

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D18345  
Y/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - January 29, 2008

DAVID S. RITTER, J.P.  
ANITA R. FLORIO  
EDWARD D. CARNI  
JOHN M. LEVENTHAL, JJ.

---

2007-01476

DECISION & ORDER

Sangho Park, et al., appellants, v Bay Crane, Inc., defendant third-party plaintiff-respondent; Rapid Tire Service of Brooklyn, Inc., third-party defendant-respondent.

(Index No. 9247/04)

---

Ginsberg & Broome, P.C., New York, N.Y. (Robert M. Ginsberg of counsel), for appellants.

Stein, McGuire, Pantages & Gigl, LLP, New York, N.Y. (Gerald J. Gunning of counsel), for defendant third-party plaintiff-respondent.

DeCicco, Gibbons & McNamara, P.C., New York, N.Y. (Daniel J. McNamara and Ankur H. Doshi of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), dated January 4, 2007, as granted the defendant's motion for summary judgment dismissing the complaint and granted that branch of the third-party defendant's separate motion which was for summary judgment dismissing the complaint.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The defendant Bay Crane, Inc. (hereinafter Bay Crane), engaged the third-party defendant Rapid Tire Service of Brooklyn, Inc. (hereinafter Rapid Tire), to service, repair, and change

March 11, 2008

Page 1.

PARK v BAY CRANE, INC.

the tires on its cranes. On October 23, 2003, the plaintiff Sangho Park, then an employee of Rapid Tire, was attempting to mount a spare tire supplied to him by Bay Crane onto one of its cranes at a Bay Crane yard. He was injured when that tire exploded.

The plaintiffs subsequently commenced this action against Bay Crane. The injured plaintiff asserted a single cause of action against Bay Crane to recover damages due to his injuries. He sought to recover based upon theories sounding in breach of warranty, strict products liability, and negligence. His spouse, the plaintiff Mingsong Park, asserted derivative claims. The Supreme Court granted Bay Crane's motion for summary judgment dismissing the complaint as well as that branch of Rapid Tire's separate motion which sought the same relief. We affirm the order insofar as appealed from.

In response to the movants' prima facie showing of their entitlement to summary judgment, the plaintiffs failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Since Bay Crane was not a manufacturer, seller, or distributor of the tire that is alleged to have caused the injuries, it was not subject to liability based upon either a breach of warranty of fitness or a strict products liability theory (*see Spallholtz v Hampton Corp.*, 294 AD2d 424; *Watford v Jack LaLanne Long Island, Inc.*, 151 AD2d 742, 747).

Further, the doctrine of res ipsa loquitur is not applicable here. The plaintiffs' own proof established not only that the instrumentality which caused the injury of the plaintiff Sangho Park, i.e., the tire, was not within the exclusive control of the defendant Bay Crane, but, at the time of the accident, was, in fact, under the exclusive control of the injured plaintiff (*see Ebanks v New York City Transit Auth.*, 70 NY2d 621, 523; *Dermatossian v New York City Transit Auth.*, 67 NY2d 219, 220).

The plaintiffs' remaining contentions are without merit.

RITTER, J.P., FLORIO, CARNI and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court