

**862 Second Ave. v 2 Dag Hammarskjold Plaza
Condominium**

2018 NY Slip Op 31339(U)

June 21, 2018

Supreme Court, New York County

Docket Number: 655408/16

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

862 SECOND AVENUE,

Plaintiff,

-against-

2 DAG HAMMARSKJOLD PLAZA CONDOMINIUM
& ALI BABA'S TERRACE INC.

Defendants.

Index No.: 655408/16
DECISION/ORDER
Motion Sequence No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiff's motion for an award of past-due use and occupancy, and use and occupancy *pendente lite*.

Papers	Numbered
Plaintiff's Notice of Motion for an award of use and occupancy <i>pendente lite</i>	41-54
Plaintiff's Memorandum of Law in Support.....	41-54
Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion	88-99
Affidavit of Timothy Mattison in support of Plaintiff's Motion	41-54
Defendant's Memorandum of Law in Opposition	73-79
Defendant's Affirmation in Support.....	73-79

Paul Hastings LLP, New York City (Zachary S. Zwillinger of counsel), for plaintiff.
Cornicello, Tendler & Baumel-Cornicello, New York City (Anthony J. Corcinello of counsel), for plaintiff.
Moulinos & Associates, New York City (Peter Moulinos & Daniel Levinas of counsel), for defendant.

Gerald Lebovits, J.

In this action, plaintiff 862 Second Avenue (Second Avenue) is the owner of the property located at 862 Second Avenue, New York, NY; defendant 2 Dag Hammarskjold Plaza Condominium (Dag) is the tenant, and defendant Ali Baba's Terrace Inc. (Ali Baba) is the subtenant. Second Avenue moves under Real Property Law § 220 for an award of use and occupancy *pendente lite*. Second Avenue seeks an order (1) directing judgment against Dag for past use and occupancy from August 18, 2016, through September 30, 2017, totaling \$291,342.58; (2) directing Dag to pay use and occupancy *pendente lite* for the subject premises from October 1, 2017, through final determination of this action for \$43,972.88 per month less the amount received from Ali Baba; and (3) directing Dag to maintain the insurance required by the lease, or an appropriate additional amount as interim use and occupancy from October 1, 2017, through final determination of the action.

I. Background

In March 2016, Dag supposedly defaulted on the rent payments required by the lease. (Complaint at 8.) The rent payments allegedly include fees for the insurance and development rights to build the 15-story building in or about 1972 that Dag currently occupies. (Complaint at 8.) But Dag continued to collect rent from Ali Baba for seven months from March 1, 2016, through October 11, 2016. (Memorandum of Law in Support of Plaintiff's Motion at 3.) Beginning January 11, 2017, Ali Baba began to pay rent to Second Avenue. (*See id.*) Second Avenue terminated the lease on August 16, 2017, after Dag failed to cure the default following the lease's five-day cure period. (Complaint at 9.) Dag has since continued to occupy the condominium without paying rent or additional rent to Second Avenue. (*Id.* at 5.)

Second Avenue now seeks to recover the unpaid rent from Dag, and additional rent for the development rights and insurance. Second Avenue's motion for use and occupancy *pendente lite* is granted.

II. Use and Occupancy

Second Avenue moves under RPL § 220 to recover use and occupancy to date, totaling \$291,342.58 and *pendente lite* for last legal monthly rental amount of \$43,972.88. Dag argues that Second Avenue is not entitled to past or future use and occupancy because Dag does not occupy the premises and because the ownership of the development rights is in dispute.

RPL § 220 provides that a landlord "may recover reasonable compensation for use and occupation of real property." The court has broad discretion to award use and occupancy *pendente lite*. (*Alphonse Hotel Corp. v 76 Corp.* 273 AD2d 124, 124 [1st Dept 2000].) An award of use and occupancy *pendente lite* accommodates the parties' competing interests by preserving the status quo until final resolution. (*MMB Assocs. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991]). Recovery for use and occupancy allows a landlord to recover only "reasonable compensation" of the fair market value of the premises after the lease expires. (*See Mushlam Inc. v Nazor*, 80 AD3d 471, 471 [1st Dept 2011].) The rent value under the lease is probative in determining the reasonable value. (*See id.*)

Under RPL § 220, this court has broad discretion to award use and occupancy *pendente lite*. The last paid rent is a reasonable value for use and occupancy. The agreed-upon rent payment under the lease includes the rent and additional rent, which includes both the costs of Second Avenue's development rights as well as the necessary insurance. Therefore, Dag is directed to pay Second Avenue (1) the past-due use and occupancy amount from August 18, 2016, through September 30, 2017, totaling \$291,342.58. If not paid, plaintiff may seek a judgment against defendant, (2) use and occupancy *pendente lite* from October 1, 2017, through June 30, 2018 for \$43,972.88 owed each month totaling \$395,755.92 less any amount received from subtenant Ali Baba, and (3) all future use and occupancy on the fifth of each month, beginning July 5, 2018, at the last legal rent of \$43,972.88.

Dag's argument that it has abandoned the premises has no merit. Ali Baba continues to occupy the one-story development, and Dag's tenants still occupy the condominium.

(Memorandum of Law in Support of Plaintiff's Motion at 5; Affidavit of Timothy Mattison at Exhibit 14 and 20.) Dag argues that although it has not paid rent for over two years, it has abandoned the premises and is therefore no longer obligated to pay rent. But the lease was terminated on August 16, 2016, and Dag continues to occupy the premises. (Memorandum of Law in Support of Plaintiff's Motion at 9; Affidavit of Timothy Mattison at Exhibit 16 and 20.)

Dag's argument that it no longer holds a landlord-tenant relationship with Ali Baba is unpersuasive. Dag has not surrendered the premises, and its tenants continue to occupy the condominium. (Memorandum of Law in Support of Plaintiff's Motion at 9; Affidavit of Timothy Mattison at Exhibit 16 and 20.) Dag argues that Second Avenue's acceptance of use and occupancy from Ali Baba created a new landlord-tenant relationship. But Article 24 of the lease provides that Second Avenue may collect rent from Ali Baba in the event of Dag's default. (Reply Memorandum of Law in support of Plaintiff's Motion at 8; Affidavit of Timothy Mattison at Exhibit 2.) Second Avenue is fulfilling the lease obligations by collecting partial payments of use and occupancy while Dag continues to withhold payment.

Dag's argument that Second Avenue's award for past and *pendente lite* use and occupancy cannot include payments for additional net rent is also unavailing. The development rights and insurance costs were included as additional rent in the lease. (Reply Memorandum of Law in support of Plaintiff's Motion at 3, 8.) Dag relies on the 1977 Zoning Resolution and 873 *Third Avenue Corp v Kenvic Associates* (109 A2d 489 [1st Dept 1985]) to argue that the development rights were transferred to the condominium. But the *Kenvic* court held that in a lease period for less than 75 years, an owner may not transfer development rights. (*Id.* at 492.) Further, under the Zoning Resolution, merging two lots into one does not transfer the air rights. Here, Second Avenue never transferred the development rights to Dag. It included the development rights as additional rent in the lease.

Accordingly, it is

ORDERED that plaintiff's motion for use and occupancy *pendente lite* is granted, and it is further

ORDERED that defendant has 30 days from service of this order with notice of entry to pay plaintiff the past-due use and occupancy from August 18, 2016, through September 30, 2017, totaling \$291,342.58, and it is further

ORDERED that defendant has 90 days from service of this order with notice of entry to pay plaintiff use and occupancy *pendente lite* from October 1, 2017, through June 30, 2018 for \$43,972.88 owed each month totaling \$395,755.92 less any amount received from subtenant Ali Baba, and it is further

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ORDERED that defendant must pay plaintiff all future use and occupancy on the fifth of each month, beginning July 5, 2018, at the last legal rent of \$43,972.88.

Dated: June 21, 2018


HON. GERALD LEBOVITS
J.S.C. J.S.C.