

<b>Fon Haw Wong v Grand Prop. Dev., LLC</b>
2008 NY Slip Op 33281(U)
December 3, 2008
Supreme Court, New York County
Docket Number: 101913/07
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 101913/2007

WONG, FON HAW

vs.

GRAND PROPERTY DEVELOPMENT

SEQUENCE NUMBER : 003

DISMISS

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INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ d on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2

5, 6

7

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No 3, 4

Upon the foregoing papers, It is ordered that this motion a cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

**FILED**

DEC 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**DORIS LING-COHAN**  
J.S.C.

Dated: 12/3/08

\_\_\_\_\_  
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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
FON HAW WONG,

Plaintiff,

Index No.: 101913/07

-against-

DECISION AND ORDER

GRAND PROPERTY DEVELOPMENT, LLC,  
213 GRAND STREET, INC., d/b/a  
GRAND STREET GOURMET and YORK  
SCAFFOLD EQUIPMENT CORP., and  
MORGAN CONSTRUCTION NY INC.,

Motion Seq. No.: 003

Defendants.

-----x  
DORIS LING-COHAN, J.:

**FILED**  
DEC 09 2008  
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NEW YORK

**FACTUAL BACKGROUND**

Defendant York Scaffold Equipment Corp. (York) moves to dismiss the cross-claims and counterclaims of defendants Grand Property Development LLC, 2123 Grand Street, Inc., d/b/a Grand Street Gourmet (collectively Grand Street) and Morgan Construction NY Inc. (Morgan), pursuant to a stipulation of discontinuance entered into between York and plaintiff. York's motion is unopposed.

Defendant Morgan cross-moves for summary judgment dismissing all claims and cross-claims against it, pursuant to CPLR 3212. Morgan's cross-motion is opposed by both Grand Street and plaintiff.

This suit is a personal injury action resulting from plaintiff falling through what is referred to as hatch/cellar door and/or a temporary construction fence, outside the

restaurant that is owned and operated by Grand Street.<sup>1</sup> At the time of the alleged accident, plaintiff had just left the restaurant where he had had lunch and several alcoholic drinks. Plaintiff admitted at his examination before trial that he had been aware of the opening before the day in question.

Extensive renovation work was being performed on the building, and Morgan was the general contractor. On January 17, 2008, plaintiff and York entered into a stipulation discontinuing the action against York, with prejudice. [Exh. I, Notice of Motion]. It is not disputed that York was not responsible for the construction or maintenance of the hatch/door, nor did it control its use.

In its cross-motion, Morgan asserts that it constructed the hatch/door at the request of Grand Street for the benefit of Grand Street's restaurant workers. Morgan states that it continually warned Grand Street that the hatch/door was dangerous and should be kept closed, and that it posted signs to keep the door locked. Further, Morgan says that it placed a spring lock on the door to keep it closed, but Grand Street employees broke the lock. It is Morgan's contention that it owed no duty to plaintiff, and that the alleged accident was caused by Grand Street's failure to keep the door/hatch closed or plaintiff's own negligence in failing to pay attention to an open and obvious hazard.

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<sup>1</sup>Grand Property Development, LLC owns the building, and 213 Grand Street, Inc. is the tenant operating a restaurant on the ground floor of the building.

[\* 4 ]

In its opposition, Grand Street provides a copy of its contract with Morgan (Exhibit A), pursuant to which Morgan agrees to be solely responsible for, and have control over construction means (section 8.2.1), and is "fully and solely responsible for the job site safety ... . Section 8.2.1 of the contract. Further, pursuant to Article 15 of the contract, Morgan is "responsible for initiating, maintaining and supervising all safety precautions," including taking responsibility for any injuries to "[e]mployees on the work and other persons who may be affected thereby ... ."

In response to Grand Street's assertions, Morgan states that the area where the alleged accident took place was not part of the contract job site. Morgan alleges that the subject area was solely occupied and controlled by 213 Grand and Grand Property.

#### **DISCUSSION**

York's motion to dismiss is granted.

The stipulation of discontinuance, with prejudice, signed between plaintiff and York constitutes a release within the meaning of the General Obligations Law § 15-108, which acts as a release from all counterclaims and cross-claims asserted against it. *Hanna v Ford Motor Company*, 252 AD2d 478 (2d Dept 1998). "However, any verdict in favor of plaintiff and against the remaining defendants will be reduced by the amount of [York]'s equitable share of the damages, if any [citations omitted]." *Tereshchenko v Lynn*, 36 AD3d 684, 686 (2d Dept 2007).

Morgan's cross-motion for summary judgment is denied.

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

"One who assumes a contractual obligation to maintain a safe condition may be answerable in damages for liability resulting from injuries sustained by a third party because of the obligor's breach [citations omitted]." *Zinn v Jefferson Towers, Inc.*, 14 AD3d 398, 399 (1<sup>st</sup> Dept 2005). Hence, Morgan may be liable for plaintiff's injuries based on its contractual obligations with Grand Street as the site's general contractor.

Furthermore, questions of fact exist which preclude granting summary judgment, such as whether the area in which the alleged accident took place was part of the contractual job site, whether Morgan was negligent in maintaining the safety of the door/hatch as part of its contractual obligations, whether the door/hatch was properly constructed, and whether plaintiff was

contributorily negligent by failing to pay attention to an open and obvious hazard (*Garrido v City of New York*, 9 AD3d 267 [1<sup>st</sup> Dept 2004]). Therefore, at this juncture, it cannot be said that Morgan is free from any liability for plaintiff's alleged injuries. See *Dickert v City of New York*, 268 AD2d 343 (1<sup>st</sup> Dept 2000).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendant York Scaffold Equipment Corp.'s motion to dismiss all cross-claims and counterclaims against it is granted, with costs and disbursements to York Scaffold Equipment Corp. as taxed by the Clerk of the Court; and it is further

ORDERED that defendant Morgan Construction NY Inc.'s motion for summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant York shall serve a copy upon all parties with notice of entry.

Dated:

12/3/08

**FILED**

DEC 09 2008

**COUNTY CLERK'S OFFICE  
NEW YORK**

Doris Ling-Cohan, J.S.C.