



107 A.D.3d 501, 967 N.Y.S.2d  
61, 2013 N.Y. Slip Op. 04432

**\*\*1** 43rd Street Deli, Inc., Appellant  
v  
Paramount Leasehold, L.P., Respondent.

Supreme Court, Appellate Division,  
First Department, New York  
June 13, 2013

CITE TITLE AS: 43rd St. Deli,  
Inc. v Paramount Leasehold, L.P.

**HEADNOTE**

Landlord and Tenant  
Use and Occupancy  
Pendente Lite Award

Cornicello, Tendler & Baumel-Cornicello, LLP, New York  
(Susan Baumel-Cornicello of counsel), for appellant.  
Rosenberg & Estis, P.C., New York (Jeffrey Turkel of  
counsel), for respondent.

Order, Supreme Court, New York County (Shlomo S. Hagler,  
J.), entered April 9, 2012, which granted defendant's motion  
seeking use and occupancy to the extent of setting the matter

down for a hearing before a referee to hear and determine  
the amount owed by plaintiff for monthly use and occupancy  
pending the outcome of this action, unanimously affirmed,  
without costs.

A court has broad discretion in awarding use and occupancy  
pendente lite (*see Alphonse Hotel Corp. v 76 Corp.*, 273  
AD2d 124 [1st Dept 2000]). Although the court may look to  
the amount of rent paid under a prior lease between the parties  
in setting use and occupancy (*see Kuo Po Trading Co. v Tsung  
Tsin Assn.*, 273 AD2d 111 [1st Dept 2000]), prior rent is only  
probative, not dispositive, on the issue (*see Mushlam, Inc. v  
Nazor*, 80 AD3d 471, 472 [1st Dept 2011]). Moreover, the  
court may refer the issue to a referee.

Here, under the lease in question, a new rent value is set when  
a tenant exercises its right of renewal. However, that right is  
only available to a tenant who is not in default. Since this suit  
is, in part, based upon plaintiff tenant's alleged default, and  
defendant landlord alleges that the lease has lapsed, making  
plaintiff a holdover tenant, it would be premature to find that  
the rent under the lease is the correct pendente lite pay **\*502**  
ment (*compare New York Physicians LLP v Ironwood Realty  
Corp.*, 103 AD3d 410 [1st Dept 2013]).

To the extent that plaintiff is ultimately successful at trial,  
it may be provided with a refund or rent credit (*see Morris  
Hgts. Health Ctr., Inc. v DellaPietra*, 38 AD3d 261 [1st Dept  
2007], *lv dismissed* 9 NY3d 887 [2007]). Concur—Tom, J.P.,  
Friedman, Freedman and Feinman, JJ.

Copr. (C) 2020, Secretary of State, State of New York