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)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Date Completed: January 11, 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.

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COURT OF APPEALS
STATE OF NEW YORK

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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.

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Reply Brief

PRELIMINARY STATEMENT

Plaintiff-appellant Xiang Fue He (the "plaintiff") submits this brief reply to the brief submitted by 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 Estate of Abraham Hershson (hereinafter the "defendants") in connection with the appeal plaintiff 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) which denied defendants' motion for summary judgment dismissing plaintiff's complaint and dismissed the complaint.

ARGUMENT

The defendants misstate the arguments set forth in our brief and fail to address the issue before this Court. We are not asking this Court to enact a rule requiring out of possession landlords to employ snow removal personnel even when a tenant has an obligation to remove snow and ice from sidewalks (defendants' brief at 2). We are asking that the Court follow the plain meaning of Administrative Code §7-210 as enacted and interpreted for the last fifteen years. In addition, defendants' contention that "[t]he issues before this Court involve an owner's liability for a slip and fall due to a transient condition (snow and ice)" (defendants' brief at 4) is incorrect.

Based on the decision on appeal before this Court and subsequent decisions, the First Department has made it crystal clear that Administrative Code section 7-210 no longer imposes a non-delegable duty upon New York City landlords to maintain and repair the sidewalk abutting their property. The issue before this Court is whether this should be the prevailing state of the law in New York City, despite the legislature's clear directives on the matter, and this Court's prior holdings.

Despite the First Department's reliance on Bing v. 296 Third Avenue Group, 94 AD3d 413 [1st Dept 2012] up until the its decision in Cepeda v. KRF Realty, 148 AD3d 512 [1st Dept. 2017], the First and Second Departments uniformly held that Administrative Code §7-210 imposed a non-delegable duty upon property owners to maintain and repair the sidewalk abutting their property[1] (see e.g., 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..."]).

This was and has always been the legislative intent underpinning the enactment of section 7-210. The 2003 amendments to this section of the Administrative Code transferred all liability for sidewalk defects from the City to the property owner, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes. Defendants are not exempt from this law merely because they claim to be out of possession landlords[2].

[1] It should be noted that Bing had nothing to do with §7-210 as plaintiff did not allege its violation in that case.

[2] While we dispute that defendants are out of possession landlords who surrendered all their obligations to their tenants, as their duty was non-delegable, this issue is merely tangential to the appeal before this Court.

Moreover, section 7-210 does not impose any duty on a commercial tenant, leaving that issue to the property owner and his contract (lease) with the tenant.

The legislature understood that tenants simply do not have the same financial incentive (and many times the wherewithal) to fulfill their statutory duties and are often just transient entities; unlike the owners of the real property. Therefore, the rule is not only clear, it is logical. Naturally, like the case at bar, landowners can require that tenants obtain insurance, guarantee indemnification or other protections as a term of their contractual agreement.

We now address defendants' assertion that Sangaray v. West River Associates, LLC, 26 NY3d 793 [2016] is inapplicable, that there is no "split" between the Appellate Divisions, and that we failed to cite any cases involving a landowner's potential liability for a slip and fall on snow and ice under these circumstances. Defendants' contentions, which are contrary to the terms of the statute and case law set forth in our brief, are fundamentally incorrect.

In Sangaray, this Court could not have been clearer that "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, and provides that said

owners are liable for personal injury that is proximately caused by such failure."

Defendants fail to take into account that a landowner's nondelegable duty under the statute to maintain the sidewalk in a reasonably safe condition specifically includes the removal of transient conditions, including snow and ice:

> "...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*"

(Administrative Code §7-210[b], emphasis added).

Even after Bing, the First department held that a landowner's duty to remove transient conditions from abutting sidewalks was non-delegable. In Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp., 110 AD3d 637 [1st Dept. 2013], which we cited in our main brief, the plaintiff slipped and fell on a large patch of grease on the public sidewalk abutting the premises owned by Lee Realty and subleased by G Noodletown, which operated a restaurant in the space. Although the First Department found that there were triable issues as to whether Noodletown created the greasy condition on the sidewalk, it denied Lee Realty's motion for summary judgment, as it had

> "a nondelegable duty to maintain the sidewalk abutting its premises pursuant to Administrative Code of City of NY §7–210, failed to meet its prima facie burden to eliminate the issue of constructive notice since it

> submitted no evidence establishing when the sidewalk was last cleaned or inspected prior to plaintiff's fall"

(Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp., 110 AD3d 637).

In fact, in Ramjohn v. Yahoo Green, LLC, 149 AD3d 992 [1st Dept. 2017], which was also cited in our main brief and decided one month after the First Department held in Cepeda that a landowner could delegate its responsibilities, the Appellate Division held, "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon certain property owners for injuries resulting from a violation of the code provision".

Yet, the First Department's decisions in this case, Cepeda, and most recently, in Fuentes-Gil v. Zear LLC, 163 AD3d 421 [1st Dept. 2018], the Appellate Division is clearly no longer following the rule that 7-210 is non-delegable. It has implicitly overturned its own precedent and rejected this Court's interpretation of the statute. This is the same department which held in Montalbano v. 136 W. 80 St. CP, 84 AD3d 600 [1st Dept. 2011], that section 7-210 "does not make persons who exercise control over the sidewalk liable—it refers only to owners of real property".

Therefore, defendants' reliance on the First Department's recent decision in Fuentes-Gil, decided nearly seven months after this case, is of no moment. Fuentes-Gil merely confirms that the First Department now holds that section 7-210 no longer imposes a non-delegable duty on a landowner for the removal of snow and ice on the sidewalk abutting its property.

Further, the First department has in fact "split" with the Second department which still holds 7-210 non-delegable in every case; even out of possession landlords cannot delegate their duty. The Second Department's decision in Bonifacio v. El Paraiso Food Mkt., Inc., 109 AD3d 454 [2d Dept. 2013] is directly on point and confirms a landowner's non-delegable duties under section 7-210. In that case, the plaintiff allegedly slipped and fell at or near the entryway of a store owned by the defendant Pitt Street Realty. Pitt Street Realty moved for summary judgment dismissing the complaint against it on the grounds that it had not created the defect and that it was an out-of-possession landlord without control of the premises and without any other duty to maintain or repair them. The Second Department held that the Supreme Court properly denied Pitt Street Realty's motion (Id., at 270).

In our main brief, we addressed numerous decisions from the Second Department holding that a landowner's duty is non-delegable under section 7-210 (see e.g., Michalska v. Coney

Island Site 1824 Houses, Inc., 155 AD3d 1024, 1025 [2d Dept. 2017] ["Section 7–210...nondelegable duty"]; Scuteri v. 7318 13th Ave. Corp., 150 AD3d 1172, 1173 [2d Dept. 2017] [§7-210 "imposes a nondelegable duty on a property owner"]). However, Bonafacio is significant, as the defendants in that case, just as defendants here, claimed that 7-210 was inapplicable to out of possession landowners. That defense, until now was rarely raised with success. Thus, the split between the departments is inescapable.

Defendants' contention that plaintiff could have pursued a claim against the commercial tenant if he was not an employee is misguided. In this vein, defendants fail to acknowledge that 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"]).

If defendants' logic were followed, a pedestrian who sustains an injury and has a legitimate claim could be left with no recourse. At best, 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, 81 AD3d 542 [1st Dept. 2011]). Defendants fail to

acknowledge that under this Court's "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]).

Defendants' contention that we "unconvincingly" argue that they are "not out-of-possession landowners" (defendants' brief at 7) is misplaced. Although we disagree with the First Departments' determination, this is not the issue before this Court. Regardless of whether or not defendants are out of possession landowners, they cannot delegate their duties under the statute given the mount of control they exercised over the property.

Indeed, regardless of whether defendants are out of possession landowners, 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 at 543, supra).

The defendants' attempt to apply the reasoning of Guzman v. Haven Plaza Housing Dev. Fund Co., 69 NY2d 559 [1987] to the facts of this case is misguided as Guzman was decided sixteen years before section 7-210 was enacted in 2003. However, it does confirm that the First Department has explicitly rejected section 7-210 and now applies the law as it existed prior to 2003.

The First Department cannot arbitrarily disregarded section 7-210's plain meaning nor this Court's interpretation of the statute. As this Court stated in Sangaray, the purpose of §7-210 is "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."

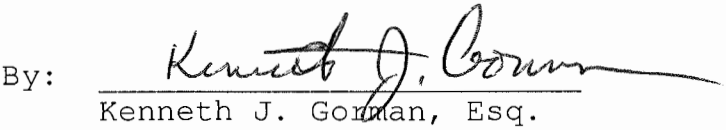
As the First Department exceeded its authority by crafting a rule departing from the plain meaning of §7-210, and this Courts clear precedent, its decision and order should be reversed, and the complaint reinstated. To hold otherwise would render Administrative Code §7-210 obsolete, disavow the legislative intent underpinning this statute and would fail to make the sidewalks safer as the legislature intended.

CONCLUSION

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

Respectfully submitted,

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

By: 
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CERTIFICATE OF COMPLIANCE

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

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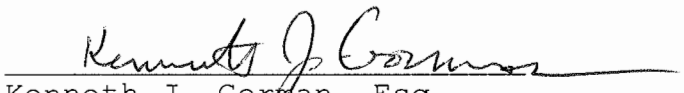
Dated: January 11, 2019

Respectfully submitted,



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