

Matter of Sklavos v Oki-Do Ltd.
2019 NY Slip Op 30254(U)
January 28, 2019
Supreme Court, New York County
Docket Number: 020698/2009
Judge: James Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XLVI

COPY

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

x-----x
ALEXANDER SKLAVOS, as Executor of the Estate of
EDWARD SKLAVOS, PRIME REAL ESTATE
VENTURES, LLC, LINDSEY LEIGH, LLC, 401K
PLAN, CHRISTINA SWIRNI a/k/a CHRISTINI
SMIRNI, MARK STYCZEN and EVE STYCZEN,

Plaintiffs,

-against-

OKI-DO LTD., and "JOHN DOE #1"through "JANE
DOE # 10, the last 10 names being fictitious and
unknown to the Plaintiffs, the persons or parties intended
being the occupants, tenants, persons or entities, if any,
having or claiming an interest in or lien upon the
mortgaged premises described in the verifies complaint,

Defendants.

x-----x

INDEX NO.:020698/2009

MOT. SEQ. NO.:024-MD

SIEGEL & REINER, LLP
Attorneys for Plaintiffs
By: Richard H. Del Valle, Esq.
900 Third Avenue
New York, NY 10022

SOLOMON & SIRIS, PC
Co-Counsel to Plaintiffs
By: Michael J. Siris, Esq.
Garden City Center
100 Quentin Roosevelt Boulevard, Suite 504
Garden City, NY 11530

ROSENBERG FELDMAN SMITH, LLP
Attorneys for Defendant
By: Michael H. Smith, Esq.
Richard B. Feldman, Esq.
551 Fifth Avenue, 24th Floor
New York, NY 10176

Upon the following papers numbered 1 to 8 read on this motion to Dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 0; Answering Affidavits and supporting papers 5-6; Replying Affidavits and supporting papers 7-8; Other 0; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the Defendant's motion (seq. no.:024) pursuant to CPLR 4404 (b) for judgment in its favor is denied; and it is further

ORDERED that the Plaintiff is directed to submit an order of reference.

In this commercial foreclosure action, Plaintiffs seek to obtain a judgement of foreclosure on the premises located at 2835 Shipyard Lane, East Marion, New York. The Court's prior Order, dated June 18th, 2018 (Hudson, J.), recited the following facts:

In 2007 the Plaintiffs loaned the Defendants a total of one million dollars which was secured by two mortgages for \$500,000.00 each. The mortgages were originally executed on October 8th, 2007 and October 15th, 2007, and were consolidated into a single note and mortgage on the latter date via a Consolidation, Extension and Modification Agreement ("CEMA"). Defendant's principal, Dr. Kazuki Hillyer, executed a Power of Attorney to Mr. Edward Stein, who was present at the closings. No payments were made on the CEMA and the Plaintiffs commenced this action to foreclose upon the mortgage.

A non-jury trial was conducted on March 8th, 2017, March 9th, 2017, March 13th, 2017, March 16th, 2017, March 17th, 2017 and March 23rd, 2017 to resolve issues of fact related to the July 3rd, 2007 Power of Attorney and subsequent Powers of Attorney dated October 3rd, 2007 and October 4th, 2007, and whether Mr. Stein had authority to execute the mortgage documents. In its order, dated June 18th, 2018, this Court determined that Mr. Stein had actual authority to bind the Defendant with the mortgage by the Power of Attorney dated July 3rd, 2007, and that the mortgage was valid. The Court directed the Plaintiffs to proceed with the foreclosure and submit an order of reference and judgment of foreclosure.

Defendant now moves pursuant to CPLR 4404 (b) for judgment in favor of the Defendant.

In support, the Defendant contends that the Power of Attorney, dated October 4th, 2007 revoked the July 3rd, 2007 Power of Attorney, thereby rendering the mortgage void. The Defendant also argues that the Court failed to give deference to custom and practice of real estate attorneys to record the Power of Attorney and to have the original Power of Attorney at the closing, and for the Attorney in Fact to present an affidavit that the Power of Attorney is in full force and effect. Inasmuch as Mr. Stein presented an affidavit of full force and effect with regard to the invalid October 4th, 2007 Power of Attorney, the mortgage should be deemed void. The Defendant further disputes that Dr. Hillyer ratified the mortgage.

Pursuant to CPLR 4404 (b), after a non-jury trial, a court may, on the motion of a party or its own motion, set aside its decision and make new findings of fact or conclusions of law. Here, the Court finds that the Defendant failed to present new evidence which would require the Court to set aside its decision. Defendant improperly relies upon *ABN AMRO Mtge. Group, Inc. v Stephens* 91 AD3d 801, 939 NYS2d 70 [2d Dept 2012]) for the proposition that the Lender's interests in the property were invalid after the Power of Attorney was found to be a forgery. *ABN AMRO* is inapposite to this matter inasmuch as no prior valid power of attorney existed. In any event, the Plaintiff

demonstrated by Dr. Hillyer's testimony that she readily signed the July 3rd, 2007 Power of Attorney before a notary public and acknowledged her signature. In addition, despite the Court's finding that portions of Dr. Hillyer's testimony lacked credibility, she consistently stated that she never signed the October 3rd and October 4th, 2007 Powers of Attorney. Thus, the Defendant fails to show support for its claim that the invalid October 4th, 2007 Power of Attorney can revoke the prior valid July 3rd, 2007 Power of Attorney.

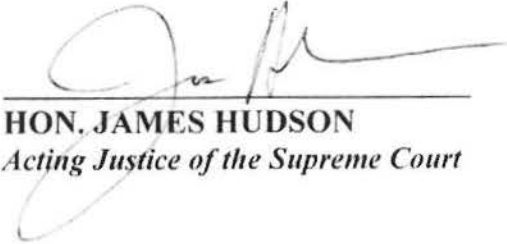
Having failed to demonstrate that the October 4th, 2007 Power of Attorney revoked the July 3rd, 2007 Power of Attorney, the Defendant presented no evidence that the July 3rd, 2007 Power of Attorney had been revoked by Dr. Hillyer. As stated in the prior Order, "revocation occurs when the principal expresses '...words or conduct which are inconsistent with the continuation of [the agent's] authority'" (*In Re Mendelsohn*, 2013 WL 3555690 [Surr.Ct. NY Co. 2013], aff'd 116 AD3d 477 [1st Dept 2014]). In addition, "an agency by ratification will arise if it is proven that a principal 'knew of its agent's practice [and] accepted the benefits'" (*New York State Med. Transporters Ass'n, Inc. v Perales*, 77 NY2d 126, 131, 564 NYS2d 1007 [1990], citing 57 NYJur.2d, Estoppel, Ratification, and Waiver, § 76). In the absence of proof of revocation, Plaintiffs were clearly authorized to rely upon the [July 3rd, 2007] Power of Attorney (*Madison Park Invs. LLC v Atlantic Lofts Corp.*, 33 Misc. 3d 1215(A), 941 N.Y.S.2d 538 [N.Y. Sup.Ct., October 18, 2011]; see GOL §§ 5-1501, 5-1502A [2]; § 5-1504; Real Property Law § 326).

Here, this Court found that Dr. Hillyer was aware of the mortgage by no later than February of 2008, when the recorded October 4th, 2007 Power of Attorney was mailed to her by the Suffolk County Clerk, and the Defendant has presented no evidence to the contrary. Although Dr. Hillyer may have discussed a revocation with her accountant, Mr. Eletto, the Defendant presents no new evidence that a revocation occurred. In addition, the Defendant failed to provide new evidence which disputes Dr. Hillyer's testimony that she wanted Mr. Stein to get her a mortgage. The Defendant also failed to support Dr. Hillyer's statement that the July 3rd, 2007 Power of Attorney expired after ninety days. The Defendant's remaining arguments are unpersuasive.

Accordingly, the Defendant has failed to present grounds to set aside the Decision under the present circumstances. The motion is denied.

The foregoing decision constitutes the decision and Order of the Court.

DATED: JANUARY 28th, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court