

Frey v Rose

2007 NY Slip Op 31057(U)

April 30, 2007

Supreme Court, Suffolk County

Docket Number: 0035964/2006

Judge: Emily Pines

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Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:

Hon. Emily Pines

Justice Supreme Court

Motion Dates: 02-09-2007

Submit Date: 04-09-2007

Motion No.: ~~001003~~MOTD

Cross Motion No.: 002004MG

ROBERT FREY,

Plaintiffs,

-against-

ALLAN V. ROSE d/b/a AVR REALTY CO. and
ALLAN V. ROSE, Individually,

Defendants.

X
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DECISION AND ORDER AFTER ORAL ARGUMENT

An Order to Show Cause (motion sequence number 001) was submitted by the Plaintiff dated January 18, 2007 requesting a Temporary Restraining Order and Permanent Injunction by the Court to enjoin, restrain, and permanently bar the Defendants from taking any action to interfere with the Plaintiff's tenancy under a lease dated October 23, 1995. However, since the proper relief requested should have been for Temporary Restraining Order and a Preliminary Injunction, the Court will treat it as such. Justice Weber signed a Temporary Restraining Order on January 19, 2007 granting this relief pending the return date of this motion. The Defendants cross-moved (motion sequence number 002) for an Order dismissing the Amended Complaint and denying the Plaintiff's motion for a preliminary injunction. Oral argument on these motions was taken before Justice Pines on April 9, 2007.

FACTS

The Plaintiff contends he is a tenant in good standing under a

certain lease dated October 23, 1995 (the "Lease"), having taken assignment of the Lease on or about June 2003. The Plaintiff argues that on or about June 16, 2006, he exercised his option to renew the Lease pursuant to section 2.2 of the lease which reads in pertinent part as follows:

Provided that this Lease is in full force and effect ... Tenant may extend the original Term of this Lease for four (4) additional and successive terms of five (5) years each ... by written notice to Landlord on or before six (6) months prior to the then scheduled expiration date.

The Plaintiff argues that on June 16, 2006, the Defendants' attorney conveyed an offer to purchase the Plaintiff's leasehold for the sum of Three Hundred Thousand Dollars. The Plaintiff contends that he declined this offer and specifically exercised his renewal option by stating his intent to the Defendants' attorney. The Plaintiff further argues that the written notice requirement, is vague and ambiguous and should be strictly construed against the Defendants, as the drafter of the lease, allowing the oral exercise of the option to Defendants' attorney to be sufficient.

The Plaintiff further contends that he has made a considerable investment in the leasehold and that the customer goodwill at that location, along with his improvements thereon, would be lost causing a substantial hardship on the Plaintiff. Additionally, the Plaintiff claims that he has an offer to purchase an assignment of the lease in the amount of Six Hundred Seventy Five Thousand Dollars from a third party and since he properly exercised his option to renew, the Defendants are unreasonably withholding consent of the assignment. The Plaintiff argues that he will suffer a substantial hardship and irreparable injury if this location is lost and in comparison, there is no prejudice to the landlord, if the Court finds for the Plaintiff.

The Defendants oppose the Order to Show Cause and cross-move for a dismissal of the Amended Verified Complaint (the "Complaint"). The Complaint asserts three causes of action including, specific performance of the lease dated October 23, 1995, tortious interference with a business advantage and contract, and a permanent injunction. In support of their cross-motion and in opposition to the plaintiff's application for a Preliminary Injunction, the Defendants make legal and

factual arguments against granting specific performance of the lease. The Defendants claim that the terms of the lease were set forth in clear, unambiguous language requiring the Plaintiff to exercise his option to renew in writing, on or before July 17, 2006 and the Plaintiff failing to comply with the these terms caused the lease to expire on January 16, 2007. The Defendants contend that there can be no specific performance of the lease, because a lease between the parties no longer exists.

The Defendants in response to the Plaintiff's second cause of action for tortious interference, argue that the Plaintiff has failed to properly allege any of the elements necessary to prevail on this claim and it should therefore be dismissed.

The Defendants contend that the Plaintiff's third cause of action for a permanent injunction should also be dismissed citing that even if the Court should rule that the oral exercise of the lease option was sufficient (which they contend is not the case), then the Plaintiff at most has claims for money damages, therefore precluding the issuance of a permanent injunction in favor of the Plaintiff.

DISCUSSION

The Plaintiff has brought an order to show cause for a Preliminary Injunction to enjoin, restrain, and bar the Defendants from taking any action to interfere with the Plaintiff's tenancy under a lease dated October 23, 1995, and a third cause of action in his complaint for a permanent injunction. These will be discussed together by the Court. It is well settled that a Preliminary Injunction will not be granted unless the moving party first establishes (1) that it has a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent a Preliminary Injunction, and (3) that a balancing of the equities favors the movant (*see, IVI Environmental, Inc. v McGovern*, 269 AD2d 497; *see also, Aetna Ins. Co. v Capasso*, 75 NY2d 860; *J.A. Preston Corp. v Fabrication Enterprises, Inc.*, 68 NY2d 397, 406; *W. T. Grant Co. v Srogi*, 52 NY2d 496, 517; *Borenstein v Rochel Properties, Inc.*, 176 AD2d 171).

The Plaintiff has failed to establish a likelihood of success on the merits. It is well settled that where a contract is plain and clear it is entitled to be enforced according to its terms. *see, Uribe v. Merchants Bank*, 91 NY2d 336. While there is no dispute that the lease contained a written notice requirement, the Plaintiff argues that the language is ambiguous and should be construed against the landlord to allow the oral exercise of the option by the Plaintiff. Upon reading the language set forth in the lease, the Court finds no ambiguity in the language requiring written notice of the renewal option. The lease clearly states that the option to renew be in writing at least six months prior to the expiration of the lease and that such notice shall be given to the landlord with a copy sent to the Defendants' attorney. Plaintiff's contention that he renewed the option by an oral statement to the defendants' attorney on June 16, 2006, does not satisfy the terms of the lease.

The Plaintiff argues that principles of equity provide him a remedy, despite the contractual failures, relying on *J.N.A. Realty Corp. v. Cross Bay Chelsea*, 42 NY2d 392. In that case, a tenant making considerable investment in the leasehold and standing to lose a considerable amount of goodwill if the location is lost, was held entitled to equitable relief if there is no prejudice to the landlord. In *J.N.A.*, the Court remanded for a new trial to determine whether the landlord made other commitments for the premises and to determine if the landlord would be prejudiced by excusing Plaintiff's failure to exercise his option to renew. However, in the case at bar, this determination need not be made. The Gansberg affidavit submitted with Defendants' cross-motion to dismiss the Complaint, states that the landlord has made a deal with a new tenant at three times the rental rate of that with the Plaintiff and that the new tenant has submitted permits to commence work on the premises. In light of this fact and the statement by Plaintiff that he is seeking to assign this lease for a sum of money and not planning on continuing his business at this location, the Court finds that the landlord would be prejudiced by excusing the Plaintiff's failure to timely renew the lease option. Accordingly, the Plaintiff has failed to demonstrate entitlement to Preliminary Injunctive relief.

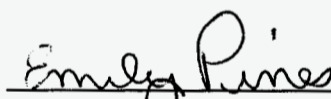
The Defendants have cross-moved to dismiss each of the three claims set forth in Plaintiff's amended verified complaint pursuant to **CPLR §3211**. The Court dismisses the Plaintiff's third cause of action for a permanent injunction on the grounds set forth above. In addition, the Plaintiff's first cause of action seeking specific performance of the lease option must be dismissed as a matter of law. Before the Plaintiff can be awarded specific performance, he must demonstrate his entitlement to relief under the contract. As set forth above, the Plaintiff did not comply with the clear language thereof, by failing to give written notice of his intent to renew. *see, Uribe v. Merchants Bank, supra.*

The Plaintiff's second cause of action for tortious interference with business advantage and contract must also be dismissed. In order to establish tortious interference with a contract, the Plaintiff must show the existence of a valid contract between the Plaintiff and a third party, Defendants' knowledge of that contract, Defendants' intentional procurement of the third party's breach of the contract without justification, actual breach of the contract and damages resulting therefrom. *see, Beecher v. Feldstein, 8 A.D.3d 597.* Other than references to an offer he received, to purchase an assignment of the lease, the Plaintiff has failed to establish that a valid contract exists with a third party. Additionally, Plaintiff has failed to argue that this contract has been breached by the third party and that there are damages resulting therefrom. Therefore the Plaintiff's second cause of action is dismissed.

For all of the above reasons, the Defendants' cross-motion to dismiss pursuant to **CPLR §3211** is granted in all respects.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 30, 2007
Riverhead, New York



Emily Pines
J. S. C.