APL-2018-00168

New York County Clerk's Index No. 111331/09

Court of Appeals

STATE OF NEW YORK

XIANG FU HE,

Plaintiff-Appellant,

against

TROON MANAGEMENT, INC, FLUSHING-THAMES REALTY COMPANY, NOEL LEVINE, DARYL GERBER, As Executor for the Estate of ABRAHAM HERSON, HARRIETTE LEVINE, As Executor for the Estate of ABRAHAM HERSON, and NOEL LEVINE, As Executor for the Estate of ABRAHAM HERSON,

Defendants-Respondents.

(Additional Caption on the Reverse)

AMICUS CURIAE BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC.

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Date Completed: April 8, 2019

TROON MANAGEMENT, INC, FLUSHING-THAMES REALTY COMPANY, NOEL LEVINE, DARYL GERBER, As Executor for the Estate of ABRAHAM HERSON, HARRIETTE LEVINE, As Executor for the Estate of ABRAHAM HERSON, and NOEL LEVINE, As Executor for the Estate of ABRAHAM HERSON,

Third-Party Plaintiffs,

against

JFD TRADING, INC. and SDJ TRADING, INC.,

Third-Party Defendants.

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES:

REGULATIONS:

CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

Plaintiff-appellant Xiang Fu He ("He" or "Plaintiff") was injured when he slipped and fell on ice on the public sidewalk abutting his employer SDJ Trading Inc.'s leased premises. Unable to sue his employer, He brought suit against the out-of-possession landlord Troon Management.[1] Citing an owner's nondelegable duty under Administrative Code § 7-210, the lower court denied summary judgment. The First Department reversed, however, on the grounds that the defendants were out-of-possession landlords and the plaintiff slipped on a transient condition that does not constitute a design or structural defect. At issue on this appeal is whether an out-of-possession landlord has a non-delegable

[1] Flushing-Thames Realty Company acted as the landlord to the tenants at the building and Troon Management, Inc. was the managing agent. For consistency, they are collectively referred to as Troon Management or Defendants.

duty under Administrative Code § 7-210 where the condition complained of involves snow and ice.

Long before the advent of Administrative Code § 7-210, this Court's decisions and their progeny permitted an out-of-possession landlord to delegate its common law duty to maintain a property under a lease. So inviolable was this rule, that, depending on the terms of the lease, an out-of-possession landlord could delegate even statutory and common law duties considered nondelegable. Enacted in 2003, and in derogation of the common law, Administrative Code § 7-210 was intended to shift the financial burden of maintaining the sidewalk maintenance from the City of New York to the abutting property owner.

Plaintiff's appeal of the First Department's decision is centered on the argument that an out-of-possession landlord has a non-delegable duty to keep the abutting sidewalk free of ice and snow. However, § 7-210 does not contain any language which can be interpreted to render a premises owner strictly liable for injuries resulting from a slip-and-fall on the abutting sidewalk, which is the practical effect of Plaintiff's reading of the statute.

Further, when § 7-210 is read in conjunction with other pertinent Administrative Code sections, as it must be, it is

clear that the Legislature did not intend to subject out-of-possession landlords to such strict liability. This is particularly so here, where another purpose of enacting § 7-210 was to rectify the discrepancy between the maintenance duties set out under Administrative Code §§ 16-123 and 19-152, and the tort liability that had been previously imposed on the City of New York.

To this end, Administrative Code § 16-123, which speaks to "property owners' duties," obligates "every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city" to remove snow and ice from abutting sidewalks, and is thus expressly applicable to not merely landowners, but also tenants, lessees and others "having charge" of the building abutting the sidewalk at issue. We submit that where the lease delegates the duty to maintain the sidewalk to the tenant in possession, the tenant has charge of the premises under Administrative Code § 16-123. An out-of-possession landlord is, therefore, entitled to dismissal of the complaint where, as here, the plaintiff's claims are based on snow and ice as well as alleged breaches of Administrative Code §§ 7-210 and 16-123 and the lease in question delegates the duty to maintain the sidewalk to the tenant. Such an interpretation is both consistent with the

existing law as it applies to out-of-possession landlords, as well as the narrow construction required when interpreting Administrative Code § 7-210 and reconciling § 7-210 with § 16-123.

STATEMENT OF FACTS

A. The Parties

Defendants Noel Levine and the Estate of Abraham Hershon own the commercial building located at 1177A Flushing Avenue, Brooklyn, New York ("the building") (R. 504-505). Mr. Levine is also the sole shareholder and president of defendant-respondent Troon Management, Inc. (R. 503). Troon Management acted as the managing agent for the building (R. 506). Defendant Flushing-Thames Realty Company acted as the landlord to the tenants at the building (R. 505).

While Troon Management is the managing agent for the building, there is no designated manager for the building (R. 506). And no one was designated by Mr. Levine, Troon Management or Flushing-Thames to perform maintenance at the building (R. 506). Troon Management hired a man named Lloyd who would go to the building when there were complaints (R. 511). Lloyd would also go by the building periodically when Mr. Levine asked (R. 512).

B. Defendants Lease The Building To Non-Party SDJ

By lease agreement, dated April 2002 (the "Lease"), Flushing-Thames leased the entire 28,651 square foot building and fenced parking area to SDJ Trading Inc. ("SDJ") for use as a warehouse and distribution center (R. 104-124, 506-507;

538-557). The lease obligated SDJ "to take good care of the demised premises and the fixtures and appurtenances therein and at [SDJ's] sole cost and expense, make all non-structural repairs thereto as an when needed to preserve them in good working order and condition . . ." (R. 538). The Rules and Regulations annexed to and made a part of the Lease expressly provide:

> "premises are situated on the ground floor of the building [SDJ] thereof shall further, at [SDJ's] expense, keep the sidewalks and curb in front of said premises clean and free from ice, snow, dirt and rubbish." (R. 109)

The Lease was supplemented by a rider that provided, "[i]f there should be any inconsistency or ambiguity between the terms if the rider portions of this Lease and the standard form of Lease, then the rider portions of this Lease shall prevail" (R. 116). Under the rider, Flushing-Times Realty Co. was not obligated to provide any services to SDJ (R. 122). Instead, SDJ was required to "arrange for and [ ] pay the cost of all electricity, heat, gas, hot water, burglar alarm system and maintenance, repair, replacement of any and all parts of the Building and the parking area, excluding only the roof and the structural portions of the foundation and exterior walls of the Demised Premises which

are Landlord's responsibility" (R. 122). Thus, the Lease placed the maintenance obligations, including snow and ice removal from the sidewalk abutting the demised premises, on the tenant (R. 508-509, 510).

C. Plaintiff's Accident

SDJ is a wholesale meat company (R. 270). In 2007, Plaintiff was working in SDJ's kitchen cutting meat (R. 269, 272, 274). On the morning of January 22, 2007, he was cutting meat when he had to change his glove (R. 279). While walking on the sidewalk to enter the cafeteria to get a new glove, Plaintiff slipped and fell on ice (R. 279-281, 287). He described the ice as transparent (R. 287, 341, 346). While it was not snowing on January 22nd, Plaintiff believes that it had snowed two days earlier (R. 290, 328).

SDJ's employees were responsible for shoveling snow and ice from the sidewalk abutting SDJ's warehouse (R. 175-176, 276-277). Indeed, SDJ had two snow blowers to remove snow, shovels and salt (R. 176, 315-316). Plaintiff has also observed SDJ employees spreading salt on the sidewalk (R. 318). In contrast, Troon Management did not hire outside contractors to remove snow from the sidewalk (R. 515).

D. The Lower Court Order

Plaintiff commenced an action against Defendants for damages relating to his 2007 accident. Following the completion of discovery, Defendants sought summary dismissal of the Complaint in its entirety arguing, inter alia, that, as out-of-possession landlords who had delegated all responsibility to maintain the sidewalk clear of snow and ice, they owed no duty to Plaintiff and were not subject to liability.

By decision and order, dated June 23, 2016, the Supreme Court, New York County, denied Defendants' motion holding that "pursuant to Administrative Code § 7-210, property owners are now 'under a statutory nondelegable duty to maintain the sidewalk;' including a duty 'to remove snow, ice, dirt or other material from the sidewalk.'" (R. 8-16) The lower court thus found Defendant position that they were entitled to summary judgment by virtue of their asserted out-of-possession status to be "unwarranted" (R. 16).

E. The Appellate Division, First Department's Unanimous Reversal Of The Lower Court's Order

By decision and order, dated January 23, 2018, the Appellate Division, First Department unanimously reversed the denial of Defendants' summary judgment motion (R. 785-786). In doing so, the First Department held that Defendants could

not be liable "because they were out-of-possession landlords with no contractual obligation to keep the sidewalks clear of snow and ice" (R. 785).

On or about September 13, 2018, this Court granted Plaintiff's request for leave to appeal the First Department's decision and order. (R. 781)

POINT I

ADMINISTRATIVE CODE § 7-210 DOES NOT IMPOSE LIABILITY ON LANDLORDS FOR SNOW AND ICE WHERE THE OUT-OF-POSSESSION LANDLORD DELEGATES THE DUTY TO REMOVE SNOW TO ITS TENANT

A. Introduction

Plaintiff He argues that an owner's duty under Administrative Code § 7-210 to remove dirt, snow and ice from abutting sidewalks is non-delegable. According to Plaintiff, the First Department's decision conflicts both with an owner's duties under Administrative Code § 7-210 and decisional law from this Court and the Second Department. This Court, however, has never deemed the duties outlined under Administrative Code § 7-210 non-delegable. Further, the very statute relied upon - which language is to be strictly construed - contains no such limiting language.

For the reasons discussed below, the First Department's decision comports both with the legislative intent of Administrative Code § 7-210 and this Court's prior precedents on the duties of out-of-possession landlords. It is therefore respectfully submitted that this Court should affirm the First Department's decision, and make clear that an out-of-possession landlord is permitted to delegate its

duty - and the attendant liability - to keep abutting sidewalks free of ice, snow and other transient hazards.

B. State Of The Existing Law As To Out-Of-Possession Landlords

In its earliest decisions, this Court followed the rule that an out-of-possession landlord owed no duty to a third party injured on the premises with whom the landlord was not in privity of contract. Cullings v. Goetz, 256 N.Y. 287, 291 (1931). Even though this Court subsequently overruled Cullings, it continued to rely on the terms of the lease to ascertain the landlord's duties with respect to the property. Putnam v. Stout, 38 N.Y.2d 607, 617 (1976). (An out-of-possession landlord may be liable after the transfer of property if the landlord "has contracted by a covenant in the lease or otherwise to keep the land in repair"); Weiner v. Leroco Realty Corp., 279 N.Y. 127, 130 (1938) ("The lease indicated that the owner in this case made no attempt to evade its responsibility.") An out-of-possession landlord who relinquished control of the premises and was not contractually obligated to repair unsafe conditions, for example, would not be liable to employees of a lessee for personal injuries caused by an unsafe condition existing on the premises. Inger v. PCK Dev. Co., LLC, 97 A.D.3d 895, 896

(3rd Dep't 2012), lv. den'd, 19 N.Y.3d 816 (2012); Keum Ok Han v. Kemp, Pin & Ski, LLC, 142 A.D.3d 688, 688 (2nd Dep't 2016) ("Under New York common law, an out-of-possession landowner retains no general responsibility for keeping leased property in a reasonably safe condition"). Indeed, even in the face of non-delegable statutory duties such as those imposed by the Multiple Dwelling Law, owners who could demonstrate that they had divested themselves of possession and control of a building under a lease were not liable for a statutory violation. Worth Distributors, Inc. v. Latham, 59 N.Y.2d 231, 238 (1983).

The rule has evolved such that an out-of-possession landlord is not liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant unless the landlord creates the defect, Whittington v. Champlain Ctr. N. LLC, 123 A.D.3d 1253, 1254 (3rd Dep't 2014); Utica Mut. Ins. Co. v. Brooklyn Navy Yard Dev. Corp., 83 A.D.3d 817 (2nd Dep't 2011), or engages in an extra contractual course of conduct under which he or she makes repairs to the demised premises. Gronski v. County of Monroe, 18 N.Y.3d 374, 380 (2011). Additionally, when the landlord has reserved a right to re-enter to make repairs and has notice, imputed or otherwise, of the condition, that out-

of-possession landlord may also be held liable. Johnson v. Urena Serv. Ctr., 227 A.D.2d 325, 326 (1st Dep't 1996), lv. denied, 88 N.Y.2d 814 (1996). However, "[t]he mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises." Richer v. JQ II Assoc., LLC, 166 A.D.3d 692 (2nd Dep't 2018); Grady v. Hoffman, 63 A.D.3d 1266, 1268 (3rd Dep't 2009). ("The fact that Hoffman may have 'retained the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord'"). Even where lease contains a reservation of rights to repair and maintain, there must also be evidence that the alleged defect constitutes a design or structural defect that is contrary to a specific statutory safety provision for liability to attach. See, Brown v. BT-Newyo, LLC, 93 A.D.3d 1138, 1139 (3rd Dep't 2012); Velazquez v. Tyler Graphics, Ltd., 214 A.D.2d 489, 489 (1st Dep't 1995); Chery v. Exotic Realty, Inc., 34 A.D.3d 412, 413 (2nd Dep't 2006). ("Administrative Code of the City of New York §§ 27-127 and 27-128, which the plaintiff contends were violated by the defendant, are nonspecific and reflect only a general duty to

maintain premises in a safe condition.") Indeed, violation of a specific statute, which violation constitutes a structural or design defect, is the sine qua non of a claim against an out-of-possession landlord. See, Devlin v. Blaggards III Rest. Corp., 80 A.D.3d 497 (1st Dep't 2011), lv. den'd, 16 N.Y.3d 713 (2011); Nunez v. Alfred Bleyer & Co., 304 A.D.2d 734 (2nd Dep't 2003); Ahmad v. City of New York, 298 A.D.2d 473, 473-474 (2nd Dep't 2002); Eckers v. Suede, 294 A.D.2d 533 (2nd Dep't 2002); Rivera v. Wood, 276 A.D.2d 682, 683 (2nd Dep't 2000).

For example, in Devlin, the plaintiff sustained injuries when she slipped on a wet bathroom floor in her employer's demised premises. The condition was allegedly caused by a leaking air conditioning vent. The plaintiff claimed that because the vent was inspected by the out-of-possession landlord's superintendent, the building owner was aware of the defective condition several weeks before her accident. Id. In dismissing the plaintiff's claims against the out-of-possession landlord, the First Department held that the out-of-possession landlord "could only be found liable for failing to [exercise its right of re-entry to repair] if the nature of the defect that caused the injuries was a significant structural or design defect that was contrary to

a specific statutory provision." Id. at 497-498; See, also, DeJesus v. Tavares, 140 A.D.3d 433, 433 (1st Dep't 2016) (holding that the out-of-possession landlord could not be held liable where "the alleged leak in the pipe in the kitchen sink was not a significant structural or design defect, and plaintiff failed to cite any specific statutory safety provision that was violated"). Without a specific, structural code violation, mere notice of the condition was not sufficient. Sapp v. S.J.C. 308 Lenox Ave. Family Ltd. Partnership, 150 A.D.3d 525, 528 (1st Dep't 2017). ("Because defendant established that it was an out-of-possession landlord with respect to the staircase, any discovery into whether and how often it or its employees and representatives visited the premises, or whether there was a leak condition on the staircase that landlord had notice of, would be irrelevant.") As can be seen from the foregoing, the law on this issue is reflected in a solid and well-established body of authority.

Thus, based on the precedents of this and other courts, the law is settled that an out-of-possession landlord with a right of re-entry can only be liable for a design or structural defect that violates a specific safety code. Transient conditions such as snow and ice alone cannot form

the basis of liability against an out-of-possession landlord with a mere right of re-entry. See, Ross v. Betty G. Reader Revocable Trust, 86 A.D.3d 419, 420 (1st Dep't 2011) (holding grease on a sidewalk is not a significant structural or design defect); Placide v. Yadid, LLC, 24 A.D.3d 529, 529 (2nd Dep't 2005) (concluding that soapy or greasy "water" that flowed from tenant's car wash onto the sidewalk was not a significant structural or design defect); Ahmad v. City of New York, 298 A.D.2d 473, 473 (2nd Dep't 2002) (holding ice on a sidewalk was not a significant structure or design defect).

C. The Duties Enumerated Under Administrative Code § 7-210

i. The Rationale Behind Enacting Administrative Code § 7-210

With the law respecting out-of-possession landlords settled, on September 14, 2003, the legislature enacted Administrative Code § 7-210 which shifted tort liability for failing to maintain sidewalks from the City of New York to the adjacent property owner. See, Staruch v. 1328 Broadway Owners, LLC, 111 A.D.3d 698 (2nd Dep't 2013).

Administrative Code § 7-210 provides, in pertinent part:

> Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
>
> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property,

to maintain such sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

The plain language of Administrative Code § 7-210 does not impose strict liability upon the property owner; rather, the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable. Muhammad v. St. Rose of Limas R.C. Church, 163 A.D.3d 693, 693 (2nd Dep't 2018); Martinez v. Khaimov, 74 A.D.3d 1031, 1032 (2nd Dep't 2010) (holding that "the plaintiff must establish (1) the existence of a duty on the defendant's part as to the plaintiff, (2) a breach of this duty, and (3) a resulting injury to the plaintiff"); Early v. Hilton Hotels Corp., 73 A.D.3d 559, 560 (1st Dep't 2010).

While broadly-worded, numerous decisions properly have narrowed the application of Administrative Code § 7-210 through reference to other sections of the Administrative

Code. For example, in determining the scope of the undefined term "sidewalk," courts have turned to Administrative Code § 19-101 and determined that certain instrumentalities on the sidewalk remain the responsibility of the City. Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517 (2008) (tree wells); Alleyne v. City of New York, 89 A.D.3d 970, 971 (2nd Dep't 2011) (curbs); Vidakovic v. City of New York, 84 A.D.3d 1357, 1358 (2nd Dep't 2011) (pedestrian ramps); Flynn v. City of New York, 84 A.D.3d 1018, 1019 (2nd Dep't 2011) (fire hydrant and twelve-inch area surrounding the hydrant); Smirnova v. City of New York, 64 A.D.3d 641, 642 (2nd Dep't 2009) ("plywood boards affixed to the sidewalk by NYCTA were not part of the 'sidewalk'"). These, and similar, court decisions reaffirm the fact that, because Administrative Code § 7-210 is a legislative enactment in derogation of the common law, it must be strictly construed. Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y.3d 200, 206 (2004); Bisono v. Quinn, 125 A.D.3d 704 (2nd Dep't 2015); Boorstein v. 1261 48th Street Condominium, 96 A.D.3d 703, 704 (2nd Dep't 2012); Harakidas v. City of New York, 86 A.D.3d 624, 627 (2nd Dep't 2011); cf. Wischnie v. Dorsch, 296 N.Y. 257, 262 (1947) (holding that because it is a remedial statute, the Labor Law must be broadly construed and does not

distinguish whether the owner is in or out-of-possession, applying to the owner regardless of whether the tenant is in sole and exclusive possession and control). The decisions also confirm that Administrative Code §7-210 does not supersede the duties imposed under pre-existing regulations. Vucetovic, 10 N.Y.3d at 521; Roman v. Bob's Discount Furniture of NY, LLC, 116 A.D.3d 940, 941 (2nd Dep't 2014). ("[W]hile § 7-210 expressly shifts tort liability to the abutting property owner for injuries proximately caused by the owner's failure to maintain the sidewalk in a reasonably safe condition, it does not supersede pre-existing regulations such as 34 RCNY 2-07(b), which provides that 'owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware'").

ii. Administrative Code § 7-210's Utilization Of The Term "Owner" Does Not Create A Non-Delegable Duty On Property Owners

The word "owner" is not defined in Article 7 (addressing the liability of the City), Article 16 (dealing with sanitation) or Article 19 (addressing sidewalk and street maintenance) of the Administrative Code. Although seemingly clear on its face, courts routinely have been called upon to

interpret the term "owner." Indeed, this Court has recognized, "[t]hat the term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit.'" Scaparo v. Village of Ilion, 13 N.Y.3d 864, 866 (2009). See, also, Ritter v. Fort Schuyler Mgmt. Corp., 169 A.D.3d 1419, 1420, (4th Dep't Feb. 1, 2019); Lai-Hor Ng Yiu v. Crevatas, 33 Misc. 3d 267, 270 (Sup. Ct. Kings Co. 2011) (holding that "dictionary definitions of what constitutes an owner encompass both one who has the fee or title to property as well as the broader concept of one who has a right to occupy and use property"), aff'd sub nom, Ng Yiu v. Crevatas, 103 A.D.3d 691 (2nd Dep't 2013).

Additionally, while a court should construe a statute so as to give effect to the plain meaning of the words used, it is equally important that "in interpreting a statute, [a court] should attempt to effectuate the intent of the Legislature." Patrolmen's Benev. Ass'n of City of New York v. City of New York, 41 N.Y.2d 205, 208 (1976); Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 207 (1989). ("It is

fundamental that in construing the words of a statute the legislative intent is the great and controlling principle.")

Here, recognizing that a landowner may delegate the duty to alleviate transient conditions on an abutting sidewalk effectuates the intent of the Legislature in enacting § 7-210. Doing so ensures that the obligation to ensure the safety of pedestrians rests with the party who, as a practical matter (as well as geographically), is in the best position to address such issues as snow and ice accumulation. Thus, there is no basis in law or in practicality to preclude an out-of-possession landlord from delegating such a duty.

iii. When Read In Pari Materia With Other Relevant Code Sections, It Is Clear That Administrative Code § 7-210 Does Not Create A Non-Delegable Duty On The Part Of The Owner To Maintain Sidewalks Free Of Snow, Dirt And Ice

Courts and the Legislature have recognized that § 7-210 of the Administrative Code was enacted to, among other things, encourage compliance with pre-existing obligations:

> Another intent of the new sidewalk law was to address an anomaly in the prior statutory scheme, which ostensibly required property owners to maintain the sidewalks abutting their properties in good repair, but imposed no tort liability for their passive failure to do so . . . Therefore, the intent of the new sidewalk law, aside from financial considerations, was to encourage owners to comply with their pre-existing

> obligations under Administrative Code §§ 16-123(a) and 19-152(a) . . .. (See, 2003 N.Y. City Legis Ann, at 330-334).

Ortiz v. City of New York, 67 A.D.3d 21, 26 (1st Dep't 2009), rev'd on other grounds, 14 N.Y.3d 779 (2010) [Internal citations omitted]; Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517, 521 (2008) (noting that "the language of § 7-210 'mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code §§ 19-152 and 16-123'") [Internal citations omitted]. Thus, in interpreting the word "owner," the pre-existing obligations set out in Administrative Code § 16-123 are relevant.

As noted above, the Legislature, in enacting § 7-210, intended in part to reconcile the property holder's sidewalk maintenance duties set forth in §§ 16-123 and 19-152 with the City's duties. Further, in as much as these Administrative Code sections all address the same issue, they must be read in pari materia. See, e.g., Matter of Albany Law Sch. v. N.Y. State Off. Of Mental Retardation & Devel. Disabl., 19 N.Y.3d 106 (2012). A review of § 16-123 in particular clearly demonstrates that § 7-210 was not intended to create a non-delegable duty in this instance.

Administrative Code § 16-123(a) provides:

§ 16-123. Removal of snow, ice and dirt from sidewalks; property owners' duties.

a. Every owner, lessee, tenant, occupant, or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall, or after the deposit of any dirt or other material upon such sidewalk, remove the snow or ice, dirt, or other material from the sidewalk and gutter, the time between nine post meridian and seven ante meridian not being included in the above period of four hours.

By its very language, Administrative Code § 16-123 imposes a duty on lessees, tenants, occupants or other persons "having charge of any building" that abuts a public sidewalk. Nothing in the legislative history or case law suggests that the owner's duties were concurrent with a tenant's duty to clear the sidewalk of transient conditions where the tenant was the best in position to address such transient hazards and was charged with maintenance obligations, for example, under a lease. To the contrary, both the First and Second Departments have determined that an owner's duty under § 16-123 is not non-delegable, and a property owner will therefore not be vicariously liable for its tenant's violation of Administrative Code § 16-123 where the tenant had removed snow and ice. Crudo v. City of New York, 42 A.D.3d 479, 480 (2nd Dep't 2007) ("the defendant

property owner made a prima facie showing of his entitlement to judgment as a matter of law by submitting evidence that neither he nor anyone acting on his behalf made the condition of the sidewalk more hazardous through negligent or improper snow removal efforts"); Feiler v. Greystone Bldg. Co., 302 A.D.2d 221 (1st Dep't 2003). ("We reject plaintiff's argument that Administrative Code § 16-123, which makes sidewalk snow removal the responsibility of "[e]very owner, lessee, tenant, occupant, or other person, having charge of any [abutting] building or lot of ground," renders landlords vicariously liable for their tenants' negligent snow removal.")

Expanding on this, several courts have concluded that the record owner is automatically liable under Administrative Code § 7-210. Keech v. 30 E. 85th St. Co., LLC, 154 A.D.3d 504, 504 (1st Dep't 2017); Evans v. State, 55 Misc. 3d 221, 227 (Ct. Cl. 2016); Araujo v. Mercer Sq. Owners Corp., 95 A.D.3d 624, 624 (1st Dep't 2012). (An owner of an individual condominium unit in the building, is not an "owner" for purposes of Administrative Code of the City of New York § 7-210). Separately, notwithstanding the fact that Administrative Code § 7-210 uses the word "owner," relying on this Court's decision in Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136, 141 (2002), both the First

and Second Departments have found that the duties inscribed in Administrative Code § 7-210 will apply to a tenant where an Espinal exception exists. Hsu v. City of New York, 145 A.D.3d 759, 760 (2nd Dep't 2016) (applying § 7-210 where "it is undisputed that the City was the tenant and not the owner of the premises"); Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 514 (1st Dep't 2010).

As discussed above, the word "owner" in Administrative Code § 7-210 is not constrained to the titled property owner. Further, courts have uniformly recognized that because Administrative Code § 16-123 includes tenants, lessees and other persons having charge of a building or lot abutting a sidewalk, Administrative Code § 16-123 was certainly intended to require that parties in possession be responsible to maintain and correct snow-covered sidewalks. Balsam v. Delma Eng'g Corp., 139 A.D.2d 292, 296 (1st Dep't 1988). ("Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.") Thus the duties set out under Administrative Code § 16-123 do not merely apply to the record owner and do not impose a non-delegable duty on the property owner for snow and ice remediation.

Reading § 16-123 in pari materia with Administrative Code § 7-210, then, it is clear that the legislature did not intend to deprive property owners of the ability to delegate maintenance responsibilities (and the corresponding legal duty) in the course of enacting § 7-210.[2] Indeed, to read § 7-210 as prohibiting delegation by out-of-possession landlords would essentially - and impermissibly - negate § 16-123's allowance for the duty to be extended to tenants, licensees and others in control of the premises. Rangolan v. Cty. of Nassau, 96 N.Y.2d 42, 48 (2001). (Noting "statutory construction 'resulting in the nullification of one part of the [statute] by another,' is impermissible, and violates the rule that all parts of a statute are to be harmonized with each other, as well as with the general intent of the statute.")

Consequently, a review of the relevant code sections demonstrates that § 7-210 was not intended to impose a non-delegable duty upon out-of-possession landlords to keep abutting sidewalks clear of transient hazards.

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[2] Conversely, § 19-152, pertaining to duties to repair, repave and construct sidewalks - which is clearly not at issue here - has been found to create a non-delegable obligation to repair such structural defects.

D. The First Department's Decision Harmonizes The Existing Law Regarding Out-Of-Possession Landlords With Administrative Code § 7-210

In this case, Plaintiff wholly ignores the terms of the lease between Troon Management and SDJ Trading, Inc. Because parties in New York may generally contract as they wish, J.P. Morgan Securities, Inc. v. Vigilant Insurance Company, 21 N.Y.3d 324, 334 (2013), and the best evidence of a contracting party's intent is what they say in their writing, Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002), the analysis of the relative duties and obligations must begin with an examination of the lease's terms. In this case here, the lease expressly provided that SDJ had the contractual duty to maintain the sidewalk abutting its leased premises and to keep it "free from ice, snow, dirt and rubbish" (R. 109). In furtherance of that contractual undertaking, SDJ purchased snow blowers, salt, and had its employees clear the sidewalk of snow and ice (R. 276-277, 315-316). Bartels v. Eack, 164 A.D.3d 1202, 1202-1203 (2nd Dep't 2018). ("The defendants also demonstrated that the parties agreed that the plaintiff would be responsible for snow and ice removal and that the plaintiff actually undertook to conduct snow and ice removal.") Indeed, Plaintiff admitted that he had observed SDJ employees

removing snow and ice from the sidewalk when necessary (R. 318). In contrast, Troon Management did not hire outside contractors to remove snow from the sidewalk (R. 515).

In interpreting Administrative Code § 7-210 against the background of an out-of-possession landlord's ownership, the First Department has consistently held that snow and ice is not a structural defect. See, Fuentes-Gil v. Zear LLC, 163 A.D.3d 421, 422 (1st Dep't 2018). ("Snow or ice is not a significant structural or design defect for which an out-of-possession landlord may be held liable"); Cepeda v. KRF Realty LLC, 148 A.D.3d 512, 513 (1st Dep't 2017); Bing v. 296 Third Ave. Group, L.P., 94 A.D.3d 413 (1st Dep't 2012). Thus, even where a plaintiff has alleged a violation of Administrative Code § 7-210, there can be no liability if the condition is snow or ice where the out-of-possession landlord has delegated the duty to remove snow and ice from the sidewalk to the tenant in possession. Based on current law as it relates to out-of-possession landlords, Defendants were out-of-possession landlords who fully delegated their duty to SDJ, and consequently owed no duty to Plaintiff.

In arguing that the First Department's decision to dismiss claims for transient conditions such as snow and ice against an out-of-possession landlord conflicts with

Administrative Code § 7-210, Plaintiff overlooks the legislative intent of Administrative Code § 7-210. See, Plaintiff's App. Br. at p. 3. Indeed, while Plaintiff focuses on the use of the word "owner" in Administrative Code § 7-210, as noted above, the language of Administrative Code § 16-123 is broader than that of Administrative Code § 7-210 and mandates that a lessee having charge of the sidewalk clear snow and ice. Finally, because it was the intent of the Legislature to encourage parties to comply with their pre-existing obligations under the Administrative Code, and not to supersede existing regulations, the First Department's decision is consistent with the legislative intent.

While the Second Department has not specifically addressed the parameters of Administrative Code § 7-210 where the defendant is an out-of-possession landlord and the allegedly defective condition is snow and ice,[3] cf. Palazzo v. Bunag, 43 Misc. 3d 4, 6 (App. Term 2nd Dep't 2014); Litkenhaus v. 1158 Hylan Boulevard Corporation, 26 Misc. 3d 19, 21 (App. Term 2nd Dep't 2009), it has a long history of dismissing claims against out-of-possession landlords where, as here,

[3] Reyderman v. Meyer Berfond Tr. #1, 90 A.D.3d 633 (2nd Dep't 2011) and James v. Blackmon, 58 A.D.3d 808 (2nd Dep't 2009) both involved structural defects.

the alleged defect is not structural in nature. See, Derosas v. Rosmarins Land Holdings, LLC, 148 A.D.3d 988, 991 (2nd Dep't 2017); Hunting Ridge Motor Sports v. County of Westchester, 80 A.D.3d 567, 568 (2nd Dep't 2011); Santos v. 786 Flatbush Food Corp., 89 A.D.3d 829 (2nd Dep't 2011) (Water in the aisle of a supermarket is nonstructural); Nikolaidis v. La Terna Rest., 40 A.D.3d 827, 828 (2nd Dep't 2007); Yadegar v. Int'l. Food Mkt., 37 A.D.3d 595, 596 (2nd Dep't 2007). (Broken asphalt in the parking lot did not constitute a significant structural or design defect); Gavallas v. Health Ins. Plan of Greater New York, 35 A.D.3d 657, 658 (2nd Dep't 2006). (Out-of-possession landlord was not responsible for tracked-in water); Couluris v. Harbor Boat Realty, Inc., 31 A.D.3d 686, 687 (2nd Dep't 2006) (Broken floor tiles and missing drain pipe cover were not structural defects); Reichberg v. Lemel, 29 A.D.3d 664, 665 (2nd Dep't 2006) ("the cause of the fire did not involve the structure of the building"); Kilimnik v. Mirage Rest., Inc., 223 A.D.2d 530, 530 (2nd Dep't 1996). (The wet surface and/or a metal strip was not structural in nature.)

With respect to snow and ice, in particular, the Second Department has consistently dismissed claims against out-of-possession landlords. Vicchiarelli v. Cold Spring Hills

Realty Co., LLC, 164 A.D.3d 542, 543 (2nd Dep't 2018); Keum Ok Han, 142 A.D.3d at 689; Repetto v. Alblan Realty Corp., 97 A.D.3d 735, 737 (2nd Dep't 2012). Perhaps the best bellwether of how the Second Department would handle this issue, however, is its decision in Paperman v. 2281 86th St. Corp., 142 A.D.3d 540 (2nd Dep't 2016).

In Paperman, the plaintiff slipped and fell on a sidewalk in front of defendant 2281 86th Street Corp.'s building which had been leased to defendant EZ Corner, Inc. The plaintiff settled with the tenant and proceeded to trial against the out-of-possession building owner. The trial court allowed 2281 86th Street Corp. to submit evidence of EZ's negligence to the jury. The jury found for the owner and dismissed the plaintiff's complaint. The plaintiff appealed citing to the nondelegable duty under Administrative Code § 7-210. The Second Department affirmed the jury's dismissal of the complaint. While not explicit, had the Second Department agreed that the out-of-possession landlord's duty under Administrative Code § 7-210 was nondelegable, such that the landlord was liable notwithstanding the tenant's obligations where the condition is snow and ice, the court would not have affirmed the jury's

finding. Thus, contrary to Plaintiff's position, there is no conflict between the First and Second Departments.

The language in Administrative Code § 16-123 expressly includes parties such as SDJ, who have both undertaken a contractual obligation and have exclusively performed snow removal. Because Troon Management is an out-of-possession landlord that did not retain a duty to maintain the sidewalk, it does not owe Plaintiff a duty under Administrative Code § 7-210. Thus, the First Department's decision comports with the legislative intent of Administrative Code § 7-210 and this Court's precedents.

E. This Court's Decision In Sangaray Does Not Warrant The Reversal Of The Appellate Division Order

Plaintiff relies heavily on this Court's decision in Sangaray v. W. River Assocs., LLC, 26 N.Y.3d 793 (2016), asserting that it supports his position that the landowner's duty under § 7-210 is non-delegable. Tellingly, the Sangaray decision is silent as to whether an owner may or may not delegate the duty to maintain its abutting sidewalk. In fact, that was not the issue before this Court in Sangaray. Rather, in Sangaray this Court considered the question of whether a neighboring property owner is absolved of liability for a sidewalk defect where the actual injury occurs on a

sidewalk abutting another's property. Thus, this Court held:

> Simply put, § 7-210 (b), by its plain language, does not restrict a landowner's liability for accidents that occur on its own abutting sidewalk where the landowner's failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff's injuries. Furthermore, our interpretation of § 7-210 as tying liability to the breach of that duty when it is a cause of the injury is consistent with the purpose underlying the enactment of that provision, namely, to incentivize the maintenance of sidewalks by abutting landowners in order to create safer sidewalks for pedestrians and to place liability on those who are in the best situation to remedy sidewalk defects. Id. at 799.

In so holding, this Court's decision in Sangaray supports the proposition that a landowner should be permitted to delegate its duty under § 7-210 with respect to such transient hazards as snow and ice. To this end, it is the in-possession tenant who is best situated to resolve any such hazards and which would, therefore, best ensure the safety of the general public traversing the sidewalk. Consequently, affirmance of the First Department decision and recognition that the transient duties under § 7-210 are, in fact, delegable comports with the policy considerations at issue. See, Feliberty v. Damon, 72 N.Y.2d 112, 119 (1988). (Noting

that the consideration of whether a particular duty or liability for the breach of that duty is properly categorized as "nondelegable" necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations.)

F. The Appellate Division's Order Should Be Affirmed

To find, as Plaintiff urges, that an out of possession landlord has a nondelegable duty to clear snow and ice under Administrative Code § 7-210, this Court would have to ignore the legislative intent of § 7-210, the pre-existing duties set out in the plain language of Administrative Code § 16-123 and binding precedents that have defined the scope of an out-of-§possession landlord's duty to remedy transient conditions. Because the First Department's decision balances the precedents that have defined an out-of-possession landlord's duties, with the legislative intent of Administrative Code § 7-210, the First Department's decision should be affirmed.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Jericho, New York
April 8, 2019

Respectfully submitted,

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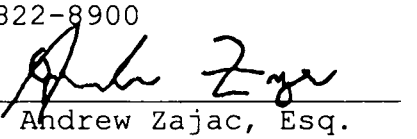
By: 
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CERTIFICATION PURSUANT TO §500.13(c)(1)

Court of Appeals

I hereby certify pursuant to §500.13(c)(1) that the foregoing brief was prepared on a computer.

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