At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 20th day of March 2007.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

ROSE WATTERS and JOSEPH WATTERS,

Plaintiffs,

- against -

MARIA CARMEN ARLISTICO, ARCANGELO PASQUALE FIORE and ERMINIO ANTONIO FIORE,

Defendants.

DECISION AND ORDER

Index No. 15500/05

The following papers numbered 1 to 6 read on this motion:	Papers Numbered
Notice of Motion/ Affidavits (Affirmations) Annexed	1
Affirmations in Opposition	2
Reply Affirmations	3

Plaintiff in the instant action was a pedestrian involved in a "slip and fall" type accident while traversing a snow and ice covered sidewalk. The sidewalk in question abuts a private home located at 328 Leonard Street in Brooklyn, New York that the defendants owned and/or resided in. The sidewalk in question is adjacent to the garage in the defendants home, and the

driveway to and from said garage crosses the sidewalk that the plaintiff alleges she fell upon. Defendants move for summary judgment and dismissal of the instant action, pursuant to CPLR § 3212, on the grounds that summary judgement should be granted to an abutting landowner where there is no evidence that the landowner cleared or attempted to clear snow from the abutting sidewalk, and as a result, either created or exacerbated a dangerous or hazardous condition thereon.

Plaintiff, in her opposition papers claims that defendants made a "special use" of the sidewalk by virtue of the fact that house's driveway crossed the sidewalk. Plaintiff further contends that the defendants' use of the driveway on the date of the accident caused or created the icy condition that the plaintiff fell upon. Plaintiff's bill of particulars [exhibit E of the opposition papers] states that the "dangerous condition that is alleged is an ice covered sidewalk, with a cracked surface with a hole".

Summary judgment standard

The proponent of 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. *See* Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenburg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

In support of the motion, defendants submit an attorney affirmation, the deposition transcripts of the plaintiff and one of the defendants, as well as an affidavit from the defendant/homeowner. In opposition to the motion, plaintiff submits an attorney affirmation, a copy of the summons and complaint, the deposition transcripts of the plaintiff and one of the defendants, five black and white photocopies of photographs of the subject sidewalk, and a copy of what's labeled as plaintiff's "verified" bill of particulars, although there is no verification attached.

As a general rule, a landowner has no affirmative duty to keep abutting public sidewalks and streets in a safe or passable condition. Mullins v. Siegel-Cooper Co., 183 N.Y. 129, 75 N.E. 1112, 1114 (1905); City of Rochester v. Campbell, 123 N.Y. 405, 25 N.E. 937, 938 (1890); Granville v. Lincoln Assocs., 211 A.D.2d 195, 627 N.Y.S.2d 4 (1st Dep't 1995); Appio v. City of Albany, 144 A.D.2d 869, 534 N.Y.S.2d 811, 812 (3d Dep't 1988). Because the landowner neither owns nor controls such adjacent public ways, there is ordinarily no more reason to impose

a duty on the landowner than on members of the general public. Instead, the duty to maintain public ways generally lies on the governmental entities controlling them. City of Rochester v. Campbell, supra; Shepherd v. Werwaiss, 947 F.Supp. 71 (E.D.N.Y.1996)

As to accidents occurring on or after September 14, 2003, the New York City Administrative Code places the obligation to maintain and clear sidewalks upon certain abutting landowners and imposes liability on such landowners for injuries sustained by third parties for the failure to do so (§ 7-210). The legislation specifically absolves the City of liability for injuries caused by the failure to maintain or clear sidewalks abutting privately owned real property. The liability-shifting provision of the legislation does not apply to one-, two- or three-family residential property that is at least partially owner-occupied and used exclusively for residential purposes.

Adjacent landowners, like other members of the public, do have a duty to refrain from engaging in affirmative acts of negligence which create dangerous conditions, or obstacles on public ways. [see generally, Granville v. Lincoln Assocs., supra; Yass v. Deepdale Gardens, 187 A.D.2d 506, 589 N.Y.S.2d 593, 594 (2d Dep't 1992); Appio v. City of Albany, supra; Griffen v. Griswold, 114 A.D.2d 596, 494 N.Y.S.2d 441, 443 (3d Dep't 1985); Clawson v. Central Hudson Gas & Elec. Corp., 298 N.Y. 291, 83 N.E.2d 121, 123 (1948). An owner who gratuitously undertakes to repair an abutting sidewalk may be liable for injury caused by a negligent repair job. A highly important rule of tort law is that even when no original duty is owed to the plaintiff, once a defendant undertakes to perform an act for the plaintiff's benefit, the act must be performed with due care for the safety of plaintiff. There is a duty created by voluntary assumption. The doctrine requires evidence of the defendant's voluntary affirmative undertaking,

that the defendant's affirmative act adversely affected the plaintiff, that is, the defendant's act placed the plaintiff in a worse position than the plaintiff would have been had the defendant failed to act at all, and lastly, that the defendant failed to act reasonably. [See generally, City of New York v. Kalikow Realty Co., 71 N.Y.2d 957, 529 N.Y.S.2d 62, 524 N.E.2d 416 (1988); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 429 N.Y.S.2d 606, 407 N.E.2d 451 (1980); Florence v. Goldberg, 44 N.Y.2d 189, 404 N.Y.S.2d 583, 375 N.E.2d 763 (1978); Parvi v. Kingston, 41 N.Y.2d 553, 394 N.Y.S.2d 161, 362 N.E.2d 960 (1977); Wolf v. City of New York, 39 N.Y.2d 568, 384 N.Y.S.2d 758, 349 N.E.2d 858 (1976); H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922); Marks v. Nambil Realty Co., 245 N.Y. 256, 258, 157 N.E. 129, 130 (1927); Gordon v. Muchnick, 180 A.D.2d 715, 579 N.Y.S.2d 745 (2d Dep't 1992); Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2d Dep't 1980).]

Also, whereas a landowner is not normally liable for the negligent act of an independent contractor, such liability attaches where the dangerous nature of the work of the contractor creates a defect in the public way. See Boylhart v. Di Marco & Reimann, 270 N.Y. 217, 200 N.E. 793, 794 (1936); Herman v. City of Buffalo, 214 N.Y. 316, 108 N.E. 451, 452 (1915). Thus, the landowner is liable if the contractor's repeated traversing over an abutting sidewalk with heavy trucks damages the sidewalk. See Mullins v. Siegel-Cooper Co., supra.

Moreover, even if the landowner did not create the condition on a public way that caused an injury, the owner may be liable for the injury if the owner makes a special use of the public way. In Katz v. City of New York, 18 A.D.3d 818, 796 N.Y.S.2d 639 (2d Dep't 2005) the plaintiff-pedestrian alleged that she was injured as a result of a defect in the sidewalk abutting the

defendants' property. The court ruled that genuine issues of material fact existed as to whether the defect occurred in a portion of the sidewalk that was used by defendants and their predecessors as a driveway and further held that liability for a sidewalk defect arising from a special use is not dependent upon a finding that the defect arose while the current abutting landowners owned the property. See also, Trustees of Village of Canandaigua v. Foster, 156 N.Y. 354, 50 N.E. 971, 972–973 (1898); Granville v. Lincoln Assocs., 211 A.D.2d 195, 627 N.Y.S.2d 4 (1st Dep't 1995); Appio v. City of Albany, 144 A.D.2d 869, 534 N.Y.S.2d 811, 812 (3d Dep't 1988). Hausser v. Giunta, 88 N.Y.2d 449, 646 N.Y.S.2d 490, 669 N.E.2d 470 (1996); MacLeod v. Pete's Tavern, 87 N.Y.2d 912, 640 N.Y.S.2d 864, 663 N.E.2d 905 (1996).

Generally, a special use exists where a property owner, or the predecessor of the owner installed an object in a sidewalk or altered the sidewalk's construction. In Charbonneau v. City of Cohoes, 232 A.D.2d 931, 648 N.Y.S.2d 836 (3d Dept.1996) the court ruled that a water line shut-off valve disk that protruded one half inch above the public sidewalk that abutted the defendant's property, did fall within "special benefit" rule; In Lucciola v. City of New York, N.Y.L.J. Jan. 5, 20065, p. 19, col. 3 (Sup. Ct., New York County 2006) the court ruled that the defendant's placement of chairs and a refrigerator to display and sell food outside of it's café raised issues of fact as to whether these furnishings constituted a special use of the sidewalk. See also Granville v. Lincoln Assocs., supra; Katz v. City of New York, supra.

The owner is responsible for injuries caused by the negligent construction or maintenance of the special use only if that installation or alteration benefits no one other than those on or using the owner's land. In Feldman v. Kings Hero Restaurant, 270 A.D.2d 1, 703 N.Y.S.2d 476 (1st Dep't 2000), the court ruled that the installation of a pay phone on the street that yielded

revenue for the defendant-restaurant was a special use, however, the injured plaintiff could not recover because there was no evidence connecting the injuries to cracks in the pavement emanating from the pay phone; In Vrabel v. City of New York, 308 A.D.2d 443, 764 N.Y.S.2d 111 (2d Dep't 2003), the plaintiff-pedestrian tripped and fell on a sidewalk decorated with brickwork and sued the City and the abutting property owner. The court ruled that the property owner was not liable, because there was no evidence that the property owner derived a special benefit from the decorative brickwork unrelated to its public use. In Lobel v. Rodco Petroleum Corp., 233 A.D.2d 369, 649 N.Y.S.2d 939 (2d Dept.1996), the court held that a plaintiff who tripped over broken pavement in a curb cut leading from the roadway onto the defendant's service station, could not recover from the defendant, as the service station did not derive a special benefit, unrelated to public use, from the curb cut. See also, Trustees of Village of Canandaigua v. Foster, 156 N.Y. 354, 50 N.E. 971, 972–973 (1898); Granville v. Lincoln Assocs., 211 A.D.2d 195, 627 N.Y.S.2d 4 (1st Dep't 1995).

In the absence of a special feature constructed in the sidewalk, the special use doctrine will not be applied even if the defendant makes continual, heavy use of the sidewalk. Thus, the special use doctrine was not applicable in a case in which the plaintiff fell on a stretch of sidewalk over which an abutting restaurant rolled heavy dumpsters twice each day. The court ruled that this was an entirely routine use, indistinguishable from the myriad ways a public sidewalk is used every day. Williams v. KFC Nat. Management Co., 391 F.3d 411, 60 Fed. R. Serv. 3d 454 (2d Cir. 2004), cert. dismissed, 125 S. Ct. 1967 (U.S. 2005).

The evidence presented in this case demonstrates that on the date of the accident, a privately owned three-family home was located on the property abutting the sidewalk that

Plaintiff fell upon; that at least one of the defendants resided there on the date of the accident; and that the property in question was used solely for residential purposes. Although the only proof submitted in support of the contention that the subject property was "a privately owned, three family home, where at least one of the defendants resided", is an affidavit and deposition testimony from defendant Arcangelo Pasquale Fiore, this is satisfactory proof, particularly in light of the fact that the plaintiff has not offered any proof to the contrary.

As the subject property falls within the previously mentioned exception to the New York City Administrative Code, the defendants had no duty or obligation to clear snow or ice from the sidewalk abutting their property. In addition, there is no evidence that the defendants attempted to clean or clear the snow and ice from the subject sidewalk prior to the plaintiff's accident, and as such, there is no proof that the defendants did anything to exacerbate or worsen the icy condition that caused the plaintiff to fall. Although there is evidence that the defendants generally had a custom and/or habit of clearing and cleaning snow and ice after a storm, there is no proof that they did so prior to the subject accident. The defendant testified that he observed snow on the subject sidewalk on the date of the accident, but he had no specific recollection of what, if anything, he did with regard to the snow on the sidewalk on the day of the accident. [See defendant EBT p21, lines 19-25, cont. p22, lines2-14.] Indeed, the Plaintiff herself testified that the icy condition upon which she fell was only upon the sidewalk abutting the defendants's property, because the other sidewalks had been shoveled. [See plaintiff's EBT p40, lines11-24]. Plaintiff also testified that the "entire sidewalk was covered with ice," [plaintiff's EBT p43, lines 18-23] and that when she observed the sidewalk upon which she fell on the date of the accident, the sidewalk appeared as if no snow removal measures had been taken. [plaintiff's EBT p56,

lines 2-22]. Moreover, the plaintiff makes no claim in her opposition papers that the within accident happened as a result of inadequate, poor or negligent snow cleaning and/or removal.

There is also proof that prior to the date of the accident, the defendants took it upon themselves to make repairs to cracks in the subject sidewalk. Under a different set of facts, the defendants affirmative action of making repairs to the sidewalk might raise factual questions as to whether the cracks in the sidewalk and the repair made thereto was the cause of or contributed to the happening of the accident. However, in the present case, the plaintiff explicitly testified that the cracks in the sidewalk in no way contributed to her accident. See plaintiff's EBT p49, lines 24-25, cont. p50, lines 2-9:

> Q. Are you aware of cracks in the sidewalk? You had mentioned cracks in the sidewalk earlier.
>
> A. Oh, yes, there are cracks.
>
> Q. Do you contend the cracks caused you to fall, or did the ice cause you to fall?
>
> A. Ice.
>
> Q. Would you agree that the cracks, if any, had nothing to do with it?
>
> A. Nothing to do with it.

Plaintiff also testified that she "slipped" on the ice as opposed to "tripping" or "stumbling". See plaintiff's EBT p47, lines 8-18:

> Q. When the accident occurred, did you slip, did you trip, did you stumble? How would you describe your accident?
>
> A. I slipped.
>
> Q. And did one of your feet slip on the ice, causing you to fall?

A. The right one, and I fell down to the right.

Q. Did your right foot slip on the ice?

A. Yes.

It should also be noted that the plaintiff's opposition papers do not contend that the accident was caused as a result of either the cracks in the subject sidewalk or the subsequent repairs made by the defendants.

Plaintiff's primary contention in opposition to the defendant's motion is that the defendant made a "special use" of the subject sidewalk, by virtue of the fact that the defendant's driveway crosses over the sidewalk upon which plaintiff fell. Although in some instances, a driveway that crosses a public sidewalk may raise questions of fact as to whether the mere fact that a person's driveway crosses a public sidewalk constitutes a "special use" of the sidewalk. However, in the present case, although the court agrees that questions of fact do exist as to whether or not the defendant's driveway crossing over the abutting sidewalk does or does not constitute a "special use", the question of whether a special use was made or not is not applicable to the facts of this case. Whether the defendants or their predecessors made a special use of the sidewalk by virtue of the fact that their driveway crosses the sidewalk is irrelevant in this instance. There is absolutely no proof that the alleged "special use" by defendant in any way caused or contributed to the happening of the within accident.

No evidence has been offered that would show or demonstrate that the icy condition that Plaintiff fell upon was in any way attributable to the defendant's alleged special use of the sidewalk. There is no proof that the defendant's alleged special use of the sidewalk "artificially" diverted water onto the sidewalk where it froze. In fact, the evidence before the court suggests

that the ice that the plaintiff fell upon was a naturally occurring condition, and that the defendant in no way contributed to or caused the icy condition that caused the plaintiff to slip and fall. Plaintiff also makes a clever, but unconvincing argument that as a result of the defendant's "use" of the garage doors prior to the plaintiff's accident, that the defendant somehow "carved out" a section of the driveway and/or sidewalk, which became icy and dangerous. This rationale is fatally flawed, however. The only evidence before the court is testimony that the defendant "used" the garage doors on the date of the accident. There is no evidence that cars were driven across the sidewalk and/or driveway on the date of the accident, or that the driveway was used at all. As such, plaintiff's contention that the defendant somehow "carved" out a section of the driveway is nothing more than speculation and conjecture. Even more telling is plaintiff's testimony regarding where she fell on the sidewalk in relation to the aforementioned garage doors. Plaintiff testified that when she fell, she fell ***between*** the two garage doors. (emphasis added) See plaintiff's EBT, p60, lines 21-25, cont. p 61, lines 2-16:

Q. What I want you to do, if you can, is put an X where you had your fall?

MS. PAULOVICH: Does that mean where she actually slipped, or where she fell after she slipped?

MR. FERRETTI: Yes, where her right foot slipped.

A. Between these two doors.

MS. PAULOVICH: Ms. Watters, do you understand that that means exactly where your foot slipped, not where you ended up after you fell, but where your foot slipped, that's what he's asking you.

Q. When you said your accident happened between the garage doors on the sidewalk, about a foot from the fence, is that where your foot slipped, is that what you meant?

A. Yes.

Immediately thereafter, the plaintiff marked a photograph with an "X" in the location where she slipped. A review of the photo clearly shows that the plaintiff placed the "X" between the garage doors, which is consistent with her testimony. [exhibit D of plaintiff's opposition papers]

The fact that the plaintiff testified that she fell between the garage doors, combined with the location that she marked in the photograph, belies the plaintiff's argument that the plaintiff fell in a spot in the driveway that had been "carved out" by the defendants through their use of the driveway. Aside from the fact that the plaintiff's contention is nothing more than pure conjecture, it would seem unlikely, if not physically impossible for the defendant, when driving in or out of the garage, to maneuver their car so that it carved out a space ***between*** the garage doors. If the defendants did drive across the driveway and sidewalk prior to the plaintiff's accident, it would be more likely, and certainly more reasonable, to conclude that any section of the snow and/or ice covered driveway and sidewalk that was "carved out" as a result of said use, would be located in the path of the tires of the defendant's car(s), not between the doors. As such, the plaintiff's attempt to avert summary judgement by claiming that the defendants were liable as a result of their "special use" of the sidewalk is not persuasive or convincing.

Based on the foregoing, the defendants have submitted sufficient proof to warrant granting summary judgement in their favor.

Conclusion

Accordingly, it is

ORDERED, that the motion of defendants for summary judgement and dismissal of the instant action, pursuant to CPLR § 3212, on the grounds that plaintiff has failed to establish a prima facie case of negligence as against the defendants, is granted.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE

J. S. C.