To Be Argued By:
Kenneth J. Gorman
Time Requested: 30 Minutes

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)

BRIEF FOR PLAINTIFF-APPELLANT

KENNETH J. GORMAN, ESQ.
225 Broadway, Suite 307
New York, New York 10007
212-267-0033
kennethjgorman@gmail.com

Appellate Counsel to:

WADE T. MORRIS, ESQ.
Attorney for Plaintiff-Appellant
225 Broadway, Suite 1510
New York, New York 10007
212-406-4993
wadetmorris@gmail.com

Of Counsel:
Kenneth J. Gorman

Date Completed: November 12, 2018

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

TABLE OF AUTHORITIES

State Cases

State Statutes

Constitutional Provisions

Other Authorities

COURT OF APPEALS
STATE OF NEW YORK

----------X

XIANG FU HE,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

----------X

Index No.: 111331/09

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Plaintiff-appellant Xiang Fu He (the "plaintiff") submits this brief in connection with the appeal he took, upon an order of the Court of Appeals dated September 13, 2018 which granted plaintiff's motion for leave to appeal to this Court from the Appellate Division, First Department's decision and order dated January 23, 2018 which reversed an order of the Supreme Court, New York County (Edmead, J.), dated June 22, 2016 (8-16)[1] which denied defendants-respondents Troon Management, Inc., Flushing-Thames Realty Company, Noel Levine, Daryl Gerber, as Executor for the Estate of Abraham Hershson, Harriette Levine, as Executor for the Estate of Abraham Hershson, and Noel Levine, as Executor for the

[1] Numbers in parenthesis refer to the record on appeal.

Estate of Abraham Hershson (hereinafter the "defendants") motion for summary judgment dismissing plaintiff's complaint and dismissed the complaint.

It is respectfully submitted that the First Department's decision and order, which is contrary to its prior decisions as well as the decisional law of this Court, the Second Department and New York City Administrative Code § 7-210 should be reversed and the plaintiff's complaint reinstated.

INTRODUCTION

In the trial court's decision and order, which the First Department reversed, the Supreme Court, New York County (Edmead, J.) rejected defendants' contention that they were not responsible for the accident because they were an out of possession landowner as they had a non-delegable duty under Administrative Code § 7-210 to maintain the sidewalk (16).

In reversing this decision, the First Department, citing to Bing v. 296 Third Ave. Group, LP, 94 AD3d 413 [1st Dept. 2012], held:

> "Defendants cannot 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" (Attached hereto at Exhibit "A", citations omitted).

We respectfully submit that the First Department's reversal of the trial Court's decision and order not only breaks with its prior decisional law, it directly conflicts with Administrative Code § 7-210, which "imposes the duty to maintain sidewalks on the "owner" of real property abutting the sidewalks, i.e., the record owner of the property abutting the portion of the sidewalk on which the unsafe condition is situated" (N.Y. Pattern Jury Instr.--Civil 2:111A, Liability for Condition or Use of Land—To Persons Outside the Land—Possessor's Liability to Persons on Sidewalk—Snow and Ice, citing, inter alia, Montalbano v. 136 W. 80 St. CP, 84 AD3d 600 [1st Dept. 2011]).

In Sangaray v. West River Associates, LLC, 26 NY3d 793 [2016], this Court recently addressed a landowner's non-delegable duties under the statue, noting "Section 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition...".

The First Department's decisions in this case and Cepeda v. KRF Realty, 148 AD3d 512 [1st Dept. 2017], -- which were the subject of a recent law journal article July 18, 2017 "Out-of-Possession Owners and Snow, Ice Liability: Appellate Courts Are Split"…"This split among the First and Second Departments may be ripe for guidance from the Court of Appeals"[2] -- are in direct conflict with

[2] Of note, this article does not even discuss the Court of Appeals decision in Sangaray

the decisional law from this Court, the Appellate Division, Second Department and the plain meaning of section 7-210. We respectfully submit that the First Department's decision which is contrary to the statute and this Court's decisional law must be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

On January 22, 2007, the plaintiff, an employee of SDJ Trading, Inc. ("SDJ") slipped and fell on snow and ice while traversing the sidewalk abutting the building located at 1177A Flushing Avenue in Brooklyn, New York. The building was owned by the defendants, who in turn leased it to SDJ.

The plaintiff slipped on un-cleared ice on the sidewalk abutting the building (287, 290-292). The plaintiff's co-worker, Enrique Guararrama signed a written statement, stating that the sidewalk where plaintiff slipped and fell had been shoveled prior to the accident (385). The person who shoveled the sidewalk prior to the incident left the area covered with uneven patches of snow and ice, the sidewalk was not salted and there were dirty foot prints which were frozen solid (385).

In their motion for summary judgment, defendants argued in relevant part that because they were out of possession landowners and because SDJ was responsible under the terms of the lease for clearing ice and snow from the sidewalk, they could not be held liable for plaintiff's injuries (17-31).

In opposition, the plaintiff argued, inter alia, that defendants had a non-delegable duty under New York City Administrative Code §7-210 to maintain the sidewalk abutting the premises, notwithstanding the lease provision cited by defendants (589-593).

In a decision and order dated June 22, 2016, the Supreme Court, New York County (Edmead, J.), rejected the defendants' contention that they were not responsible for the accident because they were an out of possession landowner as they had a non-delegable duty under Administrative Code § 7-210 to maintain the sidewalk (16).

The First Department's Decision

In a decision and order dated January 23, 2018, the Appellate Division, First Department reversed the Supreme Court's order and dismissed the complaint, stating:

> Defendants cannot 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 (Bing v. 296 Third Ave. Group, LP, 94 AD3d 413 [1st Dept. 2012], lv denied, 19 NY3d 815 [2012]; accord, Cepeda v. KRF Realty LLC, 148 AD3d 512 [1st Dept. 2017])[3].

[3] Unofficial citations omitted.

QUESTION PRESENTED

1) Was the First Department's decision, which disregarded the defendant landlord's nondelegable duty under New York City Administrative Code section 7-210 and dismissed the complaint incorrectly decided?

ARGUMENT

We respectfully submit that the First Department's decision was incorrectly decided as it disregarded the defendant landlord's nondelegable duty under New York City Administrative Code section 7-210. In addition to conflicting with its prior decisional law and case law from this Court and the Second Department, it is in derogation of the non-delegable duty Administrative Code § 7-210 "unambiguously imposes...upon owners...to maintain the sidewalk abutting their property in a reasonably safe condition..." (NY PJI3d 2:111A, Comment, Caveat 2 [online treatise], citing, inter alia, Sangaray v. West River Associates, LLC, 26 NY3d 793 [2016]; Martinez v. Khaimov, 74 AD3d 1031 [2d Dept 2010]).

Prior to the adoption of § 7-210, property owners in NYC had a statutory duty to install, construct, repave and repair the sidewalk flags in front of or abutting such property (Admin. Code § 19-152(a) and to remove the snow or ice, dirt, or other material from the sidewalk (Admin. Code of NYC § 16-123(a)). Failure to comply with both of these laws resulted in fines or an obligation

to reimburse the city for its expenses under § 19-152(e) and 167-123(e)(h).

Under the previous statutory scheme, the City, as the owner of the sidewalks, generally remained liable for injuries to pedestrians caused by defective sidewalk flags, assuming there was actual written notice of a defect (Adm. Code 7-201). Under that scheme, an abutting landowner could be held liable only if the owner affirmatively created the dangerous sidewalk condition or negligently made repairs or used the sidewalk in a special manner for its own benefit.

In 2003, the City Council modified this regime by adopting § 7-210 of the Admin. Code which states: 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) The owner of real property, abutting any sidewalk, and not limited to the intersection for the corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalk in a reasonably safe condition. Failure to install, construct, repave, repair or replace defective sidewalk and the negligent failure to remove snow, ice, etc. can result in an owner’s liability. c) NYC shall no longer be liable for injury to property or personal

injury, including death, proximately caused by the failure to maintain sidewalks in a reasonably safe condition.

"The City Council enacted section 7–210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate "to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them—the property owners" (Vucetovic v. Epsom Downs, Inc., 10 NY3d 517, 521 [2008], quoting, Rep. of Comm. on Transp., at 5, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

A property owner (other than a 1-3 family home) can be liable for a sidewalk accident under Admin. Code Sec. 7-210 even though it has a snow removal contract with another party. In other words, snow removal is a non-delegable duty (see, Polomski v. DeLuca, 161 AD3d 1116 [2d Dept. 2018]). Even where a lease places upon the tenant the obligation to maintain sidewalks, Section 7-210 places upon the landlord a non-delegable duty to maintain the sidewalk (see, Paguay v. Fischel, 36 Misc.3d 1235(A) [Sup. Ct. Queens Co.], citing, Reyderman v. Meyer Berfond Trust, 90 AD3d 633 [2d Dept. 2011]).

"The council is the local legislative body of the City of New York and, in addition to all enumerated powers, has power to adopt local laws which it deems appropriate, which are not inconsistent with the provisions of the charter or with the constitution or

laws of the United States or the state, for the good rule and government of the city; for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants; and to effectuate the purposes and provisions of the New York City Charter or of the other law relating to the city" (25 NY Jur. 2d Counties, Etc. § 166, citing, New York City, NY, Charter § 21; New York City, NY, Charter § 28[a])

"The council has power to provide for the enforcement of local laws5 as well as the power of investigation into city matters. While the New York City Council is a local legislative body, of limited power in some respects, it may, where it has jurisdiction, act for the locality precisely as the legislature may act for the state of New York" (25 NY Jur. 2d Counties, Etc. § 166, citing, New York City, NY, Charter § 29; Herlands v. Surpless, 258 AD 275 [1st Dept. 1939], order aff'd, 282 NY 647 [1940]).

"A local government has broad powers to enact legislation relating to the health and welfare of its citizens. The New York Constitution provides that every local government has the power to adopt and amend local laws not inconsistent with the provisions of the constitution or any general law, relating to the government, protection, order, conduct, safety, health, and well-being of persons or property in the local government" (25 NY Jur. 2d Counties, Etc. § 120, citing, inter alia, NY Const. Art. IX, §

2[c][ii][10]; Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau, 19 AD3d 593 [2d Dept. 2005], order aff'd, 7 NY3d 56 [2006]).

"In considering the relationship of the judicial department to the acts of a municipal corporation—that is, the ordinances passed by the municipal legislative body—it must constantly be kept in mind that the courts cannot set aside ordinances unless they are unconstitutional, ultra vires, and under certain conditions, unreasonable, and cannot interfere with municipal ordinances which are reasonable and not in violation of the Constitution" (25 NY Jur. 2d Counties, Etc. § 365, citing, Associated Transport v. City of Syracuse, 196 Misc. 1031 [Sup Ct. Onondaga Co. 1949]).

"Indeed, the courts have frequently reiterated the rule that local authorities entrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations, and that the courts may only interfere with laws or ordinances passed or regulations adopted in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred" (25 NY Jur. 2d Counties, Etc. § 365, citing, Boord v. Wallander, 195 Misc. 557, 89 NYS2d 796 (Sup 1949), judgment modified on other grounds, 277 AD 253 [1st Dept. 1950], judgment aff'd, 302 NY 890 [1951]).

The First Department's decision overlooks these well settled rules of the City Council's legislative authority and essentially nullified § 7-210. However, "[t]he policy, wisdom, or economy of a law are not matters of judicial concern, since the judiciary has no general supervision over legislation" (25 NY Jur. 2d Counties, Etc. § 365, citing, inter alia, 8200 Realty Corp. v. Lindsay, 27 NY2d 124 [1970][stating that fair latitude should be allowed by the court to the legislative body to generate new and imaginative mechanisms addressed to municipal problems]; Mitrus v. Nichols, 171 Misc. 869 [Sup Ct. Broome Co. 1939]).

Indeed, "[t]he courts have nothing to do with, and are not concerned with, the wisdom of municipal ordinances, such as police power measures" (Id., citing, Arverne Bay Const. Co. v. Thatcher, 278 NY 222 [1938]; Bacon v. Miller, 247 NY 311 [1928]). "The courts may properly intervene only when the legislative act in question offends the organic law or is otherwise in excess of delegated power" (Id., citing, Fifth Ave. Coach Co. v. City of New York, 194 NY 19 [1909], judgment aff'd on other grounds, 221 U.S. 467 [1911]; Mitrus v. Nichols, 171 Misc. 869, supra).

However, this is not the case and appears that the First Department exceeded its authority by crafting a rule that departs from § 7-210. "If a given act of legislation is not forbidden by express words, or by necessary implication, the judges cannot listen to a suggestion that the professed motives for passing it

are not the real ones. Likewise, if the validity of an ordinance or the amendment thereto is fairly debatable, the judgment of the legislative body is conclusive and beyond the interference of the courts" (25 NY Jur. 2d Counties, Etc. § 365, citing, Mitrus v. Nichols, supra; Capobianco v. Town of North Hempstead, 21 Misc.2d 32 [Sup Ct. Nassau Co. 1960]; Weinstein v. Burns, 20 Misc.2d 362 [Sup Ct. Nassau Co. 1959]).

In addition to exceeding its authority, the First Department's decision is a stark departure from the plethora of cases from the that Court explicitly stating that landlords have a nondelegable duty to keep abutting sidewalks safe pursuant to section 7-210 (see, Wahl v. JCNYC, LLC, 133 AD3d 552 [1st Dept. 2015] ["7–210 imposes a nondelegable duty on the owner"]; Montalbano v 136 W. 80 St. CP, 84 AD3d 600 [1st Dept. 2011] [7-210 "does not make persons who exercise control over the sidewalk liable—it refers only to owners of real property"] Doyley v. Steiner, 107 AD3d 517 [1st Dept. 2013] ["Accordingly, the property owners had a nondelegable duty to keep the sidewalk safe" pursuant to "Administrative Code § 7-210(a)"]; Spector v. Cushman & Wakefield, Inc., 87 AD3d 422 [1st Dept. 2011] ["Unlike a contractor, an owner, such as Citibank, has a statutory, nondelegable duty to maintain the sidewalk abutting its premises"]; Cook v. Consol. Edison Co. of NY, 51 AD3d 447, 448 [1st Dept. 2008] ["...owner was under a statutory nondelegable duty to maintain the sidewalk

(Administrative Code of City of NY § 7-210)"]; Collado v. Cruz, 81 AD3d 542, 543 [1st Dept. 2011] [same]; Carey v. Capital Cleaning Contractors, Inc., 106 AD3d 561 [1st Dept. 2013] [same]; Yuk Ping Cheng Chan v. Young T. Lee and Son realty, 110 AD3d 637 [1st Dept 2013] [same]; Oduro v. Bronxdale Outer, Inc., 130 AD3d 432 [1st Dept. 2015] [same]).

In addition, this Court and the Second Department have clearly stated that section 7-210 imposes a nondelegable duty upon owners to maintain the sidewalk abutting their premises (see, Sangaray v. W. River Assocs., LLC, 26 NY3d 793, 797 [2016] ["Section 7-210 unambiguously imposes a duty upon owners...to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure"]; Michalska v. Coney Island Site 1824 Houses, Inc., 155 AD3d 1024, 1025 [2d Dept. 2017] ["Section 7–210 of the Administrative Code of the City of New York imposes a nondelegable duty on a property owner...to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon those property owners for injuries resulting from a violation of the code provision"]; Scuteri v. 7318 13th Ave. Corp., 150 AD3d 1172, 1173 [2d Dept. 2017] [section 7-210 "imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property"]; Ramjohn v. Yahoo Green, LLC, 149 AD3d 992, 993 [1st Dept. 2017] ["§ 7–210 imposes a

nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property..."]).

Yet, the First Department completely ignored the concept of a landlord's nondelegable duty under section § 7-210, not even mentioning the statute in its decision. We fail to see the distinction of a landlord's nondelegable duty under section 7-210 and a landlord's nondelegable duty under the Labor Law. Just as the Third Department held in Nephew v. Barcomb, 260 AD2d 821, 822 [3d Dept. 1999], that "Labor Law § 240(1) makes no distinction between in-possession and out-of-possession owners", section 7-210 makes no distinction between in-possession and out-of-possession owners.

Section 7-210 was enacted to shift "tort liability for injuries arising from a defective sidewalk from the City...to the abutting property owner'" (Martin v. Rizzatti, 142 AD3d 591, 593 [2d Dept. 2016], quoting, Grier v. 35–63 Realty, Inc., 70 AD3d 772, 773 [2d Dept. 2010]) and was "designed for the safety and protection of the public..." (Castillo v. Bangladesh Soc., Inc., 12 Misc.3d 1170[A]; see, Michalska v. Coney Island Site 1824 Houses, Inc., 155 AD3d 1024 [2d Dept. 2017]; Martinez v. Khaimov, 74 AD3d 1031, 1032 [2d Dept. 2010]).

"[A]ccording 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 are in the best position to be aware of the need for repairs—namely, the abutting property owners—are motivated to make the necessary repairs in order to avoid liability" (Sangaray v. W. River Assocs., LLC, 121 AD3d 602, 604 [1st Dept. 2014] [Sax dissent], rev'd, 26 NY3d 793 [2016], quoting, Rep of Infrastructure Div, Comm on Transp at 9, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

The First Department's decision simply cannot be reconciled with the nondelegable duty section 7-210 imposes on landlords. "Nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession" (Castillo v. Bangladesh Soc., Inc., 12 Misc.3d 1170(A) [Sup. Ct. Queens County 2006] [Weiss, J.]).

"The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so" (Schron v. Jean's Fine Wine & Spirits, Inc., 114 AD3d 659, 660 [2d Dept. 2014], quoting, Bruzzo v. County of Nassau, 50 AD3d 720, 721 [2d Dept. 2008]; see Huguens v. Village of Spring Val., 86 AD3d 593, 594 [2d Dept. 2011]; Plotits v. Houaphing D. Chaou, LLC, 81 AD3d 620, 621 [2d Dept. 2011]).

By permitting landlords to contract away their nondelegable duty in derogation of section 7-210, the First Department has now

made it permissible for landlords to place responsibility on tenants who owe no duty to injured pedestrians and have no incentive to avoid liability.

Indeed, "a provision of a lease which obligates a tenant to repair a sidewalk does not impose on the tenant a duty to a third party, such as the plaintiff" (Martin v. Rizzatti, 142 AD3d 591, 593 [2d Dept. 2016], citing, Collado v. Cruz, 81 AD3d 542 [1st Dept. 2011] ["Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff"]). At most, a "tenant may be held liable to the owner for damages resulting from a violation...of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk..." (Collado v. Cruz, at 542).

The impact of the First Department's decision is demonstrated by the recent Supreme Court decisions from New York and Bronx Counties. For instance, Justice Brigantti's decision in Correa v. 3716-42 E. Tremont Assoc., LLC., 59 Misc.3d 1224(A) [Sup. Ct. Bronx Co. 2018] dismissed plaintiff's complaint notwithstanding the nondelegable duty section 7–210 places on landlords, based on the decisions in this case, Bing and Cepeda:

> Plaintiff and AAH also asserts that Defendants remain liable for the condition on the sidewalk pursuant to New York Administrative Code § 7–210(b). However, as noted supra, the First Department has held that where a landlord claims to be out of possession and the possessors/tenants have assumed the obligation to remove snow and ice from the abutting sidewalks, the

> landlord/landowner is entitled to summary judgment notwithstanding § 7–210 (see, Bing v. 296 Third Ave. Group., L.P; Cepeda v. KRF Realty, LLC; Xiang Fu He v. Troon Management, Inc.).

In Lawrence v 239 East 115th Street Housing Development Fund Corp., 2018 WL 1335252 [Sup. Ct. New York Co. 2018], Justice Edmead reached the same result and dismissed plaintiff's complaint against the defendant, an out of possession landowner, stating:

> However, as recently reiterated by the Appellate Division, First Department, a "[landlord defendant] cannot be held liable for injuries allegedly sustained by plaintiff when he slipped on snow and ice on the sidewalk adjacent to their property, because [defendant was an] out-of-possession landlord[] 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" (Xiang Fu He v. Troon Mgmt., Inc., 157 AD3d 586 [1st Dept 2018], citing, Bing v 296 Third Ave. Group, 94 AD3d 413, 414 [1st Dept 2012] [noting that the lower court's application of § 7-210 imposing liability on the landowners for, inter alia, their negligent failure to remove snow and ice from the sidewalk, was misplaced since the lease provided that the tenant was responsible for removing snow and ice from the sidewalk]; see, Cepeda v KRF Realty, 148 AD3d 512, 513 [1st Dept 2017]).
>
> Here, it is uncontested that 239 East was an out-of-possession landlord and that under the Lease, JNS agreed to maintain the subject sidewalk, including the removal of snow and ice ...Moreover, neither JNS nor Plaintiff submitted any evidence demonstrating that 239 East caused or created the alleged defective condition, and, in any event snow or ice is not a significant structural or design defect (Bing, 94 AD3d at 414). Accordingly, since 239 East was an out-of-possession landlord and it contracted the obligation of snow and ice removal of the subject sidewalk to JNS, the Complaint is dismissed against 239 East.

(Lawrence v 239 East 115th Street Housing Development Fund Corp., 2018 WL 1335252, at *3, supra; see also, Rodriguez v Napa Realty Corp., 2018 WL 1586678, at *2 [Sup. Ct. New York Co. 2018] [dismissing plaintiff's complaint against the defendant on the ground that "it owed no duty to plaintiff as an out-of-possession landlord with no contractual obligation to keep the sidewalks clear of snow and ice"]; Bell v Stratford West LLC, No. 2018 WL 1566684, at *3 [Sup. Ct. Bronx Co. 2018] [dismissing plaintiff's complaint against the defendant because it "was an out-of-possession landlord" and the tenant, under the lease, "was obligated to conduct snow removal in front of the leased premises"]).

The First Department's decision essentially overruled its prior decisional law and created a split with the Second Department and invalidated section 7-210 without any statutory or decisional authority. The First Department's reliance on Bing v. 296 Third Ave. Grp., LP, 94 AD3d 413 [1st Dept. 2012], was misplaced and does not warrant a contrary result.

In Bing, the plaintiff was injured when she allegedly slipped and fell on a snow or ice condition *on a ramp* that extended from the sidewalk to the interior of a newsstand ("the premises"). Pursuant to the commercial lease, the defendant landlord leased the premises to the tenant, who operated the newsstand. The landlord moved for summary judgment on the ground that it was an out-of-possession landlord with no duty to maintain the premises

or to remove snow. The trial court denied their motion and the First Department reversed, reasoning:

> ...the question of whether the ramp is part of the premises or the sidewalk is irrelevant because, under either scenario, tenant, and not landlord, was responsible for clearing the ramp of snow or ice. Indeed, if the ramp were part of the sidewalk, landlord was not responsible for clearing it of snow or ice because the lease provided that tenant was responsible for maintaining its premises and removing snow and ice from the sidewalk. Thus, the motion court's application of Administrative Code of the City of New York § 7-210 (b), that imposes liability on owners for, inter alia, their "negligent failure to remove snow, ice, dirt or other material from the sidewalk," was misplaced. In addition, section 7-210 is not applicable to this action because plaintiff did not allege landlord's violation of this section of the Administrative Code.

We respectfully submit that Bing is inapplicable to this case and should never have factored into to the First Department's analysis when it reversed the Supreme Court's order and dismissed plaintiff's complaint.

It is uncontested that plaintiff in this case alleged a violation of section 7-210, while the plaintiff in Bing did not. Moreover, in Bing, the accident occurred on a ramp, not the sidewalk. It is black letter law that "pedestrian ramps are not part of the sidewalk for the purpose of imposing liability on abutting landowners pursuant to [section 7-210]" (Rodriguez v. Themelion Realty Corp., 94 AD3d 733 [2d Dept. 2012], quoting, Vidakovic v. City of New York, 84 AD3d 1357, 1357–1358 [2d Dept. 2011]; see, Gary v. 101 Owners Corp., 89 AD3d 627, 627–628 [1st

Dept. 2011]; Ortiz v. City of New York, 67 AD3d 21, 23, 27–28 [1st Dept. 2009], rev'd. on other grounds, 14 NY3d 779 [2010]). Conversely, plaintiff "slipped on snow and ice on the *sidewalk* adjacent to [defendants'] property" (emphasis added).

There can be no dispute that Bing is inapplicable to section 7-210. Yet, the First Department is applying Bing to cases where section 7-210 is clearly applicable, relieving owners of their nondelegable duty. The First Department's dismissal of plaintiff's complaint based on Bing cannot even be reconciled with the decisional law from that Court post Bing.

Indeed, the First Department's decisional law for years following Bing, up until its holding in Cepeda in 2017, reaffirmed the well settled rule that an owner's statutory nondelegable duty to maintain the sidewalk pursuant to section 7-210 had not been eroded in the First Department (see, Kellogg v. All Saints Hous. Dev. Fund Co., 146 AD3d 615, 616 [1st Dept. 2017] ["As the admitted owner of the property abutting the subject sidewalk, 1916 Park had a nondelegable duty to maintain it in reasonably safe condition"]; Doyley v. Steiner, 107 AD3d 517 [1st Dept. 2013] ["Accordingly, the property owners had a nondelegable duty to keep the sidewalk safe" pursuant to "Administrative Code § 7-210 [a]"]; Carey v. Capital Cleaning Contractors, Inc., 106 AD3d 561 [1st Dept. 2013] [same]; Yuk Ping Cheng Chan v. Young T. Lee and Son Realty, 110 AD3d 637 [1st Dept 2013] [same]; Oduro v. Bronxdale Outer, Inc., 130 AD3d

432 [1st Dept. 2015][same]; Wahl v. JCNYC, LLC, 133 AD3d 552 [1st Dept. 2015]).

Thus, the holding in this case and Cepeda simply cannot be reconciled with Bing nor the remainder of the precedent in the First Department. Nor can the dismissal of plaintiff's complaint on the ground that defendants delegated their non-delegable duty to a tenant be reconciled the decisional law from the Second Department, which also holds that §7-210 is non-delegable (see, Michalska v. Coney Island Site 1824 Houses, Inc., 155 AD3d 1024, 1025 [2d Dept. 2017] ["Section 7–210 of the Administrative Code of the City of New York imposes a nondelegable duty on a property owner...to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon those property owners for injuries resulting from a violation of the code provision"]; Scuteri v. 7318 13th Ave. Corp., 150 AD3d 1172, 1173 [2d Dept. 2017] [section 7-210 "imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property"]; Ramjohn v. Yahoo Green, LLC, 149 AD3d 992, 993 [2d Dept. 2017] ["§ 7–210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property..."]).

Lastly, it cannot be reconciled with this Court's decision in Sangaray, decided only two years ago:

> …section 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 section 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."

We respectfully submit that the First Department's decision in this case is contrary of the plain meaning of §7-210 and the well-established precedent of this state. The First Department's decision disregards the legislature's decision to hold landlords directly responsible for remedying sidewalk defects, effectively nullifying § 7-210.

In the event defendants argue that this case is an exception to section 7-210's nondelegable duty because they are out of possession landowners and the lease provision obligated the tenant to maintain the sidewalk, we submit that this contention is unavailing.

First, the Second Department still adheres to the well settled rule that "an out-of-possession landlord" is not relieved of its "nondelegable duty to maintain the sidewalk in a reasonably safe condition" (Reyderman v. Meyer Berfond Trust No. 1, 90 AD3d 633, 634 [2d Dept 2011]; James v. Blackmon, 58 AD3d 808, 809 [2d Dept 2009]; Ramjohn v. Yahoo Green, LLC, 149 AD3d 992 [2d Dept. April 2017]).

Indeed both Departments hold "a provision of a lease which obligates a tenant to repair a sidewalk does not impose on the tenant a duty to a third party, such as the plaintiff" (Martin v. Rizzatti, 142 AD3d 591, 593 [2d Dept. 2016], citing, Collado v. Cruz, 81 AD3d 542 [1st Dept. 2011]["Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff"]).

At most, a "tenant may be held liable to the owner for damages resulting from a violation...of the lease, which imposed on the tenant the obligation to repair or replace the sidewalk..." (Collado v. Cruz, at 542; See also, Torres v. Visto Realty Corp., 106 AD3d 645, 646 [1st Dept. 2013], decided after Bing ["[t]he provisions of the tenant's lease obligating it to repair the sidewalk could not be enforced through the main action"]).

This is because this Court has repeatedly held "Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (Espinal v. Melville Snow Contractors, 746 NY2d 720 (2002). While Espinal discusses three exceptions to this general rule, they all are about creating a duty by a contractee to an injured plaintiff where there was none, not about relieving an owner of its statutory non-delegable duties.

In Paperman v. 2281 86th Street, 142 AD3d 540 [2d Dept. 2016], the Second Department found that a landlord's nondelegable duty

under section 7-210 can create a duty in the tenant to third parties is when its lease is "so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk" (Paperman v. 2281 86th St. Corp., 142 AD3d 540, 541 [2d Dept. 2016]).

Even if it could be interpreted to absolve a landowner of liability, it cannot be reconciled with a landlord's non-delegable duty under section 7-210. In addition, the Second Department is not using Paperman as precedent to absolve landlords of their statutory duties[4].

Yet even assuming *arguendo* that this Court adopted an expansive reading of the rational in Paperman, applied an Espinal-type exception in this case, and ignored the nondelegable duties of the landlord, the complaint should still not have been dismissed under this more strident standard. Indeed, the lease in this case was not so comprehensive that it displaced defendants' duty to maintain the sidewalk.

[4] In Chalouh v. Lati LLC, 144 AD3d 621 (2d Dept. Nov 2016) decided after Paperman, the Second Department held: "Here, the out-of-possession landlord retained the right to enter the premises to make repairs. However, the landlord established its prima facie entitlement to judgment as a matter of law by demonstrating that it was not contractually *or statutorily obligated* to repair or maintain the temporary structure erected on the second-floor balcony by Alfieh, and that it had not otherwise assumed any such duty (see, Yadegar v International Food Mkt., 37 AD3d 595, 596 [2007]; Seney v Kee Assoc., 15 AD3d 383, 384 [2005]; Berado v City of Mount Vernon, 262 AD2d 513, 514 [1999]) (emphasis added); see also Ramjohn v. Yahoo Green, LLC, 149 AD3d 992 (2d Dept. April 2017).

When determining "out-of-possession" status of a landowner, and whether or not it divested itself of its duties to another, courts look not only to the terms of written agreements but to the parties' course of conduct, including, but not limited to, the landowner's ability to access the premises, to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law (see, Gronski v. County of Monroe, 18 NY3d 374 [2011]).

Here, Lloyd Nelson, *the building's superintendent, inspected the premises three times per week, which included checking for sidewalk defects, and resolved any issues that were present* (705-707, emphasis added). More importantly, according to paragraph 4 of the lease, *the defendants were required to "maintain and repair the public portions of the building, both exterior and interior"* (538, emphasis added).

Thus, even if this Court endorsed the notion that certain out-of-possession landlords can delegate their non-delegable statutory duties under 7-210, the defendants failed to meet their burden that they sufficiently divested themselves of their duties under the lease, to be entitled to the dismissal of the complaint against them.

As such, irrespective of whether defendants are out of possession landowners who attempted to delegate their duties to their tenant, they are liable for plaintiff's injuries resulting

from their failure to maintain the sidewalk pursuant to Administrative Code § 7-210 (see, Sangaray v. West River Associates, LLC, 26 NY3d 793 [2016], James v. Blackmon, 58 AD3d 808 [2d Dept 2009]; Collado v. Cruz, 81 AD3d 542, 543 [1st Dept. 2011).

Based on the abundance of cases on this subject and because the First Department arbitrarily disregarded section 7-210 based on Bing, which is inapplicable to the facts of this case, we respectfully submit that the First Department's decision should be reversed and plaintiff's complaint reinstated. To hold otherwise would render Administrative Code §7-210 obsolete and disavow the legislative intent underpinning this statute.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Appellate Division's decision and order should be revered and plaintiff's complaint reinstated.

Respectfully submitted,

WADE T. MORRIS, Esq.
Attorney for Plaintiff-Appellant

By: _____
Kenneth J. Gorman, Esq.
225 Broadway, Suite 307
New York, New York 10007
212-267-0033

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

Name of typeface: Courier New

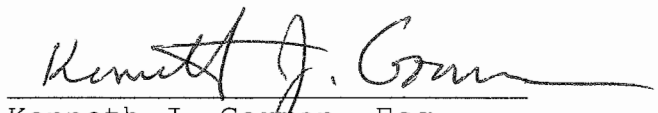
Point size: 12

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 6,160.

Dated: November 12, 2018

Respectfully submitted,



Kenneth J. Gorman, Esq.
Appellate Counsel
for Plaintiff-Appellant
225 Broadway, Suite 307
New York, New York 10007
212-267-0033