State of New York
Court of Appeals

OPINION

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No. 73
Xiang Fu He,
Appellant,
v.
Troon Management, Inc., et al.,
Respondents.

Kenneth J. Gorman, for appellant.
Scott Taylor, for respondents.
Defense Association of New York, Inc.; New York State Trial Lawyers' Association, amici curiae.

RIVERA, J.:

Section 7-210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain City sidewalks abutting their land in a reasonably safe condition. Under this duty of care, a subject owner

is liable for personal injury claims arising from the owner's negligent failure to remove snow and ice from the sidewalk (id. § 7-210 [b]). The Code makes no exception for out-of-possession landowners and so we hold that the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner. Thus, defendants are not entitled to summary judgment as a matter of law due solely to the owners' out-of-possession status.

I.

Plaintiff Xiang Fu He sued, among others, owners of a parcel of land in New York City for personal injuries arising from plaintiff's alleged slip and fall on the sidewalk abutting the property.[1] The complaint alleges that while employed by a nonparty lessee of the building on the property, plaintiff suffered injuries after falling on ice that had accumulated due to defendants' negligent maintenance of the abutting sidewalk, owned by the City of New York.[2]

Supreme Court denied defendants' motion for summary judgment dismissing the complaint, rejecting their arguments that out-of-possession landowners are not liable for personal injuries based on negligent sidewalk maintenance, and, under the lease terms, the

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[1] Plaintiff sued Noel Levine and the estate of Abraham Herson, through its executors Noel Levine, Harriette Levine, and Daryl Gerber, as owners of the property; Flushing-Thames Realty Company—of which Noel Levine was a partner and Abraham Herson had a partnership interest—which leased the premises to plaintiff's employer SDJ Trading, Inc.; and Troon Management, Inc., which was owned by Noel Levine and served as management agent of Flushing Thames Realty Company and the subject property.

[2] Defendants discontinued, without prejudice, their third-party action against lessees SDJ Trading, Inc. and JFD Trading, Inc.

lessee agreed to maintain the abutting sidewalks.[3] The Appellate Division reversed, granted defendants' motion for summary judgment, and dismissed the complaint, on the basis that the out-of-possession landowners had no contractual obligation to maintain sidewalks, and the presence of snow and ice does not constitute a significant structural or design defect for which such owners are responsible (Xiang Fu He v Troon Mgt., Inc., 157 AD3d 586, 587 [1st Dept 2018], citing Bing v 296 Third Ave. Group, L.P., 94 AD3d 413 [1st Dept 2012], lv denied 19 NY3d 815 [2012]). We granted plaintiff leave to appeal (Xiang Fu He v Troon Mgt., Inc., 32 NY3d 904 [2018]).

II.

Plaintiff argues that, with exceptions not applicable here, section 7-210 displaces the applicable common law, imposing a nondelegable duty of care and shifting all liability for sidewalk-defect-related personal injuries from the City of New York to owners of abutting property, like defendants. Plaintiff maintains that since triable issues of fact remain as to defendants' liability regarding plaintiff's personal injury claims, Supreme Court properly denied the motion. Defendants counter that they are entitled to summary judgment because, when a lessee has agreed to keep the premises in good repair, as in this case, an out-of-possession landowner retains liability only for structural defects inside the premises, whereas the lessee assumes liability for transient conditions, including those arising from sidewalk maintenance. We agree with plaintiff that defendant owners are

[3] The lease provided that the lessee would maintain the sidewalk "clean and free from ice [and] snow."

subject to the nondelegable duty imposed by section 7-210, which exposes them to potential liability for injuries allegedly caused by their failure to properly remove snow and ice from the sidewalks abutting their property as alleged in the complaint, and that triable issues of fact preclude summary judgment for defendants.

A.

Section 7-210 of the Administrative Code of the City of New York provides, in relevant part,

> "a. It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition.
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> "b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes" (Administrative Code of City of NY § 7-210 [a]-[b]).

By its terms, "[s]ection 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" (Sangaray v West Riv. Assoc., LLC, 26 NY3d 793, 797 [2016]). In other words, subject landowners are not strictly liable for personal injuries resulting from

incidents on abutting sidewalks because section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation.

Defendants do not dispute the requirements of section 7-210, but instead urge us to hold that the duty of care and attendant civil liability do not apply here. Essentially, they invite us to extend the out-of-possession landowner rule, under which landowners who have contracted out the responsibility for maintenance of their property do not assume liability for breach of that duty, to a duty to maintain premises owned by the City. This interpretation of section 7-210 disregards our first-order rule that the "text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006] [citation omitted]). Here, the Administrative Code could not be clearer. Section 7-210 applies to every "owner of real property abutting any sidewalk" and makes no distinction for those owners who are out of possession. The fact that this section expressly excludes certain owner-occupied properties from its reach (§ 7-210 [b]) demonstrates that defendant's reading is untenable because, if the City Council meant to exclude a class of owners, it knew how to do so (see Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce, 21 NY3d 55, 60 [2013] ["[T]he failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended"]; People v Finnegan, 85 NY2d 53, 58 [1995] ["We have firmly held that the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended"]; see also McKinney's Cons Laws of NY, Book

1, Statutes § 74 ["[T]he failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended"]). Contrary to the plain reading, defendants' interpretation would require us to assume the drafters meant something other than what they wrote and the City Council enacted section 7-210 anticipating that courts would insert language wholly absent from the provision, in violation of the established canon of construction that "[w]e are not at liberty to second-guess the Legislature's determination, or to disregard—or rewrite—its statutory text" (Matter of New York Civ. Liberties Union v New York City Police Dept., 32 NY3d 556, 567 [2018] [citation omitted]; see also McKinney's Cons Laws of NY, Book 1, Statutes § 73).

Other provisions of the Administrative Code support our conclusion that the New York City Council intended the word "owners" to mean all owners of abutting property, and not merely owners in possession or those charged with control of the abutting premises. Section 7-211, signed into law the same day as section 7-210, requires that an owner of real property subject to section 7-210 (b) carry personal injury and property damage liability insurance for injuries proximately caused by the failure to comply with the duty of maintenance under section 7-210. It further states that the City will not be liable for such injury if the owner failed to carry insurance as required by this section. There would be no need to impose a requirement to carry insurance if, as defendants argue, section 7-210 did not impose both a duty and civil liability upon an out-of-possession landowner. Indeed, if the City Council had intended that non-owners could be liable under section 7-

210, it would have extended the insurance mandate in section 7-211 to those with an interest in the premises other than a freehold.

Section 7-212, which allows the City to pay an unsatisfied judgment against an owner of abutting property for injury on a sidewalk after one year of non-payment by the landowner, also suggests the landowner, regardless of possessory status, would be liable. Notably, in section 16-123 of the Administrative Code, the City Council imposed a duty to "remove the snow or ice, dirt, or other material from the [abutting] sidewalk" with accompanying fines for failure to do so—but not liability in tort—on "[e]very owner, lessee, tenant, occupant, or other person, having charge of any building or lot." The City Council was thus aware that nonowners may have charge of clearing property abutting sidewalks and, in fact, imposed a more limited duty on such nonowners to maintain abutting sidewalks under section 16-123. In comparison, the City Council made a considered choice to impose broader maintenance obligations and tort liability on owners of abutting premises by enacting section 7-210.

Read in context, the phrase "owner of real property" is clear and unambiguous and cannot be read to exclude out-of-possession landowners, and so there is no need to resort to legislative history. Nonetheless, doing so confirms that "owner" means all owners, regardless of their out-of-possession status and whether the owner has contracted with the lessee or another to keep the sidewalk in reasonably safe condition.

Prior to the effective date of section 7-210, New York City was liable for all personal injuries caused by the negligent failure to properly maintain the sidewalks. Section 7-210

"was enacted for the purpose of transferring tort liability from the City to certain adjoining property owners as a cost-saving measure" (Sangaray, 26 NY3d at 795), because it was appropriate "to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them—the property owners" (Rep. of Comm. on Transp., at 5, Local Law Bill Jacket, Local Law No. 49 [2003] of City of NY).

Moreover, and contrary to defendants' assertion, a landowner's duty under section 7-210 is an affirmative, nondelegable obligation. As the Court explained in Sangaray, "the purpose underlying the enactment of [section 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" (Sangaray, 26 NY3d at 799). Accordingly, a nondelegable duty incentivizes owners to make decisions that optimize the safety and proper care of sidewalks, reducing harm to third parties and litigation costs. This interpretation of the Code not only is mandated by the language and supported by the legislative history, but also promotes the City Council's intent to place the duty squarely on the shoulders of those in the best position to maintain sidewalks in a reasonably safe condition and to insure against loss. Otherwise, if owners may delegate this responsibility and attendant liability, then they have no incentive to ensure that the delegatee is competent and properly insured.

Defendants' argument that a landowner can avoid liability by contracting with a lessee to maintain the sidewalks conflates a private covenant to maintain and repair property between parties to a leasehold agreement and whether that obligation may be

delegated under the common law, with the duty imposed by section 7-210. Assuming, for purposes of our discussion, the analytical framework for the common law out-of-possession landowner rule applies to the maintenance of abutting New York City-owned sidewalks, section 7-210 displaces the rule. However, to be clear, nothing in section 7-210 prevents a landowner from entering into a maintenance agreement with tenants and third parties. While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210.

To the extent defendants argue that the party in possession is best situated to address defects, the argument is similarly unpersuasive. Certainly, a landowner or tenant in possession may be attuned to the problems on the ground and careful to timely address defective conditions, but the City Council appears to have determined that a landowner who is held responsible for personal injuries resulting from negligent maintenance has every reason to hold those responsible for maintenance to the duty of care mandated under section 7-210 and require them to adequately insure against personal injury and property damage. Moreover, if litigation ensues, the landowner generally has an indemnification action against a tenant or lessee who covenants to maintain the property. Defendants' objection to this policy consideration is best addressed to the City Council, which, at this juncture, has chosen to impose liability on owners of land abutting City sidewalks. As we have repeatedly made clear, "the courts 'do not sit in review of the discretion of the Legislature or determine the expediency, wisdom, or propriety of its action on matters

within its powers'" (Hernandez v New York City Health & Hosps. Corp., 78 NY2d 687, 695 [1991], quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 73).[4]

B.

On a motion for summary judgment, the moving party must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). If the moving party produces the required evidence, the burden shifts to the nonmoving party "'to establish the existence of material issues of fact which require a trial of the action'" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324). Here, defendants challenge plaintiff's version of events and rely on credibility determinations that are not a proper basis for summary judgment. Therefore, as Supreme Court concluded, triable issues of fact exist regarding the manner in which the accident occurred and the presence of snow and ice.

III.

The Appellate Division erroneously reversed Supreme Court and granted defendants summary judgment on the basis that the subject property owners were out of possession and, therefore, had no duty to keep the abutting sidewalks clear and no civil liability to persons injured by the negligent failure to remove snow and ice. For the reasons

[4] Our conclusion renders it unnecessary for us to address plaintiff's alternative arguments that defendants either were not in fact out-of-possession landowners or assumed responsibility for maintenance of the sidewalk where the alleged accident occurred because of their conduct.

stated, we hold that section 7-210 abrogates the common law, imposes a nondelegable duty of care, and shifts civil liability from the City to out-of-possession owners like defendants. Accordingly, the Appellate Division order should be reversed, with costs, and the order of Supreme Court reinstated.

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Order reversed, with costs, and order of Supreme Court, New York County, reinstated. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Stein, Fahey, Garcia, Wilson and Feinman concur.

Decided October 24, 2019