

**PGREF I 1633 Broadway Land, L.P. v ABM Parking
Servs., Inc.**

2025 NY Slip Op 30909(U)

March 14, 2025

Supreme Court, New York County

Docket Number: Index No. 659492/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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PGREF I 1633 BROADWAY LAND, L.P, 1633 BROADWAY
OWNER I LP, 1633 BROADWAY OWNER II, LP

Plaintiff,

INDEX NO. 659492/2024

MOTION DATE 12/17/2024

MOTION SEQ. NO. 001

- v -

ABM PARKING SERVICES, INC., ABM INDUSTRIES
INCORPORATED,

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 29, 35

were read on this motion to/for JUDGMENT - MONEY.

Upon the foregoing documents, plaintiff’s order to show cause is granted in part.

ABM Parking Services, Inc. (“Defendant”) operates a parking garage out of premises owned by PGREF I 1633 Broadway Tower, L.P. and 1633 Broadway Owner II, L.P. (collectively, “Plaintiff”). Plaintiff brought the underlying proceeding alleging that Defendant was in arrears to the amount of \$1,494,588.81. Since 2023, Plaintiff has been conducting structural repairs to the premises. Defendant argues that they have been deprived of a number of parking spaces as a result. In September of 2023, Defendant told Plaintiff that they were going to be abating their monthly rent payments by \$52,981.79 in order to account for the unusable parking spaces, among other such correspondence regarding the amount of such rental payments.

Plaintiff brings the present order to show cause, seeking an order directing Defendant to pay use and occupancy at the full monthly rate in the lease (\$222,044.58) *pendente lite* and depositing the alleged rental arrears into escrow. Defendant opposes. For the reasons that follow, Defendant will be ordered to pay 50% of the monthly rate in the lease to Plaintiff directly as use

and occupancy and 50% into escrow pending further order from this Court. Defendant will also be ordered to pay the rental arrears amount into escrow pending further order from this Court.

Landlords Are Entitled to Use and Occupancy Pendente Lite

The main dispute here between the parties is not whether use and occupancy should be paid, but rather what amount and if there should be an abatement for the structural repairs. Defendant argues that any reasonable use and occupancy amount should take into account the impact of the repairs. They cite to the abatement provision in the Lease as support for their decision to reduce the monthly amount they pay to Plaintiff. This provision states that “there shall be no allowance to tenant for diminution of rental value [because of Landlord repairs] provided Landlord performs all such work in accordance with the terms of this Lease.” Their argument is that because the Lease Section 6.01 requires that the repairs must not “materially and adversely affect the operation of the Demised Premises” by more than a de minimis amount, and here Defendant alleges that they have been materially impacted for years, the garage repairs are not being conducted in accordance with the lease and therefore the abatement provision does not preclude a diminution in rent value. However, there is certainly ambiguity in the lease, as section 2.01 does not permit an abatement “except as expressly provided in [the] lease.

Courts routinely award landlords use and occupancy *pendente lite*, often in the amount specified in the lease. *See, e.g., Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 A.D.3d 575, 578 (1st Dept. 2021). The purpose of such awards is to balance the competing interests of the parties and “preserve the status quo until a final judgment is rendered.” *MMB Assoc. v. Dayan*, 169 A.D.2d 422, 422 (1st Dept. 1991). If there are errors in the assessment of use and occupancy against a party, the most appropriate remedy is a speedy trial where meritorious claims of error would provide the party with a refund. *East 4th St. Garage, Inc. v. Estate of Berkowitz*, 265

A.D.2d 249, 249 (1st Dept. 1999). In *Andejo*, the First Department affirmed a trial court award of interim use and occupancy in the amount of the base rent, explaining that “[t]o the extent the base rents do not represent fair valuations of current market rates, tenants’ remedy is a speedy trial.” *Andejo Corp. v. South St. Seaport Ltd. Partnership*, 35 A.D.3d 174, 174 (1st Dept. 2006); *but see Gap, Inc. v. 44-45 Broadway Leasing Co., LLC*, 191 A.D.3d 549, 549 (1st Dept. 2021) (affirming the trial court’s discretionary decision to set use and occupancy at the rate of 90% the lease amount).

But due to the long-running structural repairs that have closed off portions of the parking garage, Defendant argues that a fair market amount of use and occupancy rather than the lease base amount should apply. Plaintiff points to the abatement provision in the lease. As addressed above, there are factual issues surrounding the applicability of this provision as it requires the Landlord’s repairs to have a de minimis impact on Defendant’s business. Ambiguities in a lease about the amount of rent due each month are to be construed against the drafter. *Alphonse Hotel Corp. v. 76 Corp.*, 273 A.D.2d 124, 124 (1st Dept. 2000). Furthermore, a court has “broad discretion in awarding use and occupancy pendente lite.” *Id.* In these circumstances, the Court finds that starting in March and continuing until further order, Defendant should pay 50% of the base rent in the Lease directly to Plaintiff and 50% into an escrow account pending the resolution of this matter.

Back Rental Arrears Should Be Paid into Escrow

Plaintiff has asked that the alleged rental arrears amount, \$1,494,588.81, be paid into escrow pending further order from the Court. In *44-45 Broadway Leasing*, the First Department held that pursuant to Real Property Law and case law, it was not an abuse of discretion for the trial court to order the rental arrears deposited with the clerk of the court while the landlord and

tenant resolved their dispute. 44-45 Broadway, at 549. The Court finds that the best balance of the competing interests in this case would be for Defendant to deposit the disputed rental arrears sum to be held in escrow, pending resolution of this matter. Accordingly, it is hereby

ADJUDGED that plaintiffs' motion is granted in part; and it is further

ORDERED that defendant ABM Parking Services, Inc. pay plaintiff PGREF I 1633 Broadway Land, L.P. use and occupancy for the month of March by March 28, 2025, in the amount of \$111,022.29 to plaintiff and to the plaintiff's attorneys to hold in escrow pending further order by this Court the amount of \$111,022.29; and it is further

ORDERED that starting on April 1, 2025, and continuing on or before the first of each month until further order from this Court, defendant ABM Parking Services, Inc. pay plaintiff PGREF I 1633 Broadway Land, L.P. monthly use and occupancy in the amount of \$111,022.29 and to plaintiff's attorneys to hold in escrow pending further order by this Court the amount of \$111,022.29; and it is further

ORDERED that defendant ABM Parking Services, Inc. pay plaintiff's attorneys by April 15, 2025, the rental arrears amount of \$1,494,588.81 to be held in escrow pending further order from this Court.

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3/14/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: