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 THE BEHALF OF NEW YORK STATE TRIAL LAWYERS' ASSOCIATION

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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.

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STATE OF NEW YORK
COURT OF APPEALS

----------X **APL-2018-00168**

XIANG FU HE, **Index #111331/2009**

Plaintiff-Appellant,

-against-

BRIEF OF AMICUS CURIAE NEW YORK STATE TRIAL LAWYERS' ASSOCIATION

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.

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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.

----------X

PRELIMINARY STATEMENT

In this personal injury action, this Court is confronted with the issue of whether the duties imposed under Administrative Code §7-210 are delegable, such that a so-called "out-of-possession" property owner can escape its duties by delegation. It is NYSTLA's position, in accordance with the legislative history underlying

this regulation, as well as the better-reasoned decisional law, that the duties are not delegable through renting or leasing the property, and/or by imposing maintenance duties on third parties, even by contract.

STATEMENT OF THE CASE

THE UNDERLYING ACCIDENT

On January 22, 2007, the plaintiff, Xiang Fu He ("plaintiff"), an employee of SDJ Trading Inc. ("SDJ"), fell on snow and ice while walking on a sidewalk abutting 1177A Flushing Avenue in Brooklyn, New York, which was owned by the defendants-appellants ("defendant[s]") and leased to SDJ, a third-party defendant in this action. The ice had not been properly cleared from the sidewalk (287-92).[1] Henrique Gurarrama executed a written statement that the sidewalk had been shoveled prior to the accident but remained covered with uneven patches of snow and ice; the sidewalk was not salted and contained dirty footprints which were frozen solid (385).

DEFENDANTS' SUMMARY JUDGMENT MOTION; DECISION ON APPEAL; LEAVE TO APPEAL TO THIS COURT

The case law is now split in the First and Second Departments on the issue of whether the duties set forth under Administrative Code §7-210 can be delegated. Defendants moved for summary judgment, positing that they were out-of-possession landowners who

[1] Numbers in parentheses refer to pages of the record on appeal.

could not be held liable for plaintiff's accident, because the premises had been leased to SDJ, which, under the terms of the lease, was primarily responsible for clearing ice and snow from the abutting sidewalk (17-31).

In opposition, plaintiff asserted that the duty under §7-210 was non-delegable despite any contrary provision in the lease (589-93).

On June 22, 2016, the trial court rejected defendants' position and denied the motion.

The First Department, on January 23, 2018 (157 AD3d 586 [1st Dept. 2018]), reversed and dismissed the complaint, finding that defendants could not be held liable "for injuries allegedly sustained by plaintiff when he slipped on snow and ice on the sidewalk adjacent to their property, because they were out-of-possession landlords with no contractual obligation to keep the sidewalks clear of snow and ice, and the presence of snow and ice does not constitute a significant structural or design defect."

On or about September 13, 2018, plaintiff's motion for leave to appeal to this Court was granted (32 NY3d 904 [2018]). Briefs have been submitted by the parties and a certain *Amica Curiae* representing defendants' interests is pending permission. NYSTLA, as an organization representing the plaintiff's tort bar statewide, weighs in on this issue by means of this brief.

DISCUSSION

THE APPELLATE DIVISION ERRED IN FINDING THAT THE DUTIES SET FORTH UNDER ADMINISTRATIVE LAW §7-210 CAN BE DELEGATED.

Section §7-210 of the Administrative Code unambiguously imposes a duty of reasonable maintenance upon owners of certain real property with respect to abutting sidewalks; owners are "liable for personal injury that is proximately caused by [the] failure" to meet such obligations. See, Sangaray v. West River Assoc., 26 NY3d 793, 797 [2016]. In Sangaray, plaintiff's right toe struck a raised portion of a sidewalk, which abutted two properties. This Court, reversing the Appellate Division, held that while plaintiff tripped on "an expansion joint" abutting the co-defendant's property, that did not "end the inquiry." While the moving defendant had no general duty to remedy defects in front of the property of the codefendant, §7-210[a] "imposed a duty on [the moving defendant] to maintain the sidewalk abutting its premises in a reasonably safe condition." Based on the text of the regulation, the moving defendant could be held "liable for injuries where its failure to maintain its sidewalk is a proximate cause of those injuries." Since the "sunken sidewalk flag that plaintiff traversed abutted [the moving defendant's] property, and plaintiff claimed that [the moving defendant's] sidewalk flag had sunk lower than the expansion joint upon which plaintiff allegedly tripped, the moving defendant did not establish prima facie entitlement to judgment as a matter of law in the first

instance" (26 NY3d at 799-800).

Administrative Code §7-210 provides:

> [a] It shall be the duty of the owners 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...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 shall not be limited to, the negligent failure to...repair or replace defective sidewalk flags.

Prior to the adoption and passage of that regulation, property owners in New York City had a statutory duty to "install, construct, repave, reconstruct, and repair the sidewalk flags in front of or abutting such property" (Administrative Code §19-152[a]), and to remove "snow, ice, dirt or other material from the sidewalk" (§16-123[a]). Failure to comply resulted in fines or an obligation to reimburse the City for its expenses incurred in performing the work. However, there was no express provision for tort liability for injuries to pedestrians, which remained upon the City as the owner of all public sidewalks. See, Vucetovic v. Epsom Downs, Inc., 10 NY3d 517, 520-521 [2008]; Administrative Code §§19-152[e], 16-123[e][h].

This Court held, prior to the enactment of §7-210 in 2003 by the New York City Council, that an abutting landowner could be

liable for accidents on sidewalks only where the owner affirmatively created the defective condition which led to the accident or put the sidewalk to a special use. See Vucetovic v. Epsom Downs, supra; Hausser v. Giunta, 88 NY2d 449 [1996].

The City Council changed this paradigm when it adopted §7-210 so as to transfer tort liability for injuries resulting from defective public sidewalk conditions from the City to adjoining property owners, believing that this would result in substantial cost saving, and that it was the landowner's responsibility to maintain and repair their sidewalks (Rep. of Comm. on Transp., at 5, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

As this Court noted in Vucetovic, supra at 51, §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code §19-152 and §16-123." See also, Office of Mayor Mem. In Support, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

The First Department itself has, in some of its decisions, agreed with NYSTLA's view that the duties under §7-210 are non-delegable. See, Wahl v. JCNYC LLC, 133 AD3d 552 [1st Dept. 2015]; Montalbano v. 136 W. 80 St., 84 AD3d 600 [1st Dept. 2011]; Doyley v. Steiner, 107 AD3d 517 [1st Dept. 2013]; Spector v. Cushman & Wakefield, 87 AD3d 422 [1st Dept. 2011]; Cook v. Con Ed, 51 AD3d 447 [1st Dept. 2008]; Collado v. Cruz, 81 AD3d 542 [1st Dept. 2011];

Carey v. Capital Cleaning, 106 AD3d 561 [1st Dept. 2013]; Chan v. Lee & Son Realty, 110 AD3d 637 [1st Dept. 2013]; Oduro v. Bronxdale Outer Inc., 130 AD3d 432 [1st Dept. 2015].

NYSTLA believes that this Court in Sangaray v. W. River Assoc., supra, endorsed this very rule. The Second Department has done the same. See, Michalska v. Coney Island Site, 1824 Houses, 155 AD3d 1024 [2d Dept. 2017]; Scuteri v. 731 13th Ave., 150 AD3d 1172 [2d Dept. 2017]. Since the purpose of the regulation was to shift "tort liability for injuries arising from a defective sidewalk from the City…to the abutting owner" (Martin v. Rizzatti, 142 AD3d 591. 593 [2d Dept. 2016]), and since it was "designed for the safety and protection of the public…" (Castillo v. Bangladesh Society, 12 Misc.3d 1170[A] [Sup. Ct. 2006]), holding that the responsibilities under the statute can be delegated is contrary to the regulation's stated purpose.

Justice Saxe, in dissent to the First Department's decision in Sangaray v. W. River Assoc., supra at 602, 604,[2] stated:

> According to a Report of the Committee on Transportation, an important purpose of enacting the provision was to encourage the maintenance of sidewalks in good repair, by ensuring that those who were in the best position to be aware of the need for repairs - namely, the abutting property owners - are motivated to make emergency necessary repairs in order to avoid liability.

[2] This Court, in reversing the Appellate Division majority implicitly, if not explicitly, agreed with Justice Saxe's legal analysis.

In this regard, appellate precedent which permits owners to delegate sidewalk maintenance to tenants is contrary to this general principal. See, Martin v. Rizzatti, supra; Collado v. Cruz, supra.

The First Department in Bonifacio v. 910-930 S. Boulevard, 295 AD2d 86, 90-1 [1st Dept. 2002], citing to decisional law from this Court (Guzman v. Haven Plaza Hous., 69 NY2d 559 [1987]; Worth Distrib. v. Latham, 59 NY2d 231 [1983]; Weiner v. Leroco Realty, 279 NY 127 [1938]; Tkach v. Montefiore Hospital, 289 NY 387 [1943]), wrote of the unfairness and impropriety of allowing an owner to shift the burden of a rule of law obligating the owner to perform a certain act to a third party by the mere expedient of a lease.

In Bonifacio, the First Department specifically held that the owner of a multiple dwelling could not "rid itself of its obligations under Multiple Dwelling Law §78 by the simple expedient of voluntarily leasing the building to another with a document that does not contain a right of re-entry", given "the stringent and non-delegable nature of the duty imposed by §78", as such a "result" would be "inappropriate" (295 AD2d at 90).

In Weiner v. Leroco Realty, supra, this Court, when construing §78 and §325 of the Multiple Dwelling Law, stated: "However this may be, the owner does not escape liability by making a lease. By leasing the premises to some irresponsible person, owners could very readily shift the burden and nullify the purposes of the law."

A duty that is non-delegable, we submit, does not become capable of delegation merely by the execution of a lease or other writing, such that an intended beneficiary of the duty is deprived of a right of recovery based on the failure to carry out that duty. Where the law imposes a non-delegable duty on a particular class of defendant, that defendant's remedy, where injury is caused by a third party who assumes the duty based upon an agreement with the defendant, is to seek contribution or indemnity from that third party. See, Rogers v. Dorchester Assoc., 32 NY2d 553 [1973].

Depriving the injured party, an intended beneficiary of the rule of law, of direct compensation from the defendant upon whom the duty is placed is simply incorrect. Indeed, it has been held that a defendant's attempt to negate a duty of care even by adoption of a policy that permits the defendant to delegate the duty does not constitute a proper defense to a tort action based on breach of that duty of care. See, Zipkin v. City of New York, 196 AD2d 865 [2d Dept. 1993] (Where the City defended a case involving a trip and fall on a sidewalk by asserting that it gave "priority to making repairs in more heavily populated areas", the Second Department found that the trial court "properly excluded evidence of such policies" because it had "a duty to maintain sidewalks" and "an alleged policy not to repair the type of defect at issue is not a viable excuse in this case").

NYSTLA submits that those First Department cases holding that the duties imposed under the regulation are delegable (Cepeda v. KRF Realty, 148 AD3d 512 [1st Dept. 2017; Fuentez-Gill v. Zear LLC, 163 AD3d 421 [1st Dept. 2018]) are plainly contrary to case law dealing with non-delegable duties. If, as the First Department held in Montalbano v. 136 W. 80 St., supra that §7-210 "does not make persons who exercise control over the sidewalk liable - it refers only to owners of real property", subsequent decisions permitting an owner to escape liability through delegation represent an incorrect legal standard. See, Bonifacio v. El Paraiso Food Market, 109 AD3d 454 [2d Dept. 2013].

Even under the old common law scheme, in non-statutory duty cases, this Court has looked askance upon attempts by abutting owners to be relieved of liability regarding sidewalk conditions. Those owners, prior to the adoption of §7-210, were required to maintain sidewalks that abutted their premises, so they did not become dangerous (Klepper v. Seymour House, 246 NY 85 [1927]; Trustees of Canandaigua v. Foster, 156 NY 354 [1898]). In Appel v. Muller, 262 NY 278, 280-1 [1933], this Court stated:

> The owner may absolve himself from this duty by nothing less than "alienation of the entire property, either permanently, as by deed, or temporarily, as by lease" [cits.]. If, by lease, he vests the tenant with exclusive possession, thereby depriving himself of the power of entry to make repairs, he is not liable to a passerby, if the building or a particular part thereof, due to a condition of disrepair arising in the course of the

> tenant's occupancy, fall upon and injure him. However, if he has covenanted with the tenant to make repairs, he is liable to the passerby for injuries inflicted.

But the Appel court also noted that any agreement between the landlord and the tenant does not necessarily deprive an injured passerby of a means of recovery.

A party having a non-delegable duty to act cannot relieve himself or herself of liability "by any contract which he may make for its performance by another person", even if he "may have used the utmost care in selecting an agent to perform this duty" or "has entered into a contract with any person by which the latter undertakes to perform the duty"; the one with the duty is obligated to "do the thing, not merely to employ another to do it...If the appellant could relieve himself from the personal duty of having his elevators operated with reasonable care, by making a contract with others to perform that duty for him, the same thing could be done by a hotelkeeper...but in just such case we have held that the duty of reasonable care...is one that cannot be delegated" (Sciolaro v. Asch, 198 NY 77, 82-3 [1910]).

Plainly, where a landowner has a recognized duty of care, he or she "may not escape performance by delegating the duty to another" (Hyman v. Barrett, 224 NY 436, 438 [1918]). Where, for example, a company that undertakes work on a public highway which, unless carefully done, will create dangerous conditions for those using

the highway in the usual manner, "is under a duty to use requisite care", a duty that "cannot be delegated" (Wright v. Tudor City, 276 NY 303, 307 [1938], citing Boylhart v. DiMarco & Reimann, 270 NY 217, 220 [1936]; see generally, Rohlfs v. Weil, 271 NY 444 [1936]).

NYSTLA believes that the proper rule to be applied is that "An out-of-possession landlord" cannot be relieved of its "non-delegable duty" under §7-210 "to maintain the sidewalk in a reasonably safe condition" (Reyderman v. Meyer Berfond Trust, 90 AD3d 633-4 [2d Dept. 2011]).

Here, moreover, defendants did not even establish that they were out-of-possession owners. See, Gronski v. Monroe Co., 18 NY3d 734 [2011]). Lloyd Nelson, the building superintendent, testified that he inspected the premises three times per week, and he checked the sidewalk for defects and resolved any issues he discovered (705-07). Paragraph 4 of the lease requires defendants to "maintain and repair the public portions of the building, both exterior and interior" (538). The First Department itself has interpreted such a lease provision as one potentially imposing liability upon the landlord. See, Ledesma v. AMA Grocery, 145 AD3d 477 [1st Dept. 2016].

This is not a situation where the landlord entered into a triple net lease for the entire premises, such that it had no right to inspect or control the property. Even if it were, it should be irrelevant, as argued above, whether the property is owner occupied

(except 1-3 family owner occupied), partially leased or triple net leased, right of reentry retained or not, whether or not the lease places any responsibility on the tenant to maintain the sidewalk: A non-delegable duty, by definition, cannot be delegated. If another party fails of its duty and a personal injury case results, the landlord may seek contribution and/or indemnification from the affirmatively negligent actor, but the plaintiff should not be non-suited as a result.

The enactment of §7-210 fundamentally changed tort law in this area by expressly imposing a non-delegable duty upon abutting landowners, so as to relieve the City of what was previously its non-delegable duty; the legislative history makes this clear, and this Court should hold that defendants in this case should not be relieved of responsibility for the sidewalk condition that caused plaintiff's accident, merely by executing a lease.

This week, in Branciforte v. 2248 31st St., 2019 NY Slip. Op. 0284 [2d Dept. 2019], the Second Department again noted that §7-210 of the Administrative Code imposes a non-delegable duty on owners to maintain the abutting premises in a reasonably safe condition. Since that statute is in derogation of the common law, and must be strictly construed in favor of plaintiffs (See, Doremus v. Lynnbrook, 18 NY2d 362 [1966]), NYSTLA submits that this Court should follow the better-reasoned decisions, which hold that non-

delegable duties cannot be avoided by means of contract or lease, especially in cases involving injury on a public way. See, Sobel v. City of New York, 9 NY2d 187 [1961].

Indeed, to hold otherwise, NYSTLA argues, would make the sidewalks less safe since tenants do not have the same financial interest in the property, are far more transient than owners, less likely to have adequate financial protection in the form of assets or insurance, and are more likely to ignore their obligations as they only arise contractually and not statutorily.

The amicus brief for the Defense Association of New York posits that the First Department's decision can be justified because §16-123 of the Administrative Code can be read *in para materia* with §7-210 (Brief at 23-24). Although the defense amicus concedes that §7-210 uses the term "owner", reading the two statutes *in para materia* makes it clear that the "Legislature did not intend to deprive property owners of the ability to delegate maintenance responsibilities" (Brief at 27). The defense position is without merit.

As a matter of statutory interpretation, different regulatory enactments relating generally to the same subject matter can be construed *in para materia* such that they "form part of the same statute" (Khela v. Neiger, 85 NY2d 333, 336-7 [1999]). However, "legislative intent is the great and controlling principle, and

the proper judicial function is to discern and apply the will of the [enactors]" (ATM1 v. Landaverde, 2 NY3d 472, 477 [2004]).

Of course, the clearest indicator of the enactor's intent is the text of the statute or regulation, and "courts should construe unambiguous language to give effect to its plain meaning" (Daimler Chrysler Corp. v. Spitzer, 7 NY3d 653, 660 [2006]). Chapter §16 of the Administrative Code was not designed to supplant tort liability, but deals generally with *sanitation* (See, §16-101), while Chapter §7 deals generally with actions against the City; accordingly, though the regulations use similar language, they don't deal with shifting tort liability to a landowner. Moreover, §19-152 deals specifically with the "duties and obligations of *property owners* with respect to sidewalks and lots." Using the defense amicus's own logic, then, §16-123 cannot be read *in para materia* with §7-210 to negate the express language in the latter and confirmed in §19-152 dealing with the responsibility of "an owner."

The Defense Association's argument that §7-210 must be read *pari materia* with §16-123 and §19-153 is also contrary to the plain meaning of §7-210, the fundamental rules of statutory construction and eviscerates the legislature's intent underlying the statue's enactment. There is nothing contained in the statute or the legislative history which even remotely suggests that a landlord's

non-delegable duty is limited to repairing structural defects and that it can delegate its responsibility to with regard to clean and maintaining sidewalks abutting their property.

If it was legislature's intention to have §7-210 read in *pari materia* with §16-123 and §19-153, the statute would not have stated *"[n]otwithstanding any other provision of law, the owner of real property*...shall be liable for any...personal injury...caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (emphasis added).

Moreover, if it was the legislature's intention to limit a landlord's non-delegable duty to repairing structural defects and permit owners to delegate their responsibility with regard to removing snow, ice and other transient conditions, the statue would not have stated:

> *"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"* (emphasis added).

The reasoning underlying the Defense Association's argument ignores the terms of the statute, which, as stated above, obligates owners to, among other things, "remove snow, [and] ice...from the sidewalk". If it was the legislature's intent to limit a landlord's non-delegable duty to repairing structural sidewalk defects, the statue would have clearly stated so. The statute's legislative

history confirms that the First Department's decision and the Defense Association's arguments attempting to justify this decision are incorrect.

For instance, the Report of the Infrastructure Division, Committee on Transportation, in favor of approving Local Law No. 49, noted:

> "This legislation is designed to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them—*the property owners*. [The legislation]...will hopefully have the desired result of encouraging such *property owners* to better maintain and more expeditiously repair the sidewalks for which they are legally responsible. If successful, such incentive will result in safer sidewalks City-wide thereby reducing the number of occurrences of damage or injury therefrom.
>
> "Finally, it should be noted that the placement of liability directly upon property owners would not apply under the bill to one-, two- or three-family residential real property that is, in whole or in part, owner-occupied and used exclusively for residential purposes. This exception for such properties is out of recognition for the fact that small property owners who reside at such property have limited resources and it would not be appropriate to expose such owners to exclusive liability for sidewalk maintenance and repair."

Both Local Law No. 49 and Local Law No. 54, which were signed into law by the Mayor of the New York City on July 16, 2003 establish that a landlord has a non-delegable duty to remove snow and ice from the sidewalk abutting the premises. Local Law No. 54 of the City of New York[3], and codified as sections 7-211 and 7-212

[3] Local Law No. 54, enacted July 16, 2003, reads in relevant part as follows:

of the Administrative Code, requires property owners liable under section 7-210, other than public corporations or entities, to maintain liability insurance coverage for personal injury and property damage caused by the failure of such owners to maintain

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> Section 1. The administrative code of the city of New York is amended by adding a new section 7-211 to read as follows:
>
> §7-211 Personal injury and property damage liability insurance. An owner of real property, other than a public corporation...or a state or federal agency or instrumentality, to which subdivision b of section 7-210 of this code applies, shall be required to have a policy of personal injury and property damage liability insurance for such property for liability for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain the sidewalk abutting such property in a reasonably safe condition. The city shall not be liable for any injury to property or personal injury, including death, as a result of the failure of an owner to comply with this section.
>
> §2. The administrative code of the city of New York is amended by adding a new section 7-212 to read as follows:
>
> § 7-212 Authority to make payments for personal injury, including death, where abutting property owner liable pursuant to section 7-210 is uninsured. a. Where a judgment for personal injury, including death, obtained against an abutting property owner pursuant to section 7-210 of this code is unsatisfied for a period of at least one year following entry of such judgment..., the comptroller, after consultation with the corporation counsel, is hereby authorized and empowered to make a payment for such personal injury, including death. "b. Any such payment shall be made in the discretion of the comptroller and shall not be made as a matter of right. The amount of such payment shall not exceed uncompensated medical expenses. Payment may be in a single payment, or may be made in periodic payments. No such payment or periodic payments shall exceed fifty thousand dollars in total with respect to any unsatisfied judgment and the total of all such payments for all judgments in any fiscal year shall not exceed four million dollars. . . .

d. Before the comptroller shall make such payment, he or she shall require the petitioner to execute an assignment of the judgment to the city. After assignment the city shall be entitled to enforce the judgment. To the extent that the city collects money on the judgment in excess of the payment or payments made to a petitioner pursuant to this section, such excess amount shall be paid to the petitioner after deducting the city's expenses....

abutting sidewalks in a "reasonably safe condition" (Administrative Code §7-211).

When no liability insurance is available, section 7-212 authorizes the Comptroller of the City of New York, upon consultation with the Corporation Counsel, in certain instances, to pay judgments in favor of injured parties for uncompensated medical expenses to the extent of $50,000 when the owner, who is found liable, is uninsured. In such instances, the judgment is assigned to the City which "shall be entitled to enforce" it against the property owner.

If it was City Council's intention that the duties imposed on owners under §7-210 could be delegated, §7-211 would have required owners, and *tenants* to maintain liability insurance coverage with regard to maintaining the abutting sidewalk in a "reasonably safe condition". In addition, the Defense Association's argument cannot be reconciled with §7-212, which only permits the City to enforce judgments for uncompensated medical expenses against an uninsured property owner. If it was the City Council's intention that owners could delegate their duty under §7-210, §7-212 would have permitted the City to enforce judgments for uncompensated medical expenses against tenants as well.

In signing Local Law No. 49 and Local Law No. 54, Mayor Bloomberg stated:

> "New York City has 12,750 miles of sidewalks. Laid end to end they would stretch halfway around the world. It would cost the City billions of dollars to hire sidewalk repair crews to repair all sidewalk defects and keep the sidewalks perfectly free of defects. Under current law, property owners are required to keep their sidewalks in good repair and free of snow and ice. However, if they fail to comply with this statutory duty and someone is injured as a result, they don't get sued, the City does. This legislation transfers liability for sidewalk accidents from the City to the property owners who already have the duty to keep the sidewalks in good repair....
>
> "This bill will not only save the City millions of dollars but...will mean safer sidewalks and fewer injuries....
>
> "This bill will [also] require property owners, other than...owners of one-, two- or three-family homes, to have a policy of personal injury and property damage liability insurance to cover their liability for sidewalk accidents....
>
> "Most property owners already have liability insurance. On the slim chance that a property is not covered by insurance, this bill also authorizes the City Comptroller...to make payments for uncompensated medical expenses to persons who are injured in sidewalk accidents and who obtained a judgment against a property owner, but were unable to collect on the judgment....In this way, [Local Law No. 49 and Local Law No. 54] strike a reasonable and compassionate balance between the principle that the City should not be liable for the wrongs of another and the principle that persons injured by the wrongs of another should receive compensation."

(Mayor Michael R. Bloomberg Signs Tort Reform Legislation, Office of Mayor Press Release 200-03, July 16, 2003.)

The Defense Association fails to address the statute's legislative history and its argument that §7-210 should not be

read *in pari materia* with §16-123 and §19-153 would nullify what the City Council and Mayor's office intended to accomplish. When reading §7-210 in conjunction with Administrative Code §7-211 and §7-212 as opposed to code provisions that undermine the legislative intent, it is clear that the First Department's decision cannot stand.

As this Court noted in Rangolan v. Nassau Co., 96 NY2d 42 [2001], where the Legislature uses different terms in different parts of a related statute, "courts may reasonably infer that different concepts were intended." See, Mark G. v. Sabol, 93 NY2d 710, 722 [1999] ("If the Legislature had intended for liability to attach for failures to comply with other provisions of Title VI, it would likely have arranged for it as well"). Here, had the Legislature desired to impose specific duties on lessees in possession by virtue of §7-210, "it could have chosen to do so through appropriately worded legislation" (Eaton v. NYC Conciliation Appeals, 56 NY2d 340, 346 [1982]). Its failure to do so leads to an "irrefutable inference" that the statutory construction urged by the defendants is not legally tenable.

In People ex rel Sibley v. Sheppard, 54 NY2d 320, 325 [1981], this Court stated: "Had the Legislature intended §117 to limit §72 in the manner urged by respondents, either or both sections could have expressly reflected that intention. In substance, §117 has

been part of this State's law since 1938 [cits.]. §72 was added in 1996 [cits.], the same year in fact in which §117 was amended to provide specifically that an adopted child retained an interest he or she might have under the will or inter vivos instrument of any member of his natural family [cits.]. The Legislature, presumed to know what statutes are in effect when it enacts new laws [cits.], must have been aware of §117 when it enacted §72, and intended each to have full effect. The language of neither section supports respondent's interpretation."

In Nostrum v. AW Chesterton, 15 NY3d 502 [2010], this Court held that the attempt to use regulations in Part 12 of the Administrative Code which dealt generally with construction was inappropriate in a Labor Law §241[6] claim, which had to be based on the violation of a concrete commandment of Part §23 of the Industrial Code. Here, similarly, it is incorrect to apply sanitation regulations so as to relieve owners of non-delegable duties under §7-210 of the Administrative Code, a regulation that transformed New York law regarding responsibility for public sidewalks.

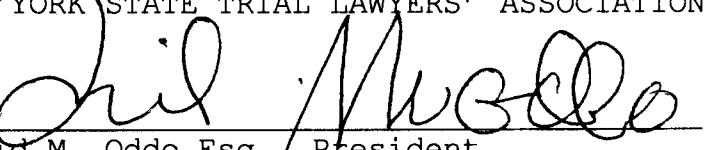
NYSTLA notes that this issue was not expressly briefed below, and questions whether it is even properly before this Court. See, Bingham v. NYCTA, 99 NY2d 355 [2003]. This Court "has no power to review...unpreserved error" (Elezaj v. Carlin Constr., 89 NY2d 992,

994 [1997]; see generally, Wilson v. Galicia Contr., 10 NY3d 827 [2008]. The defense may argue that the issue is one of law, but NYSTLA believes that this Court's jurisprudence precludes defendants or the amicus from relying on new claims regarding statutory interpretation as beyond this Court's power of review. See, Misicki v. Caradonna, 12 NY3d 511 [2009].

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the order appealed from should be reversed, and plaintiff's complaint reinstated.

Respectfully submitted,
NEW YORK STATE TRIAL LAWYERS' ASSOCIATION

By: 

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Court of Appeals

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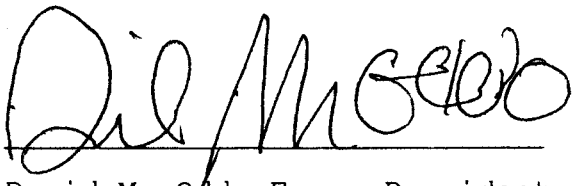

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