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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.

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.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Dated: March 11, 2018 New York County Clerk's Index No. 111331/09

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COURT OF APPEALS
STATE OF NEW YORK

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XIANG FU HE,

Index No.: 111331/09

Plaintiff-Respondent,

-against-

AFFIRMATION IN OPPOSITION

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,

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----------X

SCOTT TAYLOR, an attorney duly admitted to practice law in the courts of the State of New York, hereby affirms and makes the following statements under the penalty of perjury:

I am a partner with the law firm of ROSENBAUM & TAYLOR, P.C., attorneys for Defendants-Appellants 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 (hereinafter collectively referred to as "Defendants") in the above-entitled action and, as such, I am fully familiar with all of the facts and circumstances surrounding this matter.

I offer this affirmation in opposition to Plaintiff's motion seeking leave to appeal to the Court of Appeals from the Order of the Appellate Division, First Department, dated January 23, 2018.

QUESTION PRESENTED

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?

RELEVANT ADDITIONAL FACTS

Plaintiff's employer, SDJ Trading, Inc. ("SDJ") was obligated, by its lease to keep the sidewalk in front 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 (16-17). 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).

Plaintiff alleges that he slipped and fell on ice on the sidewalk in front of the SDJ property (292-293).

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

DISCUSSION

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.

Conspicuously absent from Plaintiff's argument that he should be granted leave to appeal is any mention of the fact that this Court has already denied leave to the plaintiff in Bing, supra. on the same exact issue that Plaintiff is now seeking to appeal.

Plaintiff's entire argument is based 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 "direct conflict" between the decisions in Bing and Cepeda and the case at bar, and there is no "direct conflict" between the decisions of this Court and the other appellate divisions of this State. Indeed, respectfully, there is no issue worthy of consideration by this Court.

The case relied on by Plaintiff, Sangaray v. West River Associates, LLC, 26 N.Y.3d 793, 28 N.Y.3d 652 (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, 176 N.Y.S.2d 628 (1958).

In Evans v State of New York, 55 Misc.3d 221, 226, 43 N.Y.S.3d 671, 675 (Court of Claims 2016), the Court held that, in a case where a plaintiff fell on an allegedly defective sidewalk, the tenant, as opposed to the true owner of the abutting property, was the "'owner' for purposes of imposing a duty upon it to keep the adjacent sidewalks ... reasonably safe." As the Court went on to state, "While the court is certainly sympathetic to the claimant's unfortunate accident, not every accident gives rise to liability." Id. at 230, 678.

Plaintiff cites to, and quotes from, Reyderman v Meyer Berfond Trust #1, 90 A.D.3d 633, 935 N.Y.S.2d 28 (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, 66 N.Y.S.314 (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, 947 N.Y.S.2d 543, 545 (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, 516 N.Y.S.2d 451 (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, 625 N.Y.S.2d 537 (1st Dept. 1995). In Manning v. New York Tel. Co., 157 A.D.2d 264, 270, 555 N.Y.S.2d 720, 724 (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, are in any way incorrect or that leave to further appeal this case to the Court

of Appeals is warranted. Indeed, in Bing, this Court already determined that, under the facts of this case, the issue of an out-of-possession landowner's responsibility for a slip and fall on ice on a sidewalk is not ripe for consideration.

WHEREFORE, Defendants 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 respectfully request that this Honorable Court deny Plaintiff's motion for leave to appeal to the Court of Appeals, in its entirety.

Dated: White Plains, New York
June 11, 2018

Yours, etc.

ROSENBAUM & TAYLOR, P.C.

By: _____

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The Third-Party actions have both been discontinued.