

**327 W. 36th St. LLC v New York Embroidery Studio,  
Inc.**

2025 NY Slip Op 31912(U)

May 23, 2025

Supreme Court, Kings County

Docket Number: Index No. 514414/2021

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 73

Index No.: 514414/2021  
Motion Date: 3/25/24  
Mot. Seq. No.: 1-2

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327 WEST 36<sup>TH</sup> ST. LLC,

Plaintiff,

-against-

NEW YORK EMBROIDERY STUDIO, INC.,  
A/K/A N.Y. EMBROIDERY, INC.,

**DECISION/ORDER**

Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 17-75, 76-85, 88-90, 91-93, and 94-101: (1) the motion of plaintiff 327 WEST 36<sup>th</sup> ST. LLC (“plaintiff”) granting it summary judgment dismissing the counterclaims of defendant NEW YORK EMBROIDERY STUDIO, INC., also known as N.Y. EMBROIDERY, INC. (“defendant”), for breach of warranty of habitability, constructive eviction, and gross negligence/wanton misconduct (collectively, the “counterclaims”)<sup>1</sup> and awarding plaintiff damages on its first and second causes of action for breach of contract and attorneys’ fees/disbursements, respectively,<sup>2</sup> and (2) defendant’s cross-motion for partial summary judgment on liability on its counterclaims, are decided as follows:<sup>3</sup>

<sup>1</sup> Defendant’s Answer, dated July 30, 2021, ¶¶ 35-37, 38-40, and 41-42 (First, Second, and Third Counterclaims, respectively). Defendant’s contractual waiver of potential counterclaims against plaintiff (in Lease, rider R11, at pages PL000030-PL000031) is unenforceable under the circumstances of this case. *See Stamp Rite Tool & Die Corp. v Branded Leather, Inc.*, 236 AD3d 1076, 1080 (2d Dept 2025); *All 4 Sports & Fitness, Inc. v Hamilton, Kane, Martin Enters., Inc.*, 22 AD3d 512, 514 (2d Dept 2005).

<sup>2</sup> Plaintiff’s Complaint, dated June 14, 2021, ¶¶ 5-14 and 15-17 (First and Second Causes of Action, respectively).

<sup>3</sup> In the interest of brevity, the Court assumes the parties’ familiarity with the underlying facts, procedural history, and the issues presented, to which the Court refers only as necessary to explain its determination. *See e.g. Longe v City of NY*, 802 Fed Appx 635, 636 (2d Cir 2020).

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The branches of plaintiff's motion which are for summary judgment dismissing the counterclaims and for summary judgment on its first cause of action for breach of contract, respectively, are *granted*, whereas defendant's cross-motion for partial summary judgment on liability on its counterclaims is *denied*, as more fully set forth in the decretal paragraphs below.

Plaintiff's evidentiary submissions in support of the aforementioned branches of its motion (and in opposition to defendant's cross-motion) demonstrated, *prima facie*, that:

(1) defendant expressly waived the rights provided by Real Property Law § 227<sup>4</sup> and thereby limited its remedies to those set forth in the lease;<sup>5</sup>

(2) in connection with the water-pressure tank leak on May 31, 2020 (the "water-leak incident"),<sup>6</sup> defendant received from its insurer two checks, one in the amount of \$227,778.74 for damage to its machines, and the other in the amount of

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<sup>4</sup> Real Property Law § 227 provides, in relevant part, that "[w]here any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, *and no express agreement to the contrary has been made in writing*, the lessee or occupant may, if the destruction or injury occurred without his or her fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he or she is not liable to pay to the lessor or owner, rent for the time subsequent to the surrender" (emphasis added).

<sup>5</sup> Lease, dated January 17, 2008, as amended by Amendment of Lease, dated July 11, 2019 (the "lease") (NYSCEF Doc Nos. 32 and 36, respectively), page PL000022, ¶ 9 (f) ("[Defendant] hereby waives the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof.").

<sup>6</sup> Affidavit of Morton Frucht, a member of plaintiff and its managing agent, dated November 28, 2022 ("Frucht's opening affidavit") (NYSCEF Doc No. 29), ¶ 23 ("During Memorial Day weekend 2020, a pressure tank on the roof of the [b]uilding and connected to the sprinkler system suffered a leak.").

\$87,285 for loss of business income,<sup>7</sup> to compensate it for the claimed losses it sustained in the water-leak incident;<sup>8</sup>

(3) plaintiff continuously offered (but was persistently rebuffed by defendant) to “repair [the] peeling paint on the ceiling of the [leased space]” resulting from the water-leak incident;<sup>9</sup>

(4) defendant’s initial concern that “the ceiling paint chips [were] considered to [have] be[en] lead-based paint” was proved unfounded by an independent laboratory which was hired by plaintiff to test the pain-ceiling chips for lead;<sup>10</sup>

(5) defendant’s follow-up concern that “a lead hazard could be created if the [ceiling] paint is turned into dust by abrasion, scraping, or sanding”<sup>11</sup> could not have been adequately responded to because of its refusal to relocate (coupled with the impracticability, outside plaintiff’s control, of relocating) all or a portion of its business to a different floor in the subject building;<sup>12</sup>

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<sup>7</sup> Correspondence between defendant and its insurer (NYSCEF Doc No. 27).

<sup>8</sup> Lease, rider, R31 at page PL000038 (“Tenant agrees to take space in an ‘AS IS’ condition, including, but not limited to, any water leaks from any source.”) (capitalization in the original). *See* Lease, ¶ 9 (e) at page PL000022 (“[E]ach party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other *casualty*, and to the extent that such insurance is in force and collectible and to the extent permitted by law, [plaintiff] and [defendant] each hereby releases and waives all right of recovery against the other or any one claiming through or under each of them by way of subrogation or otherwise.”) (emphasis added).

<sup>9</sup> Frucht’s opening affidavit, ¶¶ 29-40, 42-46.

<sup>10</sup> Report, dated July 17, 2020, of Angstrom Testing Services (the “test report”) (NYSCEF Doc No. 47), page 1 at PL000079. Nothing in the record supports defendant’s bald contention that the leased space was affected by mold before or after the water-leak incident.

<sup>11</sup> Test report, page 1 at PL000079.

<sup>12</sup> Frucht’s opening affidavit, ¶ 41; Frucht’s reply affidavit, dated March 20, 2023 (“Frucht’s reply affidavit”) (NYSCEF Doc No. 93), ¶ 9.

(6) defendant concurrently was negotiating and ultimately signed a lease for the replacement space at a nearby building;<sup>13</sup>

(7) defendant ceased paying rent for the lease space on November 24, 2020;<sup>14</sup>

(8) defendant notified plaintiff on or about December 1, 2020 that it would be vacating the leased space;<sup>15</sup> and

(9) defendant vacated the leased space on February 1, 2021, despite the lease not expiring until one year later on January 31, 2022.<sup>16</sup>

Based on the foregoing, plaintiff established its prima facie entitlement to judgment as a matter of law dismissing defendant's counterclaims and granting it judgment on its first cause of action for breach of contract.<sup>17</sup>

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<sup>13</sup> Defendant's lease with nonparty 37<sup>th</sup> Arcade Co., LLC, dated October 27, 2020, for the replacement space at a nearby building at 307 West 36<sup>th</sup> Street (NYSCEF Doc No. 25).

<sup>14</sup> Plaintiff's Tenant Statement, dated November 25, 2022 (NYSCEF Doc No. 35), unnumbered page 2. Plaintiff's acceptance of defendant's last partial payment of outstanding rent on November 24, 2020 did not constitute a waiver of its rights for the remainder of the rent. *See* Lease, rider, R32 at page 000038 ("Payment or receipt of a rental payment of less th[a]n the amount stated in the lease shall be deemed to be nothing more than partial payment on that month[']s account. Under no circumstances shall [plaintiff's] acceptance of a partial payment forfeit [plaintiff's] right to collect the balance due on the account. . .").

<sup>15</sup> Frucht's opening affidavit, ¶ 51.

<sup>16</sup> Frucht's opening affidavit, ¶ 54.

<sup>17</sup> *See 558 Seventh Ave. Corp. v E&B Barbers Inc.*, \_\_\_ AD3d \_\_\_, 2025 NY Slip Op 02546 (1st Dept 2025); *W 54-7, LLC v Rooney*, 233 AD3d 423, 424 (1st Dept 2024); *691 Tenth, LLC v A&M Healthy Grill NYC Inc.*, 222 AD3d 469, 470 (1st Dept 2023); *E-Z Eating 41 Corp. v H.E. Newport, LLC*, 171 AD3d 415 (1st Dept 2019), *lv denied* 35 NY3d 903 (2020); *Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d 1083, 1087-1088 (2d Dept 2011); *Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 (1st Dept 2011); *RVC Assoc. v Rockville Anesthesia Group*, 267 AD2d 370, 370-372 (2d Dept 1999); *Rodriguez v Nachamie*, 57 AD2d 920, 921 (2d Dept 1977); *Petrola House Inc. v The Curated NYC, LLC*, 2024 NY Slip Op 30732(U) (Sup Ct, NY County 2024); *32 W. 39th St. Sole Member LLC v The Regency NYC Inc.*, 2023 NY Slip Op 34332(U) (Sup Ct, NY County 2023), *rearg denied* 2024 WL 1197834 (Sup Ct, NY County 2024). *See also Gendell v 42 W. 17th St. Hous. Corp.*, 193 AD3d 644, 645 (1st Dept 2021); *Educational Ctr. for New Americans, Inc. v 66th Ave. Realty Co.*, 131 AD3d 442, 444 (2d Dept 2015).

In opposition, defendant failed to raise a triable issue of material fact.

Defendant's repeated citations to the email from plaintiff's agent, Morton Frucht ("Frucht"), that proposed to "release [defendant] from the lease" if [defendant found] it necessary to leave [the leased space],<sup>18</sup> were unavailing for two reasons. Initially, defendant's principal, Michelle Feinberg ("Feinberg"), promptly (or within 17 minutes) rejected Frucht's email with the statement, "Thanks so much. I [Feinberg and, by extension, defendant] really want to stay!"<sup>19</sup> Equally important, Frucht's proposed release was not formalized, in accordance with the provisions of the lease, to constitute a valid surrender of the leased space.<sup>20</sup> Thus, Feinberg could not have reasonably relied on Frucht's email (which she previously rejected) as a valid basis for her now-professed belief that defendant's move-out from the leased space, before expiration of the scheduled term of the lease, would release it from liability.<sup>21</sup>

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<sup>18</sup> Frucht's email to Michelle Feinberg (defendant), dated July 13, 2020 and timed at 4:00 p.m., pages PL000232-PL000233 (NYSCEF Doc No. 69).

<sup>19</sup> Feinberg's response email to Frucht, dated July 13, 2020 and timed at 4:17 p.m., page PL000232 (NYSCEF Doc No. 69).

<sup>20</sup> Lease, ¶ 25 at page PL000024 ("No act or thing done by [plaintiff] or [plaintiff's] agents [such as Frucht] during the term hereby demised shall be deemed an acceptance of a surrender of said premises and no agreement to accept such surrender shall be valid unless in writing signed by [plaintiff].").

<sup>21</sup> See *JER Realty, LLC v Pick & Pack Hub, LLC*, 236 AD3d 1004, 1006 (2d Dept 2025) ("the emails between the parties were insufficient to create a triable issue of fact as to whether the plaintiff intended to waive any rent or additional fees owed by the defendants under the lease"); *1140 LLC v Meis Studio Inc.*, 225 AD3d 516, 517 (1st Dept 2024) ("[A]rticle 25 of the lease, titled, 'No Waiver,' provides that no acts of landlord or its agents shall be deemed acceptance of a surrender, and no agreement to accept surrender shall be valid unless in writing signed by landlord. It is undisputed that landlord never accepted surrender in a signed writing. Therefore, tenant and assignee have not raised a triable issue of fact with respect to liability for post-surrender rent."); *Hudson Towers Hous. Co., Inc. v Vip Yacht Cruises, Inc.*, 63 AD3d 413, 413 (1st Dept 2009) ("Article 25 of the parties' lease specifically states that there is no surrender of the premises without an agreement accepting such surrender in writing signed by the landlord. It is undisputed that there was no written agreement signed by the landlord accepting any purported surrender of the premises by the tenant at any time before the parties entered into a stipulation of settlement that resolved a summary nonpayment proceeding brought by the

(footnote continued)

Defendant's complaints about plaintiff's alleged obstacles to its move-out from the leased space were similarly unavailing. Contrary to defendant's contentions, the limitations to defendant's use of the passenger and freight elevators during its move-out were not due to plaintiff's lock-out, as more fully set forth in the margin.<sup>22</sup> Further, defendant's ongoing failure to pay rent permitted plaintiff under the terms of the lease to turn off the electric power to the leased space.<sup>23</sup> In sum, "[t]he conditions alleged by defendant are not what caused it to vacate the [leased] premises."<sup>24</sup>

Although the Court may not grant summary judgment to plaintiff on the issue of liability on the *second* cause of action for recovery of attorneys' fees and disbursements, it concludes that plaintiff may recover same as permitted by the lease<sup>25</sup>

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landlord in Civil Court." See also *Odonata Ltd. v Baja 137 LLC*, 206 AD3d 567, 568 (1st Dept 2022) ("Viewing the facts in the light most favorable to plaintiff [tenant], which is that it lost a seemingly favorable lease, passed up on other opportunities and incurred financial losses, the result does not shock the conscience and confound the judgment of any person of common sense. Defendant [landlord] offered plaintiff a lease modification, plaintiff counteroffered, and ultimately their negotiations did not result in a mutually signed agreement. Plaintiff [tenant] had no reasonable basis to believe it had a binding agreement with defendant [landlord]. It is unclear what distinguishes this case from ordinary negotiations to modify a lease to warrant equitable relief. Promissory estoppel is reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied.") (internal quotation marks omitted and citations omitted).

<sup>22</sup> E-mail of Sam Tokar, Vice President of Major Elevator Corp., dated December 28, 2020 and timed at 11:39 am, page PL000367 (NYSCEF Doc No. 58) (attributing the cause of defendant's inability to use the *passenger* elevator to reach its 11<sup>th</sup>, or nearly the top, floor to the outdated software for the passenger elevator controller). See Frucht's reply affidavit, ¶ 10 (explaining that defendant's failure to schedule the use of the *freight* elevator in advance of its move-out precluded its immediate, on-demand use).

<sup>23</sup> Lease, rider R4 at page PL000025 ("In the event that such bills [for electric service] are not paid within five [5] days after the same are rendered[,] [plaintiff] may, without further notice, discontinue the service of electric current to demised premises without releasing [defendant] from any liability under this lease and without [plaintiff] or [plaintiff's] agent incurring any liability for any damage or loss sustained by [defendant] by such discontinuance of service.").

<sup>24</sup> See *M.Y. Realty Corp. v Atlantic First Fin. Corp.*, 19 AD3d 156, 156 (1st Dept 2005).

<sup>25</sup> Lease, ¶ 19 at page PL000023 ("If [plaintiff], . . . in connection with any default by [defendant] in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment (footnote continued)

and refers the matter to a referee to hear and report, as more fully set forth in the decretal paragraphs below.<sup>26</sup>

Accordingly, it is

ORDERED that (in Seq. No. 1) plaintiff's motion for summary judgment is *granted to the extent* that: (1) defendant's counterclaims are dismissed with prejudice, and (2) plaintiff is awarded summary judgment against defendant in the sum of \$327,541.95 with statutory interest at 9% per annum from December 1, 2020 on the *first* cause of action;<sup>27</sup> and it is further

ORDERED that the Clerk of the court shall enter a judgment in favor of plaintiff and against defendant in the principal sum of \$327,541.95 with statutory interest at 9% per annum from December 1, 2020 on the *first* cause of action; and it is further

ORDERED that this matter is hereby referred to the Special Referee Part (Part 82) for assignment to an available Special Referee or Judicial Hearing Officer ("JHO") to hear and report to this Court on the reasonable amount of attorneys' fees

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of money, including but not limited to attorney's fees, in instituting, prosecuting or defending any action or proceedings, then [defendant] will reimburse [plaintiff] for such sums so paid or obligations incurred with interest and costs.").

<sup>26</sup> See *Blue Water Realty, LLC v Salon Mgt. of Great Neck, Corp.*, 189 AD3d 496, 498 (1st Dept 2020). See also *W 54-7, LLC v Rooney*, 2023 NY Slip Op 32205(U), (Sup Ct, NY County 2023, Kelley, J.) (referring the matter of attorneys' fees and disbursements to a special referee), *affd* 233 AD3d 423 (1st Dept 2024); *W 54-7, LLC v Rooney*, 2024 WL 3792641 (Sup Ct, NY County 2024, Burzio, Special Ref.) (post-hearing report & recommendation), *report confirmed* 2025 WL 233598 (Sup Ct, NY County 2025, Kelley, J.).

<sup>27</sup> Complaint, ¶ 13.

and disbursements to be awarded to plaintiff on the *second* cause of action; and it is further

ORDERED that plaintiff shall electronically serve and file a proposed accounting of the number of hours of attorneys' and paralegals' time incurred in prosecuting this action (along with a statement of the applicable hourly billing rates) within 60 days from the date of electronic service of this Decision/Order with notice of entry, and defendant shall electronically serve and file objections to the proposed accounting within 30 days from the date of electronic service of plaintiff's papers; and it is further

ORDERED that the parties shall appear for the reference hearing (including with all witnesses and evidence they seek to present), and shall be ready to proceed, on the date and time fixed by the Special Referee (Part 82) Clerk; and it is further

ORDERED that, pursuant to CPLR 4320 (a), the assigned Special Referee or JHO shall conduct the trial in the same manner as a court trying an issue without a jury and (except as otherwise directed by the assigned Special Referee or JHO for good cause shown) shall proceed from day to day until completion; and it is further

ORDERED that any motion to confirm or disaffirm the report of the Special Referee or JHO shall be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44 and, after consideration of any such motion, and either the confirmation or modification of the report, the Court shall direct the Clerk of the court to enter an appropriate separate money judgment for attorneys' fees and disbursements in favor of plaintiff and against defendant; and it is further

ORDERED that (in Seq. No. 2), defendant's cross-motion is denied in its entirety; and it is further

ORDERED that plaintiff's counsel is directed to promptly electronically serve a copy of this Decision/Order with notice of entry on defendant's counsel and electronically file an affidavit of service thereof with the Kings County Clerk.

*This constitutes the Decision/Order of the Court.*

Dated: May 23, 2025



PETER P. SWEENEY, J.S.C.

KINGS COUNTY CLERK  
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