

Ruru & Assoc. LLC v Weinberg Holdings, LLC

2022 NY Slip Op 30405(U)

January 31, 2022

Supreme Court, New York County

Docket Number: Index No. 653321/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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RURU & ASSOCIATES LLC,
Plaintiff,

- v -

WEINBERG HOLDINGS, LLC, JB MAX, INC., and THE
WATERING HOLE OF 2ND AVE. CORP.,

Defendants.

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INDEX NO. 653321/2020
MOTION DATE 12/29/2020, 01/06/2022
MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40

were read on this motion for INTERIM RELIEF.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to CONSOLIDATE/JOIN FOR TRIAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion by plaintiff for interim relief (seq. no. 001), by order to show cause dated December 29, 2021 (NYSCEF Doc. No. 22), and the motion by defendants to transfer a Civil Court proceeding (Ruru & Assocs. LLC v Weinberg Holdings LLC, L&T index No. 52416/2019 [Civ Ct NY County]) to this court (seq. no. 002), by order to show cause dated January 6, 2022 (NYSCEF Doc. No. 86), are consolidated for disposition and determined as follows.

Background:

Plaintiff is the owner of the building located at 68 Second Avenue, a/k/a 68-70 Second Avenue, a/k/a 86 East 4th Street, New York, New York 10003 (the "Building"). Plaintiff seeks an order, pursuant to Real Property Law §§ 220 and 601, directing defendants/tenants to pay use

and occupancy *pendente lite* for continuing to occupy the first floor and basement of the Building (the “Premises”). Plaintiff commenced this action seeking, *inter alia*, a declaration: (i) that defendants failed to exercise a lease renewal option, that the lease expired, and that defendants are month-to-month tenants; and (ii) that defendants are required to pay two times the Fixed Rent in effect immediately preceding the expiration of the lease commencing May 31, 2019. Defendants dispute plaintiff’s claims and assert that they properly renewed the lease and that their fixed and additional monthly rent for the premises is \$16,894.21.

Relative to this motion practice: defendants do not deny that they did not pay \$16,894.21 per month in rent since on or about April 2020. Therefore, plaintiff now moves for interim relief directing defendants to remit use and occupancy payments, *pendente lite*, at \$16,894.21 per month.

Plaintiffs further move for an order directing defendants to post a bond in the full amount of all rent not paid since April 2020, asserted by plaintiffs to be \$152,047.89 (from April 2020 through December 2020). Defendants, which operate bars at the Premises, have asserted as a defense in this action that they are not responsible for rent arrears during the period of COVID-19 governmental shutdowns of non-essential businesses.

Plaintiff is Entitled to Use and Occupancy:

Defendants occupy the Premises but have not paid any use and occupancy. Their last payment to plaintiff occurred in March 2020. As such, Plaintiff is entitled to use and occupancy *pendente lite*. Real Property Law § 220 provides that:

The landlord may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled.

A tenant does not have the right to occupy space without compensation therefor merely because it is litigating with the landlord regarding other incidents of the leasehold (*see, Lispenard Partners, Inc. v 35 Smoke & Grill, LLC*, 74 AD3d 496 [1st Dept 2010]; *Oxford Towers Co., LLC v Wagner*, 58 AD3d 422 [1st Dept 2009]). Even if a tenant, as in this action, disputes the amount of rent owed, it cannot continue to occupy the leased premises without payment (*see, Levinson v 390 W. End Assocs., L.L.C.*, 22 AD3d 397 [1st Dept 2005]). The court has the inherent authority to direct the payment or deposit of rent pending the outcome of litigation (*see, Cane v Herman*, 209 AD2d 368 [1st Dept 1994]).

The complaint in this action alleges a monthly rent amount of \$23,210.67 (*see, Complaint* ¶ 64). Defendants dispute that sum, pointing to a Fair Market Value Report submitted by them which concludes with a lower rent (arguing the validity of their renewal option exercise and arguing the correctness of their Fair Market Value Report) in the amount of \$16,894.21 (Affidavit of Gina Weinberg [NYSCEF Doc. No. 25] ¶ 9). The point of plaintiff's motion for use and occupancy is – putting aside for the moment the litigable controversy regarding whether defendants' Fair Market Value applies, or is correct: at a bare minimum, they should be required to pay use and occupancy in that amount (\$16,894.21) during the pendency of such controversy.

The court concurs with plaintiff's position and, therefore, defendants are directed to pay ongoing use and occupancy at the rate of \$16,894.21 per month, the very amount that defendants concede is owed from them.

Defendants Should Not be Required, at this Time, to Post a Bond for Arrears Alleged by Plaintiff to be \$152,047.89:

Plaintiff's application for the imposition of a bond in the sum of \$152,047.89 is based on a straight calculation of rent, at \$16,894.21 (*see, supra*), for the period commencing April 2020 through December 2020 (nine months). But one of the prominent defenses asserted by

defendants both in their answer and in opposition to the plaintiff's motion for a bond is that they should not be responsible for rent during the COVID-19 shutdown period (*see*, NYSCEF Doc. Nos. 4, 25). Discovery is currently underway in this case, and this court has not been called upon (yet) to finally assess the substantive validity of defendants' COVID-19-related defenses. Not having yet reached a point in these proceedings where such final assessment can be made, the court refrains at this time from directing defendants to procure a bond for the full amount of rent measured by a period of time that spans the COVID-19 shutdown period. Plaintiff may renew this prong of its motion at a later point in these proceedings.

Consolidation in this Court of the Civil Court Proceeding is Unwarranted:

Defendants apply for consolidation here of plaintiff's Civil Court Landlord/Tenant nonpayment proceeding (*Ruru & Assocs. LLC v Weinberg Holdings LLC*, L&T index No. 52416/2019 [Civ Ct NY County]) on the ground that the two matters involve common questions of law or fact (CPLR 602). However, plaintiff draws the court's attention to the fact that the Civil Court proceeding has concluded with entry of final judgments on April 29, 2019 (*see*, NYSCEF Doc. Nos. 89-92), *which* judgments were predicated on a Stipulation of Settlement executed by the parties and endorsed by the Civil Court that day (*see*, NYSCEF Doc. No. 76). Accordingly, this motion is denied.

Conclusion:

Accordingly, it is

ORDERED that plaintiff's motion (seq. no. 001) for interim relief is granted to the extent that defendants are jointly and severally directed to remit monthly use and occupancy payments to plaintiff, *pendente lite*, in the sum of \$16,894.21 per month, and the motion is otherwise denied without prejudice to renew; and it is further

ORDERED that defendants' motion (seq. no. 002) for consolidation is denied.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

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|-----------------------|--------------------------|---------------------------------|-------------------------------------|-----------------------|
| <u>1/31/2022</u> | | | <u>LOUIS L. NOCK, J.S.C.</u> | |
| DATE | | | | |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART |
| | | <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | REFERENCE |