

**Hoffman v Biltmore 47 Assoc., LLC**

2013 NY Slip Op 33398(U)

December 3, 2013

Supreme Court, New York County

Docket Number: 108095/06

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

LEONARD HOFFMAN and ROSALIA HOFFMAN,  
Plaintiffs,

Index No.: 108095/06

Motion Date: 12/03/13

- v -

Motion Seq. No.: 19

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN  
THEATRE CLUB, INC., THE BILTMORE THEATER  
CORP., THE BILTMORE THEATRE GR., INC.,  
SWEET CONSTRUCTION CORP., BILTMORE THEATER  
INDEPENDENT MANAGER CORP., BILTMORE  
THEATRE, LLC., THE JACK PARKER CORP.,  
BILTMORE TOWER, LLC, PARKER SECOND, LLC,  
PARKER THEATRE ASSOCIATES, LLC., and  
SWEET CONSTRUCTION of LONG ISLAND, LLC.,

Defendants.

**FILED**

DEC 09 2013

COUNTY CLERK'S OFFICE  
NEW YORK

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN  
THEATRE CLUB, INC., SWEET CONSTRUCTION  
CORP., BILTMORE THEATER INDEPENDENT MANAGER  
CORP., BILTMORE THEATRE, LLC, THE JACK  
PARKER CORPORATION, BILTMORE TOWER, LLC,  
PARKER SECOND, LLC, PARKER THEATER  
ASSOCIATES, LLC and SWEET CONSTRUCTION OF  
LONG ISLAND, LLC,

Third-Party Plaintiffs,

TP Index No.:  
591083/07

- v -

MASS ELECTRIC CONSTRUCTION CO., ST. PAUL  
FIRE AND MARINE INSURANCE CO.,

Third-Party Defendants.

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

- 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

BILTMORE 47 ASSOCIATES, LLC, MANHATTAN THEATRE CLUB, INC., SWEET CONSTRUCTION CORP., BILTMORE THEATER INDEPENDENT MANAGER CORP., BILTMORE THEATRE, LLC, THE JACK PARKER CORPORATION, BILTMORE TOWER, LLC, PARKER SECOND, LLC, PARKER THEATER ASSOCIATES, LLC and SWEET CONSTRUCTION OF LONG ISLAND, LLC,

STP Index No.:  
590494/13

Second Third Party-Plaintiffs

- v -

GENERAL CONCRETE CONSTRUCTION, INC., FEINSTEIN IRONWORKS, INC., CORD CONTRACTING, INC., REACT INDUSTRIES, INC., REACT TECHNICAL, INC., REACT AC, AMERICAN FINANCIAL GROUP, FIREMAN'S FUND AND NATIONAL SURETY, INC., GREAT AMERICAN INSURANCE COMPANY, GREAT AMERICAN E&S INS. CO., AMERICAN INTERNATIONAL GROUP, AIG CASUALTY COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL INSURANCE COMPANY, AMERICAN INTERNATIONAL SPECIALTY, ACE USA, ACE GROUP OF COMPANIES, WESTCHESTER FIRE INSURANCE CO., DIAMOND STATE INSURANCE COMPANY, AXIS INSURANCE COMPANY, ALLIANZ INSURANCE GROUP, FIREMAN'S FUND INSURANCE COMPANY, NATIONAL SURETY CORPORATION, NEW YORK MARINE & GENERAL INSURANCE COMPANY and UNITED NATIONAL INSURANCE COMPANY,

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NEW YORK

Second Third-Party Defendants.

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BILTMORE 47 ASSOCIATES, LLC, MANHATTAN THEATRE CLUB, INC., SWEET CONSTRUCTION CORP., BILTMORE THEATER INDEPENDENT MANAGER CORP., BILTMORE THEATRE, LLC, THE JACK PARKER CORPORATION, BILTMORE TOWER, LLC, PARKER SECOND, LLC, PARKER THEATER ASSOCIATES, LLC and SWEET CONSTRUCTION OF LONG ISLAND, LLC,

Third Third-Party Plaintiffs,

TTP Index No.:  
590059/13

- v -

- v -

OMC, Inc.

Third Third Party Defendant.

CORD CONTRACTING CO., INC.,

Third Third-Party Plaintiff,

**FILED**

DEC 09 2013

COUNTY CLERK'S OFFICE  
NEW YORK  
Fourth TP Index No.:  
590052/13

- v -

OMC, Inc.

Third Third Party Defendant.

The following papers, numbered 1 to 8 were read on this motion and cross motion for summary judgment. \_\_\_\_\_

- Notice of Motion/Order to Show Cause -Affdavits -Exhibits
- Notice of Cross Motion/ Answering Affidavits - Exhibits
- Replying Affidavits - Exhibits

No (s) .	1, 2
No (s) .	3, 4, 5, 6, 7
No (s) .	8, 9

**Cross-Motion:**       **Yes**     **No**

Upon the foregoing papers, the motion of second third party defendants React Industries, Inc., React Technical, Inc. and React AC (React) for summary judgment dismissing the second third party complaint and cross claims against React and the cross motion of third third party defendant Feinstein Iron Works, Inc. (Feinstein) for summary judgment dismissing the second third party complaint and cross claims against Feinstein are granted.

Third party plaintiff Biltmore 47 Associates, LLC has come forward with no evidence that tends to rebut the statement of React's president that defendant Sweet Construction Corporation contracted directly with third third party defendant OMC to install the ducts of the HVAC system and that React neither caused nor created any hole in the floor where plaintiff fell. The fact that React contracted to supervise the HVAC work does not tend to show that it created the hole at the site, and there is no evidence that refutes React's principal's testimony that React did not have control of the site on the day of the accident. Nor has Biltmore 47 Associates, Inc. forth any

evidence contradicting React's evidence that it did not breach any common law or statutory duty of care owed to plaintiff. Nor is there evidence that contradicts the documentary proof in the form of the insurance policy issued by Great American Insurance Group, a copy of which is appended to React's reply papers, as in compliance with React's contract with Sweet Construction Corp.

Third third party plaintiff Biltmore 47 Associates, LLC comes forward with no evidence that tends to refute third third party defendant Feinstein's evidence that its only task on the construction site was erecting steel structures, which did not involve opening up the ground or covering any holes in the ground where plaintiff fell. The court disagrees that the deposition testimony of either the project manager for second third party defendant Cord Contracting Co., Inc. or of Feinstein as to whether Cord Contracting Co. or Feinstein installed the metal deck tends to show that Feinstein either had notice of or created the allegedly unsafe condition that plaintiff contends caused his injuries, and notes that there is no evidence that the offending hole was created in the course of the installation of the deck. Ragone v Spring Scaffolding, Inc., 46 AD3d 652, 655 (2d Dept 2007); Acevedo v York Intl Corp, 31 AD3d 255 (1<sup>st</sup> Dept 2006). There is no evidence that contradicts the testimony of Feinstein's project manager that Feinstein had completed its work and left the site months before plaintiff's accident.

Plaintiff has filed its note of issue and certificate of readiness certifying that all outstanding discovery is complete. Third third third party defendant Biltmore 47 Associates, LLC has not shown any prejudice by the lack of discovery in the third and fourth third party actions (See General Elec Capital Bus Asset Funding Corp of Conn v Kazi Family, LLC, 104 AD3d 436 [2013]), especially given the substantial discovery that has already been conducted in the first party action that is seven years old.<sup>1</sup> Biltmore 47 Associates, LLC and OMC demonstrate nothing more than a

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<sup>1</sup>As of January 2013 when plaintiffs filed their note of issue, which was six years after issue was joined in the primary, first and second third party actions, and four years after joinder of issue in the third third party action, there was no outstanding discovery.

"mere hope" that some further evidence probative on the issue of Feinstein and/or React's negligence may be uncovered. Jones v Gamaray, 153 AD2d 550 (1<sup>st</sup> Dept 1989).

. This is the decision and order of the court.

Dated: December 3, 2013

ENTER:

~~\_\_\_\_\_~~  
J.S.C.

**GERRA A. JAMES**

**FILED**

DEC 09 2013

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NEW YORK

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The fact that fourth third party defendant OMC, Inc. filed a notice of appearance on April 24, 2013 did not render plaintiffs' readiness certificate inaccurate retroactively.