

**Booston LLC v 35 W. Realty Co., LLC**

2020 NY Slip Op 35770(U)

November 18, 2020

Supreme Court, New York County

Docket Number: Index No. 654308/2019

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD
Justice

PART IAS MOTION 49EFM

BOOSTON LLC,
Plaintiff,
- v -
35 WEST REALTY CO., LLC,
Defendant.

INDEX NO. 654308/2019
MOTION DATE 10/23/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57

were read on this motion to/for ENFORCEMENT

Upon the foregoing documents, this motion is decided in accordance with the attached decision and order.

11/18/2020
DATE

O. Peter Sherwood
O. PETER SHERWOOD, J.S.C.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

----- X  
**BOOSTON LLC,**

**Plaintiff,**

**DECISION AND ORDER  
Index No.: 654308/2019**

- v -

**Motion Sequence No. 002**

**35 WEST REALTY CO., LLC,**

**Defendant.**

----- X  
**O. PETER SHERWOOD, J.:**

In the Supreme Court, plaintiff’s request for a *Yellowstone* injunction was denied and the TRO vacated, the court deciding that plaintiff’s default (failure to obtain and maintain public liability insurance in the amount of \$2,000,000) was not curable (*see* NYSCEF Doc. No. 30). Plaintiff appealed and obtained an interim stay enjoining any termination of the lease or eviction proceedings pending decision on the appeal. The interim stay was granted “on condition that plaintiff-tenant shall pay use and occupancy in the amount of the monthly rent” (*see* NYSCEF Doc. No. 36). In addition, plaintiff was required to maintain a bond in the amount of \$1,000,000 and to perfect its appeal for the March 2020 Term (*see id*). In its decision, dated July 16, 2020, the Appellate Division affirmed the decision of the Supreme Court but noted that “denial of a *Yellowstone* injunction does not resolve the underlying merits of the dispute or whether the default requires termination of the lease (*see* NYSCEF Doc. No. 46).

Defendant-landlord now seeks to draw down funds from the bond to cover unpaid use and occupancy for the period April through October 2020 in the aggregate amount of \$362,931.98 and attorney fees. It also seeks entry of a judgment of ejectment removing plaintiff from the premises plus interest on the use and occupancy amount. As an alternative, defendant-

landlord requests an order directing payment of use and occupancy in the sum of \$49,515.39 per month commencing in November 2020 (*see* NYSCEF Doc. No. 43, ¶ 2).

Plaintiff opposes the request to strike its pleadings and enter judgment on default. It claims the request for an order directing payment of use and occupancy is barred by RAPL § 745 (2)(a). That law, which was amended in June 2019, provides:

In the city of New York:

(a) In a summary proceeding upon the second of two adjournments granted solely at the request of the respondent, or, upon the sixtieth day after the first appearance of the parties in court less any days that the proceeding has been adjourned upon the request of the petitioner, counting only days attributable to adjournment requests made solely at the request of the respondent and not counting an initial adjournment requested by a respondent unrepresented by counsel for the purpose of securing counsel, whichever occurs sooner, the court may, upon consideration of the equities, direct that the respondent, upon a motion on notice made by the petitioner, deposit with the court sums of rent or use and occupancy that shall accrue subsequent to the date of the court's order, which may be established without the use of expert testimony [emphasis added by plaintiff]

Plaintiff adds that the landlord cannot recover against the bond on its “unproven and unrelated use and occupancy claim (*see* NYSCEF Doc. No. 57, p. 8). Ignoring the unambiguous conditions on which the interim stay pending the appeal was granted, plaintiff argues that there has been no finding that the stay was improperly granted and that “the use and occupancy claimed to be owed do not constitute damages sustained as a result of the stay” (*id.*).

The motion shall be granted in part. The Appellate Division granted an interim stay, thereby enabling plaintiff to remain in possession of the premises “on condition that plaintiff tenant shall pay use and occupancy” (emphasis added) (NYSCEF Doc. No. 36). As an additional condition, the court required plaintiff to maintain the bond which bond expressly provides for payment if it is finally determined that plaintiff was not entitled to an injunction (*see* NYSCEF Doc. No. 50). The Appellate Division having affirmed the decision of the Supreme Court

denying a *Yellowstone* injunction, there has been a final decision that plaintiff is not entitled to an injunction. Accordingly, the landlord is entitled to payment of use and occupancy through October 2020 in the amount of \$362,931.98 and \$49,515.39 per month commencing November 1, 2020 and continuing until possession is returned to the landlord, plus interest.

The request for a judgment of ejectment is denied as the Appellate Division held that the underlying merits of the dispute are unresolved as is the issue of whether the default requires termination.

The request for an award of attorney fees is denied without prejudice.

The landlord shall settle order on 5 days' notice.

Counsel shall appear for a conference held by Microsoft Teams on December 1 at 11:30am.

**DATED: November 18, 2020**

**ENTER,**

  
**O. PETER SHERWOOD J.S.C.**