SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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64 DOWNING STREET, LLC,

Plaintiff,

- v -

SARPAR, LLC, JOHN PARROTT, and SARA DOWLING,

Defendants.

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INDEX NO. 654703/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to AWARD RENT OR USE & OCCUPANCY.

Eisenberg & Baum, LLP, New York, NY (Brian Ullman of counsel), for plaintiff.
Law Office of Howard Poch, New York, NY (Howard Poch of counsel), for defendants.

Gerald Lebovits, J.:

In this commercial landlord-tenant action, plaintiff-landlord, 64 Downing Street, LLC, moves for an order requiring defendant-tenant Sarpar, LLC, to pay sums allegedly owed by tenant in past rent or use and occupancy (U&O), and to pay rent or U&O on a monthly basis going forward; and moves for leave to amend the complaint to add a cause of action in ejectment against tenant. The branch of landlord's motion seeking an order requiring payment of rent or U&O is denied without prejudice. The branch of landlord's motion for leave to assert an ejectment claim is granted.

BACKGROUND

In 2019, landlord leased to tenant premises located at 64 Downing Street in New York City's West Village for use "as an eating and drinking establishment."[1] (NYSCEF No. 20 at 7, 9 [lease].) That use is not permitted under the building's certificate of occupancy. (*See* NYSCEF No. 35 at 1.) As a result, the lease requires landlord to "obtain a valid Letter of No Objection allowing for the Permitted Use"—*i.e.*, as an "eating and drinking establishment." (NYSCEF No.

[1] Defendants John Parrott and Sara Dowling, members of tenant, guaranteed tenant's obligations under the lease.

20 at 28.) The lease provides that tenant's rent obligations will not begin until 90 days after the landlord supplies tenant with the no-objection letter.[2] (*Id.* at 6.)

In October 2019, landlord sent tenant a copy of a no-objection letter issued by the New York City Department of Buildings. The letter stated that DOB "has No Objection to an Eating and Drinking Establishment . . . with no open-flame cooking, at the above referenced premises." (NYSCEF No. 21 at 2.) Landlord told tenant that delivery of the letter triggered the commencement of tenant's rent obligation, to begin in late-January 2020. (*Id.* at 1.) Tenant, on the other hand, took the position that the no-objection letter, as issued, was inconsistent with the use that both tenant and landlord understood tenant would make of the premises: a restaurant serving *cooked* food. Tenant therefore declined to pay rent on the ground that the lease's rent-commencement provisions were not triggered by delivery of the no-objection letter.[3]

In 2021, landlord brought this action for an award of rent and attorney fees under the lease and guarantee. Landlord now moves for an award of rent or U&O accruing from January 2020 through the date of the motion in 2023, and for an order directing payment of future rent or U&O.[4] (NYSCEF No. 18 at 1-2.) Landlord also moves under CPLR 3025 (b) to amend its complaint to add an ejectment claim; and seeks a judgment of ejectment "in the event that [tenant] fails to pay the requirement amounts for use and occupancy." (*Id.* at 2.)

DISCUSSION

I. Whether Landlord is Entitled to an Award of Rent or U&O

Landlord contends that the question of its entitlement to rent or U&O is straightforward. According to landlord, the lease provides that rent begins to accrue 90 days after delivery of a no-objection letter permitting the premises to be used as an "eating and drinking establishment"; landlord delivered a no-objection letter permitting the premises to be used as an "eating and drinking establishment"; and yet tenant has not paid rent or U&O. (*See* NYSCEF No. 47 at 3-4.) This court doubts that the question is so simple.

A. Whether Landlord is Entitled to Rent

With respect to whether tenant owes rent under the lease, the lease does not define "eating and drinking establishment," whether in the four corners of the document or through incorporation by reference. The scope of this lease term—*i.e.*, whether it is limited to a restaurant

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[2] If the landlord were to have delivered possession of the premises to tenant *after* supplying the no-objection letter, tenant's rent obligations would have begun 90 days after delivery of possession. (NYSCEF No. 20 at 6.) That did not occur here.

[3] The record does not reflect whether landlord then asked DOB to issue a no-objection letter permitting open-flame cooking—and, if landlord did not do so, why not.

[4] Landlord asserts that tenant's refusal to pay rent constituted a lease default that led to a self-executing lease termination. Because tenant has remained in possession of the premises, landlord contends that at a minimum tenant owes past and future U&O. (*See* NYSCEF No. 28 at 3 [mem. of law].)

or bar engaged in open-flame cooking, or extends more broadly to other kinds of eating establishments—is not clear and unambiguous. Landlord's application for the no-objection letter did not refer to an "eating and drinking establishment," but instead proposed use of the property as a "Restaurant/Bar." (NYSCEF No. 39 at 2.) Landlord has not shown that this term, as used in the DOB no-objection letter, carries the same meaning as the term when used in the lease. For that matter, the DOB letter's inclusion of a "no open-flame cooking" restriction suggests that "eating and drinking establishment," standing alone, includes restaurants serving hot, cooked meals.[5]

Additionally, the context under which the lease was executed tends to indicate that "eating and drinking establishment," as used in the lease, encompasses a restaurant with open-flame cooking. The premises, when leased to tenant, were being used as a restaurant; and the restaurant's kitchen included an open-flame gas stove and a fire-suppression system. (*See* NYSCEF No. 39 at 2 ["current use of the property" answer on no-objection application]; NYSCEF No. 31 at ¶¶ 7-9 [Parrott aff. in opposition, discussing the restaurant kitchen at the time of leasing]; NYSCEF No. 36 [photographs of kitchen]; NYSCEF No. 37 [permit for installation of fire-suppression system]; NYSCEF No. 41 [2019 invoices reflecting inspection and maintenance of fire-suppression system].) If the permitted use of the premises under the lease did not include a form of use (open-flame cooking) supported by the premises' fixtures at leasing, one might expect that limitation to be expressed in the lease. It was not. And if "eating and drinking establishment" in the lease includes a restaurant engaged in open-flame cooking, it is hard to see how the DOB no-objection letter barring open-flame cooking could be satisfactory for purposes of the lease's rent-commencement provision.

Landlord contends that tenant's challenge to the validity of the no-objection letter for lease purposes is barred by the merger clause in § 16 (b) of the lease. (*See* NYSCEF No. 47 at ¶¶ 17-23.) This contention begs the question. Tenant's position does not require reliance on extra-lease representations that would be foreclosed by the merger clause, or on any discrepancy between the physical and legal condition of the premises at lease-execution and the premises' fitness for its intended purpose under the lease. To the contrary, tenant is arguing about the scope of "eating and drinking establishment," for purposes of the permitted use and the scope of landlord's no-objection-letter obligation *as set out in the lease*.

To be clear, this court is not concluding definitively on this motion that "eating and drinking establishment" in the lease *does* mean "restaurant with open-flame cooking," such that the no-objection letter's bar on open-flame cooking necessarily rendered the letter inoperative for purposes of triggering the commencement of tenant's rent obligations. On the current record, this court is unable to reach a conclusion one way or the other. But precisely for that reason, landlord has not met its burden as the moving party to show that tenant breached operative lease obligations to pay rent that commenced in January 2020 (as landlord contends).

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[5] DOB's use of "eating and drinking establishment" in its no-objection letter appears to derive from that use's status as a type of use permitted as-of-right for the premises under the New York City Zoning Resolution. The Zoning Resolution does not distinguish in that context between establishments serving cold food and establishments with open-flame cooking. (*See* New York City Zoning Resolution § 32-15 [Subgroup A].)

B. Whether Landlord is Entitled to U&O

Landlord has not demonstrated on this motion that it is entitled in the alternative to U&O in the amount of the monthly rent due under the lease, as landlord requests. An award of U&O sounds in quantum meruit, which is not available where the parties' relationship is governed by a written contract such as a lease. (*See Timur on 5th Ave. Inc. v Record Explosion, Inc.*, 290 AD2d 221, 222 [1st Dept 2002].) The term of tenant's lease has not yet expired. (*See* NYSCEF No. 33 at 6-7 [definition of "expiration date"].) Landlord's request for an award of U&O derives instead from landlord's position that tenant's rent default brought about the lease's termination. (*See* NYSCEF No. 28 at 3; NYSCEF No. 47.) If, as discussed above, landlord has not on this motion shown that tenant defaulted on its rent obligations, it follows that landlord has not established that the lease terminated such that landlord is entitled to U&O.[6]

To be sure, as landlord points out, the Appellate Division, First Department, has said in this context that it is unfair to permit a tenant "to remain in possession of the subject premises without paying for their use." (*MMB Assoc. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991].) But, as noted above, tenant has a good argument that under the circumstances of this case, landlord agreed to just that, contractually speaking.[7] This is also not a case in which the record establishes a minimum monthly sum owed by tenant while leaving the full amount owed by tenant (or by landlord) open to dispute. (*See Levinson v 390 W. End. Assoc., L.L.C.*, 22 AD3d 397, 402 [1st Dept 2005] [awarding landlord U&O pendente lite in the amount of the legal rent owed under stabilization pending a determination on landlord's argument that no stabilization applies and tenant's argument that landlord owes treble damages for an alleged overcharge].) In particular, landlord's U&O claim is based solely on the monthly rent under the parties' lease; but landlord has not offered any evidence that this sum constitutes the fair-market rental value from 2019-2023 of West Village restaurant premises that cannot be used for open-flame cooking.[8] (*See Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011] [explaining that the "reasonable value of use and occupancy is the fair market value of the premises after the expiration of the lease," and that it is the landlord, not the tenant, who bears the burden of proving that value].)

II. Whether Landlord May Amend its Complaint to Add an Ejectment Claim

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[6] Because landlord has made its U&O request in the context of the current plenary action, rather than a summary proceeding under article 7 of the Real Property Actions and Proceedings Law (RPAPL), the U&O requirements of RPAPL § 745 do not apply directly here. Nor has tenant argued that those requirements otherwise affect the availability of U&O sought in plenary actions.

[7] And, as noted above, the record does not reflect why landlord brought this action two years into the lease term, rather than obtaining and providing a no-objection letter that would permit open-flame cooking.

[8] Given the court's conclusion on this point, the court denies landlord's alternative requests (i) to direct tenant to post a bond to secure the amount claimed in allegedly unpaid rent or U&O, and (ii) for a conditional order of ejectment should the claimed rent or U&O continue to go unpaid after entry of this order.

Landlord also moves under CPLR 3025 (b) to add a cause of action in ejectment. (*See* NYSCEF No. 23 at 4-5 [proposed second amended complaint].) The motion is granted. Leave to amend under CPLR 3025 (b) should be freely granted. Tenant has not established that the proposed ejectment claim would be "palpably insufficient or clearly devoid of merit." (*Fairpoint Cos., LLC v. Vella*, 134 A.D.3d 645, 645, 22 N.Y.S.3d 49 [1st Dept. 2015] [internal quotation marks omitted].) Nor does the record suggest that tenant would be prejudiced by permitting the requested amendment.

Accordingly, it is

ORDERED that the branch of landlord's motion seeking an award of past and future rent or U&O, or alternatively, an order directing tenant to post a bond in that amount, is denied; and it is further

ORDERED that the branch of landlord's motion seeking leave to amend further its complaint is granted, and the complaint is deemed amended in the form appearing at NYSCEF No. 23; and it is further

ORDERED that all defendants shall respond to landlord's second amended complaint within 20 days from service of a copy of this order with notice of its entry; and it is further

ORDERED that plaintiff shall serve defendants with notice of entry.

11/13/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE