

**650 First Ave. Partners LLC v Jericho Off. LLC**

2016 NY Slip Op 31890(U)

September 23, 2016

Supreme Court, New York County

Docket Number: 651113/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

----- X  
650 FIRST AVENUE PARTNERS LLC,

Plaintiff,

-against-

DECISION/ORDER  
Index No.: 651113/16  
Seq. Nos.: 002 and 003

JERICHO OFFICE LLC,

Defendant.

-----X  
HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motions:

PAPERS	NUMBERED
MOT. SEQ. 002	
PLTF'S. ORDER TO SHOW CAUSE AND AFFS. IN SUPPORT	1,2 (Exs. A-D)
AFFIDAVITS IN OPPOSITION	3,4
REPLY AFFIRMATION	5
MOT. SEQ. 003	
PLTF'S. ORDER TO SHOW CAUSE AND AFFS. IN SUPPORT	1,2 (Exs. A-B)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

This decision and order resolves motion sequence numbers 002 and 003.

In motion sequence 002, defendant Jericho Office, LLC moves for an order a) directing plaintiff 650 First Avenue Partners LLC ("First Avenue"), its commercial tenant, to pay it \$31,289.87, representing past due and current use and occupancy through July 1, 2016, by certified bank check payable to defendant, to be delivered to defendant or its attorneys within three business days after service of the order deciding this motion with notice of entry; without prejudice to the

rights, claims, and defenses of the parties to this action; b) directing plaintiff to pay current use and occupancy at the same rate and at the same terms as provided for in the lease dated July 13, 2010 between defendant, as landlord, and plaintiff's predecessor, First Avenue Restaurant Corp., as tenant, for the ground floor store ("the premises") occupied by plaintiff in the building at 650 First Avenue, New York, New York, as amended by a written amendment to lease dated as of March 2012 between defendant and First Avenue Restaurant Corp. (hereinafter collectively "the lease"), including any additional rent provided for in the lease for electric charges, fixed water charges, any other items of additional rent, said payments also to be billed, paid and accepted without prejudice to the claims, rights and defenses of the parties; and c) for such other and further relief as this Court deems just and proper.

In motion sequence 003, defendant moves for an order ejecting plaintiff from the premises.

Plaintiff opposes motion sequence number 002. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are decided as set forth below.

### **FACTUAL AND PROCEDURAL BACKGROUND:<sup>1</sup>**

On or about July 13, 2010, First Ave., as tenant, entered into a lease with defendant Jericho Office LLC, as landlord, for a portion of the ground floor space at 650 First Avenue, New York, New York. Ex. A to Mot. Seq. 002. The term of the lease was from July 13, 2010 until June 30, 2022. Id., at par. 10. After the lease was executed, First Ave. asked John Kosta, a member of plaintiff 650 First Avenue Partners LLC, to help operate the store. On June 25, 2012, plaintiff purchased all of the assets of First Ave. and the lease was formally assigned from First Ave. to plaintiff ("the

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<sup>1</sup>Specific citations to facts not cited herein can be found in the order of this Court dated June 29, 2016.

assignment”).

Since June of 2012, plaintiff has occupied the premises and made rental payments to defendant from an account in the name of 650 First Avenue Partners LLC. Ex. B to Kosta Aff.; Kosta Aff., at par. 15.

On or about February 23, 2016, defendant served a “Notice of Intention to Terminate Lease” setting forth a termination date of March 7, 2016 (“the notice of termination”). The notice was based on First Ave.’s alleged violation of Article 25, sections 25.01 and 25.02 of the lease, which required defendant’s written consent to transfer possession of the lease, as well as on section 12.01(g), which, as set forth below, allowed defendant to terminate on five days’ notice in the event of an improper assignment. Ex. A to Mot. Seq. 002.

Section 12.01 (g) provided, in pertinent part:

This [l]ease and the term and estate hereby granted are subject to the limitation that:

(g) in case any event shall occur or any contingency shall arise whereby this [l]ease or the estate hereby granted or the unexpired balance of the term hereof would, by operation of law or otherwise, devolve upon or pass to any firm, association, corporation, person or entity other than [t]enant as expressly permitted under Article 25 hereof, or whenever [t]enant shall abandon the [p]remises or the same shall become vacant for a period in excess of ninety (90) days \* \* \* then, in any of said cases, [l]andlord may give to [t]enant a notice of intention to end the term of this [l]ease at the expiration of five (5) business days from the date of the giving of such notice, and, in the event such notice is given, the expiration of said five (5) business day period shall become the [e]xpiration [d]ate, but [t]enant shall remain liable for damages as provided in this [l]ease or pursuant to law...

Article 18, section 18.02 of the lease stated, in relevant part:

No waiver or modification by either party of any provision of this [l]ease or other right or benefit shall be deemed to have been made unless expressed in writing and signed by the party against whom enforcement is sought. \* \* \* Any breach by [t]enant of any provision of this [l]ease shall not be deemed waived by a) the receipt and retention by [l]andlord of [f]ixed [r]ent or additional rent from anyone other than [t]enant or b) a purported verbal release of [t]enant from the further performance by

[t]enant of the provisions of this [l]ease or c) the receipt and retention by [l]andlord of [f]ixed [r]ent or additional rent with knowledge of the breach of any provision of this [l]ease...

Section 20.01(a) provided, in pertinent part, that defendant was permitted to send plaintiff:

[B]ills for costs, charges, expenses and disbursements of every kind and nature whatsoever, including, but not limited to, reasonable counsel fees and disbursements, involved in collecting or endeavoring to collect the [f]ixed [r]ent or additional rent or other charge or any part thereof or enforcing or endeavoring to enforce any rights against [t]enant, under or in connection with this [l]ease, or pursuant to law, including (without being limited to) any such cost, expense and disbursement involved in instituting and prosecuting any action or proceeding (including summary dispossession proceeding) \* \* \* may be sent by [l]andlord to [t]enant \* \* \* and shall be due and payable \* \* \* after demand as additional rent under the [l]ease.”

Section 25.01 provided that:

Except as otherwise expressly provided herein, [t]enant shall not, whether directly, indirectly, voluntarily, involuntarily, or by operation of law or otherwise (a assign or otherwise transfer this [l]ease or the term and estate hereby granted or any interest herein \* \* \* without in each instance obtaining the prior written consent of [l]andlord, subject to the provisions of [s]ection 25.10 hereof.

Pursuant to section 25.02, the provisions of section 25.01, governing an assignment of the lease would, if tenant were a corporation, partnership, or other entity, apply to “a transfer of a majority interest of the stock or beneficial ownership interest, as the case may be, of [t]enant (at any level and however accomplished, whether in a single transaction or in a series of related or unrelated transactions).”

Section 25.03 provided, in pertinent part, that:

If this [l]ease be assigned, whether or not in violation of the provisions of this [l]ease, [l]andlord may, after default by [t]enant, and expiration of [t]enant’s time to cure such default, collect rent from the assignee. If the [p]remises or any part thereof are sublet or used or occupied by anybody other than [t]enant, whether or not in violation of this [l]ease, [l]andlord may, after default by [t]enant, and expiration of [t]enant’s time to cure such default, collect rent from the subtenant or occupant. In either event,

[l]andlord may apply the net amount collected to the [f]ixed [r]ent and additional rent herein reserved, but no such assignment, subletting, occupancy or collection shall be deemed a waiver of any of the provisions of [s]ection 25.01, or the acceptance of the assignee, subtenant or occupant as tenant, or as a release of [t]enant from the performance by [t]enant of [t]enant's obligations under this [l]ease unless [l]andlord specifically releases in writing the [t]enant and [g]uarantor from their respective obligations under this [l]ease...

Pursuant to section 25.06 of the lease, plaintiff was required to provide defendant with written notice of any intention to assign the lease. Upon receiving such a notice, defendant could either request additional information regarding the proposed assignee/subtenant or terminate the lease and take back the premises. *Id.* Section 25.07 provided that, if defendant exercised its option to terminate the lease based on an assignment by plaintiff, then the expiration of the lease would be accelerated to the date the assignment would have been effective.

On March 7, 2016, plaintiff commenced the captioned action against defendant. In the first two causes of action, plaintiff sought a declaratory judgment determining the rights of the parties on the ground that there was a justiciable controversy regarding whether the assignment violated sections 25.01 and 25.02 of the lease. Ex. B. to Mot. Seq. 002. In the first cause of action, plaintiff disputed that First Ave. improperly assigned the lease and alleged that the notice of termination incorrectly called for plaintiff to vacate the premises. *Id.* The second cause of action alleged that defendant provided written consent for the assignment. *Id.* The third cause of action sought a declaratory judgment regarding whether defendant waived any objection to the violation of sections 25.01 and 25.02 of the lease, which required plaintiff to obtain written consent before assigning the lease, by, *inter alia*, accepting rent for the premises from plaintiff. *Id.* As a fourth cause of action, plaintiff maintained that it was entitled to a *Yellowstone* injunction since it was able to cure the alleged lease default. *Id.*

Plaintiff subsequently moved, by order to show cause, for a *Yellowstone* injunction enjoining defendant, during the pendency of this action, from terminating its tenancy, and staying its time to cure any default under the lease until this Court determined that such a default had occurred. Defendant cross-moved, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint based on documentary evidence and on the ground that plaintiff failed to state a claim. Defendant further sought a declaration that it properly terminated the lease between it and plaintiff and that it was entitled to attorneys' fees, costs and disbursements.

By order dated June 29, 2016, this Court: denied plaintiff's application for a *Yellowstone* injunction; granted that branch of defendant's cross motion seeking dismissal of the *Yellowstone* injunction; granted that branch of defendant's cross motion seeking a declaration that the lease between First Avenue and defendant was improperly assigned to plaintiff, thereby violating the terms of the lease; awarded defendant reasonable counsel fees, costs and disbursements arising from the improper assignment and referred the issue of these costs and fees to a Special Referee; and vacated the temporary restraining order issued by this Court which had prevented defendant from terminating plaintiff's lease or disturbing plaintiff's right to possession pending the hearing of the motion and cross motion and had tolled any period to cure set forth in the notice of termination pending the hearing of the applications.

Defendant now moves, by order to show cause dated June 30, 2016 (motion sequence 002), for an order a) directing plaintiff to pay it \$31,289.87, representing past due and current use and occupancy through July 1, 2016, by certified bank check payable to defendant within three business days after service of the order deciding this motion with notice of entry, without prejudice to the rights, claims, and defenses of the parties to this action; b) directing plaintiff to pay current use and occupancy at the same rate and at the same terms as provided for in the lease dated July 13, 2010

between defendant, as landlord, and plaintiff's predecessor, First Avenue Restaurant Corp., as tenant, for the ground floor store ("the premises") occupied by plaintiff in the building at 650 First Avenue, New York, New York, as amended by a written amendment to lease dated as of March 2012 between defendant and First Avenue Restaurant Corp. (hereinafter collectively "the lease"), including any additional rent provided for in the lease for electric charges, fixed water charges, any other items of additional rent, said payments also to be billed, paid and accepted without prejudice to the claims, rights and defenses of the parties; and c) for such other and further relief as this Court deems just and proper. Plaintiff opposes the motion.

Defendant also moves (motion sequence 003), for an order ejecting plaintiff from the premises. Plaintiff does not oppose the motion.

### **THE PARTIES' CONTENTIONS:**

#### **Motion Sequence 002**

In an affidavit in support of the motion seeking use and occupancy, Eric Englander, property manager of the premises, asserts that plaintiff owes \$25,311.17 for base rent, electric and water charges for March 1 through June 30, 2016 and will owe a total of \$31,289.87 as of July 1, 2016. In an affirmation in support of the motion, counsel for defendant substantially reiterates the allegations by Englander and demands payment for use and occupancy of \$31,289.87 by certified or bank check. Copies of invoices for the March through June, 2016 charges are annexed to counsel's affidavit as Exhibit C. Counsel also annexes an email to plaintiff seeking payment of the outstanding charges. Ex. D to Mot. Seq. 002.

In opposition, plaintiff's counsel argues that the motion should be denied because defendant has harassed and intimidated plaintiff, thereby diminishing plaintiff's ability to generate revenue. In



an affidavit in opposition to the motion, Kosta asserts that defendant reiterates counsel's contention regarding harassment and intimidation, adding that defendant has "informed potential customers and current tenants in the apartment building above the [p]remises that I am no longer the tenant and that I would be evicted from the [p]remises in the immediate future, and as a result, should "find another deli in the neighborhood."

In a reply affidavit, Englander denies any harassment or intimidation and insists that plaintiff must pay the rent it owes so long as it occupies the premises.

### **Motion Sequence 003**

Defendant argues that, since this Court determined in its order dated June 29, 2016 that the lease had been improperly assigned, and that the notice of termination served by defendant upon plaintiff was thus proper, plaintiff must be ejected from the premises and a hearing must be held, as directed by the June 29, 2016 order, determining the amount of attorneys' fees, costs, and disbursements.

### **CONCLUSIONS OF LAW:**

#### **Motion Sequence 002**

Defendant's application seeking use and occupancy is denied. Although defendant may indeed be entitled to use and occupancy for the premises for the period of March 1 through June 30, 2016 in another proceeding, it submits no order of this Court directing that such use and occupancy be paid pending the outcome of this action. Importantly, defendant did not set forth any affirmative claim for use and occupancy against plaintiff in this proceeding.

**Motion Sequence 003**

In its order dated June 29, 2016, this Court declared that defendant's notice of termination was not improper given that the assignment of the lease was invalid. Where, as here, "a leasehold can be terminated because the tenant's breach of a condition of the lease gives the landlord the option to declare the lease at an end, thereby exercising [its] right of forfeiture, a condition [subsequent] exists pursuant to which the landlord must enforce the forfeiture by reentry in an action for ejectment (citations omitted)." *451 Rescue LLC v Rodriguez*, 15 Misc3d 1140(A) (Civ Ct New York County 2006). Since defendant must thus commence an action for ejectment, its motion seeking to enter a judgment of ejectment against plaintiff without first commencing such an action must be denied. Further, the original service of a notice to terminate was a condition precedent to an action for eviction. When the *Yellowstone* stay was lifted, defendant should have continued with that action in civil court, wherein it would have been able to get an award of use and occupancy from the date it was last paid up until the time premises are vacated. The actual time period would have been very short because the judgment of this Court would be *res judicata* regarding the legality of the lease.

In light of the foregoing, it is hereby:

ORDERED that defendant's motion seeking past due and current use and occupancy (motion sequence 002) is denied; and it is further,

ORDERED that defendant's motion seeking a judgment of ejectment against plaintiff (motion sequence 003) is denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: September 23, 2016

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**