SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. KENNETH A. DAVIS,**

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

CAROLE BERKOWITZ and WESLEY BERKOWITZ,

Plaintiff,

-against-

SUBMISSION DATE: 1/11/08
INDEX No.: 18482/05

SPRING CREEK, INC., DELUXE TRANSPORTATION, INC., and WILLETS MANAGEMENT SYSTEMS, INC.,

MOTION SEQUENCE # 3,4,5

Defendants.

SPRING CREEK, INC.,

Third Party Plaintiff,

-against-

TOWN OF NORTH HEMPSTEAD, METROPOLITAN TRANSIT AUTHORITY and LONG ISLAND RAILROAD,

Third Party Defendant.

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion/Cross-Motion..... | XXX |
| Answering Papers..... | X |
| Reply..... | XX |
| Briefs: Plaintiff's/Petitioner's..... | |
| Defendant's/Respondent's..... | XX |

Motion by defendants Willets Management Systems, Inc. and Deluxe Transportation, Inc. pursuant to CPLR 3212 for an order awarding them summary judgment and dismissing the complaint

against them is denied. Motion by defendant Spring Creek, Inc. for an order awarding summary judgment and dismissing the complaint against it is denied. Motion by third party defendants Metropolitan Transit Authority and the Long Island Rail Road for an order awarding summary judgment and dismissing the third party complaint against them is granted, and the third party complaint is dismissed against the Metropolitan Transit Authority and the Long Island Rail Road.

This action arises out of a trip and fall on a public sidewalk to the rear of premises owned by defendant Spring Creek, Inc. (Spring Creek) and occupied by defendants Willets Management Systems, Inc. (Willets) and Deluxe Transportation, Inc. (Deluxe) who operate a taxi stand. The rear of the premises located at 60-62 Main Street in Port Washington in the town of North Hempstead abuts a parking lot adjacent to the Long Island Railroad.

Plaintiff Carol Berkowitz (Berkowitz or plaintiff) used the defendant taxi service for her daily trip to and from the Long Island Railroad in Port Washington where she regularly took a commuter train to New York City. She worked for Draft Advertising on Third Avenue. After she exited the train, she would walk across the road to the taxi house and give her address to the dispatcher, who would call her a cab.

On August 5, 2005 Berkowitz arrived at the Port Washington train station at approximately 5:00 p.m. She went to Deluxe Cab and gave her address to the dispatcher. She then exited the

building and walked along the sidewalk to a waiting cab. The sidewalk curb was made up of Belgium blocks, and at the point where Berkowitz stepped into the roadway, the cement between the blocks was worn away. She caught her heel in the opening between the blocks and fell forward hitting her knee and sustaining severe injury.

The moving defendants and third party defendants seek summary judgment averring that they did not own the sidewalk where Berkowitz's injury occurred, did not do any repairs on the subject sidewalk or create the alleged dangerous condition, and did not make any special use of the sidewalk, and thus cannot be held liable to plaintiff for her injuries. There is no factual dispute with regard to ownership of the public sidewalk where plaintiff fell, as it is in the Town of North Hempstead.

Plaintiff avers that defendants are liable based upon their failure to maintain the public sidewalk in compliance with the Code of the Town of North Hempstead, and that they maintain a special use of the sidewalk as a taxi stand.

The provision of the Code of the Town of North Hempstead, § 48-10, provides for the following maintenance of the public sidewalk as follows:

> A. Every owner, lessee, tenant, occupant, or other person in charge of any property within the Town shall remove snow, ice, dirt or any other object or material from any sidewalk between

> such property line and the curbline of all adjacent streets . . .
>
> B. Every owner, lessee, tenant, occupant, or other person in charge of any property within the Town shall at all times keep such sidewalk in good and safe repair and maintain the same clean, free from filth, dirt, weeds or other objects or materials.

The ordinance does not impose tort liability upon abutting owners and occupiers for injuries sustained by third parties based upon their failure to keep the sidewalks in good repair.

In general "liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v. Giunta*, 88 NY2d 449, 452-453 [1996]). However, liability to abutting landowners will be imposed and the general rule is inapplicable where "a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks *and* imposes liability for injuries resulting from the breach of that duty" (*Hausser v. Giunta, supra* [emphasis supplied]). The ordinance must "expressly" impose such tort liability (*Vrabel v. City of New York*, 308 AD2d 443, 444 [2d Dept 2003]). As there is

no ordinance imposing tort liability on the abutting owners and operators, they cannot be held liable to plaintiff for her injuries based upon a failure to comply with maintenance obligations under the ordinance.

Liability may also be imposed if "the landowner created the defective condition, or caused the defect to occur because of some special use" (*Vrabel v. City of New York, supra* at p 443). Plaintiff avers that the parking of taxis at the curb awaiting passengers constitutes a special use, thus rendering defendants liable for the defective condition of the curb. She also avers that the defendants had constructive notice of the condition as the wearing away of the concrete must have occurred over time.

When an abutting landowners's use of the public sidewalk is no different from or shared by the general public, or where there was no "appurtenance . . . installed for its benefit" or at its request, "a special use cannot be found" (*Tyree v. Seneca Center-Home Attendant Program*, 260 AD2d 297 [1st Dept 1999]). Thus defendants cannot be held liable for a special use of the sidewalk or curb.

However, the inquiry does not end there, for "[h]aving chosen to establish and operate a taxi dispatch area, the [defendant] undertook a duty to operate the service and direct pedestrian access in a reasonably safe manner, including avoiding or warning about any hazards of which it had actual or constructive notice" (*Hendryx v. City of New York*, 3 Misc3d 512, 514 [Supreme Court New

York County 2004]). There is at least a question of fact concerning constructive notice with regard to the missing concrete between the Belgium brick at the curb, as the wearing away of concrete happens over time and defendant Spring Creek admitted to sweeping the area, thus having exposure to the advancing condition. Accordingly, a question of fact is presented as to their breach of the duty to direct pedestrians in a "reasonably safe manner" (*Hendryx v. City of New York, supra*).

Insofar as Spring Creek may claim that it did not operate the taxi dispatch area, the deposition testimony of Peter Blasucci presents a factual issue as to whether each and every corporation in which he is shareholder and president plays a role in operating the taxi business. For example, Willets Management administers the other corporations, taking income from the taxi hires. It is the "financial arm" of Blasucci's "other businesses" including taxis, limousines, vans and school buses. (T28). It has no employees (T39). Deluxe Transportation is just a "corporate name" used for advertising purposes. It has no assets, rolling stock or office space (T31). The owner of the taxi cabs is a corporation named Motown (T32). It does not have drivers. An additional coporation, Port Conveyance, uses independent contractors to drive the cabs (T47). Port Conveyance forwards the money received from drivers to Blasucci, who delivers it to Willets Management. Another corporation, Webster Management , employs people who work at the taxi station (T35). They do not provide taxi cab services to the

public and receive income from Willets (T37).

Intertwined taxi services are provided by the six named corporations, which appear to operate more like corporate departments rather than independent legal entities. Blasucci is president of each and a shareholder of each. Accordingly, it cannot be determined as a matter of law which corporation had a duty to provide safe passage and warn of dangers in the path to waiting taxis, and summary judgment is denied.

Defendants' contention that there was no height differential between the two Belgium blocks and thus the defect was trivial addresses only a tripping hazard. There is at least a factual issue as to whether the "crevice" between the blocks " was of a size sufficiently large to 'catch' plaintiff's . . . heel and cause her to stumble and fall to her knees" and whether the waiting taxis at the curb obscured the crevice, thus rendering it a "trap" (*see, Taylor v. New York City Transit Auth.*, 63 AD2d 630 [1st Dept 1978], *affd* 48 NY2d 903 [1979]).

Defendants' contention that plaintiff did not know the cause her to fall is frivolous. She testified at deposition that her heel got caught in a crevice between two Belgium blocks and that as she fell she could see the crevices in the blocks. Defendants' focus on the language used by plaintiff to initially describe what caused her fall ignores her certain testimony as to what caused it. Indeed after she stated that she remembered her "heel getting caught in, at that time it was a crevice in my mind" she was asked

if the crevice was in between two Belgium blocks and she replied "It was." (T44). Plaintiff also testified that when she looked back her "shoe remained actually in the area or was eventually pulled out". Accordingly, plaintiff sufficiently identified the cause of her fall at the time of her accident.

The third party defendants Long Island Railroad and Metropolitan Transit Authority have made out a prima facie case that they do not own the public sidewalk or curbing which is outside their property lines, have done no work to the site and have no duty to maintain same. Accordingly, the third party complaint is dismissed as against them.

This decision constitutes the order of the court.

Dated: FEB 14 2008

KENNETH A. DAVIS J.S.C.