

**601-609 W. 175th St. Corp. v Discount Linen &
Beyond Inc.**

2023 NY Slip Op 30729(U)

March 13, 2023

Supreme Court, New York County

Docket Number: Index No. 154396/2021

Judge: Mary V. Rosado

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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 154396/2021

601-609 WEST 175TH STREET CORP.,

MOTION DATE 10/26/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

DISCOUNT LINEN & BEYOND INC., XYZ CORP.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, there being no opposition, and good cause having been shown, Plaintiff 601-609 West 175th Street Corp.'s ("Landlord") motion for summary judgment on its third cause of action seeking use and occupancy retroactively and *pendente lite* from Defendant Discount Linen & Beyond Inc. ("Tenant") is granted.

Landlord commenced this action in May of 2021 seeking declaratory judgment, ejection, use and occupancy, and attorneys' fees based on Tenant's possession of the premises and failure to pay either rent or use and occupancy (NYSCEF Doc. 1). Tenant filed its Answer with Counterclaims on June 21, 2021 (NYSCEF Doc. 5). In a prior action commenced in Housing Court (*see* 601-609 West 175th Street Corp. v Discount Linen & Beyond Inc. Index No. L&T 52117/2020), Hon. Leslie A. Stroth determined that there exists a valid lease between Landlord and Tenant, but the fair market value for rent needed to be determined in a declaratory judgment action in Supreme Court (NYSCEF Doc. 26). Landlord now seeks summary judgment and an award of use and occupancy both *pendente lite* and retroactively (NYSCEF Doc. 40).

A court has broad discretion in awarding use and occupancy (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]). “The award of use and occupancy during the pendency of an action or proceeding ‘accommodates the competing interests of the parties’ in affording necessary and fair protection to both.” (*MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). The award of use and occupancy is proper where it would be manifestly unfair for a defendant to remain in possession of the subject premises without paying rent (*10E53 Owner LLC v Bruderman Asset Management*, 202 AD3d 609 [1st Dept 2022]). Use and occupancy may be awarded retroactively and prospectively (*East 4th St. Garage v Estate of Berkowitz*, 265 AD2d 249 [1st Dept 1999]). In determining the reasonable value of use and occupancy due, the rent reserved under the lease is probative (*Mushlam, Inc. v Nazor*, 80 AD3d 471 [1st Dept 2011]). Indeed, where the amount sought is the monthly rent under the last lease between the parties, that may be considered the reasonable value of use and occupancy due (*Marbru Associates v White*, 114 AD3d 554 [1st Dept 2014]).

Here, Landlord seeks an award of use and occupancy arrears and use and occupancy *pendente lite* at the monthly rent set out in the prior lease, which is \$9,785.80 per month. Based on precedent, this is a fair value at which to set use and occupancy. Moreover, Tenant has not submitted any opposition to the payment of use and occupancy at this level, nor has Tenant disputed the fact that it has not paid any rent since August 2019. Thus, Landlord’s motion is granted. Tenant is directed to pay Landlord use and occupancy \$9,785.80 per month *pendente lite*. Further, Tenant shall post a bond to secure potential liability for past due use and occupancy for accrued arrears from August 2019 through February 2023, with disbursement pending final resolution of this matter. To the extent Tenant may dispute this rate after issuance of this Decision

and Order, the remedy for any over or underpayment of any use and occupancy is a speedy trial
(*Gap, Inc. v 44-45 Broadway Lease Co., LLC*, 191 AD3d 549 [1st Dept 2021]).

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Accordingly, it is hereby,

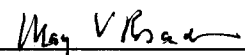
ORDERED that Plaintiff 601-609 West 175th Street Corp.'s is awarded summary judgment on its third cause of action for use and occupancy, and that Defendant Discount Linen & Beyond Inc. pay use and occupancy *pendente lite* in the amount of \$9,785.80 per month from March 1, 2023 until it has properly surrendered the premises or this matter has been discontinued, whichever comes sooner; and it is further

ORDERED that Defendant Discount Linen & Beyond Inc. shall post a bond in the amount of \$450,597.18¹ reflecting past due use and occupancy from August 2019 through February 2023 no later than June 1, 2023; and it is further

ORDERED that on or before March 29, 2023, the parties shall submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed preliminary conference order, they shall appear for an in-person preliminary conference with the Court on April 5, 2023 at 9:30 a.m. in 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

<u>3/13/2023</u> DATE					 HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

¹ Included in this amount is \$39,596.59, reflecting arrears which accrued as of August 2019, which Landlord requests on this motion and which Tenant has not opposed.