

<b>Booston LLC v 35 W. Realty Co., LLC</b>
2022 NY Slip Op 32020(U)
June 21, 2022
Supreme Court, New York County
Docket Number: Index No. 654308/2019
Judge: Margaret Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X  
 BOOSTON LLC

Plaintiff,

- v -

35 WEST REALTY CO., LLC,

Defendant.

INDEX NO. 654308/2019

MOTION DATE 02/08/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
 MOTION**

-----X  
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 195

were read on this motion to/for

ENTRY OF JUDGMENT ON ARREARS

In this action arising out of the alleged default of plaintiff-tenant Booston LLC (plaintiff) under its commercial lease (Lease) of the premises at 35 West 57th Street (the Premises) for use as a restaurant, defendant-landlord 35 West Realty Co., LLC (defendant) moves for an order (1) directing plaintiff to pay it use and occupancy in the sum of \$49,515.39 per month for a total of \$643,700.07, for the period from April 1, 2020 through May 31, 2021, and to reimburse it for water and other utilities for the same period in the amount of \$20,144.42, for a total of \$663,814.49, and in the event of nonpayment of this amount (2) awarding it a money judgment against plaintiff in the amount of \$663,814.49, plus interest from April 1, 2020, and entering a judgment of ejectment removing plaintiff from the Premises. Plaintiff opposes the motion, and cross moves for sanctions.<sup>1</sup>

**Background**

In July 2019, defendant issued a Notice to Cure stating that plaintiff was in violation of Article 9 of the Rider to the Lease which requires plaintiff “to obtain public liability coverage against claims for bodily injury or death in the amount of \$2,000,000 in a single limit or under an original policy with an umbrella” (NYSCEF

<sup>1</sup> Following oral argument held on February 8, 2022, plaintiff paid the landlord use and occupancy *pendente lite* for the period of October 2021 through February 2022 (NYSCEF # 195). Additionally, plaintiff points out that there is no dispute that it has paid landlord for use and occupancy for the period from June 2021 to September 2021 (NYSCEF # 136).

# 151, Exh. A, Art. 9, at 11). Shortly thereafter, plaintiff commenced this action seeking (i) a declaration that it did not violate any substantial obligation of its tenancy, and (ii) a *Yellowstone* injunction preventing defendant from terminating its tenancy pending a determination as to whether it violated any substantial obligations under the Lease (NYSCEF #1-Complaint). Plaintiff also moved, by order to show cause, for a *Yellowstone* injunction and a temporary restraining order (TRO) preventing defendant from taking any action to terminate the Lease (NYSCEF #'s 4-19). Defendant opposed the motion (NYSCEF #'s 20-26); it also filed an answer and counterclaim for attorney's fees (NYSCEF #'s 20-27), and subsequently amended the answer to add counterclaims for ejectment and use and occupancy (NYSCEF # 33).

In the meantime, by Decision and Order dated September 12, 2019, Hon. Andrew Borrok denied plaintiff's motion for a *Yellowstone* injunction and vacated the TRO, finding that a default in obtaining insurance was not capable of cure, therefore, there was no basis for granting a *Yellowstone* relief (NYSCEF # 30). Plaintiff appealed Justice Borrok's decision and obtained an interim stay from the First Department enjoining any termination of the lease or eviction proceedings pending a decision on the appeal (NYSCEF # 36). The First Department granted the interim stay "on condition that plaintiff-tenant pay use and occupancy in the amount of monthly rent" and required plaintiff to maintain a bond in the amount of \$1,000,000 (*id.*). The First Department subsequently affirmed Justice Borrok's decision but noted that "denial of a *Yellowstone* injunction does not resolve the underlying merits of the dispute or whether the default requires termination of the lease" (*Booston LLC v 35 West Realty Co. LLC*, 185 AD3d 508, 508 [1st Dept 2020]).<sup>2</sup>

Thereafter, defendant moved, by order to show cause, for, *inter alia*, an order allowing it to draw down funds from the bond obtained by plaintiff to cover unpaid use and occupancy for the period from April through October 2020 in the aggregate amount of \$362,931.98, and attorney's fees, and for a judgment ejecting plaintiff from the premises. Alternatively, defendant sought an order directing payment of use and occupancy in the sum of \$49,515.39 per month beginning in November 2020 (NYSCEF # 43, ¶ 2). Plaintiff opposed the motion.

By Decision and Order dated November 18, 2020, Hon O. Peter Sherwood (ret.) granted defendant's motion to the extent of finding that the defendant was entitled to payment of use and occupancy from October 2020 in the amount of \$362,931.98 and \$49,515.39 per month beginning in November 2020 and directed defendant to settle an order on five days' notice (NYSCEF # 58). Justice Sherwood subsequently issued an order permitting defendant to draw down on the bond for payment of past and future use and occupancy (NYSCEF #90).

<sup>2</sup> Justice Borrok recused himself during the pendency of the appeal (NYSCEF # 40).

Plaintiff appealed; on May 25, 2021, the Appellate Division, First Department reversed, writing that:

The subject bond was imposed on plaintiff for the specific purpose of protecting [landlord] from any liability claims while the parties litigated the merits, not for the payment of pendente lite use and occupancy... rather than directing plaintiff's surety to pay ongoing use and occupancy from the bond, the court should have granted defendant's alternative request to direct plaintiff to pay use and occupancy going forward in the amount of \$49,515.39 per month while it remains in occupancy of the premises....

The order to draw down on the bond for the alleged arrears in the payment of use and occupancy following the lifting of the stay pending appeal is tantamount to a grant of summary judgment to defendant on the ultimate relief sought in its counterclaim, despite the absence of a request for such relief in the motion and the fact that the claim has not been finally resolved. Although CPLR 6315 permits a party to recover damages sustained by the improper issuance of an injunction, the damages, if any, must await a determination on the merits....

(*Booston LLC v 35 West Realty Co., LLC*, 194 AD3d 609, 609-610 [1st Dept 2021]). The court directed plaintiff "to pay ongoing use and occupancy at a rate of \$49,515.39 per month" (*id.* at 609-610 [internal citations omitted]).

### **Defendant's Motion for Use and Occupancy or Judgment of Ejectment**

Defendant moves for an order granting it past use and occupancy or, in the alternative, a judgment of ejectment for failure to pay the arrearages. In particular, the defendant contends that plaintiff owes \$643,700.07 for use and occupancy for the period from April 1, 2020 through May 31, 2021, at a monthly rate of \$49,515.39 as per the last monthly rental amount charged under the Lease, and \$20,144.42 for water charges and other utilities. In support of its motion, defendant submits the affidavit of Alix Velasco, its Accounts Receivable Supervisor for its managing agent Solow Management Corp, and an account statement for Booston (NYSECF #'s 103-Valsco Aff., ¶ 3; NYSCEF # 111).

Plaintiff opposes the motion and seeks sanctions, asserting that defendant is impermissibly seeking the ultimate relief in this action on its counterclaims for ejectment and use and occupancy, and that the First Department in its May 25, 2021 Decision and Order specifically held that granting such relief would be premature prior to the determination of the merits and is the law of the case. In addition, plaintiff argues that it cannot be required to pay use and occupancy

because during the period at issue since its business was fully closed or operating at 25% to 35% capacity as a result of Executive Orders issued by Governor Cuomo in response to the COVID-19 pandemic and therefore the defenses of frustration of purpose or impossibility of performance apply (NYSECF # 120-Aff. Kohan, ¶¶ 5-12). Plaintiff also maintains that it was not billed for this period (*id.*, ¶ 14). Regarding the water and utility charges, plaintiff contends that these charges are “without basis or substantiation” because the restaurant was not operating during much of the period (*id.*, ¶ 15).

In reply, defendant argues that the defenses of frustration of purpose and impossibility due to the pandemic do not excuse plaintiff’s payment of use and occupancy (citing *Kel Kim Corp. v Central Mkts*, 70 NY2d 900 [1987], *Gap Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575 [1st Dept 2021]). Defendant also submits monthly use and occupancy bills and water bills addressed to plaintiff for the period in issue (NYSCEF #s 130, 140).

While the First Department held that permitting the drawing down of the bond would not be allowed absent a determination in the defendant’s favor on the underlying merits, this holding does not preclude defendant from recovering use and occupancy. In this connection, the court notes that the interim stay granted by the First Department in October 2019 was “on condition that plaintiff-tenant pay use and occupancy in the amount of monthly rent” (NYSCEF # 36). Significantly plaintiff was separately required to maintain a bond in the amount of \$1,000,000 (*id.*).

In an action for use and occupancy —

The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which [the landlord] is entitled.

(Real Property Law § 220). The award of use and occupancy during the pendency of an action or proceeding “accommodates the competing interests of the parties in affording necessary and fair protection to both... and preserves the status quo until a final judgment is rendered” (*MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). Moreover, “the remedy for overpayment or underpayment of use and occupancy is a speedy trial” (*Gap Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549, 550 [1st Dept 2021][internal citation and quotation omitted]).

Next, insofar as plaintiff argues that because of the COVID-19 pandemic it should be excused from paying use and occupancy during the period, such argument is unavailing (*see The Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575

[1st Dept 2021][holding that commercial tenant was not entitled to a rent abatement due to the COVID-19 pandemic)].

Accordingly, defendant is entitled to payment of use and occupancy from April 1, 2020 through May 31, 2021, in the amount of \$643,700.07. However, since plaintiff disputes the charges for water charges and other utilities during the period at issue, including because restrictions related to the pandemic impacted the operations of its restaurant, the defendant's request for a judgment as to these charges is denied (see *Andejo Corp. v South St. Ltd. Seaport Partnership*, 35 AD3d 174, 174 [1st Dept 2006][upholding award of use and occupancy which excluded disputed amounts charged for utilities and common area expenses]). On the other hand, defendant's request for a judgment of ejectment for the alleged failure to pay arrears is unwarranted under the circumstances here.

Finally, plaintiff's cross motion for sanctions is denied as it cannot be said that the defendant's motion is frivolous.

Defendant shall settle an order on five days' notice.

6/21/2022  
DATE

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MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE