| **90th St. Corp. v 203 W. 90th St. Retail, LLC** |
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| 2019 NY Slip Op 33340(U) |
| November 4, 2019 |
| Supreme Court, New York County |
| Docket Number: 654532/2016 |
| Judge: David Benjamin Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

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90TH STREET CORP.,

Plaintiff,

- against -

203 WEST 90TH STREET RETAIL, LLC,

Defendant.

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DECISION AND ORDER

Index No. 654532/2016

**DAVID B. COHEN, J.**:

In this breach of contract action, plaintiff 90th Street Corp. moves, pursuant to CPLR 3212, for summary judgment on the complaint and the counterclaims. Defendant 203 West 90th Street Retail, LLC opposes the application and cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and on its counterclaims.

## BACKGROUND

On December 1, 2013, plaintiff, as tenant, and defendant, as owner or landlord, entered into a standard form of store lease agreement (the Lease) for the store and basement located at 620 Amsterdam Avenue, New York, New York (the Premises), to be used by plaintiff as a "full service gourmet supermarket" (NY St Cts Elec Filing [NYSCEF] Doc No. 119, affirmation of defendant's counsel, exhibit A at 1). The annual rent for the first four years of the 15-year lease term was $950,000.04, or $79,166.67 per month (*id.* at 27). According to paragraph R10 in a rider to the Lease, plaintiff paid defendant $316,666.68 as a security deposit (*id.* at 16). Plaintiff's principal, Anthony Bileddo (Bileddo), avers that plaintiff operated a "Keyfood Supermarket" at the Premises (NYSCEF Doc No. 95, Bileddo aff, ¶ 1).

In or about November 2014, plaintiff approached defendant "for an amicable surrender of the lease" because plaintiff was unable to meet its Lease obligations (NYSCEF Doc No. 95, ¶ 3;

NYSCEF Doc No. 96, affirmation of plaintiff's counsel, exhibit A [complaint], ¶ 4). In early 2015, defendant commenced a nonpayment proceeding against plaintiff in Civil Court, New York County, *203 W. 90th St. Retail, LLC v 90th St. Corp.*, index No. 050551/2015 (NYSCEF Doc No. 116, affirmation of John Ramsen [Ramsen], ¶ 3). The parties subsequently executed a stipulation of settlement (the Stipulation) in the nonpayment proceeding. The Stipulation states that defendant "has agreed to accept Tenant's surrender of the Lease and accept the Tenant's surrender of the premises" (NYSCEF Doc No. 100, affirmation of plaintiff's counsel, exhibit E at 1), and that plaintiff consented to a final judgment of possession in defendant's favor (*id.*, ¶ 3). Paragraph three of the Stipulation further states, in part, as follows:

> "The warrant of eviction shall issue forthwith but execution shall be stayed for six (6) months through and including June 30, 2015 provided and on condition that the … [plaintiff] pays use and occupancy to the landlord in the sum of $60,000 (sixty thousand dollars) per month in advance each month for six months commencing January, 2014[1] in addition to the additional rent that would otherwise have been payable pursuant to the Lease. If the … [plaintiff] defaults and does not make one or more of the $60,000.00 monthly payments and the payment of the additional rent, then the warrant may be executed after service of the Marshal's notice of eviction. Furthermore, the notice of eviction may be pre-served at any time after June 15, 2015, but it will not be executed prior to July 1, 2015 provided the required payments have been made"

(*id.*, ¶ 3). Paragraph five required plaintiff to vacate and return the Premises in "broom clean condition and free of all … tenant's property" (*id.* at 2). Additionally, paragraph six reads:

> "Provided the … [plaintiff] has complied with the terms of this stipulation and the terms of the Lease with respect to the return of the security deposit, and provided that the … [plaintiff] has timely vacated and left the premises in the condition required, the … [defendant] shall return the security deposit, or the remaining portion thereof, to the … [plaintiff] on or about July 1, 2016, unless the … [defendant] shall re-let the premises sooner than July 1, 2016, in which event the security deposit shall be returned to the … [plaintiff] within 30 days after execution of the new Lease"

[1] The reference to "January, 2014" appears to be a scrivener's error.

(*id.* at 2).

Bileddo avers that plaintiff located another prospective tenant to assume the Lease and scheduled a date to assign the Lease to the new tenant, but the closing did not occur (NYSCEF Doc No. 95, ¶¶ 5-7). On May 13, 2015, defendant's attorney "demanded back immediate possession of the premises" (*id.*, ¶ 8). Bileddo avers that plaintiff removed its possessions from the Premises and returned the keys to defendant's broker (*id.*).

On July 5, 2016, plaintiff requested a return of its security deposit (NYSCEF Doc No. 101, affirmation of plaintiff's counsel, exhibit F at 1), but defendant refused. By letter dated July 12, 2016, defendant's general counsel, Ramsen, advised plaintiff that defendant had no obligation to return the security deposit because (1) plaintiff failed to pay use and occupancy for May and June 2015 and (2) plaintiff failed to vacate and leave the Premises in the condition required under the Stipulation (NYSCEF Doc No. 102, affirmation of plaintiff's counsel, exhibit G at 1-2). Ramsen further informed plaintiff that, since the Premises had not been re-let, plaintiff was responsible for the rent payments due for the remainder of the Lease term (*id.* at 3).

In this action, plaintiff pleads a single cause of action for breach of the Stipulation and seeks damages of $316,668.68, or the amount of the security deposit (NYSCEF Doc No. 96, ¶ 21). Defendant answered the complaint and interposed three counterclaims. The first counterclaim seeks damages of $1,583,333.40, or the monthly rent due from May 2015 through December 2016 under the Lease (NYSCEF Doc No. 97, affirmation of plaintiff's counsel, exhibit B [answer], ¶ 40). The second counterclaim alleges that plaintiff damaged the Premises by removing fixtures belonging to defendant, including the HVAC system, shelving, and refrigerated display cases (*id.*, ¶ 49). In the third counterclaim, defendant seeks to recover its legal fees, costs and expenses, as was permissible under the Lease.

**THE PARTIES' CONTENTIONS**

On this motion, plaintiff contends that defendant breached the Stipulation by refusing to return the security deposit July 2016. After the prospective new tenant failed to close on the Lease, defendant demanded possession of the Premises, and plaintiff promptly complied with this request by returning the keys to defendant's broker. Plaintiff submits that, contrary to defendant's assertion, all that was due to defendant after it demanded possession was a per diem charge for 12 days of use and occupancy for May 2015. Plaintiff contends that defendant has refused to deduct that sum from the security deposit and has chosen to improperly retain the full deposit. Plaintiff seeks to invoke the court's equitable powers to prevent a forfeiture of the security deposit. Furthermore, plaintiff argues that defendant's second counterclaim concerning plaintiff's trade fixtures should be dismissed because the fixtures were not affixed in such a manner that they became part of the Premises. Bileddo avers that plaintiff installed the supermarket shelving, walk-in boxes, refrigerated display cases and HVAC equipment using only bolts or screws or they were freestanding items (NYSCEF Doc No. 95. ¶ 12). Plaintiff also submits that the first and third counterclaims lack merit because the surrender set forth in the Stipulation terminated the Lease.

Defendant, in opposition, argues that the Stipulation unambiguously allows it to retain the security deposit in full in the event of a breach. It objects to plaintiff's characterization of the supermarket shelving, walk-in boxes, refrigerated display cases and HVAC equipment as trade fixtures because their removal caused significant damage to the Premises. Moreover, plaintiff removed certain fixtures from the bathroom which, according to the Lease, defendant had installed. Defendant relies on affidavits from Hugo Ruiz (Ruiz), its property manager for the Premises, and Jay Baron (Baron), a registered architect employed by plaintiff's managing agent. While Ruiz avers that he was not present when plaintiff installed and removed the fixtures, Ruiz observed at a

June 2015 inspection that the Premises had been "stripped clean" with "[e]lectrical cords and wiring were cut or severed throughout the Premises" (NYSCEF Doc No. 117, Hugo Ruiz [Ruiz] aff, ¶ 11). Ruiz further avers that plaintiff created "large holes in the walls and ceilings" and left a large hole in the floor between the ground floor and basement to accommodate a conveyor belt (*id.*). Baron opines that it would could cost plaintiff $264,412 to restore the Premises – $39,000 to restore and repair the lighting fixtures; $200,000 to replace the HVAC system; $3,360 to fix the electrical wiring; $5,760 to restore the bathroom; $9,000 to close the hole between the ground floor and basement; $4,992 to repair the walls and ceilings; and $2,300 to remove the garbage and debris that plaintiff left at the Premises (NYSCEF Doc No. 118, ¶¶ 13-20).

**DISCUSSION**

It is well settled that the movant on 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]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

**A. Plaintiff's Claim for Breach of the Stipulation**

It is well settled that "courts have long favored and encouraged the fashioning of stipulations as a means of expediting and simplifying the resolution of disputes" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]). A stipulation of settlement is deemed binding upon the parties when it is shown that (1) the agreement was negotiated between parties with legal capacity to negotiate and (2) the agreement was reduced to writing subscribed to by the parties' or their attorneys or agreed to on the record in open court (*see McCoy v Feinman*, 99 NY2d 295, 302 [2002]; *see also* CPLR 2104).

A stipulation is also "subject to settled principles of contract interpretation" (*McCoy*, 99 NY2d at 302; *accord Savoy Mgt Corp. v Leviev Fulton Club, LLC*, 51 AD3d 520, 520-521 [1st Dept 2008] [stating that "[a] valid stipulation should be construed as an independent agreement subject to the well-settled principles of contractual interpretation"]). To that end, a written agreement must be construed according to the parties' intent (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). The document must be read as a whole to "to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] *accord Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] ["the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms"]). "[W]hen reviewing a contract, particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 39 [2018], quoting *Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). The words must also be given their plain meaning (*see Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). Thus, "when parties set down their agreement in a clear, complete

document, their writing should as a rule be enforced according to its terms" without consideration of extrinsic evidence (*W.W.W. Assoc.*, 77 NY2d at 162).

Here, the court finds that plaintiff has failed to meet its prima facie burden on summary judgment. Preliminarily, plaintiff's contention that this court has already determined on a prior motion to dismiss that defendant may recover only 12 days of use and occupancy is unpersuasive. The scope of review on a motion to dismiss and a motion for summary judgment differs because one involves the sufficiency of the pleadings whereas the other examines the sufficiency of the evidence (*Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 350 [1st Dept 2006], *affd as mod* 9 NY3d 105 [2007], citing *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]). Here, defendant had moved for pre-answer dismissal of the complaint based upon documentary evidence and had alleged that the security deposit would be returned only if plaintiff complied with the payment requirements in the Stipulation (NYSCEF Doc No. 125, affirmation of defendant's counsel, exhibit G at 1). In denying the motion, this court determined that, in view of the allegations that defendant had agreed to adjust the payments due from plaintiff, the documentary evidence did not conclusively establish a defense to the action (*id.*). Therefore, the law of the case doctrine is inapplicable (*see J.P. Morgan Sec., Inc. v Vigilant Ins. Co.*, 166 AD3d 1, 8 [1st Dept 2018]).

A plain reading of the Stipulation shows that defendant agreed to refrain from executing a warrant of eviction if plaintiff paid $60,000 in use and occupancy "in advance" for six months beginning January 2015, and it is not disputed that plaintiff failed to pay use and occupancy in advance for both May and June 2015. Counter to plaintiff's position, the Stipulation did not require a "per diem" payment of use and occupancy. The Stipulation clearly and unambiguously mandated payment of "$60,000 (sixty thousand dollars) per month in advance each month for six months"

(NYSCEF Doc No. 100, ¶ 3). As a consequence, in the event of a default, the express terms of the Stipulation allowed defendant to immediately execute a warrant of eviction.

Furthermore, the Stipulation imposed two express conditions upon plaintiff before defendant could return the security deposit. In plain, unambiguous terms, the Stipulation states that defendant shall return all or part of the deposit "[p]rovided that … [plaintiff] has complied with the terms of this stipulation and the terms of the Lease with respect to the return of the security deposit, and provided the … [plaintiff] has … left the premises in the condition required" (NYSCEF Doc No. 100, ¶ 6). As discussed *supra*, plaintiff has not, and cannot, challenge defendant's contention that it failed to pay use and occupancy for May 2015 in advance. Thus, it was permissible for defendant to retain the deposit.

It is well settled that "[s]ubstantial public policy considerations favor the enforcement of settlement agreements as a matter of contract" (*Matter of Hofmann*, 287 AD2d 119, 121 [1st Dept 2001]). Therefore, courts will "not lightly cast aside" stipulations settling a civil action (*Hallock v State of New York*, 64 NY2d 224, 230 [1984] [refusing to invalidate a settlement agreement in the absence of fraud, collusion, mistake or accident in the making and execution of that agreement]). As such, to sustain a cause of action for breach of contract, the plaintiff must prove the existence of a contract, plaintiff's performance, the defendant's breach, and damages (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). While courts will not enforce an agreement that is illegal (*see Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]), an agreement that violates public policy (*see Mitchell*, 61 NY2d at 214 [describing an affront to public policy as one that implicates "our sense of justice or threatening the public welfare"]; *1420 Concourse Corp. v Cruz*, 135 AD2d 371, 372 [1st Dept 1987], *appeal dismissed* 73 NY2d 868 [1989] [stating that a stipulation of settlement that is "inherently vicious, wicked or immoral, and

shocking to the prevailing moral sense" violates public policy]), or an agreement that is unconscionable (*see Yeun-Ah Choi v Shoshan*, 136 AD3d 506, 506 [1st Dept 2016]), but such is not the case here. Plaintiff does not argue that the Stipulation should be set aside on the grounds of illegality or as a matter of public policy. Likewise, plaintiff does not contend that the Stipulation resulted from fraud, collusion, mistake or duress (*see McCoy*, 99 NY2d at 302). Rather, plaintiff seeks to invoke the court's power of equity to direct defendant to return the security deposit.

The court declines, however, to exercise its equitable powers to relieve plaintiff of its default, especially "where the agreement was negotiated by sophisticated parties, all of whom were represented by counsel" (*McKenzie v Vintage Hallmark*, 302 AD2d 503, 504 [2d Dept 2003]). "[P]arties are generally free to reach agreements on whatever terms they prefer" (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 368 [2015]), and, here, the parties agreed that plaintiff would forfeit its right to a return of the security deposit if it defaulted on the Stipulation's terms.

Furthermore, plaintiff's default was not trivial, as it suggests. Bileddo avers that the parties had agreed the prospective new tenant would "settle past due rent, sign the new lease, adjustment [sic] to be made for use and occupancy [from] May 1 to May 12, 2015" (NYSCEF Doc No. 95, ¶ 6), but Ramsen refutes Bileddo's contention that any adjustments would be made as to plaintiff's obligations under the Stipulation (NYSCEF Doc No. 116, ¶¶ 22-23). Although the parol evidence rule does not preclude a party from furnishing "proof of a subsequent additional agreement or of a subsequent modification of the written agreement" (*Getty Ref. & Mktg. v Linden Maintenance Corp.*, 168 AD2d 480, 481 [2d Dept 1990]), plaintiff has not offered any proof that defendant agree to modify its obligations with regards to use and occupancy if a closing on the Lease assignment did not occur. Indeed, paragraph 4 of the Stipulation reads, in part, that defendant shall consent to an assignment and reinstatement of the Lease "provided that all rent and additional rent

that would have been due were it not for this Stipulation is paid upon the closing of the assignment" (NYSCEF Doc No. 100, ¶ 4). Plaintiff acknowledges that the closing never occurred (NYSCEF Doc No. 95, ¶ 7).

The cases cited by plaintiff in support are inapposite. In *Winthrop Realty, LLC v Menal* (21 Misc 3d 141[A], 2008 NY Slip Op 52383[U], *2 [App Term, 2d Dept, 2d and 11th Jud Dists 2008]), the court found that the defendant tenant's default on a stipulation of settlement was minimal and inadvertent because the tenant promptly cured its default. In *J & H Mgt. Corp. v W.W.R.S Automotive Inc.* (7 Misc 3d 134[A], 2005 NY Slip Op 50742[U], *2 [App Term, 2d Dept, 2d and 11th Jud Dists 2005]), the court vacated a warrant of eviction where the defendant tenant had substantially complied with a stipulation. The rationale behind vacatur rested upon the premise that enforcing strict compliance with the terms of the stipulation would have led the landlord to secure an unconscionable advantage, especially where the tenant had already performed certain modifications on the demised premises as agreed to in the stipulation (*id.*). Plaintiff herein appears to concede that it has not paid the use and occupancy due for May 2015. Thus, plaintiff has not demonstrated that it would be inequitable or unjust to enforce the parties' bargain (*see Yeun-Ah Choi*, 136 AD3d at 506). Moreover, plaintiff has made no attempt to cure its default (*see RCS Recovery Servs., LLC v Mensah*, 166 AD3d 823, 825 [2d Dept 2018] [granting the defendant's alternative request for relief seeking "to preclude the plaintiff from enforcing the default provision of the stipulation without affording the defendant a reasonable opportunity to cure his default"]; *Winthrop Realty, LLC*, 2008 NY Slip Op 52383[U], *2).

Plaintiff also has not demonstrated that it left the Premises in "broom clean condition" as required by the Stipulation, as its contention that it complied with this specific provision is supported by Bileddo's wholly conclusory affidavit (*see Saunders v J.P.Z. Realty, LLC*, 175 AD3d

1163, 1164 [1st Dept 2019] [stating that "[a] conclusory affidavit … does not establish the proponent's prima facie burden"]). Bileddo states only that "[w]e were very careful not to cause any damage to the premises when the tenant vacated aside from ordinary wear and tear" (NYSCEF Doc No. 95, ¶ 11).

Defendant, though, has met its burden on its cross motion for summary judgment by demonstrating that the Premises was not left in broom clean condition (*see Akron Meats v 1418 Kitchens*, 160 AD2d 242, 243 [1st Dept 1990], *lv denied* 76 NY2d 704 [1990] [concluding that the supermarket tenant left the demised premises in "a general state of disrepair" when it dismantled plumbing and left exposed electrical wiring and sizeable holes in the walls and ceiling]). Ruiz avers that he "was informed by an employee of Landlord that plaintiff had left significant garbage and debris in the Premises upon vacating" (NYSCEF Doc No. 117, ¶ 12). Given his lack of personal knowledge, Ruiz's affidavit, by itself, is insufficient to establish that that plaintiff failed to leave the Premises in broom clean condition (*see Bhowmik v Santana*, 140 AD3d 460, 461-462 [1st Dept 2016] [discounting the plaintiff's affidavit because it was based on hearsay]; *Acevedo v Williams Scotsman, Inc.*, 116 AD3d 416, 417 [1st Dept 2014] [finding that the branch manager's affidavit demonstrates that he had no personal knowledge of the condition of the septic tank]). However, defendant also submits numerous photographs taken by plaintiff after it vacated the Premises (NYSCEF Doc No. 124, affirmation of defendant's counsel, exhibit F). Several of the photographs depict debris and other personal items strewn across the floor. In addition, the photographs appear to depict numerous loose electrical wires, unpatched holes in the walls or ceilings, and a missing bathroom vanity and toilet. In addition, plaintiff did not address whether it fixed the hole left between the ground floor and basement.

Accordingly, that branch of plaintiff's motion for summary judgment on the complaint is denied. That branch defendant's cross motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed.

**B. The First Counterclaim**

The first counterclaim seeks unpaid monthly rent from May 2015 through December 2016.

Generally, when a lessee abandons the leased premises before the lease term expires, the landlord may "do nothing and collect full rent under the lease[,] … accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability[,] … [or] notify the tenant that it was entering and reletting the premises for the tenant's benefit" (*Holy Props. v Cole Prods.*, 87 NY2d 130, 133-134 [1995] [internal citations omitted]). "An express surrender [of a lease] involves a mutual agreement between the landlord and the tenant that the lease be terminated" (*Matter of Wasserman v Ewing*, 270 AD2d 427, 428 [2d Dept 2000]; *see also* 2 Robert F. Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 26:2 [5th ed 2019] [stating that "[a]n express surrender of a lease is one voluntarily made by the express mutual agreement of the parties to a lease, and expressly manifests an intention to reconvey the leasehold estate to the landlord"]). Thus, "[w]hen a tenant offers to surrender possession of premises to a landlord prior to the expiration of the lease term and the landlord accepts such surrender, all future liability of the tenant for rent under the lease thereby terminates" (*59th & Park Assoc. v Inselbuch*, 68 AD2d 838, 840 [1st Dept 1979] [Lupiano, J., concurring], citing *Herter v Mullen*, 159 NY 28, 33 [1899] [stating that "[w]hen a landlord accepts a surrender of the premises, this act operates to discharge the tenant from all liability for rent in the future"]).

Here, defendant has not demonstrated its entitlement to summary judgment on the first counterclaim. Although defendant argues otherwise, the Stipulation terminated plaintiff's rent

obligations under the Lease. According to the plain and unambiguous terms of the Stipulation, defendant expressly agreed to accept plaintiff's surrender of the Lease and the Premises (*see Guan Tou Mkt., Inc. v 373 Wythe Ave. Realty, Inc.*, 19 Misc 3d 1108[A], 2008 NY Slip Op 50602[U], * 1 [Sup Ct, Kings County 2008] [concluding that a stipulation of settlement constitutes an express surrender]). This is bolstered by the fact that defendant opted to collect monthly use and occupancy payments instead of monthly rent once it obtained the judgment of possession and a warrant of eviction. Notably, "liability for use and occupation is not liability for rent under the lease" (*Peoples Trust Co. v Schultz Novelty & Sporting Goods Co.*, 244 NY 14, 18 [1926]; *see also* RPAPL § 749 (3); 2 Robert F. Dolan, Rasch's Landlord and Tenant—Summary Proceedings § 10:9 [5th ed 2019]).

Furthermore, the Stipulation does not include a provision preserving defendant's right to enforce the payment obligations under the Lease in the event plaintiff defaulted on the Stipulation's terms (*see Empire Room, LLC v Empire State Bldg. Co. LLC,* 159 AD3d 648, 649 [1st Dept 2018] [stating that the parties' stipulation for the surrender of the demised premises "was without prejudice to defendant's right to assert any claim against plaintiff, including for breach of the lease, and to seek the payment of rent for the entire lease term]; *242 W. 38th St., LLC v Madame Paulette, Inc.*, 31 Misc 3d 1218[A], 2011 NY Slip Op 50719[U], *2 [Sup Ct, NY County 2011] [concluding that the tenant was liable for rent and additional rent under the Lease because the surrender agreement executed in connection with a nonpayment proceeding expressly stated that the landlord had agreed to accept the tenant's surrender without releasing it from its obligations under the Lease]). The Stipulation clearly states that defendant agreed to accept plaintiff's surrender of the Lease and the Premises. Because defendant is not entitled to collect unpaid rent under the Lease, plaintiff's motion for summary judgment on the first counterclaim is granted.

Accordingly, that branch of plaintiff's motion for summary judgment dismissing the first counterclaim is granted, and the first counterclaim is dismissed. That branch of defendant's cross motion for summary judgment on the first counterclaim is denied.

**C. The Second Counterclaim**

The second counterclaim alleges that plaintiff damaged the Premises by removing the HVAC system including ductwork and the compressor, lighting fixtures and its components, and bathroom fixtures (NYSCEF Doc No. 117, ¶ 11), as well as walk-in boxes, permanent shelving systems, and refrigeration displays (NYSCEF Doc No. 97, ¶¶ 45-47).

Paragraph 3 of the Lease, which discusses alterations, states, in part:

> "Nothing in this article shall be construed to give Owner title to, or to prevent Tenant's removal of, trade fixtures, moveable office furniture and equipment, but upon removal of same from the demised premises or upon removal, of other installations as may be required by Owner, Tenant shall immediately, and at its expense, repair and restore the demised premises to the condition existing prior to any such installations, and repair any damage to the demised premises or the building due to such removal. All property permitted or required to be removed by Tenant at the end of the term remaining in the demised premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or may be removed from the demised premises by Owner, at Tenant's expense"

(NYSCEF Doc No. 119 at 1). Paragraph 21 of the Lease also provides, in part, that at the end of the Lease term, "Tenant shall quit and surrender to Owner the demised premises, 'broom-clean', in good order and condition, ordinary wear and damages which Tenant is not required to repair as provided elsewhere in this lease excepted, and Tenant shall remove all its property" (NYSCEF Doc No. 119 at 5). Importantly, paragraph R45 in the rider to the Lease states:

> "At the expiration of the term of this lease, Tenant shall deliver to the Landlord all of the keys to the premises, and vacate, broom clean possession thereof, free of all occupancies, tenancies and Tenant's property. At its own cost and expense, Tenant shall restore the

> premises to good condition, reasonable wear and tear accepted. Tenant may not remove any items of property that are affixed to the demised premises or to the building"

(NYSCEF Doc No. 119 at 30). In addition, paragraph R33 of the rider provides, in pertinent part, that "[i]n the event of any conflict between the provisions of this rider and of the printed lease, the provisions of this rider shall prevail" (*id.* at 24).

An improvement or fixture is deemed part of the realty if "its removal will result in material injury to it or the realty [,] … where there is other evidence that its installation was of a permanent nature … [or where] improvements which are used for business purposes … would lose substantial value if removed" (*Rose v State of New York*, 24 NY2d 80, 86 [1969] [internal quotation marks and citations omitted]). As is relevant here, a trade fixture is a fixture "installed by a tenant during its lease term to carry on its business" (*East Side Car Wash v K.R.K. Capitol*, 102 AD2d 157, 162 [1st Dept 1984], *appeal dismissed* 63 NY2d 770 [1984]). A trade fixture remains the tenant's personal property and may be removed by the tenant "prior to the expiration of the lease or before the tenant quits possession, unless otherwise agreed to by the parties" (*Modica v Capece*, 189 AD2d 860, 861 [2d Dept 1993]). The court must consider the following factors to determine whether an item qualifies as a trade fixture: "the permanence with which the property has been annexed to the realty [,] . . . the adaptability of the fixture to the use to which the real property is being put . . . [and] the intent of the parties at the time of the annexation" (*East Side Car Wash*, 102 AD2d at 161). However, "[t]here is no single test to determine whether an object is a trade rather than an ordinary fixture, and such determination is generally a mixed question of law and fact" (*see J.K.S.P. Rest. v County of Nassau*, 127 AD2d 121, 127 [2d Dept 1987]).

Applying the three-part test described in *East Side Car Wash* here, many of the items plaintiff removed from the Premises are trade fixtures, not permanent fixtures. Thus, defendant has not demonstrated its entitlement to summary judgment on this cause of action.

Large refrigeration units, counters, and shelves are considered trade fixtures (*see Akron Meats*, 160 AD2d at 243-244; *N. & S. Decor Fixture Co. v V. J. Enters.*, 57 AD2d 890, 890 [2d Dept 1977] [finding a "rack" is a trade fixture]). Likewise, ventilation and air conditioning equipment and storage units are considered trade fixtures (*see Whitehall Corners v State of New York*, 210 AD2d 398, 400 [2d Dept 1994] [finding that floor tiles, paneling, HVAC equipment, bathroom fixtures and a circuit breaker installed by the tenant who operated a restaurant at the premises was the tenant's personal property]). Bileddo avers that the trade fixtures were installed using brackets and bolts, thereby making them easy to remove, and defendant has not offered any probative evidence to refute this contention. As such, the permanency and intent elements for permanent fixtures are lacking (*see 174 Second Equities, Corp. v Hee Nam Bae*, 57 AD3d 319, 320 [1st Dept 2008] [concluding that the machinery and equipment used in a dry cleaning and leather treatment business were affixed to the walls of the premises by pipes, hoses and brackets which could be removed without substantial damage to the demised premises]).

Defendant also fails to present any evidence demonstrating that the items were adapted solely for the Premises. "Adaptability … contemplates both fitting the chattel to the particular purpose of the freehold, and the necessity of the chattel for complete use of the freehold, as when machinery is placed in a factory to perform a special purpose and is fitted for that purpose" (*Matter of City of New York [Kaiser Woodcraft Corp.]*, 11 NY3d 353, 360 [2008], *rearg denied* 11 NY3d 903 [2009]). At his deposition, Bileddo testified that he sold the "equipment for the supermarket" to an individual who owned supermarkets (NYSCEF Doc No. 133, affirmation of defendant's

counsel, exhibit 4 [Bileddo tr] at 49-51]). Thus, their removal did not cause the items to substantially lose their value because they could be, and were, used in other supermarkets.

However, as to plaintiff's motion on this cause of action, a triable issue of fact exists whether plaintiff improperly removed defendant's bathroom fixtures. According to the Lease, defendant paid to "[d]emolish the existing bathrooms … [and] replace [them] with one ADA compliant (wheelchair accessible bathroom … [which] shall have no special or legally required finishes (NYSCEF Doc No. 119 at 39), and Baron avers that "plaintiff removed almost every fixture included in the toilet room" (NYSCEF Doc No. 118, ¶ 16). Plaintiff has not expressly refuted this contention.

Accordingly, summary judgment is denied to plaintiff and defendant on the second counterclaim.

**D. The Third Counterclaim**

In the third counterclaim, defendant seeks to recover its legal fees, costs and expenses of not less than $10,000.

"[A]ttorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [citations omitted]). Paragraph 19 in the Lease states, in pertinent part:

> "If Owner … in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid, or obligations incurred, with interest and costs"

(NYSCEF Doc No. 119 at 5). Under paragraph R5 of the rider, if "Landlord incurs any expense resulting from Tenant's failure to comply with any provision of this lease, including, without limitation, attorneys fees, … Tenant shall be obligated to reimburse Landlord …" (NYSCEF Doc No. 119 at 12). In addition, paragraph R54 of the rider states:

> "Whenever Landlord incurs any attorney's fees or other costs or expenses, whether on behalf of Tenant, or by reason of any default, request, action or inaction of Tenant, Tenant agrees that it shall pay and reimburse Landlord for such reasonable attorneys fees, costs or expenses, and that same shall be collectible as additional rent. In the event of litigation between the parties, Landlord shall only be entitled to recover its reasonable legal fees if Landlord is the prevailing party"

(NYSCEF Doc No. 119 at 33).

Although these provisions allow defendant to recover its fees, as discussed *supra*, defendant has not demonstrated its entitlement to its attorneys' fees because the express surrender in the Stipulation terminated plaintiff's obligations under the Lease, and the Stipulation did not contain any provision reserving defendant's rights to recover such fees (*see Fifty E. Forty-Second Co. LLC v Ildiko Pekar Inc.*, 2019 NY Slip Op 30164[U], * 7 [Sup Ct, NY County 2019] [granting a motion for attorneys' fees under a lease against a tenant's guarantor because the parties' surrender agreement expressly stated that the tenant's abandonment of the premises did not terminate the lease or the tenant's obligations thereunder]; *154-7th Ave. Chelsea, Inc. v Ballaghaderreen Corp.*, 2018 NY Slip Op 31729[U], *5 [Sup Ct, NY County 2018] [stating that both the guaranty and the surrender agreement provide for the recovery of attorneys' fees]). As such, the recovery of attorneys' fees is not permissible (*see Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528, 529 [1st Dept 2010]). In any event, a party seeking to recover its attorneys' fees "must simply be the prevailing party on the central claims advanced, and receive substantial relief in consequence thereof" (*Board of Mgrs. of 55 Walker St. Condo. v Walker St.*, 6

AD3d 279, 280 [1st Dept 2004]). Defendant has not established that it was the prevailing party in the nonpayment proceeding because the parties elected to resolve their dispute by stipulation.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted to the extent of dismissing the first counterclaim and third counterclaim, and the motion is otherwise denied; and it is further

ORDERED that the defendant's cross motion for summary judgment is granted to the extent of dismissing the complaint, and the cross motion is otherwise denied.

Dated: NOVEMBER 4, 2019

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.