

**Matter of HSK Marcy Ave LLC v Hart Estates LLC**

2023 NY Slip Op 30308(U)

January 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 527342/2021

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of January 2023

HONORABLE FRANCOIS A. RIVERA

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In the matter of the Application of HSK Marcy Ave LLC, Marcy Vernon Inc. and Samuel Hoffman,

Petitioners,

- against -

**DECISION & ORDER**

Index No.: 527342/2021

For an Order Discharging a Certain Declaration of Restriction and Mortgage filed against the Property 592 Marcy Avenue, Brooklyn, NY 11206 filed by and in favor of

Hart Estates LLC, Leizer Klar, Rock Fraser, LLC, and Joel Sternberger

Respondents.

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By order to show cause, verified petition and accompanying documents filed on October 26, 2021, under motion sequence number one, the petitioners HSK Marcy Ave LLC, Marcy Vernon Inc., and Samuel Hoffman (hereinafter collectively as petitioners) seek an order pursuant to RPAPL §§1501(1) and 1951(2) discharging a certain declaration of restriction and mortgage filed against the property 592 Marcy Avenue, Brooklyn, New York (hereinafter the subject property) filed by and in favor of respondents Hart Estates LLC, Leizer Klar, Rock Fraser, LLC, and Joel Sternberger.

By notice of cross motion filed on July 7, 2022, under motion sequence number two, respondents Hart Estates LLC, Leizer Klar and Rock Fraser (hereinafter the moving respondents) jointly seek an order: (1) dismissing the petition as asserted against them pursuant to CPLR 3211(a)(8), or, in the alternative, denying the petition pursuant to CPLR 3211(a)(1).

The moving respondents' cross motion also serves as opposition to the order to show cause and petition. The petitioners have opposed the cross motion.

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The Court reviewed and considered documents Nos. 1 through and including 46 filed in the NYSCEF system in determining the petition and cross motion.

## BACKGROUND

On October 26, 2021, the petitioner commenced the instant special proceeding by filing an order to show cause, verified petition, and accompanying documents (hereinafter the commencement papers) with the Kings County Clerk's office.

On November 5, 2021, the Court signed the order to show cause and directed service of the commencement papers upon the respondents on or before November 19, 2021. However, the order did not direct the manner of service upon the respondents.

The petitioners filed an affidavit of service reflecting service of the commencement papers upon the respondents on November 15, 2021, by United States Postal Service priority mail.

By order issued on February 17, 2022 (hereinafter the February 2022 order), the Court, to correct the failure to direct a manner of service of the commencement papers, directed the petitioner to serve the commencement papers upon the respondents by personal service on or before April 8, 2022.

The moving respondents filed the instant cross motion seeking, inter alia, dismissal of the petition in lieu of answering the petition. Respondent Joel Sternberger (hereinafter Sternberger) has not appeared or opposed the petition.

The verified petition alleges the following salient facts among others. The petitioners are identified as follows. Marcy Vernon Inc. is a New York Corporation, HSK Marcy Avenue LLC (hereinafter HSK) is a New York Limited Liability Company and

petitioner Samuel Hoffman (hereinafter Hoffman) is a Kings County resident and the prior owner of the subject property.

The respondent Leizer Klar (hereinafter Klar) is a Kings County resident and the managing member of respondent Hart Estates LLC (hereinafter Hart Estates); respondent Rock Fraser LLC (hereinafter Rock) is a New York Limited Liability Company and respondent Sternberger is a resident of Kings County.

The petitioners are seeking an order directing the Kings County Clerk to remove and discharge a certain declaration of restriction and certain mortgage filed with the Kings County Register on the subject property. The declaration of restriction is dated January 21, 2021, and was recorded on January 27, 2021, with the office of the Kings County City Register under CRFN: 2021000032787. The mortgage, in the amount of \$180,000.00, is dated June 10, 2014, and was recorded on September 8, 2021. The subject declaration and mortgage were filed by the respondents on the subject property.

On May 11, 2021, Hoffman transferred title to the subject property. At the time of the transfer there was a declaration of restriction filed against the subject property and notice of pendency under Index No. 501669/2021 by Hart Estates and Klar as the managing member. By decision and order of this Court, dated September 3, 2021, the action for specific performance filed by Hart Estates and Klar was dismissed. The petitioners contend that the declaration of restriction is frivolous and its enforcement has no actual and substantial benefit to Hart Estates nor to Klar as it is related to the LLC. It has no bearing on the subject property as the LLC neither owns nor has interest in the subject property.

On September 8, 2021, the subject mortgage was filed with the Office of the Register, County of Kings in CRFN 2021000354851. The subject mortgage is dated June 10, 2014 (hereinafter the June 2014 Mortgage), with the borrower being petitioner Marcy Vernon Inc. and the lender being Rock Fraser, LLC. The June 2014 Mortgage was signed by Sternberger, who identified himself as the President of Marcy Vernon Inc.

Here, petitioner HSK took title the property on May 11, 2021, by virtue of a bargain and sale deed recorded against the subject property on June 7, 2021. HSK, as the new owner, had no notice of this purported mortgage lien as the title search it had obtained did not reveal any interest by virtue of respondents' mortgage lien. The petitioners further contend that June 2014 Mortgage cannot not bind Hoffman, the prior owner, who had not executed the mortgage, nor can it bind HSK as the new owner who took title without any notice of any mortgage lien.

The petitioners allege that there was no agreement with Hart Estates to sell the subject property. The petitioners did not obtain a mortgage nor had signed mortgage been signed on behalf of Marcy Vernon Inc. with Rock. Hoffman was always the sole owner and principal of the entity since Marcy Vernon Inc. was originated in April 2012. The petitioners allege that no other individual had authority act on behalf of Marcy Vernon, Inc. Hoffman has not transferred his interest in Marcy Vernon Inc. nor given anyone the authority to act on behalf of Marcy Vernon Inc.

Due to the aforementioned, the petitioners contend that Sternberger had no legal authority to sign the June 2014 Mortgage on behalf of Marcy Vernon Inc. The June 2014

Mortgage was recorded seven years after its fraudulent execution by Sternberger. Therefore, petitioners also seek to discharge, and cancel the fraudulent mortgage recorded against the subject property and to discharge the declaration of restriction.

### LAW AND APPLCATION

The petitioners commenced the instant special proceeding seeking an order pursuant to RPAPL §§1501(1) and 1951(2) discharging the subject declaration of restriction and mortgage filed by the respondents against the subject property. The moving respondents have raised an objection in point of law pursuant to CPLR 404 (a) by the instant cross motion to dismiss the petition, made upon notice within the time allowed for an answer. The moving respondents specifically claimed that the Court lacked personal jurisdiction over them due to improper service of the commencement papers upon them. By decision and order dated December 12, 2022, the Court, pursuant to CPLR 306-b, granted the petitioners an extension of time to personally serve the commencement papers on Hart Estates and Rock by December 30, 2022. The Court also ordered the dismissal of the action as asserted against Klar upon the consent of the petitioners and the moving respondents.

By affidavits of service filed on December 27, 2022, the petitioners demonstrated service of the commencement papers on Hart Estates and Rock on December 15, 2022, by service upon the New York State Secretary of State. Inasmuch, as the petitioners served the commencement papers within the time directed by the Court, the motion by

Hart Estates and Rock to dismiss the verified petition for lack of personal jurisdiction is denied.

In the alternative, the moving respondents seek dismissal of the verified petition pursuant to CPLR 3211(a)(1). In support of this branch of their motion they submitted an affirmation of their counsel, an affidavit of Klar, and nine annexed exhibits labeled A through J. Exhibit A is a copy of the instant petition. Exhibit B is a copy of the February 2022 order. Exhibit C is a copy of the service of the commencement papers on Klar. Exhibit D is a national grid utility bill for Klar. Exhibit E is an affidavit of service of the commencement papers. Exhibit F is a copy of a document from the New York State Department, Division of Corporations purportedly illustrating the address of Rock. Exhibit G is described as a copy of a contract between Marcy Vernon Inc., and Hart Estates and Klar to purchase the subject property. Exhibit H is described as a document reflecting that Samuel Hoffman resigned as officer of Marcy Vernon Inc effective 2012. Exhibit I is described as proof of a docket number of a lawsuit commenced by Sternberger bearing Index Number 16669/2014. Exhibit J is a copy of a check payable to the New York City Department of Finance.

The affirmation of the moving respondents' counsel demonstrated no personal knowledge of any of the allegations of fact in the petition. Their counsel was not the transactional attorney for any transaction between the petitioners and the respondents. Their counsel also failed to authenticate the alleged contract between Marcy Vernon Inc., and Hart Estates and Klar to purchase the subject property. Their counsel also did not

authenticate the alleged resignation of Samuel Hoffman. Finally, their counsel was silent regarding annexed exhibit J.

The affidavit of Klar did not authenticate the alleged contract between Marcy Vernon Inc., and Hart Estates and Klar to purchase the subject property. Nor did it authenticate the document purporting to be the resignation of Samuel Hoffman. Finally, Klar was silent regarding annexed exhibit J.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*Constant v Pub. Adm'r of Queens Cnty.*, 204 AD3d 640, 641 [2nd Dept 2022]). A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849 [2nd Dept 2012], citing *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). To be considered documentary evidence within the meaning of CPLR 3211[a][1], the evidence must be unambiguous and of undisputed authenticity (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2nd Dept 2010]), that is, it must be essentially unassailable (*Suchmacher v Manana Grocery*, 73 AD3d 1017 [2nd Dept 2010]). Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially

undeniable, would qualify as documentary evidence in the proper case (*see Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 682 [2nd Dept 2017]).

The affidavit of Klar and the affirmation of the moving respondents' counsel are not documentary evidence within the intendment of CPLR 3211(a) (1). The alleged contract annexed as exhibit G and the allegation resignation by Hoffman annexed as exhibit H are not in admissible form because there is no testimony by anyone with personal knowledge authenticating these documents.

The remaining papers annexed to the moving respondents' motion, do not refute petitioners' factual allegations, conclusively establishing a defense as a matter of law. Accordingly, the moving respondents' motion to dismiss the petition pursuant to CPLR 3211(a) (1) is denied.

In an exercise of discretion, the Court will permit the moving respondents to interpose an answer to the petition. Leave to submit an answer following denial of a motion to dismiss a special proceeding is discretionary (*see CPLR 404 [a]; Targee St. Internal Med. Grp. P.C. Profit Sharing Tr. v Nationwide Assocs., Inc.*, 300 AD2d 497, 498 2nd Dept 2002]). The answer shall be served and filed within five days after service of the instant order with notice of entry. The petitioner may re-notice the matter for hearing upon two days' notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days' notice (*see CPLR 404 [a]*).

**CONCLUSION**

That branch of the cross motion by respondents Hart Estates LLC, Leizer Klar and Rock Fraser for an order dismissing the petition as asserted against them pursuant to CPLR 3211(a)(8) is denied. However, the petition is dismissed as against respondent Leizer Klar on consent.

That branch of the cross motion by the remaining respondents Hart Estates LLC and Rock Fraser, LLC for an order dismissing the petition as asserted against them pursuant to CPLR 3211(a)(1) is denied.

The respondents Hart Estates LLC, and Rock Fraser, LLC may file their respective answer to the petition within five days after service of the instant order with notice of entry upon them.

The petitioners HSK Marcy Ave LLC, Marcy Vernon Inc. and Samuel Hoffman may re-notice the matter for hearing upon two days' notice, or the respondents Hart Estates LLC, and Rock Fraser, LLC may re-notice the matter for hearing upon service of the answer upon seven days' notice.

The parties are further directed to appear before this Court on February 14, 2023, at 10:30 a.m. for a status conference on the petition.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francis A. Rivera*  
J.S.C.

**HON. FRANCOIS A. RIVERA**  
J.S.C.

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