

**Axos Bank v Michael Gangi Plumbing & Heating
Contrs., Inc**

2022 NY Slip Op 32597(U)

July 29, 2022

Supreme Court, Kings County

Docket Number: Index No. 502392/20

Judge: Lawrence Knipel

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At an IAS Term, Part Comm 6 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 29th day of July, 2022

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X

AXOS BANK f/k/a BOFI FEDERAL BANK,

Plaintiff,

- against -

Index No. 502392/20

MICHAEL GANGI PLUMBING AND HEATING CONTRACTORS, INC, d/b/a GANGI PLUMBING AND HEATING CONTRACTORS, ROSARIO GANGI, JOSEPHINE GANGI a/k/a JOSEPHINE THEISEN, LEONORA GANGI, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE ONE through JOHN DOE TEN,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

71-83, 166-168, 95-126
88-93, 130-139, 142-151, 155-164
130-139, 142-151, 170-174

Upon the foregoing papers in this action to foreclose commercial mortgages on the properties at 1002 Bay Ridge Avenue in Brooklyn (Block 5880, Lot 7) (Bay Ridge Ave. Property) and 983 76th Street in Brooklyn (Block 5945, Lot 55) (76th Street Property) (collectively, the Properties), defendant Josephine Gangi a/k/a Josephine Theisen (Josephine) moves (in motion sequence [mot. seq.] five) for an order: (1) dismissing the complaint, pursuant to CPLR 306-b and 3211 (a) (1), (a) (7) and (a) (8), based on

documentary evidence, failure to state a cause of action and lack of personal jurisdiction; (2) dismissing the complaint, pursuant to Business Corporation Law (BCL) § 1312; (3) extending her time to move to dismiss pursuant to 3211 (e) if it was not already suspended; (4) granting her summary judgment, pursuant to CPLR 3212; and (5) disqualifying her former counsel, Adam Roth, Esq., from representing her co-defendants, pursuant to Rule 1.7 of the New York Rules of Professional Conduct, 22 NYCRR § 1200.7, on the ground that he has a conflict of interest.

Plaintiff Axos Bank f/k/a BOFI Federal Bank (Axos) cross-moves (in mot. seq. six) for an order: (1) granting it summary judgment on its first cause of action to foreclose the July 5, 2018 mortgage in the amount of \$450,000.00 encumbering the Bay Ridge Ave. Property, pursuant to CPLR 3212 (a); (2) granting it summary judgment on its first cause of action to foreclose the October 12, 2018 mortgage in the amount \$160,000.00 encumbering the 76th Street Property, pursuant to CPR 3212 (a); (3) granting it summary judgment on its third cause of action for an award of attorneys' fees and expenses, pursuant to CPLR 3212 (a); (4) dismissing defendants' affirmative defenses, pursuant to CPLR 3212 (a) and 3211 (b); (5) granting it a default judgment against non-appearing defendant NYS Department of Taxation and Finance, pursuant to CPLR 3215; and (6) granting it an order of reference.

Background

On January 30, 2020, Axos commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Properties. The complaint alleges

that: (1) on or about July 5, 2018, Michael Gangi Plumbing and Heating Contractors, Inc. d/b/a Gangi Plumbing and Heating Contractors (MGPHC or borrower) executed a \$450,000.00 promissory note in favor of BOFI Federal Bank (BOFI) (Note #1), which was secured by a mortgage executed by defendants Rosario Gangi (Rosario) and his sister, Josephine, on the Bay Ridge Ave. Property (Loan #1), and (2) on or about October 15, 2018, MGPHC executed a \$160,000.00 promissory note in favor of BOFI (Note #2), which was secured by a mortgage on the 76th Street Property (Loan #2) (NYSCEF Doc No. 2, complaint at ¶¶ 14, 16, 21 and 23). The complaint alleges that defendant Rosario guaranteed the loans (*id.* at ¶¶ 15 and 22). The complaint alleges that defendant Josephine “is an individual who currently resides at [the 76th Street Property] and is named as a party Defendant in order to foreclose her interest in the mortgaged premises *as a tenant*”¹ (*id.* at ¶ 7 [emphasis added]).

Notably, paragraph 16 of the July 5, 2018 and the October 15, 2018 notes, both of which were entitled “Business Promissory Note and Security Agreement,” contained identical choice of law and venue provisions which provide that:

“(c) Lender is an FDIC insured, federal savings association and this Loan Agreement is approved, and the proceeds are disbursed, by Lender in Nevada. CONSEQUENTLY, THIS LOAN AGREEMENT WILL BE GOVERNED BY FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED

¹ Axos claims that the allegation in paragraph 7 of the complaint regarding Josephine is a “misnomer” and a “typographical error” that should be excused, pursuant to CPLR 3026, because the July 5, 2018 mortgage attached to the complaint reflects that Josephine executed the mortgage and the addendum for the Bay Ridge Ave. Property along with her brother and co-owner of the Property, Rosario (*see* NYSCEF Doc No. 5 and 94 at pages 3 and 12).

BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES. The legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and reserved under this Loan Agreement will be governed by such laws.

“(d) Borrower and Lender agree that any action or proceeding to enforce any rights or obligations arising out this Loan Agreement shall be commenced in the state (or commonwealth, as the case may be) of Borrower’s address set forth in Section 1 above (‘Borrower’s State’) and Borrower waives personal service of process and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and shall confer personal jurisdiction if served by registered or certified mail to Borrower at the address specified by Borrower above in Section 1, or as otherwise provided by the laws of the Borrower’s State or the United States of America. Borrower and Lender agree that venue is proper in such courts . . .” (NYSCEF Doc Nos. 3 and 6 at ¶ 16 [c] and [d]).

The Business Promissory Note and Security Agreements are annexed collectively to the complaint as Exhibits A and C with the respective “Business Loan Summary” stating that “[i]f there is any conflict between the terms of this Business Loan Summary and the related Business Promissory Note and Security Agreement entered into by borrower, the terms of the Business Promissory Note and Security Agreement shall govern” (*id.*).

The Business Promissory Notes and Security Agreements are secured by the first and second mortgages on the Bay Ridge Ave. and 76th Street Properties, both of which provide that the “enforcement” of the first and second mortgages “shall be governed” by the laws of the State of New York:

“Governing Law. The creation, perfection, priority and enforcement of the security interest created pursuant to this

Mortgage shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York (“Property Jurisdiction”) without regard to the conflict of laws provisions of the Property Jurisdiction. The provisions of this Security Instrument relating to the obligations secured hereby or to any agreement, instrument or document giving rise to the obligations secured hereby shall be governed by and construed and interpreted in accordance with, the governing law of the Note. Nothing in this Mortgage shall be construed or interpreted to provide that any other agreement, instrument or document shall be governed by the laws of the Property Jurisdiction. . . .” (*see* NYSCEF Doc Nos. 5 and 8 at page 8 [emphasis added]).

The complaint alleges that MGPHC and Rosario “failed to make payment under Note #1 and Continuing Guaranty #1 beginning on or about March 28, 2019 and continuing each day thereafter . . .” and “failed to make payment under Note #2 and Continuing Guaranty #2 beginning on or about October 12, 2018 and continuing each day thereafter . . .” (*id.* at ¶¶ 18 and 25). The complaint asserts: (1) the first cause of action to foreclose on the first and second mortgages and guarantees; (2) the second cause of action against MGPHC to foreclose on collateral, including equipment and machinery; and (3) a third cause of action for an award of attorneys’ fees.

On February 6, 2020, all of the defendants with the exception of the New York State Department of Taxation and Finance (which never answered), collectively answered the complaint, asserted affirmative defenses, including lack of personal jurisdiction, and two counterclaims for: (1) a judgment declaring that the loans are usurious, and (2) violation of GBL § 349 (h) (*see* NYSCEF Doc No. 10).

On February 18, 2020, Axos e-filed an affidavit of service of the pleadings upon MGPHC by delivering the documents to the New York Secretary of State on February 7, 2020 (NYSCEF Doc No. 11).

Axos' First Dismissal Motion

On August 7, 2020, during the Covid-19 pandemic,² Axos moved to dismiss defendants' counterclaims. By an October 21, 2020 stipulation, the parties agreed that "[t]he defendants' first counter-claim of usury is dismissed with prejudice[,] " [t]he defendants' second counter-claim is dismissed without prejudice pursuant to CPLR 3217 with leave to re-plead within 15 days" and "[t]he defendants will Amend its Answer within 15 days" (see NYSCEF Doc No. 102 [emphasis added]).

Defendants' Amended Answer

On November 4, 2020, defendants (with the exception of the New York State Department of Taxation and Finance) collectively e-filed an amended answer asserting affirmative defenses, including lack of personal jurisdiction,³ criminal usury and unclean hands. Defendants also asserted counterclaims for: (1) violation of GBL § 349 (h) and (2) fraud by allegedly misrepresenting to Josephine in the HUD-1 statement that there was no pre-payment penalty (see NYSCEF Doc No. 30, amended answer at ¶¶ 16-27 and 28-37).

² Notably, the court's docket reflects that Josephine *did not* file a Covid-19 hardship declaration.

³ Defendants failed to move to dismiss the complaint based on improper service of process "within sixty days after serving the pleading . . ." on November 4, 2020, or by January 4, 2021, as required by CPLR 3211 (e) and this court did not "extend[] the time upon the ground of undue hardship" (see CPLR 3211 [e]).

Axos' Second Dismissal Motion

On February 12, 2021, also during the Covid-19 pandemic, Axos moved to dismiss the counterclaims in defendants' amended answer. By a May 28, 2021 decision and order, this court granted Axos' dismissal motion (*see* NYSCEF Doc No. 53). Defendants' counterclaim for violation of GBL § 349 was dismissed because the allegedly deceptive acts were not directed towards a "consumer" such as a homebuyer, but rather towards a company (MGPHC) receiving funding in furtherance of a business purpose. Defendants' counterclaim for fraud based on the alleged representation in the HUD-1 Statement that there would be no prepayment penalty was dismissed because the HUD-1 Statement was not prepared by Axos and the mortgage advised that there was a prepayment penalty.

On July 7, 2021, defendants collectively moved for leave to renew their opposition to Axos' dismissal motion, which was denied by a September 13, 2021 decision and order (NYSCEF Doc Nos. 56 and 63). On July 7, 2021, defendants also collectively filed their appeal (*see* NYSCEF Doc No. 55). In July 2021, all of the defendants, including Josephine, were still represented by defense counsel Adam Roth, Esq.

Defendant Josephine's Instant Dismissal Motion

Three months later, on October 22, 2021, Josephine filed a Consent to Change Attorney from Adam Roth, Esq. (*see* NYSCEF Doc No. 65). On December 3, 2021, one year and ten months after Josephine first asserted lack of personal jurisdiction in her February 6, 2020 answer (*see* NYSCEF Doc No. 10) and more than one year after she re-asserted lack of personal jurisdiction in her November 4, 2020 amended answer (*see*

NYSCEF Doc No. 30), Josephine, by her new defense counsel, moved to dismiss the complaint under CPLR 306-b, 3211 (a) (1), (a) (7) and (a) (8) and BCL § 1312 (A) and extending her time within which to move to dismiss the complaint for lack of personal jurisdiction, pursuant to 3211 (e) “if it was not already suspended.” Josephine also seeks summary judgment dismissing the complaint and an order disqualifying her former defense counsel, Mr. Roth, from representing her co-defendants, including Rosario, based on an alleged conflict of interest.

Josephine submits an affidavit attesting that she owns the Bay Ridge Ave. Property with her brother, Rosario, who owns and operates MGPHC, Rosario’s plumbing business. Josephine attests that Rosario and defendant Leonora Gangi (Leonora) own the 76th Street Property. Josephine, for the first time since asserting lack of personal jurisdiction as an affirmative defense in her November 2020 amended answer, now attests that:

“I have never been served with the Summons and Complaint in this foreclosure action.

“I understand from the Court’s docket that the Plaintiff did not file any affidavit of service of the Summons and Complaint relating to me. That is because the Plaintiff never served those papers on me, as indicated in my Affirmative Defense in my Amended Answer. I understand that this violates Rule 306-b of the Civil Practice Laws and Rules (the CPLR) which required the Plaintiff to serve the Summons and Complaint upon me within 120 days after commencing the action.

“For these reasons, the action should be dismissed. Without service of process, I respectfully submit that the Court lacks jurisdiction to determine any of the claims in the Complaint against me or the Property” (NYSCEF Doc No. 73 at ¶¶ 5-7).

Josephine acknowledges that while a motion to dismiss based on lack of service and jurisdiction must be filed within 60 days after answering the Complaint, she asserts that “that rule or deadline was suspended or extended during the Covid pandemic” (*id.* at ¶ 10). Otherwise, Josephine “request[s] that the Court extend the time to make the motion now because her former defense counsel, Mr. Roth, “caused [her] an undue hardship in this action . . .” (*id.* at ¶¶ 11 and 19).

Josephine argues that the complaint should be dismissed, and that she is entitled to summary judgment, because “Plaintiff included a claim for a potential deficiency judgment against me in the ‘Wherefore Clause’ at the end of the Complaint”⁴ and “[t]here is no basis for that” because she “did not sign any note or guaranty” (*id.* at ¶ 8). Josephine also argues that “[p]laintiff and prior lender did not give me anything of value” so “I received no ‘consideration’ for the mortgage and therefore it should be declared invalid and the action should be dismissed” and “[a]s a co-owner of the Property, I should have been given an opportunity to have a lawyer review [the loan]” (*id.* at ¶¶ 20-21). Defense counsel further contends that dismissal is warranted “because based on a corporate search of the online records for the NYS Department of State, the Plaintiff is an unauthorized foreign entity not registered to do business in NY” (NYSCEF Doc No. 74 at ¶ 16).

⁴ Contrary to Josephine’s assertion, paragraph “g” of the “Wherefore” Clause in the complaint requests that a judgment specify the amount of any deficiency, if there is one, so that plaintiff may make a future application “pursuant to section 1371 of the Real Property Actions and Proceedings Law, for a judgment against the Defendants, for any deficiency . . .” (NYSCEF Doc No. 2, complaint at page 12, ¶ g).

Josephine seeks to disqualify her former defense attorney, Adam Roth, Esq., on the ground that he “has and had a conflict of interest that interfered with his ability to represent me and *he did not look out to protect my interests*” (*id.* at ¶ 11 [emphasis added]).

Specifically, Josephine attests that:

“The conflict of interest arises because the entire loan transaction was for Rosario’s benefit, not mine. He received all of the account statements for the loan. He has refused to give me access to the books and records for the Property. His conduct, including defaulting on his loan payment, has reduced my equity in the Property.

“Mr. Roth has attempted to represent all of the defendants in this action but it is clear that a conflict of interest caused him to have divided loyalties and fail to protect me. Mr. Roth never apprised me of any possible cross-claims against Rosario. *Mr. Roth never made a motion to dismiss even though he prepared the Amended Answer that contains my defense based on the lack of service.* He also knew that there is no affidavit of service filed with the Court. A motion to dismiss the case against me would have left Mr. Roth’s other clients still in the case. *Mr. Roth did ask me to waive the conflict of interest after Rosario had retained him first.* However, Mr. Roth never explained to me how he could possibly represent all the defendants at the same time in the same case when they are all so clearly at odds with each other. My interest in the case was very different than Rosario’s interest. Mr. Roth knew this from the very first time we met” (*id.* at ¶¶ 12-13 [emphasis added]).

Josephine also asserts that “Mr. Roth actively encouraged me to sell the Property but never took account of the capital gains tax that may become due from a sale” (*id.* at ¶ 16). Josephine explains that she retained new counsel on October 22, 2021, a few months before filing this motion. Essentially, Josephine argues that Mr. Roth should be disqualified from representing MGPHC and/or Rosario because “[h]e was made privy to

my confidential information during our communications” and he did not adequately defend her interest in the Bay Ridge Ave. Property (*id.* at ¶ 18).

Josephine submits an attorney affirmation from her new counsel, who filed a notice of appearance with the court on November 11, 2021 (*see* NYSCEF Doc No. 66), arguing that the court docket reflects that only the defendant borrower, MGPHC, was served with process and claims that “[p]laintiff has not served the Summons and Complaint upon Defendant Josephine Theisen and has not filed any affidavit of service of the Summons and Complaint upon her” (NYSCEF Doc No. 74 at ¶ 8). Defense counsel argues that:

“As set forth in the accompanying affidavit of Josephine Theisen, this action should be dismissed because the Plaintiff has never served the Summons and Complaint upon Ms. Theisen and has not filed any affidavit of service of the pleadings upon her. There is no dispute over the method of service and no need for a traverse hearing because the Plaintiff has not alleged any attempted service under any method. It hard to imagine a stronger case for a lack of jurisdiction than where a plaintiff does not even allege to have served the Summons (NYSCEF Doc No. 74 at ¶ 14).

Defense counsel contends that “[t]he time to file this motion to dismiss based on a lack of service was tolled during the COVID-19 pandemic” despite the fact that the parties engaged in extensive motion practice regarding the legal propriety of defendants’ counterclaims (*id.* at ¶ 15). Defense counsel also argues that Josephine’s time to move for dismissal on jurisdictional grounds should be extended, pursuant to CPLR 3211 (e), based on “undue hardship” because “Mr. Roth did not file any motion to dismiss the Complaint on behalf of Ms. Theisen based upon the lack of service of process” (*id.*).

Josephine's Co-Defendants' Partial Support

Josephine's co-defendants, in partial support of Josephine's dismissal motion, submit an affirmation from their new defense counsel, who affirms that he "supports co-defendant's application for (a) dismissal of the Complaint pursuant to Business Corporation Law § 1312 (A) . . ." and that:

"[y]our affirmant takes no position with the other and/or additional relief sought by defendant JOSEPHINE THEISEN in her motion, although points out that with respect to said defendant's application to disqualify her former attorney of record, Adam Roth, Esq., from representing [the other] defendants . . . said application is seemingly moot in light of the Honorable Court's December 8, 2021 Order permitting Mr. Roth to withdraw as counsel for the defendants for which he previously appeared . . ." (NYSCEF Doc No. 166 at ¶¶ 2-3).

Axos' Opposition to Josephine's Dismissal Motion

Axos, in opposition, submits an affidavit from John Murphy (Murphy), a Senior Vice President of World Business Lenders LLC (WBL), the servicing agent of the loans, who submits a number of exhibits, including the July 5, 2018, mortgage encumbering the Bay Ridge Ave. Property executed and delivered by Rosario and his sister, Josephine, together with the Hypothecation Agreement executed by Josephine (NYSCEF Doc Nos. 88 at ¶ 3 and 89 at 12 and Exhibit B).⁵ Axos argues that Josephine litigated her counterclaims for violation of GBL § 349 and common law fraud against Axos in this case

⁵ The Hypothecation Agreement executed by Josephine provides that "[t]his Mortgage is given in the form of hypothecated security in that it is given to secure the debt of another, to wit: the indebtedness evidenced by the Promissory Note dated July 5th, 2018, in the amount of \$450,000.00 which is made and delivered by MGPHC . . ." (see NYSECF Doc No. 89 at Exhibit B).

and against WBL (in a related case filed under Kings County index No. 500481/21) and now seeks “another bite at the apple by asserting meritless claims and waived defenses . . . by arguing that prior counsel was conflicted (without grappling with the fact that Josephine’s interests were zealously represented).”

Axos also argues that Josephine’s dismissal motion based on a purported “lack of service is about two years late” since the original answer was filed on February 7, 2020, and “[t]he CPLR is crystal clear that a motion on the basis of service was due within 60-days.” Axos contends that any toll based on the Covid-19 pandemic expired on November 3, 2020. Axos also asserts that there was no “undue hardship” based on Mr. Roth’s failure to file a timely motion asserting lack of service because “the record of this and the related action . . . show Mr. Roth’s zealous defense of Josephine . . .” Axos further argues that Josephine cannot now claim that she was not properly joined in this action, after she actively litigated the propriety of her counterclaims for the past two years.

Axos’ Summary Judgment Cross Motion

On January 19, 2022, Axos cross-moved: (1) to foreclose on the Bay Ridge Ave. Property based on defendants’ payment default under the July 5, 2018 mortgage in the principal amount of \$450,000.00; (2) to foreclose on the 76th Street Property based on defendants’ payment default under the October 12, 2018 mortgage in the principal amount of \$160,000.000; (3) for an award of its attorneys’ fees and expenses; (4) for an order dismissing defendants’ affirmative defenses; (5) for a default judgment against non-

answering and non-appearing defendant NYS Department of Taxation and Finance; and (6) an order of reference.

Axos submits an “Affidavit of Merit and Amounts Due” from Murphy, a Senior Vice President of WBL, servicer of the subject loans since their origination (NYSCEF Doc No. 106 at ¶¶ 4, 114 and 115), that includes copies of the first and second notes, the first and second mortgages and the guarantees regarding the Bay Ridge and the 76th Street Properties (*see* NYSCEF Doc Nos. 107-112).⁶ Murphy attests to Axos’ right to foreclose on the Properties by asserting that “Axos is a federal savings association chartered by the Office of the Comptroller of the Currency under the Home Owners’ Loan Act of 1933, 12 U.S.C. 1461, et seq.” and submits a screenshot of Axos’ listing on the FDIC’s website (NYSCEF Doc Nos. 106 at ¶¶ 3 and 113). Murphy further attests that “[a]s set forth in paragraph 1 of both the First Note and Second Note, Plaintiff maintains a branch office at 9205 West Russel Road, Suite 400, Las Vegas, NV 89148, out of which the loans at issue were originated” (*id.* ¶ 3).

Regarding the first loan on the Bay Ridge Ave. Property, Murphy attests that “Borrower defaulted on the First Note by failing to make numerous daily payments[,]” “[t]hat default was not cured by the Borrower or Rosario, the guarantor” and “Plaintiff accelerated the balances due under the Note and sent demand letters specifying the

⁶ Although the parties do not dispute that the first note, mortgage and guaranty were executed on July 5, 2018, and the second note, mortgage and guaranty were executed on October 12, 2018, Murphy’s fact affidavit mistakenly attests that those documents were entered into on July 5, 2019 and October 12, 2019, respectively (NYSCEF Doc No. 106 at ¶¶ 11, 13, 14, 23, 25 and 26).

outstanding amount owed as of March 28, 2019, including the principal, interest, prepayment premium and NSF fees” (*id.* at ¶¶ 17-18). Murphy attests that “[a]s evidence of the current debt for the First Loan, Plaintiff provides an unsettled loan brief, dated January 13, 2022 . . . which shows the accrual of interest and NSF fees on Borrower’s account” (*id.* at ¶ 21 and NYSCEF Doc No. 120).

Regarding the second loan on the 76th Street Property, Murphy attests that “Borrower defaulted on the Second Note by failing to make numerous daily payments[,]” “[t]hat default was not cured by the Borrower or Rosario, the guarantor” and “Plaintiff accelerated the balances due under the Note and sent demand letters specifying the outstanding amount owed as of April 3, 2019, including the principal, interest, prepayment premium and NSF fees” (*id.* at ¶¶ 27-28). Murphy attests that “[a]s evidence of the default under the Second Note, Plaintiff provides an updated borrower statement, dated January 13, 2022 . . . which shows the loan terms and balances and loan activity from the inception of the account through the default” (*id.* at ¶ 31 and NYSCEF Doc No. 124).

In addition to Murphy’s “Affidavit of Merit and Amounts Due,” Axos also submits a memorandum of law in support of its summary judgment cross motion in which it asserts that Federal and Nevada Law govern the enforcement of the notes and the process of foreclosure is governed by New York law, as provided for in the first and second mortgages. Axos asserts that it satisfied its prima facie burden for summary judgment on its first cause of action to foreclose on the first and second mortgages by producing the notes, mortgages and guarantees and evidence of defendants’ payment default. Axos also

argues that it is entitled to summary judgment on its third cause of action for an award of attorneys' fees based on the express terms of the first and second mortgages. Axos also seeks summary judgment dismissing defendants' affirmative defenses as conclusory. Axos asserts that defendants' affirmative defense of criminal usury is barred by res judicata, since defendants executed an October 21, 2020 stipulation agreeing to dismiss their usury counterclaim *with prejudice* (see NYSCEF Doc No. 102).

Axos' counsel also submits an affirmation with exhibits, including Axos' affidavit of service (which was never before e-filed) attesting that on February 7, 2020 the New York State Department of Taxation and Finance was served with process by delivering the summons, complaint and notice of pendency to its authorized agent in Albany, New York (see NYSCEF Doc Nos. 96 at ¶ 10 and NYSCEF Doc No. 105). According to Axos' affidavit of service, the New York State Department of Taxation and Finance was required to answer the complaint in March 2020. In its memorandum of law, Axos asserts that it is entitled to a default judgment against the New York State Department of Taxation and Finance because "[i]ts time to appear expired no later than November 3, 2020" based on the Covid-19 toll imposed by Governor Cuomo. Axos asserts that it is entitled to a default judgment because "[m]ore than 30 days have passed since the Tax Dept. was served with the Complaint but it has not answered or otherwise appeared in this action" (see NYSCEF Doc No. 127 at 19). Axos fails to address the timing of its cross motion for a default judgment, which was filed on January 19, 2022, over one year since the New York State Department of Taxation and Finance's appearance default.

Josephine's Reply and Opposition to the Cross Motion

Josephine, in reply and in opposition to Axos' summary judgment cross motion, reiterates that "I have never been served with the Summons and Complaint . . ." and asserts that "[p]laintiff now admits that it never served the Summons and Complaint on me[,] never filed any affidavit of service . . . on me[,] included a frivolous claim for a potential deficiency judgment against me in the 'Wherefore Clause' at the end of the Complaint even though I did not sign any note or guaranty, and this was not my loan [and] concedes that I am not personally liable to the Plaintiff in any way" (NYSCEF Doc No. 130 at ¶¶ 6 and 7).

Josephine also asserts that "[c]ontrary to the Plaintiff's suggestion, Mr. Roth's conduct caused me an undue hardship in this action that justifies extending the time for me to make this motion to dismiss based on the lack of service" (*id.* at ¶ 8). Although Josephine admits that "this was not my loan . . ." she reiterates that she received no consideration for the mortgage and she was not represented by an attorney in connection therewith, and thus, it should be declared invalid and the foreclosure action dismissed (*id.* at ¶¶ 9-10). Finally, Josephine asserts that "[t]his is a predatory and usurious loan" and that "[t]here has been no discovery in this action . . . to review the disputed facts" (*id.* at ¶ 11).

Josephine also submits a reply memorandum of law arguing that "[t]he Plaintiff's failure to serve the Summons and Complaint or file proof of service, an initializing document, renders the Court without jurisdiction regardless of the Defendant's objection" and "[r]egardless of the timing of the Defendant's motion to dismiss [because] the Plaintiff still bears the burden to at least file an affidavit of service" (NYSCEF Doc No. 140 at 5).

Josephine's Co-Defendants' Opposition

Josephine's co-defendants, in opposition to Axos' summary judgment cross motion, submit an affirmation from their new attorney referencing and quoting from paragraph 16 of both the July 5, 2018 and the October 15, 2018 Business Promissory Note and Security Agreements which provide that the loans will be governed by Federal Law and the laws of the State of Nevada without regard to conflict of law rules (NYSCEF Doc No. 155 at ¶ 13).

Defense counsel argues that "[n]owhere within plaintiff's subject motion papers . . . is either Federal Law or Nevada State law cited with respect to the merits of *any of the Affirmative Defenses* set forth in the Amended Answer . . ." (*id.* at ¶ 14 [emphasis added]). Defense counsel argues that "[p]laintiff's Memorandum of Law cites only New York case law, with respect to the merits of those Affirmative Defenses raised within defendants' said Amended Answer" (*id.*). Defense counsel contends that "in the clear absence of any execution of a waiver of said choice of law provisions set forth by the promissory notes upon which the subject foreclosure action is based, plaintiff clearly has failed to satisfy its prima facie burden of establishing entitlement to Summary Judgment, pursuant to either Federal Law or Nevada Law" (*id.* at ¶ 15). Notably, defense counsel argues that Axos seeks excessive interest, has unclean hands and the mortgage loans are unenforceable based on unconscionability *under New York law* (*id.* at ¶¶ 28-31).

Axos' Reply

Axos, in reply, submits a two-page attorney affirmation addressing Josephine's claim that there has been no discovery. Axos' counsel annexed defense counsel's February

6, 2020 document demands, Axos' August 6, 2020 objections and responses and defendants' document production (*see* NYSCEF Doc Nos. 170-174).

Discussion

(1)

The Choice of Law

“Generally, choice-of-law clauses are enforced so long as the chosen law bears a reasonable relationship to the parties or the transaction, and the chosen law does not violate public policy” (*Brown Bark III, L.P. v AGBL Enterprises, LLC*, 85 AD3d 699, 700 [2d Dept 2011]). “Choice of law provisions typically apply to only substantive issues . . .” while the law of the forum applies to procedural issues, which pertain to “the remedy rather than the right” (*see Portfolio Recovery Associates, LLC v King*, 14 NY3d 410, 416 [2010] [internal citations and quotation marks omitted]; *see also Education Resources Institute, Inc. v Piazza*, 17 AD3d 513, 513 [2d Dept 2005]).

Here, the July 5, 2018 and the October 15, 2018 Business Promissory Notes and Security Agreements for the first and second loans contain the identical provision providing that “Lender is an FDIC insured, federal savings association and this Loan Agreement is approved, and the proceeds *are disbursed, by Lender in Nevada*” and unequivocally state that they are governed by “FEDERAL LAW APPLICABLE TO AN FDIC INSURED INSTITUTION AND TO THE EXTENT NOT PREEMPTED BY FEDERAL LAW, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO CONFLICT OF LAW RULES” (*see* NYSCEF Doc Nos. 3 and 6 at ¶ 16 [c] [emphasis

added)). The provision further provides that “[t]he legality, enforceability and interpretation of this Agreement and the amounts contracted for, charged and reserved under this Loan Agreement will be governed by such laws” (*id.*). However, the Business Promissory Notes and Security Agreements are secured by the first and second mortgages encumbering the Bay Ridge and 76th Street Properties, both of which explicitly provide that the “enforcement” of the first and second mortgages “shall be governed” by the laws of the State of New York (*see* NYSCEF Doc Nos. 5 and 8 at page 8).

Thus, while Federal and Nevada laws bear a reasonable relationship to the notes at issue here, since the loan funds were disbursed in Nevada by a federal savings association, this commercial foreclosure action in which Axos seeks to enforce the first and second mortgages are governed by New York law.

(2)

Josephine’s Dismissal/Summary Judgment Motion

CPLR 3211 (e) provides, as a procedural matter, that

“an objection that the summons and complaint . . . was not properly served is *waived* if, having raised such an objection in a pleading, the objecting *party does not move for judgment on that ground within sixty days after serving the pleading*, unless the court extends the time upon the ground of undue hardship” (emphasis added).

“[T]he requirement in CPLR 3211(e) that a party move for judgment upon the ground of improper service within 60 days after service of the responsive pleading is not limited to motions made pursuant to CPLR 3211 and applies with equal force to motions made

pursuant to CPLR 3212” (*U.S. Bank Nat’l Ass’n v Roque*, 172 AD3d 948, 950 [2d Dept 2019]).

There is no dispute that Josephine, collectively with all but one of the other defendants, filed an answer to the complaint on February 6, 2020, and asserted lack of personal jurisdiction as an affirmative defense. Josephine admits that she failed to timely move to dismiss on that ground within 60 days, or by April 6, 2020, as required by CPLR 3211 (e). There is also no dispute that Josephine, collectively with the other defendants, filed an amended answer to the complaint on November 4, 2020, and, once again, asserted lack of personal jurisdiction as an affirmative defense. Even if the 60-day statutory deadline is measured from the filing of Josephine’s amended answer, she indisputably failed to move for dismissal on that ground within 60 days after filing her pleading, or by January 4, 2021, as required by CPLR 3211 (e), and Josephine failed to describe any undue hardship to justify retroactively extending her time within which to do so (CPLR 3211 [e]).

Indeed, as Axos argues in its opposition, Josephine has waived the affirmative defense of improper service and lack of personal jurisdiction by failing to timely file a dismissal motion challenging personal jurisdiction while actively litigating the propriety of her counterclaims for the past two years. While Josephine references the Covid-19 pandemic, the record reveals that she never filed a hardship declaration and she (through her prior defense counsel, Adam Roth, Esq.) zealously defended the propriety of her counterclaims during the Covid-19 pandemic, thus availing herself of the jurisdiction of this court. Although Josephine, in hindsight, may not be happy with the quality of her prior

legal representation, she cites no authority holding that ineffective assistance of defense counsel is an “undue hardship” warranting an extension of the 60-day period to challenge personal jurisdiction under CLR 3211 (e), especially where, as here, Josephine did not retain new counsel until after litigating the propriety of her counterclaims, moving to renew her opposition and filing an appeal. Consequently, Josephine’s dismissal/summary judgment motion seeking to dismiss the complaint for lack of personal jurisdiction is denied as untimely.

That branch of Josephine’s motion seeking an order disqualifying her prior defense counsel, Adam Roth, Esq. from continuing to represent her co-defendants is denied as moot. As Josephine’s co-defendants advised this court, Mr. Roth’s motion for leave to withdraw as defense counsel, which was e-filed on November 17, 2021 (in mot. seq. four) was granted without opposition by a December 8, 2021 decision and order (*see* NYSCEF Doc Nos. 70 and 86).

Josephine’s remaining argument in support of her dismissal/summary judgment motion, including an alleged lack of consideration received for the first loan, are rejected. Josephine does not deny that she executed the Hypothecation Agreement, in which she specifically acknowledged that “[t]his Mortgage is given in the form of hypothecated security in that *it is given to secure the debt of another*, to wit: the indebtedness evidenced by the Promissory Note dated July 5th, 2018 , in the amount of \$450,000.00 which is made and delivered by MGPHC . . .” (*see* NYSCEF Doc No. 89 at Exhibit B [emphasis added]). Josephine acknowledged the commercial nature of the mortgage loan that she knowingly

executed for the financial benefit of her brother Rosario's business, MGPHC, and is thus, estopped from claiming a lack of consideration.

(3)

Axos' Summary Judgment Cross Motion

On a summary judgment motion, courts routinely apply the New York summary judgment standard, which is a procedural issue, to questions of whether a party established its prima facie case (*see Sunbridge Capital, Inc. v G Bon Funding Corp.*, 2008 N.Y. Slip Op. 31873[U] [Sup. Ct. Nassau County 2008]). In addition, a cause of action for foreclosure of property in New York is governed by New York foreclosure law, even where a note contains a choice of law provision for another state (*see Nagel v Simeonidou*, 2014 N.Y. Slip Op 33532 [U] [Sup. Ct. Queens County 2014]). More importantly, the first and second mortgages encumbering the New York Properties that Axos seeks to foreclose in this action specifically state that their enforcement shall be governed by New York law (*see* NYSCEF Doc Nos. 5 and 8 at page 8).

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Under New York law, "[t]he proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*

v Prospect Hosp., 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Generally, to establish prima facie entitlement to judgment as a matter of law in an action to foreclose a mortgage under New York law, a plaintiff must produce the mortgage, the unpaid note, and evidence of the borrower’s payment default (*see Deutsche Bank Natl. Trust Co. v Karibandi*, 188 AD3d 650, 651 [2020]; *Christiana Trust v Moneta*, 186 AD3d 1604, 1605 [2020]; *Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725, 726 [2017]). Where a plaintiff establishes prima facie entitlement to judgment, the burden then shifts to the defendant to raise a triable issue of fact as to a bona fide defense to the action (*CitiMortgage, Inc. v Guillermo*, 143 AD3d 852, 853 [2016]; *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467 [1997]).

Here, Axos has demonstrated its prima facie right to summary judgment on its first cause of action for foreclosure by producing the first and second promissory notes, the first and second mortgages and Murphy’s affidavit testimony regarding the amounts due based on the production of business records evidencing defendants’ payment defaults under the first and second loans. Axos has also demonstrated its entitlement to summary judgment

on its third cause of action for an award of attorneys' fees based on the terms of the mortgages (*see* NYSCEF Doc Nos. 5 and 8 at page 7). Axos has demonstrated that dismissal of defendants' sixth affirmative defenses for criminal usury is warranted under the doctrine of res judicata because defendants previously stipulated to dismiss their usury counterclaim as against Axos *with prejudice* (*see* NYSCEF Doc No. 102). Having stipulated to dismissing their usury counterclaim with prejudice, defendants cannot recharacterize and reassert it as an affirmative defense.

Defendants have failed to raise any triable issues of fact that preclude granting an order of reference and summary judgment in favor of Axos.

(4)

Axos' Cross Motion for A Default Judgment

Axos moves for an order granting it a default judgment against non-appearing defendant New York State Department of Taxation and Finance more than one year after it defaulted by failing to answer or otherwise respond to Axos' January 2020 complaint. Axos does not address or even mention the fact that its motion for a default judgment is untimely, pursuant to CPLR 3215 (c), and fails to provide any excuse for its delay in moving for a default judgment.

CPLR 3215 (c) provides that:

“[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but *shall dismiss the complaint as abandoned*, without costs, upon its own initiative or on motion, *unless sufficient cause is shown why the complaint should not be dismissed*” (emphasis added).

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Where a plaintiff fails to seek leave to enter a default judgment within one year after a party's default, the plaintiff must show "sufficient cause," which requires the plaintiff to demonstrate both a reasonable excuse for the delay and a meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308 [2011]; *First Nationwide Bank v Pretel*, 240 AD2d 629, 629 [1997]). The determination of whether an excuse is reasonable is within the sound discretion of the court (*Deutsche Bank National Trust Co. v Bakarey*, 198 AD3d 718, 721 [2021]; *Deutsche Bank National Trust Co. v Charles*, 186 AD3d 454, 456 [2020]).

The Second Department has clarified that, if plaintiff fails to demonstrate a reasonable excuse for the delay and a meritorious cause of action, CPLR 3215 (c) explicitly provides that the complaint "shall" be dismissed, which is not discretionary, but mandatory (*Deutsche Bank National Trust Company v Watson*, 199 AD3d 879, 880 [2021]; *US Bank National Assoc. v Davis*, 196 AD3d 530, 533 [2021]; *HSBC USA, National Assoc. v Grella*, 14 AD3d 669 [2016]). "The policy underlying the statute is 'to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims'" (*Aurora Loan Servs., LLC v Hiyo*, 130 AD3d 763, 764 [2015] [quoting *Giglio*, 86 AD3d at 307]):

Here, Axos' affidavit of service in the record (which was e-filed for the first time with this cross motion) reflects that New York State Department of Taxation and Finance was served with process on February 7, 2020 (NYSCEF Doc No. 105). It was thus required to serve its response to Axos' complaint in March 2020. According to Axos, the Covid-19 toll extended the time for New York State Department of Taxation and Finance to answer

until November 2020. Under CPLR 3215 (c), Axos was required “to take proceedings for the entry of judgment within one year after default . . .”

Applying either the March 2020 or the November 2020 deadline for New York State Department of Taxation and Finance to answer the complaint, Axos still missed the one-year deadline, and inexplicably waited until January 19, 2022 before it filed its untimely motion for a default judgment against New York State Department of Taxation and Finance. Axos failed to provide any excuse for this delay. Consequently, Axos’ instant cross motion for the entry of a default judgment against New York State Department of Taxation and Finance is denied and Axos’ complaint against that defendant is dismissed, pursuant to CPLR 3215 (c). Accordingly, it is hereby

ORDERED that Josephine’s motion (mot. seq. five): (1) to dismiss the complaint for lack of personal jurisdiction is denied as untimely, pursuant to CPLR 3211 (e); (2) to disqualify her former counsel, Adam Roth, Esq., from representing her co-defendants, pursuant to Rule 1.7 of the New York Rules of Professional Conduct, 22 NYCRR § 1200.7, is denied as moot; and (3) for summary judgment dismissing the complaint, pursuant to CPLR 3212, is denied; and it is further

ORDERED that Axos’ cross motion (mot. seq. six) is only granted to the extent that: (1) Axos is entitled to summary judgment on its first cause of action to foreclose the first mortgage encumbering the Bay Ridge Ave. Property and to foreclose the second Mortgage encumbering the 76th Street Property; (2) Axos is entitled to summary judgment on its third cause of action for an award of attorneys’ fees, the amount of which shall be

determined upon Axos' submission of an affirmation setting forth the legal fees incurred; (3) Axos is entitled to an order of reference to determine the amounts due and owing under the first and second mortgages and whether the Bay Ridge and 76th Street Properties can be sold in parcels, which Axos shall settle on notice within 30 days after service of this decision and order with notice of entry thereof upon all defendants; and (4) defendants' sixth affirmative defenses for criminal usury is dismissed with prejudice; and it is further

ORDERED that the branch of Axos' cross motion (mot. seq. six) for a default judgment against non-appearing defendant New York State Department of Taxation and Finance is denied, the complaint is hereby dismissed as abandoned against defendant New York State Department of Taxation and Finance, pursuant to CPLR 3215 (c), and the caption is amended to remove New York State Department of Taxation and Finance.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.


HON. LAWRENCE KNIPE
ADMINISTRATIVE JUDGE