Farmingville Assoc. Phase 1 LLC v Sally Beauty Supply LLC
2026 NY Slip Op 32121(U)
April 29, 2026
Supreme Court, New York County
Docket Number: Index No.656450/2021
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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FARMINGVILLE ASSOCIATES PHASE 1 LLC and EXPRESSWAY PLAZA I LLC,

Plaintiffs,

- v -

SALLY BEAUTY SUPPLY LLC,

Defendant.

---X

INDEX NO. 656450/2021

MOTION DATE 11/20/2025, 11/20/2025

MOTION SEQ. NO. 011 012

DECISION + ORDER ON MOTION

SALLY BEAUTY SUPPLY LLC,

Plaintiff,

-against-

CUSHMAN & WAKEFIELD U.S., INC.,

Defendant.

---X

Third-Party
Index No. 595309/2023

The following e-filed documents, listed by NYSCEF document number (Motion 011) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 187, 216, 217, 219

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 220, 221, 222, 223, 224

were read on this motion for SUMMARY JUDGMENT (AFTER JOINDER).

Fox Rothschild LLP, New York, NY (Brett A. Berman of counsel), for plaintiffs.
Law Firm of Alexander D. Tripp, P.C., New York, NY (Alexander Tripp of counsel), for defendant.

Gerald Lebovits, J.:

Plaintiffs, Farmingville Associates Phase 1 LLC and Expressway Plaza I LLC, bring this action against defendant, Sally Beauty Supply LLC, for breach of commercial lease. Plaintiffs seek damages arising from Sally Beauty's alleged premature vacatur of the leased premises.

Defendant leased the premises from plaintiffs in 1995, and the parties subsequently entered into multiple lease amendments. The fifth amendment to the lease, dated October 27, 2015, extended the lease term through October 31, 2021, at a fixed minimum rent of $5,159.00 a month. The parties dispute whether they extended the lease a sixth time and therefore extended the lease term to October 31, 2024.

In early 2020, defendant sought rent relief due to the COVID-19 pandemic. Negotiations were conducted between Midwood Investment & Development, plaintiffs' property manager, and defendant's real estate broker, Patrick Selby from Cushman & Wakefield U.S., Inc. The parties planned to include a three-year term extension, two months of abated rent, and a reduced base rent of $4,106.67 a month in the sixth amended lease.

On August 13, 2020, defendant executed the sixth amended lease and emailed it to Midwood, with instructions to return the fully executed amendment to defendant. On September 15, Midwood responded that it would not agree to sign the sixth amended lease unless they resolved the parties' common area maintenance (CAM) dispute and attached its own executed sixth amended lease. Defendant says this constituted a counteroffer. In contrast, plaintiffs say that the CAMs dispute was resolved by August 27, 2020, and therefore that by signing defendant's proposed sixth amended lease on September 15, 2020, the parties executed that version of the lease.

On September 15, 2020, plaintiffs emailed the executed sixth amended lease to Selby with the instruction: "Please share with tenant." (NYSCEF No. 46 at 3 [third-party complaint].) Selby never forwarded the executed sixth amendment to Sally Beauty.

In February 2021, a Cushman represented to defendant that plaintiffs had not yet executed the sixth amendment. Defendant decided to close the store. Sally Beauty served a notice of closing in September 2021 and vacated the premises on October 31, 2021.

Plaintiffs rejected the notice of closing, served a notice of default, and began this action on November 11, 2021. Plaintiffs attached the fully executed version of the sixth amended to the complaint. (*See* NYSCEF No. 8.) Defendant claims that it had never before seen the executed version.

In April 2023, Sally Beauty filed a third-party complaint against Cushman for negligent misrepresentation. Sally Beauty alleged that Cushman misrepresented to defendant that the sixth amended lease had not been executed, resulting in defendant's vacatur. That third-party action was settled and discontinued with prejudice. (*See* NYSCEF No 65 [stipulation of discontinuance].)

On motion sequence 011, plaintiffs seek summary judgment on their complaint (consisting of one breach-of-contract claim), plus damages of $201,523.58 and prejudgment interest from November 1, 2021 (the day after defendant vacated). They also seek to dismiss defendant's affirmative defenses and an inquest to determine attorney fees. The motion is granted, and plaintiffs may seek a supplemental judgment for attorney fees by motion made on notice.

On motion sequence 012, Sally Beauty seeks summary judgment dismissing the complaint. The motion is denied.

The motions are consolidated for disposition.

DISCUSSION

Plaintiffs argue that the sixth amendment is enforceable contract and that defendant breached it by vacating the premises before the extended term expired. Defendant advances three arguments against enforceability: (1) there was no meeting of the minds because Midwood's CAM condition constituted a counteroffer that defendant never accepted; (2) delivery of the executed sixth amendment was improper; and (3) Selby had no authority to receive the executed document on defendant's behalf.

I. Meeting of the Minds

Defendant contends that Midwood's August 2020 email, which conditioned plaintiffs' execution of the sixth amendment on resolution of the CAM dispute, constituted a rejection and counteroffer, which it never unequivocally accepted. Defendant also says that it could not have accepted the counteroffer, because it never received the executed sixth amendment.

The court disagrees with defendant. Even assuming that Midwood proposed a counteroffer, the record establishes that defendant accepted that counteroffer by conduct. (*See John William Castillo Assocs. v Standard Metals Corp.*, 99 AD2d 227, 231 [1st Dept 1984] [holding that a counteroffer, like an offer, may be accepted by words or conduct].)

Defendant's lease accounting supervisor, Marie Taylor-Flores, acknowledged that the CAM dispute was resolved as of August 27, 2020. (*See* NYSCEF No. 217 at 25 [defendant's counterstatement of material facts]; NYSCEF No. 134 at 32 [Flores deposition transcript].) Defendant's participation in resolving the CAM dispute, followed by Midwood's execution and transmittal of the sixth amendment, reflects defendant's acceptance of Midwood's counteroffer through conduct.

Defendant's subsequent conduct further confirms acceptance. In October 2020, plaintiffs gave defendant a rental credit for $12,241.56—the exact amount of the abated rent set forth in the sixth amendment. (*See* NYSCEF No. 134 at 24-25 [pdf pagination].) In January 2021, Midwood notified defendant that its base rent had decreased to $4,106.67 (see NYSCEF No. 166), the rent rate under the sixth amendment from July 1, 2020 - June 30, 2021 (*see* NYSCEF No. 8 at ¶ 3 [sixth amended lease]). Defendant then continued to pay rent at the sixth amendment rate (which increased to $4,188.80 in July 2021) through October 2021. (*See* NYSCEF No. 133 [ledger].)

Sally Beauty insists that it always paid $5,159.00 per month and that Midwood's ledger reflects only its internal accounting. But defendant offers no explanation for why it was entitled to receive $12,241.56 in abated rent and $6,313.98 in retroactive credits if the sixth amendment never became effective. That defendant's own internal accounting system continued to input charges at $5,159.00 does not negate the credits defendant received and retained. Defendant has therefore failed to raise a triable dispute of fact about whether defendant accepted the counteroffer.

II. Delivery

Defendant contends that section 24.6 of the original lease requires Midwood to deliver the executed sixth amendment by registered or certified mail to defendant's address for the amendment to become effective. The court disagrees.

Section 24.6 provides that "Any notice or demand from Landlord to Tenant or from Tenant to Landlord shall be in writing and shall be deemed duly served if mailed by registered or certified mail, return receipt requested. . . ." (NYSCEF No. 205 at 27 [pdf pagination].) But a lease amendment is neither a notice nor a demand. Section 24.6 is therefore inapplicable.

Section 9 of the sixth amendment does apply, however. Section 9 provides that the agreement "may be executed and delivered by electronic copy or via facsimile, which such electronic copy or facsimile signatures and delivery shall be valid and binding the same as if original documents were delivered." (NYSCEF No. 142 at 3.) Midwood's September 15, 2020, email to Selby, which attached the executed sixth amendment, satisfies this requirement.[1]

III. Selby as Agent for Delivery

Implied actual authority exists when the principal performs acts that gave the agent "the reasonable impression that he had authority" to act. (*Five Hous. Dev. Fund Corp. v Estate of Bullock*, 112 AD3d 479, 480 [1st Dept. 2013].) Defendant argues that Selby lacked authority to receive the executed sixth amendment on its behalf. The court disagrees.

Selby was defendant's dedicated broker. Defendant was Selby's only client at Cushman, and he was the main point of contact for, and took instructions from, defendant's vice president of real estate (*See* NYSCEF No. 130 at 14.) Selby also handled the early COVID-19 negotiations, which ultimately led to the sixth amendment (*See* NYSCEF No. 200; NYSCEF No. 202 at ¶ 57.) Selby's deposition testimony establishes that his standard practice upon receiving a fully executed lease amendment was to upload it to the Reflex system (to which defendant had access) and to forward it to defendant's paralegal. (*See* NYSCEF No. 130 at 24.)

In contrast, defendant's vice president of real estate construction, Michael Smith, represented that it "would not be normal protocol" for Cushman to "receive and exchange lease amendments, leases between their landlord and Sally Beauty." (NYSCEF No. 176 at 15-16). Smith's representations, however, fail to raise a triable issue of fact about Seby's authority. His representation that allowing defendant's broker to accept lease amendments on defendant's behalf is not "normal" protocol does not, without more, mean that the parties adhered to that

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[1] Defendant's argument is further undermined by its own use of email to deliver its executed pre-counteroffer copy of the sixth amendment.

protocol. Smith acknowledged, however, that Selby's failure to forward the document was "a pretty big mistake." (NYSCEF No. 176 at 42 [Smith deposition transcript].)

On this record, the court concludes that the breadth of Selby's role gave Selby the reasonable impression that receiving the completed document fell within his authority.

In addition, defendant's third-party complaint against Cushman forecloses its present position. Defendant alleged that Cushman was defendant's leasing agent and that Cushman received the executed sixth amendment with instructions to "please share with tenant," and that Cushman failed to do so. (*See* NYSCEF No. 46 at ¶ 8 [third-party complaint].) To allege here that Selby lacked authority to act on defendant's behalf is inconsistent with the third-party complaint under which defendant sued Cushman for failing to act in accordance with that authority.

IV. Affirmative Defenses

Because of this court's conclusions above, defendants' first affirmative defense (failure to state a claim for breach of contract), third affirmative defense (that defendant timely vacated the premises), and fourth affirmative defense (parties' failure to form an enforceable contract) are dismissed.

Defendant does not meaningfully oppose dismissal of the remaining affirmative defenses or seek summary judgment on the basis of those defenses. Those defenses are dismissed.

V. Damages

Plaintiffs seek in damages from lost rent and additional charges during the vacancy period (November 1, 2021 through November 18, 2023) ($143,332.73); the rent differential between defendant's sixth amended lease and the new lease plaintiffs secured to mitigated damages (December 2023 through October 2024) ($10,963.97); broker's fees paid to secure a new commercial tenant ($19,036.88); attorney fees incurred in negotiating and completing the new commercial lease ($9,690.00 to Goldfarb & Fleece LLP); and HVAC and plumbing work performed to rent the premises to a new tenant ($18,500.00). Plaintiffs also seek legal fees and costs incurred in enforcing the terms of the lease, plus prejudgment interest from November 1, 2021, the date of vacatur.

Section 19.2 of the original lease authorizes recovery of lost rent, re-letting expenses, costs of preparing the premises for re-letting, and reasonable attorney fees incurred in prosecuting a default.

Defendant does not dispute the amount of damages, only the enforceability of the sixth amended lease, which this court has already addressed. Plaintiffs are therefore entitled to a principal sum of $201,523.58. They are also entitled to interest running from May 1, 2023—a "reasonable intermediate date"—given plaintiffs incurred damages at "various times." (CPLR 5001.) Plaintiffs may seek a supplemental judgment for attorney fees incurred in this action.

Accordingly, it is

ORDERED that the branch of plaintiffs' motion for summary judgment is granted, and plaintiffs are awarded $201,523.58, with interest at the statutory rate running from May 1, 2023, plus costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff may enter a supplemental judgment for its reasonable attorney fees incurred in this action, with the amount of those fees to be determined by motion made on notice made within 30 days of entry of this order; and it is further

ORDERED that the branch of plaintiffs' motion to dismiss defendant's affirmative defenses is granted; and it is further

ORDERED that defendant's motion for summary judgment to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs serve a copy of this order with notice of its entry on defendants and on the office of the County Clerk (using the NYSCEF document type "Notice to the County Clerk - CPLR § 8019 (c)"), which shall enter judgment accordingly.

4/29/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	[ ]	DENIED	GRANTED IN PART	[ ]	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	[ ]	REFERENCE