

**Ross Realty v V&A Iron Fabricators, Inc.**

2005 NY Slip Op 30077(U)

October 27, 2005

Supreme Court, Suffolk County

Docket Number: 0026466/2004

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 8-18-05  
SUBMITTED: 9-14-05  
MOTION NO.: 001-MG; CASE DISP  
002-MD

\_\_\_\_\_  
ROSS REALTY,

Plaintiff,

-against-

SOMER & HELLER, LLP  
Attorneys for Plaintiff  
2171 Jericho Turnpike, Suite 350  
Commack, New York 11725

V&A IRON FABRICATORS, INC.,

Defendant.

RABINOWITZ & GALINA  
Attorneys for Defendant  
94 Willis Avenue  
Mineola, New York 11501

\_\_\_\_\_  
Upon the following papers numbered 1 to 19 read on this motion to dismiss and cross-motion for summary judgment; Notice of Motion and supporting papers 1-7; Notice of Cross Motion and supporting papers 8-18; Answering Affidavits and supporting papers 19; Replying Affidavits and supporting papers\_\_\_; it is,

**ORDERED** that the motion by the defendant for an order dismissing the complaint and for summary judgment in its favor on the counterclaim is granted; and it is further

**ORDERED** that the cross motion by the plaintiff for summary judgment in its favor on the issue of liability and for dismissal of the defendant's affirmative defenses and counterclaim is denied.

On April 1, 2003, the plaintiff (landlord) and defendant (tenant) entered into a written lease for a term of five years commencing on May 1, 2003, and ending on April 30, 2008. The demised premises consisted of approximately 12,200 square feet of commercial space, which was to be used by the defendant for the fabrication of structural steel. The defendant paid the May 2003 rent and a security deposit of two months' rent. Soon after taking possession of the premises, the plaintiff wrote to the defendant complaining about noise and vibrations to the building caused by the defendant's business. By a letter dated May 30, 2003, the defendant advised the plaintiff that it would be terminating the lease due to restrictions being imposed by the plaintiff which made it impossible for the defendant to conduct its business. On June 19, 2003, the plaintiff commenced a summary non-payment proceeding in Suffolk County District Court to recover possession of the premises and rent arrears for June 2003. Soon thereafter, the defendant returned the keys and

vacated the premises. The plaintiff subsequently amended its petition to add as damages accelerated rent in the amount of \$420,820.

After a non-jury trial on July 11, 2003, the District Court (Murphy, J.) rendered its decision on July 17, 2003. The court found that there had been a surrender of the premises by operation of law in that the conduct of the parties was inconsistent with a continuation of the landlord-tenant relationship. The court also found that the plaintiff had accepted the defendant's surrender of the premises, thereby releasing the defendant from any further rent liability. Accordingly, the court granted the plaintiff a judgment of possession and a judgment for rent arrears in the amount of \$6,578.91, which represented rent arrears for the month of June 2003, but declined to award the plaintiff the accelerated rent allegedly due under the lease.

On appeal, the Appellate Term for the Ninth and Tenth Judicial Districts affirmed the District Court's judgment by a decision dated October 21, 2004. Although the Appellate Term disagreed with the District Court on the issue of the surrender of the premises, it found that the District Court did not err in refusing to award the plaintiff the accelerated rent sought. The Appellate Term found the accelerated rent clause unenforceable because the lease did not require the plaintiff to re-rent the premises upon its recovery of possession after a default in rent and to apply the rent received from the re-renting to the benefit of the defendant.

The plaintiff re-rented the premises in October 2003. The rent paid by the new tenant is less than rent paid by the defendant. The plaintiff commenced this action in November 2004 to recover legal fees incurred in connection with the prior proceeding; rental payments for the months of July, August, and September 2003 when the premises was vacant; the difference between the rent paid by the defendant and the rent paid by the new tenant for the months of October 2003 through April 2008; and legal fees incurred in connection with this action. The defendant counterclaimed to recover the balance of its security deposit after deducting therefrom the amount of the District Court's judgment.

The defendant now moves to dismiss the action on the ground that it may not be maintained because of res judicata and for summary judgment on its counterclaim. The plaintiff cross moves for summary judgment in its favor on the issue of liability and dismissal of the defendant's counterclaim.

Under res judicata, or claim preclusion, a final judgment bars future actions between the same parties on the same cause of action (*see, Matter of Reilly v Reid*, 45 NY2d 24, 27). As a general rule, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*see, O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Matter of Reilly v Reid*, *supra* at 30). Thus, when a plaintiff in a later action brings a claim for damages that could have been presented in a prior proceeding against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by res judicata (*see, Parker v Baluvelt Fire Co.*, 93 NY2d 343, 348-349). The policy against relitigation of adjudicated disputes is strong enough generally to bar a second action even when further investigation of the law or facts

indicates that the controversy has been erroneously decided, whether due to oversight by the parties or error by the courts. Considerations of judicial economy, as well as fairness to the parties, mandate an end to litigation at some point (*see*, **Ellis v Abbey & Ellis**, 294 AD2d 168, *citing Matter of Reilly v Reid*, *supra* at 30).

The present action is between the same parties, is based on the same harm, and arises out of the same transaction as the prior proceeding in District Court. The only difference between this action and that proceeding is the measure of damages. Here, the plaintiff seeks to recover its actual damages, while in the prior proceeding it sought to recover the accelerated rent. The plaintiff proffers no reason why it could not have sought both actual damages and accelerated rent, in the alternative, in the prior proceeding. Although the prior proceeding was commenced before the premises was re-let to another tenant, the plaintiff re-rented the premises in October 2003. The Appellate Term handed down its decision in October 2004, one year later. Thus, the matter could have been remanded to the District Court, at that time, for a determination of the plaintiff's actual damages, including legal fees. Under these circumstances, the court finds that this action is barred by the doctrine of res judicata.

In view of the foregoing, the motion is granted; the complaint is dismissed, and the defendant is awarded \$6,578.91 on its counterclaim with interest from July 17, 2003. The cross motion is denied.

DATED: October 27, 2005

**HON. ELIZABETH HAZLITT EMERSON**

J. S.C.