona v State*, 147 AD3d at 809). While the water filter over which the plaintiff allegedly tripped clearly cannot be characterized as an accumulation of dirt, debris, scattered tools/materials, or a sharp projection within the purview of section 23-1.7 (e) (*see Castillo v Starrett City*, 4 AD3d 320 [2d Dept 2004]), the court finds that an issue of fact exists as to whether the filter constituted an obstruction which caused a tripping hazard to the plaintiff.

In determining whether these code provisions are applicable, the controlling issue becomes whether the water filter, under the factual circumstances presented herein, was an integral part of the ongoing asbestos abatement work at the site. In this regard, Saltru has established that the water filter *itself* was required and necessary for the asbestos abatement/decontamination process in that its purpose was to aid in removal of asbestos materials/debris from the workers' bodies after removing tiles[2] (*see Smith v New York City Hous. Auth.*, 71 AD3d 985, 987 [2d Dept 2010]). Indeed, this is not an instance where the object over which the plaintiff tripped and fell served no purpose related to his work. Rather, the issue is whether the *placement* of the water filter (directly in front of the shower's exit), which arguably created a tripping hazard, was an integral and inherent part of the plaintiff's work or the work of his co-workers. A review of the record reveals that the water filter, measuring about 20 inches tall and 8 inches wide, was placed directly in front of the 3 foot by 3 foot shower, which was in the second air lock room (measuring 3 feet by 5 feet). Moreover, it is undisputed that visibility of the water filter was obscured by an opaque plastic curtain, which separated the chambers. More importantly, 212 Services' supervisor, Koroma, admitted that he placed the water filter directly in the path of the shower's exit (Koroma tr at 131-132), and further admitted that he could have

placed it in a different location and still have it connected to the shower for its intended purpose (*id.* at 166-117). Under these circumstances, the court finds that an issue of fact has been raised as to whether the *placement* of the water filter, which admittedly obstructed the pathway exiting the shower, was necessary and, therefore, integral to the ongoing asbestos abatement work (*see Giza v New York City School Construction Auth.*, 22 AD3d 800 [2d Dept 2005]).

In *Giza,* the Second Department affirmed the lower court's determination which found that there was a triable issue of fact as to whether section 23-1.7 (e) (2) was violated when the plaintiff tripped over a piece of "warped" plywood that had been intentionally laid down in a parking lot in order to protect the asphalt during construction work (*Giza v New York City School Constr. Auth.,* 2004 WL 5488367 [Sup Ct, Kings County 2004], *affd* 22 AD3d 800 [2d Dept 2005]). In reaching its determination, the court reasoned as follows:

> "[the] [p]laintiff did not merely trip over a piece of plywood. He tripped over a piece of plywood that was warped to the point that its edge was elevated three inches above the surface of the parking lot. It was the warped nature of the plywood that presented the tripping hazard, and while the work might have required the use of plywood, it did not require the use of warped plywood." (*Id.* at * 3).

Here, as in *Giza,* the water filter over which the plaintiff tripped was clearly necessary and required for the asbestos abatement process. However, a question has been raised as to whether its placement directly in front of the shower's exit, when other locations were admittedly available, was an integral and unavoidable consequence of the ongoing asbestos abatement work (*see Giza v NYC Sch. Constr. Auth.*, 22 AD3d at 801; *see also Lopez v New York City Dept. of Envtl. Protection*, 123 AD3d 982 [2d Dept 2014] [12 NYCRR 23-1.7 (e) (2) held applicable where plaintiff was injured when he was impaled by uncapped rebar; the uncapped rebar, which was a sharp projection at the site, was deemed not an integral part of the work]; *Egan v West Square Corp.*, 2018 NY Slip Op 33376 [U] [Sup Ct, Kings County, December 31, 2018, Landicino, J.]

[holding that "the Masonite itself was integral to the work inasmuch as it was needed to protect the wood floors. However, the hazardous condition present in the Masonite that caused the accident (i.e., the raised edge) was not integral to the work"]; *cf. Krzyzanowski v City of New York*, 179 AD3d 479, 480 [1st Dept 2020] [court held a triable issue of fact existed as to whether Masonite boards were a "protective covering [that] had been purposefully installed on the floor as an integral part of the renovation project" where no renovation work was taking place at time of plaintiff's accident and there was no evidence in record as to why the boards were placed on the floor or what condition they were in]; *Johnson v 923 Fifth Ave. Condominium*, 102 AD3d 592, 593 [1st Dept 2013] [holding that there was no section 23-1.7 (e) (2) liability where the plaintiff tripped over a piece of unwarped plywood that had been purposely laid over the sidewalk to protect it, and thus, it was an integral part of the work]).

Accordingly, in light of the issues of fact as to whether the placement of the water filter was an integral part of the ongoing asbestos abatement work and/or an obstruction which caused a tripping hazard, Saltru is not entitled to dismissal of that part of plaintiff's Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.7 (e) (1) and (2), and plaintiff is also not entitled to partial summary judgment on this particular claim as based upon these provisions.

Section 23-2.1 (a) (1)

As to section 23-2.1 ("Maintenance and housekeeping"), subsection (a)(1) ("Storage of material or equipment"), that provision provides:

> All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.

The court finds that Saltru has also made a prima facie showing that this provision is not applicable herein. The water filter that allegedly caused the plaintiff's injuries "was not being 'stored' but was in use" at the

time of the accident (*Castillo v Starrett City*, 4 AD3d 320, 321 [2d Dept 2004]; *see Zamajtys v Cholewa*, 84 AD3d 1360, 1362–63 [2d Dept 2011]; *Buckley v Columbia Grammar & Preparatory*, 44 AD3d 263, 272 [1st Dept 2007]). Samura Koroma, the field supervisor for 212 Services, testified that the water filter was connected to the shower and aided in removing asbestos from the workers and their clothing. As such, section 23-2.1 (a) (1) cannot serve as a predicate for plaintiff's Labor Law § 241 (6) claim (*see Castillo v Starrett City, Inc.*, 4 AD3d at 321). Based upon the foregoing, the plaintiff's motion for partial summary judgment as to liability on his Labor Law § 241 (6) claim as predicated upon sections 23-1.7 (e) (1), (2), and 23-2.1 (a) (1) is denied. That branch of Saltru's cross motion seeking to dismiss plaintiff's Labor Law § 241 (6) claim as predicated upon section 23-2.1 (a) (1) is granted, and denied as to sections 23-1.7 (e) (1) and (2).

Plaintiff also moves, pursuant to CPLR 3211(b), for dismissal of Saltru's first affirmative defense alleging that culpable conduct on his part was entirely or partly the cause of his injuries. A party seeking dismissal of an affirmative defense bears the burden of demonstrating that the defense is without merit as a matter of law (*see Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 822 [2nd Dept 2011]; *534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." If there is any doubt as to the availability of a defense, it should not be dismissed." (*Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d at 822). Here, as there are no issues of fact that have been established regarding culpable conduct on the part of plaintiff for his accident, he is entitled to dismissal of Saltru's affirmative defense which alleges same. The court notes that Saltru fails to address this aspect of the plaintiff's motion.

Contractual Indemnity

Saltru seeks a conditional order of summary judgment on its contractual indemnification third-party claim against 212 Services. 212 Services opposes and cross-moves seeking to dismiss said claim.

Saltru's contractual indemnity claim is based upon an indemnity provision set forth in its contract with 212 Services, dated March 16, 2017. The "Terms and Conditions" section of the contract, specifically § 6, states as follows:

> Contractor (212 Services LLC) shall indemnify, defend and hold harmless **Toys "R" Us, its parent Toys "R" Us subsidiaries and affiliates** against any and all actions, claims, demands, suits, losses, costs, damages, fines and penalties (except where reimbursement of fines and penalties is prohibited by law) judgments, expense (including reasonable attorneys' fees) and causes of action of every kind and character (including those of the parties and their agents and employees) directly or indirectly incurred or to be incurred and arising out of or in connection with the work by any act or omission of the contractor or subcontractor, agent, employee, invitee or licensee of contractor. (NYSCEF Doc. No. 79, § 6 [emphasis supplied]).

Based upon the foregoing language, Saltru argues that 212 Services is obligated to defend and indemnify it since the plaintiff's accident arose out of 212 Services' work at the site. In this regard, Saltru notes that 212 Services' employee (Koroma) admitted that he was the one responsible for setting up the water filter and placing it in front of the shower's exit, which was the alleged cause of plaintiff's accident. Saltru further argues that there is no evidence of any negligence on its part. In this regard, the plaintiff testified that he only received his instructions from Saltru employees, specifically his supervisor, Koroma, or his foreman, Juan.

In opposition to Saltru's cross motion, and in support of its own cross motion, 212 Services points out that the indemnity provision specifically limits its duty to indemnify to "Toys "R" Us, its parent Toys "R" Us subsidiaries and affiliates." 212 Services contends that Saltru is not a parent, subsidiary or an affiliate of Toys "R" Us and, therefore, its contractual indemnification claim should be dismissed. In this regard, 212

Services contends that while the third-party complaint alleges that "Saltru was and still is a Joint Venture created under a Joint Venture Agreement between Toys "R" Us and Caesar's Bazaar Limited Partnership," Saltru has failed to establish that it is, or was, owned by Toys "R" Us or that it is an "affiliate" thereof.

In response, Saltru contends that it is an affiliate of Toys "R" Us and submits an affidavit by Leon Silvera (NYSCEF Doc. No. 109). Silvera avers that he is a managing member of CBB Realty Associates, LLC, and a managing agent member of Saltru. Silvera further avers that Toys "R" Us was a 50% partner in Saltru until they were bought out in June of 2018 through a Bankruptcy Court proceeding. He further avers that CBB Realty Associates was the other partner at that time. Thus, Silvera maintains that at the time of the accident, Toys "R" Us was in fact a 50% owner of Saltru. In support of this contention, Silvera has annexed to his affidavit a copy of a letter he forwarded to Toys "R" Us, dated October 31, 2017, which he claims outlines the proposed sale of Toys "R" Us' 50% share in Saltru to CBB Realty Associates, which he claims was ultimately approved by the Bankruptcy Court in June 2018. Based upon the foregoing, Saltru argues that it has made a prima facie showing that it was an affiliate of Toys "R" Us at the time of the plaintiff's accident, and therefore is entitled to indemnification from 212 Services.

A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [internal quotation marks and citations omitted]" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms [internal quotation marks and citations omitted]" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008]).

Here, the broad language of the indemnity provision clearly obligates 212 Services to indemnify for all claims which arose out of its work and which were caused by its actions at the site. In addition, there is

no evidence in the record of any negligence on Saltru's part. However, the court finds that an issue of fact exists as to whether Saltru was an intended indemnified party under the agreement. The above-referenced indemnity provision includes

Toys "R" Us' "parent," "subsidiaries" and "affiliates" as entities that are entitled to indemnification. Although Saltru argues that it was an "affiliate" of Toys "R" Us at the time of the accident, it has failed to make a prima facie showing establishing same. In this regard, the court notes that the term, "affiliate," is not defined in the contract and, therefore, it is unclear who qualifies as an indemnified party (*see Hurtado v 1501 Pitkin Owners, LLC; No.* 1585/16, 2020 WL 1274231, at *8 [N.Y. Sup. Ct. Mar. 06, 2020]; *Verduzco-Soto v Georgia Props., Inc.*, 26 Misc 3d 1222 [A], 2010 NY Slip Op 50215, [U] [Sup Ct, Bronx County 2010]; *see also Omnicom Group, Inc. v 880 West Long Lake Assoc*, 504 Fed Appx 487, 490-492 [6th Cir 2012] [finding use of term affiliates ambiguous]). Moreover, the court finds that the evidence proffered by Saltru, which was not presented in its initial moving papers, fails to eliminate all triable issues of fact as to whether it was an "affiliate" of Toys "R" Us at the time of the accident, as contemplated within the indemnity provision. In order to succeed on a motion for summary judgment it is necessary that the movant tender evidentiary proof in admissible form, sufficient to establish its cause of action so as to warrant the court, as a matter of law, directing judgment in its favor (*see Zuckerman v New York*, 49 NY2d 557 [1980]; CPLR 3212). Saltru failed to make such a showing.

Accordingly, that branch of Saltru's cross motion for conditional contractual indemnity against 212 Services is denied. That branch of 212 Services' cross motion seeking to dismiss said claim is also denied in light of the issue of fact as to whether Saltru is an indemnified party under the agreement.

Conclusion

In sum, it is hereby

Motion Sequence No. 5

ORDERED that plaintiff's motion seeking partial summary judgment as to liability as based upon his Labor Law § 241 (6) cause of action is denied; and it is further

ORDERED that branch of plaintiff's motion seeking to dismiss Saltru's affirmative defense as to his culpable conduct is granted; and it is further

Motion Sequence No. 6

ORDERED that branch of Saltru's cross motion seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) claim as predicated upon section 23-2.1 (a) (1) is granted and denied as to sections 23-1.7 (e) (1) and (2); and it is further

ORDERED that the remainder of Saltru's motion is denied; and it is further

Motion Sequence No. 7

ORDERED that 212 Service's cross motion is denied.

The foregoing constitutes the decision, order and judgment of the court.

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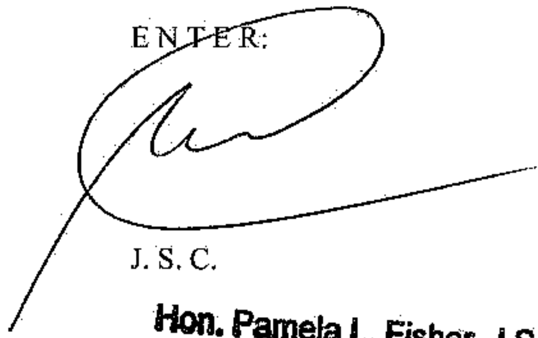

J. S. C.

Hon. Pamela L. Fisher, J.S.C.