Goldstein-Narvaez v Waylon
2026 NY Slip Op 31027(U)
February 26, 2026
Supreme Court, New York County
Docket Number: Index No. 153674/2020
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LESLIE A. STROTH** — *Justice* **PART** **12M**

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EDWARD GOLDSTEIN-NARVAEZ, LAUREN GOLDSTEIN-NARVAEZ,

Plaintiff,

- v -

THE WAYLON, TIP TOP TENTH AVE MANAGEMENT INC.,736 TENTH AVENUE CAFE LLC

Defendant.

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INDEX NO. 153674/2020

MOTION DATE 05/07/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiffs Edward Goldstein-Narvaez and Lauren Goldstein-Narvaez commenced this action for alleged injuries sustained by Edward Goldstein-Narvaez from a defective staircase leading to the basement of the premises located at 736 Tenth Avenue, owned by Defendant landlord Tip Top Tenth Avenue Management, Inc. ("Defendant Tip Top"), and leased to The Waylon and 736 Tenth Avenue Café LLC. Plaintiff alleges that he was walking down the basement steps located under the sidewalk trap door when his foot fell through the stairs.

Defendant Tip Top now moves for summary judgment pursuant to CPLR § 3212. Plaintiffs submit a cross-motion to supplement and/or amend their bill of particulars. Plaintiffs and Defendant Tip Top appeared for oral argument on these motions on January 20, 2025. For the reasons outlined below, the Court denies Defendant Tip Top's motion for summary judgment and denies Plaintiffs' cross-motion to supplement and/or amend their bill of particulars.

To prevail on a motion for summary judgment pursuant to CPLR § 3212, the movant must tender sufficient evidence to show the absence of any material issue of fact and the right to

entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Once the movant submits competent proof demonstrating that there is no substance to its opponent's claims and no disputed issues of fact, the opponent, in turn, is required to "lay bare [its] proof and come forward with some admissible proof that would require a trial of the material questions of fact on which [its] claims rest" (*Ferber v Sterndent Corp.*, 51 NY2d 782, 783 [1980]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted (*see Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]).

In its moving papers, Defendant Tip Top argues that as an out-of-possession landlord, it is not liable for the Plaintiff Edward Goldstein-Narvaez's injury. An out-of-possession landlord is generally not liable for the conditions resulting in injury on a relinquished property, absent a contractual, statutory, or otherwise covenanted obligation, because control and possession of the property has been relinquished to the tenant (*see Hernandez v Neubert Realto Corp.*, 169 AD2d 645,646 [1st Dept 1991]).

In support of Defendant Tip Top's assertion that it is an out-of-possession landlord, Defendant Tip Top states it has "relinquished control of the premises to The Waylon" (Defendant Tip Top's Memorandum of Law in Support of Summary Judgment, NYSCEF Doc. No. 67 at 9). Defendant Tip Top states that it "is rarely at the premises" (*id.*, at 6). This is insufficient to establish as a material fact that Defendant Tip Top is an out-of-possession landlord.

Several facts dispute Defendant Tip Top's status as an out-of-possession landlord. Defendant Tip Top's use of the basement and their "retained… right to re-enter the premises to make *any* needed repairs" (*id.*, at 9 [emphasis added]) creates a material issue of fact as to

whether Defendant Tip Top is an out-of-possession landlord and/or has any obligation to make repairs. The terms of the lease for the subject premises establish the following: "[Defendant] [l]andlord shall have the right of access to the basement portion of the demised premises *at all times to maintain equipment*" (Rider to Lease between Defendant Tip Top and The Waylon, item 45, emphasis added).

Defendant Tip Top had its own key to the basement, used the basement and the stairway to gain access to the water heater and electric meters in the basement, and even kept a locked room in the basement to which only Defendant Tip Top had access (Deposition of Michelle Vargas, Defendant Tip Top's Exhibit E). Tenant Waylon's testimony confirms that Defendant Tip Top shares the staircase with them to gain access to the shared basement, and that Defendant Tip Top maintains and controls a portion of the basement that was never relinquished to the tenants (Deposition of Peter Smith, Defendant Tip Top's Exhibit F). Consequently, the Court finds insufficient evidence to establish that Defendant Tip Top is an out-of-possession landlord, making summary judgment improper. Defendant Tip Top's motion for summary judgment is therefore denied.

Regarding Plaintiffs' cross-motion to amend and/or supplement their bill of particulars, Plaintiffs moved to include the following: (1) the 1916 Building Code of the City of New York §§ 153(4) and (6), detailing the requirements for "treads and risers" and "landings" for "interior stairs;" (2) the 1938 Building Laws of the City of New York, §§ 6.4.1.1, 6.4.1.12(1) and 6.4.1.4, which apply to "interior required stairs," "hand-rails in required stairways," and "treads and risers for required means of egress"; and/or (3) the 1968 Building Code of the City of New York §§ 27-375(e)(2) and (f), detailing requirements for riser height and tread width, and guards and handrails for "interior stairs" (Plaintiff's cross-motion).

The First Department has acknowledged that "leave to amend pleadings, including a bill of particulars, is to be freely given, absent prejudice or surprise," but that when there is an "'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion'" (*Cherebin v Empress Ambulance Service, Inc.*, 43 AD3d 364, 365 [1st Dept 2007], quoting *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]; *see also Cintron v New York City Transit Authority*, 77AD3d 410, 410-11 [1st Dept 2010] [finding that leave to amend the bill of particulars four years after commencement of action, and four months after filing the note of issue is improper]).

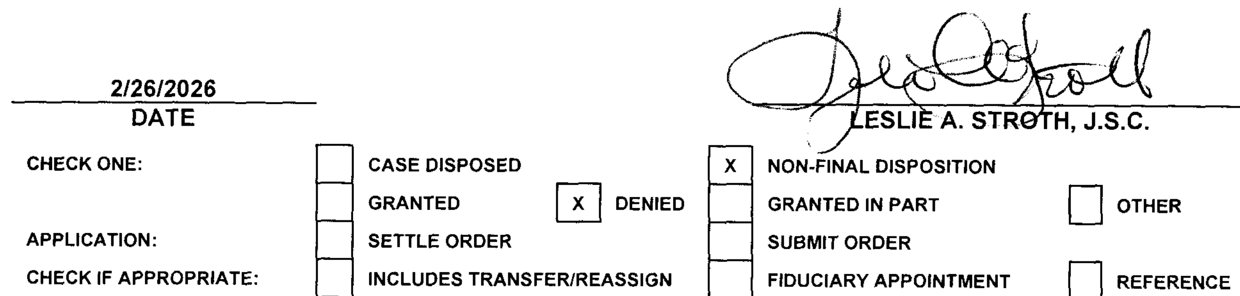
Here, Plaintiffs seek to amend the bill of particulars four and a half years after the original bill of particulars was served, and over three months after the note of issue was filed. In its cross-motion, Plaintiffs did not provide any reason for the delay and did not provide an affidavit of merit. Therefore, Plaintiffs' cross-motion to amend their bill of particulars is denied.

Accordingly, it is hereby

ORDERED that the Defendant Tip Top's motion for summary judgment is denied; and it is further

ORDERED that the Plaintiffs' cross-motion to supplement and/or amend the bill of particulars is denied.

The foregoing constitutes the decision and order of the Court.



2/26/2026		LESLIE A. STROTH, J.S.C.
DATE		

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE