To be argued by:
DARA L. ROSENBAUM
Time Requested: 15 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.

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.

BRIEF OF DEFENDANTS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), TROON MANAGEMENT, INC. states that it has no parent, subsidiary or affiliate.

FLUSHING-THAMES REALTY COMPANY states that it has no parent, subsidiary or affiliate.

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QUESTIONS PRESENTED

1. Must an out of possession landlord employ someone to assure that a tenant obligated under a lease to clean snow and ice from the sidewalk in fact fulfills its contractual obligation?
2. Can an out-of-possession landlord be held liable for its tenant's alleged negligent failure to remove snow or ice on an abutting sidewalk when that tenant was obligated, by its lease, to remove snow and ice?

STATEMENT OF FACTS

Plaintiff's employer, SDJ Trading, Inc. ("SDJ") was obligated, by its lease to keep the sidewalk in front of its leased property, including the location where plaintiff claims to have fallen, free from snow and ice (109, 718)[1].

Consistent with its obligations under the lease, SDJ did, in fact, have its employees clear snow from the sidewalk (314-317). Although out-of-possession, the Defendant Troon Management, Inc. had an employee check the outside of the building and the sidewalks for structural damage (709-710).

[1] Numbers in parenthesis refer to the Record on Appeal.

ARGUMENT

WHEREAS PLAINTIFF'S EMPLOYER WAS OBLIGATED UNDER ITS LEASE TO CLEAR SNOW AND ICE FROM THE SIDEWALK, AND INDEED IT DID SO, THE DEFENDANTS, WHO WERE OUT OF POSSESSION LANDLORDS, CAN NOT BE HELD LIABLE FOR ANY NEGLIGENT CLEARING OF SNOW AND ICE FROM THE SIDEWALK.

Plaintiff is asking this Court to reverse the Appellate Division's decision and effectively enact a rule of law requiring out-of-possession landlords to employ snow removal personnel or contractors even when the tenant has the obligation to remove snow and ice from sidewalks, in case tenants fail to properly remove the snow and ice. Under such a new rule of law, not only would landlords be required to have employees or contractors remove snow and ice when a tenant fails to do so, the employees or contractors would have to inspect all snow and ice removal done by a tenant to make certain that the work was done properly, so as to avoid potential liability on the part of the landlord. This new law would effectively eliminate the concept of an out of possession landlord.

Plaintiff largely bases his argument on his misguided reliance on the case of Sangaray v. West River Associates, LLC, 26 N.Y.3d 793 (2016) and his misperception that the Appellate Division incorrectly relied on its earlier decisions of Bing v. 296 Third Ave. Group, L.P., 94 A.D.3d 413 (1st

Dept. 2012), lv denied, 19 N.Y.3d 815 (2012) and Cepeda v. KRF Realty LLC, 148 A.D.3d 512 (1st Dept. 2017).

In fact, contrary to Plaintiff's assertion, there is no "split" between the appellate divisions of this State regarding the issues at bar. Indeed, Plaintiff is relying on cases wherein the courts have held owners responsible for defects in sidewalks that caused trips and falls. The issues before this Court involve an owner's potential liability for a slip and fall due to a transient condition (snow and ice). Plaintiff has not cited any authority for holding an owner liable under these circumstances.

The recent decision of Fuentes-Gil v. Zear LLC, 163 A.D.3d 421 (1st Dept. 2018) states clearly that there is a distinction to be made between cases involving structural defects and cases involving transient conditions, like snow and ice. The Court in Fuentes-Gil, supra, found that, since Plaintiff's accident arose out of a failure to properly remove snow and ice from a sidewalk, the landlord, who obligated the tenant to remove snow and ice, could not be liable as a matter of law. This Court is respectfully requested to continue the holdings in these lines of cases and affirm the Appellate Division decision herein.

The main case relied on by Plaintiff, Sangaray v. West River Associates, LLC, 26 N.Y.3d 793 (2016), in fact, does not in any way deal

with an out-of-possession landowner's duty to remove snow and ice from a sidewalk when a tenant has, by its lease, assumed those obligations.

Sangaray, supra., is simply inapplicable to the case at bar. In Sangaray, supra., the landowner was charged with the obligation to repair a pre-existing physical defect, a holding consistent with other cases in all courts, including the Appellate Division, First Department, and in no way addresses the situation present in the case at bar – a transient condition that the tenant was contractually obligated to address. As this Court stated in Sangaray, "the purpose underlying the enactment of that provision [Administrative Code § 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." Id. at 799, 655. In the case at bar, there is no "sidewalk defect" and the plaintiff was not a mere pedestrian. Plaintiff was an employee of the tenant, the party obligated to remove snow and ice from the sidewalk. That tenant, who was in possession of the premises, was in the best situation to remedy the condition, was obligated by the lease to remove snow and ice and did, in fact, remove snow and ice from the sidewalk.

Plaintiff somehow is claiming that an out-of-possession landlord can be found to have acted unreasonably, which is a requirement for a finding of liability under Administrative Code § 7-210, when an obligated tenant allegedly fails to properly remove snow or ice from an abutting sidewalk.

Had Plaintiff merely been a pedestrian, other tenant in the building, delivery man, repair man, or any person other than an employee of the tenant with the responsibility of snow and ice removal, his remedy would have been to pursue a claim as against the potentially liable party, his employer, SDJ Trading, Inc. Since Plaintiff was indeed an employee of SDJ Trading, Inc., his sole remedy was the workers compensation benefits he received. See Rauch v. Jones, 4 N.Y.2d 592 (1958).

Plaintiff cites to, and quotes from, Reyderman v. Meyer Berfond Trust #1, 90 A.D.3d 633 (2d Dept. 2011), a case that, in fact, supports Defendants' position that Plaintiff's motion is without merit. In denying summary judgment to an out-of-possession landowner for a fall that allegedly occurred due to a defect in a sidewalk (as opposed to a slip on ice, as is the case herein), the Court found that the moving landowner failed to establish in its moving papers "that the sidewalk at issue was a part of the demised premises and that [the tenant] assumed the duty to maintain the sidewalk abutting its building." Id. at 634, 30. In the case at bar, it is undisputed

that the tenant, SDJ Trading, Inc., did indeed assume the duty to remove snow from the sidewalk.

Further, unlike the cases Plaintiff relies on, including Reyderman, the case at bar did not involve an alleged defect in the sidewalk, but instead involved a claimed accident due to an alleged transient condition.

Plaintiff also relies on the Second Department case of Michalska v. Coney Is. Site 1824 Houses, Inc., 155 A.D.3d 1024 (2d Dept. 2017), which is clearly distinguishable from the case at bar. In Michalska, the Court was not considering the liability of an out-of-possession landowner for the alleged failure of a tenant to remove ice from a sidewalk.

Additionally, in denying summary judgment to the landowner, in Michalska, the Second Department found that Administrative Code § 7-210 "does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence." Id. at 1025, 315. Unlike in the case at bar, the landowner in Michalska was not out-of-possession and did not contract with a tenant to remove ice who, the evidence in the case at bar shows, did, in fact, remove the snow and ice from the sidewalk. Plaintiff's papers are entirely, and Defendants submit, fatally, silent as to how, under this set of facts, the landlord could be found negligent for the tenant's alleged failure to properly remove snow and ice.

As the Appellate Division, Second Department noted in Pevzner v. 1397 E. 2ND LLC, 96 A.D.3d 921, 922 (2d Dept. 2012), "Administrative Code of the City of New York § 7-210 ... shifted tort liability for injuries arising out from a *defective* sidewalk ...." (emphasis supplied).

Plaintiff unconvincingly argues, with absolutely no case law to support his position, that Defendants were not out-of-possession landowners. Plaintiff merely cites the testimony of Lloyd Nelson who inspected the premises every week. However, Mr. Nelson testified that he inspected the building and sidewalk for defects and he never testified that he was inspecting the tenant's snow or ice removal on the sidewalk. In fact, Mr. Nelson testified that he could not gain access to the building without permission from a tenant (709). Somehow, Plaintiff is asking this Court to determine that the ability to access the building, after gaining the tenant's permission, means that the landlord was in possession of that building. There is no evidence that the Defendants, in any way, operated the subject premises or played any role in the relevant events, other than being the out-of-possession owner of the subject premises.

Further, a finding that a landowner who inspects his/her property for defects could be liable for the negligent removal of ice on a sidewalk would

implicitly suggest to landowners that they would be better served not to make any inspections at all.

An analogy can be drawn to Guzman v. Haven Plaza Housing Dev. Fund Co., 69 N.Y.2d 559 (1987). In that seminal case, this Court, applying a different Administrative Code provision, held that an out-of-possession landlord, who retains the right of re-entry, can be liable for defects on the premises. However, liability could only be imposed for structural and design defects. See Velazquez v. Tyler Graphics, 214 A.D.2d 489 (1st Dept. 1995). In Manning v. New York Tel. Co., 157 A.D.2d 264, 270 (1st Dept. 1990) the Court refused to find liability on a landowner who had the right of reentry onto the premises because the alleged "defect" merely involved "simple general maintenance of the premises, which was the sole responsibility of the tenant. As a consequence, the landlord cannot be held liable ...." Applying the same rationale to the case at bar, a landlord should not be responsible for general maintenance, as opposed to true defects, when that responsibility has been shifted to the tenant.

In sum, despite Plaintiff's best efforts, Plaintiff has failed to make the requisite showing that the Bing and Cepeda decisions, which are the basis for the decision in the case at bar, and, indeed the Fuentes-Gil case, are in any way incorrect. Plaintiff has not provided any compelling arguments as

CONCLUSION

For the reasons set forth above, this Court should affirm the Appellate Division's decision which granted summary judgment to Defendants Troon Management, Inc., Flushing-Thames Realty Company, Noel Levin, Daryl Gerber, As Executor of the Estate of Abraham Hershon, Harriette Levine, As Executor of the Estate of Abraham Hershon and Noel Levine, as Executor of the Estate of Abraham Hershon.

Dated: White Plains, New York
December 18, 2018

Yours, etc.

ROSENBAUM & TAYLOR, P.C.

By: _____
Scott Taylor

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