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E.R. Butler & Co., Inc. v Wyeth, Inc.

2020 NY Slip Op 34214(U)

December 16, 2020

Supreme Court, New York County

Docket Number: 653716/2019

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

E.R. BUTLER & CO., INC.,
Plaintiff,

- v -

WYETH, INC.,
Defendant.

-----X

INDEX NO. 653716/2019
MOTION DATE 07/30/2019
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

were read on this motion to DISMISS

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion to dismiss the complaint is denied for the reasons set forth hereinbelow.

BACKGROUND

This is an action to recover unpaid rent, real estate tax escalations, finance charges and attorneys' fees, all of which arising out of a prior landlord-tenant relationship between the parties. Plaintiff is the owner and landlord of commercial space located on the ground floor of 55 Ferris Street, Brooklyn, New York. Defendant occupied that space until it vacated it in March 2019. That vacatur of premises occurred during the pendency of a summary holdover proceeding commenced by plaintiff in Civil Court, Kings County, titled ER Butler & Co., Inc. v Wyeth, Inc. (index No. LT 082314/18/KI).

Defendant entered possession of the space pursuant to a written lease dated May 15, 2003, expiring May 30, 2004 (NYSCEF Doc. No. 9), at an initial base rent of \$10,500 per month and thereafter increasing annually by three percent (id., ¶ 44). The lease continued after the

natural expiration date of May 30, 2004, as a month-to-month tenancy until terminated by notice of termination on August 31, 2018. Upon expiration of the notice, the above-mentioned summary holdover proceeding was commenced seeking possession and a judgment for rent arrears, unpaid real estate tax charges, and attorneys' fees.

Defendant had moved the Civil Court for dismissal of the petition insofar as it related to the monetary and legal fee claims. Plaintiff cross-moved for summary judgment on its petition, alleging unpaid rent through August 31, 2018, in an amount of \$120,775.58, and use and occupancy thereafter at the rate of \$15,882.20 per month. Plaintiff also sought real estate taxes chargeable pursuant to Lease ¶ 45 in an amount equal to 25 percent over the base rent, coming to \$212,358.62.

The Civil Court motion practice was argued before, and decided by, Hon. Odessa Kennedy, who issued a Decision & Order dated March 1, 2019, and filed March 5, 2019 (NYSCEF Doc. No. 12) (the "Civil Court Decision"). That court dismissed the monetary claims "without prejudice to the landlord to seek monetary recovery in a plenary action" (*id.*, at 5).¹ The Civil Court Decision was made available to the parties in June 2019, and in that very month, without any delay whatsoever, plaintiff commenced this plenary action in prompt and laudable compliance with the guidance set forth in the Civil Court Decision.

Defendant has moved this court for dismissal of the complaint on the puzzling assertion that the Civil Court Decision, somehow, some way, constitutes *res judicata* **in negation of** plaintiff's monetary claims. Defendant's counsel's said assertion is found at paragraph 23 of his moving affirmation (NYSCEF Doc. No. 6) as follows:

Wyeth had established that the Landlord's monetary claims should be dismissed because the [*sic*] there was no written lease entitling the Landlord to recover rent arrears, attorney fees, late fees, interest, or any other fees from the former tenant. In addition, the

¹ Page citations to the Civil Court Decision are to its pages, as unnumbered.

Landlord did not show a “meeting of the minds” about the payment of any rent amount regarding the unpaid rent claims. The Landlord was thus precluded from recovering rent arrears, attorney fees, late fees, interest, finance charges and other fees without any binding written lease.

(*Id.*, ¶ 23.)

As will be shown below, defendant’s counsel grossly misreads the very plain and clear language of the Civil Court Decision, which in no way, shape, or form dismissed plaintiff’s monetary claims on substantive grounds.

Defendant alternatively – and a second, tersely stated, point (*see*, NYSCEF Doc. No. 6 at 12) – opines that this action is barred by the six-year statute of limitations of CPLR 213 (2). This argument is similarly meritless, as will also be shown below.

DISCUSSION

One need only read the clear words of the Civil Court Decision to see, plainly, that it dismissed the monetary claims “without prejudice to the landlord to seek monetary recovery in a plenary action” (NYSCEF Doc. No. 12 at 5). It is elementary that a dismissal without prejudice enjoys absolutely no *res judicata* effect (*e.g.*, *Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343 [1999]). As the Court of Appeals has declared: “It would be inequitable to preclude a party from asserting a claim under the principle of *res judicata*, where, as in this case, ‘[t]he court in the first action has expressly reserved the plaintiff’s right to maintain the second action’ (Restatement [Second] of Judgments § 26 [1] [b])” (*id.*, at 349). For this reason, defendant’s motion to dismiss on asserted *res judicata* grounds must be denied.

To give narrative context to the foregoing, the court will now proceed to point out the several observations made by the Civil Court which led to its foregoing dismissal without prejudice.

The Civil Court first noted that “proof” would be required by the plaintiff in order to demonstrate that the post-expiration month-to-month tenant had agreed to pay rent “pursuant to the terms of the lease” (Civil Court Decision at 2) which, in the context of that proceeding and this action, refers specifically to charges extrinsic to ordinary use and occupancy, such as taxes, finance charges, and attorneys’ fees. The only thing conceded by the plaintiff in the Civil Court proceeding was “that the parties did not enter into a written contract to extend the terms of the expired lease or a written contract to agree to the rent specified in the lease” (*id.*, at 3). Nowhere did that court say that the plaintiff is precluded from presenting proof of an oral agreement, or, as evidence may or may not permit at trial, proof of various writings which might be held to constitute a written contract as a matter of law. All the Civil Court found was that “there are factual issues as to the amount of rent the tenant agreed to pay after the lease expired” (*id.*). Civil Court then observed that a summary holdover proceeding is not an accommodating platform for monetary claims “involv[ing] material issues of fact as to the rent amount” (*id.*, at 4), concluding that “it would appear that a plenary action is the more appropriate forum to resolve the issues through meaningful discovery” (*id.*).

Thus, defendant’s bold attempt to argue before this court that the Civil Court Decision, somehow, some way, constitutes *res judicata* negating plaintiff’s monetary claims, is patently without merit. All Civil Court did, was to recognize the existence of issues of fact on which the plaintiff bears an evidentiary burden, and to permit plaintiff to attempt to meet that burden in a plenary action in Supreme Court (as opposed to a summary proceeding), where abundant discovery opportunities can be taken advantage of to accommodate the plaintiff’s need to prove its monetary claims that are extrinsic to ordinary use and occupancy. The plaintiff will either be able to prove those claims, or not.

Similarly without merit is defendant's counsel's alternative suggestion that this action – commenced the very same month the Civil Court Decision was received by the parties – is somehow untimely. Defendant's counsel offers the following oversimplified time calculation: the lease expired May 2004; *ergo*, this action commenced in 2019 is 15 years late (*see*, NYSCEF Doc. 6 ¶¶ 49-52). But plaintiff's monetary claims both in this action and in the Civil Court proceeding are not necessarily based on the lease, *per se*. Indeed, the Civil Court Decision expressly observed that “[b]oth sides concede that the parties did not enter into a written contract to extend the terms of the expired lease” (Civil Court Decision at 3). Nevertheless, as the Civil Court Decision concludes, plaintiff is entitled to try to prove that the parties orally or otherwise agreed to the alleged monetary – short of a formal written contract to that effect – “in a plenary action” (*id.*, at 5). Such agreement, and breach thereof, if proven at trial in this action, could very well have occurred within the time proximity allowed by the six-year statute of limitations (CPLR 213 [2]) (*see, e.g., Plaza Investments v Capital One Fin. Corp.*, 165 AD3d 853 [2d Dept 2018] [the defendant bears the burden of proving a defense based on statute of limitations]).

Accordingly, it is

ORDERED that the defendant's motion to dismiss the complaint is denied; and it is further

ORDERED that a preliminary conference will be conducted on January 14, 2021, at 2:30 p.m. via remote video/audio communications to be arranged by the court.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>12/16/2020</u>			<u>LOUIS L. NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE