

<b>Midtown Hotel, LLC v 522 W. 38th St. LLC</b>
2026 NY Slip Op 31340(U)
April 2, 2026
Supreme Court, New York County
Docket Number: Index No. 151190/2024
Judge: Matthew V. Grieco
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MATTHEW V. GRIECO PART 30M

Justice

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MIDTOWN HOTEL, LLC

Plaintiff,

- v -

522 W. 38TH ST. LLC,

Defendant.

-----X

INDEX NO. 151190/2024

MOTION DATE 11/24/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for AMEND PLEADINGS

Upon the foregoing documents, and for the reasons stated infra, the motion is granted.

Plaintiff tenant, Midtown Hotel, LLC, commenced this action on February 7, 2024, asserting claims for breach of contract, unjust enrichment, constructive trust, and conversion, to recover security deposits and other payments totalling \$815,502.48 made to defendant landlord, 52 W. 38th St., LLC, under a September 2022 lease agreement that terminated in May 2023 upon the City of New York's condemnation of the commercial property (NYSCEF Doc. No. 1).

Landlord filed an answer on August 14, 2024, asserting various affirmative defenses, including that tenant had breached the lease (NYSCEF Doc. No. 8).

On November 24, 2025, landlord moved to amend its answer to assert a counterclaim for unpaid additional rent of \$123,562.16 for utilities and operating expenses incurred during the lease term (NYSCEF Doc. Nos. 51-57). Tenant opposes (NYSCEF Doc. Nos. 58-60).

Leave to amend a pleading should be freely granted, absent prejudice to the non-moving party (see *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]; CPLR 3025[b]). Prejudice requires some indication that the defendants have been hindered in the preparation of their case or have been prevented from taking some measure in support of their position (see *Kocourek v Booz Allen Hamilton, Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Even under that liberal standard, however, the proposed pleading must not be palpably insufficient or patently devoid of merit (see *Norguard Ins. Co. v 148 West Owner LLC*, 241 AD3d 1205 [1st Dept 2025]) and there must be “appropriate substantiation” as circumstances dictate (*Hoppe v Bd. of Directors of 51-78 Owners Corp.*, 49 AD3d 477 [1st Dept 2008]; see *Board of Mgrs. of Residential Section of Plaza Condominium v Franzese*, 228 AD3d 571, 572 [1st Dept 2024] [citing *Hoppe, supra*, for need to substantiate proposed new claims]; *Velarde v City of New York*, 149 AD3d 457 [1st Dept 2017] [evidentiary proof that could be considered on a motion for summary judgment required to show defendants acted recklessly or in concert with assailant, rather than negligently]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [proposed amendment supported by a sufficient showing of merit through the submission of an affirmation by counsel, along with a transcript of relevant deposition testimony]; *Briggs v New York City Tr. Auth.*, 132 AD2d 451 [1st Dept 1987] [affidavit of merits needed to explain reasons for delay and facts warranting increased ad damnum clause]).

Tenant contends that it would be severely prejudiced by the amendment because it has already waived or “possibly” waived attorneys’ fees in detrimental reliance on settlement of a significant portion of its claims (NYSCEF Doc. No. 60 at 7-8 [mem. of law in opp. to motion]). Although the parties were referred to mediation and attended a

settlement conference with the Court (Arthur F. Engoron, J.) (NYSCEF Doc. Nos. 27-28, 50), no settlement was ever reached; landlord did send tenant several checks totalling \$594,000, the amount of the security deposit, but under a reservation of rights (NYSCEF Doc. No. 64 [letter from landlord's counsel to tenant's counsel]; No. 61 [reply affirmation of counsel]). Insofar as tenant argues that the settlement was its withdrawal of its first two orders to show cause ("OSC") to compel immediate return of the security deposit (NYSCEF Doc. Nos. 9-17, 18-26), the Court (Engoron, J.) denied tenant's third OSC, noting that there were issues of fact (NYSCEF Doc. No. 50); thus, the likelihood that tenant would have obtained attorneys' fees on those applications is not evident, and because landlord tendered the moneys under a reservation of rights, tenant can still seek attorneys' fees, provided there is a contractual or other basis to do so.

Landlord's answer included an affirmative defense that tenant had breached the lease (NYSCEF Doc. No. 8), and as early as January 22, 2025 landlord's manager submitted an affidavit (in opposition to the second OSC) itemizing \$148,728.52 in additional rent charges purportedly outstanding (NYSCEF Doc. No. 23). Accordingly, there could be no surprise from landlord's subsequent proposed counterclaim. In addition, there has been no discovery in this action.

Regarding the sufficiency of the proposed amendment, landlord has submitted the lease, which defines "additional rent" and sets forth tenant's obligations to pay it (NYSCEF Doc. No. 53), and two affidavits from its manager, detailing additional rent claimed was due and owing (NYSCEF 65-66). Those submissions satisfy the "appropriate substantiation" under the circumstances (*see Hoppe*, 49 AD3d at 477; *Board of Mgrs. of Residential Section of Plaza Condominium*, 228 AD3d at 572), and

the proposed pleadings are not otherwise palpably insufficient or patently devoid of merit to make out a (counterclaim) cause of action for breach of contract.


It is therefore

ORDERED that defendant's motion for leave to amend the answer herein is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that plaintiff shall serve a reply to the counterclaim or otherwise respond thereto within 20 days from the date of service of the answer; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 623, 111 Centre Street, on May 19, 2026, at 10:00 AM.

This constitutes the decision and order of the Court.

4/2/2026 DATE					 MATTHEW V. GRIECO, J.S.C.
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"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				OTHER	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>