

**Einstein v The New York Pub. Lib. Astor Lenox and  
Tilden Found.**

2018 NY Slip Op 33003(U)

November 21, 2018

Supreme Court, New York County

Docket Number: 159412/16

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

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ESTEE EINSTEIN,

Plaintiff,

-against-

THE NEW YORK PUBLIC LIBRARY ASTOR  
LENOX AND TILDEN FOUNDATIONS, LENOX  
HILL HOSPITAL, LENOX HILL HOSPITAL  
MEDICAL, P.C., and NORTHWELL HEALTH,  
INC.,

Defendants.  
-----X

**CAROL R. EDMEAD, J.S.C.:**

In this negligence action, defendants Lenox Hill Hospital, Lenox Hill Hospital Medical, P.C., and Northwell Health, Inc. (collectively, the Lenox Hill Defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint as against them. Plaintiff Estee Einstein (Einstein, or Plaintiff) cross-moves for summary judgment as to liability on her negligence claims against the Lenox Hill Defendants.

**BACKGROUND**

This action arises from Plaintiff’s fall, on September 17, 2016, on the exterior stairs of the New York Public Library located at 135 Second Avenue in the East Village of Manhattan. In her initial Complaint, filed on November 8, 2016, Plaintiff brought negligence claims against only one defendant, The New York Public Library Astor Lenox and Tilden Foundations (the Public Library). However, Plaintiff filed an Amended Complain on January 4, 2017.

The Lenox Hill Defendants own the subject property and the Public Library is their tenant. The tenancy is based on a lease entered-into initially by the parties’ predecessors-in-interest in 1884. Plaintiff’s allegations of negligence center on the claim that the Public Library’s

exterior stairs are defective in various ways, including the lack of handrails. The Lenox Hill Defendants argue that, as out-of-possession landlords, they have no duty to Plaintiff related to these alleged defects. While Plaintiff nominally moves for summary judgment on the issue of negligence, her papers read more like a plain opposition to summary judgment, as the papers respond to the Lenox Hill Defendants' arguments without putting forth an argument as to why Plaintiff is entitled to summary judgment. More specifically, Plaintiff argues that the Lenox Hill Defendants are not out-of-possession landlords, and that, even if they were, they still have a duty to maintain a safe means of ingress and egress at the Public Library. Plaintiff also argues that the Lenox Hill Defendants' moving papers are technically defective.

#### DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Initially, Plaintiff's technical arguments are misguided. The Lenox Hill Defendants' may rely on certified, though unsigned transcripts, as Plaintiff has not challenged the accuracy of the transcripts (*see Martin v City of New York*, 82 AD3d 653 [1st Dept 2011]).

#### **Out-of-Possession Landlord**

The Lenox Hill Defendants submit the nineteenth century lease governing the Public Library's leasehold of the subject property. The lease provides that the Public Library "hereby

covenants and agrees to keep all the premises so it is use and occupation under this agreement at all times in good and proper repair” (NYSCEF doc No. 39). The lease provides no explicit right of reentry for the Lenox Hill Defendants (*id.*).

The Lenox Hill Defendants also submit the deposition testimony of David Holowka (Holowka), a senior project manager for the Public Library. Holowka, who “manage[s] construction and design projects on library renovations and on new construction of libraries,” testified that the Lenox Hill Defendants have no involvement with the subject property beyond owning it (NYSCEF doc No. 34 at 128). Finally, the Lenox Hill Defendants submit the testimony of Kevin Connolly (Connolly), their own vice president of property management, design, and construction. Connolly testified that the Lenox Hill Defendants “are not responsible for property management” at the subject property (NYSCEF doc No. 35).

With the lease, as well as the testimony of Holowka and Connolly, the Lenox Hill Defendants make a *prima facie* showing that they are out-of-possession landlords. The First Department has recently reiterated the parameters of duty relating to out-of-possession landlords:

“An out-of-possession landlord is generally not liable for negligence with respect to the condition of property . . . unless [it] is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision”

(*Sapp v S.J.C. 308 Lenox Ave. Family L.P.*, 150 AD3d 525 [1st Dept 2017] [internal quotation marks and citation omitted]).

Plaintiff, in opposition, fails to raise an issue of fact as to whether the Lenox Hill Defendants were out-of-possession landlords. As the Lenox Hill Defendants did not have a contractual right to reenter, inspect, and to make needed repairs, they have no duty to Plaintiff. Thus, the Lenox Hill Defendants’ motion for summary judgment must be granted and Plaintiff’s

cross motion for summary judgment must be denied.

### CONCLUSION

Accordingly, it is

ORDERED that defendants Lenox Hill Hospital, Lenox Hill Hospital Medical, P.C., and Northwell Health, Inc.'s (the Lenox Hill Defendants) motion for summary judgment dismissing the Complaint as against them is granted and all claims as against these defendants are severed and dismissed; and it is further

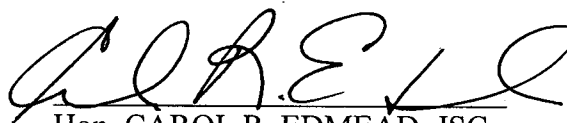
ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that Plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that counsel for the Lenox Hill Defendants shall serve of a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: November 21, 2018

ENTER:

  
Hon. CAROL R. EDMED, JSC  
**HON. CAROL R. EDMED**  
J.S.C.