

650 First Ave. Partners LLC v Jericho Off., LLC

2017 NY Slip Op 31102(U)

May 17, 2017

Supreme Court, New York County

Docket Number: 651113/16

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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650 FIRST AVENUE PARTNERS LLC,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 651113/16

Seq. Nos.: 005

JERICHO OFFICE, LLC,

Defendant.

----- X
HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

PAPERS	NUMBERED
PLTF'S. ORDER TO SHOW CAUSE AND AFFS. IN SUPPORT	1,2 (Exs. A-F)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

By decision and order dated June 29, 2016 and entered August 9, 2016 (mot. seq. 001), this Court, inter alia, denied the application by plaintiff 650 First Avenue Partners LLC ("First Avenue"), a commercial tenant, for a *Yellowstone* injunction against defendant Jericho Office, LLC ("Jericho"), its landlord, on the ground that the lease was improperly assigned to First Avenue. This Court also granted Jericho's cross-motion seeking attorneys' fees, costs and disbursements against First Avenue, "to be determined at the time of trial or the final settlement determining the occupancy of the subject premises."

Jericho subsequently moved (mot. seq. 002) for an order directing First Avenue to pay it \$31,289.87, representing past due and current use and occupancy, at the same rate set forth in the parties' lease, through July 1, 2016. It also moved (mot. seq. 003) for an order ejecting First Avenue

from the premises. By decision and order dated September 23, 2016 and entered October 11, 2016, this Court denied Jericho's motion for use and occupancy ("U&O") on the ground that it did not specifically claim such relief as against First Avenue. This Court also denied Jericho's motion for ejectment.

Jericho now moves, by order to show cause, for a hearing to determine the amount of costs, disbursements, and attorneys' fees it is owed by First Avenue pursuant to the order of this Court dated June 29, 2016 and entered August 9, 2016. It also moves, pursuant to CPLR 2221(d), for reargument of that branch of the decision and order of this Court dated September 23, 2016 and entered October 11, 2016 which denied it U&O on the ground that a claim for the said relief was not asserted by Jericho. Jericho argues that reargument must be granted because this Court had the discretion and authority to award it U&O and that, as of the time it brought a motion seeking U&O, it had not yet joined issue and thus had no opportunity to assert an affirmative claim for U&O against First Avenue.

This Court grants that branch of Jericho's motion for reargument on the ground that it overlooked the fact that an award of U&O could have been made in its broad discretion, pendente lite, even if Jericho did not make an affirmative demand for such relief. *See 43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501 (1st Dept 2013). Since First Avenue had no right to occupy the premises without paying (*see 35 Lispenard Partners, Inc. v 35 Smoke & Grill, LLC*, 74 AD3d 496 [1st Dept 2010]), this Court agrees that First Avenue must pay Jericho U&O.

Despite this finding, however, this Court notes that, by judgment dated December 2, 2016, the Civil Court of the City of New York, New York County (Goetz, J.) awarded Jericho U&O in the amount of \$32,596.91 in a Landlord Tenant proceeding commenced by Jericho against First Avenue under Index Number LT-079388-16/NY. In a separate judgment issued the same day, and under the

same Index Number, the Civil Court granted Jericho a warrant of eviction as against First Avenue. Although these judgments are not included in Jericho's motion papers, this Court may take judicial notice of the same. *See Tinberg v Tinberg*, 85 AD3d 673, 674 (1st Dept 2011).

Despite these judgments, this Court does not know the precise dates for which U&O was awarded by the Civil Court or the date on which First Avenue vacated the premises.¹ Thus, this matter is hereby assigned to a referee for the purpose of ascertaining from Jericho the date through which the U&O payments were calculated by the Civil Court in rendering its judgment, as well as the date on which First Avenue vacated the premises. Upon obtaining this information from Jericho, the referee is to calculate the U&O owed to Jericho by First Avenue from the last date used by the Civil Court to calculate U&O until the date First Avenue vacated the premises, plus and costs and disbursements.

The branch of Jericho's motion seeking a hearing regarding attorneys' fees is also granted, and the referee is to determine the reasonable attorneys' fees owed to Jericho by First Avenue as a result of having to defend the captioned proceeding.

In light of the foregoing, it is hereby:

¹Although Jericho argues that is entitled to U&O in the amount of \$54,141.20 from March 1, 2016 through October 31, 2016 based on its "business record" (Jericho's Aff., at par. 28; Ex. C to Jericho's Aff.), the said business record does not set forth the dates of the invoices referenced therein and may not set forth additional amounts of U&O which may be owed to Jericho between the time that document was generated and the date First Avenue vacated the premises. Jericho's contention is further complicated by the fact that it claimed it was owed \$31,289.87 for U&O, an amount almost identical to that awarded by the Civil Court, as of July 1, 2016.

ORDERED that the branch of the motion by defendant Jericho Office, LLC seeking reargument of its motion requesting use and occupancy is granted; and it is further,

ORDERED that, upon reargument, this Court vacates that portion of its decision and order dated September 23, 2016 and entered October 11, 2016 which denied the request by defendant Jericho Office, LLP for use and occupancy; and it is further,

ORDERED that the branch of the motion by defendant Jericho Office, LLP seeking a hearing regarding attorneys' fees is granted; and it is further,

ORDERED that the issue of the amount of any additional use and occupancy owed by plaintiff 650 First Avenue Partners LLC to defendant Jericho Office, LLC, representing payments from the date for which the Civil Court last awarded Jericho Office, LLC use and occupancy until the date on which plaintiff 650 First Avenue Partners vacated the premises, is referred to a Special Referee to hear and report; and it is further,

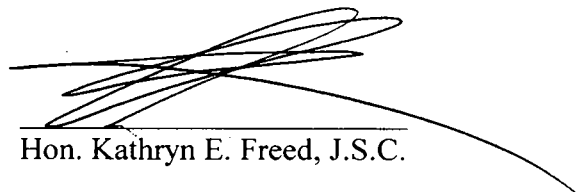
ORDERED that this matter is referred to a special referee to hear and report regarding the amount of attorneys' fees, costs and disbursements owed to defendant Jericho Office, LLC; and it is further,

ORDERED that Rosenberg & Estis, P.C., counsel for Jericho Office, LLC, shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the General Clerk's Office (Room 119M at 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: May 17, 2017

ENTER:



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**

² Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at <http://www.nycourts.gov/courts/ljd/suptctmanh/> under the "References" section.