

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30813
H/ct

_____AD3d_____

Argued - March 17, 2011

A. GAIL PRUDENTI, P.J.
MARK C. DILLON
RUTH C. BALKIN
SANDRA L. SGROI, JJ.

2009-09304

DECISION & ORDER

CCCLF, Inc., appellant, v Charlene M. Bonin, et al.,
respondents.

(Index No. 34486/08)

Poltorak, P.C., Brooklyn, N.Y. (Elie C. Poltorak and Levi Silver of counsel), for
appellant.

Rottenberg Lipman Rich, P.C., New York, N.Y. (Thomas E. Chase of counsel), for
respondents.

In an action, inter alia, to recover damages for conversion of corporate assets and
tortious interference with contract, the plaintiff appeals, as limited by its brief, from so much of an
order of the Supreme Court, Kings County (Demarest, J.), dated July 17, 2010, as granted those
branches of the defendants' motion which were to dismiss the complaint pursuant to CPLR 3211(a)(1)
and (7).

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff operated a day care center business (hereinafter the center) located in
premises owned by a nonparty (hereinafter the landlord). In 2007, the plaintiff listed the business for
sale with a broker. The defendants submitted an offer to the broker to buy the center, although no
deal was reached. The plaintiff alleges that the defendants instead offered to pay money directly to
the landlord to evict the plaintiff, and then offer a lease to the defendants. Although the defendants
took possession and began operating the center in 2008, the defendants contend that this occurred
only after the plaintiff surrendered possession of the premises and had, in effect, abandoned the

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business. The plaintiff commenced this action, inter alia, to recover damages for conversion of corporate assets and tortious interference with the lease.

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a cause of action based on documentary evidence which conclusively establishes a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88; *Goldfarb v Schwartz*, 26 AD3d 462). Here, the “surrender agreement” submitted by the defendants demonstrated that the plaintiff voluntarily ceased operating the center and surrendered the lease to the landlord, and agreed to relinquish the premises and its fixtures, in return for being released from any obligations under the lease. Thus, the evidence “utterly refute[d] [the] plaintiff’s factual allegations [and] conclusively establish[ed] . . . defense[s] as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 893). Accordingly, the Supreme Court properly dismissed each of the causes of action asserted in the verified complaint, other than the eighth cause of action, alleging “equitable estoppel,” pursuant to CPLR 3211(a)(1).

Under the circumstances of this case, the Supreme Court also properly dismissed the eighth cause of action, alleging “equitable estoppel,” for failure to state a cause of action (*see CPLR 3211[a][7]*; *Paolino v Paolino*, 51 AD3d 886).

In light of our determination, we need not reach the plaintiff’s remaining contentions.

PRUDENTI, P.J., DILLON, BALKIN and SGROI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court