

**King Constr. and Design, Inc. v 210 Wycombe LLC**

2019 NY Slip Op 31347(U)

May 10, 2019

Supreme Court, New York County

Docket Number: 151558/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

-----X  
**INDEX NO. 151558/2017**

KING CONSTRUCTION AND DESIGN, INC.,

Plaintiff,

**MOTION SEQ. NO. 004**

- v -

210 WYCOMBE LLC, 210 NORTHFIELD LLC, EDWARD WASSERMAN, JLS COST MANAGEMENT SYSTEM INC., EXCELLENT CONTRACTING LLC, JOHN F. GRANEY METAL DESIGN LLC, ROYAL HVAC SYSTEMS, INC., and FIRST REPUBLIC BANK,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 114

were read on this motion to/for RENEWAL/RECONSIDERATION

**FACTUAL AND PROCEDURAL BACKGROUND:**

In this action by plaintiff King Construction and Design, Inc. (“King”) for, among other things, foreclosure on a mechanic’s lien based on home improvement work on the building located at 210 West 11th Street, New York, New York (“the premises”), defendants 210 Wycombe LLC (“210 Wycombe”), 210 Northfield LLC (“210 Northfield”), Edward Wasserman a/k/a Ted Wasserman (“Wasserman”), JLS Cost Management System, Inc. (“JLS”), Jennifer Diamond and Robert Diamond (hereinafter collectively referred to as “defendants”) moved (motion sequence 002), pre-answer, to dismiss the amended complaint against them (“the dismissal motion”). Plaintiff cross-moved for leave to file and serve a second amended complaint to add, among other claims, causes of action sounding in quantum meruit and unjust enrichment.<sup>1</sup>

<sup>1</sup> The cross motion was erroneously filed under motion sequence 003 (Doc. 53). However, when the main motion filed under motion sequence 003 was withdrawn (Doc. 69), it appeared in this Court’s records as though the cross

By decision and order filed December 4, 2017 (Doc. 72) (“the prior order”), this Court, among other things: 1) granted the motion to dismiss the amended complaint (Doc. 19) to the extent that it dismissed the first (tortious interference), third (permanent injunction), and fourth causes of action (promise to answer for debt of another); 2) granted, in part, King’s cross motion to serve a second amended complaint, allowing King to “add causes of action for quantum meruit and unjust enrichment” which, it stated were “appropriate causes of action” given “the absence of a signed written contract”,<sup>2</sup> dismissed the first, third, and fourth causes of action, and added First Republic Bank as a defendant; and 3) directed the Clerk to remove LTI Construction Corp., Jennifer Diamond, and Robert Diamond from the caption as defendants, and to add Excellent Contracting LLC, John F. Graney Metal Design LLC, Royal HVAC Systems, Inc. and First Republic Bank (which held a mortgage on the property) to the caption as defendants.

Wasserman, 210 Wycombe, 210 Northfield, and JLS now move, pursuant to CPLR 2221, for an order vacating that branch of this Court’s filed December 4, 2017 which partially denied the dismissal motion and granted plaintiff’s motion to amend and, upon reconsideration, granting the dismissal motion pursuant to CPLR 3211.<sup>3</sup> In support of the motion, defendants submit an attorney affirmation (Doc. 92); the prior order (Doc. 93); a memorandum of law (Doc. 97); the papers submitted in connection with motion sequence 002 (Docs. 94-96); an affidavit written by Wasserman, a member of 210 Wycombe and 210 Northfield authorized to act on behalf of those

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motion had been resolved. However, the parties thereafter executed a stipulation dated June 1, 2017 deeming the cross motion as having been timely filed in opposition to the motion filed under motion sequence 002. Doc. 71.

<sup>2</sup> This Court further stated that “[d]efendants’ only arguments against adding the causes of action would require this Court to determine, as a matter of law, that the written contract that they submit governs this dispute, despite never being executed by the parties.” Doc. 72, at 4.

<sup>3</sup> Although the notice of motion reflects that defendants seek to partially “vacate” the prior order, they move pursuant to CPLR 2221 (Doc. 89) and the wherefore clause of their attorney’s affirmation (Doc. 92) seeks to renew the dismissal motion. Given the foregoing, this Court treats the motion as one for renewal.

entities (Doc. 90); and an agreement between King and Wasserman purportedly executed on April 20, 2015 (“the purported contract”). Doc. 91.

In their memorandum of law in support of their motion, defendants argue that the amended complaint must be dismissed because plaintiff intentionally overstated the lien amount, a fact which they could prove if this Court were to consider the purported contract.

In his affidavit in support of the motion, Wasserman represents, among other things, that, since 2016, he made “multiple attempts” to find the purported contract (Doc. 90 at par. 3); that his “efforts to locate the [purported contract] were substantially hindered by the fact that the [purported contract], along with the overwhelming majority of my and my family’s personal possession[s], had been placed in storage pending the completion of the work that was the subject of the [purported contract], specifically the remodeling of [his family’s current and future] primary residence” (Doc. 90 at par. 4); that “[d]espite diligent efforts to look through the storage facility in which my copy of the [purported contract] had been placed, I was unable to locate [it]” (Doc. 90, at par. 6); and that, now that the renovation has been completed, his “family’s belongings have been retrieved from storage, which enabled me to conduct a more thorough search than was physically possible while out belongings remained in storage.” Doc. 90 at par. 9.

In opposition to the motion, Michael Babarcich, president of King, argues that the motion must be denied because he never executed the purported agreement. Doc. 98. He maintains that “Wasserman or someone acting on his behalf signed [Babarcich’s] name on the [purported contract] so that he could present it to the Court [and seek reargument of the prior order] and seek dismissal of the fifth and sixth causes of action for quantum meruit and unjust enrichment which are the two causes of action pending against Wasserman individually.” Doc. 98 at par. 12.

In a reply memorandum of law in further support of the motion, defendants argue that Babarcich fails to submit any evidence supporting his claim that his signature was forged on the purported contract.

#### LEGAL CONCLUSIONS:

CPLR 2221 provides, in pertinent part, that a motion for renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]) and that the application “shall contain reasonable justification for the failure to present such facts on the prior motion.” CPLR 2221 (e) (3). Whether to grant renewal is a matter within the discretion of the court. *Cortez v Gersh*, \_\_\_ AD3d \_\_\_, 93 NYS3d 846 (1<sup>st</sup> Dept 2019). “Renewal is granted sparingly ... ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.” *Henry v Peguero*, 72 AD3d 600, 602 (1<sup>st</sup> Dept 2010) (citation omitted).

This Court denies that branch of defendants’ motion seeking renewal since they fail to adequately explain why they did not submit the purported contract in opposition to the dismissal motion. See CPLR 2221(e) (3); *Cortez*, 93 NYS3d at 846; *Jones v City of New York*, 146 AD3d 690, 691 (1<sup>st</sup> Dept 2017). Although Wasserman claims that he did not annex the purported contract to defendants’ dismissal motion because he could not find the same, his cursory affidavit (Doc. 90) left numerous questions regarding his due diligence unanswered, specifically:

1. Although he states that he made “multiple attempts” to find the purported contract (Doc. 90 at par. 3), he does not state the number of attempts, the dates of the attempts or where he looked;
2. Despite stating that most of his family’s personal possessions, as well as the purported contract, were placed in storage during the course of the renovation (Doc. 90, at pars. 4, 6), he does not state which storage facility these items were in;
3. He does not describe his alleged “diligent efforts to look through the storage facility” (Doc. 90 at par 6);
4. He does not explain how or why he was able “to conduct a more thorough search” of his belongings after they were retrieved from storage (Doc. 90 at par. 9);
5. He does not state when, in relation to the time defendants made the dismissal motion, his personal belongings were removed from storage, thus enabling him to make what he claims was the more thorough search referenced above;
6. He does not explain whether he attempted to obtain an executed copy of the purported agreement from King; and
7. He does not address whether a copy of the purported agreement was kept at 210 West 11<sup>th</sup> Street, New York, New York, the business address shown for him on the purported contract he proffers upon this motion. Doc. 91 at 1.

Since that branch of defendants’ motion seeking renewal is denied, it is unnecessary for this Court to address that branch of the motion seeking dismissal of the amended complaint.

Therefore, in light of the foregoing, it is hereby:

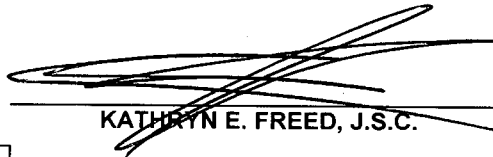
ORDERED that the motion is denied in all respects; and it is further

ORDERED that the parties are directed to appear for a compliance conference at 80 Centre Street, Room 280 on July 16, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/10/2019

DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE