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6/18

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

Court of Appeals

STATE OF NEW YORK

XIANG FU HE,

Plaintiff-Respondent,

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-Appellants.

(Additional Caption on the Reverse)

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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

Appellate Counsel to:

WADE T. MORRIS, ESQ.
Attorney for Plaintiff-Respondent
225 Broadway, Suite 1510
New York, New York 10007
212-406-4993

Date Completed: May 29, 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.

COURT OF APPEALS
STATE OF NEW YORK

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XIANG FU HE,

Plaintiff-Respondent,

-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-Appellants.

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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-Appellants,

-against-

JFD TRADING, INC. and SDJ TRADING, INC.

Third-Party Defendants.

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Index No.: 111331/09

Notice of Motion for Leave to Appeal to the Court of Appeals

PLEASE TAKE NOTICE, that upon the annexed affirmation of Kenneth J. Gorman, Esq., the notice of appeal and order appealed from the undersigned will move this Court at a Motion Part to be held at the Courthouse located at 20 Eagle Street, Albany, New

York, on the 18th day of June, 2018 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order providing the following relief:

[a] pursuant to CPLR §5601 et. seq. granting plaintiff leave to appeal to this Court from the Appellate Division's decision and order dated January 23, 2018, which reversed an order of the Supreme Court, dismissing the complaint in its entirety; and

[b] Any other, further or different relief that this Court may deem just, proper and equitable.

PLEASE TAKE FURTHER NOTICE that any answering affidavits are required to be served not later than seven (7) days prior to the return date of this motion pursuant to CPLR.

Dated: New York, New York
May 29, 2018

Yours, etc.,
Wade T. Morris, Esq.

By: Kenneth J. Gorman

Kenneth J. Gorman, Esq.
225 Broadway, Suite 307
New York, NY 10007
(212) 267-0033

Clerk of the Court

Rosenbaum & Taylor, P.C.,
7-11 S Broadway #401,
White Plains, NY 10601

COURT OF APPEALS
STATE OF NEW YORK

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XIANG FU HE,

Plaintiff-Respondent,

-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,

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Defendants-Appellants,

-against-

JFD TRADING, INC. and SDJ TRADING, INC.

Third-Party Defendants.

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Index No.: 111331/09

AFFIRMATION IN SUPPORT

Kenneth J. Gorman, an attorney duly licensed to practice law in the State of New York, hereby affirms under the penalties of perjury the truth of the following statements pursuant to CPLR 2106:

I am appellate counsel to Wade T. Morris, Esq., the attorney for the plaintiff-respondent Xiang Fu He (hereinafter the "plaintiff") in the above captioned matter. I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained by my office and in the prosecution of this action. I submit this affirmation in support of the plaintiff's instant application for leave to appeal to the Court of Appeals from the decision and order of the Appellate Division, First Department dated January 23, 2018, which is annexed hereto as Exhibit A.

Statement of Procedural History
Pursuant to 22 NYCRR § 500.22(B)(2)

The plaintiff commenced this action to recover damages for personal injuries on or about August 6, 2009 by filing a summons and verified complaint (32-45)[1]. Issue was joined with service of defendants' amended verified answer dated September 8, 2009 (56-63).

In a decision and order dated June 22, 2016, the Supreme Court, New York County (Edmead, J.) denied defendants' motion for summary judgment (8-16). The court rejected defendants' argument that they were not responsible for plaintiff's accident because they were out of possession landlords as they had a non-

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

delegable duty under Administrative Code §7-210 to maintain the sidewalk (16).

In a decision and order dated January 23, 2018, the Appellate Division, First Department reversed the Supreme Court's order and dismissed the complaint on the ground that defendants were out of possession landlords with no contractual obligation to keep the sidewalks clear of snow and ice (Attached hereto at Exhibit "A"). The Court made no mention of defendant's statutory obligations nor referenced the statute § 7-210.

Plaintiff timely moved to reargue the Appellate Division's decision, or in the alternative, for leave to Appeal to the Court of Appeals on February 18, 2018.

By order dated April 26, 2018, the Appellate Division, First Department denied plaintiff's motion for re-argument and for leave to appeal to the Court of Appeals. Defendant served a copy of that order with notice of entry on April 26, 2018 (Exhibit "B").

The present motion for leave to appeal is being made within 35 days of service of the Appellate Division, First Department's April 26, 2018, order denying plaintiff's motion for reargument and/or leave to appeal to the Court of Appeals.

Accordingly, the timeliness chain is intact for making the present motion.

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?

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" (NY 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 the decisional law from this Court, the Appellate Division, Second Department and the plain meaning of section 7-210, making this issue ripe for Court of Appeals review.

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

Relevant Factual 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].

Discussion

We respectfully submit that the First Department's decision presents a leave worthy issue. 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

[3] Unofficial citations omitted.

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]).

The Appellate Division's decision is a stark departure from the plethora of cases from the First Department explicitly 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.

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 using Bing to cases where section 7-210 is clearly applicable and relieving owners of their nondelegable duty. The First Department's dismissal of plaintiff's complaint based on Bing cannot 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 and presents a leave worthy issue.

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].

[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

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.

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*

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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),

"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.

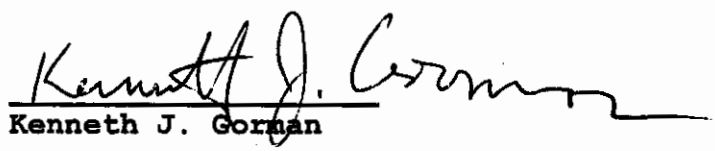
As such, irrespective of whether defendants are out of possession landowners who attempted to delegate their duties to their tenant, they are liable for plaintiff's injuries resulting from their failure to maintain the sidewalk pursuant to Administrative Code §7-210 (see, Sangaray v. West River Associates, 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 this is a leave worthy issue. Given the potential impact this decision will have on every sidewalk liability case involving Administrative Code §7-210, as evidenced by Brigantti's recent decision in Correa v. 3716-42 E. Tremont Assoc., LLC, 59 Misc.3d 1224(A), as well as the split created in

the departments, we respectfully submit that this is a leave worthy issue warranting Court of Appeals review pursuant to 22 NYCRR §500.11[d]

WHEREFORE, for the foregoing reasons, it is respectfully requested that the plaintiffs' application be granted and that this Court grant any further relief it deems just and equitable.

Dated: New York, New York
May 29, 2018



Kenneth J. Gorman

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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XIANG FU HE,

Index No.: 111331/09

Plaintiff,

-against-

NOTICE OF ENTRY

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.

----------X

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.

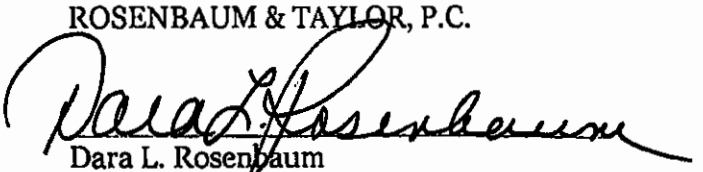
----------X

PLEASE TAKE NOTICE, that the within is a true copy of Honorable John W. Sweeny, Jr., Rosalyn H. Richter, Richard T. Andrias, Troy K. Webber, and Jeffrey K. Oing, JJ's Decision and Order, decided and entered on January 23, 2018.

Dated: White Plains, New York
January 23, 2018

Yours, etc.

ROSENBAUM & TAYLOR, P.C.



Dara L. Rosenbaum
Attorneys for Defendants
7-11 South Broadway, Suite 401
White Plains, New York 10601
(914) 358-4422

TO: WADE T. MORRIS, ESQ.
Attorney for Plaintiff
225 Broadway, Suite 1510
New York, New York 10007
(212) 406-4993

The Third-Party actions have both been discontinued.

Sweeny, J.P., Richter, Andrias, Webber, Oing, JJ.

5495 Xiang Fu He, Index 111331/09
Plaintiff-Respondent,

-against-

Troon Management, Inc., et al.
Defendants-Appellants.

- - - - -

[And a Third Party-Action]

Rosenbaum & Taylor, P.C., White Plains (Scott Taylor of counsel), for appellants.

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered June 23, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

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, L.P.*, 94 AD3d 413 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *accord Cepeda v KRF Realty LLC*, 148 AD3d 512 [1st Dept 2017]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 23, 2018

CLERK

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

XIANG FU HE,

Plaintiff,

Index No. 111331/09

-against-

NOTICE OF ENTRY

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.

----------X

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.

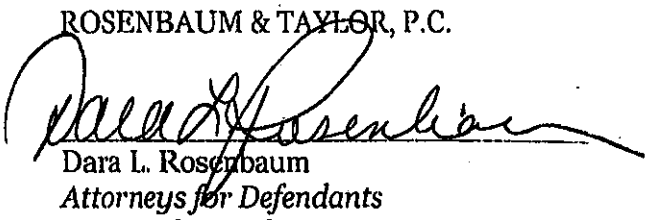
----------X

PLEASE TAKE NOTICE, that the within is a true copy of Honorable John W. Sweeny, Jr., Rosalyn H. Richter, Richard T. Andrias, Troy K. Webber, and Jeffrey K. Oing, JJ's Decision and Order, decided and entered on April 26, 2018.

Dated: White Plains, New York
April 26, 2018

Yours, etc.

ROSENBAUM & TAYLOR, P.C.



Dara L. Rosenbaum
Attorneys for Defendants
7-11 South Broadway, Suite 401
White Plains, New York 10601
(914) 358-4422

TO: WADE T. MORRIS, ESQ.
Attorney for Plaintiff
225 Broadway, Suite 1510
New York, New York 10007
(212) 406-4993

Kenneth J. Gorman, Esq.
Appellate Attorney to Plaintiff
225 Broadway, Suite 307
New York, New York 10007

The Third-Party actions have both been discontinued.

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on April 26, 2018.

PRESENT: Hon. John W. Sweeny, Jr., Justice Presiding,
Rosalyn H. Richter
Richard T. Andrias
Troy K. Webber
Jeffrey K. Oing, Justices.

Xiang Fu He,
Plaintiff-Respondent,

-against-

M-918
Index No. 111331/09

Troon Management, Inc., et al.,
Defendants-Appellants.

(And a third-party action)

Plaintiff-respondent having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on January 23, 2018 (Appeal No. 5495),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

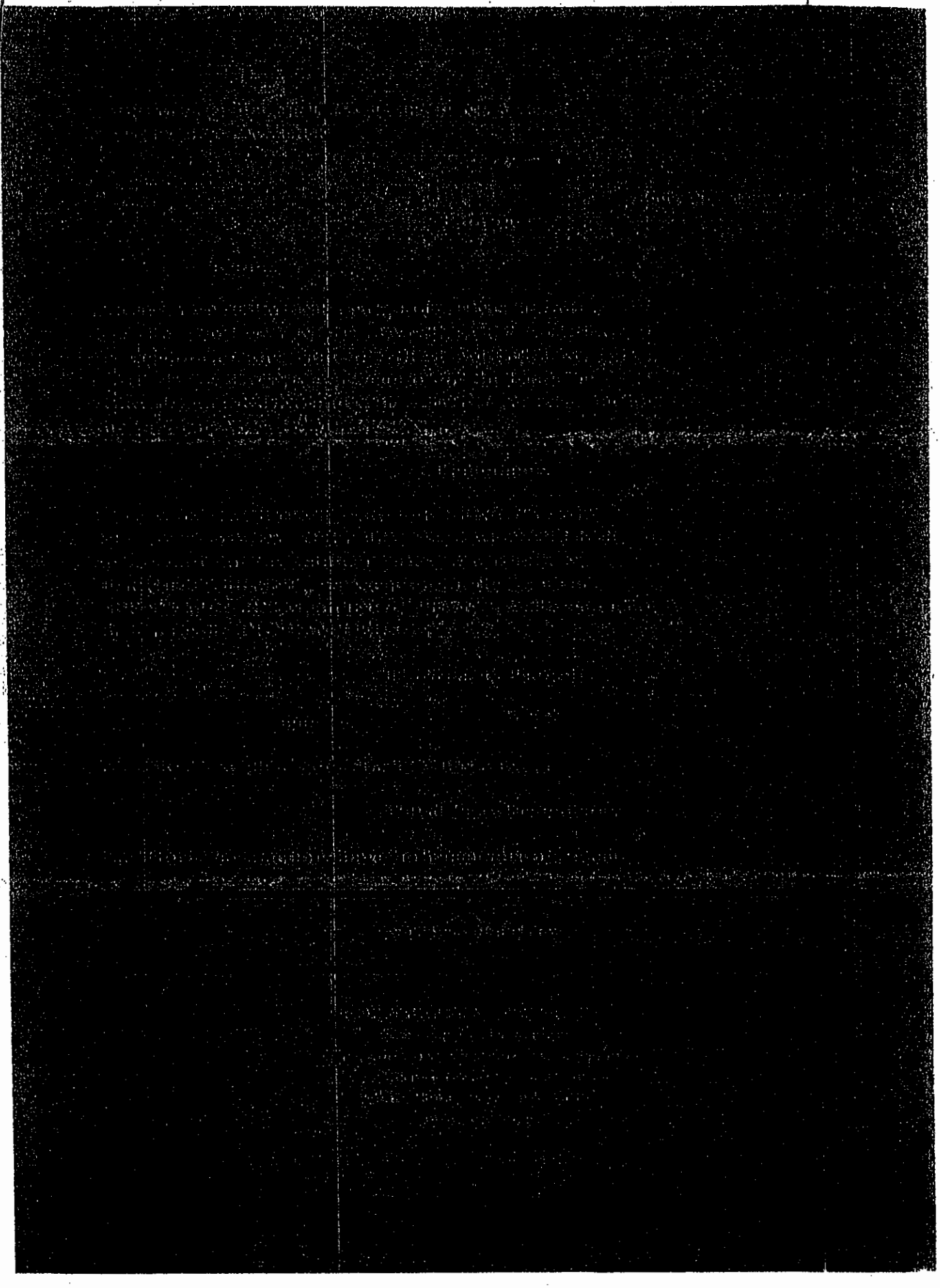


EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

XIANG FU HE,

Plaintiff,

-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.

----------X

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

Index No.: 111331/09

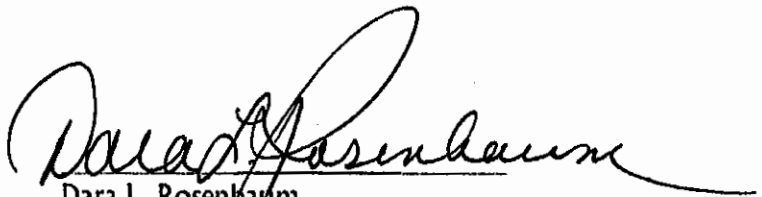
NOTICE OF ENTRY

PLEASE TAKE NOTICE, that the within is a true copy of Hon. Carol R. Edmead's Order, dated June 22, 2016, and duly entered in the office of the clerk of the within named court on June 23, 2016.

Dated: White Plains, New York
June 28, 2016

Yours, etc.

ROSENBAUM & TAYLOR, P.C.



Dara L. Rosenbaum
Attorneys for Defendants
7-11 South Broadway, Suite 401
White Plains, New York 10601
(914) 358-4422

TO: WADE T. MORRIS, ESQ.
Attorney for Plaintiff
225 Broadway, Suite 1510
New York, New York 10007
(212) 406-4993

The Third-Party actions have both been discontinued.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35
Justice

Index Number : 111331/2009
HE, XIANG FU
vs.
TROON MANAGEMENT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/29/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for summary judgment dismissing the plaintiff's complaint is denied. It is further

ORDERED that defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/22/16

J.S.C.
HON. CAROL R. EDMEAD

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------x

XIANG FU HE,

Plaintiff,

-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.

----------x

Index No. 111331/2009
Motion Seq. 004

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Troon Management, Inc. ("Troon Management"), Flushing-Thames Realty Company ("Realty Co."), Noel Levine ("Mr. 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 (collectively, "defendants") move for summary judgment dismissing the complaint of plaintiff Xiang Fu He ("plaintiff").

Factual Background

The premises at issue is located at 1177A Flushing Avenue, Brooklyn, New York and was owned by defendant Mr. Levine and the Estate of Abraham Herson. Mr. Levine also owned Troon Management, and used Troon Management "for whatever" his "properties needed" (EBT of Howard Justvig of Becker Ross, LLP, attorneys for Mr. Levine, p. 8). Defendant Realty Co. (as landlord) leased the premises to SDJ Trading (plaintiff's employer) (*id.* pp. 7-8).

According to plaintiff's bill of particulars, on January 22, 2007, plaintiff "slipped on ice and snow that was left in front of the" premises while working for nonparty SDJ Trading, Inc. ("SDJ Trading") (¶5). Plaintiff testified at his deposition that on the date the incident, his glove became wet while he was working, cutting meat to fill orders (EBT, pp. 17-18, 24, 29). Therefore, plaintiff went "to change a new glove"; "because it was so busy in the morning a lot of people were cutting meat inside, so I had to go to outside" "to get the glove" (EBT, p. 25). He had walked out of the building in which he was working to get new gloves which were located in the cafeteria (EBT, pp. 25, 29). Plaintiff testified that he slipped and fell while outside on his way back to his work area (EBT, p. 30, 32, 36, 37). After he fell, he "realized there was a big ice on the ground." (EBT, p. 38).

On June 4, 2008, plaintiff's co-worker, Enrique Guadarrama ("Guadarrama"), signed a written statement taken by an investigator, which indicates that the "sidewalk where the accident took place was covered with uneven patches of snow and ice and dirty foot prints. . . ." (Page 3 of 3). Guadarrama later testified at his deposition that plaintiff slipped on a two foot by four foot solid metal cover that located inside the building (EBT, pp. 74-76). Guadarrama also testified that he can read and write English "a little bit," (EBT, p. 19) that he did not understand what was written on the report (EBT, p. 41), that "as cold as it was it made the steel slippery" (EBT, p. 37), and that the initials on the top of page one was not his (EBT, p. 41).

In support of summary judgment, defendants argue that Guadarrama's testimony and the certified weather reports of the day in question render plaintiff's testimony incredible as a matter of law. Based on Guadarrama's testimony, the accident occurred within the premises leased by plaintiff's employer, SDJ Trading, and not on the sidewalk. Further, even assuming plaintiff's

accident occurred on the sidewalk, the certified weather report demonstrates that there was no ice in that area, and plaintiff testified that he did not know where the ice originated. Thus, the ice most likely originated from plaintiff's employer's frozen meat operations. Moreover, plaintiff's employer was responsible under the lease agreement for keeping the sidewalk "clean and free from ice [and] snow. . . ." And, defendants were out of possession landlords and owners of premises, for which SDJ Trading's workers shoveled and salted sidewalk snow. Thus, defendants cannot be held liable for plaintiff's injuries.

Plaintiff opposes the motion, arguing that the defendants have a nondelegable duty under the New York City Administrative Code §7-210 to maintain the sidewalk which abuts the premises, notwithstanding the lease provision cited by defendants. Defendants cannot rely on uncertified weather reports or the unsworn report of their meteorologist to support summary judgment. Plaintiff specifically alleges a violation of §7-210, and submits weather reports and his expert's opinion showing that there was ice on the sidewalk at the time of plaintiff's accident. Further, the evidence indicates that defendants are not out of possession landlords, as the building superintendent inspected the sidewalk several times a week. And, defendants failed to meet their burden of showing the lack of notice of the dangerous ice condition, as there is no evidence of their maintenance activities or inspections performed.

In reply, defendants add that the investigator misled Guadarrama about the contents of the report Guadarrama's signed, and plaintiff's expert failed to raise an issue of fact as to the conditions of the sidewalk. Further, the Administrative Code is inapplicable to the incident in question. Further, the weather report was submitted to dhow that the accident did not occur outside the building.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Defendants failed to show, *prima facie*, that the incident did not occur in the manner alleged by the plaintiff (*see Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920), or that the alleged snow, ice, and/or slippery condition on the sidewalk was not a proximate cause

of the accident (*see Derdiarian v Felix Contr. Corp.*, 51 N.Y.2d 308). Contrary to defendants' contention, Guadarrama's testimony and the certified weather reports do not render plaintiff's testimony incredible as a matter of law. Notably, Guadarrama testified at his deposition that "The initials on the top and bottom of page two and the top and bottom of page three (concerning the report of uneven patches of snow and ice) were his (EBT, p. 41). Guadarrama deposition testimony about the report he gave the investigator repudiates some of the statements taken by the investigator, but when read in context, does not flatly contradict plaintiff's claim that he fell on the sidewalk due to snow or icy conditions:

> Q Okay. It says, *"It had snowed at some time prior to Xiang's accident"?*
> *A Yes, before.*
> Q Okay. "And following the snowfall, someone shovelled the sidewalk and the surrounding area"?
> A No. The sidewalk was clean.
> Q Okay. Well, it says, "*Following the snowfall, someone shovelled the sidewalk and the surrounding area"?*
> *A Yes.*
> *Q Is that accurate?*
> *A Yes.*
> (EBT, p. 31) (emphasis added).
>
> A I told the person -- I told the reporter that it was clean, that *he had fallen right near where the gate* was but the area was clean where he fell.
> (EBT, p. 32) (emphasis added).
>
> * * * * *
>
> Q Okay. "The sidewalk where Xian slipped and fell was shovelled"?
> A Yes.
> Q Moving on to page three. "The sidewalk where the accident took place was covered with uneven patches of snow and ice and dirty footprints, which were frozen solid"?
> A No.
> Q You didn't say that?
> A No.
> Q "*The sidewalk where Xiang had his accident was very slippery making for it very dangerous conditions"?*
> *A Yes, I said that*. It could have been that as cold as it was it made the steel slippery.
> (P. 37) (emphasis added)

At Guadarrama's deposition, he identified the steel plate at issue, which appears to located inside the premises and also abutting the sidewalk where the gate is located (E-Doc No. 106). Plaintiff, however, circled the area in which he fell, which included a portion of the steel plate located on the exterior, sidewalk side of a steel plate by a gate ((E-Doc No. 118).

Plaintiff's account of how the accident occurred is just as plausible as defendants' account. If, as is the case herein, it appears that there is a discrepancy in the evidence, the jury will have to consider whether the apparent discrepancy can be reconciled by fitting the two stories together. If, however, that is not possible, then the jury will have to decide which of the conflicting stories it will accept.

Even assuming the record gives conflicting testimony as to how the accident occurred, any inconsistency between plaintiff's testimony and the defendants' rendition of the facts is to be resolved by the jury (*see Cuevas v. City of New York*, 32 A.D.3d 372, 821 N.Y.S.2d 37 [1st Dept 2006] ("Any inconsistency in plaintiff's testimony would merely raise a credibility issue for the trier of fact"); *Yaziciyan v. Blancato*, 267 A.D.2d 152, 700 N.Y.S.2d 22 [1st Dept 1999] ("deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact")).

And, the unsworn weather report submitted by defendants fail to establish, as a matter law, the absence of any snow or icy conditions existing or remaining at the time of plaintiff's accident (*Morabito v. 11 Park Place LLC*, 107 A.D.3d 472, 967 N.Y.S.2d 694 [1st Dept 2013] ("unaffirmed report from a weather reporting company, not accompanied by any certified weather records or admissible climatological reports, cannot be considered")). It is also noted that plaintiff's expert affidavit, which indicates that the ice on which plaintiff fell was formed by

the snow, sleet and rain that froze into ice during January 18-20, 2007, raises an issue of fact as to the presence of snow and ice at the time and location of plaintiff's accident.

Therefore, summary judgment dismissing the complaint on the ground that plaintiff's accident occurred within the leased premises and not on the sidewalk, that there was no ice in the accident location, and on the ground that plaintiff did not know where the ice originated, is unwarranted.

Moreover, plaintiff's employer was responsible under the lease agreement for keeping the sidewalk "clean and free from ice [and] snow. . . ."

And, defendants failed to demonstrate, as a matter of law, they were out of possession landlords not liable for plaintiff's injuries. "An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*Bing v. 296 Third Ave. Group, L.P.*, 94 A.D.3d 413941 N.Y.S.2d 141 [1st Dept 2012] *citing Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 420, 927 N.Y.S.2d 49 [2011]). Snow or ice is not a significant structural or design defect (*Bing v. 296 Third Ave. Group, L.P., supra* at 414), and the lease herein imposes an express obligation upon the tenant, SDJ Trading, "to keep the sidewalk and curb in front of said premises clean and free" from snow and ice (Rules and Regulations attached to and made part of this Lease in accordance with Article 35 (1)).

However, pursuant to Administrative Code § 7–210, property owners are now "under a statutory nondelegable duty to maintain the sidewalk" (*see Cook v. Consolidated Edison Co. of*

NY, Inc., 51 A.D.3d 447, 448, 859 N.Y.S.2d 117 [1st Dept 2008]), including a duty " to remove snow, ice, dirt or other material from the sidewalk" (*see Collado v. Cruz*, 81 A.D.3d 542, 917 N.Y.S.2d 178 [1st Dept 2011] ("Administrative Code § 7–210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk")). The City ordinance is clear in imposing a duty to maintain the sidewalk in a reasonably safe condition on "the owner of real property abutting [the] sidewalk" (see Administrative Code of City of N.Y. § 7–210[a]), including liability for personal injury caused by "the negligent failure to remove snow, ice, dirt or other material from the sidewalk" (*see id.* § 7–210[b]). Inasmuch as the record supports plaintiff's claim that he fell on the sidewalk due to icy conditions thereat, summary judgment dismissing the complaint on the theory that defendants were out of possession landlords, is unwarranted.

Because defendants failed to eliminate issues of fact with respect to the occurrence of the accident and their liability, the motion of defendants for summary judgment is denied.

Conclusion

Based on the foregoing, it is here

ORDERED that defendants' motion for summary judgment dismissing the plaintiff's complaint is denied. It is further

ORDERED that defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: June 22, 2016

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

NYSCEF - New York County Supreme Court

Confirmation Notice

This is an automated response for Supreme Court / Court of Claims cases. The NYSCEF site has received your electronically filed document(s) for:

XIANG FU HE et al - v. - TROON MANAGEMENT INC et al

111331/2009

Documents Received on 06/28/2016 01:11 PM

Doc #	Document Type	Motion #
131	NOTICE OF ENTRY Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	004

Filing User

Name: **DARA L ROSENBAUM**

Phone #: **914-358-4422**

E-mail Address: **dlr@rosenbaumtaylor.com**

Fax #:

Work Address: **Rosenbaum & Taylor, P.C.**
7-11 South Broadway, Suite 401
White Plains, NY 10601

E-mail Notifications

An e-mail notification regarding this filing has been sent to the following address(es) on 06/28/2016 01:11 PM:

ISAAC, BRIAN J. - bji@ppid.com

LEWIS, LORI B - lblewis@ksinlaw.com

MORRIS, WADE T - wadetmorris@gmail.com

ROSENBAUM, DARA L - dlr@rosenbaumtaylor.com

NOTE: If submitting a working copy of this filing to the court, you must include as a notification page firmly affixed thereto a copy of this Confirmation Notice.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

XIANG FU HE,

Index No.: 111331/09

Plaintiff,

-against-

AFFIDAVIT OF SERVICE

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.

----------X

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

The Third-Party actions have both been discontinued

STATE OF NEW YORK)
) ss.:
COUNTY OF WESCHESTER)

SAMANTHA TEJERA, being duly sworn, deposes and says:

I am over the age of 18 years of age and reside at Bronx, NY.

On April 28, 2016, I served the following with a copy of the Notice of Entry via NYSCEF only:

Wade T. Morris, Esq.
Attorney for Plaintiff
225 Broadway, Suite 1510
New York, New York 10007
(212) 406-4993

SAMANTHA TEJERA

Sworn to before me this
28th day of June, 2016

Notary Public

TUYET HANH VICTORIA TRAN
Notary Public, State of New York
Registration No. 02TR6238966
Qualified in Bronx County
Commission Expires 4/11/2019