

**United States Court of Appeals  
For the Second Circuit**

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August Term 2025

Argued: January 21, 2026

Decided: May 5, 2026

Nos. 25-148 & 25-237

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DELSHAH 60 NINTH, LLC,

*Plaintiff-Counter-Defendant-Appellee-Cross-Appellant,*

*v.*

FREE PEOPLE OF PA LLC,

*Defendant-Counter-Claimant-Appellant-Cross-Appellee*

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Appeal from the United States District Court  
for the Southern District of New York  
No. 20-cv-5905, Jesse M. Furman, *Judge*.

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Before: LEVAL, LYNCH, AND SULLIVAN, *Circuit Judges*.

These appeals involve a commercial landlord–tenant dispute arising out of emergency orders issued at the height of the COVID-19 pandemic. Free People of PA LLC (“Free People”) operated a Manhattan-based retail clothing store that it leased from Delshah 60 Ninth, LLC (“Delshah”). But when New York ordered businesses to shut down in March 2020, Free People stopped paying rent, pointing

to the lease agreement's exception for government takings. Disagreeing with Free People's interpretation of the takings provision, Delshah terminated the lease and sued for breach of contract, seeking to recover damages for the rent due under the lease. Free People then counterclaimed for a declaratory judgment, breach of contract, money had and received, and unjust enrichment, premised on Delshah's allegedly wrongful termination of the lease and retention of two inadvertent payments that Free People made after Delshah terminated the lease and Free People vacated the premises.

On appeal, Free People argues that the district court erred in granting summary judgment in favor of Delshah on Delshah's claim for breach of contract, in rejecting Free People's counterclaims for breach of contract and unjust enrichment, and in assessing Delshah's damages. Delshah cross-appeals, arguing that the district court's damages award in its favor was too low. For the following reasons, we hold that the district court misinterpreted the lease's takings provision and accordingly reverse its grant of summary judgment to Delshah on its claim for breach of contract. We also conclude that the district court erred in denying Free People's motion for summary judgment on its counterclaim for breach of contract and in dismissing Free People's counterclaim for unjust enrichment. And because we reverse the district court's judgment with respect to liability, we do not address the parties' challenges to the court's damages award.

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MARK D. TATICCHI (Elizabeth M. Casey, *on the brief*), Faegre Drinker Biddle & Reath LLP, Philadelphia, PA, *Defendant-Counter-Claimant-Appellant-Cross-Appellee*.

PER CURIAM:

These appeals involve a commercial landlord–tenant dispute arising out of emergency orders issued at the height of the COVID-19 pandemic. Free People of PA LLC (“Free People”) operated a Manhattan-based retail clothing store that it leased from Delshah 60 Ninth, LLC (“Delshah”).<sup>1</sup> But when New York ordered businesses to shut down in March 2020, Free People stopped paying rent, pointing to the lease agreement’s exception for government takings. Disagreeing with Free People’s interpretation of the takings provision, Delshah terminated the lease and sued for breach of contract, seeking to recover damages for the rent due under the lease. Free People then counterclaimed for a declaratory judgment, breach of contract, money had and received, and unjust enrichment, premised on Delshah’s allegedly wrongful termination of the lease and retention of two inadvertent payments that Free People made after Delshah terminated the lease and Free People vacated the premises.

On appeal, Free People argues that the district court erred in granting summary judgment in favor of Delshah on Delshah’s claim for breach of contract,

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<sup>1</sup> In February 2020, Free People merged with Anthropologie LLC to form a new entity called URBN US Retail LLC. For consistency, we refer to the defendant in this litigation as Free People.

in rejecting Free People's counterclaims for breach of contract and unjust enrichment, and in assessing Delshah's damages. Delshah cross-appeals, arguing that the district court's damages award in its favor was too low. For the following reasons, we hold that the district court misinterpreted the lease's takings provision and accordingly reverse its grant of summary judgment to Delshah on its claim for breach of contract. We also conclude that the district court erred in denying Free People's motion for summary judgment on its counterclaim for breach of contract and in dismissing Free People's counterclaim for unjust enrichment. And because we reverse the district court's judgment with respect to liability, we do not address the parties' challenges to the court's damages award.

## I. BACKGROUND

Free People "is an American apparel and lifestyle retail company that sells women's clothing, accessories, shoes, intimates[,] and swimwear in approximately 136 stores across the United States, Europe[,] and Canada." App'x at 1317. In 2015, Free People and Delshah executed a ten-year lease for a commercial space located at 58-60 Ninth Avenue, in the Meatpacking District of Manhattan.<sup>2</sup>

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<sup>2</sup> As its name suggests, the Meatpacking District was once home to many slaughterhouses and meatpacking plants, but it has since evolved into a high-fashion district.

According to Free People, “[t]he purpose of the Lease was to provide Free People with commercial retail space suitable for the operation of a brick-and-mortar retail store in a well-trafficked and highly desirable neighborhood in Manhattan.” *Id.* at 1318. To that end, the lease authorized Free People to “use[] and occup[y]” the space for any “Permitted Uses,” *id.* at 796, which the lease defined as follows:

Any general retail use, including the display and sale of apparel, shoes and accessories, gifts, cards, furniture, home furnishings, housewares, packaged foods prepared for off-site consumption, plants, fresh and dried flowers, pots, containers and stands for plants or flowers, and/or items related to the foregoing, together with ancillary office and storage use.

*Id.* at 791. In December 2016, Free People “opened a retail apparel store” on the premises. Dist. Ct. Doc. No. 88 ¶ 20.

In return, the lease obligated Free People to make monthly rent payments, subject to the following provision regarding a government “taking”:

If any portion(s) of the Leased Space is taken or condemned for a public or quasi-public use by any lawful power or authority, or if Tenant is denied access to or egress from the Leased Space by any action or decree of any lawful power or authority or as a result of natural or other disaster, or if Tenant is denied or deprived of either the use, occupancy and/or enjoyment of the Leased Space and/or the ability to operate its business thereon or therefrom by action or decree of any lawful power or authority or as a result of natural or other disaster, or by any oral or written agreement between Landlord or any such power or authority or by the acquiescence of Landlord (individually, and collectively, a “taking”), and the taking is not deemed “temporary” (as that term is hereinafter defined), this Lease

shall, as to the part that is subject to the taking, terminate as of the date Tenant is denied or deprived of such possession, use, occupancy, enjoyment and/or operation of or on the Leased Space, and the Rent due hereunder shall be reduced proportionately by the square footage of the Leased Space that is so affected.

App'x at 816–17. In the event of a “temporary taking” – when the “Tenant has the expectation that, within three hundred sixty-five (365) days after the taking, Tenant’s access and egress to and from the Leased Space, and/or Tenant’s possession, use, occupancy, enjoyment and operation of or on the Leased Space, as the case may be, shall be restored” – the lease entitled Free People to a reduction in rent in proportion to the amount of space affected by the taking.<sup>3</sup> *Id.* at 817.

Responding to the rapid spread of COVID-19 in early 2020, then-Governor Andrew Cuomo and then-Mayor Bill de Blasio issued a number of executive orders and related guidance restricting commercial activities in New York State and New York City, respectively. As a result of these orders, businesses except for take-out or delivery services were closed to the public as of March 16, 2020, and Free People employees were unable to enter the leased premises between March 22 and April 9, 2020. On April 9, the New York State Department of Economic Development issued guidance allowing retailers like Free People to

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<sup>3</sup> The parties appear to agree, or at least do not dispute before us, that the alleged taking was a temporary one.

have only a single employee at any given time enter the business premises to fulfill online orders from inventory stored on-site. By early June, the government began permitting clothing retailers like Free People to allow curbside pickup for online and telephone orders. Then, on June 22, 2020, the government greenlighted retailers to resume in-store shopping in compliance with various health and safety guidelines, including occupancy restrictions and physical distancing; that same day, Free People welcomed customers back into the store in compliance with those guidelines.

In the meantime, Free People had largely been withholding rent, asserting that it was entitled to do so as a result of New York's emergency orders because it "ha[d] not been able to operate [its] business." *Id.* at 1156. Eventually, Delshah served a notice of termination under the lease based on Free People's failure to pay rent and directed Free People to vacate the premises by June 10. Free People did not do so, and Delshah sued for breach of contract in New York state court, seeking to recover the amount of unpaid rent allegedly due under the lease up to the date of termination, plus the aggregate amount of rent that would have been payable for the remainder of the lease term, less any amounts that Free People could prove that Delshah could have reasonably avoided.

After removing the case to federal court, Free People counterclaimed for a declaration that it did not owe any rent under the lease and for damages based on breach of contract, money had and received, and unjust enrichment. Specifically, Free People alleged that the lease's takings provision excused it from paying rent for the months at issue and that, as a result, Delshah had wrongfully terminated the lease. Free People also claimed that Delshah misapplied a partial rent payment from May 15, 2020 and wrongfully retained two further payments that Free People mistakenly made in August and September 2020 – after Free People had already vacated the premises.

After the close of discovery, Free People and Delshah cross-moved for summary judgment. Magistrate Judge Sarah L. Cave, to whom those motions had been referred, recommended granting Delshah's motion and denying Free People's. Judge Cave concluded that the government's emergency orders did not effect a "taking" under the lease, and that Free People therefore breached its obligation to pay rent. In particular, Judge Cave found that Free People continued to make "general retail use" of the leased space during the period, subject to the government's emergency orders, including by displaying and storing merchandise in the leased space, fulfilling online orders through inventory

stored in the leased space, and advertising through signage on the outside of the leased space. App'x at 31. Judge Cave also determined that Free People failed to comply with the lease's notice-and-cure provision, barring its counterclaim for breach of contract. Finally, Judge Cave rejected Free People's counterclaims for money had and received and unjust enrichment as duplicative of its unsuccessful contract claim.

The district court adopted Judge Cave's report and recommendation in substantial part and then referred the case again for a damages inquest. Following the inquest, the district court entered final judgment in favor of Delshah, awarding it \$6,707,916.84 in damages plus interest. Free People timely appealed, and Delshah timely cross-appealed the court's damages calculation.

## II. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment. *Windward Bora, LLC v. Wilmington Sav. Fund Soc'y, FSB*, 982 F.3d 139, 141–42 (2d Cir. 2020). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Galloway v. County of Nassau*, 141 F.4th 417, 422–23 (2d Cir. 2025) (quoting Fed. R. Civ. P. 56(a)). In determining whether a party is entitled to

summary judgment, we “constru[e] the evidence in the light most favorable to the non-movant.” *Alberty v. Hunter*, 144 F.4th 408, 414 (2d Cir. 2025) (internal quotation marks omitted).

We also review *de novo* a district court’s interpretation of a contract. *L. Debenture Tr. Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 468 (2d Cir. 2010). When interpreting a contract, we begin with the principle, “axiomatic under New York law, which the parties agree applies, that the fundamental objective of contract interpretation is to give effect to the expressed intentions of the parties.” *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011) (alteration adopted and internal quotation marks omitted). “The best evidence of what parties to a written agreement intend is what they say in their writing.” *L. Debenture Tr. Co.*, 595 F.3d at 468 (alteration adopted and internal quotation marks omitted). If the contract “is unambiguous on its face, it must be enforced according to the plain meaning of its terms.” *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004) (alteration adopted and internal quotation marks omitted).

### III. DISCUSSION

#### A. Delshah's Breach-of-Contract Claim

Free People seeks reversal of the district court's grant of summary judgment in Delshah's favor on Delshah's claim for breach of contract. With respect to that claim, the district court held that "because Free People was never deprived of all use or occupancy of the leased space, there was no taking, and Free People remained obligated to pay rent." App'x at 49–50. The court explained that Free People remained able to store merchandise on the premises and therefore "never fully lost the 'use' of the leased premises," even during the times when its employees were completely excluded from the store. *Id.* at 49. Free People argues that the district court misconstrued the takings provision by failing to separately consider whether Free People had nonetheless been prevented from operating its business from the leased space. We agree.

Under the lease, a taking occurs when the tenant "is denied or deprived of either the use, occupancy[, ] and/or enjoyment of the Leased Space *and/or* the ability to operate its business thereon or therefrom." *Id.* at 816 (emphasis added). Thus, "a taking can occur when . . . the tenant is unable to 'operate its business' on the premises." *195 B Owner LLC v. Anthropologie, Inc.*, 213 N.Y.S.3d 30, 32 (1st Dep't

2024). The district court, however, interpreted the takings provision as requiring a showing that Free People was “deprived of *all* use or occupancy of the leased space,” App’x at 49 (emphasis added), without considering whether Free People had been denied the “ability to operate its business,” *id.* But the mere fact that Free People had some use or occupancy of its premises does not necessarily mean that it was able to operate *its* business there. The district court’s application of the takings provision therefore “improperly render[ed] the alternate phrase ‘operate its business’ meaningless and without effect.” *195 B Owner LLC*, 213 N.Y.S.3d at 32; *see JN Contemp. Art LLC v. Phillips Auctioneers LLC*, 29 F.4th 118, 124 (2d Cir. 2022) (“[A]ny interpretation that has the effect of rendering at least one clause . . . meaningless is not preferred and will be avoided if possible.” (alteration adopted and internal quotation marks omitted)).

Equally unavailing is Delshah’s argument that the lease’s Permitted Uses provision defines Free People’s business as “general retail use,” such that Free People’s continued use of the premises for storing inventory, fulfilling online sales, and advertising through signage meant that it never lost “the ability to operate its business.” Delshah Br. at 30 (internal quotation marks omitted). Nothing in the Permitted Uses provision purports to define Free People’s “business” for purposes

of determining whether a taking occurred. To the contrary, the Permitted Uses provision merely specifies the ways in which Free People *could* use the premises without itself breaching the lease. See App'x at 791, 796. Nor does the takings clause explicitly cross-reference the Permitted Uses provision, as other provisions of the lease do. See, e.g., *id.* at 796, 822. The plain language of the takings provision, in contrast, excuses Free People's obligation to pay rent when it is unable to "operate *its* business," *id.* at 816 (emphasis added) – that is, Free People's *actual* business.

We agree with Free People that the district court's entry of summary judgment in Delshah's favor on its contract claim must be reversed. The undisputed portions of the record clarify that, with respect to the leased premises, Free People's business consisted of operating a traditional retail clothing store offering in-person sales, from which Free People also fulfilled a portion of its online orders. By virtue of New York's emergency COVID-19 orders, however, Free People's store was closed to the public until June 22, 2020, and *no* Free People employees were allowed to enter the premises from March 22 to April 9. To be sure, beginning on April 9, one employee was allowed to enter the store at a time to fulfill online orders. And from June 8 until June 22, Free People could also offer

curbside pickup outside the store for orders placed remotely. But under the takings provision, an operation limited to fulfilling remote orders is not the “business” that Free People had previously operated on the premises, which consisted principally of a brick-and-mortar clothing store offering a traditional, in-person retail experience “in a well-trafficked and highly desirable neighborhood in Manhattan.” *Id.* at 1318.

Because New York’s emergency orders prevented Free People from operating “its business” on the premises between March 22 and June 22, 2020, the lease excused Free People’s obligation to pay rent during that period. Free People is therefore entitled to summary judgment on Delshah’s claim that Free People breached the lease when it failed to pay rent.

#### **B. Free People’s Breach-of-Contract Counterclaim**

Free People also challenges the district court’s denial of summary judgment on its counterclaim for breach of contract. That counterclaim alleges that Delshah wrongfully terminated the lease based on Free People’s nonpayment of rent

between March and June 2020 given that, in Free People's view, the lease's takings provision excused its obligation to pay rent during that period.<sup>4</sup>

As an initial matter, the district court held that this counterclaim was barred because Free People failed to comply with the lease's notice-and-cure provision. That provision states that "[i]t shall constitute a default hereunder if, from and after the date of this Lease, Landlord fails to keep, observe or perform any of its obligations to be kept, observed[,] or performed under this Lease within thirty (30) days after Landlord's receipt of notice of nonperformance from Tenant." *Id.* at 820. The provision goes on to say that "[i]f Landlord fails to cure [its] default within the applicable time period, then Tenant may elect, in addition to any and all other rights and remedies available to Tenant hereunder or at law or in equity, to cure such default on behalf of Landlord." *Id.* at 821. The district court construed this provision as a procedural condition precedent to Free People's filing of a breach-of-contract claim for wrongful termination of the lease. We disagree.

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<sup>4</sup> Free People's operative complaint also alleges that Delshah breached the lease in other ways, including by misapplying a partial rent payment that Free People made in May 2020. Because Free People does not meaningfully address these alternative theories of breach in its briefing on appeal, we consider only its claim that Delshah wrongfully terminated the lease.

By its terms, the notice-and-cure provision applies only to a landlord's failure to "keep, observe[,] or perform any of its obligations" under the lease. *Id.* at 820. Delshah's termination of the lease, however, was not merely the nonperformance of an obligation, but rather the election of a contractual remedy pursuant to the lease. Treating such a termination as subject to the lease's notice-and-cure provision would produce absurd consequences, requiring the tenant to provide the landlord with formal notice of Delshah's own termination of the lease and, nonsensically, permitting the tenant to (somehow) "cure" the termination of the lease on behalf of the landlord. The parties cannot possibly have intended such an incoherent interaction between the notice-and-cure provision and Delshah's termination remedy. We therefore conclude that Free People's failure to provide Delshah with a formal notice of default and an opportunity to cure does not prevent Free People from asserting a counterclaim based on Delshah's alleged wrongful termination of the lease. *See Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 6 N.Y.S.3d 7, 11 (1st Dep't 2015) ("It is well settled that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties." (internal quotation marks omitted)).

The district court also rejected Free People's counterclaim on the ground that the takings provision did not apply and that Delshah therefore properly terminated the lease. Because we conclude that the takings provision *did* excuse Free People's obligation to pay rent during the relevant period, it follows that Free People is also entitled to summary judgment on its claim that Delshah improperly terminated the lease.

### **C. Free People's Unjust-Enrichment Counterclaim**

Finally, Free People argues that the district court erred by dismissing Free People's counterclaim for unjust enrichment. That claim relates to two payments Free People made to Delshah in August and September 2020, which Delshah refused to return. Free People asserts that the district court incorrectly held that its unjust-enrichment claim duplicated its breach-of-contract claim. We agree.

An unjust-enrichment claim under New York law requires the plaintiff to show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (alteration adopted and internal quotation marks omitted). Quasi-contract claims like unjust enrichment, however, "are ordinarily precluded if a valid and

enforceable written contract . . . governs the relevant subject matter.” *Goldberg v. Pace Univ.*, 88 F.4th 204, 214 (2d Cir. 2023) (alteration adopted and internal quotation marks omitted); *see also Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987) (“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.”). Accordingly, “[a]n unjust[-]enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim.” *Corsello v. Verizon N.Y., Inc.*, 18 N.Y.3d 777, 790 (2012).

Here, the district court held that section 22(c) of the lease – which provides that “in the event of any termination of this Lease . . . by reason of an Event of Default [by Free People],” Free People would “pay the Rent that would be payable under this Lease” as liquidated damages, App’x at 819 – authorized Delshah to treat Free People’s August and September 2020 payments as post-termination rent and that Free People thus had no claim for unjust enrichment. But that reasoning presumes that Free People, not Delshah, breached the lease. Because we conclude the opposite, the court’s decision concerning the unjust-enrichment claim cannot

stand.<sup>5</sup> Moreover, Free People’s unjust-enrichment claim is premised on a theory that it essentially overpaid on the lease by making two payments in August and September 2020 that it did not actually owe, since Delshah had wrongfully terminated the lease months earlier. Neither Delshah nor the district court identified any provision of the contract governing Delshah’s obligations with respect to reimbursement of such overpayments. Indeed, the mistaken payment of an amount not owed under a contract between the parties typically “presents one of the core cases of restitution, whether liability is explained by reference to the transferee’s unjustified enrichment or to the transferor’s unintended dispossession.” Restatement (Third) of Restitution and Unjust Enrichment § 6 cmt. a (2011); *see id.* illus. 7 (“Debtor pays a debt to Creditor. Forgetting the earlier payment, Debtor pays Creditor a second time. Debtor has a claim in restitution to recover the overpayment.”). Thus, we are not persuaded that Free People’s unjust-enrichment claim is necessarily precluded by the lease.

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<sup>5</sup> Even if we were not inclined to vacate the district court’s grant of summary judgment in Delshah’s favor, the district court’s reliance on section 22(c) was improper. That section would have provided Delshah with an exclusive remedy in the form of liquidated damages only if Delshah had not pursued damages under section 22(d). But Delshah did pursue damages under section 22(d), so section 22(c) is inapplicable, and Delshah agrees. *See* Delshah Br. at 55 (“Section 22(c) should have been irrelevant to the District Court’s analysis because, as per the plain language of the Delshah Lease, the remedy outlined in Section 22(c) could not be utilized in conjunction with Section 22(d).”).

Because the district court concluded, as a matter of law, that Free People’s unjust-enrichment claim was duplicative of its breach-of-contract claim, the court did not consider Judge Cave’s determination that “genuine issues of material fact in dispute would preclude summary judgment in Free People’s favor” on that claim. App’x at 43–44. Nor does the parties’ briefing substantively address that issue. Rather than take up that unbriefed question on appeal, we remand for the district court to consider it in the first instance. *See New York ex rel. James v. Niagara-Wheatfield Cent. Sch. Dist.*, 119 F.4th 270, 284 (2d Cir. 2024) (observing that our “preferred” and “usual” practice “is to allow the district court to address arguments in the first instance” (alteration adopted and internal quotation marks omitted)).<sup>6</sup>

#### IV. CONCLUSION

For these reasons, we **REVERSE** the district court’s grant of summary judgment to Delshah on its claim for breach of contract, as well as its denial of summary judgment to Free People on its counterclaim for breach of contract; we **VACATE** the district court’s judgment with respect to Free People’s counterclaim

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<sup>6</sup> We likewise express no view on the calculation of damages for Free People’s breach-of-contract counterclaim and the calculation of damages, if any, for Free People’s revived unjust-enrichment claim, which shall be resolved in the first instance by the district court on remand.

for unjust enrichment; we **DISMISS** Delshah's cross-appeal as moot; and we **REMAND** this case for further proceedings.