

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

D19759
X/kmg

_____AD3d_____

Argued - May 19, 2008

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2007-02943

DECISION & ORDER

Madeline Agricola, plaintiff-respondent,
v City of New York, et al., defendants-respondents,
Bay Crane Service, Inc., defendant third-party
plaintiff-appellant-respondent, Maspeth Supply
Company, LLC, defendant-respondent-appellant;
Northeast Services, Inc., third-party defendant-respondent.

(Index No. 7628/03).

John P. Humphreys, New York, N.Y. (Eric P. Tosca of counsel), for defendant third-party plaintiff-appellant-respondent.

Baxter, Smith, Tassan & Shapiro, P.C., Hicksville, N.Y. (Sim R. Shapiro of counsel), for third-party defendant-respondent.

In an action to recover damages for personal injuries, the defendant third-party plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Hinds-Radix, J.), dated March 7, 2007, as granted that branch of the third-party defendant's motion which was for summary judgment dismissing the third-party complaint and denied that branch of its cross motion which was for summary judgment on so much of the third-party complaint as sought a defense and indemnification from the third-party defendant, and the defendant Maspeth Supply Company, LLC, cross-appeals from stated portions of the same order.

ORDERED that the cross appeal by the defendant Maspeth Supply Company, LLC, is dismissed as abandoned (*see* 22 NYCRR 670.8[e][1]); and it is further,

June 17, 2008

Page 1.

ORDERED that the order is affirmed insofar as appealed from by the defendant third-party plaintiff; and it is further,

ORDERED that one bill of costs is awarded to the third-party defendant payable by the defendant third-party plaintiff.

The plaintiff allegedly was injured when she tripped over a pothole. She commenced this action seeking damages for personal injuries against, among others, Bay Crane Service, Inc. (hereinafter Bay Crane). Bay Crane then initiated a third-party action seeking, among other things, a defense and indemnification from Northeast Services, Inc. (hereinafter Northeast). Bay Crane had rented a crane to Northeast that had been used in the general vicinity of where the pothole was located, although not on the same street.

The rental agreement between Bay Crane and Northeast included an indemnification clause. The plain terms of the indemnification clause provide that Northeast would be required to defend and indemnify Bay Crane for any claims “occasioned by the operation, handling or transportation of this equipment during the rental period.”

The Supreme Court properly determined that the indemnification clause did not require Northeast to provide a defense and indemnification under the circumstances presented here (*see Sievert v Morlef Holding Co.*, 241 AD2d 445). The record showed, as a matter of law, that the plaintiff's injuries were not occasioned by Northeast's use of this equipment, and as such, the indemnification clause was never triggered (*see Luby v Rotterdam Sq., L.P.*, 47 AD3d 1053; *Fuller-Mosley v Union Theol. Seminary*, 47 AD3d 487; *Loiek v 1133 Fifth Ave. Corp.*, 46 AD3d 766).

MASTRO, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court