

<b>O'Brien v Sweet Constr. Corp.</b>
2013 NY Slip Op 30271(U)
January 30, 2013
Supreme Court, New York County
Docket Number: 108307/09
Judge: Jeffrey K. Oing
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JEFFREY K. OING  
J.S.C.  
*Justice*

PART 48

Index Number : 108307/2009  
O'BRIEN, ELLEN  
vs.  
SWEET CONSTRUCTION  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits -- Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

"This motion is decided in accordance with the annexed decision and order of the Court."

"This motion is decided in accordance with the annexed decision and order of the Court."

## FILED

FEB 06 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/30/13

JEFFREY K. OING, J.S.C.  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  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: IAS PART 48

-----x

ELLEN O'BRIEN,

Plaintiff,

-against-

SWEET CONSTRUCTION CORP., SWEET  
CONSTRUCTION OF NEW JERSEY, LLC, SWEET  
CONSTRUCTION OF GEORGIA, LLC, PERIMETER  
BRIDGE AND SCAFFOLDING CO. INC.,  
40 BROAD LLC, BROAD CONSTRUCTION LLC,  
NEWMARK CONSTRUCTION SERVICES L.L.C.,  
PRO SAFETY SERVICES, LLC, ZAMIR  
EQUITIES, LLC AND BOVIS LEND LEASE  
LMB, INC.

Defendants.

-----x

JEFFREY K. OING, J.:

**Facts**

On April 15, 2009, plaintiff, Ellen O'Brien, was walking to work along Broad Street in front of a Manhattan construction site. As she walked under a sidewalk bridge in front of the site, she alleges that she was struck in the head by what she described as a "black brick" measuring 6" x 4". After being struck in the head, she noticed the object lying on the ground near her (O'Brien 7/7/10 EBT at pp. 20-29). At the time, workers from defendant Perimeter Bridge and Scaffolding Co. Inc. ("Perimeter") were on top of the sidewalk bridge removing debris and rubbish.

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006, 007

**DECISION AND ORDER**

**FILED**

FEB 06 2013

NEW YORK  
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Manuel Aybar ("Aybar"), Perimeter's foreman, testified at his EBT that his supervisors assigned him to take a crew of workers to the site to clean off the top of the sidewalk bridge. The only workers on top of the bridge at this time were Perimeter employees. While working, Aybar saw plaintiff lying on the ground. When plaintiff got up, Aybar observed that she was bleeding from the head. He testified that he saw a block of wood on the ground after the police moved plaintiff. He further testified that a police officer later told him it was the object that struck plaintiff in the head (Aybar 6/22/12 EBT, Defendant Pro Safety Services, LLC, Moving Papers, Ex. D, at pp. 56-60).

Plaintiff commenced this action against defendants Sweet Construction Corp. ("Sweet Construction"), Sweet Construction of New Jersey, LLC ("Sweet Construction NJ"), Sweet Construction of Georgia, LLC ("Sweet Construction Georgia") (collectively referred to as the "Sweet Defendants"), Perimeter, 40 Broad LLC ("40 Broad"), Broad Construction LLC ("Broad Construction"), Newmark Construction Services, LLC ("Newmark Construction"), Pro Safety Services, LLC ("Pro Safety"), Zamir Equities, LLC ("Zamir Equities"), and Bovis Lend Lease LMB, Inc. ("Bovis").

Defendants Zamir Equities and Broad Construction have not appeared or served responsive pleadings. Plaintiff discontinued this action against Newmark Construction on June 22, 2011.

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### Summary Judgment Motions

The Sweet Defendants (mtn seq. no. 005), defendant Bovis (mtn seq. no. 006), and defendant Pro Safety (mtn seq. no. 007) separately move for summary judgment dismissing the complaint, as well as all cross-claims and counterclaims asserted against them.

Although interposing an answer to the original complaint, defendants Perimeter and 40 Broad have not interposed an answer to the amended complaint. Defendants Perimeter and 40 Broad collectively cross-move, pursuant to CPLR 3025, for leave to serve a verified answer to the amended verified complaint interposing a cross-claim for common law indemnification and contribution against Pro Safety.

Motion sequence numbers 005, 006, and 007 are consolidated for disposition.

### The Project

On or about April 25, 2006, defendant 40 Broad, as owner of the Manhattan office building located at 40 Broad Street (the "building"), began a renovation project on the building. 40 Broad retained defendant Broad Construction as the general contractor, who in turn retained defendant Newmark Construction as the construction manager.

Pursuant to a trade contract (the "Trade Contract"), dated April 25, 2006, Broad Construction employed Perimeter to install and maintain a sidewalk bridge to guard against falling debris.

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The bridge was 125 feet long, ten feet wide, and sixteen feet tall. The contract provided that Perimeter would be responsible for, inter alia, "safety precautions and programs in connection with the work", preventing "damage, injury or loss to ... persons who may be affected [by the work]", and removal of waste materials and rubbish as well as all required cleaning of the bridge at the request of the general contractor (Trade Contract, Arts. 5, 8, 17).

Pursuant to the Trade Contract, Perimeter also agreed to indemnify and hold harmless the indemnitees - including 40 Broad, as owner, Broad Construction, as contractor, and Newmark, as construction manager - for any "claim[s] of injury ... occurring or resulting directly or indirectly from the [w]ork or the activities of [Perimeter] (Trade Contract, Arts. 1(g), 9(a)(iii)).

On October 31, 2008, 40 Broad contracted with Sweet Construction to replace Newmark Construction as the construction manager for the project. By this time, the sidewalk bridge was already in place. During construction, Sweet Construction was responsible for finding subcontractors and suppliers for any work that Sweet Construction did not perform with its own personnel (Sweet Construction Moving Papers, Ex. L, § 2.3.2.1), and for removing debris from the site at its own cost, which 40 Broad would reimburse (Id. at § 6.1.5.3). In addition, Sweet

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Construction prepared and furnished to 40 Broad monthly progress reports, and kept a daily log of, inter alia, weather, subcontractors working on the site, what work was accomplished, and what problems were encountered (Id. at § 2.3.2.6). Jerry Botti, Sweet Construction's project manager, testified at his EBT that Sweet Construction also had the authority to stop work on the site, if necessary (Botti 6/13/11 EBT, Sweet Defendants Moving Papers, Ex. I, at p. 16). It employed a site superintendent, Romeo Volpaccio, to manage the day-to-day construction operations. Botti also testified that Sweet Construction was not involved with the regular maintenance and annual inspections of the sidewalk bridge (Id. at pp. 23-26).

On December 4, 2008, Broad Construction employed Pro Safety to work as a site safety consultant. Sathar Ansari, Pro Safety's on-site representative, testified at his EBT that Pro Safety was responsible for ensuring compliance with OSHA, Department of Buildings, and other regulations, but did not direct the construction workers on site (Ansari 11/7/11 EBT, Plaintiff's Opposition to Sweet Defendants' Motion, Ex. 1, at p. 22). In that regard, Ansari testified that his responsibilities encompassed the sidewalk bridge and that he inspected it periodically both from the street and from the upper floors of the building (Id. at pp. 52-54). He further testified that Pro Safety maintained a site safety log (Id. at p. 28). In addition,

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Pro Safety's Consultant Agreement expressly provided that Broad Construction did not delegate any duties of compliance with laws or regulations, and that Broad Construction would indemnify Pro Safety unless they were "adjudicated solely negligent" for any injuries that occurred on site (Pro Safety Moving Papers, Ex. F, ¶¶ 6, 8).

At some time prior to April 15, 2009 incident, the Department of Buildings issued a stop work order for the construction site and all work ceased (Botti 6/13/11 EBT at pp. 41-42). On April 14, 2009, Botti met with the superintendent of 50 Broad Street, to discuss coordinating clean-up of the top of the sidewalk bridge (Id. at p. 81). In the daily site safety log, Ansari, defendant Pro Safety's on-site representative, noted both this meeting and a conversation with Volpaccio, Sweet Construction's site superintendent, and others that once the stop work order was lifted, the top of the sidewalk bridge had to be cleaned (Plaintiff's Opposition to the Sweet Defendants' motion, Ex. 4). Following that conversation, Edmund A. Kirsch, Perimeter's president, testified at his EBT that Perimeter received several telephone calls requesting Perimeter send workers to the construction site and remove debris from the top of the sidewalk bridge (Kirsch 6/13/11 EBT, Plaintiff's Opposition to Sweet Defendants' Motion, Ex. 2, at pp. 92-93). Although Kirsch testified that he did not recall who exactly



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called Perimeter, his testimony indicated the telephone calls may have been from Sweet Construction by stating that Perimeter had a "big contract" and that the caller was a "good customer" (Id. at p. 93).

#### Discussion

To begin, that branch of the Sweet Defendants' motion for summary judgment dismissing the complaint as to defendants Sweet Construction NJ and Sweet Construction Georgia is granted without opposition<sup>1</sup>, and the complaint is dismissed against these defendants. That branch of the Sweet Defendants' motion to dismiss the cross-claims asserted by Bovis and Pro Safety is granted without opposition and the cross-claims are hereby dismissed.

Bovis' motion for summary judgment dismissing the complaint against it is granted without opposition, and the complaint is dismissed against it.<sup>2</sup> That branch of the motion to dismiss all cross-claims against it is also granted. In that regard, contemporaneously with this project, three other projects near 40 Broad Street were underway. Holly Pratt Ulses, Defendant Bovis'

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<sup>1</sup>Plaintiff's Opposition to the Sweet Defendants' motion, fn. 1

<sup>2</sup>On January 10, 2013, the Court held a telephone conference with plaintiff's counsel and counsel for the Sweet Defendants, 40 Broad and Perimeter, and Bovis, during which plaintiff's counsel represented that plaintiff did not intend to oppose Bovis and Pro Safety's motions for summary judgment.

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Senior Project Manager, testified that Bovis was involved with all three projects (Ulses 11/7/11 EBT, defendant Bovis Moving Papers, Ex. D, at pp. 11-13). The record demonstrates that none of these projects or Bovis itself were connected to the renovation of 40 Broad Street (Id. at pp. 13-14). The record also demonstrates that Bovis was not involved in any work near the 40 Broad project the day of the incident (Id.). The record further demonstrates that Bovis did not store any material on top of the sidewalk bridge (Id. at 42-43).

Pro Safety's motion for summary judgment dismissing the complaint against it is granted without opposition, and the complaint is dismissed against it.<sup>3</sup>

40 Broad and Perimeter's cross-motion for leave to serve a verified amended answer asserting a cross-claim for common law indemnification and contribution against Pro Safety is granted without opposition.

### **Res Ipsa Loquitur**

To assert a claim under the doctrine of res ipsa loquitur, plaintiff must show that 1) the event in question would not ordinarily occur absent someone's negligence, 2) the injury was caused by an "agency or instrumentality" exclusively controlled by the defendant, and 3) plaintiff did not voluntarily act to

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<sup>3</sup>See fn. 2, supra.

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contribute to the event. (Ebanks v. New York City Trans. Auth., 70 NY2d 621, 623 [1987]). Exclusive control is an essential element of the claim. (Reyes v. Active Fire Sprinkler, 267 AD2d 70, 70 [1st Dept 1999]).

The record demonstrates that Sweet Construction did not exercise exclusive control over the "black brick". Nor did plaintiff raise a factual issue with respect to that issue. The record demonstrates that Sweet Construction did not work on the sidewalk bridge or have any workers on top of the sidewalk bridge (Botti 6/13/11 EBT at p. 82 ["all labor was purchased and paid by ownership. Sweet only provided management"]). In fact, the record indisputedly demonstrates that on the day of the incident Perimeter's workers had access to the sidewalk bridge and were cleaning the top of it (Aybar 6/22/12 EBT at pp. 14-15, 35).

Accordingly, that branch of the Sweet Defendants' summary judgment motion to dismiss plaintiff's res ipsa loquitur claim is granted, and that claim is dismissed against them.

#### **Common-Law Negligence**

To maintain her negligence claim, plaintiff must show that defendant Sweet Construction created or maintained a dangerous condition on the property, or had actual or constructive notice of such a condition (Frank v. Time Equities, 292 AD2d 186, 186 [1st Dept 2002]).

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Sweet Construction argues that it did not place debris on top of the sidewalk bridge, or that, in the alternative, it had no notice that debris had accumulated there. Sweet Construction's argument of lack of notice is unavailing. Although it may not have caused and/or created the debris condition on the sidewalk bridge, Ansari, Pro Safety's on-site representative, testified at his EBT that Sweet Construction had notice of the debris the day before the incident when he informed Volpaccio, Sweet Construction's superintendent, that the top of the sidewalk bridge needed to be cleaned (Ansari 11/7/11 EBT at pp. 50-51).

Next, Sweet Construction argues that it may only be held liable if it had notice that the specific object which struck plaintiff was on top of the sidewalk bridge. That argument is equally unavailing, and its reliance on Gordon v. American Museum of Natural History (67 NY2d 836 [1986]) is misplaced.

In Gordon, the plaintiff slipped and fell on a piece of wax paper on the stairs leading out of the building. The plaintiff offered no evidence that the paper had been there for a long enough time to give the defendant constructive notice of a dangerous condition on its property. Given that the museum entrance was a heavily trafficked area, the Court found that the only conclusion not grounded in speculation a jury could draw from the evidence was that the paper was on the steps only

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minutes or seconds prior to the accident (Gordon, 67 NY2d at 838, supra).

In stark contrast to the absence of evidence in Gordon, here, Ansari's EBT testimony with regard to his conversation with Volpaccio clearly demonstrates that a factual issue exists concerning Sweet Construction's actual or constructive notice of the debris and how long it had such notice (see also Sweeney v. Riverbay, 76 AD3d 847, 848 [1st Dept 2010] [Gordon ... is distinguishable because in that case there was no evidence that anyone observed the dangerous condition prior to the accident"]).

Lastly, Sweet Construction argues that it cannot be held liable because the sidewalk bridge's upkeep, cleaning and maintenance were Perimeter's sole responsibility. Botti, Sweet Construction's project manager, testified at his EBT that Perimeter was solely responsible for maintenance and inspection of the sidewalk bridge (Botti 6/13/11 EBT at p. 26). Such testimony is contradicted by testimony and documentary proof. Ansari's, Pro Safety's on-site representative, testified at his EBT that his responsibilities as site safety manager included periodic inspections of the sidewalk bridge (Ansari 11/7/11 EBT at pp. 52-54). In addition, Sweet Construction's contract with 40 Broad provides as category for reimbursable costs "removal of debris from the site" (Sweet Construction Moving Papers, Ex. L, § 6.1.5.3). Under these circumstances, a factual issue exists as

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to whether Sweet Construction's responsibility encompassed debris removal from the sidewalk bridge.

Accordingly, that branch of Sweet Construction's summary judgment motion to dismiss plaintiff's negligence cause of action is denied.

Turning to that branch of Sweet Construction's motion to dismiss 40 Broad's and Perimeter's cross-claims for common law indemnification and contribution, Sweet Construction argues that 40 Broad and Perimeter's claims must fail as a matter of law because neither defendant can demonstrate that they were not actively negligent (McCarthy v Turner Const., Inc., 17 NY3d 369, 377-78 [2011][A party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part]). Both indemnification and contribution rely on an adjudication as to which parties are liable to plaintiff due to their negligence.

Here, given that factual issues exist as to Sweet Construction's liability with respect to plaintiff's negligence claim, any determination regarding indemnification and contribution would be premature and must await final disposition of this issue. Therefore, that branch of Sweet Construction's motion for summary judgment to dismiss 40 Broad's and Perimeter's cross-claims is denied.

Accordingly, it is

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ORDERED, that branch of the Sweet Defendants' motion for summary judgment dismissing the complaint against defendants Sweet Construction NJ and Sweet Construction Georgia is granted without opposition, and the complaint is dismissed against them; and it is further

ORDERED, that branch of the Sweet Defendants' motion for summary judgment dismissing plaintiff's cause of action based on res ipsa loquitur is granted, and that claim is dismissed against them; and it is further

ORDERED, that branch of the Sweet Defendants' motion for summary judgment dismissing plaintiff's cause of action for negligence is denied; and it is further

ORDERED, that branch of the Sweet Defendants' motion for summary judgment dismissing the cross-claims asserted by defendants Bovis and Pro Safety is granted without opposition, and the cross-claims are dismissed; and it is further

ORDERED, that branch of the Sweet Defendants' motion for summary judgment dismissing defendants 40 Broad's and Perimeter's cross-claims against defendant Sweet Construction is denied; and it is further

ORDERED, that defendant Bovis's motion for summary judgment dismissing the complaint against it is granted without opposition, and the complaint is dismissed against it; and it is further

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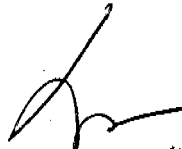
ORDERED, that defendant Pro Safety's motion for summary judgment dismissing the complaint against it is granted without opposition, and the complaint is dismissed against it; and it is further

ORDERED, that defendants 40 Broad and Perimeter's cross-motion for leave to serve a verified amended answer asserting a cross-claim against Pro Safety is granted without opposition; and it is further

ORDERED, that counsel shall call the Clerk of Part 48 at 646-386-3265 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 1/30/13

  
**JEFFREY K. OING**  
J.S.C.  
HON. JEFFREY K. OING, J.S.C.

**FILED**

**FEB 06 2013**

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