

Jesan Constr. Group LLC v Medford Ber LLC

2022 NY Slip Op 30807(U)

February 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 511407/2021

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS ; CIVIL TERM: COMMERCIAL PART 8

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JESAN CONSTRUCTION GROUP LLC,

Plaintiff, Decision and order

Index No. 511407/2021

MEDFORD BER LLC AND DAVID LEVINE,

Defendants, February 24, 2022

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PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the action on various grounds. The plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The plaintiff is a contractor who was hired by the defendant Medford Ber on September 15, 2017 to perform certain construction work at property located at 99 and 101 Granite Street in Kings County. The plaintiff instituted this lawsuit against the defendants arguing he has not been paid and is owed approximately \$720,255.44 and filed a Mechanic's Lien against the property. The amended complaint asserts six causes of action, namely for a foreclosure of the mechanic's line, breach of contract, unjust enrichment, account stated, trust fund diversion and a violation of the New York Prompt Pay Act. The defendants have moved seeking to dismiss the lawsuit on numerous grounds. First, they assert the plaintiff assigned the contract and thus no longer has any standing to pursue these claims. Further, they argue the lien expired by operation of law, the plaintiff failed

to comply with a condition precedent and that all claims are barred by the contract. As noted, the plaintiff has opposed the motion arguing the claims all have merit.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the complaint as true, whether the party can succeed upon any reasonable view of those facts (Strujan v. Kaufman & Kahn, LLP, 168 AD3d 1114, 93 NYS3d 334 [2d Dept., 2019]). Further, all the allegations in the complaint are deemed true and all reasonable inferences may be drawn in favor of the plaintiff (Weiss v. Lowenberg, 95 AD3d 405, 944 NYS2d 27 [1st Dept., 2012]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, Moskowitz v. Masliansky, 198 AD3d 637, 155 NYS3d 414 [2021]).

The defendants have introduced an 'assignment of contract' wherein Jesan assigned its rights and interests in the contract to an entity entitled ABC Select NY Inc. The document is executed by Angelo Giacchi. Mr. Giacchi has submitted an affidavit wherein he asserts that "the Assignment of Contract annexed to the Motion by MEDFORD BER and LEVINE does not contain

my signature" (see, Affidavit of Angelo Giacchi, ¶12). However, on November 21, 2017 a representative of the plaintiff sent an email which stated "Per your request, please find signed Assignment of Contract" with an attachment of the same 'assignment of contract' presented in the motion.

Furthermore, Mr. Giacchi's assertion he never signed the document compels the only other reasonable conclusion that can be drawn, namely that his signature has been forged. This is true because beneath the signature which Mr. Giacchi denies is his are the printed words "Name: Angelo Giacchi" and beneath that the printed words "Title:Owner" (id). However, it is well settled that the bare self-serving claim that a document was forged is insufficient to raise any questions of fact (Brown Park I, LP v. Imperial Development and Construction Corp., 65 AD3d 510, 882 NYS2d 919 [2d Dept., 2009]). As the Court of Appeals stated in Banco Popular North America v. Victory Taxi Management Inc., 1 NY3d 381, 774 NYS2d 480 [2004] "something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature. Here, there is an absence of factual assertions supporting a claim of forgery..." (id). Of course, where a party presents more than conclusory evidence that the signature is a forgery then questions of fact have been raised and there can be no summary determination of the lawsuit (see, Diplacidi v. Gruder, 135 AD2d 395, 522 NYS2d 1 [1st

Dept., 1987])).

In this case, other than a bald denial as noted, there is no accompanying support for the contention that the signature of Mr. Giacchi is a forgery. Thus, a party that signs and agrees to a contract is generally presumed to know the contents of the contract and to have assented to its terms (Choung v. Allstate Insurance Co., 283 AD2d 468, 724 NYS2d 882 [2d Dept., 2001]).

Mr. Giacchi further argues that "even assuming the authenticity of the Assignment of Contract, ABC was dismissed from the Project so any assignment would have been withdrawn" (see, Affidavit of Angelo Giacchi, ¶13). However, once an assignment has been validly executed it does merely become "withdrawn" upon any occurrences or non-occurrences that may or may not have taken place. Thus, once the assignment was executed in remains valid and is unaffected by ABC's involvement at the project site.

Therefore, the plaintiff has failed to present any evidence raising any questions they maintain standing to proceed with this lawsuit.

Further, Article 18.4 of the contract requires any lawsuit to be filing within one year of substantial completion of the work performed. The plaintiff does not assert the lawsuit was filed within the requisite year, rather, that the time in which


to file the lawsuit was tolled because the defendants had indicated they would pay the plaintiff the outstanding money owed. However, to succeed upon an argument based upon equitable estoppel it must be demonstrated the "plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (Zumpano v. Quinn, 6 NY3d 666, 816 NYS2d 703 [2006]). There is no allegation the defendants engaged in such improper and fraudulent conduct which prevented the plaintiff from commencing the lawsuit in a timely manner pursuant to the contract. Further, there is no basis to question the authenticity of the signatures on the contract.

Consequently, based on the foregoing, the motion seeking to dismiss the complaint is granted.

So ordered.

ENTER:

DATED: February 24, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC