

Andejo Corp. v South Street Seaport Limited Partnership

2006 NY Slip Op 30304(U)

May 5, 2006

Supreme Court, New York County

Docket Number: 0603707/2004

Judge: Marcy S. Friedman

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DECENT. **MARCY S. FRIEDMAN**

PART 57

Index Number : 603707/2004

ANDEJO CORP.

vs
SOUTH STREET SEAPORT LTD.

INDEX NO. _____

Sequence Number : 007

MOTION DATE _____

OTHER RELIEFS

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for use and occupancy

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

PAPERS NUMBERED

1, 1a - 1d

Answering Affidavits – Exhibits _____

2

Replying Affidavits _____

MF-15

Cross-Motion: Yes No *Memos of Law*

Upon the foregoing papers, it is ordered that this motion is _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 5/5/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ANDEJO CORP., et al,

Plaintiffs,

- against -

SOUTH STREET SEAPORT LIMITED
PARTNERSHIP,

Defendant.

_____ x

Index No.: 603707/04

DECISION/ORDER

UNFILED JUDGMENT
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This is an action in which plaintiffs, who are tenants of Pier 17 at the South Street Seaport in Manhattan, seek damages against defendant-owner, on the ground that defendant breached its fiduciary duty to plaintiffs by failing, among other things, to market and promote the South Street Seaport as required by plaintiffs' leases and the by-laws of the South Street Seaport Merchant's Association. Plaintiffs allege that defendant's conduct has damaged their business, and is part of a scheme to vacate and redevelop Pier 17.

Defendant brought summary nonpayment eviction proceedings in Civil Court against seven of the plaintiffs (Booth Street Food Corp. d/b/a Yorkville Packing House; Salad Mania, Inc. d/b/a Salad Mania; Seaport Novelties, Gifts & News, Ltd.; Ry-Allie Candy Corp. d/b/a Nutcracker Sweets; Hot Dogs Del Mar, Inc. d/b/a Nathan's Famous; Ainolahpek, Inc. t/a Athenian Express; Lakous, Inc. t/a Pizza on the Pier). By stipulation dated September 28, 2005, which was so ordered by this Court (Beeler, J.), the parties agreed to consolidate these proceedings with the instant action, and plaintiffs agreed to pay use and occupancy in an amount to be determined by the court, upon motion to be filed by defendant. Defendant also brought

ejectment actions against eight of the plaintiffs (Roslu Corp. d/b/a Bergin's Beer & Wine; Apple Mac & R Corp. d/b/a MacMenamins Pub; Mariposa, Inc. t/a Mariposa; Andrew Huestis d/b/a The New York Shell Shop; Andejo Corp. d/b/a Seaport Watch Co.; Uteasa Ltd. d/b/a Sedutto Ice Cream; Fulton Market Retail Fish Inc. d/b/a Simply Seafood; Hayley Manufacturing Inc. d/b/a Taqueria Mexicali), alleging termination of their leases based on their default in the payment of rent. These actions were subsequently discontinued and the ejectment claims have been asserted as counterclaims in the instant action.

In addition, defendant brought summary holdover proceedings in Civil Court against two of the plaintiffs (Broadway Beat, Inc. t/a Broadway Beat and A View of the World Products, Inc. d/b/a A View of the World). By stipulations dated April 29, 2005, each of these plaintiffs consented to a judgment of possession in favor of defendant (there, petitioner), with a stay of execution of the warrant of eviction through March 31, 2006. It appears to be undisputed that these two proceedings were also consolidated with the instant action pursuant to the September 28, 2005 stipulation. In the April 29, 2005 stipulations (§ 5[b][iii]), these tenants agreed to pay use and occupancy "in an amount to be set in the Supreme Court Action."

Defendant moves for an order awarding use and occupancy against the above seventeen plaintiffs. By subsequent motion, defendant seeks a declaration that it is entitled to accept rental payments made by certain plaintiffs without waiving any rights. The subsequent motion duplicates the prior motion insofar as it seeks use and occupancy, and requests expedited hearing of the motion for use and occupancy. Plaintiffs consent to the requested declaration.

Real Property Law § 220 provides that "[t]he landlord may recover a reasonable compensation for the use and occupation of real property." Consistent with this statute, it has long been held that it is appropriate to award use and occupancy during the pendency of an action

involving possessory claims to rental premises, even where there is a dispute concerning the amount of rent owed. (Levinson v 390 W. End Assocs., L.L.C., 22 AD3d 397 [1st Dept 2005]. See Trump CPS L.L.P. v Meyer, 249 AD2d 22 [1st Dept 1998]; MMB Assocs. v Dayan, 169 AD2d 422 [1st Dept 1991]; Englert v Mahoney, 258 AD2d 859 [3d Dept 1999], lv dismissed 93 NY2d 999.)

Plaintiffs do not dispute that defendant is entitled to an award of use and occupancy during the pendency of this action. However, plaintiffs claim that a hearing should be held to determine the fair market value of the use and occupancy, whereas defendant claims that the use and occupancy should be set at the rent reserved in the plaintiffs' leases.

On this record, plaintiffs fail to demonstrate that use and occupancy should not be set at the rent reserved in each plaintiff's lease. This is not a case in which there is a dispute as to the amount of the legal rent or in which the amount of rent due cannot be ascertained on the motion papers, and in which a hearing on the proper amount of use and occupancy should therefore be held. (Compare Trump CPS L.L.P., 249 AD2d at 23.) Moreover, although plaintiffs allege that defendant has failed to provide required promotional and marketing services as part of a scheme to vacate Pier 17 and that plaintiffs have lost business as a result,¹ plaintiffs do not cite any authority that they are entitled to withhold rent based on such a claim or that they will be entitled to a rent reduction in the event they ultimately prevail on the claim. Plaintiffs' complaint also alleges that defendant has over billed plaintiffs for "CAM" charges – i.e., charges for such items as tax pass-throughs and utilities. However, as defendant appears to seek use and occupancy payments only of base rent and not of CAM charges, there is no need for a hearing on the amount

¹The parties have not attached a copy of the complaint in this action. However, the court has taken notice of the amended complaint from the original court file. (See, Bookazine Co. v J&A Bindery, Inc., 61 AD2d 919 [1st Dept 1978].)

of such charges.

The court accordingly finds that, except for Broadway Beat and A View of the World, use and occupancy for each plaintiff should be set at the base rent reserved in each plaintiff's lease. In so holding, the court notes that there is long-standing authority approving the setting of use and occupancy at the rent provided for in the lease. (See Haddad Corp. v Cal Redmond Studio, 102 AD2d 730 [1st Dept 1984]; Englert v Mahoney, 258 AD2d 859, supra.) After a lease is terminated and a warrant is issued, the reasonable value of use and occupancy is the fair market rental, and the last rent reserved in the lease will not be conclusive on this issue. (2641 Concourse Co. v City Univ. of New York, 137 Misc 2d 802 [Ct Cl 1987], affd 147 AD2d 379 [1st Dept 1989] for reasons stated below; Beacway Operating Corp. v Concert Arts. Socy., 123 Misc 2d 452 [Civ Ct, New York County 1984].) In contrast, where the leases remain in effect, as in the case of the plaintiffs who are the subject of nonpayment proceedings, or the termination of the leases is challenged, as in the case of the plaintiffs against whom ejectment proceedings were brought, there is no reason why use and occupancy should not be awarded at the lease base rent rate, in conformity with settled authority.

The court thus holds that plaintiffs, except Broadway Beat and a View of the World, should pay future use and occupancy, at the lease base rent rate, during the pendency of this action. The court further holds that such plaintiffs should pay past use and occupancy, at the lease base rent rate, for the period from the day after completion of service of the first summary proceeding or ejectment action brought against each plaintiff. (See, e.g., Levinson v 390 W. End Assocs., L.L.C., 22 AD3d 397, supra; East 4th St. Garage, Inc. v Estate of Berkowitz, 265 AD2d 249 [1st Dept 1999]; South St. Ltd. Partnership v Jade Sea Rest., Inc., 187 AD2d 397 [1st Dept 1992].)

Broadway Beat and A View of the World are in a different position from the other plaintiffs inasmuch as they have stipulated that their tenancies were terminated and consented to warrants of eviction. Defendant's claim for past use and occupancy against them thus requires final resolution, whereas defendant's claim against the other plaintiffs for past use and occupancy involves an interim award in order to maintain the status quo. Past use and occupancy should therefore be awarded against each from the date each defaulted in the payment of base rent or other charges such as CAM charges through and including May 31, 2005, the date as of which they agreed, pursuant to the November 29, 2005 stipulations of settlement, that their tenancies were terminated. Such use and occupancy should be awarded at the rate of the base rent reserved in the lease plus any unpaid CAM charges or additional rent to which defendant is entitled under the lease. As the amount of the CAM charges or additional rent cannot be determined on this record, a hearing must be held on the issue. In addition, for the period from June 1, 2005 to the date of each tenant's vacatur, use and occupancy will be set at the fair market rental value of the premises, in an amount to be determined at a hearing. (See 2641 Concourse Co. v City Univ. of New York, 137 Misc 2d 802, affd 147 AD2d 379, supra; Beacway Operating Corp. v Concert Arts. Socy., 123 Misc 2d 452, supra.) The court rejects plaintiffs' contention that discovery should be afforded before this hearing is held.

It is accordingly hereby ORDERED that defendant's motion for use and occupancy (Seq. No. 007) is granted to the following extent:

1) Plaintiffs Booth Street Food Corp. d/b/a Yorkville Packing House; Salad Mania, Inc. d/b/a Salad Mania; Seaport Novelties, Gifts & News, Ltd.; Ry-Allie Candy Corp. d/b/a Nutcracker Sweets; Hot Dogs Del Mar, Inc. d/b/a Nathan's Famous; Ainolahpek, Inc. t/a Athenian Express; Lakous, Inc. t/a Pizza on the Pier; Roslu Corp. d/b/a Bergin's Beer & Wine;

Apple Mac & R Corp. d/b/a MacMenamins Pub; Mariposa, Inc. t/a Mariposa; Andrew Huestis d/b/a The New York Shell Shop; Andejo Corp. d/b/a Seaport Watch Co.; Uteasa Ltd. d/b/a Sedutto Ice Cream; Fulton Market Retail Fish Inc. d/b/a Simply Seafood; Hayley Manufacturing Inc. d/b/a Taqueria Mexicali shall each make the following payments of use and occupancy: a) commencing with the month of June 2006 and each month thereafter during the pendency of the above-captioned action, each tenant shall pay use and occupancy as and when due at the base rent reserved in such tenant's lease; and b) each tenant shall pay use and occupancy at the base rent reserved in such tenant's lease for the period from the day after the date of completion of service of the first possessory action or proceeding brought against such tenant through and including May 31, 2006. In the event the date of completion of service was later than the first of the month, use and occupancy for the first month after such date shall be paid on a pro rata basis. All payments of past use and occupancy pursuant to this sub-paragraph (b) shall be made within 60 days after service of a copy of this order with notice of entry; and

2) Plaintiffs Broadway Beat, Inc. t/a Broadway Beat and A View of the World Products, Inc. d/b/a A View of the World shall each make the following payments of use and occupancy: a) each tenant shall pay use and occupancy for the period from the date each defaulted in the payment of base rent or other charges such as CAM charges through and including May 31, 2005. Such use and occupancy shall be paid at the rate of the base rent reserved in the lease plus any unpaid CAM charges or additional rent to which defendant is entitled under the lease, in an amount to be determined by a Special Referee after a hearing; and b) each tenant shall pay use and occupancy for the period from June 1, 2005 to the date of each tenant's vacatur. Such use and occupancy shall be paid at the rate of the fair market rental value of the premises, in an amount to be determined by a Special Referee after a hearing; and it is further

ORDERED that the Special Referee shall hear and report with recommendations on the above-specified issues, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that defendant shall forthwith serve a copy of this order with notice of entry on the Clerk of the Special Referee's Office (Room 119), in order to arrange a date for the reference to a Special Referee; and is further

ORDERED that a motion to confirm or reject the report of the Special Referee shall be made within 15 days of the filing of the report; and it is further

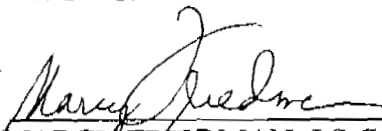
ORDERED that defendant's motion for declaratory and other relief (Seq. No. 008) is granted to the following extent:

It is hereby ORDERED, ADJUDGED and DECLARED that defendant may accept rental payments from plaintiffs, including payments made prior to this order, without waiving any rights and without affecting plaintiffs' alleged defaults or defendant's alleged terminations of plaintiffs' leases.

This constitutes the decision, order and judgment of the court.

Dated: New York, New York
May 5, 2006

ENTER:


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
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