

N.Y. Park N. Salem Inc. v ADBH 22nd Floor Inc.

2023 NY Slip Op 33303(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 656616/2020

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

-----X

N.Y. PARK N. SALEM INC.,

Plaintiff,

- v -

ADBH 22ND FLOOR INC.,

Defendant.

-----X

INDEX NO. 656616/2020

MOTION DATE 03/15/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 77, and 78 were read on this motion for PENDENTE LITE RELIEF.

LOUIS L. NOCK, J.

Upon the foregoing documents, the plaintiff’s motion for pendente lite use and occupancy is granted in part for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 51-52, 62, 69) and the exhibits attached thereto, in which the court concurs, to the extent summarized herein. The court assumes familiarity with the facts and circumstances of this case as set forth in its prior order of October 25, 2022 (NYSCEF Doc. No. 46).

For the avoidance of doubt, the court sets forth below the applicable provisions of the parties’ lease. Paragraph 43(A)(2) of the lease provides, in part, that

Tenant acknowledges that no use or occupancy of the demised premises as contemplated in Article 42 hereof shall take place until such time as owner has delivered the temporary certificate of occupancy authorizing such use and occupancy. So long as tenant has delivered the sign-offs before the end of the six month period, if owner has failed to deliver the temporary certificate of occupancy within thirty (30) days of delivery of the sign-offs, tenant shall receive a rent abatement equal to one day of fixed rent for each day of delay until the temporary certificate of occupancy is received.

(Lease, NYSCEF Doc. No. 26, ¶ 43[A][2].)

Article 42 defines the prescribed use and occupancy of the demised premises as “consistent with the condition, level of operation and prudent business and management practices applicable to high quality spa engaged in providing Nano color Infusion, high quality spa services, beauty, health and wellness related services and office administrative use in mid-town Manhattan and for no other purpose” (*id.*, ¶ 42[A]).

Plaintiff seeks use and occupancy at the lease rate of \$22,854.73 per month (*id.*, ¶ 40[B][5]), beginning in March 2023. Plaintiff asserts that defendant is using the leased premises while refusing to pay rent. In opposition to the motion, defendant asserts that plaintiff has failed to comply with a condition precedent to defendant’s obligation to pay rent, namely plaintiff’s obligation to obtain a certificate of occupancy which allows defendant to operate its business as contemplated by Article 42 of the lease. In reply, plaintiff effectively argues that regardless of the absence of a certificate of occupancy, which plaintiff does not dispute, defendant’s failure to obtain sign-offs from the New York City Department of Buildings in the time required by the lease precludes any rent abatement, and tenant is in default of the payment of rent.

“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” (Real Property Law § 220). “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]). Use and occupancy is a concept rooted in equity, separate and apart from a tenant’s obligation to pay rent in accordance with the lease, in recognition of the fact that “[i]t is manifestly unfair that [a tenant] should be permitted to remain in possession of the subject premises without paying for their use” (*id.*). Thus, a court

may consider the provisions of the lease in determining whether and for how much to award use and occupancy (*Synod of Bishops of Russian Orthodox Church Outside of Russia v Preschool of America (USA) Inc.*, 214 AD3d 466, 466-67 [1st Dept 2023]), but is not required to award the entire monthly rent if the circumstances dictate otherwise (*The Gap, Inc. v 44-45 Broadway Leasing Co., LLC*, 191 AD3d 549 [1st Dept 2021] [“We disagree with defendant that the motion court abused its discretion in setting use and occupancy at a rate of approximately 90% of the lease rates”]). Further, if a tenant is ultimately found to be the prevailing party at the end of the action, “it may be provided with a refund or rent credit” (*43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501, 502 [1st Dept 2013]).

Here, there is no question that defendant is making at least some use of the demised premises. While arguing that the absence of a certificate of occupancy prevents it from utilizing the entire space as contemplated by the lease, defendant’s principal admits in her affidavit that she has “been able to book some appointments,” specifically seeing “two to three clients approximately every two, utilizing only one of the office spaces in the premises” (Bossavy Sur-Reply Aff., NYSCEF Doc. No. 77, ¶¶ 30-31). Thus, defendant should be required to compensate plaintiff for its use of the space, independent of its obligation pay rent, simply as a matter of equity.

Yet while defendant owes plaintiff something, it would be equally unjust to require defendant to pay the full rent for the space when plaintiff has failed to fulfill its own obligations under the lease, specifically, to obtain a certificate of occupancy (Lease, NYSCEF Doc. No. 26, ¶ 43[A][2]). Defendant asserts, and plaintiff does not dispute, that defendant cannot legally operate in the premises as specified in the lease without a certificate of occupancy, and it is equally undisputed that the monthly rent specified in the lease encompasses the use of the entire

floor. Awarding plaintiff use and occupancy equal to the entire monthly rent would render meaningless plaintiff's obligation to obtain a certificate of occupancy, and a court may not, through interpretation, render any provision of a contract meaningless (*Warner v Kaplan*, 71 AD3d 1, 5 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]). While defendant does not deny that certain sign-offs from the Department of Buildings were obtained outside of the period specified in the lease, reading the lease to absolve plaintiff of the obligation to obtain a certificate of occupancy under these circumstances would lead to an absurd result (*Rubin v Baumann*, 148 AD3d 556, 556 [1st Dept 2017]). Indeed, where there is no certificate of occupancy for the contemplated use by the tenant, use and occupancy could be subject to denial entirely (*e.g.*, *Forrester v American Package Co., Inc.*, 55 AD3d 787, 788 [2d Dept 2008] ["the Supreme Court correctly denied the defendant's request for a pendente lite award because there is no certificate of occupancy permitting residential use of the premises"]).

Ultimately, the propriety and amount of an award of use and occupancy are committed to the court's discretion (*The Gap, Inc.*, 191 AD3d at 549). In consideration of the circumstances of this case, the requirements of the lease, and the fact that defendant is using only a small portion of the demised premises, and in order to fulfill the balancing of equities inherent in an award of use and occupancy (*MMB Assocs.*, 169 AD2d at 422), the court awards use and occupancy in the amount of 10% of the monthly rent set forth in the lease. For the period of March 2023 through August 2023, the monthly rent is set at \$22,854.73 per month (Lease, NYSCEF Doc. No. 26, ¶ 40[B][5]). Beginning September 1, 2023, through August 31, 2024, the monthly rent increases to \$24,246.32 (*id.*, ¶ 40[B][6]). Accordingly, the amount of use and occupancy shall be set at \$2,285.47 per month for March 2023 through August 2023, and \$2,424.63 for September 2023 through August 2024, if necessary. Defendant shall pay to

plaintiff the total sum of \$16,137.45, representing the total owed for March 2023 through September 2023, on or before September 29, 2023. Thereafter, on the fifteenth day of the month, beginning on October 15, 2023, the monthly amount of \$2,424.63. Either party may seek amendment of this order based upon a change of circumstances related to defendant's present use of the premises.

Accordingly, it is hereby

ORDERED that the motion is granted in part; and it is further

ORDERED the defendant ADBH 22nd Floor Inc. shall pay interim use and occupancy to plaintiff during the pendency of this action in the amount of:

- a. \$2,285.47 per month from March 2023 through August 2023; and,
- b. \$2,424.63 per month from September 2023 through August 2024 (Lease, NYSCEF Doc. No. 26, ¶ 40[B][5-6]); and it is further

ORDERED that such interim use and occupancy payments shall be remitted to plaintiff on or before the 15th day of each month during the pendency of this action, excepting the first payment which shall be due on or before September 29, 2023, said first payment being for the total amount for March 2023 through September 2023, unless and until this action is terminated; and it is further

ORDERED that plaintiff's acceptance of the aforementioned payments as interim use and occupancy during the pendency of this action, and defendant's payment of same, is without prejudice and without waiver, and subject to a full reservation, of all of the parties' rights in this action.

This constitutes the decision and order of the court.

ENTER:



<u>8/29/2023</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"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE