

Vanita Fine Art & Antiques, Inc. v Falu LLC

2024 NY Slip Op 32001(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 153029/2022

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

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VANITA FINE ART & ANTIQUES, INC.,

Plaintiff,

- v -

FALU LLC, FJLU, LLC, ARLUS OWNER, LLC, 829
MADISON WE TIC OWNER LLC

Defendants.

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INDEX NO. 153029/2022

MOTION DATE 01/26/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 136

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this commercial landlord-tenant action, defendants move to vacate the *Yellowstone* injunction granted in plaintiff’s favor on June 6, 2023, and plaintiff cross-moves for an order modifying same.

BACKGROUND

Defendants are the current owners and landlords of the building located at 19 East 69th Street, New York, NY 10021 (the building). Pursuant to a lease dated May 1, 2013 (NYSCEF Doc No 8), plaintiff, a fine arts and antiques gallery, leased from defendants’ predecessor-in-interest the third floor of the building (the premises) for a period of five years, with options to renew, which were exercised.

On March 14, 2022, defendants served plaintiff with a fifteen-day notice of default indicating that plaintiff owed a total of \$144,629.68 in outstanding rent and other charges from August 2021 to present (NYSCEF Doc No 9). Plaintiff brought this action on April 7, 2022,

seeking a *Yellowstone* injunction on the grounds that the charges demanded were inaccurate, and that the notice had been served as part of defendants' orchestrated effort to harass and improperly oust plaintiff from the building (NYSCEF Doc No 1).

The June 6, 2023 decision and order granting the *Yellowstone* injunction enjoined defendants from terminating plaintiff's tenancy based on the March 14, 2022 notice, on the condition that plaintiff post a bond and pay use and occupancy on a timely basis (NYSCEF Doc No 35). Notably, the order did not specify the amount to be paid in use and occupancy. Plaintiff posted the required bond (NYSCEF Doc No 36) and began making monthly payments of \$15,221.30 (which sum represents \$15,071.30 in rent and \$150 in fuel charges).

On July 21, 2023, defendants moved to vacate the *Yellowstone* injunction on the basis that plaintiff failed to pay rent arrears for the period from April 2022 through May 2023 (the pre-injunction period). By decision and order dated September 26, 2023, their motion was denied, and the court reiterated that plaintiff was obligated to pay use and occupancy on an ongoing basis starting from the date of the June 6, 2023 order (the post-injunction period) and was not required to make retroactive payments (MS #2, NYSCEF Doc No 76).

Defendants now allege that plaintiff stopped making payments from September 2023, onward. Defendants therefore move to vacate the *Yellowstone* injunction based on plaintiff's failure to comply with the use and occupancy payment obligations imposed by the June 6, 2023 order. Upon vacatur, defendants also seek a money judgment representing the unpaid use and occupancy for both the pre- and post-injunction periods; or, in the alternative, granting defendants a money judgment representing the unpaid use and occupancy for the post-injunction period and ordering the release of the bond to defendants (NYSCEF Doc No 86).

Plaintiff opposes and cross-moves for an order modifying the June 6, 2023 order to lift the use and occupancy payment requirement due to a change in circumstances. Specifically, plaintiff alleges that the premises cannot be used for their intended purposes under the lease because of construction work defendants began in June 2023, and that defendants have removed and failed to restore plaintiff's exterior signage, ground floor vitrine space, and intercom system. Additionally, plaintiff notes that the June 6, 2023 order did not specify the amount of use and occupancy to be paid (NYSCEF Doc No 107). In the affirmation of plaintiff's president, Michail Theodoropoulos, plaintiff also alleges that defendants failed to credit it for a pandemic-related rent abatement and for capital improvements to the building made by plaintiff's affiliate; and overcharged plaintiff for real estate taxes (NYSCEF Doc No 95).

In reply, defendants argue that section 4 of the lease precludes plaintiff from making a claim for constructive eviction or seeking any setoff or reduction of rent due to construction. They also argue that the pandemic-related rent abatement only covers the period from August 2021 to January 2022, whereas plaintiff was ordered to make timely use and occupancy payments starting in June 2023; and that the lease provides that rent and additional rent must be paid without any setoff or deduction, which includes reimbursement for any capital improvements made by plaintiff or its affiliate (NYSCEF Doc No 136).

DISCUSSION

“[A] dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's property gratis” (*Levinson v 390 W. End Assoc., LLC*, 22 AD3d 397, 403 [1st Dept 2005]; *Oxford Towers Co., LLC v Wagner*, 58 AD3d 422, 423 [1st Dept 2009] [“[Tenants] have no right to continue to occupy the apartment rent-free”]). Plaintiff correctly notes that the order granting the *Yellowstone* injunction failed to specify the amount of use and occupancy to be paid.

However, it may reasonably be presumed that use and occupancy is in “the amount of monthly rent [due] under the last effective lease between the parties” (*Marbru Assoc. v White*, 114 AD3d 554, 555 [1st Dept 2014]; see also *Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011] [“In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative”]; *Oxford Towers*, 58 AD3d at 423 [“Under the last lease in effect between the parties, the rent was \$3,084.71 per month. [Tenants] must continue to pay this amount pendent lite”]). Moreover, it appears that plaintiff did, in fact, understand this to be the appropriate amount, as evidenced by its use and occupancy payments in the amount of \$15,221.30 (NYSCEF Doc No 97 [“Tenant in good faith shall remit payment for June 2023 in the amount of \$15,221.30 (\$15,071.30 Monthly Rent pursuant to the Lease + \$150.00 Fuel Reimbursement)”]). Rather than unilaterally ceasing its payments when defendant’s construction project became an issue, plaintiff should have sought an order modifying the *Yellowstone* injunction based on changed circumstances, as it did in its cross-motion.

Since the June 6, 2023 order did not specify the amount of use and occupancy to be paid by plaintiff, plaintiff’s failure to pay from September 2023 onward will not be considered a violation of the order meriting vacatur of the *Yellowstone* injunction. However, plaintiff will be ordered to compensate defendants for unpaid use and occupancy for those months, and to continue making monthly use and occupancy payments going forward.

Turning to the amount of use and occupancy: As already noted, “[i]n determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative” (*Mushlam, Inc. v Nazor*, 80 AD3d 471, 472 [1st Dept 2011]). “[U]nder the last effective lease between the parties,” rent and fuel charges totaled \$15,221.30 per month,

and therefore, use and occupancy will be presumed to equal this amount (*Marbru Assoc.*, 114 AD3d at 555).

Plaintiff argues that the actual value of use and occupancy is \$0.00 based on the condition of the premises due to defendants' construction activities. However, as noted by defendants, section 4 of the lease provides that "[t]here shall be no allowance to Tenant for diminution of rental value . . . arising from Owner or others making repairs, alterations, additions or improvements in or to any portion of the building" (NYSCEF Doc No 8). It goes on to explicitly state: "It is specifically agreed that Tenant shall not be entitled to any setoff or reduction of rent by reason of any failure of Owner to comply with the covenants of this or any other article of this lease" (*id.*). Identical provisions have been deemed enforceable by the First Department (*Fieldstone Capital Inc. v Ryan & Conlon, LLP*, 104 NYS 3d 823, 824 [1st Dept 2019] [giving "proper effect to the clear terms of the commercial lease, an arm's length agreement entered into by sophisticated parties"]; see also *Ivy League Med. Realty Corp. v ET & AK Billing Inc.*, 2009 NY Slip Op 32606[U] [Sup Ct NY Co 2009] ["paragraph 4 of the lease specifically bars any claim for a rent reduction based on disruptions due to construction"]). Additionally, while plaintiff asserts that "Landlord has removed Tenant's exterior signage and its ground floor vitrine space, *in violation of the Lease*" (NYSCEF Doc No 107 [emphasis added]), plaintiff does not identify any such provision.

Plaintiff's argument concerning the alleged COVID-19-related rent abatement agreement will not be considered here, as this decision and order is concerned only with the amounts claimed for the post-injunction period, whereas the abatements applied to the pre-injunction period of August 2021 to January 2022. Similarly, plaintiff's argument concerning alleged real estate overcharges will not be considered at this time since this decision and order is concerned

only with use and occupancy payments, which do not include real estate taxes. Finally, plaintiff argues that it should be reimbursed for the \$2.5 million its affiliate expended in capital improvements to the building based on a lease amending agreement between plaintiff and defendants' predecessor-in-interest dated August 5, 2021 (NYSCEF Doc No 64). However, plaintiff has not adequately shown that the assignment of the lease to defendants included an assignment of this amendment; in fact, there are two tenant estoppel certificates—dated February 3, 2023 and May 15, 2023—in which plaintiff attested that “[t]here are no amendments to the Lease other than the ‘Lease Amending Agreement’ . . . dated *as of January 1, 2018*” (NYSCEF Doc Nos 67-68 [emphasis added]).¹ Thus, plaintiff failed to demonstrate that it is entitled to any kind of abatement, reimbursement, or reduction in the amount of use and occupancy.

Accordingly, plaintiff will be directed to pay use and occupancy in the amount of \$15,221.30 per month, representing the monthly rent and fuel charges.

CONCLUSION

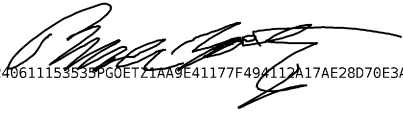
Based on the foregoing, it is

ORDERED that defendants' motion to vacate the June 6, 2023 Yellowstone injunction is denied; and it is further

ORDERED that plaintiff's cross-motion to modify the decision and order dated June 6, 2023 is granted to the extent that plaintiff is directed to pay to defendants use and occupancy in the amount of \$15,221.30 per month by the first day of each month and the cross-motion is otherwise denied; and it is further

¹ These certificates were not submitted as part of MS #3.

ORDERED that plaintiff is directed to pay to defendants \$152,213.00, representing unpaid use and occupancy payments for the months of September 2023 through June 2024 within 20 days of the date of this order with notice of entry.


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6/11/2024

DATE

PAUL A. GOETZ, 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