

**Jesan Constr. Group LLC v Medford Ber LLC**

2023 NY Slip Op 30652(U)

February 23, 2023

Supreme Court, Kings County

Docket Number: Index No. 511407/2021

Judge: Leon Ruchelsman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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

-----X  
JESAN CONSTRUCTION GROUP LLC,

Plaintiff,

Decision and order

Index No. 511407/2021

MEDFORD BER LLC AND DAVID LEVINE,

Defendants,

February 23, 2023

-----X  
PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #4

The plaintiff has moved pursuant to CPLR §2221 seeking to renew a decision and order dated February 24, 2022 which dismissed the complaint on the grounds the plaintiff did not maintain standing to commence the action. The defendants oppose the motion. After reviewing all the arguments this court now makes the following determination.

As recorded in the prior order, the court held that an assignment of contract wherein the plaintiff assigned its rights and interests to another entity foreclosed the plaintiff's right to commence this action. The court held the plaintiff's assertion the assignment contained a forgery failed to raise any question of fact since such a bald assertion is insufficient to defeat a motion to dismiss. Upon renewal, the plaintiff argues that evidence unavailable until now demonstrates that indeed the assignment was nullified. Consequently, the complaint should not be dismissed and the parties should proceed with discovery. The plaintiff has opposed the motion arguing the newly discovered evidence fails to raise any question regarding the assignment and

therefore the motion seeking renewal should be denied.

#### Conclusions of Law

It is true that generally, a motion to renew must contain evidence that existed at the time the original motion was filed but was unknown to the moving party (Brooklyn Welding Corp., v. Chin, 236 AD2d 392, 653 NYS2d 631 [2d Dept., 1997]). However, that rule has been defined as 'flexible' and a party may file a motion to renew even if the evidence was known at the time of the original motion provided the party offers a reasonable explanation why the additional facts were not included within the original motion (Progressive Northeastern Insurance Company v. Frenkel, 8 AD3d 390, 777 NYS2d 652 [2d Dept., 2004]).

As noted in the prior order 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 assignment of contract to ABC Select NY Inc., is also dated September 15, 2017. The new evidence presented consists of a document dated October 2, 2017 which is executed by both the plaintiff and ABC Select NY Inc., nullifying the assignment of contract. The defendants argue that although the contract and the assignment are dated September 15, 2017 they were in actuality signed in November 2017 and thus the document dated October 2, 2017 nullifying the

assignment is itself a nullity since it pre-dates the actual assignment. However, there is no evidence supporting the assertion the assignment was not executed on September 15, 2017. It is true that the assignment was not emailed to the parties until November 21, 2017, however, that does not mean it had not been signed until that date. The defendant David Levine asserts that "on November 14, 2017, I emailed Mr. Rosenfeld and asked him where we were on getting the assignment signed" (see, Affidavit of David Levine, ¶ 12 [NYSCEF Doc. No. 73]). In a footnote Mr. Levine clarifies that "I wrote: "Where are we on getting the assignment changed." The word "changed" was a typo. I meant to write "signed."" (id). In any event, that affidavit does not conclusively establish the assignment had not been executed by then, merely that the defendant had not received a copy of such assignment by then. Indeed, there is a presumption that a contract is executed on the date the contract bears (see, Le Valley v. Overacker, 64 AD 612, 72 NYS 12 [3<sup>rd</sup> Dept., 1901]). Of course, the defendant may rebut that presumption with competent evidence, however, it cannot be said as a matter of law that any revocation of the assignment is invalid. Whether the assignment was executed on the date it bears and whether the nullification of the assignment was valid are questions that must be tested by discovery. Therefore, based on the foregoing, the motion to renew is granted and upon the motion to renew the motion seeking

to dismiss the lawsuit is denied. The parties must now proceed with discovery.

So ordered.

ENTER:

DATED: February 23, 2023  
Brooklyn N.Y.



\_\_\_\_\_  
Hon. Leon Ruchelsman  
JSC