

**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

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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.

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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, 24<sup>th</sup> 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 18<sup>th</sup>, 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 8<sup>th</sup>, 2007 and October 15<sup>th</sup>, 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 8<sup>th</sup>, 2017, March 9<sup>th</sup>, 2017, March 13<sup>th</sup>, 2017, March 16<sup>th</sup>, 2017, March 17<sup>th</sup>, 2017 and March 23<sup>rd</sup>, 2017 to resolve issues of fact related to the July 3<sup>rd</sup>, 2007 Power of Attorney and subsequent Powers of Attorney dated October 3<sup>rd</sup>, 2007 and October 4<sup>th</sup>, 2007, and whether Mr. Stein had authority to execute the mortgage documents. In its order, dated June 18<sup>th</sup>, 2018, this Court determined that Mr. Stein had actual authority to bind the Defendant with the mortgage by the Power of Attorney dated July 3<sup>rd</sup>, 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 4<sup>th</sup>, 2007 revoked the July 3<sup>rd</sup>, 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 4<sup>th</sup>, 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 3<sup>rd</sup>, 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 3<sup>rd</sup> and October 4<sup>th</sup>, 2007 Powers of Attorney. Thus, the Defendant fails to show support for its claim that the invalid October 4<sup>th</sup>, 2007 Power of Attorney can revoke the prior valid July 3<sup>rd</sup>, 2007 Power of Attorney.


Having failed to demonstrate that the October 4<sup>th</sup>, 2007 Power of Attorney revoked the July 3<sup>rd</sup>, 2007 Power of Attorney, the Defendant presented no evidence that the July 3<sup>rd</sup>, 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 3<sup>rd</sup>, 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 4<sup>th</sup>, 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 3<sup>rd</sup>, 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 28<sup>th</sup>, 2018**  
**RIVERHEAD, NY**

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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*