

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

HETTIE MCGEE and ULYSEE MCGEE,

Index No. 8606/05

Plaintiffs,

Motion
Date September 2, 2008

-against-

Motion
Cal. No. 27

JUDY ELAINE DENSON, JESSE DENSON, JR.,
ROBERT DENSON, FAYE DENSON, DIANE
DENSON and THE GLORIOUS CHURCH OF
GOD & CHRIST,

Motion
Sequence No. 2

Defendants.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-5
Opposition.....	6-8

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant The Glorious Church of God in Christ (hereinafter referred to as defendant "Church") moves for an order dismissing plaintiffs' complaint on the ground that as a tenant of the building it is not liable as a matter of law for the plaintiff's injury on the adjacent sidewalk. The Church argues that it, as tenant, and as well the owner/landlord did not create the defective condition (assuming one existed) nor did the Church use or maintain the sidewalk for a special use. Plaintiffs oppose the motion on the ground that triable issues of fact exist with respect to whether the Church derived a special use of the sidewalk where the alleged accident occurred.

Plaintiffs filed a summons and complaint on or about April 18, 2005, alleging that on April 22, 2002, plaintiff Hettie McGee fell as she was walking on the public sidewalk abutting the premises owned by defendants Judy Elaine Denson, Jessie Denson, Jr., Robert Denson, Faye Denson and Diane Denson and occupied by defendant The Glorious Church of God in Christ, located at 132-01 111 Street in South Ozone Park, Queens County. Plaintiffs allege in the bill of particulars the dangerous and defective condition

that existed on the sidewalk was "a raised sidewalk door and lock on the public sidewalk." The sidewalk doors at issue are metal doors (a vault as it is commonly called) which locked from the outside and covered the 132nd Street entrance to the basement area of four adjacent building units which face 111th Street. The Church occupied one corner unit, and three stores, including a grocery store and candy store occupied the other three units. The basement area is an open space that is shared in common with all four units of the four adjacent rental units. At plaintiff's examination before trial she was presented with a photograph of the area of the incident and asked to identify the spot where she fell. She made a circle around a section of the sidewalk which included the metal doors of the vault. Ennis Theodore Vines, Pastor of the defendant Church testified at the examination before trial that the Church did not have any keys for the lock on the exterior metal doors, could not open the doors from the interior, and did not use the vault to gain entrance to the basement of the church. He further testified that the exterior metal doors were the sole and exclusive means of access to the basement area from the sidewalk for the three other stores. He testified that since the Church had its own separate internal access to the basement through the interior of the church, the Church had no occasion or need to use the exterior metal doors to access the basement. He testified that keys to the exterior vault door lock were kept by both the grocery store and the candy store, and if the Church needed to use the metal doors to get into the basement from the exterior of the building he had to get the key from either the candy store or the grocery store. He testified that the only occasion that the Church had a need to open the exterior metal doors was at a time when he was cleaning out the basement, he opened the doors for the purpose of venting dust raised in the air caused by sweeping and cleaning the basement. The plaintiffs did not sue the municipality, the City of New York.

LAW ON SUMMARY JUDGMENT

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the

proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

**LAW ON PREMISES LIABILITY ON LAND ABUTTING PUBLIC SIDEWALKS
- SPECIAL USE**

At the time that plaintiff was allegedly injured,¹ it was "well-settled that a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless 'the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him' ... [and imposes] tort liability upon the landowner for injuries caused by a violation of that duty" (*Bloch v. Potter*, 204 AD2d 672, 673 [2d Dept 1994], quoting *Surowiec v. City of New York*, 139 AD2d 727, 728 [2d Dept 1988]; see also, *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 335 [1st Dept 2002]; *Otero v. City of New York*, 213 AD2d 339 [1st Dept 1995] [holding " that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a special purpose"]).

The concept of "special use" or "special benefit" has long been recognized. As the Court of Appeals observed in *Kaufman v. Silver*, 90 NY2d 204 (1997) the doctrine was developed to place liability on those who, because they derived a special benefit, should bear the responsibility of maintaining the appurtenance in a reasonably safe condition:

The doctrine of special use was fashioned in New York

¹The Court notes that Administrative Code of the City of New York §7-210, effective September 14, 2003, provides in pertinent part that '[i]t shall be the duty of the owner of real property abutting any sidewalk, ...to maintain such sidewalk in a reasonably safe condition.' NYC Admin Code §7-210(a). This includes liability for personal injury 'caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.' NYC Admin Code §7-210(b). However, the instant case is controlled by the law which prevailed prior to September 14, 2003 and on April 22, 2002, the date of the alleged incident (see, *Klotz v. City of New York*, 9 AD3d 392, 393 [2d Dept 2004]).

in the previous century, to authorize the imposition of liability upon an adjacent occupier of land for injuries arising out of circumstances where "permission [has been] given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use" (*Clifford v. Dam*, 81 NY 52, 56-57). Consequently, where the abutting landowner "derives a special benefit from that [public property] unrelated to the public use," the person obtaining the benefit is "required to maintain" the used property in a reasonably safe condition to avoid injury to others (*Poirier v. City of Schenectady*, 85 NY2d 310, 315 [emphasis supplied]; *D'Ambrosio v. City of New York*, 55 NY2d 454, 462-463 [the abutting landowner's obligation to maintain the sidewalk appurtenance, installed for that landowner's private advantage, runs to the public who might otherwise be harmed by his or her negligence]; see also, *Trustees of Vil. of Canandaigua v. Foster*, 156 NY 354, 359). Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit (*cf.*, *Heacock v. Sherman*, 14 Wend 58, 60 ["if a (structure) is built by an individual over a public highway for his own exclusive benefit, he is bound to repair it ... in consideration of private advantage"]).

A special use has been characterized as involving the installation of some object in the sidewalk (*Weiskopf v. City of New York, et al.*, 5 AD3d 202 [2d Dept 2004]). Such special use gives rise to maintenance responsibilities *Santorelli v. City of New York*, 77 AD2d 825 (1st Dept 1980). The existence of a "special use" has been found in various circumstances, including the installation of cellar doors or vault doors in the sidewalk. *McCutcheon v. National City Bank*, 291 NY 509 (1943); *Fleming v. Fifth Avenue Coach Lines, Inc.*, 23 AD2d 726 (1st Dept 1965). Courts have imposed liability on abutting landowners and lessees for raised features on sidewalks such as oil filler caps, tiles, steps, etc., where liability was connected to that feature having been requested by or benefitting the abutting property (*McGee v. City of New York*, 252 AD2d 483 (2d Dept 1998)).

When the abutting owner leases a portion of the property and both the owner and the tenant jointly control the special use, both may be liable (*Oliva v. Gouze*, 285 App Div 762, *affd* 1 NY2d 811 (1956)). On the other hand, a tenant is shielded from liability for any defect it did not cause or maintain (*Lowenthal v. Theodore H. Heidrich Realty Corp.*, 304 AD2d 725 [2d Dept 2003]). Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised upon the existence of the abutting land occupier's access and ability to exercise control over the special use structure or installation

(*Kaufman v. Silver*, 90 NY2d 204 [1997]).

DISCUSSION

1. Plaintiff has failed to establish the existence of a "special use."

In this case, plaintiffs do not assert nor is there any evidence that the Church created the alleged defective condition. On the record before the Court the only basis for imposing liability upon the defendant Church is the doctrine of special use. Although liability may be imposed on an abutting lessee or occupier for raised features on a metal doors or vault, the liability must be connected to the benefit or actual use of the metal doors by the lessee or occupier (*Thomas v. Triangle Realty Company*, 255 AD2d 153 [1st Dept 1998]). Here, the exterior metal doors and lock did not confer a benefit on the Church, as there is no evidence in the record to show that the Church used, or had a need to use the metal doors and lock for access to the basement. The mere fact the metal doors and lock were adjacent to the Church's leasehold was not a special use that might impose correlating maintenance and repair obligations with respect to the metal doors and lock.

Moreover, plaintiffs presented no evidence to show that the Church made special use of the metal doors on the sidewalk abutting the premises upon which plaintiff allegedly tripped and fell. Plaintiffs proffered no proof demonstrating that it was necessary to the Church to use the exterior metal doors to access the basement to perform church, or related church business or operation, or that the lease required the Church to maintain the metal doors or sidewalk in good repair and make non-structural repairs (*Keane v. 85-87 Mercer Street Associates*, 304 AD2d 327, [1st Dept 2003]); see also, *Navarreto v. 995 Westchester Avenue LLC*, 35 AD3d 267 [1st Dept 2006]).

2. Plaintiffs failed to establish that defendant Church had actual possession, access and ability to exercise control over the exterior metal doors and lock

In *Kaufman v. Silver*, 90 NY2d 204 (1997) the court stated:

Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised, however, upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation. "The doctrine of implied duty [to repair a special use structure] requires the person who, even with

due permission, constructs a scuttle hole in the sidewalk in front of his premises, to use reasonable care for the safety of the public, as long as it remains there and is subject to his control" (*Trustees of Vil. of Canandaigua v. Foster*, 156 NY, at 359, [emphasis supplied]). Thus, although the duty to repair runs with the land as long as the appurtenance is maintained for the benefit of the land (*Nickelsburg v. City of New York*, 263 App Div 625, 627), it is the express or implied access to, and control of, the special use which gives rise to the duty (see, *Jennings v. Van Schaick*, 108 NY 530, 532-533; *Trustees of Vil. of Canandaigua v. Foster*, *supra*).

That access and ability to exercise control over the special use are essential to the existence of a duty to repair and maintain is further illustrated by circumstances in which separate entities, each possessing control over the instrumentality, have been held liable on a special benefit theory. Where, for example, a patron fell on a defective iron grating in the sidewalk adjacent to a store front, the owner and the occupying tenant were held directly liable to the injured party: "[a]s both ... were in control of the grating and coping, each was under an affirmative duty to properly maintain the premises, and their failure to discharge that obligation rendered them both liable as joint tort-feasors" (*Olivia v. Gouze*, 285 App Div 762, 766 [emphasis supplied], *affd* 1 NY2d 811; see also, *Smith v. City of Corning*, 14 AD2d 27 [partial control of the instrumentality by the special user is sufficient to impose liability]; 1A NY PJI3d 2:111, at 464-468 [1997]). Conversely, where a tenant, in possession and occupation, carelessly causes injury by his or her use of the instrumentality, and the owner reserved no control over the special use structure, the owner is under no duty and incurs no liability (see, *Jennings v. Van Schaick*, 108 NY, at 532, *supra*; cf., *McCutcheon v. National City Bank*, 265 App Div 878, *affd without opn* 291 NY 509)

Plaintiffs have not tendered evidentiary proof, in admissible form, demonstrating the existence of material questions of fact to show that the Church assumed control over the vault or metal doors (see, *Zuckerman v. City of New York*, 49 NY2d 557). To the contrary, the evidence shows that the Church had no control over the vault and/or the metal doors, and that the only means available to the Church to secure access to the basement from the outside/exterior of the building was to obtain a key to unlock the metal doors that was in the custody and control of third parties, to wit; the grocery store tenant or the candy store tenant (see, *Keane v. 85-87 Mercer Street Associates*, 304 AD2d 327, [1st Dept 2003]).

3. Plaintiffs have failed to establish that defendant Church's negligent use of the metal doors and lock caused plaintiff's injury

In order to impose liability on the abutting owner, the special use must be the cause of the sidewalk defect which allegedly resulted in injury (see, *Santana v. City of New York*, 722 NYS2d 545 [1st Dept 2001] [use of the public sidewalk in front of private school as a children's playground constituted a special use of the public sidewalk by school; however, as the special use did not cause the crack on which the infant plaintiff tripped and fell, the school could not be held liable]; *Benenati v. City of New York*, 282 AD2d 418 [2d Dept 2001] [absent evidence the defect was caused by owner's special use of public sidewalk as a driveway or that driveway in any way contributed to allegedly defective condition, property owner was not liable to pedestrian who allegedly tripped and fell on defect]). The mere proximity of a special use to a defect allegedly causing injury is not a sufficient basis on which to impose liability (*Benenati v. City of New York*, 282 AD2d 418 [2d Dept 2001]).

Here, the plaintiff allegedly tripped and fell on a defective condition in the metal doors. The evidence fails to support the plaintiff's allegation that the defect was caused by the Church's special use of the metal doors which merely was to open the metal doors to allow dust to vent outdoors when the Church was sweeping and cleaning the basement or that the opening of the metal door to allow dust to vent to the outdoors in any way contributed to the allegedly defective condition or subjected pedestrians such as the plaintiff to unnecessary dangers. The Court finds that the Church has sustained its burden of establishing that it did "nothing to either create the defective condition or cause the condition through" the special use of the metal doors as means of venting dust raised in the air caused by occasional cleaning of the basement (*Breger v. City of New York*, 297 AD2d 770, 771 (2d Dept 2004); *Katz v. City of New York*, 18 AD3d 818 [2d Dept 2005]).

Accordingly, as the plaintiffs have failed to "to raise any questions of fact as to any connection between the defendant[] and the accident" [*Tsamis v. Volmar Construction Co.*, 231 AD2d 709 [2d Dept 1996], defendant Church's motion for summary judgment is granted. This action is severed as against the defendant Glorious Church of God in Christ and continued as against the remaining defendants.

This constitutes the decision and order of the Court.

Dated: November 26, 2008

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Howard G. Lane, J.S.C.