IN THE DISTRICT COURT OF RICHARDSON COUNTY, NEBRASKA

JOHN JAMES WOLNEY, Plaintiff, vs. DREAM WEAVER HOTEL, INC., Defendant.	)	Case No. CI 23-95 **ORDER ON MOTION FOR SUMMARY JUDGMENT**

DATE OF HEARING:	October 22, 2024
TAKEN UNDER ADVISEMENT:	December 22, 2024 See Neb. Ct. R. §6-105(B).
DATE OF RULING:	January 11, 2025
APPEARANCES:	Plaintiff by Louie Ligouri Defendant by Trevor Rogers Julie D. Smith, presiding

INTRODUCTION

This matter comes before the Court on Defendant Dream Waver Hotel, Inc.'s ("Defendant") motion for summary judgment. A hearing was held on the motion on October 22, 2024. The parties introduced evidence and the Court heard arguments. The parties submitted briefed arguments to the Court. The Court took the

matter under advisement. Being fully advised of the premise, the Court grants Defendant's motion for summary judgment.

RULINGS ON EVIDENCE

At the October hearing, the Court received the following exhibits subject to the rules of evidence, 37, 38, 41, 44. Further, the Court reserved ruling on Exhibit 46. Additionally, the record was reopened to supplement Exhibit 46. Exhibit 46 was supplemented with Exhibit 54 and was received subject to the rules of Evidence. Moreover, the Court also received Exhibit 55. The Court hereby overrules the objections to the Exhibits and receives the Exhibits. Exhibit 46 is received.

FACTS

The Court hereby incorporates by reference Defendant's Annotated Statement of Undisputed Facts in Support of its Motion for Summary Judgment, and Plaintiff's responsive Annotated Statement of Disputed facts. Both have been filed with the Court and are hereby incorporated by reference.

STANDARD OF REVIEW

Summary judgment is only proper "when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Palmtag v. Republican Party of Nebraska*, 315 Neb. 679 (2024). The moving party "must make a prima facie case by producing enough evidence to show the movant would be entitled to judgment if the evidence were uncontroverted

at trial." *Id.* Only once the moving party makes such a prima facie case does the burden shift to the nonmoving party to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id.*

"[I]t is not the role of summary judgment to weigh the evidence." *Garcia v. City of Omaha*, 316 Neb. 817 (2024). The non-movant's evidence must be believed, and all justifiable inferences are drawn in the non-movant's favor. *Id.* Summary judgment is inappropriate when the parties' evidence would support reasonable, contrary inferences on the issue for which a movant seeks summary judgment. *Wynne v. Menard, Inc.*, 299 Neb. 710 (2018); *Estate of Block by Hoffman v. Estate of Becker by Becker*, 313 Neb. 818 (2023).

ANALYSIS

The Court grants Defendant's motion for summary judgment, because even construing the facts in favor of Plaintiff and giving Plaintiff every inference, there is no genuine issue of material fact. Defendant does not owe Plaintiff a duty with respect to the sidewalk. Without a duty, Plaintiff cannot maintain a negligence action against Defendant.

Plaintiff argues that it can maintain a negligence action against Defendant, because Defendant owed Plaintiff a duty to maintain the sidewalk abutting Defendant's property. Plaintiff argues that a question of fact exists as to whether Defendant knew its sidewalk was unlevel creating a dangerous condition. Conversely, Defendant argues that under the common law, whether the sidewalk was in disrepair or not, Defendant cannot be liable for personal injuries Plaintiff sustained due to the sidewalk. Defendant argues it can only be liable if Plaintiff can show that Defendant used the sidewalk wrongfully or negligently or that Defendant

derives a special use from the sidewalk. Defendant argues that Plaintiff cannot maintain its burden in proving either of these exceptions and thus, Defendant as a matter of law does not owe Plaintiff a duty.

The Court agrees with Defendant. The Court finds that as a matter of law, Defendant does not owe a duty to Plaintiff. Specifically, Plaintiff cannot show Defendant wrongfully or negligently used the sidewalk or derived any special use that would create a duty from Defendant to Plaintiff.

1. Based on the common law, Defendant does not owe any duty to Plaintiff.

Based on the common law, Defendant does not owe any duty to Plaintiff. In a negligence action, "[t]he question whether a legal duty exists for actionable negligence is a question of law." *A.W. v. Lancaster Cnty. Sch. Dist. 0001*, 280 Neb. 205 (2010). Regarding second class cities, under the common law, "'no duty devolved upon an abutting owner to keep the sidewalks adjacent to his property in a safe condition for travel' because 'the fee of the streets and sidewalks is in the municipality,' which has the primary duty of keeping them in a safe condition for travel.'" *Dean v. Yahnke*, 266 Neb. 820 (2003) (citing *Hanley v. Fireproof Building Co.*, 107 Neb. 544 (1922)). However, "[i]f… the Legislature enacts a statute imposing liability on property owners for failing to repair a dangerous sidewalk condition upon notice to do so, the resulting cause of action will be recognized." *Id.*

The most applicable statute that could create liability in the present case is Neb. Rev. Stat. § 17-522. Pursuant to Neb. Rev. Stat. § 17-522:

> (2) If the owner of any property abutting any street or avenue or part thereof fails to construct or repair any sidewalk in front of the owner's property within the time and in the manner as directed and requested by the mayor and city council or village board of trustees, after having received due notice to do so, the mayor and city council or village board of trustees may cause the sidewalk to be constructed or repaired and may assess the cost of such construction or repairs against the property.

Neb. Rev. Stat. § 17-522. Nothing in this statute creates liability on the part of Defendant. The statute is silent as to imposing liability on abutting property owners, meaning the above common law is the default law regarding duty of an abutting property owner to a pedestrian. Therefore, because the sidewalk in the present case is located within a city of the second-class, Defendant does not owe any duty to Plaintiff to maintain the sidewalk abutting its property and Defendant cannot be liable for Plaintiff's injuries.

Additionally, the Nebraska Supreme Court was faced with largely the same issue in the case of *Dean v. Yahnke*, 266 Neb. 820 (2003). In *Dean*, a district court found that an abutting property owner was not liable for personal injuries from a trip on a sidewalk because the second-class city had not shifted the duty to maintain the sidewalk to the property owner. The Nebraska Supreme Court affirmed but on other grounds. The Nebraska Supreme Court held that second-class cities lacked any authority to place personal injury liability because the Unicameral had not given second class cities the authority to impose liability on private parties. In the Court's words, "no section of chapter 17 authorizes second-class cities to delegate the duty of sidewalk maintenance and repairs to owners or mandates that owners shall be liable for injuries to pedestrians if

they fail to maintain or repair sidewalks." A review of those statutes with recent revisions shows no substantive change that places personal liability on abutting property owners.

Even if the notice structure applied to Defendant to hold Defendant liable, there has been no evidence presented to show any notice was given to Defendant regarding the sidewalk abutting Defendant's property. (*See* Ex. 44, 45). In a search through the City records, Mr. Anthony Nussbaum, the City Administrator of the City, admitted he could not find any notices issued regarding the sidewalk at issue. (Ex. 41, p. 16:5-17:6). In addition, no notices were found in the City records produced by the City Administrator. (*See* Ex. 46, Ex. 54). Defendant has been able to show that it has not received any kind of notice regarding the sidewalk. Plaintiff has not been able to produce any evidence showing that there was notice. At most, Plaintiff speculates as to whether the Defendant should have had notice. Under Nebraska law:

> in the face of direct, uncontroverted evidence supporting judgment for the movant, a nonmovant's equivocal statements or speculative assertions do not create a material issue of fact on a disputed ground for summary judgment. The evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.

C.E. v. Prairie Fields Family Med. P.C., 287 Neb. 667 (2014).

Defendant has provided evidence that it had no notice. Plaintiff provides no evidence to controvert Defendant's evidence, but instead makes speculative assertions. This is not enough to create a genuine issue of material fact. Without any sufficient evidence that Defendant had notice from the City involving the

sidewalk in this matter, Plaintiff has failed to show that Defendant had a duty to maintain the sidewalk. Thus, Defendant cannot be held liable for Plaintiff's injuries as a matter of law. Moreover, the Court finds that Plaintiff has not created a genuine issue of material fact as to whether Defendant had a duty due to Defendant wrongfully or negligently using the sidewalk.

2. Defendant is not liable for Plaintiff's injuries because there is no evidence that Defendant wrongfully or negligently used the sidewalk.

Defendant is not liable for Plaintiff's injuries because there is no evidence that Defendant wrongfully or negligently used the sidewalk. There is an exception to the common law rule enumerated above. An abutting property owner "could be liable for injuries caused by defective sidewalks only when the condition was the result of the owner's affirmative wrongdoing or negligent use of the sidewalk for a purpose other than its intended use." *Dean*, *supra.*

In sum, Plaintiff has not presented any evidence that Defendant used the sidewalk wrongfully or in some negligent fashion. Plaintiff has no evidence that Defendant was negligent in its *use* of the sidewalk. If anything, the evidence shows only that the sidewalk was used for routine purposes. Because Defendant may satisfy its burden by demonstrating that Plaintiff cannot satisfy his burden, Defendant has shown that Defendant does not owe Plaintiff a duty under this exception. Finally, the Court finds that the special use doctrine does not apply to the present case.

3. The special use doctrine does not create a duty from Defendant to Plaintiff.

The special use doctrine does not create a duty from Defendant to Plaintiff. Defendant does not have a duty to Plaintiff because the sidewalk at issue does not fall within the exception of the special use doctrine. The special use doctrine can lead to the creation of a duty for an abutting property owner who did not receive notice from the city to maintain the sidewalk in a reasonably safe condition. *See Henderson v. Heath Smallcomb*, 22 Neb.App. 90 (2014). This exception applies either when: (1) the sidewalk was constructed or altered for the special benefit of the abutting property owner and served a use independent of the ordinary use for which sidewalks are designed; or (2) the sidewalk has been used for the special benefit of the abutting property owner, regardless of whether it was constructed for such purpose. *Id.*

Again, under Nebraska law, liability can only arise for abutting property owners if the sidewalk was constructed or altered for the special benefit of Defendant and the sidewalk served a use beyond the ordinary use of a sidewalk:

> Historically, under the common law, cities were responsible for the care and condition of sidewalks within municipal boundaries, and no duty devolved upon an abutting owner to keep the sidewalk adjacent to such owner's property in a safe condition. … The special use doctrine is the exception to the general rule that where the **sidewalk was constructed or altered for the special benefit of the abutting property owner and served a use independent of the ordinary use for which sidewalks are designed**, or where a sidewalk, though not specifically constructed or altered for the special

> benefit of the abutting property, has been used for such benefit, the owner or occupant of the property, regardless of whether he or she constructed or altered the sidewalk, owes a duty to the public to maintain the sidewalk in a reasonably safe condition, and hence, he or she may be held liable for injuries resulting from a defective or dangerous condition created by such special use of the sidewalk, particularly where such use is improper, extraordinary, or excessive under the circumstances.

Id. (emphasis added). The special use doctrine has no application in the present case, because the sidewalk abutting Defendant's Property does not provide a special benefit to Defendant for three reasons: (1) the sidewalk providing mere ingress or egress to Defendant's building is insufficient to be considered a special benefit; (2) the sidewalk does not serve a use independent of the ordinary use of the sidewalk; and (3) Defendant does not have exclusive access or control to the sidewalk.

A. The sidewalk providing a path for mere ingress and egress of the building is not a special benefit to Defendant.

The sidewalk providing a path for mere ingress and egress of the building is not a special benefit to Defendant. To be sure, "the special use doctrine is not applicable merely because a sidewalk provides a method of ingress and egress into a business, which in turn benefits the business." *Henderson*, 22 Neb. App. at 101, 847 N.W.2d at 746; *see Roe v. City of Poughkeepsie*, 229 A.D.2d 568, 645 N.Y.S.2d 856 (1996) (holding "the mere fact that the patrons of the restaurant used the abutting sidewalk does not establish a 'special

use' imposing an obligation on the landowners to maintain the sidewalk"); *Whitlow v. Jones*, 134 Or. App. 404, 895 P.2d 324 (1995) (finding that "although a business establishment derives special advantage from the use of a sidewalk by its business invitees for ingress to and egress from the business, that use is not a special use for liability purposes, because it is customary and normal"). Thus, the use of the sidewalk at issue to enter or exit from Defendant's building does not provide Defendant with a special benefit to fall within the special use doctrine.

B. The sidewalk does not serve a use independent of the ordinary use of a sidewalk.

The sidewalk does not serve a use independent of the ordinary use of a sidewalk. The sidewalk abutting Defendant's property serves the ordinary use of a sidewalk even with the structural variance of a ramp and rails. (*See* Ex. 52). In general, special use cases include the installation of an object in the sidewalk or a modification in the construction, such as a "concrete step mounted upon the sidewalk immediately beneath the elevated doorway of a restaurant," or "the installation of rails in the sidewalk to facilitate the removal of refuse." *Margulies*, 228 A.D.2d at 966, 644 N.Y.S.2d at 596; see *Henderson,* 22 Neb. App. at 101, 847 N.W.2d at 746 (holding an addition of a raised concrete landing to the sidewalk in front of the sidewalk constituted a special benefit). However, these installations must still be used "'in a manner different from that of the general populace'" for the special use doctrine to apply. *See Locke v. Gellhaus*, 2010 S.D. 11, 778 N.W.2d 594, 600–01 (quoting *Moore v. United States*, 882 F.Supp. 1297, 1299 (E.D.N.Y.1995)); *see Wilkins v. Hendel*, 654 S.W.3d 429, 432–33 (Mo. Ct. App. 2022) (finding "to create a duty under this

exception, there must be evidence that the property was used for something other than what it was intended to be used for").

For example, in *Crosswhite v. City of Lincoln*, 185 Neb. 331 (1970), the court held that an abutting property owner was jointly liable with the city for an injury arising from a pedestrian tripping on a water pipe that protruded above the sidewalk. There, the Nebraska Supreme Court reasoned that "[t]he use of the sidewalk for the purpose of installing and maintaining a water facility was a use independent and apart from the ordinary and customary use for which sidewalks are designed," so the abutting property owner owed a duty to maintain the sidewalk. *Id.*

In the present case, the sidewalk abutting Defendant's property simply serves the ordinary use of a sidewalk. Sidewalks serve as a path of travel for individuals. Unlike the installation of a water pipe on a sidewalk with the purpose of maintaining a water facility in *Crosswhite*, the installation of a ramp and rails in a sidewalk serves the purpose as a method of travel for individuals. Ramps and rails on sidewalks have become an industry standard for public areas due to the Americans with Disabilities Act of 1990 ("ADA"). *See* 28 C.F.R. § 36.101. Before the reconstruction of the sidewalk with the ramp, there was still a natural slope of the sidewalk abutting Defendant's Property. (*See* Ex. 47 and 49). That said, the installation of a ramp and rails and rails did not change the purpose of the sidewalk at issue, but rather made it more accessible for individuals. (*Compare* Ex. 52 *with* Ex. 47 and 49). Even with the installation of the ramp to the sidewalk abutting Defendant's property, the use of the sidewalk is not independent to ordinary use of a sidewalk. Additionally, the sidewalk is not exclusive to Defendant's building.

C. The sidewalk is not exclusive to Defendant's building.

The sidewalk is not exclusive to Defendant's building. It is not exclusively controlled by Defendant nor exclusively used by individuals entering or exiting Defendant's property. An abutting property owner can be held liable if the owner "has exclusive access to and control of the special use structure or appurtenance." *Posner*, 27 A.D.3d at 543, 813 N.Y.S.2d at 108. *Compare Petty v. Dumont*, 77 A.D.3d 466, 469, 910 N.Y.S.2d 46, 49 (2010) (finding the special use doctrine applied since the abutting property owner had exclusive access and control of special use area) *with Sipprell v. Merner Motors*, 164 Neb. 447 (1957) (finding a landlord was not liable because the step where the plaintiff fell was under the exclusive control of the lessee).

In addition, the special use doctrine can fail if the special use structure is not being exclusively used by the abutting property at issue since the benefit of the structure will be shared, hence destroying the exclusiveness of the benefit to the abutting property owner. *See O'Neil For & on Behalf of O'Neil v. ADM Growmark River Sys., Inc.*, 871 S.W.2d 54, 56 (Mo. Ct. App. 1993) (finding the special use doctrine did not apply since the property owner was not the exclusive user of the public street and rail crossing); *Montalvo v. Heege*, 301 A.D.2d 427, 428, 753 N.Y.S.2d 491, 493 (2003) (holding the special use claim failed since the utility pole was used by the abutting property owner as well as additional property owners).

Indeed, in examining photos of the sidewalk at issue, the Court notes that a person may use a flat path, a slope path, a stairs path, or a ramp path to enter or exit Defendant's building and other property owner's businesses on the same side of the street as the sidewalk. The Court therefore finds that any benefit bestowed to

Defendant by the abutting sidewalk also benefits every other property owner on the street where Plaintiff fell. The photos demonstrate that the abutting sidewalk is nothing more than an ordinary sidewalk with a slope to it that allows any person using the abutting sidewalk to access all buildings on the street where Plaintiff fell. Any benefit that Defendant receives by that access is shared by every other building on the street. The abutting sidewalk runs west until the next intersection. Any person coming from the east can walk the length of the abutting sidewalk all the way to the next intersection, which leads to access to every single building on that side of the street. As case law unequivocally shows, a sidewalk used for its ordinary use is not encompassed by the special use doctrine. *See Henderson*, 22 Neb. at 101 (stating that the special use doctrine is not applicable merely because a sidewalk provides a method of ingress and egress into a business, which in turn benefits the business).

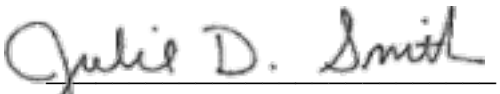
Accordingly, the Court finds that there is no genuine issue of material fact that the sidewalk in the present case is only used as an ordinary sidewalk and Defendant derives no special use from the sidewalk. Indeed, the facts demonstrate that the sidewalk benefits all property owners on the same side of the street as the sidewalk by functioning as a sidewalk only. Therefore, for all the above reasons, the Court finds that the special use doctrine is inapplicable to the present case to create a duty between Defendant and Plaintiff. Because the Court finds as a matter of law that there is not duty from Defendant to the Plaintiff, Plaintiff cannot maintain its negligence cause of action and the Court grants Defendant's motion for summary judgment.

CONCLUSION

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Defendant's motion for summary judgment is granted.

DATED this 11th day of January, 2025.

BY THE COURT:



JULIE D. SMITH,
District Court Judge

CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 13, 2025 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

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Date: January 13, 2025 BY THE COURT: Pamela Scott
CLERK