

**255 Butler Assoc. LLC v 255 Butler LLC**

2021 NY Slip Op 32208(U)

November 8, 2021

Supreme Court, Kings County

Docket Number: Index No. 511560/15

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: PART 16

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255 BUTLER ASSOCIATES LLC,

Plaintiff,

Decision and order

- against -

Index No. 511560/15

255 BUTLER LLC, ARIEL AKKAD a/k/a  
ARIEL ACCAD, NATHAN AKKAD a/k/a  
NATHAN ACCAD, SOLOMON AKKAD  
a/k/a SOLOMON ACCAD, and BENJAMIN  
AKKAD a/k/a BENJAMIN ACCAD,,

Defendants,

November 8, 2021

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to modify the use and occupancy stipulation to direct that all future payments should be paid to escrow instead of the landlord. The defendants oppose the motion. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

In 255 Butler Associates LLC v. 255 Butler LLC, 173 AD3d 651 [2d Dept., 2018] the Appellate Division, reversing an order of this court, held there was "no basis" to modify the stipulation to reduce the use and occupancy required to be paid each month. First, the Appellate Division explained the plaintiff had failed to demonstrate it would be unjust or inequitable to enforce the stipulation according to its terms. Specifically, the Appellate Division pointed out that it was erroneous to conclude the property had no value as long as a notice of default remained in the property because such an analysis only considered the "value

to the *plaintiff* of using and occupying the subject property after the lease was purportedly terminated, instead of considering the fair market rental value of the subject property, namely, the amount that a prospective commercial tenant would be willing to lease the subject property from the defendant" (*id.*). The Appellate Division concluded that any notice of default did not encumber the property as to render the fair market value at zero and consequently reinstated the monthly payments of \$111,041.66.

The plaintiff now argues that since that decision there has been a summary judgement determination that the notices were improperly filed, resolving the issue of fault and that the only outstanding issue is the damages to which the plaintiff is entitled. To facilitate the ability to collect "a refund or rent credit" as acknowledged by the Appellate Division, the plaintiff seeks to modify the stipulation to pay the use and occupancy into escrow instead.

The defendant argues that since the summary judgement decision dated October 5, 2019 concluding the defaults were improperly filed the notices have "effectively" been removed (see, Affirmation in Opposition, ¶ 10). The defendant asserts there has been no evidence presented whether the plaintiff made any efforts to develop the property since that date. The court cannot verify whether in fact the property could have been

developed since then, however, the failure to even address these arguments militates against the plaintiff.

Nevertheless, the defendant argues the Appellate Division already ordered the temporary placement of the use and occupancy into escrow pending the appeal and the failure to continue that expedient necessarily means the Appellate Division rejected its availability. However, no precedential value can be drawn prohibiting escrow payments now because the Appellate Division only approved of them pending appeal. There is no merit to the argument that permitting escrow payments at this juncture is implicitly prohibited by an order issued under completely different circumstances. The defendants note that "if the Appellate Division thought that a continued escrow was the way to go, they could easily have so provided in the June 5 Decision" (see, Affirmation in Opposition, page 6). However, an interim decision pending appeal can hardly be a basis to deny the request at this time.

Further, the defendants argue the plaintiff has failed to present any evidence it would be unjust or inequitable to amend the stipulation and that the Appellate Division has already ruled in this regard. However, the Appellate Division's determination concerned the relief granted not requiring any payments at all. The plaintiff's request is simply to direct the payments to an alternate destination securing the funds pending the trial. The

defendants equate paying the funds to escrow as not paying them at all. There is no basis for such a stark comparison. Therefore, similarly, the arguments the plaintiff is attempting to relieve itself of obligations contained in the stipulation is likewise inappropriate. The plaintiff is not seeking to alter the amount of any of the payments. Rather, as noted, the plaintiff is merely seeking to place the funds into escrow to allow a more flexible collection strategy if they prevail upon the damages trial.

Further, the defendants argue the plaintiff has mischaracterized the scope of the upcoming trial and that it is not "just" about damages but there are substantive elements as well. This decision will not address that contentious issue which will no doubt be decided prior to the trial. Nor does that issue have anything really to do with the relief sought here.

Lastly, the defendants argue there is no reason for this relief since the plaintiff has ample recourse to any funds in the form of rent abatements should they prevail. Further, the defendants note the property is sufficiently collateralized to support any award that might ensue. In any event, considering the large sums already paid to the defendants during the years of ongoing litigation in this case a few months of use and occupancy being placed in escrow can hardly be deemed an intolerable hardship.


This is particularly true since the trial is scheduled to commence next month and should be concluded shortly thereafter. A decision on the trial should likewise be issued promptly. This modification of the stipulation is warranted considering all the facts of this case.

Therefore, the plaintiff's motion seeking to place the use and occupancy payments into escrow commencing with the next monthly payment is granted. The escrow shall be placed in an account with a recognized title insurance company.

So ordered.

ENTER:

DATED: November 8, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC