

<b>Nagel v Simeonidou</b>
2014 NY Slip Op 33532(U)
December 19, 2014
Supreme Court, Queens County
Docket Number: 1344/14
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS  
-----x  
DOUGLAS J. NAGEL.

IA PART 2

Index No: 1344/14

Plaintiff,

Motion Date: 7/29/14

-against-

Motion Seq. No.: 1

MARIA SIMEONIDOU, GEORGE GRAFA,

“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 pon  
the premises described in the complaint,

Defendants.

-----x  
The following papers numbered 1 to 18 read on this motion by defendants for an order  
dismissing the complaint on the grounds of lack of subject matter jurisdiction pursuant to  
CPLR 3211(a)(2); dismissing the complaint against defendant George Grafas on the grounds  
of lack of personal jurisdiction, pursuant to CPLR 3211(a)(3) and 308; and in the alternative  
extending defendants’ time to renew the within motion pursuant to CPLR 2004; and  
determining that the within action be deemed a residential foreclosure. Plaintiff Douglas J.  
Nadel cross move for an order striking the defendants’ answer and granting summary  
judgment in his favor; appointing a referee to compute the amount due; and amending the  
caption to strike the names John Doe #1 through John Doe #2.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Notice of Cross Motion-Affirmation-Affidavit-Exhibits.....	6-10
Opposing Affirmation-Affidavits-Exhibit.....	11-15
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Upon the foregoing papers the motion and cross motion are determined as follows:

Douglas J. Nagel entered into a loan agreement dated March 31, 2010 with George Grafas, whereby Nagel agreed to loan Grafas the maximum sum of \$250,000.00, to be “funded in installments by Nagel at his sole discretion at such times and in such amounts as shall be mutually agreed upon by Nagel and Grafas from time to time.” Said agreement recites that pursuant to an agreement dated February 22, 2010, the members of Buzios Grand, LLC, a Florida limited liability company assigned to Grafas all of its claims, rights, and interest in a civil action pending in Florida, entitled *James Sanchez, et. al. v Buzios Grand LLC, et al.*; that Nagel in his capacity as Trustee for the Trustee for the Douglas James Nagel Revocable Trust of May 1, 1989, is a party to an arbitration proceeding with the American Arbitration Association against Photios Cougentakis; and that Grafas possessed documentation and information concerning the assets of Cougentakis and the assets and operations of various business entities which are owned and operated by Cougentakis. Said agreement further recites that Grafas sought financing from Nagel in order to pay his litigation costs and that Nagel sought Grafas’ assistance in collecting any judgment or award in the Cougentakis arbitration. Maria Simeonidou is identified in said agreement as the Grafas’ mother and the sole owner of the real property known as 25-89 42<sup>nd</sup> Street, Astoria, New York, and that said property would be given as collateral for the loans. Grafas, pursuant to said agreement acknowledged that the loan proceeds would be used solely for the payment of costs, expenses and legal fees associated with the Florida lawsuit. Said agreement was executed by George Grafas.

George Grafas and Maria Simeonidou executed a secured promissory note dated March 31, 2010, with a monetary limit of \$250,000.00, with an interest rate of 7% per annum, in connection with the March 31, 2010 loan agreement between Grafas and Nagel, which provides that the entire outstanding principal comprised of the sum of all loan advances, together with interest, is due and payable in full on or before the maturity date of September 30, 2011. On April 8, 2010, Mr. Grafas executed a schedule of loan advances whereby he acknowledged the receipt of \$81,775.00 on March 31, 2010.

On April 8, 2010, George Grafas and Maria Simeonidou executed mortgage and security agreement dated March 31, 2010, whereby Simeondiou gave Douglas J. Nagel a mortgage in the real property known as 25-89 42<sup>nd</sup> Street, Astoria, New York; Grafas and Simeondiou agreed, among other things, to promptly pay when due the principal and interest on the indebtedness evidenced by the loan documents and other sums secured by said agreement.

Douglas J. Nagel and George Grafas executed a First Amended Loan Agreement with a monetary limit of \$250,000.00, dated July 1, 2011, extending the duration of the March 31,

2010 loan agreement to September 30, 2012, and, among other things, requiring Grafas to pay to Nagel 5% of any amount Grafas received in connection with the Florida lawsuit entitled *James Sanchez, et. al. v Buzios Grand LLC, et al.* Said agreement also provided that the First Amended and Restated Secured Promissory Note “shall be accompanied by a Schedule of Loan Advances, which shall account for and identify each and every loan installment made by Nagel. Upon each loan installment, the Schedule of Loan Advances shall be amended to reflect additional amounts funded by Nagel. Each amendment to the Schedule of Loan Advances shall be signed and acknowledged by Grafas and shall constitute a corresponding restatement and amendment to the First Amended and Restated Secured Promissory Note.

George Grafas and Maria Simeonidou executed a First Amended and Restated Secured Promissory Note, dated July 1, 2011, whereby they jointly and severally agreed to repay Nagel “the outstanding principal balance as stated in the Schedule of Loan Advances dated March 31, 2010, attached hereto and incorporated herein, and amended from time to time (the “Schedule of Loan Advances”), up to a maximum principal sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars together with interest therein at a rate per annum of seven (7%) percent (the “Interest Rate”) calculated on the basis of a 365-day year , for the actual number of days elapsed”. Said document provides, among other things that the loan’s maturity date is September 30, 2012; and that the indebtedness is secured by a security interest and first mortgage on the real property owned by Simeonidou, known as 25-89 42<sup>nd</sup> Street, Astoria, New York.

Each of these documents contain a choice of law provision, stating that it is to be governed by and construed in accordance with the laws of the State of Florida, and the parties agreed to submit to the jurisdiction and venue of the state and/or federal courts located in Miami/Dade County, Florida, “for resolution of all disputes arising out of, in connection with, or by reason of the interpretation, construction, and enforcement of this Agreement...”.

Plaintiff Douglas J. Nagel commenced the within mortgage foreclosure action on January 28, 2014, and alleges, in pertinent part, that he is the holder of the first note, the amended note and the mortgage; that the defendants failed to pay the sums due under the loan agreements which matured on September 30, 2012; that the total amount advanced from March 31, 2010 through November 15, 2012 was \$361,145.99; that interest from the date of each advance at the rate of 7% per annum through January 1, 2014 (\$51.63 per diem) totaled \$55,749.17; and that plaintiff received payments totaling \$135,00.00. Each of the documents described above are attached to, and made part of the complaint.

Defendants served an answer on February 26, 2014 and interposed 29 affirmative defenses, including lack of personal jurisdiction.

Defendants' present motion which seeks, among other things, to dismiss the complaint on the grounds of lack of personal jurisdiction as to George Grafas was timely served within 60 days of service of the answer (CPLR 3211[e]).

Under CPLR 313, the same methods used to serve process on a defendant located in New York must also be used when service is made outside New York (*Morgenthau v Avion Resources Ltd*, 11 NY3d 383, 389 [2008]).

CPLR 308 governs service on natural persons, and under that provision, plaintiff may serve a defendant by delivering the summons and complaint to said defendant in person (CPLR 308 [1]). As an alternative to personal delivery, plaintiff may deliver the summons and complaint to a "person of suitable age and discretion" at defendant's "actual place of business, dwelling place or usual place of abode," and then mailing the summons and complaint to defendant at his "last know residence" or "actual place of business" (CPLR 308 [2]). If service cannot with due diligence be made by either the personal delivery method or the "delivery and mail" method described above, plaintiff may use the "affix and mail" method provided for in CPLR 308(4). Under 308(4), the summons and complaint are affixed to the door of either defendant's "actual place of business, actual dwelling place or usual place of abode," and then mailed to either defendant's last known residence or actual place of business. CPLR 308(6) provides that "[f]or the purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business".

Defendant Maria Simeonidou does not raise any issue with respect to personal jurisdiction.

Defendant George Grafas alleges that he resides in Brazil and that following a telephone conversation with his mother, he mistakenly believed that he was served with process in New York, and retained counsel who served an answer and interposed the affirmative defense of lack of personal jurisdiction. Mr. Grafas asserts that he was never properly served with the summons and complaint. It is undisputed that the service of process by affixing the RPAPL 1303 notice, summons and complaint on March 20, 2014 at 1688 West Avenue, Apt 206, Miami Beach, Florida 33139, and mailing a copy of the papers to said address on April 2, 2014, is ineffective, as it did not comply with CPLR 308 (4) (*see Feinstein v Bergner*, 48 NY2d 234, 241 [1979]; *Tetro v Tizov*, 184 AD2d 633 [1992]; *Gibson v Salvatore*, 102 AD2d 861, 862[1984]). Defendant states in his affidavit that he has resided in Brazil since 2012, and that the place where the summons and verified complaint were affixed was not his dwelling place or usual place of abode at the time service was purportedly made. The affidavit of service on its face recites that defendant Grafas had been evicted from said address prior to March 20, 2014, and that service was being made at his

last known address. Since the summons was affixed to the door of the defendant's last known residence rather than his actual residence or usual place of abode, the purported "nail and mail" service was ineffective and personal jurisdiction was not acquired over the defendant at that time (*see Commissioners of State Ins. Fund v Khondoker*, 55 AD3d 525, 526 [2d Dept 2008]; *In Ja Kim v Dong Hee Han*, 37 AD3d 662 [2d Dept 2007]; *Bank One Natl. Assn. v Osorio*, 26 AD3d 452 [2d Dept 2006]; *European Am. Bank & Trust Co. v Serota*, 242 AD2d 363 [1997]; *2837 Bailey Corp. v Gould*, 143 AD2d 523 [1988]).

Plaintiff's process server also made 16 attempts to serve Grafas at his place of business, Unique Casting Partners LLC, located at 1825 West Ave, Bay 8, Miami, Florida 33139, by either in-hand or suitable age of discretion delivery, between February 20, 2014 and April 15, 2014. After these attempts at service failed, the summons, verified complaint and RPAPL 1303 notices were affixed to the door of 1825 West Ave, Bay 8, Miami, Florida, 33139, on April 15, 2014. A copy of the summons, verified complaint and RPAPL 1303 notices were mailed to Grafas at said address in an envelope marked "personal and confidential" on April 23, 2014.

Mr. Grafas, in his affidavit, asserts that he did not receive the papers that were alleged to have been affixed and that he did not receive anything in the mail. Mr. Grafas contends that service at his business address was improper as he lives in Brazil; that he was in Miami on April 28, 2014 to attend to some business, for a total of 33 hours; and that he flew from Miami to New York on April 30, 2014, and spent 5 days in New York before flying back to Brazil on May 5, 2014.

Mr. Grafas does not deny that he maintains a business at 1825 West Ave, Bay 8, Miami, Florida, 33139, known as Unique Casting Partners LLC. Plaintiff has submitted documentary evidence which establishes that Mr. Grafas is a manager and member of said limited liability company; and that he advertises said business and his services on the internet. The court therefore finds that said address constitutes Mr. Grafas' actual place of business in the United States; that the plaintiff's process server exercised due diligence in attempting to serve Mr. Grafas at his actual place of business in Miami, Florida; and that service was properly made on this defendant by affixing and mailing the summons, verified complaint and RPAPL 1303 notices to his actual place of business in Miami, Florida. Therefore, as this court has personal jurisdiction over defendant George Grafas, that branch of the defendant's motion which seeks to dismiss the complaint on the grounds of lack of personal jurisdiction, is denied.

The within action is an in rem proceeding that seeks to foreclose a mortgage on real property located in Astoria, New York. CPLR 507 provides that "[t]he place of trial of an action in which the judgment demanded would affect the title to, or the possession, use or

enjoyment of, real property shall be in the county in which any part of the subject of the action is situated.”

Contrary to defendants’ assertion, this court has jurisdiction to determine whether the forum selection clause set forth in the mortgage is enforceable. “Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract” (*Brooke Group v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]). “A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (*Creative Mobile Tech., LLC v Smart Modular Tech., Inc.*, 97 AD3d 626, 626 [2d Dept 2012] [citation omitted]; see also *U.S. Mdse., Inc. v L&R Distribs., Inc.*, AD3d , 2014 NY Slip Op 07495, 2014 NY App Div LEXIS 7448 [ 2d Dept 2014]; *Lifetime Brands, Inc. v Garden Ridge, L.P.*, 105 AD3d 1011, 1012 [ 2d Dept 2013]). Accordingly, a forum selection clause will be given effect in the absence of a “strong showing” that it should be set aside (*Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836[2d Dept 2009], quoting *Di Ruocco v Flamingo Beach Hotel & Casino*, 163 AD2d 270, 272 [2d Dept 1990]; see *U.S. Mdse., Inc. v L&R Distribs., Inc.*, *supra*).

Here, the forum selection clause set forth in the mortgage is unenforceable, as the Florida courts do not have subject matter jurisdiction over a mortgage foreclosure action involving real property located in New York. In Florida, an action directly related to the legal status of real property, such as an action to quiet title or to foreclose a mortgage or lien, must be brought in the circuit wherein the property is located (*Publix Super Markets, Inc. v Cheesbro Roofing, Inc.*, 502 So 2d 484, 489 (Fla. 5th DCA 1987) [superseded by statute on other grounds]; *Lallouz v Lallouz*, 695 So 2d 466, 467 [Fla. 3d DCA 1997]; see also *Ruth v Department of Legal Affairs*, 684 So 2d 181, 185 (Fla. 1996) *Goedmakers v Goedmakers*, 520 So 2d 575, 578 [Fla. 1988]; *Bauman v Rayburn*, 878 So 2d 1273, 1274 [Fla. Dist. Ct. App. 5th Dist. 2004]) . “Florida courts do not have in rem or quasi in rem jurisdiction over foreign property ” (*Sargeant v Al-Saleh*, 137 So 3d 432, 434 [Fla. 4th DCA 2014][*citations omitted*]); see also *Burns v State*, 147 So 3d 95, 97 [Fla. Dist. Ct. App. 5th Dist. 2014]; *Paciocco v Young, Stern & Tannenbaum, P.A.*, 481 So 2d 39 [Fla. 3d DCA 1985][“A Florida trial court has no in rem jurisdiction over notes secured by mortgages on real property located in a foreign state, to wit: New York.”)]. Therefore, that branch of the defendants’ motion which seeks to dismiss the complaint on the grounds of lack of subject matter jurisdiction, is denied.

CPLR 3408 mandates a settlement conference in residential foreclosure actions involving a home loan as defined in RPAPL 1304 where the defendant is a resident of the property subject to foreclosure (*see* CPLR 3408). RPAPL 1304 (5) defines a home loan as “a loan, including an open-end credit plan, other than a reverse mortgage transaction, in which: (i) The borrower is a natural person; (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes;(iii) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or a condominium unit, in either case, used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling ; and (iv) The property is located in this state.”

Here, the residential property subject to foreclosure was pledged by Simeonidou as collateral to secure a loan, the proceeds of which were to be used by her son George Grafas solely to finance his legal expenses in an action in which he had acquired an interest. As such, the loan was for business or commercial purposes, and not for personal, family, or household purposes. Furthermore, Mr. Grafas asserts that he is a resident of Brazil and does not state in his affidavit that he intended to occupy the subject property as his principal dwelling. Defendants thus have failed to establish that the subject loan was a home loan, and that they are entitled to a settlement conference pursuant to CPLR 3408 (*see* CPLR 3408; RPAPL 1304 [5]; *see generally, Emigrant Savs. Bank v Philip Sia, Citibank N.A.*, 2012 NY Misc LEXIS 3377, 2012 NY Slip Op 31854 [U] [Sup Ct, Suffolk Co., 2012] *New York Community Bank v Holland*, 2012 NY Misc LEXIS 789, 2012 NY Slip Op 30411[U]) ( Sup Ct, Suffolk County, 2012); *Meyerson Capital X LLC v Kats*, 33 Misc3d 1017 [Sup Ct, Kings County 2011]; *Eastern Sav. Bank, FSB v Aguirre*, 30 Misc 3d 1230 [A],[Sup Ct, Queens County, 2011]; *Home Loan Inv. Bank, F.S.B. v Goodness and Mercy, Inc.*, US Dist Ct, ED NY, 10 CV 4677, 2011 US Dist LEXIS 48213 [2011]. Therefore, that branch of the defendants’ motion which seeks to deem the within action a residential foreclosure, is denied.

Turning now to plaintiff’s cross motion, entitlement to a judgment of foreclosure is established, as a matter of law, where the plaintiff produces the mortgage, the unpaid note, and evidence of the default (*see KeyBank Natl. Assn. v Chapman Steamer Collective, LLC*, 117 AD3d 991 [2d Dept 2014]; *Independence Bank v Valentine*, 113 AD3d 62, 64 [ 2d Dept 2013]). Here, the plaintiff has submitting the loan agreement, mortgage and security agreement and the underlying promissory note and related amended agreements extending the time in which the loan became due. The documentary evidence, however, is insufficient to establish, at this juncture, the amount loaned to the defendants and the default. The subject promissory notes provide that plaintiff would lend the defendants up to the sum of \$250,000. Although the complaint alleges that plaintiff advanced to the defendants from March 31, 2010 through November 15, 2012 the sum of \$361,145.99, the schedule of loan advances dated March 31, 2010, only establishes that the sum of \$81,775.00 was advanced

and received by George Grafas. Plaintiff has not submitted any other evidence establishing that any other amounts allegedly advanced to Grafas. As the complaint alleges that payments of \$135,000.00 were received by the plaintiff, it is not clear that the defendants defaulted on the loan. It is further noted that any sums above and beyond \$250,000.00 are not secured by the subject mortgage. Finally, to the extent that the complaint alleges that advances were made through the date of November 15, 2012, said date was after the date the loan was allegedly due. Therefore, those branches of the cross motion which seeks to strike the defendants answer, directing the entry of summary judgment in plaintiff’s favor, and appointing a referee to compute the amount due, is denied.

That branch of the plaintiff’s motion which seeks to delete the fictitious defendants “John Doe #1” through “John Doe #12” is granted and the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----x

DOUGLAS J. NAGEL,

Index No: 1344/14

Plaintiff,

-against-

MARIA SIMEONIDOU, GEORGE GRAFTS,

Defendants.

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In view of the foregoing, defendants’ motion is denied in its entirety, and plaintiff’s cross motion is granted solely to the extent plaintiff seeks to delete the fictitious defendants “John Doe #1” through “John Doe #12”, and the caption is hereby amended as stated above.

Dated: December 19, 2014

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J.S.C.