

**Slavit v Sweet Constr. of Long Is. LLC**

2008 NY Slip Op 33087(U)

November 13, 2008

Supreme Court, New York County

Docket Number: 107831/05

Judge: Louis B. York

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

LOUIS B. YORK

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 2

Plavit  
- v -  
Sweet Construction

INDEX NO. 107831/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 09  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accord  
with the accompanying short-form order.

**FILED**  
NOV 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/13/09

Leif  
\_\_\_\_\_  
J.S.C.

LOUIS B. YORK

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 2

-----x  
BARBARA L. SLAVIT and LEONARD SLAVIT,

Plaintiffs,

Index No.: 107831/05

-against-

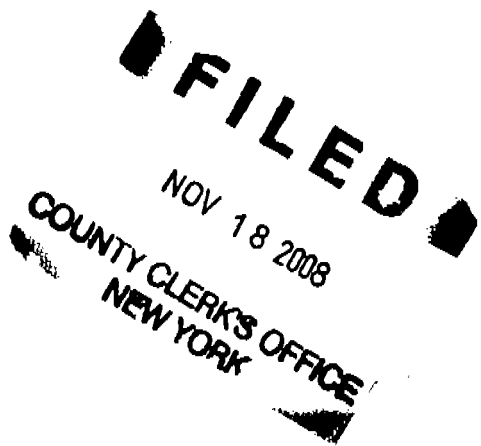
DECISION AND ORDER

SWEET CONSTRUCTION OF LONG ISLAND LLC,  
SWEET CONSTRUCTION CORP., SEASONS  
CONTRACTING CORP., PARK EAST SYNAGOGUE  
a/k/a CONGREGATION ZICHRON EPHRAIM and  
THE CITY OF NEW YORK,

Defendants.

-----x  
SWEET CONSTRUCTION OF LONG ISLAND LLC,  
SWEET CONSTRUCTION CORP., SEASONS  
CONTRACTING CORP., PARK EAST SYNAGOGUE  
a/k/a CONGREGATION ZICHRON EPHRAIM and  
THE CITY OF NEW YORK,

Third-Party  
Plaintiffs,



Third Party  
Index No. 590273/07

-against-

ARCH INSURANCE GROUP, INC.,

Third-Party  
Defendant.

-----x  
LOUIS B. YORK, J.:

**FACTUAL BACKGROUND**

Sweet Construction of Long Island LLC and Sweet Construction Corp. (collectively, Sweet) move for summary judgment to dismiss the complaint and all cross claims asserted against it pursuant to CPLR 3211 and 3212.

This action arises from a trip and fall on a sidewalk abutting property owned by Park East Synagogue. Park East Synagogue hired Sweet as its construction manager for a project involving renovation and construction at the involved premises. Sweet entered into a subcontract with Seasons Contracting Corp. (Seasons) for the construction of a sidewalk bridge, and performance of demolition work.

Plaintiff alleges that she was caused to fall due to a hole in the sidewalk next to a sidewalk shed. The sidewalk shed was erected by Seasons, and the hole was allegedly opened and repaved by non-parties Con Edison or Triborough Plumbing, in conjunction with the shut-off of utilities to the building.

Pursuant to § 3.18.1 of the contract between Park East Synagogue and Sweet,

"To the fullest extent permitted by law and to the extent claims, damage, losses, or expenses are not covered by insurance purchased by the Contractor in accordance with paragraph 11.3, the Contractor shall indemnify and hold harmless the owner ... from and against claims, damage, losses, or expenses, including but not limited to attorneys fees, arising out of or resulting from performance of the Work, but only to the extent caused by the acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, except to the extent such claim, damage, losses, or expenses is caused by a party indemnified hereunder ... ."

As part of its contractual duties, Sweet employed an on-site safety officer whose function was to perform inspections to make sure that the work was being performed in a safe manner.

\* 4 ] ,  
Additionally, Sweet employed an on-site superintendent for work concerning the demolition of the sidewalk shed. Sweet has been unable to produce logs to substantiate the superintendent's daily activities.

Sweet maintains that it cannot be held liable for the alleged injuries because it did not perform any work in the area in which the alleged accident took place.

Pursuant to an order of February 7, 2007, Seasons' answer to the complaint was stricken because of its failure to comply with directives of the court.

#### **DISCUSSION**

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Therefore, summary judgment must be precluded if, upon the papers submitted, there remains a question in the mind of the court.

Sweet's motion for summary judgment is denied. Regardless of whether or not Sweet performed any act or omission that might have caused the alleged injury, and the court makes no judgment as to that at this time, by contractual agreement Sweet has

[\* 5 ] ,  
agreed to indemnify and hold harmless Park East Synagogue should it be found liable.

Park East Synagogue, as the owner of the property, and the one for whose benefit the construction work was being performed, has a non-delegable duty to make sure that the work performed on the public street does not create a dangerous condition. *Tytell v Battery Beer Distributing, Inc.*, 202 AD2d 226 (1<sup>st</sup> Dept 1994). "Where an owner of property is held to respond in damages for injury to another merely because of his ownership and not by reason of his participation in the negligence or the principal wrongdoer, he is entitled to indemnification from the one primarily at fault." *Tipaldi v Riverside Memorial Chapel, Inc.*, 273 AD 414, 419 (1<sup>st</sup> Dept), *affd* 298 NY 686 (1948).

In the instant case, Park East Synagogue, as the property owner, may be held liable for plaintiff's injuries caused by an act or omission of the contractor, subcontractor, one of its employees, or someone performing work on their behalf. Sweet has contracted to indemnify and hold Park East Synagogue harmless under those circumstances. Consequently, the action against Sweet cannot be dismissed at this time, since there remain questions of fact as to who may have caused the alleged injury.

Although the cases cited by Sweet all correctly hold that a contractor will not be held liable if the alleged injury did not result from the contractor's affirmative act of negligence

[\*6]  
(Kleeberg v City of New York, 305 AD2d 549 [2d Dept 2003];  
Tsviling v City of New York, 275 AD2d 367 [2d Dept 2000]), none  
of them discussed the element of contractual indemnification,  
which the court finds determinative in the instant matter.


**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that Sweet Construction of Long Island LLC and Sweet  
Construction Corp.'s motion for summary judgment is denied.

Dated: 11/13/08

ENTER:

  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
**J.S.C.**

**FILED**  
NOV 18 2008  
COUNTY CLERK'S OFFICE  
NEW YORK