

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

2024 NY Slip Op 31899(U)

May 30, 2024

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 12/06/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, and 105

were read on this motion to

RENEW

LOUIS L. NOCK, J.S.C.

In this commercial landlord-tenant action, plaintiff landlord seeks to modify this court's order of August 29, 2023, setting the rate of use and occupancy to be paid to plaintiff by defendant tenant (NYSCEF Doc. No. 80). For the reasons set forth in the following memorandum decision, plaintiff's motion is granted, but upon renewal the court adheres to its prior order on use and occupancy. The court assumes familiarity with the facts and circumstances of this matter as set forth in the prior use and occupancy order (*id.*), and the order dated October 25, 2022 (NYSCEF Doc. No. 46).

In the prior use and occupancy order, the court set the rate of use and occupancy at 10% of the lease rate, on the grounds that while defendant owed plaintiff some amount for its minimal use of the space, plaintiff had failed to satisfy its own obligation obtain a certificate of occupancy allowing defendant to operate its business as contemplated by the lease. To wit:

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]).

(NYSCEF Doc. No. 80 at 3-4.) In closing, the court allowed either party to seek modification of the order "based upon a change of circumstances related to defendant's present use of the premises" (*id.* at 5).

Plaintiff now comes to the court having obtained a temporary certificate of occupancy for the premises on November 2, 2023, which plaintiff asserts allows the use of the premises as contemplated by Article 42 of the Lease. As set forth in said lease article, "[defendant] shall use and operate the demised premises in a manner consistent with the condition, level of operation and prudent business and management practices applicable to [a] high quality spa . . . in mid-town Manhattan and for no other purpose" (lease, NYSCEF Doc. No. 102, § 42 [A]). The lease further provides that "no use and 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" (*id.*, § 43 [A] [2]). The temporary certificate of occupancy submitted by plaintiff provides that the permitted uses of the demised premises are "Mechanical and/or electrical equipment rooms" and "Offices" (temporary certificate of occupancy, NYSCEF Doc. No. 96). As the temporary certificate does not allow for the use set forth in Article 42, the rent abatement set forth in the lease remains in effect. To hold otherwise would deny tenant the benefit of its bargained for premises, as it cannot lawfully operate its business absent a certificate of occupancy that permits the use described in the lease. Landlord

cannot satisfy its obligation simply by obtaining a certificate that does not permit plaintiff to operate its business; the court sees this as the sort of absurd result that courts are strictly instructed to avoid in interpreting contracts (*Rubin v Baumann*, 148 AD3d 556, 556 [1st Dept 2017]). If plaintiff wishes to obtain an award of use and occupancy in the full amount provided by the lease, then it must satisfy its own obligations to allow tenant to make use of the premises as provided by the lease.

Defendant, in its opposition to the motion, asserts that it is entitled to a credit against any rent assessed in the amount that it had previously paid while the rent was abated. The calculation of plaintiff's damages and any set-off, if any, is not presently before the court. 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" (*MMB Assocs. v Dayan*, 169 AD2d 422 [1st Dept 1991]). Neither party suggests that defendant has stopped making use of the premises, or conversely that defendant has expanded its use of the premises since the court's award of use and occupancy. Because defendant continues to use the premises, an award of use and occupancy remains appropriate. To the extent defendant believes it is entitled to a rent abatement, "it may be provided with a refund or rent credit" at the close of the action (*43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501, 502 [1st Dept 2013]). Either party may seek further amendment of the use and occupancy order based upon a change of circumstances related to defendant's present use of the premises.

Accordingly, it is hereby

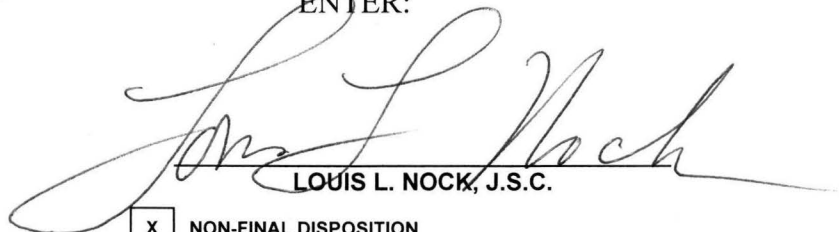
ORDERED that plaintiff's motion to renew its application for an award of use and occupancy is granted for the reasons set forth above, but upon renewal the court adheres to its prior decision; and it is further

ORDERED that defendant shall continue to pay use and occupancy as directed in the court's order dated August 29, 2023 (NYSCEF Doc. No. 80); 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, are 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:


LOUIS L. NOCK, J.S.C.

5/30/2024
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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