

**Maple 80 Maiden Minority Owner, LLC v Gristede's  
Foods, Inc.**

2025 NY Slip Op 34381(U)

November 17, 2025

Supreme Court, New York County

Docket Number: Index No. 651637/2025

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JUDY H. KIM PART 04**

*Justice*

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MAPLE 80 MAIDEN MINORITY OWNER, LLC, NK 80  
MAIDEN OWNER, LLC, WASSCO LLC,

Plaintiffs,

- v -

GRISTEDE'S FOODS, INC.,

Defendant.

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**INDEX NO.** 651637/2025

**MOTION DATE** 04/18/2025,  
05/30/2025

**MOTION SEQ. NO.** 001 002

**DECISION + ORDER ON  
MOTION**

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, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 42, 43, 44, 45, 46, 47

were read on this motion for PENDENTE LITE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion for DISMISSAL.

Upon the foregoing documents, defendant's motion to dismiss this action is denied and plaintiffs' motion for an order directing defendant to pay outstanding rent arrears and use and occupancy pendente lite is granted in part.

**FACTUAL BACKGROUND**

Plaintiffs Maple 80 Maiden Minority Owner, LLC, NK 80 Maiden Owner, LLC and Wassco LLC (collectively, the "Landlord") own the building located at 90 Maiden Lane, New York, New York (the "Building"). On March 2, 2007, plaintiffs' predecessor-in-interest entered into a commercial lease with defendant Gristede's Foods, Inc. (the "Lease"), in which defendant leased the Building's ground floor and part of its basement and roof (the "Premises") to operate a grocery store or "grocery/general merchandise business."

In 2016, plaintiffs commenced a summary holdover proceeding against Gristede's Foods, Inc. ("Gristede's") in New York City Civil Court, New York County under L&T index number 50421/16 (the "Holdover Proceeding"). On December 14, 2016, the parties to the Holdover Proceeding executed a Stipulation of Settlement (the "Stipulation") in which defendant agreed to maintain a letter of credit in the amount of \$268,654.98 that plaintiffs could draw upon in the event defendant failed to pay rent (NYSCEF Doc No. 22, stipulation at ¶3). The Stipulation further provided that defendant would replenish the letter of credit after two drawdowns and that, upon defendant's failure to replenish the letter of credit, plaintiff could restore the Holdover Proceeding to Civil Court to "schedule a limited scope hearing" to determine whether Gristede's had defaulted on its obligations to issue and maintain the letter of credit (*id.* at ¶2). If, at that hearing, Gristede's was found "to be in default of [the] Stipulation, the Court ... [would] find the Lease ... terminated based upon said default" (*id.*). However, the Stipulation also provided that "[n]othing herein shall preclude the parties from pursuing all other remedies under the Lease, including but not limited to rent and additional rent through the term of the Lease" (*id.*).

In their complaint, plaintiffs alleges that in July 2020, Gristede's stopped operating its business in the Premises and "abandoned" same (NYSCEF Doc No. 1, complaint at ¶23). They further allege that, as a result of this abandonment, plaintiffs served Gristede's with a Notice of Termination terminating the Lease as of January 27, 2025, which notice advised Gristede's that, pursuant to section 19.01(b) of the Lease, after the Lease's termination it would be liable for all rents that would have been due for the remainder of the Lease term (*id.* at ¶24). Defendant responded to this notice with a letter, by counsel, dated February 21, 2025, rejecting the termination on the grounds that Landlord had waived its right to terminate the Lease on this basis (NYSCEF Doc No. 11, letter).

Plaintiffs allege that the Lease was properly terminated and that defendant has not paid the amounts due under the Lease and assert claims for: breach of the Lease, seeking rent and additional rent arrears and all rent for the remainder of the Lease term; and ejectment (NYSCEF Doc No. 1, complaint at ¶¶28-46). Plaintiffs also seek attorney's fees under the Lease (*id.* at ¶¶47-50).

Defendant now moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss this action, arguing that it is barred by the Stipulation and that, in any event, plaintiffs waived their right to terminate the Lease based on Gristede's alleged abandonment of the Premises by accepting rent payments for four and a half years after such abandonment (NSYCEF Doc No. 39, memo of law at p 2). Plaintiffs oppose the motion and separately move for an order directing defendant to: (1) pay plaintiffs for its use and occupancy of the Premises at the rate of \$57,032.83 per month (reflecting the monthly rent under the Lease) and additional rent charges due under the Lease, *pendente lite* from April 2025 onward; and (2) post an undertaking for "unpaid past due use and occupancy" of the Premises, totaling \$258,956.19 or immediately pay this amount to plaintiffs (NYSCEF Doc No. 17, order to show cause).

Defendant opposes plaintiffs' motion, arguing that the relief sought is precluded by the terms of the Stipulation and that, in any event, plaintiffs' demand for use and occupancy is inconsistent with their position that the Lease was terminated based on defendant's vacatur of the Premises. In reply, plaintiffs argue that they have never claimed that defendant vacated the Premises but rather that defendant has "abandoned" the Premises while remaining in possession and control, as demonstrated by its payment of rent through August 2024 and its ongoing efforts to assign the Lease.

These motions are consolidated for disposition.

## DISCUSSION

### *Defendant's Motion to Dismiss*

In addressing a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]). On a motion to dismiss pursuant to CPLR 3211(a)(1), “[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc, Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal citations and quotations omitted]).

Defendant’s motion to dismiss is denied. Contrary to defendant’s claim, the Stipulation neither precludes plaintiffs from asserting the claims set out in their complaint nor requires plaintiffs to litigate these claims in Civil Court. A stipulation to modify or waive the terms of a prior written agreement, such as the Lease, must be “clear, unmistakable and without ambiguity” (*Jacoby and Meyers v Crispi*, 205 AD2d 312, 312 [1st Dept 1994] [internal quotations and citations omitted]; *see also Shelvin Plaza Assoc., LLC v Lew Lieberbaum Holdings Co., Inc.*, 18 AD3d 730, 731-32 [2d Dept 2005]) whereas the Stipulation contemplates only that the question of whether Gristede’s defaulted in issuing and maintaining the letter of credit as dictated by the Stipulation would be adjudicated in Civil Court while permitting plaintiffs to “pursu[e] all other remedies under the Lease, including but not limited to rent and additional rent through the term of the Lease,” i.e., the relief plaintiffs seek here. In short, nothing in the Stipulation “indicate[s] that the

parties manifestly intended the stipulation to ... terminate[] plaintiffs' rights to recover damages under the lease" (*Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 480-81 [1st Dept 2010]).

Neither did plaintiffs' acceptance of rent following defendant's alleged abandonment of the Premises waive their right to terminate the Lease. Article 20 of the Lease expressly prohibits such a waiver, stating:

The failure of Landlord to seek redress for breach or violation of, or to insist upon the strict performance of, any term, covenant or condition of this Lease on Tenant's part to be observed or performed shall not prevent a subsequent act or omission (which would have originally constituted a breach or violation of any such term, covenant or condition) from having all the force and effect of an original breach or violation. No provision of this Lease shall be deemed to have been waived by Landlord unless such waiver shall be set forth in writing by Landlord.

The receipt by Landlord of Rent with knowledge of the breach or violation by Tenant of any term, covenant or condition of this Lease on Tenant's part to be observed or performed shall not be deemed a waiver of such breach or violation. No payment by Tenant or receipt by Landlord of a lesser amount than the aggregate of all Rent payable hereunder shall be deemed to be other than on account of the first accruing of all such items of Rent then due, and no endorsement or statement on any check, no letter accompanying any check or other payment in any such lesser amount and no acceptance of any such check or other such payment by Landlord shall constitute an accord and satisfaction. Landlord may accept any such check or payment without prejudice to Landlord's right to recover the balance of Rent or to pursue any other legal remedy.

(NYSCEF Doc No. 8, lease at Art. 20 [emphasis added]).

Where, as here, "the parties to a commercial lease ... mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained-for provisions of a lease" such language must be honored (*Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 AD3d 65, 70 [1st Dept 2003]). Although "parties to a lease may waive a non-waiver clause where the reasonable expectations of both parties under the lease have been modified by subsequent actions of the parties" (*Ray & W Cut Inc. v 240 W. 37 LLC*, 22 Misc 3d 1103(A) [Sup Ct, NY County 2008] [internal citations omitted]; *see also Paramount*

*Leasehold, L.P. v 43rd St. Deli, Inc.*, 136 AD3d 563, 568 [1st Dept 2016]), this exception is inapplicable here given the clear and unambiguous language of the Lease barring the precise waiver proposed by defendant<sup>1</sup> (*Jeppaul Garage Corp. v Presbyt. Hosp. in City of New York*, 61 NY2d 442, 446-47 [1984]). In any event, the fact that plaintiffs accepted rent after defendant's alleged abandonment, as they were entitled to do (*see Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 133-34 [1995] [where tenant abandons premises prior to expiration of lease landlord may, inter alia, "do nothing and collect the full rent due under the lease"]), cannot reasonably have modified defendant's understanding of plaintiffs' rights under the Lease.

*Plaintiffs' Motion for Use and Occupancy*

That branch of plaintiffs' motion seeking an order directing defendant to pay rent arrears and use and occupancy pendente lite is granted, in part, to the extent defendant is to pay use and occupancy pendente lite.

"[T]he court has broad discretion in awarding use and occupancy pendente lite" (*N.Y. Park N. Salem Inc. v ADBH 22nd Floor Inc.*, 236 AD3d 573, 574 [1st Dept 2025] [internal citations omitted]) and may award same to a commercial landlord where defendant remains in possession of the subject premises without payment (*see 10E53 Owner LLC v Bruderman Asset Mgmt.*, 202 AD3d 609 [1st Dept 2022]; *see also 862 Second Ave. LLC v 2 Dag Hammar skjold Plaza Condominium*, 185 AD3d 421 [1st Dept 2020]). Plaintiffs have established through the affidavit of Paul Wasserman, an authorized signatory for plaintiffs' Asset Manager and agent, that defendant rejected plaintiffs' termination and remains in the Premises without payment (NYSCEF

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<sup>1</sup> Defendant's reliance on plaintiffs' July 14, 2020 letter, in which they represented that they would not "call defendant in default under section 17.01(e) for remaining closed through .... September 8, 2020" (NYSCEF Doc No. 44) does not present a bar to plaintiffs doing so years later based on defendant's continued abandonment of the Premises after that date.

Doc No. 5, Wasserman aff). In opposition, defendant does not dispute this point (*cf. Riverside Ctr. 2 Bit Owner, LLC v Soulcycle 21 W. End Ave., LLC* 2020 WL 7316031 [Sup Ct, NY County 2020]) but concedes that it “withheld” rent for December 2024 (NYSCEF Doc No. 21, D’Amico aff in opp at ¶¶19, 22). Instead, defendant argues that an award of use and occupancy would be inconsistent with plaintiffs’ position that the Lease is terminated and defendant has vacated the Premises. This is a mischaracterization of plaintiffs’ position, however, which is that defendant has “abandoned” the Premises under the Lease but remains in possession. The term “abandon” in this context is not synonymous with “vacate,” as established by the use of both terms in sections 14.01 and 18.04 of the Lease (*see Travelers Indem. Co. of Am. v Royal Ins. Co. of Am.*, 22 AD3d 252, 253 [1st Dept 2005] [“Defendant’s interpretation appears to eliminate any difference in meaning between the words “contract” and “agreement,” seemingly rendering one or the other superfluous, contrary to settled rules of construction”]). While undefined in the Lease, in this context, the term “abandon” is understood to mean “to cease from maintaining, practicing, or using” (Merriam-Webster.com Dictionary, abandon [https://www.merriam-webster.com/dictionary/abandon]) and such an abandonment is not, in and of itself, tantamount to vacatur and surrender (*see Brock Enterprises Ltd. v Dunham’s Bay Boat Co. Inc.*, 292 AD2d 681, 682 [3d Dept 2002] [“when a tenant abandons possession and the landlord thereafter utilizes the premises in a manner inconsistent with the abandoning tenant’s rights under the lease, such as, for example, by reletting the premises or using it for its own benefit, a surrender will be inferred”]).

Defendant’s other argument in opposition—that the parties’ Stipulation precludes the present relief—is rejected for the reasons set forth above. Accordingly, plaintiffs’ motion is granted to the extent that they are awarded use and occupancy pendente lite. As the status of defendant’s tenancy is in dispute, use and occupancy is set at \$57,032.83, as requested by plaintiffs,

to reflect the current rent under the Lease rather than the holdover rate set in Article 37 of the Lease (*see Kuo Po Trading Co., Inc. v Tsung Tsin Ass'n, Inc.*, 273 AD2d 111, 111-12 [1st Dept 2000] [“The direction that plaintiff continue to pay rent at the same rate it has been paying since December 1987 was a proper exercise of discretion that gave appropriate consideration to the long-standing status quo”]).

That branch of plaintiffs’ motion seeking an order directing defendant to pay rent arrears is denied, without prejudice, as premature. Plaintiffs seek, in effect, summary judgment on their first cause of action prior to issue being joined, in contravention of CPLR 3212(a). Plaintiffs’ request that the Court order defendant to post an undertaking to secure the alleged rent arrears is rejected for the same reason (*see Ghose v CNA Reins. Co. Ltd.*, 43 AD3d 656, 659 [1st Dept 2007] [“The [trial] court rejected Ghose’s request for the imposition of a bond ... as premature, on the ground that issue had not yet been joined”]).

Accordingly, it is

**ORDERED** that defendant’s motion to dismiss the complaint is denied; and it is further

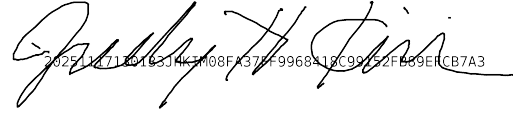
**ORDERED** that plaintiffs’ motion to recover rent arrears and use and occupancy pendente lite is granted, in part, to the extent that defendant is to pay use and occupancy, pendente lite, in the amount of \$57,032.83 per month starting on December 1, 2025, and on the first of each month thereafter, and is otherwise denied; and it is further

**ORDERED** that plaintiffs shall, within ten days of the date of this decision and order, serve a copy of same, with notice of entry, on defendant; and it is further

**ORDERED** that service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website); and it is further

**ORDERED** that defendant shall file and serve an Answer within twenty days of the date of this decision and order.

This constitutes the decision and order of the Court.



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**11/17/2025**

**DATE**

**HON. JUDY H. KIM, J.S.C.**

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