98-48 Queens Blvd LLC v Parkside Mem. Chapels, Inc.
2020 NY Slip Op 34487(U)
August 24, 2020
Civil Court of the City of New York, Queens County
Docket Number: L&T 50942/20
Judge: Sally E. Unger
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[* 1]

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS: NONHOUSING PART 52

Index No. L&T 50942/20
Motion Cal.# Motion Seq.# 1 & 2
Papers Submitted on 8/10/20

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98-48 QUEENS BLVD LLC as to an undivided 88% Interest and ELITE PROMOTION SYSTEMS, INC. As to an undivided 12% interest, as TENANTS IN COMMON and successor in interest to ADMIRAL REALTY ENTERPRISES, L.P. formerly known as ANDON REALTY ENTERPRISES, L.P., Owner,

Petitioner,

-against-

PARKSIDE MEMORIAL CHAPELS, INC., a New York corporation, as successor in interest to Mowry Buick, Inc. and Robert Mowry, the tenant, by Assignment of the Lease dated September 15, 1959 Affecting The ENTIRE BUILDING and Improvements consisting of approximately 2,500 square feet with 70 linear feet of frontage, together with all Rooms; and the ENTIRE CONCRETE SLAB consisting of Parking Area surrounding the Building; together consisting of the ENTIRE LOT being the Premises known as and situated at 98-48 QUEENS BOULEVARD also known as 98-40/48 QUEENS BOULEVARD formerly known as 92-46/48 Queens Boulevard, in REGO PARK, QUEENS COUNTY, NEW YORK 11374 and having a Tax map designation of Block 3086, Lot 29,

Respondent-Tenant,

BLINDS TO GO (U.S.) INC., a Delaware corporation, doing business as BLINDS TO GO also known as BLINDS TO GO INC., Store #216;

"John Doe" * and "Jane Doe"*,

Respondent(s)–Undertenant(s).

*Names of Respondents being fictitious and unknown to Petitioner; persons intended being in possession of the premises herein described

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DECISION AND ORDER

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

	Papers Numbered
Notice of Motion & Affts.	1
Afft in Opposition	2
Opp & Cross Motion	3
Reply & Opp to Cross Motion	4
Add'l Affidavit/Affirmation	5,6,7

Upon the foregoing cited papers and after oral argument, the Decision/Order on petitioner's motion for use and occupancy at the holdover rate of 150% of the last lease

rate of $28,688.08 and the respondent Parkside Memorial Chapels, Inc.'s cross-motion to dismiss the instant petition based upon an alleged lack of subject matter jurisdiction and because the respondents' vacatur of the subject premises is as follows:

Petitioners are the owners of the commercial premises located at 98-48 Queens Boulevard also known as 98-40/48 Queens Boulevard formerly known as 92-46/48 Queens Boulevard, in Rego Park, New York 11374 (hereinafter "subject premises"). Respondent Parkside Memorial Chapels, Inc., (hereinafter "Parkside" or "respondent") is the commercial tenant of the subject premises. Blinds To Go (U.S.) Inc., (hereinafter "Blinds to Go" or "sublessee") is the undertenant of Parkside. The parties' predecessors-in-interest executed a lease dated September 15, 1959, which was assigned, amended and extended over time, such that the last lease term expired on December 31, 2019 with the petitioner as landlord and the respondent as tenant. Parkside came into possession of the subject premises through a lease assignment in 1971. The sublessee came into possession of a portion of the subject premises by its sublease with Parkside dated November 30, 1998.

On January 15, 2020, petitioner commenced this classic holdover summary eviction proceeding against the respondent and its sublessee (hereinafter collectively "respondents") seeking to recover possession of the subject premises, together with related relief. On February 3, 2020 the parties first appeared before this Court and the respondents obtained an adjournment to February 24, 2020 for the purpose of interposing their answers. Since neither had previously done so, Parkside and Blinds to Go were both given an extension of time to February 7, 2020 to interpose their respective answers. Blinds to Go failed to interpose an answer and is therefore in default with a deemed denial of the allegations in the petition. Parkside interposed its answer on the deadline date and raised numerous affirmative defenses.

Settlement discussions proved unsuccessful and on February 24, 2020, the case was then set for trial which was to be conducted on April 1, 2020. By April 1st, the operations of the courts throughout New York State had already ceased due to the global pandemic of Covid-19. However, the petitioner made the instant motion prior to the cessation of court operations, which was then left in limbo. Once court operations resumed, Parkside brought on the instant cross-motion.

Discussion

By motion dated March 5, 2020, the petitioner seeks use and occupancy pursuant to RPAPL §745 at the holdover rate under the lease provisions, as well as payment of outstanding and additional rent attributable to past due real estate taxes. The holdover rate is 150% of the last monthly rent reserved in the expired lease. Parkside cross-moves to dismiss the petition, on the theory that both respondents surrendered the subject premises and therefore, the proceeding was thereby rendered moot and the court was divested of jurisdiction. Parkside also maintains that the petitioner is relegated to a plenary action for damages outside this Court's jurisdiction. Oral argument on the instant motion and cross-motion was conducted on August 6, 2020 and August 10, 2020. Thereafter, the motions were submitted for the court's decision.

[* 3]

The portion of petitioner's moving papers which seeks an order for ongoing use and occupancy at the holdover rate recites the facts with respect to nonpayment of base rent and is inappropriately predicated on an attorney's affirmation. Recognizing that issue is most appropriately supported by an affidavit of the petitioner's principal or its bookkeeper or managing agent, the deficiency was cured in the affidavit of the property manager, Lisa Byrus sworn to on the 3rd day of August, 2020. Nonetheless, the respondent failed to dispute the authenticity of either lease amendment, which sets forth the amount of monthly rent and the obligation of holdover rent at the rate of 150% of the last monthly rent reserved in the expired lease. Moreover, because RPAPL §745, as amended, provides that such an order can only be prospective, the amount which was due and unpaid at the time the instant motion was served and through the date of this decision must be held in abeyance until trial. The issue regarding the respondent's responsibility for additional rent attributable to allegedly unpaid real estate taxes was not addressed directly by Ms. Byrus and will remain an issue for trial as well.

The petitioner's position is that the respondents did not vacate and surrender the subject premises. According to the petitioner, Parkside as well as Blinds to Go are still in possession. Therefore, the petitioner asserts that the respondent remains obligated for use and occupancy to date. The petitioner maintains under its interpretation of the amended lease, the surrender of legal possession requires the respondent and its sublessee to return possession by "removing all of their effects, as if the lease had not been made". In furtherance of petitioner's claim, petitioner asserts that the respondent is responsible to obtain the recovery of possession from its sublessee, not the petitioner. The petitioner also insists that numerous effects of the respondent and sublessee remain in or on the subject premises. Additionally, petitioner claims that during respondent's tenancy, a wall was constructed by a third party with the permission or condonation of the respondent, which encroaches approximately 6 feet into the subject premises and runs about 100 feet, along the length of the western perimeter of the subject premises.

For its attempt to defeat the motion for use and occupancy, Blinds to Go submitted an affidavit of its president, Stephen Shiller. Mr. Shiller makes various assertions pertaining to the legal sufficiency of the moving papers. Although he repeatedly opines on the legal requirements of motion practice, he does not purport to be an attorney. On the contrary, his legal conclusions are premised upon what his attorneys have advised him to be the law. This is wholly inappropriate and has no place in motion papers.

Mr. Shiller does not dispute the legitimacy of the lease amendments or the existence of the sublease. Moreover, the sublessee is reminded it is in default, having never interposed an answer and has no defense to the instant proceeding. Therefore, this defense of a surrender is not one which is properly before the Court. Yet, the temerity of the sublessee to justify the condition in which his party left the subject premises, if they vacated, by attempting to shift the responsibility of Blinds to Go to the petitioner, based upon some rumor of demolition is also inappropriate.

In their opposition to the motion, Parkside alleged the amount is onerous and the petitioner should be limited to use and occupancy at the last lease amount, because while petitioner refers to it as holdover use and occupancy, it is interim use and occupancy that is actually sought by petitioner.* The respondent does not dispute ownership or the validity of the lease amendments. The amount of the last monthly rent reserved under the lease was $28,688.08.

Parkside also seeks to defeat the motion on the basis that it did not meet the 60-day requirement of the relevant statute. Pursuant to the revised RPAPL §745, a motion for use and occupancy can be made after the passage of 60 days from the first appearance in court by both parties. The 60 days is measured with an offset of any time for which the petitioner sought an adjournment. An order for use and occupancy can only be made prospectively under this statute. While the respondent is correct in that the petitioner made its motion returnable 2 days early, to deny the motion on this basis would be elevating form over substance, which this Court is unwilling to do. Moreover, more than 120 days have passed since the initial return date of the motion and the adjournments were not at the behest of the petitioner.

In opposition to the application for use and occupancy at the holdover rate, respondent's counsel cites cases which purportedly stand for the proposition that use and occupancy should be set at the last lease rate. However, *Vermeer Owners v. Guterman*, 78 NY2d 1114, 578 NYS2d 128 (1991) is a case involving a cooperative apartment unit and allegations of violations of the Martin Act, breach of fiduciary duty and fraud. Nowhere in that case is the phrase use and occupancy even mentioned. Moreover, *Soho Dev. Corp. v. Dean & DeLuca, Inc.*, 131 AD2d 385, 517 NYS2d 498 (1st Dept 1987) also relied upon by the respondent, was a case in which the court did not award use and occupancy at the rate of the rent reserved under the expired lease. Rather, the court awarded use and occupancy in the amount of rent that was offered by the landlord under a proposed new lease. These erroneous case references can only lead the Court to the conclusion that respondent's concern over a waste of judicial resources is disingenuous.

Although the respondent cited case law erroneously, his premise is partially correct, i.e. that interim use and occupancy **can** be set by the court using the last lease rate or the fair market value of the subject premises. However, the formula used is at the discretion of the court. *Alphonse Hotel Corp v. 76 Corp.*, 273 AD2d 124, 710 NYS2d 890 (1st Dept 2000). Utilizing the last lease rate in determining the monthly use and occupancy is merely a guidepost. The court may consider the last lease rate. *43rd Street Deli, Inc. v. Paramount Leasehold, L.P., 107 AD3d 501, 967 NYS2d 61(1st Dept 2013)* However, it is not a requirement. *Mushlam, Inc. v. Nazor, 80 AD3d 471, 916 NYS2d 25 (1st Dept 2011)*. To determine fair market value would require a hearing in which an expert

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* The Court cannot ignore the irony of the respondent claiming holdover rent at the rate of 150% of the previous monthly rent is onerous, if in fact the respondent set holdover rent for its sublessee at the rate of 200%, as alleged by petitioner.

witness would have to testify regarding comparable rents in the vicinity. Rather than delay this proceeding further by conducting such a hearing at this juncture, and considering the parties have agreed to a short trial date, it is more prudent to set interim use and occupancy at the last rent rate reserved under the expired lease.

Ultimately, a tenant is liable for use and occupancy for the entire holdover period, from the lease expiration through the date of vacatur of the subject premises. *501 East 87th St. Realty Co., LLC v. Ole Pa Enterprises Inc.*, 304 AD2d 310, 757 NYS2d 31 (1st Dept 2003); *Beacway Operating Corp. v. Concert Arts Socy*, 123 Misc 2d 452, 474 NYS2d 227 (Civ. Ct NY 1984); *2641 Concourse Co. v. City University of New York*, 137 Misc2d 802, 522 NYS2d 775 (Ct of Claims 1987). It is undisputed that they are also obligated to remove their undertenant and that where an undertenant holds over, they are viewed the same as if a tenant had done so. *Stahl Associates Co. v. Mapes*, 111 AD2d 626 (1st Dept 1985). What is disputed here is whether there has been an actual vacatur. Therefore, it is necessary to determine when and whether the vacatur occurred in the course of a trial at the point in which final use and occupancy is being determined, if the parties are unable to agree on a date of vacatur. To determine whether holdover use and occupancy can be awarded, the threshold issue of whether there has been a holdover must be resolved first. Therefore, while it is certainly permissible for the petitioner to seek use and occupancy at this stage of the proceeding, the aspect of the petitioner's motion which is seeking holdover rate use and occupancy is premature.

Respondent's Cross-Motion

In support of respondent's cross-motion, it now argues *de novo* that both Parkside and Blinds to Go surrendered the subject premises and therefore, petitioner's claim is limited to damages caused as a result of the timing and the actual actions of its vacatur. Respondent's answer is devoid of any such affirmative defense. The reason for this apparently is that the alleged vacatur occurred post-petition. While there may or may not be some basis for respondent's arguments, the court does not review de novo defenses in motion papers. Additionally, a disposition of this factual issue would not be appropriate in motion practice. The respondent's defenses must first be raised as affirmative defenses, which was not done in the case at bar. Nor could this defense have been appropriately raised in an answer, because the defense to a petition must be limited to the facts as they existed at the time of the service of the petition. In the case at bar, the alleged surrender occurred in July 2020, approximately 6 months after the commencement of the instant proceeding.

Moreover, while respondent's counsel challenged the ability of petitioner's counsel to submit an affirmation alleging factual statements, Parkside's cross-motion is premised upon an affidavit of a nonparty, whose basis for his knowledge is a mystery. Mr. Yassky fails to set forth whether he was affiliated with either or both the respondent and the sublessee. If he was so affiliated, he fails to state when that relationship commenced. He makes numerous factual pronouncements with respect to tenancy, occupancy, purported surrender, damages, construction of an encroaching wall, etc., but never states how he obtained this information. He simply states he is the Vice President of PMC Owner's Corp, the successor-in-interest to the respondent. Further, while he

makes repeated legal pronouncements, he does not purport to be an attorney. On the contrary, his legal conclusions are premised upon what "his attorneys" have advised him to be the law. And yet, the respondent's law firm is not representing Mr. Yassky or his corporation. For all these reasons, his affidavit has no probative value.

The respondent argues in furtherance of its cross-motion that once the issue of possession is resolved during the pendency of the summary eviction proceeding, considering the court's jurisdictional limit, the case should be transferred to Supreme Court. However, it is beyond this Court's authority to remove a case to Supreme Court. CPLR §325. *In re Daniel* 181 Misc2d 941, 694 NYS2d 913 (Civ. Ct NY1999).

Parkside also posits that both respondents are not making a legal claim to possession of the subject premises. Therefore, according to respondent, no marshal is necessary, and the matter should be dismissed. Both respondents were putting forth this premise during oral argument on the motions. Both counsel for respondents were seemingly unaware of the existence of a distinction between a marshal taking legal possession and a marshal conducting an eviction or that it is the landlord's prerogative to choose one over the other.

> The distinction between an eviction and a legal possession is that in an eviction both the tenant and his or her personal property are removed from the premises, where in a legal possession the tenant is removed from the premises and his or her property remains under the care and control of the landlord as bailee for the tenant. Marshals are required to perform whichever service is desired by the landlord and may not restrict themselves to legal possessions.
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> In the event the landlord demands that the premises be turned over in "broom clean" condition, the marshal must conduct an eviction. The marshal must hire a bonded moving company which is licensed by the New York State Department of Transportation. The marshal must also direct the moving company to deliver the items removed from the premises to a warehouse licensed by the Department of Consumer Affairs pursuant to Title 20, Chapter 2, subchapter 28 of the New York City Administrative Code. *New York City Marshals Handbook of Regulations Ch. IV, §6-4.*

For the same reason, both the petitioner and the respondent are wrong in their approach to their respective pending motion and cross-motion; that is because a trial is necessary to resolve the issues raised in both the motion and the cross-motion. For the issue of holdover use and occupancy to be ripe, there must first be a determination of the core issue of possession of the subject premises. Similarly, only once the possessory issue has been resolved can the issue of the type and extent of damages be determined, i.e. whether they are limited to use and occupancy, whether they include use and occupancy at the holdover rate and whether other damages may have been caused. As of this moment, the possessory issue has not been resolved. Moreover, if

there was a valid surrender during the pendency of this proceeding, i.e. post-petition, its relevance would be limited to the date of the surrender to aid in determining the relevant time frame for which holdover use and occupancy may be awarded. Simply put, a trial is necessary before these issues are ripe.

The respondent asserts that since it is no longer in possession of the subject premises, the court lacks jurisdiction over the proceeding. However, the possessory issue in this proceeding relates to the time of the service of the petition. This Court obtained jurisdiction through personal service of the pleadings. Once jurisdiction is obtained, it is not divested, merely because a respondent vacates. To follow respondent's argument would permit every respondent ever served with process in a summary eviction proceeding to evade the court's purview by simply returning their keys to their landlord. Clearly, this is a fallacious premise.

As set forth in *Ballard v HSBC Bank USA*, 6 NY3d 658, 815 NYS2d 915 (2006), "[T]he question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it" *(Matter of Fry v. Village of Tarrytown*, 89 NY2d 714, 718, 658 NYS2d 205 [1997])." Contrary to respondent's assertion, this Court has subject matter jurisdiction to hear the proceeding pursuant to New York City Civil Court Act §204.

As determined in *Tricarichi v Moran,* 38 Misc3d 31, 959 NYS2d 372 (App. Term, 9th & 10th Jud. Dists.2012),

> Contrary to the District Court's ruling, the fact that tenants had surrendered possession was not a basis to dismiss the petition. While a surrender of possession after the commencement of a summary proceeding terminates the tenancy (see Patchogue *33 Assoc. v. Sears, Roebuck & Co., 37 Misc.3d 1, 951 N.Y.S.2d 314 [App. Term, 9th & 10th Jud. Dists.2012]), it does not divest the court of jurisdiction over the proceeding (*Sowalsky v. MacDonald Stamp Co.*, 31 AD2d 582, 294 NYS2d 1016 [1968]; *Bahamonde v. Grabel*, 34 Misc.3d 58, 62, 939 NYS2d 226 [App. Term, 9th & 10th Jud. Dists.2011]; *Lido Realty, LLC v. Thompson*, 19 Misc.3d 144[A], 2008 NY Slip Op. 51105[U], 2008 WL 2286011 [App. Term, 2d & 11th Jud. Dists.2008].

In the instance case, a landlord tenant relationship existed between the parties from the outset. Since there was the existence of a landlord tenant relationship and the instant proceeding was commenced prior to respondent's surrender, the Court has the right to award a money judgment after surrender of possession. *Tricarichi v Moran, supra.*

The respondent herein has asserted numerous conclusory affirmative defenses in its answer. Such pleading is wholly inappropriate. In fact, the respondent's affirmative defenses are comprised solely of one sentence conclusory statements without any specific allegations at all, making them inadequate as a matter of law. *Bank of Am., N.A. v. Seon Yeong Kang*, 2011 WL 5295014, 201 NY Slip Op. 32828(U)(NY Sup). Also *see Becher v. Feller*, 64 AD3d 672, 884 NYS2d 83 (2d Dept., 2009), *Cohen Fashion Optical, Inc. v. V&M Optical, Inc.*, 51 AD3d 619, 858 NYS2d 260 (2nd Dept., 2008), *Brody v. Saroka*, 173 AD2d 421, 570 NYS2d 57 (2nd Dept., 1991). The only

affirmative defense which has any substance is respondent's second affirmative defense. Therefore, the Court sua sponte strikes the first, third, fourth, fifth and sixth affirmative defenses.

On August 10, 2020, at the conclusion of oral argument on the instant motion and cross-motion, Parkside's attorney was granted limited leave to submit case law by the close of business that day. Instead, respondent's counsel submitted an unauthorized affirmation in which several cases were cited. Without the benefit of an additional oral argument, the Court would be left to wonder which case was being supplied to support which proposition of the respondent. Therefore, in reaching its decision, the Court has considered the case law and the affirmation. Nonetheless, these cases are largely inapposite to the issues presented. For instance, *LaRicolter v. Viera* 13 HCR 290A, n.o.r. L&T Index No.#72386/84 involved a scenario where the court had already restored the petitioner to possession. Possession has not been adjudicated in the case at bar. *Coello v. Nehring*, 17 HCR 139C, NYLJ 4/21/89, 24:2 is similarly not relevant to the case at bar. In *Coello*, the petitioner was a building superintendent who claimed they were illegally locked out, and yet had all the keys to the premises in dispute but one when the proceeding commenced. Once the court viewed the photographs demonstrating the petitioner was still in possession at trial and the super obtained the last key, the case was dismissed.

Pacific Carlton Dev. Corn v. 752 Pacific LLC, 17 Misc3 1102(A), 851 NYS2d 59 (Kings 2007) was a case in which a landlord sought use and occupancy from a party who had never occupied the subject premises and as to the one which had been in occupancy, the court found that it had granted use and occupancy previously. That case bore no relevance to the issues at bar. With respect to *Peat v. Dorilas*, 22 Misc3d 142(A), 881 NYS2d 365 (AT 9&10 2009), that was an appeal of a small claims action, where the court's standard is different and in which the lower court prorated use and occupancy. The notion of prorating has not been raised as an issue here. Additionally, where a tenant vacated after the first of the month and the relevant lease required rent payments in advance, on the first of the month, the tenant has been held liable for use and occupancy for the entire month. *ATM One, L.L.C. v. Allicino*, 190 Misc2d 181 737 NYS2d 812 (Dist. Ct Nass 2001).

Finally, Parkside requested that the sublessee should also be required to pay use and occupancy to the petitioner, if the Court is going to award it use and occupancy. The relief suggested by Parkside would require a cross-motion, with the submission of its sublease to Blinds to Go. Parkside failed to make such a cross-motion. Moreover, the petitioner did not seek use and occupancy in its moving papers and would not be entitled to it in any event, because privity of contract would be necessary. *Teft v. Apex Pawnbroking & Jewelry Co., Inc.*, 75 AD2d 891, 428 NYS2d 52 (2nd Dept. 1980). If the petitioner and Blinds to Go have privity of contract, which is unlikely, it has not been demonstrated by any of the parties. For all these reasons, the Court does not award use and occupancy against Blinds to Go.

Conclusion

The petitioner's motion is granted pursuant to RPAPL §745, to the extent that the petitioner is awarded pendente lite or interim use and occupancy against Parkside at the last lease rate of $28,688.08 per month prospectively, commencing September 1, 2020 and thereafter during the pendency of this proceeding, without prejudice to seeking the holdover rate at the conclusion of trial, if the petitioner prevails. The petitioner's claim for additional rent attributable to real estate taxes in the amount of $54,647.84 is preserved for trial, where the documentation can be appropriately authenticated. The respondent's cross-motion to dismiss is denied. The trial of this matter shall be conducted on the agreed upon date of September 1, 2020 with via Skype for Business at 2:15 pm.

This constitutes the Decision and Order of this Court.

August 24, 2020

SALLY E. UNGER, J.C.C./A.J.S.C.