

Madison Park Invs. LLC v 488-486 Lefferts LLC

2015 NY Slip Op 30178(U)

February 5, 2015

Supreme Court, Kings County

Docket Number: 502509/2013

Judge: Carolyn E. Demarest

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At an IAS Term, Part Comm-7 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 5th day of February, 2015.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

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MADISON PARK INVESTORS LLC,
Plaintiff,

- against -

Index No. 502509/2013

488-486 LEFFERTS LLC A/K/A 486-488 LEFFERTS LLC
A/K/A 488/486 LEFFERTS AVE LLC A/K/A 488-486
LEFFERTS AVENUE, LLC, SHLOMO ZEER A/K/A
SHLOMO ZER, DAVID MAROM, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY DEPARTMENT OF FINANCE, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE AND
JOHN DOE NO. 1 THROUGH JOHN DOE NO. 10 INCLUSIVE,
THE NAMES OF THE LAST 10 DEFENDANTS BEING
FICTITIOUS, THE TRUE NAMES OF SAID DEFENDANTS
BEING UNKNOWN TO PLAINTIFF, THE PARTIES INTENDED
BEING THOSE HAVING OR CLAIMING AN INTEREST IN,
POSSESSION OF OR LIEN UPON THE MORTGAGED PREMISES
DESCRIBED IN THE COMPLAINT,

Defendants.

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The following e-filed papers read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	24, 26-35 40-44
Opposing Affidavits (Affirmations) _____	47-51
Reply Affidavits (Affirmations) _____	53-54
Memoranda of Law _____	36 52

In this action by plaintiff Madison Park Investors LLC (Madison) to foreclose a commercial mortgage on real property, Madison moves, under motion sequence number one, for an order: (1) granting summary judgment in its favor as against defendants 488-486 Lefferts LLC a/k/a 486-488 Lefferts LLC a/k/a 488-486 Lefferts Ave, LLC a/k/a 488-486 Lefferts Avenue, LLC (Lefferts) and David Marom (Marom), pursuant to CPLR 3212, for the relief demanded in its complaint, based upon the ground that no material issues of fact exist for trial and that it is entitled to judgment as a matter of law, (2) granting it a default judgment, pursuant to CPLR 3215, as against defendants Shlomo Zeer a/k/a Shlomo Zer (Shlomo), New York City Transit Adjudication Bureau, New York City Environmental Control Board, New York City Department of Finance, and New York State Department of Taxation and Finance for the relief demanded in its complaint, based upon the ground that these defendants were duly served with its summons and verified complaint and have not appeared or answered, and the time to do so has expired and has not been extended, (3) appointing a referee to compute the amount due to it for principal and interest on the note and mortgages set forth in its complaint, and for taxes, assessments, water and sewer rents and insurance premiums or other charges advanced and paid for by it, pursuant to any term or provision of the mortgages and/or note, and for all sums advanced by it to secure and preserve the mortgaged premises, with interest from the respective dates of payments and advances, and the amount due to it for its expenses incurred in connection with this foreclosure action and any other steps taken as a result of the default, together with interest

thereon, and to determine whether the mortgaged property shall be sold in separate parcels or as a single parcel, and providing that, upon the confirmation of the referee's report, a final judgment of foreclosure and sale shall be made and entered herein, and (4) amending the caption of this action by omitting the names of "John Does No. 1 through John Doe No. 10" inclusive, as well as the language in the caption appearing thereafter. Marom cross-moves, under motion sequence number two, for an order dismissing this action, pursuant to CPLR 3211 and 3212, based upon the claimed ground that the loan at issue violates the civil and criminal usury statutes.

BACKGROUND

Lefferts is a limited liability company whose sole members and managers are Nir Zeer (Nir) (who is not a party to this action and has a 37.5% membership interest in Lefferts), Shlomo (who has a 37.5% membership interest in Lefferts), and Marom (who has a 25% membership interest in Lefferts). By a promissory note dated June 16, 2008 (the Note), Lefferts unconditionally promised to pay to the order of Madison or its designee the principal sum of \$650,000 with interest at a rate of 13% per annum. The terms of repayment, as recited in the Note were that Lefferts was to pay monthly installments of \$7,041.66 (representing monthly interest at the rate of 13% per annum) beginning on July 16, 2008 and on the same day of each ensuing month for a total of 11 months, and a twelfth payment on June 14, 2009 in the sum of \$657,041.66 (representing principal of \$650,000 and the monthly

interest of \$7,041.66). The Note was executed by Lefferts by Shlomo, as its managing member, and by Nir and Shlomo, individually.

The Note was issued pursuant to the terms of a loan agreement among Madison, Lefferts, Shlomo, and Nir (the Loan Agreement). The Loan Agreement specified that the gross loan amount was for \$650,000 for a loan term of 12 months with interest at a 13% yearly rate on unpaid principal balance. Although both the Loan Agreement and the Note set forth a monthly interest obligation, the entire monthly interest obligation was prepaid by deduction from the principal at closing. The Loan Agreement and Note provided that Shlomo and Nir personally guaranteed the payment of Lefferts' obligation to Madison. The Loan Agreement further provided that first mortgages on property owned by Lefferts would be given as collateral for the Note. The Loan Agreement was executed by Lefferts and by Shlomo and Nir, as personal guarantors. Defendant Marom was not a party to the Note, the Loan Agreement, or the Mortgage and Security Agreement.

As agreed in the Loan Agreement, Lefferts, as mortgagor, executed two mortgages on two properties owned by it (collectively, the property) in favor of Madison, as the mortgagee, each of which partially secured the payment of the indebtedness evidenced by the Note. These mortgages consisted of: (1) a \$325,000 mortgage and security agreement dated June 16, 2008 from Lefferts in favor of Madison encumbering the property located at 486 Lefferts Avenue, in Brooklyn, New York, and (2) a \$325,000 mortgage and security

agreement, also dated June 16, 2008, encumbering the property located at 488 Lefferts Avenue, in Brooklyn, New York (collectively, the mortgages).

Lefferts, in breach of the covenants under the Note, the Loan Agreement, and the mortgages, failed to pay the principal due under the Note on the June 14, 2009 maturity date, and no other party has paid any portion of this indebtedness to date. As a result of this default in payment, in 2009, Madison sued Lefferts, Shlomo, and Nir under the Note in Supreme Court, Richmond County (*Madison Park Investors LLC v 488-486 Lefferts LLC*, Sup Ct, Richmond County, Index No. 102246/09) (the Richmond County action) and was awarded a \$835,640 judgment by order dated August 24, 2011, entered on September 16, 2011. However, nothing was ever collected by Madison on this judgment, as evidenced by an execution against the property of Lefferts, issued in the Richmond County action and returned as unsatisfied on November 30, 2012 by the New York City Marshal. Nir has received a discharge in bankruptcy by the United States Bankruptcy Court for the Eastern District of New York.

Following the inability to collect on the judgment obtained in the Richmond County action based upon the Note, Madison, on May 14, 2013, filed this action against Lefferts, Shlomo, Marom, and others¹ to foreclose the mortgages on the property, and also filed a notice of pendency on that date. Marom, individually and on behalf of Lefferts, interposed an answer, dated July 9, 2013, containing general denials and 22 affirmative defenses.

¹As a result of Nir's discharge in bankruptcy, he is not being sued herein for any deficiency.

Shlomo and the other defendants have not appeared or answered Madison's complaint and the time for them to do so has expired. According to the Complaint, Marom has been made a party to this action to bar his claims asserted in two pending actions brought by him against Lefferts, Nir and Shlomo in Kings County Index No. 12455/09 and against Lefferts, Nir, Shlomo, and plaintiff Madison in Index No. 503134/14.

On June 23, 2014, Madison e-filed the instant motion. Subsequent to the commencement of this action and the filing of this motion, Madison, on June 24, 2014, executed: (1) an Assignment of Action, in which it assigned all of its right, title, and interest in this action to Vintage Equities Corp. (Vintage), (2) an allonge, in which it assigned the Note to Vintage, (3) two Assignments of Mortgages, in which it assigned the mortgages to Vintage, (4) an Assignment of Other Loan Documents to Vintage, and (5) an Assignment of Judgment, in which it assigned its rights in the judgment in the Richmond County action to Vintage. On August 27, 2014, Marom e-filed its instant cross motion. On September 24, 2014, Vintage submitted papers, as the real party in interest based upon the aforesaid assignments, in support of Madison's motion and in opposition to Marom's cross motion.

DISCUSSION

Initially, the Court notes that with respect to Marom's nineteenth affirmative defense, which asserts that Madison is precluded from bringing this action because Madison had previously brought the Richmond County action, RPAPL 1301 (1) provides that "[w]here final judgment for the plaintiff has been rendered in an action to recover any part of the

mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where [it] resides, if [it] resides within the state, or if [it] resides without the state, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.” Here, the execution against Lefferts’ property has been returned wholly unsatisfied, and, thus, this action to foreclose the mortgages has been properly commenced in the county in which the Property is located (*see* CPLR 507).

Additionally, the Court notes that with respect to Marom’s seventh affirmative defense, which asserts a failure to join necessary parties, and its eighth affirmative defense, which asserts a lack of standing, CPLR 1018 provides that “[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action.” Thus, while Madison has transferred its interests in the Note, mortgages, Loan Agreement, and other loan documents to Vintage after the commencement of this action, it may properly continue this action in its name (*see IndyMac Bank F.S.B. v Thompson*, 99 AD3d 669, 669 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 761 [2d Dept 2011]; *NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564 [2d Dept 2005]; *Lincoln Sav. Bank, FSB v Wynn*, 7 AD3d 760, 761 [2d Dept 2004], *lv dismissed* 3 NY3d 766 [2004]; *Central Fed. Sav. v 405 W. 45th St.*, 242 AD2d 512, 512 [1st Dept 1997]).

As to the relief sought by Madison's motion, it is well settled that "in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793, 793 [2d Dept 2012], quoting *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 1080 [2d Dept 2010]). "The burden then shifts to the defendant to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action" (*U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez*, 49 AD3d 711, 711 [2d Dept 2008], quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [2d Dept 1997], *lv dismissed* 91 NY2d 1003 [1998]).

Here, Madison has made a prima facie showing of its entitlement to a judgment of foreclosure by producing the mortgages, the unpaid Note, and the affidavit of its member, Herb Wolowitz, attesting to the default (*see Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895 [2d Dept 2013]; *Solomon v Burden*, 104 AD3d 839, 839 [2d Dept 2013]; *Argent Mtge. Co., LLC*, 79 AD3d at 1080; *Aurora Loan Servs., LLC v Thomas*, 53 AD3d 561, 561 [2d Dept 2008]). It, therefore, became incumbent upon defendants to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to this action (*see Argent Mtge. Co., LLC*, 79 AD3d at 1080-1081).

Marom, on behalf of Lefferts and himself, is the only defendant that has submitted opposition papers to Madison's motion. In his opposition papers, Marom does not dispute

that Lefferts did not pay the amount due under the terms of the Note and mortgages. Rather, Marom contends that the loan was usurious, and he further contends that the loan was governed by a Hetter Iska agreement (the Hetter Iska) which, he claims, by its terms, supersedes the Note and mortgages.

With respect to Marom's eleventh affirmative defense of usury, he argues that the loan at issue violates New York's civil usury statute (General Obligations Law § 5-501) and criminal usury statutes (Penal Law § 190.40 and § 190.42), and that it is, therefore, unenforceable. "A transaction is usurious under civil law when it imposes an annual interest rate exceeding 16%" (*Abir v Malky, Inc.*, 59 AD3d 646, 649 [2d Dept 2009]; *see also* General Obligations Law § 5-501 [1]; Banking Law §14-a [1]). It "is usurious under criminal law when it imposes an annual interest rate exceeding 25%" (*Abir*, 59 AD3d at 649; *see also* Penal Law §§ 190.40, 190.42). "A usurious contract is void and relieves the [borrower] of the obligation to repay principal and interest thereon" (*Abir*, 59 AD3d at 649; *see also* General Obligations Law § 5-511; *Seidel v 18 E. 17th St. Owners*, 79 NY2d 735, 740 [1992]; *Stanley Weisz, P.C. Retirement Plan v NCHD Assoc.*, 237 AD2d 276, 277 [2d Dept 1997]).

As to the defense of civil usury, however, Limited Liability Company Law § 1104 (a) provides that "[n]o domestic or foreign limited liability company shall hereafter interpose the defense of usury in any action." As noted, Lefferts is a limited liability company. In addition, General Obligations Law § 5-501 (6) (a) provides that "[n]o law regulating the

maximum rate of interest which may be charged, taken or received, except section 190.40 and section 190.42 of the penal law, shall apply to any loan or forbearance in the amount of two hundred fifty thousand dollars or more, other than a loan or a forbearance secured primarily by an interest in real property improved by a one or two family residence.” Here, the loan involved commercial property and was in the amount of \$650,000, and, thus, constituted a loan which was more than \$250,000. Therefore, Lefferts (and Marom on Lefferts’ behalf) is precluded from raising the defense of civil usury as a matter of law.

As to the defense of criminal usury, Limited Liability Company Law § 1104 (c) provides that “[t]he provisions of subdivision (a) of this section shall not apply to any action in which a limited liability company interposes a defense of criminal usury as described in section 190.40 of the penal law.” Penal Law § 190.40 provides that “[a] person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, [it] knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.”

Here, the Note provided that the interest rate was 13% for one year on the unpaid principal balance, with 12 monthly interest payments of \$7,041.66, equaling \$84,499.92 in total interest. While a 13% interest rate is below 25%, Marom argues that the loan was nevertheless usurious because the loan disbursement sheet reflects that for this 12-month

loan, Madison retained \$133,250² of the loan proceeds at closing as pre-paid interest and points. He annexes the June 16, 2008 loan disbursement sheet, which states that the deductions from the gross loan of \$650,000 included: (1) pre-paid interest of \$84,500, (2) lender/broker net out (i.e., points) of \$48,750. These sums, together, equal \$133,250. Marom states that subtracting this \$133,250 from \$650,000 resulted in the loan amount actually given to Lefferts as being \$516,750. Marom argues that \$133,500 is 26% of \$516,750, which exceeds the 25% criminal usury cap. He contends that, as a result, this loan is not collectible and Madison is precluded from foreclosing upon it.

Marom's contention is devoid of merit. It is well established that "the net advance is to be calculated by deducting the initial discount, but not the prepaid interest, from the loan amount" (*Shifer v Kelmendi*, 204 AD2d 300, 301 [2d Dept 1994], *lv dismissed* 84 NY2d 978 [1994]; *see also Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 594, n 5 [1981]; *Ludlum Corp. Pension Plan Trust v Matty's Superservice*, 156 AD2d 339, 341 [2d Dept 1989]). Therefore, only the \$48,750 in points, and not the prepaid interest of \$84,500, can be deducted from the \$650,000 to determine the net loan advance. Upon such mathematical calculation, the actual advance of funds subject to calculation of the effective interest rate is \$601,250. Thus, Lefferts' up-front interest payment did not increase the effective interest rate on the loan (*see Band Realty Co. v North Brewster, Inc.*, 37 NY2d 460, 464 [1975],

²While Marom erroneously states that this amount is \$133,500, he actually uses the sum of \$133,250 (\$84,500 plus \$48,750) to make his calculations to arrive at \$516,750 as the net loan amount.

rearg denied 37 NY2d 937[1975]; *Shifer*, 204 AD2d at 301; *Martell v Drake*, 2013 NY Slip Op 31485, *2 [Sup Ct, Albany County 2013]).

The effective interest rate under the Note is, therefore, determined by first applying the interest rate under the Note, 13% for one year on the unpaid principal balance. Multiplying the monthly interest, \$7,041.66, ^{by} 12 months is \$84,499.92 or approximately \$84,500. Adding the \$48,750 in points to this sum of \$84,500 equals \$133,250 in total interest. The total interest of \$133,250 divided by the correct net advance of \$601,250 (\$650,000 - \$48,750) yields the interest rate of 22.16%, the effective interest rate to be used for the purpose of determining whether the loan was usurious. Since the effective interest rate is below the 25% limit set forth in Penal Law § 190.40, it does not support a finding of criminal usury. Consequently, defendants' eleventh affirmative defense of usury is baseless and must be stricken.

Moreover, it is noted that in the Richmond County action, the defense of usury was raised as Lefferts' eleventh affirmative defense and was stricken and Madison was awarded summary judgment in its favor on the Note. Thus, the doctrine of collateral estoppel also precludes this defense from being raised in this action in favor of Lefferts (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). As Marom was not a party to the loan personally, and is joined in interest with Lefferts in the context of this foreclosure action, he is similarly precluded from raising this defense.

Marom further argues that Madison's motion for summary judgment should be denied because the subject loan is governed by a Hetter Iska. He annexes a copy of an unsigned agreement, entitled "Iska Contract," dated June 16, 2008, which provides that "the undersigned" had received the sum of \$650,000 from Madison, as the "Investing Partner," "to be used for business purposes," and that "the undersigned" "obligated [itself] to utilize these funds in a manner which [it] believe[d] w[ould] generate profits." It set forth that "[a]ny profits realized or losses sustained as a result of this investment shall be allocated to the Investing Partner." It stated that "[a]ny claim of loss must be verified through the testimony of two qualified witnesses in, and under conditions acceptable to, an Orthodox Jewish court of law." It also stated that "[a]ny claim regarding the amount of profit generated by these funds shall be verified under solemn oath before and under conditions acceptable to, an Orthodox Jewish court of law." The Iska Contract provided that it was agreed that if the "undersigned" returned the \$650,000 principal to the Investing Partner, "together with an additional \$133,250.00 as payment for the profits which are generated", then the "undersigned" would not be required to make any further payment, nor to make an oath, and that the balance of the profits, if any, would be the sole property of the "undersigned". It stated that the "undersigned" was obligated to make this payment on or before June 15, 2009, and if payment were not made by that time, the terms of the Iska would continue. It set forth that in the event of any conflict between the terms of the Iska agreement and "the terms of any other agreement signed by the two parties in regard to these funds, the

terms of this agreement would prevail". It also stated that it was agreed that any dispute which might arise in connection with this agreement would be submitted to a Beis Din, and that any judgment by the Beis Din could be entered in any court having jurisdiction thereof.

While Marom's copy of the Hetter Iska is unsigned, Vintage has annexed a signed copy of it. The Hetter Iska, dated June 16, 2008 (the same date as the Note and mortgages), was executed by Madison by its attorney David A. Linn. The identity of the "undersigned", which is described in the singular "I", is unclear. There are also three other signatures, without any printed names underneath them, which are not notarized. Upon a comparison of these signatures with those on the Note and mortgages, it appears, as Marom contends, that two of these signatures are those of Shlomo and Nir. The Hetter Iska was not signed by Marom, who was not a party to it. While Marom asserts that the third signature appears to be on behalf of Lefferts, either by its attorney, Steve Rubel, or by its managing member, Shlomo, it is not clear, from the indecipherable signature, which contains no printed name, that it was signed on behalf of Lefferts, whose name does not appear anywhere in the Iska Contract.

Marom contends that the Hetter Iska supersedes Madison's Note and mortgages. He argues that Madison is not entitled to enforce the explicit terms of the Note or mortgages, but, rather, pursuant to the Hetter Iska, Madison was only entitled to collect the actual profits from the business venture involving the property for which the \$650,000 was given, which would be the difference between the eventual sales price of the real property at issue and the

purchase price, less all business costs to Lefferts. Marom claims that one of those costs to Lefferts was \$500,000 Marom had advanced to it, which was never repaid, and is apparently the subject of the two pending actions brought by Marom. He argues (without pointing to any term in Lefferts' Operating Agreement) that pursuant to Lefferts' Operating Agreement, he is entitled to the return of his \$500,000 before any other monies are disbursed. He states that until he is repaid the \$500,000 he put into this business venture, Madison cannot take its "profits".

Notably, however, Article VIII of Lefferts' Operating Agreement only provides that the net profits and net losses of Lefferts would be allocated to the members in the same proportions that they share in distributions of its cash flow. Lefferts' Operating Agreement listed, on Schedule A, that the \$500,000 given by Marom was his capital contribution for his 25% membership interest in Lefferts. Thus, it is Marom who would be limited in his right to recovery proportional to his interest in profits.

In his action filed on May 20, 2009 (*Marom v Zeer*, Sup Ct, Kings County, Index No. 12477/09) (the 2009 action), Marom alleged that he had an equitable mortgage and a first priority lien in the amount of \$500,000 against the property, and sought damages as against Shlomo and Nir for fraud, conversion, breach of fiduciary duty, and breach of contract, and as against Madison for allegedly aiding and abetting Shlomo and Nir's alleged fraud. Specifically, in the 2009 action, Marom alleged that in June 2008, Shlomo and Nir, who were developers of condominiums, solicited him to provide \$500,000 in funds for a project,

whereby they would purchase the property, erect condominiums thereon, and then sell the condominiums. He alleged that in return for this contribution, he was to be made a 25% member of Lefferts and receive 25% of the profits of Lefferts in lieu of interest on his \$500,000, and that he believed, based upon this investment, that he would have a first mortgage and first priority lien against the property. However, Marom alleged in the complaint in the 2009 action, that, instead, Lefferts took a “hard money” acquisition loan from Madison in the amount of \$650,000, which he conceded gave Madison a first mortgage against the property. Marom alleged that Shlomo and Nir fraudulently concealed this fact from him. In acknowledging that Madison held a first mortgage on the property, Marom did not raise the issue of the Hetter Iska in the 2009 action, nor did he allege that there was a profit-sharing arrangement with Madison or that the Note and mortgages held by Madison were superseded by the Hetter Iska.

Marom contends that the Hetter Iska, tracking the terms of the Note and Loan Agreement, provided for Madison to receive “profits” of \$133,250 on or before June 15, 2009, and that this amount was already prepaid at the closing, as shown on the loan disbursement sheet. Such terms do not support defendant’s contention that the terms of the Hetter Iska superseded the terms of the Note and mortgages but, rather, suggests an acknowledgment of the obligations reflected in the Note and Loan Agreement. Moreover, no evidence has been proffered of a resolution authorizing a profit-sharing or joint venture agreement between Madison and Lefferts and the signatures appearing on the Hetter Iska are

not only unclear, but, in contrast to the formally notarized signatures on the Note and mortgages, are not notarized. Furthermore, as previously noted, while the Hetter Iska was executed on the same date as the Note and mortgages, the Note and mortgages make no reference to it, and the title holder of the Property and maker of the Note, Lefferts, was not a party to the Iska agreement.

Finally, contrary to Marom's arguments, the Hetter Iska does not provide that Madison is only entitled to actual profits from a business venture after it has repaid him the \$500,000 which he claims to have advanced to Lefferts. While the Hetter Iska states that any profits realized or losses sustained as a result of this investment would be allocated to the Investing Partner, it does not mention Marom or any loans which would take priority over plaintiff's loan. Lefferts has never sought to submit any dispute with Madison to a Beis Din, as required by the terms of the Hetter Iska and no motion has been made either to compel or stay arbitration before the Beis Din though this action has been pending before this Court since May 2013. Notably, the Hetter Iska stated that the "undersigned" agreed to return the principal of \$650,000 plus \$133,250 as payment for the profits which are generated, and that only then would the balance of the profits become the sole property of the "undersigned". Consistent with the terms of the Note which required payment of \$133,250 in interest plus the return of the principal of \$650,000 by June 15, 2009, under the Iska agreement, the "undersigned" was obligated to make this payment on or before June 15, 2009.

Marom argues that Madison wrongfully concealed the existence of the Hetter Iska from this Court and from the Richmond County Supreme Court in the Richmond County action and had retained the only signed copy of the Hetter Iska. He states that he is the only member of Lefferts who has invested money in this project, and that the other members of Lefferts made no attempt to protect his investment in the Richmond County action. He points to the fact that he was not served, and was not a defendant, in the Richmond County action, and maintains that, as a result, he cannot be bound by it.

This argument, however, is unavailing as a defense to the foreclosure of Lefferts' property. As previously noted, Marom was not a signatory to the Hetter Iska, and there is no showing that the Hetter Iska was duly signed on behalf of Lefferts or authorized by it. Furthermore, even if Lefferts had been a signatory to the Hetter Iska, Lefferts, at no time, sought relief before a Beis Din, and did not raise the issue of the Hetter Iska in the Richmond County action. The validity of Lefferts' obligation under the Note (which the mortgages secured) was determined in the Richmond County action as a matter of law, and Marom cannot now question its validity on behalf of Lefferts, as a defense to this foreclosure action brought against Lefferts' property.

In any event, the Hetter Iska³ cannot be held to have affected the validity of the duly executed Note and mortgages. The explicit language of the mortgages disavows any intent to substitute the relevant laws with that of Jewish Law. Paragraph 38 of the mortgages explicitly provides that “[t]he validity and enforceability of this mortgage and all transactions and questions arising hereunder, shall be construed and interpreted according to the Laws of the State wherein the premises is located.” This explicit language reflects the parties’ clear and unambiguous intent to be bound by the civil laws of the appropriate jurisdiction (i.e., New York State) and an agreement must be construed according to the expressed intent of

³A Hetter Iska “was a device developed in the 12th to 14th centuries to overcome the Biblical prohibition against charging interest by one Jew to another” (*Leibovici v Rawicki*, 57 Misc 2d 141, 144 [Civil Ct, NY County 1968], *affd* 64 Misc 2d 858 [App Term 1969]; *see also Arnav Indus., Inc. Empl. Retirement Trust v Westside Realty Assoc.*, 180 AD2d 463, 463 [1st Dept 1992]; *Wiesel v Rubinstein*, 12 Misc 3d 1168[A], 2006 NY Slip Op 51107[U], *1 [Sup Ct, Nassau County 2006] [noting that a Heter Iska is a Talmudic doctrine which was devised to avoid the religious proscription against lending money for interest]). It has been described as a “loan structured in a certain way under Jewish law that allows interest” (*Muller v Wertzberger*, 39 Misc 3d 1237[A], 2013 NY Slip Op 50915[U], *4 n 2 [Sup Ct, Kings County 2013], *rearg denied* 41 Misc 3d 1229[A], 2013 NY Slip Op 51928[U] [Sup Ct, Kings County 2013]).

It has been held that a Hetter Iska constitutes “merely a compliance in form with Hebraic law,” and does not create a partnership, joint venture, or profit sharing agreement (*Arnav Indus., Inc. Empl. Retirement Trust*, 180 AD2d at 464, quoting *Barclay Commerce Corp. v Finkelstein*, 11 AD2d 327, 328 [1st Dept 1960], *appeal denied* 11 AD2d 1019 [1st Dept 1960]; *see also Barclays Discount Bank v Levy*, 743 F2d 722, 724 n 2 [9th Cir 1984]; *VNB New York Corp. v Lynbrook LLC*, 2012 NY Slip Op 30207[U] [Sup Ct, Nassau County 2012]; *Jedwab v Brite Candle & Gifts, Inc.*, 2006 WL 4547646 [Sup Ct, NY County 2006]; *Heimbinder v Berkovitz*, 175 Misc 2d 808, 818 [Sup Ct, Kings County 1998], *mod on other grounds* 263 AD2d 466 [2d Dept 1999], *lv denied* 94 NY2d 755 [1999]). Moreover, it has been specifically held that “a Het[t]er Iska agreement does not alter the clear civil law terms of a note and a mortgage” (*VNB New York Corp.*, 2012 NY Slip Op 30207[U]).

the parties (*see Lobacz v Lobacz*, 72 AD3d 653, 654 [2d Dept 2010]; *Ditmars-31' St. Dev. Corp. v Punia*, 17 AD2d 357, 361 [2d Dept 1962]). Consequently, the mortgages are governed by New York law, not Hebraic law.

Marom also argues that this action should be dismissed on the basis that the loan was not duly authorized by Lefferts (as asserted by the second affirmative defense in Marom's answer). He asserts that the resolution that Madison relies upon to show that the loan was authorized by Lefferts contained the language, in paragraph 1, that the secretary of Lefferts certifies that "[a]t a meeting of the board of directors of [Lefferts] duly called and held this day at which a quorum was present and acted throughout, the board of directors unanimously adopted the following resolution, *which has been modified or rescinded*" (emphasis added). He states that this shows that the resolution was modified or rescinded because the Hetter Iska governs.

The resolution, however, which was dated June 16, 2008, the same date as the execution of the Note, the mortgages, and the Loan Agreement, and was executed on behalf of Lefferts by Zer and Marom (whose signatures are notarized), and contained the corporate seal, further stated that it was "resolved, that [Lefferts] execute and deliver to [Madison] . . . a mortgage covering the property owned by [it], located at 488-496 Lefferts Avenue, Brooklyn, New York, such mortgage to be for the sum of \$650,000 to secure the payment of a note of [Lefferts], bearing even date therewith, conditioned for the payment of said sum, with interest thereon." It further authorized "the president or vice-president or any other

officer of [Lefferts] . . . to execute and deliver such note and mortgage and such other instruments as such officer may deem proper and advisable and to affix the seal of [Lefferts] thereto.” In addition, it stated that “[t]his certificate is made and delivered in order to induce the lender referred to in the foregoing resolution to make the loan and accept the mortgage referred to therein and to induce any title insurance company to issue a policy of title insurance insuring to such lender the validity and priority of such mortgage.” Thus, in view of the language regarding the unambiguous intent of the resolution and the fact that it was dated the same date as the date on which the Note, mortgages, and the Loan Agreement were executed, it appears that the language stating that it was modified or rescinded was a mere inadvertent typographical error, and that the word “not” should have preceded the words “modified or rescinded.” Therefore, contrary to Marom’s contention, the loan to Lefferts was duly authorized pursuant to the resolution.

Moreover, the note and mortgages were also authorized pursuant to Lefferts’ Operating Agreement. Article V (A) of Lefferts’ Operating Agreement provided that the management of Lefferts was vested in its members, who shall also serve as its operating managers, and that “all decisions of the Operating Managers shall be by a majority in interest of the Members.” Article V (E) further provided that the operating managers (i.e., the members) may “without obtaining the consent of two-thirds in interest of the Members . . . create any indebtedness for borrowed money whether or not secured.” Thus, since Shlomo and Nir, who held a majority in interest in Lefferts (37.5% each or a total of 75% interest in

Lefferts), signed the note and mortgages, the Note and mortgages were consented to by more than a majority in interest of the members of Lefferts, as required by the Operating Agreement.

Inasmuch as Marom has failed to show any basis for dismissal of this action, his cross motion must be denied. As to the remaining affirmative defenses interposed in defendants' answer, they have been demonstrated to be without merit by Madison's supporting papers. In opposition to Madison's motion, Marom has failed to specifically address Madison's arguments regarding these other affirmative defenses and has failed to raise any triable issue of fact with respect to any of them. Thus, Madison is entitled to summary judgment of foreclosure in its favor as against both Lefferts and Marom (*see* CPLR 3212 [b]). However, in light of plaintiff's allegation that its purpose in joining Marom was to defeat Marom's claims in the pending actions, plaintiff's judgment of foreclosure herein, effectively cutting off any claim Marom might have against the Property, is without prejudice to his claims in the other actions. Marom's rights in the pending actions do not, however, defeat plaintiff's right to foreclose upon the property.

As to Shlomo, New York City Transit Adjudication Bureau, New York City Environmental Control Board, New York City Department of Finance, and New York State Department of Taxation and Finance, Madison has submitted affidavits of service showing that these defendants were duly served, and that they failed to answer the complaint or otherwise appear in this action. Madison is, therefore, entitled to a default judgment against

them (*see* RPAPL 1321). Additionally, since Madison states that the fictitious defendants named as "John Doe No. 1 through John Doe No. 10" are unnecessary parties, an order amending the caption of this action to omit their names is warranted (*see Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 1227 [2d Dept 2014]; *US Bank, N.A. v Boyce*, 93 AD3d 782, 783 [2d Dept 2012]).

CONCLUSION

Accordingly, Madison's motion for an order granting it summary judgment in its favor as against Lefferts and Marom, striking and dismissing their affirmative defenses, and appointing a referee to compute the amounts due under the mortgages to it (or its assignee, Vintage), is granted. Since Madison has already submitted a proposed order for the appointment of a referee in this mortgage foreclosure action, such order (which is annexed to its motion) will be signed by the Court, and a referee will be selected from the list established by the Chief Administrator of the Courts pursuant to the Rules of the Chief Judge (22 NYCRR) Part 36. A default judgment shall be entered with the Kings County Clerk as against Shlomo, New York City Transit Adjudication Bureau, New York City Environmental Control Board, New York City Department of Finance, and New York State Department of Taxation and Finance, who have not answered or appeared in this action. This action is dismissed as against "John Doe No. 1 through John Doe No. 10" as unnecessary party defendants to this action and the caption of this action shall be amended to delete them as

parties to this action. Defendants Marom and Leffert's cross motion for an order dismissing Madison's complaint is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. CAROLYN E. DEMAREST