

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

D32024
W/prt

_____AD3d_____

Argued - June 20, 2011

MARK C. DILLON, J.P.
RANDALL T. ENG
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2010-11560

DECISION & ORDER

Nassau Regional Off Track Betting Corporation,
appellant, v Gloria R. Keily Revocable Trust,
defendant, WL Sunrise Highway, LLC, et al.,
respondents.

(Index No. 14436/10)

Ryan, Brennan & Donnelly LLP, Floral Park, N.Y. (John E. Ryan and John M. Donnelly of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City, N.Y. (Ronald J. Rosenberg and Lesley A. Reardon of counsel), for respondents.

In an action, inter alia, to recover damages for breach of a lease and tortious interference with that lease, the plaintiff appeals from so much of an order and judgment (one paper) of the Supreme Court, Nassau County (Warshawsky, J.), dated November 30, 2010, as granted the motion of the defendants WL Sunrise Highway, LLC, and Larry R. Weinberger for summary judgment dismissing the complaint insofar as asserted against them, to vacate a temporary restraining order contained in an order to show cause dated July 29, 2010, and to cancel a notice of pendency filed on July 29, 2010, with respect to the premises that were the subject of the lease, and denied its motion for a preliminary injunction enjoining the defendants WL Sunrise Highway, LLC, and Larry R. Weinberger from selling, transferring, disposing, or otherwise encumbering the premises, and from evicting it from the premises pending the disposition of the action, and is in favor of the defendants WL Sunrise Highway, LLC, and Larry R. Weinberger and against it dismissing the complaint insofar as asserted against those defendants. By decision and order on motion dated December 28, 2010, this Court granted the plaintiff's motion for a stay of any sale, transfer, disposition, or other encumbrance by the defendant of the premises which are the subject of the lease, and to stay any eviction of the plaintiff from the premises, pending the hearing and determination of this appeal.

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

The plaintiff, as tenant, entered into a lease with the defendant Gloria R. Keily Revocable Trust (hereinafter the Trust), as landlord, permitting the plaintiff to occupy the subject premises (hereinafter the property), where the plaintiff operates an Off Track Betting parlor. Pursuant to the lease, the plaintiff had a right of first refusal to purchase the property. On April 8, 2010, the Trust closed on its sale of the property to the defendant WL Sunrise Highway, LLC (hereinafter WL), which was established by the defendant Larry R. Weinberger. The plaintiff commenced this action against the Trust for breach of the lease and against WL and Weinberger for tortious interference with the lease.

The plaintiff, on its motion for a preliminary injunction enjoining WL and Weinberger from selling, transferring, disposing, or otherwise encumbering the subject premises, or evicting it from the premises pending the disposition of the action, failed to demonstrate by clear and convincing evidence that there was a likelihood of success on the merits and that it would suffer irreparable harm if the injunction were not granted (*see Blinds & Carpet Gallery, Inc., v E.E.M. Realty, Inc.*, 82 AD3d 691, 692; *Liotta v Mattone*, 71 AD3d 741). Accordingly, the Supreme Court properly denied the motion, and vacated a temporary restraining order contained in the order to show cause by which the plaintiff initiated the motion.

Moreover, WL and Weinberger established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them. They demonstrated that they did not intentionally procure the Trust to breach the lease and, thus, that the plaintiff did not have a viable cause of action to recover damages for tortious interference with the lease (*see Dome Prop. Mgt., Inc. v Barbaria*, 47 AD3d 870; *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 593). In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324) or make a showing that additional discovery was necessary to oppose the motion (*see CPLR 3212[f]*; *Westport Ins. Co. v Alvertec Energy Conservation, LLC*, 82 AD3d 1207, 1212). Accordingly, the Supreme Court properly awarded summary judgment to WL and Weinberger dismissing the complaint insofar as asserted against them and vacated the notice of pendency filed in connection with the subject premises.

DILLON, J.P., ENG, SGROI and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court