

2009 NY Slip Op 51682U, *; 2009 N.Y. Misc. LEXIS 2024, **

FOR IMMEDIATE RELEASE

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**Landowner's Use of Driveway May Constitute Special Use
Precluding Dismissal of Personal Injury Suit**

A Kings County Court has denied a Brooklyn homeowner defendant's attempt to dismiss a personal injury lawsuit for a slip and fall on the sidewalk in front of his home. The case arises out of a 2007 slip and fall by the plaintiff, Charles Schwartz, on a cracked sidewalk in front of property owned by the defendants, Anthony Pezzolanti and Rose Pezzolanti. The area where the plaintiff fell was a cracked sidewalk in the driveway of the Pezzolanti's home. The Pezzolanti's moved for summary judgment pursuant to the Administrative Code of the City of New York, which states essentially that the City of New York is responsible for personal injuries proximately caused by the failure to maintain sidewalks, except those abutting owner occupied one-, two- or three-family residential homes. The Court held that Pezzolanti's use of the driveway constituted a special use of the sidewalk and denied their motion for summary judgment. If the defendants' use of the driveway upon which the plaintiff caused the sidewalk to crack, they may be held liable by a jury for the plaintiff's injuries.

Frank J. Dito, Jr. is a personal injury attorney in New York and the author of the New York Accident Book. To schedule an interview with Attorney Frank J. Dito, Jr., call (718) 979-4300.

2009 NY Slip Op 51682U, *; 2009 N.Y. Misc. LEXIS 2024, **

[*1] **Charles Schwartz, Plaintiff, against The City of New York,
ANTHONY PEZZOLANTI and ROSE PEZZOLANTI, Defendant(s)**

19682/07

SUPREME COURT OF NEW YORK, KINGS COUNTY

2009 NY Slip Op 51682U; 2009 N.Y. Misc. LEXIS 2024

August 3, 2009, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

COUNSEL: [**1] For Plaintiff: The law firm of Miller & Miller, Esqs., by Andrew R. Miller, Esq., of counsel.

For the City of New York, Defendant: Michael A Cardozo, Esq., Corporation Counsel of the City of New York.

For Anthony Pezzolanti, Defendant: Richard T. Lau & Associates by Nancy S. Goodman, Esq., of counsel.

JUDGES: Robert J. Miller, J.S.C.

OPINION BY: Robert J. Miller

OPINION

Robert J. Miller, J.

In this action, plaintiff Charles Schwartz ("Schwartz") seeks to recover against Rose and Anthony Pezzolanti ("Pezzolanti"), co-owners of a property located at 2907 Avenue Z, Brooklyn, New York as well as The City of New York ("City") for injuries he sustained on January 16, 2007 when he allegedly fell on a portion of cracked sidewalk in front of the property.

Defendant Anthony Pezzolanti moves for summary judgment dismissing the complaint, arguing that he cannot be held liable for the occurrence of an accident where, as here, he did not (a) create the alleged

2009 NY Slip Op 51682U, *, 2009 N.Y. Misc. LEXIS 2024, **

defective condition on the public sidewalk abutting his property; (b) cause the defective condition to arise by virtue of his special use of that sidewalk; or (c) was under a statutory duty to repair or maintain the sidewalk abutting his property. Plaintiff opposes this motion. [**2] The City takes no position.

A motion for summary judgment is a drastic measure and is to be used sparingly. (*Andre v. Pomeroy*, 35 NY2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1947]). The court's focus is issue-finding, not issue solving, and all competent evidence must be viewed in light most favorable to the party opposing the motion. (*B-S Industrial Contractors, Inc. v. Town of Wells*, 173 Ad2d 1053, 570 N.Y.S.2d 390 [3rd Dept 1990]). To prevail [*2] on a motion for summary judgment, the moving party must tender sufficient evidence to eliminate all material issues of fact. (*Winegard v. New York University Medical Center*, 64 Ny2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]).

First, defendant homeowner asserts that pursuant to § 7-210 of the *Administrative Code of the City of New York* (The "Sidewalk Law") he is exempt from liability because he resides alone in a two family home. The Sidewalk Law in pertinent part reads:

Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one- two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential [**3] purposes) in reasonably safe condition. This subdivision shall not be constructed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

Second, Pezzolanti asserts that he did not cause or create the condition of the cracked sidewalk where plaintiff fell. It is well established "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". (*Otero v City of New York*, 213 AD2d 339, 624 N.Y.S.2d 157 [1st Dept 1995]).

However "[w]here a landowner's driveway crosses a sidewalk, the landowner is the beneficiary of a "special use" of the sidewalk, and is obligated to keep said sidewalk in a reasonably safe condition." (*Adorno v. Carty*, 23 AD.3d 590, 804 N.Y.S.2d 798, [2nd Dept. 2005].) Here plaintiff contends that he fell on a cracked sidewalk at or adjacent to the driveway in front of Pezzolanti's home.

Pezzolanti asserts that the photographs marked as Exhibits "A" and "B" of plaintiff's deposition accurately reflect the location of plaintiff's accident, which they assert is not within the driveway portion [**4] of the sidewalk. The photographs reveal the location of the accident as being on the public sidewalk in front of the fence which is in front of defendant's property. During his 50-H hearing, the plaintiff testified that as a result of the fall he landed into the fence and then fell to the ground, which the defendant asserts supports that the plaintiff fell on the portion of the sidewalk adjacent to the driveway

2009 NY Slip Op 51682U, *; 2009 N.Y. Misc. LEXIS 2024, **

and not in the driveway itself. The photographs submitted to the Court also show an "x" marked by the plaintiff at his deposition. It is clear the "x" is marked within very close proximity to the edge of the driveway, right at the beginning of the fence around the front lawn. The picture also depicts that the fall occurred at the very corner of the fence which bends around and runs next to the driveway. Furthermore, the pictures also show the edge of the cracked sidewalk where plaintiff fell which appears to be the same broken slab of the driveway which is clearly cracked and broken up.

In response to the issue of special use, Pezzolanti offers an affidavit stating that his special use of the sidewalk adjacent to the accident site did not create this alleged cracked condition. [**5] However, there is photographic evidence which shows two vehicles parked in the driveway, as well as, deposition testimony from Pezzolanti stating that he "always parks the jeep [*3] in the driveway". As such the area of sidewalk adjacent to where the plaintiff tripped was being used as a driveway in which several vehicles traversed. As a result, Pezzolanti has failed to show that he did not use his driveway.

The Court finds that there are triable issues of fact as to whether the cracked area where plaintiff fell on was caused by the use of the driveway by Pezzolanti as plaintiff fell very close to the part of the driveway that was damaged. Even if he did not fall directly on the driveway, if the weight of traffic on the driveway could have been a concurrent cause of the defect in the sidewalk, the motion for summary judgment should be denied. The defendants fail to meet their burden of establishing that their special use of the sidewalk did not contribute to the allegedly defective condition (*Adorno v. Carty*, 23 AD3d 590, 804 N.Y.S.2d 798 [2nd Dept. 2005]).

Accordingly, the defendant Anthony Pezzolanti's motion for summary judgment dismissing the complaint is denied.

The foregoing constitutes the decision [**6] and Order of the Court.

Robert J. Miller

J.S.C.

August 3, 2009