

<b>Vancleef v Milstein Props., Inc.</b>
2018 NY Slip Op 31031(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 158814/2014
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

ROSALIE VANCLEEF,

Plaintiff,

Index No.: 158814/2014  
**DECISION/ORDER**  
Motion Seq. No. 004, 005

-against-

MILSTEIN PROPERTIES, INC.,  
MILFORD MANAGEMENT, INC.,  
MP FREEDOM, LLC, MP LIBERTY LLC,  
PLAZA CONSTRUCTION CORP.,  
STALCO CONSTRUCTION CORP., and  
LIRO CONSTRUCTION CORP.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motions for summary judgment.

**Papers**

**NYSCEF Documents Numbered**

**Motion Sequence No. 004**

Defendants' Notice of Motion .....	138
Defendants' Affidavit or Affirmation in Support .....	139, 141-165

**Motion Sequence No. 005**

Defendants' Notice of Motion .....	110
Defendants' Affidavit or Affirmation in Support .....	111-137
Plaintiff's Affidavit or Affirmation in Opposition to Motion.....	175-176
Defendants' Affidavit or Affirmation in Reply .....	177, 179

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*Law Office of Margaret G. Klein & Associates.*, New York (David R. Frank, Robert J. Doolan of counsel), *London Fischer LLP*, New York (Brian P. McLaughlin of counsel), *Law Office of James J. Toomey*, New York (James J. Toomey of counsel), for defendants.

Gerald Lebovits, J.

Motion sequences 4 and 5 are consolidated for disposition.

In motion sequence 4, defendants Milstein Properties Corp., Milford Management Inc., MP Freedom, LLC., and MP Liberty LLC (Milstein defendants) move for summary judgment to

dismiss the complaint and all cross and counter-claims against them. They argue that summary judgment is appropriate because (1) there was no sidewalk defect; (2) there was no notice of any alleged sidewalk defect; and (3) no defect was caused or created.

In motion sequence 5, defendant Plaza Construction Corporation (Plaza) and third-party defendant Prima Paving Corporation (Prima) (collectively the Construction defendants) move for summary judgment to dismiss all claims, cross-claims, and third-party claims against them. The Construction defendants move for summary judgment on the same grounds as those raised by the Milstein defendants: that (1) there was no sidewalk defect or anything otherwise dangerous or defective; (2) even if the sidewalk were defective, the Construction defendants should not be held liable as the Milstein defendants, as owners, are responsible for the upkeep of the sidewalk; and (3) Milstein defendants' cross-claims and third-party claims should be dismissed given the Construction defendants' lack of liability for plaintiff's injuries and the inapplicability of their contractual indemnification obligations.

Plaintiff, Rosalie Vancleef, alleges that on October 8, 2011, she tripped and fell on an allegedly uneven sidewalk in front of 200 North End Avenue (the Property). The Milstein defendants were the Property's owner and managing agent. Plaza Construction was the general contractor of a construction job that included installing a new sidewalk in front of the Property a month before the accident. Stalco Construction, Liro Construction, and Prima Paving were subcontractors on the construction job. Defendants allege that no defect on the sidewalk existed or any notice of an alleged defect.

Amy Gould, district manager for Milford Management, the managing agent for the Property, has been with the Property since 2012, after the alleged accident took place. She searched for incident reports, repair records, maintenance records, construction-repair orders, and work orders but could find no document related to the sidewalk or otherwise in the general vicinity of the accident. Gould inquired of several Milford Management employees, and no one knew of any accident of the sort alleged. Other depositions, including from Michael Marcolini, the senior lead superintendent of Plaza Construction, Allan Burghardt, the general superintendent of Prima, and Joseph Serpe of Stalco Construction, who was the project manager for the construction on the Property, confirm that on October 8, 2011, nothing in the accident vicinity or the sidewalk was defective. In addition, Gould confirmed that no further construction, repairs, or alterations to the sidewalk bordering the Property were performed, nor was a contractor called back to perform any repair.

The evidence on these motions includes no suggestion that either the Milstein defendants or Construction defendants had any notice of any sidewalk defect or abnormality on the day in question. When a plaintiff's bare allegations of a hazardous property condition lack evidentiary support and are, in fact, refuted by that evidence, summary judgment is warranted. (*See Ragusa v Lincoln Ctr for the Performing Arts, Inc.* 39 AD3d 294, 295 [1st Dept 2007].) Defendants have provided ample evidence to prove that there was no defect of any kind on the sidewalk on the day of the accident and that they had no notice of a defect.

In her first deposition, plaintiff claimed that her toe got caught on something and that she fell. She allegedly was lying on the pavement for around 10 minutes before an ambulance arrived. (NYSCEF Doc. 151 at 32.) She did not notice what caused her fall, but she testified in

her deposition that the sidewalk was “very uneven” (NYSCEF Doc. 151, at 22) and “was up about an inch or two.” (NYSCEF Doc. 151, at 34.) Plaintiff admitted in her first deposition to having passed by the area where she fell before and noticing an unevenness, but she never reported any defect. (NYSCEF Doc. 151, at 41, 42.) In plaintiff’s second deposition, however, when asked by defendants’ attorney to point on a photograph to the location of the accident, she pointed to a location different from where she earlier believed the trip and fall occurred.

In addition, plaintiff could not identify the exact location where the accident occurred. During her three depositions, plaintiff was shown a panoply of photographs (NYSCEF Doc. 152), but she could only guess where the trip and fall occurred, admitting that she thought it was at one location but that the location looked differently from how she remembered it. (NYSCEF Doc. 153, at 40, 41.)

The Millstein defendants affirm in their reply affirmation that there were no defects in the accident location and no post-accident repairs. (NYSCEF Doc. 177, at 2.) Photographic evidence of the sidewalk and of the scene confirm that there were no abnormalities on the sidewalk of any kind. In her affidavit of merit, plaintiff stated that corrective work had to have been done on the sidewalk after her accident to cover up the defect. (NYSCEF Doc. 176, at 2.) But her statement is unsupported by evidence and amounts to speculation insufficient to deny defendants’ entitlement to summary judgment. Because no evidence suggests that the sidewalk was defective, any finding that defendants are responsible for plaintiff’s accident would rest on speculation. (*See Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [2d Dept 2006].)

Similarly, the Construction defendants affirm that no post-construction work was done in the area after the accident occurred and that there was no notice of any defect. (NYSCEF Doc. 112, at ¶10.) Burghardt of Prima and Michael Marcolini of Plaza testified that they were at the worksite frequently and that they routinely checked that the pavers were level. (NYSCEF Doc. 177, at ¶¶ 6-7.) Even if there was a defect with the sidewalk, liability would fall upon the Millstein defendants as owners. In premises liability actions concerning sidewalk defects, “it is clear that the issue is not who constructed the sidewalk, but who has the duty to maintain it.” (*Sas v City of New York*, 221 AD2d 216, 216 [1st Dept 1995].) Plaintiff has failed to establish a defect of any kind on the pavement on the day of her fall.

The cross-claims, third-party claims, and counterclaims hinge on whether the Milstein defendants and the Construction defendants are liable. Because no liability has attached to the Milstein defendants and the Construction defendants and their motions are granted, the cross-claims, third-party claims, and counterclaims are likewise dismissed.

Accordingly, it is


ORDERED that defendants Milstein Properties Corp., Milford Management Inc., MP Freedom, LLC., and MP Liberty LLC motion for summary judgment to dismiss the complaint and all cross and counter-claims against them is granted, and the complaint is dismissed as to these defendants; and it is further

ORDERED that defendant Plaza Construction Corporation and third-party defendant Prima Paving Corporation’s motion for summary judgment to dismiss the complaint and all

cross-claims and counter-claims against them is granted, and the complaint is dismissed as to these defendants; and it is further

ORDERED that movants shall serve a copy of this order with notice of entry on all parties and on the County Clerk, who shall enter judgment accordingly.

Dated: May 18, 2018



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.