SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

ELIZABETH SWIRE FALKER,
Plaintiff,

-v-

STARBUCKS CORPORATION, CONSOLIDATED EDISON, INC. and FIRST DIXON REALTY, LLC,
Defendants.

Index No.: 100763/06
Motion Date: 05/31/11
Motion Seq. No.: 03
Motion Cal. No.: _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits - Exhibits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

In this sidewalk trip and fall case the motions of defendants First Dixon Realty, LLP, (Motion Sequence No. 3) and Starbucks Corporation (Motion Sequence No. 4) for summary judgment dismissing the complaint are hereby consolidated for disposition. The court shall grant the motions of First Dixon, owner of the premises, and Starbucks, commercial lessee, because they do not come within the special use doctrine applicable to municipal facilities such as sidewalks.

Plaintiff alleges that on February 16, 2005, she tripped on

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

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

a Con Ed gas valve box recessed into the sidewalk outside the Starbucks store in Rye, New York. The valve box had been installed in 1912 and the deposition testimony states that it is used by the utility to turn off gas service to the building without the need to enter the premises.

The movants assert that they have no liability for the accident because they did not install or maintain the valve box. Plaintiff argues that the motions should be denied because the movants made special use of the public sidewalk by the presence of the gas valve box servicing their premises.

As stated by the Court

> The doctrine of special use was fashioned in New York 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. 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. 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.
>
> 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.

Kaufman v Silver, 90 NY2d 204, 207 -208 (1997) (citiations and internal quotations omitted, emphasis added).

In a similar personal injury action arising from a fall on a portion of a sidewalk immediately adjacent to a metal grate owned by Consolidated Edison, the First Department has recently held

> [The owners] made a prima facie showing of entitlement to judgment as a matter of law with evidence that they did not have the ability to exercise control over the sidewalk defect that allegedly caused plaintiff's fall .
>
> In opposition, plaintiff and Con Edison failed to raise an issue of fact. As the undisputed owner of the subject grate, Con Edison had exclusive maintenance responsibility over the grate and the area extending 12 inches outward from the perimeter of the grate, which included the alleged sidewalk defect that caused plaintiff's fall. Accordingly, only Con Edison, and not [the owners], may be liable for plaintiff's injuries

Lewis v City of New York, __AD3d__, 2011 NY Slip Op 07679 (1st Dept, November 1, 2011).

In this case, the deposition testimony was that the gas valve box was solely for the use of Con Ed or the fire department to be able to shut of gas to the premises and there is no evidence that the movants had any control over the installation of the valve or had any ability to utilize the box. Even though the valve box was part of the gas service to the movants' premises, the box was not maintained by, or serviced under the direction of the movants.

The cases cited by the plaintiff are inapposite because the utilities in those cases were specifically installed to service the adjacent property owners under the direction of those property owners. For example, where the adjoining property

requires temporary electrical service via wires and shunt boards installed upon a sidewalk, such facilities may constitute a special use because they are installed at the owner's direction and request for the sole benefit of the owner. See Cook v Consolidated Edison Co. of NY, Inc., 51 AD3d 447, 448 (1st Dept 2008) ("With respect to both tenant and owner, issues of fact exist as to whether the placement of the shunt boards constituted a special use of the sidewalk such as to give rise to a duty to maintain this 'provisional sidewalk structure'"); Eliassian v Consolidated Edison Co. of NY, 300 AD2d 51 (1st Dept 2002) (same). The distinction between the results in Lewis and Cook is that in Lewis the facility was part of the utility's distribution network under its control and maintenance even though it serviced the owner's premises while in Cook the temporary wires and shunt covering were not part of the utility's network but were a temporary hookup that only benefitted the adjoining property owner and were placed into service for reasons having to do with the conditions on the adjoining property. This principle is further illustrated in Sheehy v City of New York (43 AD3d 336, 337 [1st Dept 2007] [emphasis added]) where the Court held that

> an issue of fact exists as to whether defendant-appellant [owner] made a special use of the sidewalk. Th[e] evidence tended to show that while [the owner] did not itself make "cuts" in the sidewalk, defendant Con Edison had done so a few months before the injured plaintiff's accident for the sole purpose of fixing a gas main inside [the owner]'s premises. . . Therefore, the evidence in the record creates a question of fact as to whether the

broken sidewalk where she fell resulted from Con Edison's defective restoration of the sidewalk after repairing the gas main for [the owner], and thus whether the "special use" doctrine applies to render [the owner] liable for the injuries.

Movants have met their burden of showing that they neither created the condition that caused plaintiff's injury nor did they have responsibility in law for maintaining the valve box. Therefore the court shall grant the respective motions.

Accordingly, it is

ORDERED that the motion of FIRST DIXON REALTY, LLC, for summary judgment dismissing the complaint is GRANTED and the Clerk is directed to enter judgment dismissing the complaint against FIRST DIXON REALTY, LLC; and it is further

ORDERED that the remaining parties are directed to attend a pre-trial conference on December 13, 2011, at 2:30 P.M., in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013, to set a trial date.

This is the decision and order of the court.

Dated: November 14, 2011 ENTER:

DEBRA A. JAMES J.S.C.