255 Butler Assoc. LLC v 255 Butler, LLC
2022 NY Slip Op 33204(U)
September 21, 2022
Supreme Court, Kings County
Docket Number: Index No. 511560/15
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

255 BUTLER ASSOCIATES LLC,

Plaintiff, Decision and order

- against - Index No. 511560/15

255 BUTLER, LLC, ARIEL AKKAD, NATHAN AKKAD, SOLOMON AKKAD and BEJAMIN AKKAD,

Defendants, September 21, 2022

PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking to modify the use and occupancy stipulation negotiated between the parties dated November 23, 2015. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On June 5, 2019 the Appellate Division held that the use and occupancy order negotiated between the parties on November 23, 2015 was deemed a court order (see, 255 Butler Associates LLC v. 255 Butler LLC, 173 AD3d 651, 102 NYS3d 259 [2d Dept., 2019]). The court further held, citing earlier authority, that "where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief" (id). The Appellate Division reversed an earlier determination modifying the use and occupancy amount finding that the court incorrectly considered the value to the plaintiff and should have considered "the fair market rental value of the subject property, namely, the amount that a prospective commercial tenant would be willing to pay to lease the subject property from the defendant" (id). The Appellate Division concluded that "in the event that the plaintiff is successful at trial

and it is determined that the plaintiff did not default on its obligations under the lease, the plaintiff may be entitled to recover damages, including 'a refund or rent credit'" (id). Thus, the award of 'use and occupancy' is not final but rather it is pendente lite and subject to change upon the conclusion of a trial (Morris Heights Health Center Inc., v. DellaPietra, 38 AD3d 261, 834 NYS2d 9 [1st Dept., 2007]).

In its opposition, the defendants concede the Appellate Division authorized plaintiff's entitlement to a refund or a rent credit but stresses the plaintiff can avail itself of a rent credit for the remaining years of the lease and that there is no need (and no basis) for a refund of the escrow payments to date or a suspension of further payments. That argument contradicts further arguments presented by the defendants in an email to the court where the defendants assert that in the event the Yellowstone injunction has now lapsed "the 'absolute and unconditional' obligation to pay rent and taxes under the Net Lease would appear to be reactivated" (see, Email sent by Stuart Blander Esq., on behalf of defendants, Tuesday, September 20, 2022 at 5:34 PM [NYSCEF Doc. #]. Notwithstanding the inconsistent arguments presented the defendants arguments wholly ignore the impact of the Appellate Division decisions, first striking their answer and second concluding the plaintiff never defaulted its obligations pursuant to the lease. The defendant's strained arguments simply refuse to contend with the consequences of the Appellate Division decisions.

Thus, there are two distinct reasons the tenant should be

entitled to a return of the escrow funds paid to date and a suspension of future use and occupancy payments. First, the Appellate Division's clear directive the plaintiff is entitled to such refund. The defendant's argument that awarding the escrow funds prior to a judgement is improper fails to appreciate the escrow funds, and only the escrow funds, are distinct from other damages sought by the plaintiff and will be the subject of a broader motion. It is true the Appellate Division made no distinction between escrow funds (which perhaps did not even exist when the ruling was decided) and other rents paid, however, regarding a judgement, and the amount of such judgement, requires careful consideration of future rent credits as noted and an examination of the potential WeWork lease and any issues the defendant may present in opposition. No such analysis is required concerning the escrow funds which remain available.

Second, surely the striking of the defendant's answer and counterclaims and a determination the plaintiff did not breach the lease and acted with due diligence as decided by the Appellate Division in two separate decisions, demands a modification of the use and occupancy agreement (see, 255 Butler Associates LLC v. 255 Butler LLC, 2022 WL 3904649 [2d Dept., 2022] and 255 Butler Associates LLC v. 255 Butler LLC, 2022 WL 3904616 [2d Dept., 2022]). As the court observed in 255 Butler Associates LLC v. 255 Butler LLC, 173 AD3d 651, 102 NYS3d 259 [2d Dept., 2019]) in cases where it would be unjust or inequitable to enforce a stipulation then the court may afford relief. Considering the changed circumstances, as noted, wherein the defendant's complaint has been dismissed and there has been an

Appellate determination there was no basis for the defaults which precipitated this lawsuit, it would be inequitable to maintain any funds in escrow and to further require any payments of use and occupancy during the continuation of the litigation.

Thus, the motion of the plaintiff seeking recovery of all the funds placed in escrow is granted. The defendant's shall return all the current escrow funds to the plaintiff within ten days of receipt of this order. Further, the plaintiff's request seeking to suspend use and occupancy payments during the pendency of the litigation is granted.

Lastly, this decision does not address any other issues regarding other refunds, credits and an ultimate judgement. The defendant's arguments that this motion should be denied because of claims the lease will be anticipatorily breached by the tenant are unsubstantiated arguments that do not alter the analysis of this court's conclusion. In the event the plaintiff or any party commits breaches of the lease appropriate relief may be sought. Likewise, arguments the plaintiff has an obligation to continue to pay rent, if use and occupancy is eliminated, and thus, this court, by imposing this ruling implicitly approves of such future breaches of not paying rent, must be rejected for three reasons. First, the existence of any future breaches is speculative as noted. Second, the Appellate Division explicitly authorized such refunds or credits in the event the plaintiff prevailed. Lastly, it is grossly unfair to demand either the payment of use and occupancy for the past seven years followed by the resumption of rent, as if the intervening lawsuit,

precipitated solely by the defendant, never happened. This is particularly true since the Appellate Division has concluded there was no basis for initiating the lawsuit and that therefore the plaintiff was surely harmed by the delay resulting in the inability to develop the property. The defendant's arguments, that the lease should be resumed as if no damage has been appreciated by the plaintiff at all is untenable. The parameters regarding the resumption of rent, if at all, are surely issues that must be explored, however, that issue has no bearing on the plaintiff's right to a return of the escrow money and a cessation of future use and occupancy.

Therefore, as noted, the plaintiff's motion seeking the return of all the escrow funds and the cessation of any use and occupancy going forward is granted. All other issues remain undecided.

So ordered.

ENTER:

DATED: September 21, 2022
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC