MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 6

EASTERN SAVINGS BANK, FSB,	Index No.: 21895/10
Plaintiff,	By: **Lane, J.**
-against-	Dated: June 19, 2015
AMALIA KILADITIS et al.,	Motion Date: April 23, 2015
Defendants.	Motion Cal. No. : 43
	Motion Seq. No.: 10

Plaintiff commenced an action entitled *Eastern Savings Bank, FSB v Kiladitis* (Supreme Court, Queens County, Index No. 8759/10) to foreclose a "Mortgage, Assignment of Leases and Rents and Security Agreement" (the subject mortgage) dated as of May 13, 2008 and recorded on May 29, 2008, given to it by defendants Amalia Kiladitis and Demetria K. Bartziokas on the real property known as 23-60 36th Street, Astoria, New York and certain personal property, to secure a promissory note in the principal amount of $175,000.00, plus interest. Plaintiff alleged that it recorded a UCC financing statement, securing equipment on the property. Plaintiff thereafter commenced the instant action on August 26, 2010, which seeks to reform the same mortgage, insofar as the mortgage contains an incomplete property description, foreclose the subject mortgage as reformed, based upon a default in payment of the monthly mortgage

installment due on November 1, 2009 and thereafter. By order dated May 4, 2011 and entered on May 10, 2011, the two (2) actions were consolidated into this foreclosure action under the index number assigned to this action (Index No. 21895/10), and a referee was appointed for the purposes of computing the amount due and owing plaintiff and to examine and report whether the mortgaged premises may be sold in parcels.

On July 11, 2011, the Referee filed his oath and report dated July 6, 2011. The referee's report indicated that the principal and interest amount due plaintiff under the mortgage and note was in the amount of $303,620.92 as of November 15, 2012, plus interest on the principal and any escrow advances, as set forth in a computation schedule annexed to the report, from June 15, 2011, exclusive of attorneys' fees. The computation schedule indicated, among other things, that the contract rate of interest had been computed for the period from October 1, 2008 through October 31, 2008, and a default rate interest had been computed for the period from November 1, 2008 through and including June 15, 2011. The schedule also indicated that the referee's computation included late charges for the period of November 2008 through August 2010. The referee's report also indicated that the mortgaged premises should be sold in one parcel.

Plaintiff thereafter obtained a default judgment of foreclosure and sale dated October 28, 2011, and entered on November 7, 2011, which confirmed the referee's report of computation. Pursuant to the judgment of foreclosure and sale, the amount of $303,620.25 was due plaintiff as of June 15, 2011, plus interest thereafter.

Defendants Kiladitis and Bartziokas subsequently sought, by various motions (including orders to show cause), to vacate the judgment of foreclosure and sale and dismiss the complaint insofar as asserted against them, or in the alternative, for leave to serve a late answer, and stay the foreclosure sale, and for other relief. The parties entered into a stipulation on February 5, 2013, whereby defendant Bartziokas withdrew that portion of one of the motions objecting to service of process, and waived her right to a traverse hearing. A traverse hearing, however, was held on the issue of proper service of process upon defendant Kiladitis. By order dated June 17, 2014, the court determined that defendant Kiladitis was properly served with process. By the same order, the court denied those pending motions by defendant Bartziokas with prejudice insofar as she was a defaulting party, and granted that branch of one of the motions by defendant Kiladitis for leave to interpose a late answer pursuant to CPLR 317. The court denied the remaining branches of the motions by defendant Kiladitis in which she sought to declare the subject mortgage to be residential, and not commercial in nature, "expunge" it from the public records as usurious, unconscionable or against public policy, and compel plaintiff to accept the sum of $175,000.00 as payment in full satisfaction of the subject mortgage, or alternatively, for leave to pay the amount of $175,000.00 into court, to toll the accumulation of interest, late fees, penalties and other like charges as of January 2012, direct plaintiff to make an accounting, compel plaintiff to assign the note and mortgage to a third party, declare plaintiff's actions towards her to be unconscionable, and award

costs, including attorneys' fees to defendants Kiladitis and Bartziokas, without prejudice with leave to renew upon Kiladitis's answering the complaint. On July 25, 2014, defendant Kiladitis served an answer, asserting various affirmative defenses and interposing counterclaims for rescission, reformation of the subject mortgage, breach of the implied covenant of good faith and fair dealing, deceptive business practices, fraud, and violation of federal and state laws including the federal Truth in Lending Act (15 USC § 1601 *et seq.*) (the TILA) and New York State's Banking Law. Plaintiff filed a reply to the counterclaims.

Defendants Kiladitis and Bartziokas now move to declare the subject mortgage to be residential, and not commercial in nature, to expunge it from the public records as usurious, unconscionable or against public policy, to compel plaintiff to accept the sum of $175,000.00 as payment in full satisfaction of the subject mortgage, or alternatively, for leave to pay the amount of $175,000.00 into court, to "stay" the accumulation of interest, late fees, penalties and other like charges as of January 2012, to direct plaintiff to make an accounting, compel plaintiff to assign the note and mortgage to a third party, to declare plaintiff's actions towards them to be unconscionable, to award them their costs, including attorneys' fees, and for leave to appoint a receiver. Plaintiff opposes the motion by defendant Kiladitis and cross-moves pursuant to CPLR 3212 for summary judgment against defendant Kiladitis, to strike her answer and dismiss her counterclaims, and for leave to amend the judgment of foreclosure and sale dated

November 7, 2011 as proposed, without first holding an additional computation hearing before the Referee. Defendant Kiladitis opposes the cross motion. The remaining defendants have not appeared in relation to the motion or cross motion.

That branch of the cross motion by plaintiff to amend the judgment of foreclosure and sale is denied as moot. By the prior order dated June 17, 2014, the judgment, insofar as it was entered against defendant Kiladitis upon default, was vacated and defendant Kiladitis has answered the complaint.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). In addition, "when moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law' " (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006; *see Mendel Group, Inc. v Prince*, 114 AD3d 732 [2d Dept 2014]).

In support of the cross motion, plaintiff offers, among other things, a copy

of the pleadings, the subject mortgage and note, a UCC financing statement (Form UCC-1), the affirmation of its counsel, an excerpt of a title report, and an affidavit of Terry Brown, a senior asset manager of plaintiff.

With respect to that branch of the cross motion by plaintiff for summary judgment on the complaint insofar as asserted against defendant Kiladitis and dismissing her affirmative defenses and counterclaims, plaintiff has made a prima facie showing of entitlement to judgment as a matter of law (*see Deutsche Bank Nat. Trust Co. v Whalen*, 107 AD3d 931 [2d Dept 2013]*; Deutsche Bank Nat. Trust Co. v Islar*, 122 AD3d 566 [2d Dept 2014]; *see Katz v Miller*, 120 AD3d 768 [2d Dept 2014]; *KeyBank N.A. v Chapman Steamer Collective, LLC*, 117 AD3d 991, 992 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895 [2d Dept 2013]).

The burden shifts to defendant Kiladitis to lay bare her proof in opposition to the plaintiff's prima facie showing, or to demonstrate the existence of a question of fact with respect to a defense or counterclaim warranting the denial of summary judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067–1068 [1979]).

Defendant Kiladitis asserts the purpose of the mortgage loan was a consumer loan, related to a residential property. She also asserts that plaintiff took advantage of her and defendant Bartziokas, who were unrepresented by counsel in the transaction, and violated the TILA, the New York Banking Law, RPAPL 1304 and

CPLR 3408.

The TILA and the Home Ownership and Equity Protection Act of 1994 (15 USC § 1639) ("the HOEPA"), an amendment to the TILA, do not apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes (15 USC § 1603[1]), and the TILA implementing regulations, (found in Federal Reserve Board Regulation Z [Regulation Z] at 12 CFR 226), do not apply to business, commercial, agricultural or organizational credit transactions (12 CFR 226.3[a]).

Defendant Kiladitis does not identify which section of the New York Banking Law was allegedly violated by plaintiff, but Banking Law § 6–l imposes limitations and prohibits certain practices for "high-cost home loans" (Banking Law § 6–l[2]), and Banking Law § 6-m imposes limitations and prohibits certain practices for "subprime home loans." Banking Law §§ 6-l and 6-m each define a "home loan" as one in which, among other things, the debt is incurred by the borrower "primarily for personal, family, or household purposes."

CPLR 3408, as amended (L 2009, c 507, § 25, subd e), provides that the court hold a mandatory settlement conference in any residential foreclosure action involving a "home loan" as defined pursuant to RPAPL 1304, in which the defendant is a resident of the property subject to foreclosure. RPAPL 1304, as amended (L 2009, c 507, § 1-a), defines "home loan" to mean:

> "(5)(a) 'Home loan' means 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."

(L 2009, c 507, § 25, subd a).

It is undisputed that the subject premises has two residential units. At the time defendants Kiladitis and Bartziokas applied for the mortgage loan, they already owned the subject premises. They indicated on their loan application they owned another property, at 23-58 36th Street, Astoria, New York (which abuts the subject premises), used the subject property and the other property as rental-investment properties, and resided at

an address in Middletown, New York. They also indicated that defendant Kiladitis had been the owner/vice-president of a painting corporation for eight (8) years. In support of their loan application, they presented plaintiff with copies of two (2) leases for the subject property, identifying third persons as the tenants in each unit, and defendant Kiladitis as the landlord. There is no indication on the application that defendant Kiladitis intended to reside in the demised/subject premises with any of the tenants. Defendant Kiladitis also submitted a document to plaintiff to show proof of her receipt of Social Security benefits, which listed her address as the Middletown address, and a W-9 form request for a taxpayer identification number and certification, which also listed the Middletown address as Kiladitis' residence. Defendant Kiladitis makes no claim she apprised plaintiff, at the time of the application, the Middletown address was erroneous, or that she intended to reside at the subject premises. Under such circumstances, defendants Kiladitis and Bartziokas represented to plaintiff, in effect, that the sought-after loan would be for a business or commercial purpose, i.e. for the purpose of paying off their outstanding debts related to the ownership and maintenance of the neighboring investment property. Furthermore, a portion of the proceeds of the subject mortgage loan were used to pay off such outstanding debts.

Under such circumstances, the subject mortgage loan was for a business or commercial purpose and defendant Kiladitis is estopped from claiming otherwise. The subject mortgage loan therefore is not covered by the TILA, HOEPA or Regulation Z or

Banking Law § 6-1.

To the extent defendant Kiladitis asserts plaintiff violated Banking Law § 6-m, which pertains to subprime and high-cost mortgage loans, that section was not enacted until 2008 and applies only to loans issued on or after September 1, 2008. Because the subject loan was made on May 13, 2008, it does not fall under the purview of Banking Law § 6-m (*see* Banking Law § 6-m, as added by L 2008, ch 472; *Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]).

Plaintiff was not obligated to comply with the notice requirements of RPAPL 1304 as a condition precedent to suit because defendant Kiladitis did not reside at the subject property at the time of the commencement of the action, and no settlement conference pursuant to CPLR 3408 is required in this action. The court previously determined defendant Kiladitis had not rebutted the prima facie showing by plaintiff that service of process was made upon her pursuant to CPLR 308(2) at the Middletown address-- as her residence.

Defendant Kiladitis' claim that the loan is usurious is without merit. The mortgage calls for payment of the principal amount of $175,000.00 plus interest pursuant to the note and the stated rate of interest in the note is 12.99 % per annum. Such rate is below the maximum legal rate of 16% per annum and hence is not usurious (*see* Banking Law § 14-a[1]; General Obligations Law § 5-501[1]). Although the note calls for a default rate of interest of 24% per annum, it is well settled that "the defense of usury

does not apply where ... the terms of the mortgage and note impose a rate of interest in excess of the statutory maximum only upon default or maturity (*see Hicki v Choice Capital Corp.*, 264 AD2d 710 [2d Dept 1999]). The note's default rate of interest falls below New York's criminal usury limit of 25% per annum (see Penal Law §§ 190.40, 190.42).

The claim by defendant Kiladitis that the loan is unconscionable based upon the interest rate similarly is without merit. She asserts mortgage home loans were available to other persons at a much lower interest rate than the one offered by plaintiff to defendants Kiladitis and Bartziokas. But, as discussed above, the subject mortgage loan is a commercial one. Defendant Kiladitis has failed to establish such lower rates were also available for commercial loans, or that "no reasonable and competent person would accept the [subject mortgage] terms, which are so inequitable as to shock the conscience (*Rodriguez v Rodriguez*, 11 AD3d 768, 769 [3d Dept 2004]; *see Lounsbury v Lounsbury*, 300 AD2d 812, 814 [3d Dept 2002])" (*LaSalle Bank N.A. v Kosarovich*, 31 AD3d 904 [3d Dept 2006]).

To the degree defendant Kiladitis asserts plaintiff issued three (3) separate payoff letters with different amounts set forth therein for interest and late fees, summary judgment is not precluded by discrepancies in the amounts of money claimed by plaintiff to be outstanding. These allegations, even if accepted as true, do not in any way affect the validity of the plaintiff's mortgage, and do not constitute a meritorious defense to

plaintiff's motion for summary judgment as against defendant Kiladitis.

Defendants Kiladitis and Bartziokas claim to have tendered, in January 2102, a certified check to plaintiff in the amount of $200,000.00. Even accepting that the payoff letter dated January 20, 2012 erroneously overstated the amount of interest due and owing plaintiff through the same date, defendants Kiladitis and Bartziokas have failed to prove the tendered amount was sufficient to satisfy the actual mortgage debt and any costs of the foreclosure action to which plaintiff was entitled (*see Astoria Federal Sav. & Loan Assn. v Nong Yaw Trakansook*, 18 AD3d 586 [2d Dept 2005], *lv to appeal dismissed* 5 NY3d 880 [2005]). Nor have they shown that it was tendered in accordance with any written stipulation, or pursuant to an agreement in open court (*see* CPLR 2104).

To the extent defendants Kiladitis and Bartziokas also claim they sought to have the mortgage debt assigned to a third party, they have failed to demonstrate that the loan documents provide any right to them to assignment of the mortgage and loan to a third party. They also have failed to demonstrate that the prospective assignee's offers in April 2013 to procure the mortgage and loan were sufficient to satisfy the mortgage debt at the time of the offers (*see* Real Property Law § 275; *River Bank America v Stabile*, 216 AD2d 104 [1st Dept 1995]; *cf. 767 Third Ave. LLC v Orix Capital Markets, LLC*, 26 AD3d 216 [1st Dept 2006]). Defendants Kiladitis and Bartziokas also have not shown there is a present offer by a prospective assignee to satisfy the entire mortgage debt, notwithstanding their request to compel plaintiff to assign the note and mortgage to a

third party.

To the extent Kiladitis and Bartziokas move to compel plaintiff to accept the sum of $175,000.00 as payment in full satisfaction of the subject mortgage, such relief is unavailable. It would constitute a rewriting of the mortgage insofar as it would remove the contractual obligation on the part of defendants Kiladitis and Bartziokas to pay interest and other charges related to the property (*see generally Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 22 [2d Dept 2013]).

Defendants Kiladitis and Bartziokas alternatively seek leave to pay the amount of $175,000.00 into court pursuant to RPAPL 1341. RPAPL 1341, however, does not apply outside the partial foreclosure context (*see NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573 [2009]).

Defendant Kiladitis has failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense or counterclaim. Plaintiff, therefore, is entitled to summary judgment against her and dismissing the affirmative defenses and counterclaims (*see Deutsche Bank Nat. Trust Co. v Whalen*, 107 AD3d 931 [2d Dept 2013]).

That branch of the motion by plaintiff for summary judgment against defendant Kiladitis and dismissing the affirmative defenses and counterclaims is granted. Those branches of the motion by defendant Kiladitis to expunge the mortgage from the public records as usurious, unconscionable or against public policy, to compel plaintiff to

accept the sum of $175,000.00 as payment in full satisfaction of the subject mortgage, for leave to pay the amount of $175,000.00 into court, and to compel plaintiff to assign the note and mortgage to a third party are denied.

That branch of the motion by plaintiff for leave to dispense with a hearing before a referee pursuant to RPAPL 1321 to compute the sums due and owing plaintiff is granted only to the extent of granting leave to appoint a referee to ascertain and compute the sums due and owing plaintiff and to determine whether the subject premises can be sold in one parcel. That branch of the cross motion by defendants Kiladitis and Bartziokas to direct plaintiff to make an accounting is denied. A dispute as to the exact amount owed by the mortgagor to the mortgagee may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co., Inc. v Baumann*, 160 AD2d 831 [2d Dept 1990]; *Johnson v Gaughan*, 128 AD2d 756, 757 [2d Dept 1987]). In this instance, it is conceded by plaintiff that the original judgment did not reflect the correct amount due to plaintiff because of a miscalculation of the default interest by the Referee. The default in payment occurred on November 1, 2009, and plaintiff acknowledges that the Referee incorrectly included in his calculations, default rate interest for the period from November 1, 2008 through November 1, 2009. The court notes that the Referee's calculations also erroneously included late charges claimed to be due after April 8, 2010. In the complaint filed under Index No. 8759/10 on April 8, 2010, plaintiff elected to accelerate the subject mortgage debt, and as a consequence, it is not entitled, under the

terms of the note to late charges for nonpayment of installments claimed to be due after April 8, 2010 (*see Green Point Sav. Bank v Varana*, 236 AD2d 443 [2d Dept 1997; *see also Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472, 476 [1932]; *Clayton Natl. v Guldi*, 307 AD2d 982 [2d Dept 2003]).

To the extent defendant Kiladitis seeks to toll the accumulation of interest as of January 2012, "[i]n an action of an equitable nature, the recovery of interest is within the court's discretion" (*Dayan v York*, 51 AD3d 964, 965 [2d Dept 2008]). The exercise of that discretion is governed by the particular facts in each case, including any wrongful conduct by either party (*see U.S. Bank Natl. Assn. v Williams*, 121 AD3d 1098 [2d Dept 2014]; *Danielowich v PBL Dev.*, 292 AD2d 414, 415 [2d Dept 2002]; *Sloane v Gape*, 216 AD2d 285, 286 [2d Dept 1995], *lv to appeal dismissed* 87 NY2d 968 [1996]; *South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978 [2d Dept 1976]). In this case, defendant Kiladitis has failed to prove plaintiff engaged in wrongful conduct, warranting forfeiture of interest simply by virtue of its issuance of payoff letters with discrepancies, and refusal to accept tenders in amounts less than the amount due under the subject mortgage and note or offers to procure the mortgage by a third party. Defendant Kiladitis also has failed to show that "penalties and other like charges" have been accumulating against it as of January 2012, and it is entitled to stay such accumulation. That branch of the motion by defendants Kiladitis and Bartziokas to toll the accumulation of interest, penalties and other charges as of January 2012 is denied.

That branch of the motion by defendants Kiladitis and Bartziokas for an award of attorneys' fees is denied.

That branch of the cross motion by defendants Kiladitis and Bartziokas for leave to appoint a receiver is denied. Defendants Kiladitis and Bartziokas have failed to cite to any provision in the mortgage which authorizes the appointment of a receiver upon application of the mortgagors. To the extent they seek leave to appoint a temporary receiver pursuant to CPLR 6401, the appointment of a temporary receiver is an extreme and intrusive remedy which may only be invoked upon a clear showing of the necessity for the conservation of the property at issue and the need to protect the interests of the moving party (*see Suissa v Baron*, 107 AD3d 689 [2d Dept 2013]). Defendants Kiladitis and Bartziokas have made no such showing.

Settle order and submit to the Motion Support Office, Room 140.

Howard G. Lane, J.S.C.