

558 Seventh Ave. Corp. v PKNY IV LLC
2022 NY Slip Op 34032(U)
November 29, 2022
Supreme Court, New York County
Docket Number: Index No. 160550/2020
Judge: William Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY

PART

23

Justice

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558 SEVENTH AVE. CORP.,

INDEX NO. 160550/2020MOTION DATE 01/21/2021

Plaintiff,

MOTION SEQ. NO. 001

- V -

PKNY IV LLC, GRAB & GO CONVENIENCE LLC, SID
SOHAIL, JOHN DOE, ABC CORP

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 40, 42, 44

were read on this motion to/for

PENDENTE LITE

In this action for ejectment and to recover damages for use and occupancy, plaintiffs 558 Seventh Ave. Corp., Two Lions Capital LLC, and 200 West 40 LLC (Landlord) move, by order to show cause, for an order: (1) pursuant to Real Property Law § 220 and Real Property Actions and Proceedings Law § 601, directing defendants Grab & Go Convenience LLC (Grab & Go) and Sid Sohail (Sohail) to pay use and occupancy pendente lite in the monthly amount of \$45,000, or not less than \$23,175 per month, for their ongoing possession of the subject premises; and (2) directing defendants to post a bond for use and occupancy arrears from October 2020 through January 2021 in the sum of \$180,000, or not less than \$92,700.

Defendant PKNY IV, LLC (Tenant) is the tenant of the ground floor store known as 200b West 40th Street, New York, New York (NYSCEF Doc No. 20, Schmoekler aff, ¶ 5).

By way of background, in a *Yellowstone* action filed by Tenant against Landlord, Justice Jennifer G. Schecter determined that Grab & Go and Sohail were “responsible for use and occupancy (U&O) based on actual use of the premises, committing to pay U&O as a condition of

the injunctive relief sought and based on the Management Agreement [between PKNY and Grab & Go] invoked” (*PKNY IV, LLC v 558 Seventh Ave. Corp.*, 2020 WL 6041393, *2 [Sup Ct, NY County 2020]). Justice Schecter awarded Landlord a judgment “against Grab & Go and Sohail, jointly and severally, in the amount of \$202,500 representing use and occupancy for the period January through September 2020, plus 9% pre-judgment interest from a reasonable intermediate date of April 30, 2020 without prejudice to recovery of any additional use and occupancy that may be owed for future months” (*id.*).

Landlord now argues that it is entitled to use and occupancy pendente lite, and that the court should direct defendants to post a bond for past arrears. Landlord contends that Grab & Go and Sohail continue to unlawfully occupy the premises and have not remitted any use and occupancy since February 2020.

Grab & Go and Sohail do not contest that they are currently occupying the space, but assert that: (1) the court should hold a hearing to determine use and occupancy because the building does not have a valid certificate of occupancy; (2) Sohail is not personally liable under Limited Liability Company Law § 609; and (3) Landlord has unclean hands because the space was illegally rented and misrepresented to Tenant that the space could be rented as a Papaya King restaurant. These arguments are unpersuasive.

“The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant” (*Eighteen Assoc., LLC v Nanjim Leasing Corp.*, 257 AD2d 559, 559 [2d Dept 1999]). “Rather, an occupant’s duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is imposed by law for the purpose of bringing about justice without reference to the intention of the parties” (*id.* at 559-560 [internal quotation marks and citations omitted]). “The reasonable value of use and

occupancy is the fair market value of the premises after the expiration of the lease” (*Mushlam Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]). The court has broad discretion in awarding use and occupancy pendente lite, and may look to the amount of rent paid under a prior lease between the parties (43rd St. Deli, Inc. v Paramount Leasehold, L.P., 107 AD3d 501, 501 [1st Dept 2013]; *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]).

Pursuant to article 42 of the subject lease between Landlord and Tenant, the rent for the period September 1, 2019 through August 31, 2020 was \$22,500 per month, and the rent for the period September 1, 2020 through August 31, 2021 was \$23,175 per month (NYSCEF Doc No. 22 at 7). Justice Schecter has already determined that Grab & Go and Sohail are liable for use and occupancy. Thus, in exercising its discretion, the court finds that Landlord is entitled to \$23,175 per month in use and occupancy pendente lite. Landlord’s request of \$45,000 per month, however, would result in a windfall to Landlord. The court’s setting of this rate is without prejudice to either party with respect to the ultimate determination of any issue in this action (see *Wasserman v Gordon*, 24 AD3d 201, 203 [1st Dept 2005]). Considering that defendants have not paid any rent since February 2020, Landlord is also entitled to an order directing the posting of an undertaking by defendants for the amount of past use and occupancy, as requested in Landlord’s motion (see *Esposito v Larig*, 174 AD3d 574, 576 [2d Dept 2019]).

Contrary to defendants’ contention, a hearing is not required because the award is not final and any necessary adjustments can be made at the time of trial (see *Morris Hgts. Health Ctr., Inc. v DellaPietra*, 38 AD3d 261, 261 [1st Dept 2007], *lv dismissed* 9 NY3d 887 [2007]). To the extent that defendants argue that the premises did not have a valid certificate of occupancy, in a commercial setting, the mere absence of a certificate of occupancy does not relieve them of the obligation to pay use and occupancy (see *Silver v Moe’s Pizza*, 121 AD2d

376, 378 [2d Dept 1996])). Moreover, insofar as defendants assert that because of the COVID-19 pandemic they should be excused from paying use and occupancy during the relevant period, this argument is unavailing (*see Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 577 [1st Dept 2021] [commercial tenant was not entitled to a rent abatement due to the COVID-19 pandemic]).

The court has considered defendants' remaining arguments and finds them to be without merit.

Accordingly, it is

ORDERED that the motion (sequence number 001) of plaintiffs seeking use and occupancy pendente lite is granted and defendants Grab & Go Convenience LLC and Sid Sohail are directed to pay use and occupancy pendente lite in the amount of \$23,175 per month for said defendants' ongoing possession of the subject premises; and it is further

ORDERED that defendants Grab & Go Convenience LLC and Sid Sohail are directed to post a bond for use and occupancy arrears from October 2020 through January 2021 in the amount of \$92,700 no later than December 16, 2022.

<u>11/29/2022</u>			
DATE		WILLIAM PERRY, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☒ GRANTED ☐ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE