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COURT OF APPEALS

STATE OF NEW YORK

XIANG FU HE,

Appellant,

-against-

TROON MANAGEMENT, INC., et al.,

NO. 73

Respondents.

20 Eagle Street
Albany, New York
September 10, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The second appeal on this
2 afternoon's calendar is appeal number 73, He v. Troon
3 Management.

4 Good afternoon, Counsel.

5 MR. GORMAN: Good afternoon, Your Honors. May it
6 please the court, Kenneth J. Gorman for the plaintiff-
7 appellant. I would like to reserve two minutes for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: You may have two minutes,
10 sir.

11 MR. GORMAN: Thank you.

12 Well, for the past sixteen years, the First and
13 Second Departments have uniformly held that under
14 Administrative Code Section 7-210, with the - - - with the
15 exception of certain exceptions not applicable to this
16 case, landlords had a nondelegable duty to maintain the
17 sidewalk abutting their property in a reasonably safe
18 condition, and this included the removal of transient
19 conditions.

20 The First Department's decision ignored the terms
21 of Section 7-210, which expressly states that the "failure
22 to maintain a sidewalk in a reasonably safe condition shall
23 include"...the negligent failure to remove snow" and
24 "ice."

25 JUDGE STEIN: You're not saying that you - - -



1 you - - - you don't still have to prove negligence?

2 MR. GORMAN: I'm sorry?

3 JUDGE STEIN: You're not saying that you don't
4 still have to prove negligence?

5 MR. GORMAN: Absolutely, yes. I mean, yes, you
6 have to show negligence and proximate causation.

7 JUDGE STEIN: Show constructive notice and all
8 that, right?

9 MR. GORMAN: And all that.

10 JUDGE STEIN: Okay, so it's not strict liability.

11 MR. GORMAN: It's not strict liability, but they
12 have to - - - it - - - but they don't have to be - - - they
13 - - - they could be a landlord out of possession or in
14 possession. It - - - it doesn't matter. But it has to be
15 the landlord that is the - - - that - - - that has the
16 ultimate responsibility for maintaining the sidewalk.

17 CHIEF JUDGE DIFIORE: Under that section, can the
18 landlord ever delegate to the tenant under a provision of
19 the lease?

20 MR. GORMAN: I mean, the landlord can delegate to
21 the tenant, but the landlord would still be liable to an
22 injured third party.

23 CHIEF JUDGE DIFIORE: So he can't absolve himself
24 - - -

25 MR. GORMAN: That's correct.



1 CHIEF JUDGE DIFIORE: - - - by delegating to the
2 tenant under that statute.

3 JUDGE FEINMAN: I mean, that just becomes the
4 third-party action, or, you know, they bring him in as a
5 codefendant.

6 MR. GORMAN: That's correct. Like a tenant can
7 be held liable to the owner for indemnification, but for
8 the most part, tenants don't have any obligation or duty of
9 care to pedestrians. And - - -

10 JUDGE RIVERA: So you're saying you can delegate
11 the work, but not - - - the - - - the actual work that
12 needs to be done, but not the ultimate responsibility under
13 the law.

14 MR. GORMAN: I couldn't have said it better
15 myself.

16 And, I mean, there's policy issues behind this.
17 And this court recognized that in Sangaray. And when it
18 discussed the legislative history in Vucetovic v. Epsom,
19 the court recognized - - - this court recognized that the
20 legislative purpose underlying the enactment of Section 7-
21 210 was to incentivize abutting landlords to create safer
22 sidewalks to pedestrians, because they're best situated to
23 remedy sidewalk defects.

24 Tenants, unlike owners, are often transient
25 entities. They don't have the financial incentives that



1 ties to the property, and often the financial ability to
2 fulfill the statutory duty. There - - -

3 JUDGE FAHEY: You know, there - - - there seems
4 to be a line of cases from the First Department - - - Bing,
5 Cepeda, He, and Fuentes - - - that seem to say that - - -
6 that a landlord violation of - - - that the - - - the - - -
7 basically, that the lease trumps the statute. Do you want
8 to address some of those? Because that - - - that's been
9 con - - - pretty consistently their rule - - - their ruling
10 there and - - -

11 JUDGE FEINMAN: Yeah, but there are - - -

12 JUDGE FAHEY: Maybe the conflict with the - - -

13 JUDGE FEINMAN: - - - also some cases such as
14 Chan v. Lee, from the First Department, in which some judge
15 I know sat on the panel saying the opposite.

16 JUDGE FAHEY: Oh, like a Feinman case.

17 JUDGE FEINMAN: So they're a little bit at war
18 with themselves, aren't they?

19 MR. GORMAN: I - - - it - - - it appears that
20 way, but - - -

21 JUDGE FAHEY: Well, how does it compare to the
22 Second Department?

23 MR. GORMAN: Well, I mean, the First Department,
24 up until even now, says that a landlord has a nondelegable
25 duty to maintain the property in reasonably good repair.



1 Now, it's nondelegable, but it's - - - but it appear - - -
2 apparently, the First Department appears to say this is
3 nondelegable with regard to structural defects - - -

4 JUDGE FAHEY: I see.

5 MR. GORMAN: - - - and not with regard to
6 transient conditions. But - - -

7 JUDGE FAHEY: And - - - and what does the Second
8 Department say about that?

9 MR. GORMAN: The Second Department says that it's
10 respon - - - nondelegable with regard to all - - - all
11 defects, whether it's transient or structural.

12 If it was the legislature's intent to limit a
13 landlord's nondelegable duty to repairing structural
14 defects, the statute would have stated so. And it would
15 not have included the removal of snow and ice.

16 JUDGE RIVERA: Well, could the legislative
17 history be read - - - be understood to mean that all the
18 legislature did was recognize there's a duty on a landlord,
19 but instead of the city paying for the injuries, the
20 landlord's going to pay for it, but under the existing
21 framework at the time, an out-of-possession landlord was
22 generally not responsible and didn't have that duty?

23 MR. GORMAN: That's correct, which is why the
24 city - - - the city wanted to create a remedy for injured
25 pedestrians. And this is what they did to rectify that



1 situation, because under the previous statutory scheme,
2 although landlords and tenants were responsible for
3 clearing snow and ice and remedying structural defects - -
4 -

5 JUDGE RIVERA: No, no, but my question is, could
6 the legislative history be interpreted to simply show that
7 what was intended was to shift the responsibility for the
8 payment to those who already carried the duty? And if an
9 out-of-possession landlord didn't have that duty, they
10 weren't going to carry the responsibility - - -

11 MR. GORMAN: Yes. It - - -

12 JUDGE RIVERA: - - - for the payment.

13 MR. GORMAN: It's in the legislative history and
14 I - - - I think it's pretty clear. Also, the amicus - - -
15 the amicus brief for the Trial Lawyers Association set
16 forth in Administrative Code Section 7-211 and Section 7-
17 212 that landlords are responsible for getting insurance,
18 not tenants-in-possession. And under 7-212, landlord - - -
19 the city can actually go after a property owner for
20 unreimbursed medical costs that - - - that an injured party
21 sustains up to 50,000 dollars.

22 So I think that the legislative history and the
23 accompanying statutes that were enacted with 7-210 clearly
24 state that the ultimate responsibility lies with the
25 landlord, although a tenant could be responsible for



1 clearing snow and ice and remedying property defects;
2 that's between the landlord and the tenant.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MR. GORMAN: Thank you very much.

5 CHIEF JUDGE DIFIORE: Counsel?

6 MR. TAYLOR: May it please the court, my name is
7 Scott Taylor. I represent the respondents, or the Troon
8 Management defendants.

9 JUDGE FEINMAN: So can I - - - can I just start
10 where he sort of ended up, which is why would the statute
11 require a non-liable party to have insurance?

12 MR. TAYLOR: The - - -

13 JUDGE FEINMAN: I mean, why would they have that
14 insurance requirement if - - - if there was no liability on
15 behalf of the landlord?

16 MR. TAYLOR: Well, the - - - the Administrative
17 Code shifted the responsibility for maintenance of
18 sidewalks from the city to - - -

19 JUDGE FEINMAN: Oh, I'm well aware. I spent many
20 years - - -

21 MR. TAYLOR: Right, but I'm saying and that's why
22 they - - -

23 JUDGE FEINMAN: - - - looking after that pavement
24 in the city part.

25 MR. TAYLOR: But that's - - -



1 JUDGE FEINMAN: And it was a clear policy
2 decision by the city council and Mayor Bloomberg to get the
3 city out of the business of paying for all these trips and
4 falls and whatnot on the sidewalk.

5 MR. TAYLOR: Right, and - - -

6 JUDGE FEINMAN: So - - - so we all understand
7 that. But as part of that, they also required that
8 landlords have insurance.

9 MR. TAYLOR: Well, I think those go hand-in-hand.
10 I mean, they - - -

11 JUDGE FEINMAN: Right.

12 MR. TAYLOR: - - - they shifted the
13 responsibility and said, make sure you have the insurance
14 to - - -

15 JUDGE STEIN: But if - - -

16 MR. TAYLOR: - - - to cover it.

17 JUDGE STEIN: - - - if they wanted to protect
18 themselves, and they were thinking, they were recognizing,
19 they were anticipating that tenants might have a
20 responsibility under the lease to clear ice and snow, why
21 wouldn't it have - - - the - - - it have said that the
22 tenant or the owner or whoever is responsible for snow
23 removal has to have insurance? Why wouldn't it do that?

24 MR. TAYLOR: I mean, I don't know why they did or
25 didn't do what they did. I - - - I - - - I just know that



1 from - - -

2 JUDGE STEIN: Well, and how would they enforce
3 that if they did?

4 MR. TAYLOR: How would the - - -

5 JUDGE STEIN: How would they enforce it against
6 tenants - - -

7 MR. TAYLOR: They couldn't.

8 JUDGE STEIN: - - - who are - - - are transient?
9 So - - - so - - - so doesn't that support the
10 interpretation that it was meant - - - that - - - that the
11 obligation was meant to be nondelegable on the part of the
12 - - - the obligation to compensate people for their
13 injuries was meant to be nondelegable on - - -

14 MR. TAYLOR: Well, I - - -

15 JUDGE STEIN: - - - on the part of the owners?

16 MR. TAYLOR: I mean, I think if they intended 7-
17 210 to be nondelegable, they could have said in the - - -
18 in the provision that it's nondelegable. That's an
19 entirely different provision, and - - - and this provision
20 is silent as to that. And it - - - and as we've already -
21 - - and - - - and the appellant acknowledged - - -

22 JUDGE STEIN: But don't we have to - - - don't -
23 - - since - - - since it says neither it is or it isn't
24 nondelegable or delegable - - -

25 MR. TAYLOR: Correct.



1 JUDGE STEIN: - - - don't we have to look at it
2 in the context of the entire statutory scheme here - - -

3 MR. TAYLOR: I think you have to look - - -

4 JUDGE STEIN: - - - and - - - and the purpose - -
5 - the purpose?

6 MR. TAYLOR: I think you have to look at the
7 totality of - - - of everything including that; I - - - I
8 do, yes. But - - - but by looking at it the way appellant
9 wants this court to look at it, you're basically
10 eliminating the concept of the out-of-possession landlord.
11 And you - - - because you're basically saying there is no
12 such thing. You can buy a building, and you can move to
13 Florida, and you can require the tenant to remove snow and
14 ice, but if it snows, you better have somebody up there,
15 and that's going to have a ripple effect, because the cost
16 of that - - -

17 JUDGE STEIN: But - - - but why can't - - - why
18 can't the - - - the landlord - - - why can't the owner have
19 a separate agreement with the tenant that if I end up
20 having to pay for this, you have indemnify me?

21 MR. TAYLOR: Well, they can, and - - - and they
22 do, but that doesn't - - - that doesn't - - - the separate
23 agreement to indemnify - - - I mean, there's an
24 indemnification provision within this lease. So I mean,
25 they can do that.



1 JUDGE FAHEY: Would we have to - - -

2 MR. TAYLOR: But - - -

3 JUDGE FAHEY: Would we have to overrule - - -
4 rule Sangaray, which we ruled on in 2016, if we were to
5 vote - - - go your way?

6 MR. TAYLOR: I - - - I do not believe you do,
7 Your Honor.

8 JUDGE FAHEY: Okay, tell me why.

9 MR. TAYLOR: And - - - and I'll tell you, and it
10 also addresses the - - - one of the questions you - - - you
11 placed to the appellant, which is - - - Sangaray is not a
12 transient condition, which is what we have here. The - - -
13 you had asked about the Second Department- - -

14 JUDGE FAHEY: So it - - - so - - - so it's a
15 structural - - - it's a structural - - -

16 MR. TAYLOR: Exactly.

17 JUDGE FAHEY: Thank you.

18 MR. TAYLOR: And that's consistent with Guzman
19 and everything else this court has done. And - - - and
20 when you asked before if there are Second Department cases
21 that ru - - - go against Bing and Cepeda and Fuentes, and
22 the short answer to you is no, there are not, because all
23 the cases that are cited, because that's all the cases that
24 there are, are structural-defect cases.

25 JUDGE STEIN: But does 7-210 make any



1 distinction? You're talking about what's in and what's not
2 in the - - - in the language. Does it make any distinction
3 between structural defects and transient conditions?

4 MR. TAYLOR: Well, I mean, there's separate
5 provisions for each, I mean, you know, they talk about
6 specifically snow separately from - - - from the structural
7 defects.

8 JUDGE STEIN: But they lump them together in - -
9 - under the same provision.

10 MR. TAYLOR: It's in the same provision, yes,
11 Your Honor. I mean, but they say - - -

12 JUDGE STEIN: So they don't say that some - - -
13 certain things apply to some things and not others. They
14 include them all; they include all of them.

15 MR. TAYLOR: I - - - I just - - -

16 JUDGE STEIN: Under 7-210.

17 MR. TAYLOR: Yeah.

18 JUDGE STEIN: That includes the structural and
19 the nonstructural.

20 MR. TAYLOR: Yes, it does, Judge.

21 JUDGE STEIN: So - - - so what basis would there
22 be then for us to interpret that - - -

23 MR. TAYLOR: Well, I mean, I think - - -

24 JUDGE STEIN: - - - differently?

25 MR. TAYLOR: - - - what really is before this



1 court is one of policy. I mean, it's a question, you know
2 - - - the only reason we are here is because Mr. He was not
3 satisfied with the exclusive remedy provided in Workers'
4 Compensation Section 11. Had Mr. He been a pedestrian or a
5 delivery man - - -

6 JUDGE FAHEY: That pretty much covers about
7 seventy percent of the tort cases we see, though.

8 MR. TAYLOR: Well, but not - - -

9 JUDGE FAHEY: So I mean, that's - - -

10 MR. TAYLOR: - - - not most of the sidewalk
11 cases. I mean, you know - - -

12 JUDGE FAHEY: No, but it covers it - - - I mean,
13 a lot of workmen comps, fall downs, labor law cases, and it
14 - - - it covers a lot of those kind of cases.

15 MR. TAYLOR: It certainly does, but not so - - -
16 I mean, pre - - - predominantly, most sidewalk cases are
17 trip-and-falls, slip-and-falls, and they're - - -

18 JUDGE FAHEY: Certainly, all the ones under this
19 statute are, so - - -

20 MR. TAYLOR: Yes, and they're - - - and - - - and
21 had he been a delivery man or a pedestrian - - -

22 JUDGE FAHEY: Let me ask you this.

23 MR. TAYLOR: - - - he could have sued the tenant.

24 JUDGE FAHEY: Let - - - let me ask a question.

25 You - - - you - - -



1 MR. TAYLOR: Yes.

2 JUDGE FAHEY: You were listening to the other
3 arguments. Does the owner - - - can the owner here escape
4 liability by executing the lease?

5 MR. TAYLOR: Yes.

6 JUDGE FAHEY: Fully?

7 MR. TAYLOR: For - - - for this. I mean, not
8 for, again, a structural defect.

9 JUDGE FAHEY: Wouldn't the owner be liable and
10 then - - - then he'd have to go after the tenant?

11 MR. TAYLOR: I - - - I'm sorry, Judge; I just
12 didn't hear you.

13 JUDGE FAHEY: Wouldn't the owner be liable and
14 then he would have to go through - - - after the tenant to
15 either get indemnification - - -

16 MR. TAYLOR: No, I believe that the owner shifted
17 the liability pursuant to the terms of the lease. He says
18 I'm going to be out of possession, you maintain the
19 sidewalk, and he did. Now, that wouldn't alleviate his
20 responsibility for a structural defect under Sangaray and -
21 - - and that line of cases, but for transient conditions,
22 that's imposing a duty on him to retain a contractor or an
23 employee, a cost which I assume will ultimately be shifted
24 onto the tenant.

25 JUDGE FAHEY: One of things that strikes me is -



1 - - on - - - on the displacement argument, that's - - -
2 that's a common - - - common law argument, but here we have
3 a statute that makes it a little bit different in the
4 creation of the duty. Do you agree with that?

5 MR. TAYLOR: I - - - I agree that the statute
6 does do that, but you know, when you read the language - -
7 -

8 JUDGE FAHEY: Does that extra layer work against
9 your - - - your - - - your side of the argument?

10 MR. TAYLOR: I - - - I did not believe so, Your
11 Honor. I mean, I believe when you read this - - - this
12 provision, and the Bing case, and the Cepeda case, and all
13 those, it makes it clear that, you know, there is such a
14 thing as an out-of-possession landlord, and he can protect
15 himself by - - - by shifting that responsibility.

16 CHIEF JUDGE DIFIORE: So under the - - - under
17 the - - -

18 MR. TAYLOR: So how can he be negligent for
19 something that - - - a snow event when he's not there?

20 CHIEF JUDGE DIFIORE: Under the out-of-possession
21 landlord doctrine, doesn't that require the landlord to
22 transfer control of the property on which the person was
23 injured?

24 MR. TAYLOR: Yes.

25 CHIEF JUDGE DIFIORE: So we're talking about a



1 sidewalk here, no?

2 MR. TAYLOR: Yes.

3 CHIEF JUDGE DIFIORE: So talk me through that.

4 MR. TAYLOR: Well, but he doesn't own the - - - I
5 mean, the landlord doesn't own the sidewalk.

6 CHIEF JUDGE DIFIORE: So how does he transfer - -
7 -

8 MR. TAYLOR: The city still owns it.

9 CHIEF JUDGE DIFIORE: Right, so we're talk - - -
10 you - - - you keep mentioning the out-of-possession
11 landlord doctrine. I want to know how that squares with
12 the fact that this is a sidewalk that's owned by the city,
13 and why this isn't - - - not a straight statutory
14 interpretation case.

15 MR. TAYLOR: I - - - well, I mean, I think it's
16 just - - - very simply a landlord purchases a building. He
17 doesn't purchase a sidewalk.

18 CHIEF JUDGE DIFIORE: Right.

19 MR. TAYLOR: He has a duty to maintain that
20 sidewalk under the Administrative Code - - -

21 CHIEF JUDGE DIFIORE: So would you agree that - -
22 -

23 MR. TAYLOR: But - - -

24 CHIEF JUDGE DIFIORE: - - - we decide this case
25 under the statute and that's our limited analysis? Is that



1 what you're arguing?

2 MR. TAYLOR: Yeah, I think it's the
3 Administrative Code 7-210.

4 CHIEF JUDGE DIFIORE: Okay, just want to make
5 sure.

6 MR. TAYLOR: Yeah.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. TAYLOR: Thank you, Your Honors.

9 CHIEF JUDGE DIFIORE: Counsel, rebuttal?

10 MR. GORMAN: My colleague stated that the statute
11 doesn't specifically state nondelegable duty, but no
12 statute really does that's - - - that's - - - that imposes
13 a nondelegable duty.

14 For instance, Labor Law Section 241 states that
15 all contractors and owners shall furnish proper protection.
16 And Multiple Dwelling Law Section 78 states that "the owner
17 shall be responsible for compliance with the provisions of
18 this section" to keep the dwelling in good repair. The
19 word "shall" means nondelegable, and that's what courts
20 have interpreted for - - - for decades.

21 With regard to the worker's comp issue, there's
22 really no distinction between the landlord's nondelegable
23 duty under Section 7-210 and a landlord's nondelegable duty
24 under the labor law. Just as the Third Department stated
25 in Nephew v. Barcomb, which we cite at pages 13 to 14 of



1 our brief, that Labor Law Section 241 makes no distinction
2 between - - -

3 JUDGE FEINMAN: Well, we don't need to go to the
4 labor law, though, to resolve this case.

5 MR. GORMAN: No, no, but just - - - I'm just
6 making an - - - an analogy.

7 JUDGE FEINMAN: Okay, fine, just to be clear,
8 because - - -

9 MR. GORMAN: We don't; we don't, but - - -

10 JUDGE FEINMAN: - - - that's - - -

11 MR. GORMAN: - - - but - - -

12 JUDGE FEINMAN: - - - -dangerous territory.

13 MR. GORMAN: I understand that, but the labor law
14 - - - it doesn't make a distinction between an in-
15 possession landlord and an out-of-possession landlord. 7-
16 210 doesn't make a distinction between an in-possession
17 landlord and - - -

18 JUDGE FEINMAN: I - - - I get the point.

19 MR. GORMAN: So - - -

20 JUDGE FEINMAN: I'm just saying I don't need to
21 rely on labor law cases - - -

22 MR. GORMAN: Understood.

23 JUDGE FEINMAN: - - - to interpret this statute.

24 MR. GORMAN: If there's any further questions,
25 I'll - - -



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CHIEF JUDGE DIFIORE: Thank you, Counsel.

MR. GORMAN: - - - just rest on my briefs. Thank
you very much, Judge.

(Court is adjourned)



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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Xiang Fu He v. Troon Management, Inc., et al., No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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