

**Kam Won Lo v City of New York**

2011 NY Slip Op 31232(U)

May 6, 2011

Supreme Court, New York County

Docket Number: 112174/06

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 112174/2006

LO, KAM WON

vs  
CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

CAL # 77

INDEX NO. 112174/06

MOTION DATE 3/15/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 77

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1
2
3

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, it is ordered that this motion

MAY 10 2011

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 5/6/11  
MAY 06 2011

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 5

-----X  
KAM WON LO,

Plaintiff,

-against-

Index No.: 112174/06

Motion Date: 3/15/11

Motion Seq. Nos.: 001,

Motion Cal. Nos.: , 77

**DECISION AND ORDER**

**FILED**

**MAY 10 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

THE CITY OF NEW YORK, HSBC BANK USA,  
NATIONAL ASSOCIATION, and  
11 EAST BROADWAY GROUP, LLC

Defendants.

-----X  
BARBARA JAFFE, J.S.C.:

**For plaintiff:**

Evelyn Jaw, Esq.  
Popick, Rutman & Jaw  
41 Elizabeth Street  
New York, NY 10013  
212-213-3676

**For defendant 11 East Broadway:**

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Law Offices of Charles J. Siegel  
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New York, NY 10005  
212-440-2350

**For defendant HSBC:**

Annmarie Giblin, Esq.  
Goldberg Segalla LLP  
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Mineola, NY 11501-4923  
516-281-9800

By notice of motion dated October 19, 2010, defendant 11 East Broadway Group, LLC moves pursuant to CPLR 3212 for an order dismissing plaintiff's complaint and any and all cross-claims against it. By notice of motion dated December 6, 2010, defendant HSBC Bank USA, National Association moves for the same relief. Plaintiff opposes both motions.

**I. BACKGROUND**

On May 19, 2004, defendants 11 East Broadway and HSBC executed a lease for the basement, first, second, and third floors of 11 East Broadway, a building located on East

Broadway between Catherine and Henry Streets in Manhattan. (Affirmation of Annmarie Giblin, Esq., dated Dec. 6, 2010 [Giblin Aff.], Exh. F). Although the lease provides that a tenant occupying the ground floor of the building must “keep the sidewalk and curb in front of said premises clean and free from ice, snow, dirt, and rubbish,” the rider to the lease, which controls when in conflict with the lease itself, provides that the landlord is obligated to maintain adjacent sidewalks and keep them “free from accumulated snow, ice, and refuse.” (*Id.*) 11 East Broadway maintained the adjacent sidewalks in accordance with the rider. (*Id.*, Exh. K).

HSBC’s tenancy began on September 1, 2004, and it remains a tenant today. (*Id.*, Exh. F). On August 10, 2005, at approximately 2:00 p.m., plaintiff allegedly tripped and fell on the signpost of a “No Parking” sign that was laying on the sidewalk adjacent to the building, along Catherine Street. (*Id.*, Exh. C).

On August 31, 2006, plaintiff commenced this action by filing a summons and complaint, alleging that defendants’ negligence in permitting the signpost to remain laying on the sidewalk caused him to trip, fall, and sustain physical injuries. (*Id.*, Exh. A). HSBC and 11 East Broadway joined issue by serving their answers on October 3, 2006 and November 1, 2006, respectively. (*Id.*, Exh. B). Plaintiff served a bill of particulars on defendants on January 19, 2007. (*Id.*, Exh. C).

## II. CONTENTIONS

HSBC claims that it is entitled to summary judgment because it did not cause or create the condition at issue, the fallen sign, and that it was not obligated to maintain the sidewalk, as it did not own the building. (*Id.*). Even if it had been responsible for the sidewalk, HSBC maintains that it would be entitled to summary judgment because the signpost was not part of the

sidewalk for the purposes of section 7-210 of the New York City Administrative Code. (*Id.*).

11 East Broadway also contends that it is entitled to summary judgment on the grounds that it did not cause or create the condition at issue and that it had no duty to maintain, correct, or repair the signpost because it was not part of the sidewalk. (Affirmation of Alfred T. Lewyn, Esq., dated Oct. 19, 2010).

In opposition to both motions, plaintiff claims material issues of fact exist as to whether HSBC or 11 East Broadway was responsible for the maintenance of the sidewalk, as the lease obligates HSBC, as a ground floor tenant, to clean and maintain adjacent sidewalks. (Affirmation of Evelyn Jaw, Esq. in Opposition, dated Jan. 5, 2011). He also argues that the sign and signpost are part of the sidewalk. (*Id.*).

In reply, HSBC argues that 11 East Broadway was obligated to clean and maintain the sidewalk pursuant to the rider. (Affirmation of Annmarie Giblin in Reply, dated Jan. 17, 2011). HSBC and 11 East Broadway maintain that decisions holding that signs and signposts are not part of the sidewalk are indistinguishable from the instant case, and that the decision on which plaintiff relies is inapposite. (*Id.*; Affirmation of Alfred T. Lewyn in Reply, dated Jan. 13, 2011).

### III. ANALYSIS

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff’s opposition papers. (*Winegrad*, 64 NY2d at 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d at 562). The opposing party must “lay bare” its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d at 562).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof, but must affirmatively demonstrate the merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4<sup>th</sup> Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff’s cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

Pursuant to section 7-210 of the New York City Administrative Code, the owner of real property abutting a sidewalk, and not the City, has the duty to “maintain such sidewalk in a reasonably safe condition” and is liable for injuries arising from his failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). This section is strictly construed against City. (*Id.* at 521). Although abutting real property owners must maintain certain sidewalk hardware and appurtenances (NY City Admin. Code § 19-152), they need not maintain traffic signs and signposts, which is the obligation of the New York City Department of Transportation (NY City Charter § 2903[a][2]), and these signs and signposts are not considered part of the sidewalk for the purposes of section 7-210 (*see Smith v 125<sup>th</sup> St. Gateway Ventures, LLC*,

75AD3d 425 [1<sup>st</sup> Dept 2010]; *Calise v Millennium Partners*, 26 Misc 3d 1222[A], 2010 NY Slip Op 50208[U] [Sup Ct, New York County 2010]; *King v Alltom Props., Inc.*, 16 Misc 3d 1125[A], 2007 NY Slip Op 51570[U] [Sup Ct, Kings County 2007]). Therefore, abutting real property owners are not liable for injuries proximately caused by signs and signposts unless they caused or created the sign-related condition. (*Smith*, 75 AD3d at 425).

Although broken signposts embedded in sidewalks were in issue in *Smith*, *Calise*, and *King*, in *Smith*, the court made no mention of the fact that the signpost was embedded in the sidewalk. (75 AD3d at 425). Rather, it held that “a City sign or signpost is not part of the ‘sidewalk’ for purposes of section 7-210 . . . .” (*Id.*). Similarly, in *Calise*, the court did not discuss the embedded signpost in holding that section 7-210 does not shift liability for city signs and signposts to abutting real property owners. (26 Misc 3d at 1222[A], 2010 NY Slip Op at \*3). Instead, the court based its decision on the Department of Transportation’s “exclusive responsibility” for the installation, maintenance, and repair of these signs. (*Id.*). And in *King*, the court held that abutting landowners “have an obligation to maintain the sidewalk leading up to the signpost, [but] there is, however, no consequent obligation to maintain the signpost itself.” (16 Misc 3d 1125[A], 2007 NY Slip Op at \*5). Consequently, the court did not limit its decision to embedded portions of traffic signposts. (*See id.*).

Moreover, the case upon which plaintiff relies in arguing against the application of *Smith*, *Calise*, and *King*, *Flynn v Town of North Hempstead*, (97 AD2d 430 [2d Dept 1983]), was decided before section 7-210 was enacted and does not address New York City law. (*See Early v Hilton Hotels Corp.*, 73 AD3d 559, 560 [1<sup>st</sup> Dept 2010] [enactment of section 7-210 on September 13, 2004 shifted liability for failure to maintain sidewalks from City to abutting

landowners]).

Here, the rider to the lease and the law clearly repose liability in 11 East Broadway, the owner of the building, for failing to maintain the sidewalk in a "reasonably safe condition." (See NY City Admin. Code § 7-210). However, because the sign and signpost were not part of the sidewalk, and because plaintiff fails to present evidence showing that 11 East Broadway and/or HSBC caused the sign to fall, neither defendant is liable for plaintiff's injuries. (See *Smith*, 75 AD3d at 425). Therefore, both 11 East Broadway and HSBC are entitled to summary judgment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant HSBC Bank USA, National Association's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant HSBC Bank USA, National Association, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that defendant 11 East Broadway, LLC's motion for summary judgment is granted and the complaint is hereby severed and dismissed as against defendant 11 East Broadway, LLC, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

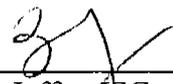
ORDERED, that the remainder of the action shall continue.

**FILED**

**MAY 10 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**  
DATED: May 6, 2011  
New York, New York

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC **BARBARA**