

## Outside Counsel

## Expert Analysis

# Out-of-Possession Owners and Snow, Ice Liability: Appellate Courts Are Split

One of the more common types of personal injury lawsuits is when a pedestrian slips and falls on an alleged condition of snow and ice on a public sidewalk abutting a commercial premises. Under long-standing N.Y. law, generally, liability for injuries sustained as a result of a dangerous condition such as snow/ice on a public sidewalk rested with the municipality and not the abutting landowner. See *City of Rochester v. Campbell*, 123 N.Y. 405 (1890); *Roark v. Hunting*, 24 N.Y.2d 470 (1969). Traditionally, there are exceptions where the landowners can be held liable:

[W]here the sidewalk was constructed in a special manner for the benefit of the abutting owner, the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk, and *where a local ordinance or statute specifically*

ALAN R. LEVY is of counsel at Bonner, Kiernan, Trebach & Crociata. He handles insurance defense civil liability matters.

By  
Alan R. Levy



*charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty.*

*Hausser v. Giunta*, 88 N.Y.2d 449, 453 (1996) (emphasis added).

Hence, absent a statutory provision imposing liability for failure to remove snow/ice from the sidewalk, so long as the landowner did not affirmatively make the snow/ice conditions on the sidewalk worse, that landowner could not be held liable for a pedestrian slipping and falling on accumulated snow/ice on their sidewalk. See *Martinez v. City of New York*, 20 A.D.3d 513 (2d Dept. 2005).

In 2003, the enactment of Administrative Code of the City of New York §7-210 shifted the allocation of liability for personal injury claims arising from the alleged failure to

properly remove snow/ice from New York City public sidewalks from the City to the abutting landowners. Section 7-210 (b) states: Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner

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property, shall be liable for any injury to property or personal injury, including death, 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, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.

Simply put, §7-210 imposes a non-delegable duty upon commercial landowners to remove snow and ice from their abutting sidewalks, and imposes liability upon that landowner for injuries which allegedly occur resulting from their failure to comply with the statute. See *McKenzie v. City of New York*, 116 A.D.3d 526 (1st Dept. 2014); *Schron v. Jean's Fine Wine & Spirits*, 114 A.D.3d 659 (2d Dept. 2014).

But what about “out-of-possession” commercial landowners, who have transferred possession and control of the premises to a commercial tenant? Do they also have the same non-delegable duty to remove snow/ice from their abutting sidewalks, and can they be liable for injuries arising from the alleged failure to comply with §7-210. Alas, the courts appear to be struggling with this question as there appears to be a split among the First and Second Departments.

Under New York law, an “out-of-possession” landowner who has transferred possession and control of the premises to a tenant is not liable for injuries caused by dangerous conditions on the property, unless (1) the landlord has a contractual obligation to maintain the premises, or right to reenter in order to repair, and (2) the defective condition is a significant structural or design defect that is contrary to a specific statutory safety provision. See *Gronski v. County of Monroe*, 18 N.Y.3d 374 (2011); *Stryker v. D'Agostino Supermarkets*, 88 A.D.3d 584 (1st Dept. 2011); *Ross v. Betty G. Reader Revocable Trust*,

86 A.D.3d 419 (1st Dept. 2011); *Alnashmi v. Certified Analytical Group*, 89 A.D.3d 10 (2d Dept. 2011); *Bouima v. Dacomi*, 36 A.D.3d 739 (2d Dept. 2007).

This raises the question of whether an out-of-possession landlord who has transferred control of the premises and responsibility to remove snow/ice from the sidewalk to its tenant can be absolved of liability alleged by a personal injury plaintiff at the summary judgment stage in light of the obligations of §7-210.

### First Department

It appears that the Appellate Division, First Department, holds that an out-of-possession landlord is not bound by §7-210. In *Bing v. 296 Third Ave. Group*, 94 A.D.3d 413 (1st Dept. 2012) lv. den. 19 N.Y.3d 815 (2012), a plaintiff alleged that she fell on snow and ice on a sidewalk abutting a newsstand located on East 23rd St. in Manhattan. Pursuant to a lease agreement, the landowner had transferred possession and control of the property to the tenant, and the tenant was responsible for removal of snow and ice. The lower court denied summary judgment for the landowner, arguing that §7-210 imposed liability on the owner for failure to remove snow and ice. However, the First Department reversed the lower court's ruling and held that even in the face of §7-210, as an out-of-possession landlord, the property owner was entitled to dismissal because snow or ice is not a significant structural or

design defect. Hence, the property owner was entitled to dismissal.

*Bing* has been repeatedly upheld by several lower court rulings granting summary judgment to out-of-possession landlords and at least one First Department appellate decision. See *Cepeda v. KRF Realty*, 148 A.D.3d 512 (1st Dept. 2017) (“Snow or ice is not a significant structural or design defect for which an out-of-possession landlord may be held liable.”); *Mari-zan v. City of New York*, 2016 N.Y. Misc. LEXIS 51 (N.Y. County Sup. Ct. 2016); *Gregory v. Wasserman*, 2015 N.Y. Misc. LEXIS 4105 (Bronx County Sup. Ct. 2015); *Fox v. Infinity 103*, 2013 N.Y. Misc. LEXIS 3226 (N.Y. County Sup. Ct. 2013) (a transient piece of wood on a sidewalk was not held to be a significant structural defect enough to impose liability on an out-of-possession landlord).

### Second Department

Meanwhile, the Appellate Division, Second Department, appears to take the opposite position on out-of-possession landowners seeking summary judgment for snow/ice sidewalk cases where the tenant has control of the premises and the duty to remove snow and ice from the sidewalk. In *James v. Blackmon*, 58 A.D.3d 808 (2d Dept. 2009), the Appellate court upheld the lower court's denial of summary judgment on behalf of the landowner. Not only did the Second Department hold that §7-210 imposes liability on the landlord for claims of failure to properly remove snow and ice, but the court explicitly stated

that being an out-of-possession landlord was not a viable defense in the face of the statute. See also *Reyderman v. Meyer Berford Trust #1*, 90 A.D.3d 633 (2d Dept. 2011) (fact that landowner was an out-of-possession landlord did not absolve it of the statutory duty imposed by §7-210); *Litkenhaus v. 1158 Hylan Blvd.*, 26 Misc.3d 19 (2d Dept. App. Term 2009) (owners of premises have non-delegable duty “to remove snow and ice from the sidewalk abutting the premises, regardless of the fact that they were out-of-possession landlords”)

### Lower Courts

The majority of lower court decisions which have addressed the interplay of §7-210 with out-of-possession landlords, appear to side with the Second Department’s inter-

a defense to a claim based upon §7-210”); *Langston v. Gonzalez*, 39 Misc.3d 371 (Kings County Sup. Ct. 2013) (out-of-possession defense is not applicable in the face of §7-210); *Leslie v. Shanik Bros.*, 2012 N.Y. Misc. LEXIS 3598 (Queens County Sup. Ct. 2012) (owner’s “argument that it cannot be held liable to plaintiff since it was an out-of-possession landlord that transferred possession of the premises to a tenant is without merit.”); *Pounds v. City of New York*, 2010 N.Y. Misc. LEXIS 4405 (N.Y. County Sup. Ct. 2010) (out-of-possession owner liable under §7-210 and owner cannot delegate said duty to the tenant); *Vega v. Wil-Cor Realty Co.*, 2010 N.Y. Misc. LEXIS 3969, 2010 N.Y. Slip. Op. 32206(U) (Queens County Sup. Ct. 2010) (owners “owed plaintiff a non-delegable duty of care, as a matter of law, to maintain said sidewalk in a reasonable safe condition and that said duty existed notwithstanding the fact that they may have been out-of-possession owners at the time of the accident”); *Simon v. Astoria Fed. Sav.*, 27 Misc.3d 1206(A) (Kings County Sup. Ct. 2010); *Castillo v. Bangl. Soc’y*, 12 Misc.3d 1170(A) (Queens County Sup. Ct. 2006) (“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.”).

Indeed, one lower court specifically addressed the First Department’s holding in *Bing*, and held that regardless of the appellate court’s holding, §7-210 imposes liability on

out-of-possession landlords. See *Xiang Fu He v. Troon Mgt.*, 2016 N.Y. Misc. LEXIS 2341 (N.Y. County Sup. Ct. 2016) (court denied summary judgment holding that Administrative Code §7-210 imposes liability on out-of-possession landlords).

### Conclusion

Clearly, out-of-possession property owners will side with the First Department’s interpretation, arguing that by transferring possession and control of the premises to a tenant, they no longer have a duty to keep the sidewalk free from snow and ice. Such duty would rest with the tenant assuming the lease agreement requires the tenant to remove snow and ice from the sidewalk. Meanwhile the Second Department’s interpretation would impose liability upon a landowner who is not present at the premises and would have no ability to keep the sidewalk free from snow and ice.

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pretation; that an out-of-possession landlord is still obligated to the requirements of the statute. See *Lorman v. Emil Mosbacher Real Estate*, 2015 N.Y. Misc. LEXIS 4588 (Bronx County Sup. Ct. 2015) (owner’s status as an out-of-possession landlord “does not affect a landowner’s statutory duty, and does not provide