

Liberty View Corp. v Wyeth, Inc.
2020 NY Slip Op 30670(U)
March 6, 2020
Supreme Court, New York County
Docket Number: 150909/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

LIBERTY VIEW CORPORATION, INDEX NO. 150909/2019

MOTION DATE 06/18/2019, 06/18/2019

MOTION SEQ. NO. 005 006

- v -

WYETH, INC., JOHN BIRCH, XYZ CORP. DEFENDANT. DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 108, 109, 110 were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 006) 90, 91, 92, 93, 94, 95, 111, 112, 113 were read on this motion to/for DISMISS

Upon the foregoing documents:

These motions to dismiss, brought by both the corporate defendant Wyeth, Inc. (Mot Seq 5), and by its principal John Birch (Mot Seq 6), are denied. The motion brought by the Wyeth seeks dismissal based upon several arguments, including: that this action should be heard in Civil Court rather than Supreme Court; that the predicate notices are defective; the late fees and use and occupancy rate of 3 times the rent are unenforceable penalties; plaintiff accepted rent after terminating the tenancy, thus vitiating the termination and that plaintiff's request for a preliminary injunction should be dismissed. Birch's motion sought dismissal on some of the same grounds but also sought dismissal based upon a lack of personal jurisdiction and for amounts that become due after March 31, 2018. The Complaint lists six causes of action: (1) ejectment against Wyeth; (2) breach of contract (lease) against Wyeth; (3) use and occupancy

against Wyeth; (4) attorney's fees against Wyeth; (5) breach of guarantee against Birch; and (6) attorney's fees against Birch.

As a threshold matter, since the motion was filed, Wyeth has vacated the premises. Thus, the motion to dismiss the request for an injunction has been rendered academic. Similarly, although, there remains a dispute as to what date the vacatur took place, it is undisputed that the premises were surrendered (see transcript of proceedings dated October 2, 2019). Thus, the motion to dismiss the ejectment cause of action is denied as academic. Further, defendant Wyeth's argument that this Court lacks jurisdiction over this matter is without merit. The fact that certain commercial landlord/tenant disputes are routinely brought in Civil Court does not divest this Court of jurisdiction in this ejectment action. In fact, the request by plaintiff for injunctive relief demonstrates why this Court's jurisdiction is necessary as the sought-after injunctive relief would not have been obtainable in Civil Court. As the Court does not have to determine whether plaintiff has a right to eject defendant, the remaining claims all are money claims and the arguments relating to the validity of the predicate notices are also academic.

Wyeth's motion to dismiss based upon the argument that the late fees and use and occupancy rate of 3 times the rent are unenforceable penalties is also denied. Without making a determination as to the enforceability of that clause in the lease, it would be premature for the Court to determine, at this motion to dismiss stage, whether something is a permissible liquidated damages clause or an unenforceable penalty. Wyeth may seek to include this argument as a defense, but it is not a proper basis to dismiss. Finally, Wyeth's motion to dismiss based upon an allegation that plaintiff vitiated the termination by accepting rent is denied as this is a proper defense and, in any event, has been contested properly by plaintiff.

Birch's motion to dismiss is also denied. To the extent that Birch has the same arguments as Wyeth, the motion is denied for the same reasons stated above. Birch also moved to dismiss based upon two arguments unique to him; a lack of personal jurisdiction based upon improper service and that the guarantee he signed ended by March 31, 2018. The affidavit of service states that the process server, at Birch's usual place of business located at 533 Canal Street, First Floor and basement, served a copy of the summons and complaint on a Sarah Burns, a person of suitable age and discretion, who was an employee and coworker of Birch and was willing to accept service. Birch argues that for a period of time prior to the commencement of this suit, due to acrimony between the parties over a companion action, he avoided Wyeth Inc.'s 533 Canal office and because of this avoidance it wasn't his "actual place of business" as required under CPLR 308(4).

Birch's argument is without merit. He does not contest that he previously worked at 533 Canal Street. In fact, he does not state that he stopped working there. He simply avoided having a presence there on a "regular basis." The statute does not require service at someone's primary place of business or the office a person most frequently works at. Rather it requires service be made at an actual place of business. Nothing in Birch's statements suggests that he completely stopped going to 533 Canal Street or that he stopped transacting business at that location. As stated in the practice commentaries to CPLR 308(4):

No definitive test has emerged as to the meaning of "actual place of business." It is submitted that the focus should be on a business location at which prompt redelivery to the defendant is likely to occur. One court said, "There must be an identification of the defendant's business with the place, such as comes with employment or proprietorship." *Glasser v. Keller*, 1991, 149 Misc.2d 875, 877, 567 N.Y.S.2d 981, 982 (Sup.Ct. Queens Co.). Thus, delivery at a hospital where the defendant physician frequently performed surgery did not qualify because he had similar privileges at other hospitals in the vicinity. The fact that defendant did business at a given

place “[did] not necessarily make it *his* place of business.” Id. (emphasis in original).

Another potential definition is the place at which the person is physically present with regularity for the purpose of regularly transacting business...

Further, there is no question that Birch held 533 Canal Street out as his place of business (see CPLR 308(6)) prior to the acrimony, that the business that he was the principal of was still located there and transacting business, that an employee/co-worker of his accepted service on his behalf (and he does not argue that she did not have authority to do so), and that he has not articulated any actual other place of business. Given all of the above, the Court finds that Birch was properly served and his motion to dismiss is denied.

Finally, Birch’s motion to dismiss based upon his argument that the guarantee ended March 31, 2018 is denied. A plain reading of the guarantee demonstrates that the guarantee would remain in effect under the circumstances presented here. Accordingly, it is therefore

ORDERED that defendants’ motions to dismiss (Sequences 5 and 6) are denied in all respects. Parties to appear for a preliminary conference on April 1, 2020 in Part 58 in Room 574, 111 Centre Street, New York, NY at 9:30 am.

This constitutes the decision and order of the Court.

3/6/2020

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

DAVID BENJAMIN COHEN, J.S.C.

**HON. DAVID B. COHEN
J.S.C.**