

HSBC Bank USA, N.A. v Proctor
2019 NY Slip Op 32426(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 850039/2015
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

INDEX NO. 850039/2015
MOTION DATE
MOTION SEQ. NO. 005 006 007

HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR WELLS FARGO ASSET SECURITIES
CORPORATION, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2006-AR19,

Plaintiff,

- v -

SUSAN PROCTOR, RON HILLMAN, KAY MEDRANO,
ROBERT SHEMIN, BOARD OF MANAGERS OF ORION
CONDOMINIUM, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, JOHN DOE

DECISION + ORDER ON
MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 121, 122, 123, 124,
125, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 149, 150, 151, 156, 157,
158, 181

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 006) 162, 163, 164, 165,
166, 167, 168, 169, 170, 171, 172, 173, 175, 176, 177, 178, 179, 180, 182, 185, 186, 187, 188, 189, 190
were read on this motion to/for EXTEND - TIME

The following e-filed documents, listed by NYSCEF document number (Motion 007) 183, 184, 191, 192,
193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213,
214, 215
were read on this motion to/for DISMISSAL

Motion Sequence Numbers 005, 006 and 007 are consolidated for disposition.

The motion (MS 005) by defendant Ron Hillman to dismiss is granted to the extent that all
claims against him are severed and dismiss and denied to the extent it seeks to extinguish the
mortgage on the property. The motion (MS 006) by plaintiff to extend its time to serve

defendants Hillman and Shemin is denied. The motion (MS 007) by defendant Shemin to dismiss is granted to the extent that all claims against him are severed and dismissed.

Background

This foreclosure action arises out of an apartment located at 350 West 42nd Street in Manhattan. The property is owned by defendants Hillman, Proctor, Medrano and Shemin. Plaintiff claims that it served defendants Hillman and Shemin by serving defendant Proctor. Plaintiff contends that there is a valid and recorded power of attorney that entitled plaintiff to serve Proctor rather than serve Hillman and Shemin individually.

Defendants Hillman and Shemin claim that the power of attorney expired and plaintiff's service on Proctor did not effectuate service on them. These defendants also claim that the statute of limitations expired because plaintiff started a case in 2009 that was later discontinued.

Discussion

The central question on this motion is whether the power of attorney allowed plaintiff to serve Hillman and Shemin by serving only defendant Proctor. The power of attorney for Ron Hillman from August 2006 states that "This Power of Attorney is expressly limited to the purchase of property located at 350 West 42nd Street, Unit #35C, New York, New York 10036 (the "Property"), the accompanying Promissory Note and Mortgage given by Ron Hillman, Robert Shemin, Kay Medrano" (NYSCEF Doc. No. 144). The power of attorney signed by Robert Shemin, also from August 2006, contains the same exact language (*see* NYSCEF Doc. No. 210).

The Court finds that this limited power of attorney relates only to a specific transaction—the purchase of the apartment—and did not permit plaintiff to use it to serve these defendants years later. Plaintiff provides no basis for this Court to find that it could serve defendants

Hillman and Shemin by only serving Proctor. Clearly, these defendants decided the sign a power of attorney to facilitate the purchase of the property; that does not mean that plaintiff could serve Proctor instead of Hillman and Shemin when commencing a foreclosure action.

The Court recognizes that the power of attorney granted Proctor powers relating to “claims and litigation.” But that relates to “claims and litigation” arising out of the purchase of the property, not a subsequent default on the note and mortgage. Simply put, the Court cannot infer that defendants intended the power of attorney to grant Proctor powers for everything related to the property indefinitely. The language contained on the second page of the power of attorney evidences a clear intent to limit Proctor’s powers to the purchase of the property. Therefore, plaintiff was not entitled to serve Hillman and Shemin by serving Proctor and the case is dismissed against them.

The Court also denies plaintiff’s motion for an extension of time to serve Hillman and Shemin. Plaintiff has not demonstrated that good cause exists or that it is in the interest of justice (*see* CPLR 306-b) to extend its time to serve these defendants. For some reason, plaintiff decided to rely on a power of attorney that was expressly limited and not personally serve Hillman and Shemin. The fact that this Court disagreed with plaintiff’s judgment about using the power of attorney for service of process is not a reason to extend plaintiff’s time to serve more than four years after this case began.¹

¹ The Court’s decision is *not* based upon the expiration of the statute of limitations because plaintiff commenced this action within six years after the filing the complaint in the 2009 action. A review of the Supreme Court Records On-Line Library (“SCROLL”) reveals that the 2009 case was commenced in December 2009 and this action began in February 2015. Moreover, the alleged revocation of the power of attorney (NYSCEF Doc. No. 145) played no role in the Court’s decision because there is no evidence it was ever recorded.

Summary

This Court's finding is based solely on the language contained in the power of attorney documentation. There is no question that the power of attorney was created to help facilitate the purchase of the property and there is no indication on this record that it was intended to apply to litigation arising out of a default on the note and mortgage. Moreover, plaintiff offered no binding precedent permitting it to serve Hillman and Shemin based on a power of attorney signed years earlier. The Court also observes that there is no evidence that Proctor was designated as an agent for service of process for either Hillman or Shemin. Therefore, Hillman and Shemin are dismissed from the case and the action will continue against the remaining defendants.

Accordingly, it is hereby

ORDERED that the motion (MS 005) by defendant Ron Hillman to dismiss is granted to the extent that all claims against this defendant are severed and dismissed and denied as to the remaining branches of the motion; and it is further

ORDERED that the motion (MS 006) by plaintiff for an extension of time to serve defendants Hillman and Shemin is denied; and it is further

ORDERED that the motion (MS 007) by defendant Robert Shemin to dismiss is granted and all claims against this defendant are severed and dismissed.

Next Conference: October 29, 2019 at 2:15 p.m.

8/13/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

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