

**Ajax Mtge. Loan Trust 2019-C v
Seneca Mgt. Corp.**

2022 NY Slip Op 34955(U)

November 22, 2022

Supreme Court, Queens County

Docket Number: Index No. 723696/2021

Judge: Denis J. Butler

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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Ajax Mortgage Loan Trust 2019-C,
Mortgage-Backed Securities, Series
2019-C, By U.S. Bank National
Association, As Indenture Trustee,

Plaintiff,

-against-

Seneca Management Corp., New York State
Department Of Taxation and Finance, New
York City Department of Finance, New
York City Environmental Control Board,
New York City Department of
Transportation,

"John Doe #1" through "John Doe #12",
the last twelve names being fictitious
and unknown to plaintiff, the persons or
parties intended being the tenants,
occupants, persons or corporations, if
any, having or claiming an interest in
or lien upon the premises, described in
the complaint,

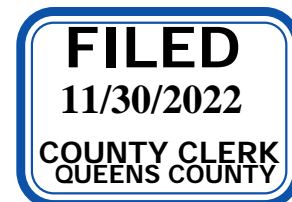
Defendants.

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The following papers were read on this motion by plaintiff Ajax Mortgage Loan Trust 2019-C, Mortgage-Backed Securities, Series 2019-C, By U.S. Bank National Association, As Indenture Trustee (hereinafter Ajax) for an order, (1) pursuant to CPLR § 2304, to quash a subpoena which defendant Seneca Management Corp. (hereinafter Seneca) served upon plaintiff Ajax's counsel, Bruce J. Bergman, Esq., requiring him to submit to a deposition regarding actions he undertook in his current and ongoing representation of plaintiff Ajax, (2) pursuant to CPLR § 3103, for a protective order

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denying defendant Seneca the use of a subpoena or other device to take the deposition of Mr. Bergman, and (3) an award of sanctions against defendant Seneca pursuant to 22 NYCRR § 130-1.1, along with such other and further relief as justice may require under the circumstances.

	Papers <u>Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	E64-68
Affirmation In Opposition, Exhibits.....	E93-94
Reply Affirmation.....	E96

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is a mortgage foreclosure action in which counsel for defendant Seneca served a subpoena seeking to compel counsel for plaintiff Ajax, Bruce J. Bergman, Esq., to appear at a deposition and answer questions concerning his authority to accelerate of the debt. It is uncontroverted that the complaint was unverified (E57), contained an acceleration clause, and was signed by the attorney who is now subject to the subpoena. Plaintiff Ajax moves, inter alia, to quash the subpoena, and for a protective order.

"The party who served the subpoena has an initial minimal obligation to show that the nonparty was apprised of the circumstances or reasons that the disclosure is sought" (Nunez v Peikarian, 208 AD3d 670, 671 [2d Dept 2022]; see Matter of Kapon v Koch, 23 NY3d 32, 34 [2014]). Upon meeting this minimal burden, the burden shifts to the party moving to quash "to establish either that the requested disclosure 'is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious" (Nunez v Peikarian, 208 AD3d 670, 671 [2d Dept 2022], quoting Matter of Kapon v Koch, 23 NY3d 32, 34). Upon meeting this burden, the burden returns to the party issuing the subpoena to demonstrate that the information sought is material and necessary to the prosecution or defense of an action (see Matter of Kapon v Koch, 23 NY3d 32, 38; U.S. Bank Tr., N.A. v Carter, 204 AD3d 727, 730 [2d Dept 2022]). In cases where a party seeks to depose opposing counsel, the party issuing the subpoena must additionally demonstrate "a good faith basis" for the subpoena (Liberty Petroleum Realty, LLC v Gulf Oil, L.P., 164 AD3d 401, 406 [1st Dept 2018]; see generally Matter of Winston, 238 AD2d 345, 346 [2d Dept 1997]; Byoung Sool Kim v Cho Ho Bae, 198 AD2d 206 [2d Dept 1993]).

Defendant Seneca met its initial minimal burden apprising the subpoenaed party of the circumstances or reasons for the

disclosure. The subpoena sought disclosure with respect to five lines of inquiry: 1) attorney Bergman's authority to accelerate the loan, and 2) the basis for that authority; 3) the dates, facts and circumstances surrounding the over act of acceleration; 4) the facts and circumstances surrounding any revocation of such acceleration; and 5) documents reviewed by attorney Bergman identified in his certification. Plaintiff Ajax, however, met its burden demonstrating that the information sought is irrelevant. The subpoena here would serve to inquire into the degree, or extent, of authority conveyed to attorney Bergman to advocate on his client's behalf, which is not relevant to the defense or prosecution of the action.

Defendant Seneca, in response, asserts the information is relevant to the overt act of acceleration. Defendant Seneca, however, failed to demonstrate a good faith basis in seeking to subpoena attorney Bergman, particularly since this information was not in the exclusive control of attorney Bergman (see Liberty Petroleum Realty, LLC v Gulf Oil, L.P., 164 AD3d 401, 406; cf. Matter of Kapon v Koch, 23 NY3d 32, 38), and was premised on defense counsel's speculation that plaintiff Ajax's retainer did not authorize plaintiff Ajax's attorney to accelerate the debt.

To qualify for a protective order "the party seeking such an order must make a factual showing of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice" (Nunez v Peikarian, 208 AD3d 670, 671). Plaintiff Ajax has not made a factual showing of unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice, and thus fails to demonstrate entitlement to a protective order.

Accordingly, it is hereby

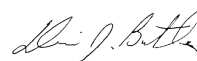
ORDERED that the branch of plaintiff Ajax's motion which was to quash the subpoena is GRANTED; and it is further

ORDERED that the branch of plaintiff Ajax's motion which was for a protective order is DENIED.

Any requests for relief not specifically addressed herein are DENIED.

This constitutes the decision and order of the court.

Dated: November 22, 2022



Denis J. Butler, J.S.C.