

**Mitchell Consultants NY Corp. v 77 Realty Owner
LLC**

2025 NY Slip Op 33929(U)

October 10, 2025

Supreme Court, New York County

Docket Number: Index No. 659841/2024

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MITCHELL CONSULTANTS NY CORPORATION

Plaintiff,

- v -

77 REALTY OWNER LLC,

Defendant.

INDEX NO. 659841/2024

MOTION DATE 02/20/2025,
05/19/2025

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 33, 34, 36, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons stated on record (*tr.*10.10.25), Mitchell Consultants NY Corporation (the **Tenant**)’s motion (Mtn. Seq. No. 001) for a Yellowstone injunction is GRANTED.

The Tenant (i) holds a commercial lease (NYSCEF Doc. No. 8), (ii) has received a notice of default (the **Notice of Default**; NYSCEF Doc. No. 6) dated January 21, 2025 from 77 Realty Owner LLC (the **Landlord**), (iii) has requested injunctive relief prior to the termination of the lease, and (iv) has indicated its readiness to procure the required insurance upon commencement of the Free Rent Period as required by the Lease (hereinafter defined) (*tr.* 10.10.25; NYSCEF Doc. No. 1, ¶ 47; *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]).

The Notice of Default against which Tenant seeks a Yellowstone injunction provides that the Tenant is in default because of its failure to “produce copies of all certifies (sic) of insurance and insurance policies” relating to the Unit (NYSCEF Doc. No. 6 at 8) with an accompanying demand to “provide [77 Realty] with the full copies of all certificates of insurance and insurance policies, in compliance with the terms of the Lease, for the period from June 2019 to PRESENT, on or before February 25, 2025” (*id.* at 9).

The Notice appears to be defective on its face because pursuant to Section 6 of the Modification Agreement the Landlord agreed to waive “any and all claims” against the Tenant with regard to any claims under the Lease from the date of the Original Lease (hereinafter defined) until through the beginning of the Free Rent Period (as such term is defined in the Lease [hereinafter defined]) which Free Rent Period has not begun and Tenant has not accepted possession in accordance with the terms of the Lease (*Cf. Bliss World LLC v 10 W. 57th St. Realty LLC* (170 AD3d 401, 402 [1st Dept 2019]); They are not open for business and can not be.

To wit, reference is made to a certain Lease Agreement (the **Original Lease**; NYSCEF Doc. No. 7) dated May 31, 2019, by and between the Tenant and the Landlord and modified by a certain Lease Modification and Settlement Agreement (the **Modification Agreement**; the Modification Agreement together with the Original Lease, hereinafter the **Lease**) dated September 2020, by and between the same parties.

As discussed (*tr.* 10.10.25), there came a time when the parties agreed to modify the Original Lease to provide, among other things, that the Landlord waived any and all claims under the Lease from the beginning of the Lease through the beginning of the Free Rent Period:

4. Lease Terms The Lease Term for the Initial 10-year period of the Lease will be set based on the date the Free Rent Period begins and each succeeding twelve (12) full calendar month period thereafter shall be a Lease Year. Notwithstanding anything to the contrary set forth herein, it is agreed that the Termination Date set forth in the Good Guy Guaranty shall be twenty-one (21) months from the beginning of the Free Rent Period.

5. In exchange for the modification of the terms of the Lease Agreement as specified above, Tenant agrees to waive any and all claims and will not commence any form of litigation against the Landlord, 77 Realty LLC, Abro Management, their successors and assigns, and their past and present principals, members, managers, officers, directors, affiliates, employees, agents, successors and assigns, and the Contractor, E&D General Contracting LLC, for any and all claims that may arise from the alleged misrepresentation resulting in not filing proper permits with DOB provided that all permits are obtained and complied with and all certificates of completion from the DOB have been obtained so that the Tenant can open for business as anticipated by the Agreement. The Landlord acknowledges that the Architect prepared and filed the plans and the contractor E&D General Contracting LLC is filing for the necessary permits for the required work. Tenant acknowledges that once it has been established in writing by the DOB and the Architect that the Tenant's store is "open for business" and all permits have been complied with and all necessary certificates of completion from the DOB have been obtained that Tenant will accept possession of the Premises in as is condition

6. **Landlord** agrees to indemnify defend and hold harmless the Tenant and **waive any and all claims** and will not commence any form of litigation against the Tenant, the Guarantor, their successors and assigns, and their past and present principals, members, managers, officers, directors, affiliates, employees, agents, successors and assigns **with regard to any claims arising out of the Lease or this Agreement from the date of the Lease through the beginning of the Free Rent Period.**

(NYSCEF Doc. No. 8 §§ 4, 5, and 6 [emphasis added]).

On the record before the Court, it is undisputed that the Free Rent Period has not yet commenced or that there has been a writing by the DOB and the Architect that the Tenant's store is "open for

business" and all permits have been complied with and all necessary certificates of completion from the DOB have been obtained such that the Tenant has (or is obligated to) accept possession (*id. at 5*). Thus, the motion for a Yellowstone Injunction is GRANTED.

However, the Landlord is entitled to dismissal of the complaint with prejudice to the extent that it seeks punitive damage. Simply put, the Tenant has neither identified a tort independent of the Lease, nor alleged that the Landlord's conduct is part of a pattern directed at the public generally (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 316 [1995]).

The Landlord is also entitled to dismissal of the third cause of action with prejudice to the extent it seeks reimbursement of expenses which are not expressly covered by the Lease. These damages are entirely duplicative of its breach of contract claim (*SAA-A, Inc. v Morgan Stanley Dean Witter & Co.*, 281 AD2d 201, 203 [1st Dept 2001]; NYSCEF Doc. 281 AD2d 201, 203 [1st Dept 2001]) because expectancy damages are already addressed by the breach of contract cause of action which breach of contract cause of action may include anything expressly provided for in the Lease, and its stated factual basis is identical to the breach of contract claim (Landlord's breaches as set for above" [NYSCEF Doc. No. 42 ¶ 66]).

Finally, the Landlord is entitled to dismissal without prejudice of the cause of action for a mandatory injunction. It is not clear that money damages would be sufficient and adequate to address the harm alleged. Among other things, the Landlord may be needed to do the work which prevents the Building Department and other third parties (architects, etc.) from obtaining the approvals so that the demised premises can be "open for business" and so that the Tenant can

be said to be “in possession” as such terms are defined in the Lease. As such, leave is granted to the Tenant to do so and they shall file an amended complaint no later than November 28, 2025. To the extent that the Tenant wishes to press this claim, his must be articulated in an amended complaint. out. As such, leave is granted to do so and they shall file an amended complaint no later than November 28, 2025.

Accordingly, it is hereby ORDERED that the motion for a Yellowstone Injunction is granted; and it is further

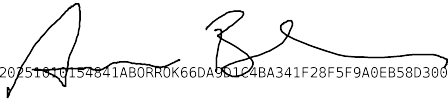
ORDERED that the Tenant shall post a bond in the amount of \$500 no later than October 24, 2025; and it is further

ORDERED that the Landlord’s motion to dismiss is granted to the extent set forth above; and it is further

ORDERED that the Landlord’s motion to dismiss is granted solely to the extent set forth above; and it is further

ORDERED that the Tenant may file an amended complaint as set forth above no later than November 28, 2025 to which the Landlord shall have 45 days to respond.

ORDERED that the Tenant may file an amended complaint as set forth above no later than November 28, 2025 to which the Landlord shall have until December 30, 2025 to file an answer to either the complaint or the amended complaint.


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<u>10/10/2025</u> DATE		<u>ANDREW BORROK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE