

627 Second Corp. v Brasero Rest., Inc.

2026 NY Slip Op 31884(U)

April 20, 2026

Supreme Court, New York County

Docket Number: Index No. 655205/2021

Judge: Verna L. Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

INDEX NO. 655205/2021

627 SECOND CORP.,

Plaintiff,

- v -

BRASERO RESTAURANT, INC., MAURICE QUIJANO, DAN PASCALE, NORA LOUISE CONNOLLY, THOMAS J. CONNOLLY, and WILLIAM VAN ORMER, Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 2, 6, 54, 116, 117, 118, 119, 120, 121, 122, 123, 126, 132, 134, 135, 136, 137, 138, 139, 140, 141, 142, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 180, 181, 182, 183, 184, 185, 187, 188, 189, 190, 195, 196

were read on this motion to/for USE AND OCCUPANCY PENDENTE LITE

In this action, plaintiff, the owner of the premises at 627 Second Avenue, New York County, New York (the, "Premises" or "Building"), moves for an order awarding it use and occupancy pendente lite against defendants Maurice Quijano ("Quijano"), the President of Brasero Restaurant, Inc. ("Brasero"), Dan Pascale ("Pascale"), Nora Louise Connolly ("N. Connolly"), Thomas J. Connolly ("T. Connolly"), and William Van Ormer ("Van Ormer"), from January 1, 2023 to the present time.

Van Ormer cross-moves pursuant to CPLR 2201 for a stay of plaintiff's motion pending restoration of gas service as ordered in a HPD enforcement proceeding (see Newman v 627 Second Corp., Index No. HP25N000055-24 [Civ Ct., NY County]).¹

The background facts giving rise to this dispute are as follows. Plaintiff and Brasero entered into a triple net lease dated July 2, 2001 ("Lease") for the entirety of the premises, which consists of a mixed-use building with a restaurant on the main floor and six upper-floor residential apartments (NYSCEF Doc. No. 118, Lease). Pursuant to the Lease, Brasero was obligated to operate, manage, maintain, repair, and provide essential services in accordance with the terms of the Lease, and to comply with all applicable state and local laws and regulations, including those enforced by the New York City Department of Buildings ("DOB"), New York City Department of Health ("DOH"), New York City Department of Housing, Preservation and Development ("HPD"), and New York State Department of Housing and Community Renewal ("DHCR") (NYSCEF Doc. No. 117 ¶ 1-11, Weinbaum affidavit; Lease pp. 4-8).

¹ Annabel Newman ("Newman"), Van Ormer's sister, testified that she is living in his apartment and safeguarding his property while he is deployed as a United States Service Member (Air Force—National Guard). His Combat Order was submitted. Newman filed an action in Housing Court for failure of landlord/owner to provide essential services.

By a Lease Modification and Extension Agreement dated November 30, 2004, plaintiff and Brasero agreed to extend the Lease term through July 31, 2021 (NYSCEF Doc No. 54, *Lease and lease amendment*).

As set forth in the Lease, the Premises contained several residential apartments, which, according to the Lease, were “rent controlled/stabilized apartments.” (*Lease*, Section 4, ¶ 6). Brasero issued renewal leases to the individual defendants for the period of January 1, 2021, through December 31, 2022, for the following apartment units and for a monthly rent fee as follows:

Quijano (Apt. 4A):	\$545.71
Pascale (Apt. 4B):	\$551.89
N. Connolly (Apt. 3A):	\$737.11 ²
T. Connolly (Apt. 3B):	\$756.25
Van Ormer (Apt. 2B):	\$1,168.50

(*Weinbaum affidavit*, ¶ 13-21; NYSCEF Doc. No. 120, *renewal leases*.)

According to plaintiff, Brasero remained in possession after the Lease expired and vacated the Premises in December 2023 or January 2024, leaving the Building in disrepair (NYSCEF Doc. No. 183, *further Weinbaum affidavit*). The individual defendants’ renewal leases expired pursuant to their terms and they remain in possession of their apartments.

Plaintiff brings this action, alleging, *inter alia*, that Brasero breached the Lease by failing to obtain its permission to rent the residential apartments to the individual defendants, and seeks to set aside the individual defendants’ respective leases as void *ab initio*, in addition to seeking an order of ejectment, and judgment of possession, and a warrant of eviction (NYSCEF Doc No. 2, *Complaint*; NYSCEF Doc. No. 119, *Amended Complaint*).

On this motion, plaintiff seeks use and occupancy *pendente lite*. Brasero, Quijano, Pascale, Nora, and Thomas Connolly (collectively “the Brasero Defendants”) oppose. Van Ormer also opposes and cross-moves for a stay.

Plaintiff complains Quijano did not vacate or surrender Apartment 4A and asserts that the remaining residential occupants did not vacate or surrender their apartments on December 31, 2022, the date their leases expired (*renewal leases*; *Weinbaum affidavit*, ¶ 13-21). Plaintiff asserts defendants have not paid rent since January 2023 (*Amended Complaint*, pp. 6-7). Plaintiff further argues that the monthly rents set in the individual defendants’ leases constitute reasonable and lawful amounts to grant for use and occupancy.

Plaintiff argues that under the terms of the Lease, plaintiff was indemnified and held harmless from all liabilities, obligations, fines, and penalties, and that defendants were to comply with each and every state or city agency rule or regulation, all applicable laws and regulations of New York, and fulfill other duties and responsibilities (*Lease*, Articles 4, 5, 6, 9, 12, 14, 30 *et seq*).

² Although plaintiff’s moving papers claim that Nora’s monthly rent was \$632.53, the renewal lease indicates that her monthly rent was \$737.11 (NYSCEF Doc. No. 120 at 4).

Plaintiff asserts it found out Brasero had vacated the premises in or about December 2022 or January 2023, leaving the building in disrepair with defective conditions, code violations, and not in compliance with New York and city agency laws and regulations (*Amended Complaint; Weinbaum affidavit*). Plaintiff claims it discovered the condition of the building after the residential occupants complained to City agencies and brought actions against plaintiff in New York City Housing Court. The Housing Court and City agencies issued violations and fines for hot water and gas, holding plaintiff liable as the title holder or fee owner for the fines assessed, notwithstanding plaintiff's averments regarding the triple net lease (NYSCEF Doc. No. 150, *hot water violation*; NYSCEF Doc. No. 154, *gas violation*).

Plaintiff further argues that defendants engaged in nothing short of dilatory practices by failing to provide discovery and failing to comply with court deadlines throughout the matter. Plaintiff contends that defendants needlessly protracted the litigation of this matter. Defendants reject the contention that they needlessly engaged in dilatory practices.

The Brasero Defendants essentially argue that plaintiff's motion must be denied on the following grounds: plaintiff lacks standing (not argued by Van Ormer); plaintiff continues to have "unclean hands," including by failing to provide essential services to the building as Housing Court found; plaintiff may only seek use and occupancy from occupiers of premises, alleging that defendants have already vacated.

Van Ormer, who remains on the premises and does not wish to leave, filed a non-renewal proceeding with DHCR on February 19, 2025 (NYSCEF Doc No. 187, ¶ 5, *McCarney affidavit*); NYSCEF Doc No. 146, ¶¶ 12-13, *Newman affidavit*). Van Ormer through Newman, filed proceedings in Housing Court for failing to have essential services in his apartment. Van Ormer claims that plaintiff refused to renew his rent stabilized lease, arguing that plaintiff's refusal negates its claim for use and occupancy (NYSCEF Doc. No. 190, *DHCR proceeding confirmation*).

The Brasero Defendants claim plaintiff lacks standing to seek use and occupancy from these residential tenants, primarily on the grounds that plaintiff did not submit a form (RA-44) to DHCR, a document advising DHCR of a change in ownership or management. Defendants argue that plaintiff does not show that it "controls the rent stabilized building..." Plaintiff counters that defendants' position is erroneous and irrelevant to plaintiff's ability to collect use and occupancy and flies in the face of his [counsel for Brasero Defendants'] previous representation that plaintiff "is now entitled to collect the legal rent stabilized rent directly from the residential tenants." (*Further Weinbaum affidavit*, ¶ 14). Plaintiff argues that filing an RA-44 is purely administrative without any bearing on rights to possession or its right to demand use and occupancy or obligations of tenants, further asserting that it demonstrates Brasero's failure to comply with the Lease.

The Brasero Defendants raise "unclean hands" as a defense to plaintiff's demand for payment of use and occupancy. The Brasero Defendants allege a lack of providing essential services to them "such as heat, hot water, and maintenance of the building." (NYSCEF Doc. No. 135, ¶ 10, *Deignan affidavit*).

Van Ormer, by and through Newman who asserts that plaintiff did not provide essential services to his apartment, brought an action in New York Civil Court, Housing Part, to document

and to rectify the lack of services they have received in violation of New York State and New York City housing laws and regulations.³ (*McCarney affidavit; Newman affidavit*).

In the instant matter, Van Ormer cross-moves for a stay of proceedings pursuant to CPLR 2201 “pending restoration of gas service in the companion HPD enforcement proceeding, *Newman v 627 Second Corp*, Index No. HP25N000055-24.” (NYSCEF Doc. No. 145, *Notice of Cross-Motion*). Accompanying his motion was Newman’s affirmation. Newman is not a party to the within action, nor is she named on the Brasero renewal lease.⁴ Ms. Newman’s objection to paying use and occupancy is mostly based on her personal observations of the premises, contending she is residing in her brother’s apartment, and based on the proceedings in and findings of Housing Court.

In essence, Van Ormer’s primary argument against awarding use and occupancy is that the defective conditions on the premises caused them to bring proceedings in Housing Court. He argues the Housing Court’s findings in his favor should convince this Court to deny granting plaintiff’s motion for use and occupancy as to him. Housing Court found violations for problems with hot water, heat, and gas in the Van Ormer apartment (*hot water violation, NY SCEF Doc No. 152, heating violation, gas violations*), all of which apply only to his unit. Housing Court ordered plaintiff as fee owner and title holder to rectify the conditions and assessed civil fines and penalties for what it later identified as a failure(s) to correct.

By e-mail dated August 6, 2024, Brasero’s defense counsel advised that defendants T. Connolly and N. Connolly wished to surrender their units (NYSCEF Doc No. 139, *defendants’ vacatur*). The Brasero defendants also state that Pascale, N. Conolloy, and T. Connolly have vacated the apartments and surrendered possession to plaintiff. No proof of document or correspondence is before the court specifically stating the date of vacatur. Plaintiff contests that these defendants surrendered and vacated (*Weinbaum affidavit ¶¶ 23-25; NY SCEF Doc. No. 137, Hegyes e-mail re: apartments 3A and 4A; NY SCEF Doc. No. 138, Hegyes e-mail re: other tenants; defendants’ vacatur; Lease*). Brasero’s defense counsel wrote to plaintiff’s attorneys that he returned the keys “to the ground floor commercial level and the upper-level residential common areas...to the office of plaintiff’s counsel.” However, defense counsel did not declare with any particularity the date he alleges Quijano ultimately vacated the Building or confirm whether Quijano remains in possession of Apt. 4A (NYSCEF Doc. No. 142, *Housing Court Interim Order*).

Plaintiff’s counsel rejects the contention that the Brasero defendants surrendered possession, arguing that neither Pascale, nor N. Connolly, nor T. Connolly, nor Quijano have relinquished the keys to their respective apartments or performed “any other overt act intended to surrender possession....” Plaintiff’s counsel maintains that defense counsel has no personal knowledge and refers to defense counsel’s exhibits (*further Weinbaum affidavit, ¶¶ 18-19; NY SCEF Doc. Nos. 35, 37, 38, 39, and 40*). Plaintiff argues that by defense counsel’s own letter dated December 28, 2022, Edward Deignan writes, “My residential clients retain their keys and possession of the rent

³ See Footnote 1, *supra*.

⁴ Attached as Exhibit B to the cross-motion (NYSCEF Doc. No. 148), counsel submitted a 1994 Lease Agreement that was entered into by Brasero Restaurant, Inc. and Barbara Langlois, Van Ormer and Newman’s mother. This 1994 Lease Agreement has a handwritten notation under “TENANT” reading “changed to William Tate Van Ormer.” The date on the document pre-exists the Triple Net Lease entered into on July 2, 2001 by and between plaintiff and Brasero when taken at face value. It does not affect a decision on the issue of use and occupancy. The renewal lease was entered into by Brasero and Van Ormer as discussed herein.

stabilized apartments.” (NYSCEF Doc. No. 140, ¶ 2, *Deignan letter*). Moreover, plaintiff argues that counsel for Brasero advised on July 24, 2024, “...[My] clients remaining in #3A and #4A will be present tomorrow morning for the inspection...” further advising that more discussions were needed about the surrender (*further Weinbaum affidavit*, ¶¶ 18-24).

Plaintiff points to Brasero defense counsel’s own correspondence contradicting any assertion that defendants vacated the building. Since each defendant’s renewal lease expired December 31, 2022, plaintiff argues the Court should order use and occupancy for the sums contained in the Renewal Lease forms before the Court.

Real Property Law (“RPL”) § 220 establishes that a landlord may recover reasonable compensation for the use and occupancy of its rental premises. The remedy of use and occupancy is grounded in equitable principles designed to prevent a party from occupying property without compensating the owner for the value of the occupancy (see *10E53 Owner LLC v Bruderman Asset Mgmt.*, 202 AD3d 609 [1st Dept 2022]; *Jonathan Schestowitz Ltd v Jones*, 2023 NY Slip Op 32159[U], *4 [Sup Ct NY County 2023]; *Dahl v Prince Holdings 2012, LLC*, 2023 NY Slip Op 31584(U), *1-2 [Sup Ct NY County 2023]). New York courts have long recognized that a court possesses the authority to require a party in possession of real property to pay for use and occupancy while litigation concerning the premises is pending (see *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124 [1st Dept 2000]; *MMB Assoc. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991]; *Abright v Shapiro*, 92 AD2d 452, 453 [1st Dept 1983]; *Shoshany v Goldstein*, 20 Misc3d 687, 689 [Civ Ct. NY County 2008]).

Such relief is intended to prevent unjust enrichment and to ensure that a party who continues to occupy premises during the pendency of litigation does not do so rent-free (see *10E53 Owner LLC*, 202 AD3d at 609).

The award of use and occupancy is not automatic, however. Rather, it rests within the sound discretion of the court, which must consider the equities presented by the particular facts (see generally *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]). Use and occupancy is awarded as damages for the withholding of possession after the expiration or termination of a permitted possession or lease.

It is well-settled that where a tenant remains in possession after the expiration of a lease, the court may award use and occupancy based on the proofs submitted or, failing that, based on the reasonable value of the premises. (see *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730 731 [1st Dept 1984]; *22 Holding Corp. v Rodriguez*, 85 Misc3d 1218(A), 2025 NY Slip Op 50223(U) [Civ Ct. NY County 2025]). The obligation to pay use and occupancy arises from possession, not contract, and is grounded in principles of equity to prevent unjust enrichment (see *Dahl*, 2023 NY Slip Op. 31584(U), *1-2 [Sup Ct. NY County]). “When the parties do not hold a lease, or when a valid lease has terminated and the tenant adversely occupies the premises, the tenant must remit payment for the ‘use and occupancy’ of the space based on the premises’ fair market value.” (*Saba Realty Partners LLC v International Gold Star Inc.*, 29 Misc3d 850, 853 [Civ Ct. Kings County 2025]).

“The reasonable value of use and occupancy is the fair market value of the premises after the expiration of the lease.” “In determining the reasonable value of use and occupancy, the rent reserved under the lease, while not necessarily conclusive, is probative.” (*Mushlam, Inc. v Nazor et al.*, 80 AD3d 471 [1st Dept 2011]). The landlord has the burden of proving the reasonable value of use and occupancy (see *Mushlam*, 80 AD3d at 472). An award of use and occupancy *pendente lite* lies within the sound discretion of the court (see *Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d at 124). It is grounded in equitable principles of restitution, preventing unjust enrichment by an occupant who remains in possession of premises without payment. Put another way, it is “manifestly unfair that [a] defendant should be permitted to remain in possession of the subject premises without paying for their use.” (*MMB Assoc.*, 169 AD2d at 422).

It is well established that a court may direct payment of use and occupancy during the pendency of an action to accommodate the competing interests of the parties (see *MMB Assoc.*, 169 AD2d at 422). “When the parties do not hold a lease, or when a valid lease has terminated and the tenant adversely occupies the premises, the tenant must remit payment for the ‘use and occupancy’ of the space based on the premises’ fair-market value [sic] value. Such payment is not ‘rent,’ but a means to prevent unjust enrichment to the occupant for its holding over ...” (*Saba Realty Partners LLC v Int’l Gold Star Inc.*, 29 Misc3d 850, 853 [Civ Ct, Kings County 2010]).

As an initial matter, plaintiff raises the Brasero Defendants’ late filing of its opposition papers, which is contrary to the court’s order that the deadline for opposition papers was January 3, 2025. CPLR 2004 establishes: “Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.” Here, the Brasero Defendants submitted their opposition to motion late and untimely and counsel did not provide any explanation to the court as to why said papers were late. Counsel did not contact the court to request an extension of time to file the opposition papers. Nevertheless, the court exercises its discretion and permits this late filing, considering there was no prejudice to plaintiff due to defendants’ lateness. Plaintiff had the opportunity to and did counter with its own supplemental papers. Despite defendants’ failures to follow the schedule as set forth, the defendants’ delay was not a matter of weeks but a matter of days and, in any event, nothing was filed on the eve of the motion hearing.

In the instant matter, the rental amounts established and reserved under the most recent renewal leases, while not dispositive, constitute *prima facie* evidence of reasonable value. Here, defendants’ renewal leases expired December 31, 2022, yet defendants have failed to prove surrender of possession or vacatur. Mere statements of intent to surrender and to vacate are insufficient proof of surrender and vacatur and acceptance of possession by landlord or owner. Possession, for purposes of use and occupancy, is determined by occupants on premises, not by uncorroborated assertions, coupled with contradictory averments. The renewal leases do not establish any method for surrender and acceptance. A surrender by operation of law occurs when the parties to a lease take actions inconsistent with the landlord-tenant relationship, “indicating that they have both agreed to a surrender” (*Stahl Assoc. Co. v Mapes*, 111 AD2d 626, 628 [1st Dept 1985]), which would be accomplished by vacating possession, tendering keys, etc., and acceptance and taking possession of premises by landlord.

Defendants' argument that plaintiff lacks standing due to its failure to file a DHCR RA-44 form (NYSCEF Doc No. 136, *DHCR form RA-44*) is unavailing and without merit. Defendants do not present any case or other authority on which such an argument is grounded. Administrative registration requirements do not bar an owner from seeking use and occupancy from occupants in possession of premises. DHCR registration falls under an administrative requirement and does not divest a fee owner or title holder of standing to seek possession or use and occupancy (*Deignan affidavit*, ¶ 3). There is no authority that categorically determines that the form RA-44 has any bearing on use and occupancy *pendente lite*.

This court also rejects defendants' argument that use and occupancy cannot be awarded to plaintiff as a matter of law because Housing Court found violations for failing to provide certain essential services to the Building. A claim for lack of essential services does not preclude an interim award of use and occupancy, particularly where defendants remain in possession (see *Shoshany*, 20 Misc 3d 687, 689; *Eli Haddad Corp.*, 102 AD2d at 732). At best, such issues may be considered in determining the amount of use and occupancy or through abatement(s) or adjustment(s) at trial. Abatements or adjustments based on any lack of essential services may be addressed at trial through credits or refunds, if warranted. Such remedies may be obtained most appropriately at a speedy trial (see *East 4th St. Garage v Estate of Berkowitz*, 265 AD2d 249, 249 [1st Dept 1999]).

Van Ormer, by Newman, asserts that plaintiff cut essential services to the premises as partly retaliatory against defendant(s) to make him/them leave the building. A properly asserted claim is raised by a party to a lease, and Van Ormer's name is on the renewal lease. However, without more facts, such a claim does not impede granting use and occupancy. Again, a speedy trial is the most appropriate way to flesh out any facts that may present a question of retaliatory tactics.

Van Ormer's cross-motion for a stay pursuant to CPLR 2201 is denied. Under this section, the granting of a stay is authorized "in a proper case, upon such terms as may be just." (*Hope's Windows v Albro Metal Prods. Corp.*, 93 AD2d 711, 712 [1st Dept 1983], *lv dismissed* 59 NY2d 968 [1983]). In *Hope's Windows*, the First Department said it specifically requires "complete identity of parties, causes of action and judgment sought." In the instant case, although there is overlap with Housing Court proceedings, the standard to grant a stay is not met. The issues to be litigated, however related or similar, are not identical. In sum, a stay, further delaying this case, is not warranted.

Plaintiff demands use and occupancy based on the last legal rents set forth in defendants' renewal leases which expired December 31, 2022. The amounts are reasonable, supported by documentary evidence and case law. The court finds no basis to deviate from those figures at this time. Use and occupancy shall therefore be fixed at the following monthly rates.

Maurice Quijano (President of Brasero) (Apt. 4A):	\$545.71
Dan Pascale (Apt. 4B):	\$551.89
Nora Connolly (Apt. 3A):	\$737.11
Tom Connolly (Apt. 3B):	\$756.25
William Van Ormer (Apt. 2B):	\$1,168.50

Defendants shall pay use and occupancy from January 1, 2023, through the date possession is surrendered, without prejudice to claims, defenses, abatements, or adjustments to be determined at trial, including any set off. Accordingly, it is hereby

ORDERED that plaintiff’s motion for use and occupancy is granted for the reasons herein stated, and it is further

ORDERED that defendants shall pay plaintiff use and occupancy at the monthly rates set forth in the renewal leases as follows:

Maurice Quijano (President of Brasero) (Apt. 4A):	\$545.71
Dan Pascale (Apt. 4B):	\$551.89
Nora Connolly (Apt. 3A):	\$737.11
Tom Connolly (Apt. 3B):	\$756.25
William Van Ormer (Apt. 2B):	\$1,168.50

retroactive to January 1, 2023, the date defendants’ respective tenancies expired; and it is further

ORDERED that nothing in this decision precludes either defendants or plaintiff from seeking abatements or adjustments; and it is further

ORDERED that payment for all past use and occupancy shall be made within sixty (60) days from the date this decision and order is uploaded to NYSCEF; and it is further

ORDERED that any use and occupancy payments going forward shall be made on the 10th of each month, starting May 2026; and it is further

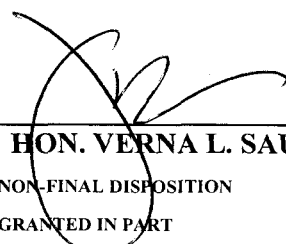
ORDERED that the cross-motion of defendant Van Ormer for an order granting a stay of plaintiff’s application for use and occupancy is denied; and it is further

ORDERED that within twenty (20) days from the entry of this Order, plaintiff shall serve a copy of this Order with notice of entry upon all parties as well as the Clerk of the General Clerk’s Office 60 Centre Street, Room 119; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address nycourts.gov/suptmanh).

This constitutes the decision and order of this court.

April 20, 2026


HON. VERNA L. SAUNDERS, JSC

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"/>	DENIED	<input type="checkbox"/>	OTHER