

Hoa Ran Sun v City of New York

2008 NY Slip Op 33098(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 115890/2003

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KAREN SMITH

PART 62

Index Number : 115890/2003
SUN, HAO RAN
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT
2

INDEX NO. _____
MOTION DATE 10/16/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

and cross-motion.
this motion ~~is for~~ summary judgment

PAPERS NUMBERED
1
2

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
~~Notice of Cross-Motion~~
~~Answering Affidavits — Exhibits~~

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted in part and denied in part and the "cross-motion" is denied in accordance with the annexed memorandum decision and order.

FILED
NOV 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/13/08

K.S.
HON. KAREN SMITH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
HAO RAN SUN,

Plaintiff,

-against-

Index No.: 115890/2003
Motion Seq.: 001
Motion Date: 10/16/2008

THE CITY OF NEW YORK and THE NEW YORK
CITY DEPARTMENT OF PARKS AND RECREATION,
Defendants.

DECISION AND ORDER

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

Index No.: 590119/2007

FILED
NOV 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

KOMI CONSTRUCTION, INC. and UNITED
METRO CONSTRUCTION CORP.,
Third-Party Defendants.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

Third-Party Defendant, United Metro Construction Corp ("United")'s motion for summary judgment dismissing all claims and cross-claims is granted to the limited extent of dismissing the third-party complaint of the City of New York ("CNY) as against United and the cross-claims of the third-party defendant, Komi Construction, Inc. ("Komi") asserted against United in the third-party action herein. In all other respects, United's motion is denied. Komi's "cross-motion" seeking dismissal of the third-party complaint and "any applicable cross-claims" is denied.

The primary action in this matter is a personal injury action in which an infant was allegedly injured on September 22, 2002 when he fell from playground equipment onto the safety surface installed on the ground below the equipment in a New York City Park. Plaintiff brought

the primary action against the City of New York and its Department of Parks and Recreation (“CNY”) alleging that the safety surface was improperly designed, installed, inspected, repaired and maintained. CNY thereafter brought the third-party action captioned above against Komi and United asserting causes of action for common law and contractual indemnity. Komi was the general contractor for a renovation project in the park, including the playground equipment, involved in plaintiff’s accident. The project was undertaken and completed some time before plaintiff’s accident. United was a subcontractor who, as part of the renovation project, had installed the safety surface involved in plaintiff’s accident in or around 1997 or 1998. After the completion of its work, United had no further involvement in the operation or maintenance of the park.

United brought the instant motion seeking summary judgment dismissing the third-party complaint and all cross-claims asserted against it in the third-party action and, also, dismissing the complaint and all cross-claims asserted against United in the primary action. No papers were received by the Court in opposition to United’s motion.

Komi has submitted what it denominates a “cross-motion” seeking the dismissal of the third-party action and all cross-claims asserted against it in the third-party action. Komi’s papers offer no opposition to United’s motion. No papers were received by the Court in opposition to Komi’s “cross-motion”.

United, through the submission of pleadings and deposition transcripts, has made a *prima facie* showing that it is entitled to summary judgment dismissing CNY’s third party action and the cross-claims asserted by Komi against United in that action. United has shown; 1) it was engaged to install the safety matting (which was supplied by an entity known as Mitchell Rubber

Products, who is not a party to the instant actions) pursuant to plans and specifications established by CNY and provided to United by Mitchell Rubber Products, 2) United had no discretion to vary or alter the plans or specifications regarding the installation, 3) Upon United's completion of its work, CNY accepted the work as complete and in full compliance with the plans and specifications which had been provided to United, 4) United did not receive any complaints from CNY, Komi or Mitchell Rubber Products from the date of the completion of United's work through the date of Plaintiff's accident and 5) there was no agreement between United and Komi or CNY which provided for indemnity by United to either Komi or CNY. Thus, United has made a *prima facie* showing that neither Komi or CNY can present any viable cause of action against United for common law or contractual indemnity. As no party has presented opposition to the branch of United's motion seeking summary judgment dismissing the third-party complaint by CNY as against United and the cross-claims asserted by Komi against United in the third-party action, this branch of United's motion is granted.

The branch of United's motion seeking summary judgment dismissing the complaint and any cross-claims asserted in the primary action as against United is denied as United has failed to provide the necessary pleadings to allow the court to determine if the plaintiff or any of the other parties to the primary action has, in fact, asserted any claims against United therein.

The motion by Komi designated a "cross-motion" seeking summary judgment dismissing the third-party action and all cross-claims asserted against Komi in the third-party action is also denied. The motion is only a proper cross-motion as it relates to United (see CPLR §2215). Komi has offered no pleadings which indicate that United has asserted any cross-claims against Komi in the third-party action. However, United's answer to the third-party action (attached to its motion papers as part of its Exhibit D) asserts no cross-claims against Komi. Therefore, the

court is unaware of the nature of the cross-claims, if any, asserted by United against Komi in the third-party action and has no basis to award Komi a summary judgment dismissing any such claims as may exist. With respect to any relief requested by Komi against any other parties, the motion was made more than 60 days after the filing of the note of issue in this matter and is, therefore, untimely and may not be considered by the court (see *Brill v City of New York*, 2 NY3d 648 [2004] and *Fuller v Westchester County Health Care Corp*, 32 AD3d 896 [2nd Dept, 2006]).

Accordingly, it is;

ORDERED the United is granted summary dismissing the third-party complaint by CNY as against United and the cross-claims asserted by Komi against United in the third-party action but the third-party action is continued with respect to the other parties thereto, and it is further;

ORDERED that, upon the service of a copy of this order, together with notice of entry hereof and such other forms and fees as may reasonably be required by the clerk, upon the appropriate division of the clerk's office, the clerk shall forthwith enter judgment accordingly, and it is further;

ORDERED that, in all other respects, the instant motion and "cross-motion" are denied.

The foregoing constitutes the decision and order of this court.

Dated: November 13, 2008

FILED
NOV 18 2008
ENTER: KSS
Hon. Karen S. Smith, J.S.C.
COUNTY CLERK'S OFFICE
NEW YORK