

20 Rewe St. Ltd. v O'Connell
2020 NY Slip Op 31188(U)
May 5, 2020
Supreme Court, Kings County
Docket Number: 0501429/2018
Judge: Richard J. Montelione
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At IAS Part DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, County of Kings, State of New York, on the 5th day of May 2020

PRESENT: HON. RICHARD J. MONTELIONE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART DJMP

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20 REWE STREET LTD.

Plaintiffs,

Order and Judgment
After Inquest

-against-

Decision and Order After Inquest

JOHN O'CONNELL, and O'CONNEL
CONTRACTING CORP.,

Index No. 0501429/2018

Defendants.

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An inquest was held on November 19, 2019 pursuant to the Order of the below named Justice entered on April 1, 2019 and a subsequent Order entered on September 3, 2019 directing an assessment of damages.

The court heard testimony from James Holiber, counsel to Morjam Supply Co. Inc. which owns the plaintiff. The subject vacant lot which was rented to the defendant is located near the Kosciusko Bridge which is comprised of about an acre of land or approximately 6,000 square feet. This property was rented to the defendant for \$1,400.00 per month or 23 cents a square foot from January 2012 until September 1, 2016. No rent was paid in September 2016. The lease was terminated as of November 22, 2017. There was no rent paid between September 2016 and November 2017. Defendants did not vacate in November 2017. The rent due during this period of time was \$21,000.00 (15 months x \$1,400.00). It is unclear exactly when the plaintiff

obtained possession, but plaintiff did sign a new lease (Exhibit 9) which was effective in March 2018, which is a period of four months (if rent was being charged it would amount to \$5,600.00).

The parties stipulate that plaintiff has possession of the subject vacant lot.

Applicable Law

The Court in *Kim v S&M Caterers, Inc.*, 136 AD3d 755, 756 (2d Dept 2016), laid out the standards to be applied at inquest:

By defaulting, the defendant admitted ‘all traversable allegations in the complaint, including the basic allegation of liability’ (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730, 469 NE2d 518, 480 NYS2d 197 [1984]; see *Cole-Hatchard v Eggers*, 132 AD3d 718, 18 NYS3d 100 [2015]; *Gonzalez v Wu*, 131 AD3d 1205, 1206, 16 NYS3d 768 [2015]; *Kouho v Trump Vil. Section 4, Inc.*, 93 AD3d 761, 763, 941 NYS2d 186 [2012]; *Suburban Graphics Supply Corp. v Nagle*, 5 AD3d 663, 663, 774 NYS2d 160 [2004]). As such, the sole issue to be determined at the inquest was the extent of the damages sustained by the plaintiffs...

Once liability is established, the burden is on the plaintiff to prove his or her or its damages. See, *Paulson v Kotsilimbas*, 124 AD2d 513, 514 [1st Dept 1986],

The order (determining) liability and directing an inquest as to damages is not a determination that plaintiff is entitled to the damages alleged in his complaint. Nor does this defendant's failure to appear at the inquest constitute an admission that plaintiff was entitled to recover such sums (*Kraus Bros. v Hoffman & Co.*, 99 AD2d 401, 403). Even in the case of a default upon inquest and assessment, plaintiff is required to prove the actual damages sustained.

The court may determine the credibility of a witness at an inquest which is supported by the record and warranted by the facts. See and cf. *Mears v Long*, 173 AD3d 734 (2d Dept 2019); *Frankel v Hirsch*, 38 AD3d 712 [2d Dept 2007]; and *Claridge Gardens, Inc. v Menotti*, 160 AD2d 544 [1st Dept 1990]).

RPAPL § 601 reflects the following:

RPAPL § 601. Damages for withholding real property obtainable in action to recover possession; set-off by defendant.

In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims. Where permanent improvements have been made in good faith by the defendant or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages.

Legal Analysis and Conclusion and Judgment

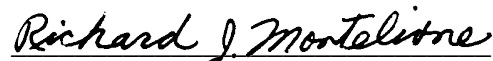
After hearing testimony from James Holiber, Chief Counsel to the plaintiff, and John O'Connell, personally and as principal of the defendant corporation, arguments of respective counsel, reviewing the exhibits entered into evidence, and after due consideration herein, the court finds that the plaintiff proved that it is owed rent from between September 2016 and November 2017 at \$1,400.00 per month in the total amount of \$21,000.00 (15 months x \$1,400.00), but plaintiff failed to adequately prove the value of the vacant lot pursuant to RPAPL § 601 subsequently; however, the court will use the rental amount as the measure of damages under RPAPL § 601 for additional damages between December 2017 and March 2018, the date of the new lease, of \$5,600.00 (4 months x \$1,400), together with statutory interest from June 1, 2017, an intermediate date, and therefore it is

ORDERED AND ADJUDGED, that the plaintiff's first cause of action for possession of the premises is dismissed as moot because the parties stipulated that the defendant is no longer in possession and acknowledges no legal right to possession and the plaintiff acknowledges its possession; and it is further

ORDERED AND ADJUDGED, that plaintiff 20 Rewe Street Ltd., located at 885 Conklin Street, Farmingdale, NY 11735, have and recover judgment against the defendants John O'Connell and O'Connell Contracting Corp., residing or located at 85-25 68th Road, Suite 1D, Rego Park, New York 11374, upon the plaintiff's second and third cause of action, the total sum

of \$26,600.00 for damages sustained and for which damages are thus fixed, together with the costs of the action to be taxed by the Clerk of the court, if authorized by statute, in the amount of _____, and interest from June 1, 2017 of _____, for a total sum of \$_____ and said Clerk is hereby directed to enter judgment in favor of the foregoing plaintiff and against the defendants for said sum.

ENTER


Richard J. Montelione, A.J.S.C.

(Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020).

Judgment entered this day

of

Clerk