

SHORT FORM ORDER

FILED

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

1/15/2021
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P R E S E N T : HON. ROBERT J. MCDONALD
Justice

COUNTY CLERK
 QUEENS COUNTY

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138-77 QUEENS BLVD LLC,

Index No.: 715071/2020

Plaintiff,

Motion Date: 12/24/2020

- against -

Motion No.: 25

QB WASH LLC AND "XYZ CORP.",

Motion Seq.: 2

Defendant.

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The following electronically filed documents read on this motion by plaintiff for an Order directing payment of prospective and retroactive use and occupancy:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law...	EF 14 - 31
Affirmation in Opposition-Exhibits-Memo. of Law.....	EF 34 - 50
Affirmation in Reply-Exhibits-Memo. of Law.....	EF 51 - 58

This is a commercial ejectment action, seeking the eviction of a commercial tenant, defendant QB Wash LLC, from the premises located at 138-77 Queens Boulevard and 138-77 87th Avenue, in Queens County, New York on which tenant operates a car wash and automotive lube shop.

Plaintiff landlord commenced this action on September 4, 2020. Defendant tenant filed an answer with counterclaims on October 26, 2020. Landlord now seeks an Order directing payment of prospective and retroactive use and occupancy.

In support of the motion, landlord submits an affidavit of its manager, Ethan D. Wohl. Mr. Wohl affirms, inter alia, that the relevant Lease, entered into in 2010, has a 25-year term that requires tenant, in addition to paying base rent, to reimburse landlord for real estate taxes and insurance and assume full responsibility for maintenance and repairs. Tenant has failed to pay rent since February 2020, resulting in present arrears totaling over \$184,000. The monthly base rent for the June 2019

through May 2020 lease year was \$17,337 per month. The reimbursable real estate taxes and insurance for 2020 have totaled approximately \$94,000. The Lease provides for the base rent to be reset to market rate in June 2020, and sets forth a procedure requiring good faith negotiations between the parties, followed by appointment of party appraisers, followed by appointment of a neutral third party appraiser if necessary. In February 2020, pursuant to the rent reset procedure set forth in the Lease, the parties' principals met twice. Tenant stated that it would need a substantial rent reduction. In March 2020, the parties designated appraisers and exchanged appraisals in late May 2020. The parties' appraisers' divergent valuations triggered appointment of a third, neutral appraiser. In July 2020, landlord accepted tenant's proposal to appoint Steven Schleider. In June 2020, following the parties' failed negotiations over rent arrears, landlord drew down the one-month security deposit it held and sent tenant a notice to replenish the security deposit or face termination of the Lease. Landlord also sent a notice to cure an outstanding Fire Department violation and lapsed petroleum bulk storage registration. Tenant replenished the security deposit and timely cured the outstanding Fire Department violation. In July, landlord again drew down the security deposit and sent tenant a new notice to replenish. Tenant again replenished the security deposit. On August 5, 2020, plaintiff received a Determination of Theft of Services and Cease and Desist Notice issued by the New York City Department of Environmental Protection, finding that tenant had illegally removed DEP's water meter and connected an unmetered water supply. Landlord immediately emailed the notice to tenant. A formal notice to cure was sent on August 6, 2020. On August 10, 2020, landlord sent tenant a second notice to cure, regarding water arrears and an unpaid Fire Department violation. On August 14, 2020, Mr. Schleider rendered his rent reset determination, determining the fair market base rent for the premises to be \$21,729, a 25% increase over the prior base rent. Thereafter, the parties' principals met. Tenant offered to purchase the premises for \$2 million or pay \$14,500 per month base rent. Landlord rejected the offers. Tenant allowed the cure periods provided in the August 6 and August 10 Notices to lapse without attempting to correct the Lease violations specified therein. On August 27, 2020, landlord sent a cancellation notice, which terminated the Lease effective September 3, 2020.

In opposition, Zachary Silver, a member of tenant, submits an affidavit affirming, inter alia, that tenant did not default under the lease as its purpose was frustrated and became impossible as a consequence of the Covid-19 pandemic. Specifically, Mr. Silver points to Paragraph 80 of the Lease,

which states that the Lease "is granted subject to the following . . . any other applicable governmental or quasi-governmental requirements". Additionally, Paragraph 9 of the Lease provides that "if any part of the premises is rendered un-tenantable by reason of such damages, the annual fixed rent payable hereunder . . . shall be abated for the period from the date of such damage to the date when such part of the premises shall have been made tenantable". Mr. Silver contends that it was never the parties' intent to pay rent if the premises would remain closed or if car traffic declined to the levels it is now. Mr. Silver further affirms that tenant was barred from operating the property as a car wash, automotive lube and detail shop for at least five months.

A threshold issue is whether Governor Andrew M. Cuomo's moratorium on commercial evictions precludes this action. Executive Order 202.28 states, in relevant part, "[t]here shall be no initiation of a proceeding or enforcement of either an eviction of commercial tenant, for nonpayment of rent". The Executive Order only applies to proceedings and not actions. RPAPL 701 specifies that a landlord-tenant proceeding is a special proceeding. Since this is an ejectment action, rather than a landlord-tenant proceeding, Executive Order 202.28, and the executive orders extending the protections stated therein, does not preclude this action (see CPLR 103[a] & [b]).

Tenant also argues that the notices to cure violated Executive Order 202.8, which tolled "any specific time limit for the . . . service of any . . . notice . . . process or proceeding, as prescribed by the procedural laws of the state". While Executive Order 202.8 does toll procedural laws of the state, it does not address contractual deadlines, including the sending of notices. Tenant further argues that landlord has harassed it with multiple notices to cure and a notice of cancellation. However, N.Y.C. Admin. Code 22-902.b, states that a landlord's lawful termination of a lease shall not constitute harassment. Accordingly, the notices to cure and the commencement of this action were proper.

Turning to whether landlord is entitled to use and occupancy, 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" (255 Butler Assoc., LLC v 255 Butler, LLC, 173 AD3d 651, 653 [2d Dept. 2019][internal quotation marks omitted]). Although tenant contends that use and occupancy is awarded only after the expiration of a lease, use and occupancy has been awarded under both existing and expired leases (see Andejo Corp. v South St.

Seaport Ltd. Partnership, 35 AD3d 174 [1st Dept. 2006])). Additionally, use and occupancy has been awarded where the principal dispute concerned the amount of rent payable (see 255 Butler Assoc., LLC v 255 Butler, LLC, 173 AD3d 651, 654 [2d Dept. 2019][if tenant "is successful at trial and it is determined that [tenant] did not default on its obligations under the lease, [tenant] may be entitled to recover damages, including a refund or a rent credit"]). Even during the Covid-19 pandemic, courts have held that tenants are required to pay use and occupancy (see CP Assoc. LLC v Concourse Plaza Family Dental LLC, 2020 NY Slip Op 33875[U][Sup Ct, New York Cnty 2020]; Rame, LLC v Metropolitan Realty Mgt., Inc., 2020 NY Slip Op 33538[U][Sup Ct, New York Cnty 2020]; Gap v 44-45 Broadway Leasing Co. LLC, 2020 NY Slip Op 32403[U][Sup Ct, New York Cnty 2020])).

Here, the equities support payment of use and occupancy. Tenant has no claim that landlord has done anything to impair tenant's performance under the Lease or use and enjoyment of the premises. Although tenant argues that a partial closure of its business due to the Covid-19 pandemic justifies the non-payment of rent, this Court finds that permitting tenant to remain in possession of the subject premises without paying for its use would be "manifestly unfair" (MMB Assocs. v Dayan, 169 AD2d 422, 422 [1st Dept. 1991]). Moreover, the Court need not adjudicate the merits of whether tenant is entitled to a rent abatement on account of Covid-19 at this juncture (see East 4th St. Garage v Estate of Berkowitz, 265 AD2d 249 [1999][finding that if tenant contends that the base rent does not represent fair valuations of current market rates, tenant's remedy is a speedy trial]).

"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, 80 AD3d 471, 472 [1st Dept. 2011]; see Andejo Corp. v South St. Seaport Ltd. Partnership, 35 AD3d 174 [1st Dept. 2006])). At this point, the Court sees no reason to divert from the neutral appraiser's values. The rent was set in August 2020, in the midst of the pandemic, by a neutral appraiser who was chosen by tenant, and consistent with the Lease's rent reset process.

Accordingly, based on the reasons stated above, and in the discretion of the Court, it is hereby

ORDERED, that the motion is granted to the extent that defendant tenant QB WASH LLC shall pay prospective use and occupancy to plaintiff landlord 138-77 QUEENS BLVD LLC in the amount of \$29,765 per month (\$21,729 per month as set by the appraiser plus \$8,036, which is half of the annual real estate taxes and insurance), from and after February 1, 2021; and it is further

ORDERED, that within 20 days of service of a copy of this Order with Notice of Entry, defendant tenant QB WASH LLC shall post a bond in the amount of \$255,758, on account of the period through January 31, 2021; and it is further

ORDERED, that defendant tenant QB WASH LLC shall pay all arrears for water and sewer charges at the premises and timely payment of all future and sewer charges at the premises.

Dated: January 15, 2021
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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