


Co., 404 F.3d 566, 608 (2d Cir. 2005) (per curiam) (holding that the affirmative defense of failure to mitigate damages “does not bar the entry of summary judgment as to liability”), and, as Delshah concedes, the question of mitigation can and will be addressed by Magistrate Judge Cave as part of the inquest given the terms of the parties’ lease, *see* ECF No. 127 (“Pl.’s Opp’n”), at 3-4; ECF No. 75-1 (“Lease”), at § 22(e). That said, Free People is technically correct in arguing that the Court erred in deeming the failure-to-mitigate defense abandoned because the issue was never raised in Delshah’s summary judgment briefing or, for that matter, in its objections to Magistrate Judge Cave’s Report and Recommendation. *See Pro. Merch. Advance Cap., LLC v. C Care Svcs., LLC*, No. 13-CV-6562 (RJS), 2015 WL 4392081 at *5 (S.D.N.Y. July 15, 2015) (declining to dismiss an affirmative defense where neither party briefed it in summary judgment motions); *cf. Summit Health Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 397-98 (S.D.N.Y. 2014) (deeming an affirmative defense abandoned where the defendant had failed to respond to the plaintiff’s motion for summary judgment as to the defense). Accordingly, and if only out of an abundance of caution, Free People’s motion for reconsideration is GRANTED and the failure-to-mitigate defense is deemed reinstated.

The Clerk of Court is directed to terminate ECF No. 121.

SO ORDERED.

Dated: October 4, 2022
New York, New York



JESSE M. FURMAN
United States District Judge