

<b>Frank's W. 15th Corp. v Rao</b>
2021 NY Slip Op 30091(U)
January 6, 2021
Supreme Court, Kings County
Docket Number: 512327/19
Judge: Lawrence S. 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 6<sup>th</sup> day of January, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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FRANK'S WEST 15<sup>TH</sup> CORP.,

Plaintiff,

- against -

Index No. 512327/19

BILQIS A. RAO, NYC DEPARTMENT OF FINANCE, "JOHN DOE AND JANE DOE 1-10" and "XYZ CORP. 1-10" the names being fictitious and unknown to Plaintiff, the persons or parties intended to be tenants, occupants, persons or entities, of any, having or claiming an interest in or lien upon the premises,

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) Annexed \_\_\_\_\_

10-25 27-43

Opposing Affidavits (Affirmations) \_\_\_\_\_

28-43 56-65

Reply Affidavits (Affirmations) \_\_\_\_\_

56-65 66

Upon the foregoing papers in this action to foreclose a mortgage on the property at 2743-2751 West 15<sup>th</sup> Street in Brooklyn (Block 6997 Lots 27 and 29) (Property), plaintiff Frank's West 15<sup>th</sup> Corp. (Frank's West) moves (in motion sequence [mot. seq.] one) for an order: (1) striking and dismissing defendant Bilqis A. Rao's (Rao) answer, affirmative defenses and counterclaim, pursuant to CPLR 3211 (b); (2) granting it summary judgment as against Rao, pursuant to CPLR 3212; (3) discontinuing this action as against the NYC

Department of Finance (NYCDOF); (4) appointing a referee to ascertain and compute the amounts due and to report whether the Property can be sold in one parcel, pursuant to RPAPL 1321; and (5) amending the caption to eliminate the “John Doe” and “Jane Doe” defendants and the NYCDOF.

Rao cross-moves (in mot. seq. two) for an order, pursuant to CPLR 3124, compelling Frank’s West to respond to her outstanding discovery requests.

### *Background*

#### *The Foreclosure Action*

On June 4, 2019, Frank’s West commenced this foreclosure action by filing a summons, a verified complaint and a notice of pendency against the Property.

On July 3, 2019, Rao answered the complaint and asserted several affirmative defenses, including Frank’s West’s failure to comply with the notice requirements of RPAPL 1303 and 1304. In addition, Rao asserted a counterclaim against Frank’s West for attorney’s fees, pursuant to Real Property Law § 282. Contemporaneously with her answer, Rao served Frank’s West with a notice to produce documents and a deposition notice.

On July 18, 2019, Frank’s West replied to Rao’s counterclaim.

#### *Frank’s West’s Instant Summary Judgment Motion*

On July 6, 2020, Frank’s West, prior to responding to Rao’s outstanding discovery requests, moved for summary judgment against Rao and for an order of reference. Frank’s West’s motion is supported by an affidavit from its officer, Joanne Raffaele

(Raffaele), who attests that Frank's West seeks to foreclose on a \$584,000.00 purchase money mortgage encumbering the Property, which secures payment under a December 20, 2012 promissory note made by Rao. Raffaele attests that Rao defaulted under the note and mortgage by failing to pay the principal and interest that was due in March 2016 and thereafter. Frank's West submits copies of the note and mortgage, which reflect that Frank's West was the original lender.

Frank's West also seeks an order dismissing Rao's answer, affirmative defenses and counterclaim on the ground that they only apply to a *residential* foreclosure, are thus, are not applicable to this *commercial* foreclosure action. Raffaele attests that "the Property consists of commercial lots as set forth in the transfer documents to RAO." Frank's West submits a copy of a "Combined Real Estate Transfer Tax Return, Credit Line Mortgage Certificate, and Certification of Exemption from the Payment of Estimated Personal Income Tax," which indicated that the Property "conveyed" to Rao on December 20, 2012 was "commercial/industrial."

#### ***Rao's Opposition and Cross Motion to Compel Discovery***

Rao, in opposition, submits an affidavit attesting that "I purchased the home located at 2743-2751 West 15<sup>th</sup> Street, Brooklyn . . . in 2012 as a *residential* property to live in with my family" and that "[t]he Property consists of three *residential* units" (emphasis added). Rao further attests that "[m]y daughter and I reside at 2751, First Floor, West 15<sup>th</sup> Street . . ." and that she rents the other two residential units at the Property to families. Rao's daughter, Saba Rao, also attests that she resides at the

Property with her mother. As further proof that the Property is residential, Rao submits copies of the Notices of Property Values that she received from the NYCDOF regarding the Property for the tax year 2020-2021, which indicate that the Property consists of “residential” units. Rao also submits a Property Overview from the New York City Department of Buildings which classifies the Property as a “A1-1 Family Dwelling” and a “B1-2 Family Dwelling.” Although Rao admits that she was served with process, Rao attests that she never received any of the pre-foreclosure notices required by RPAPL 1303 and 1304 or a notice of default either by personal delivery, mail or otherwise.

Rao argues that Frank’s West has failed to meet its prima facie burden of demonstrating its compliance with RPAPL 1303, 1304 or 1306 because it failed to provide an affidavit of service verifying that the statutory foreclosure notices were served and Raffaele’s affidavit does not address the mailing of the requisite RPAPL notices. Rao contends that Frank’s West’s assertion that it is exempt from the requirements of RPAPL 1303, 1304 and 1306 because the Property is commercial is unsupported. Rao asserts that the note and mortgage “do not indicate this was a commercial loan.” Rao contends that the tax transfer documents submitted by Frank’s West is insufficient to prove that the Property is commercial because “this document was wholly created by Plaintiff” and “[i]t is self-serving at best, misleading at worst and is not based upon actual land usage or zoning.” Rao argues that “[r]egardless of the specious designation of the Property written into Plaintiff’s transfer document annexed to its Motion . . . New York City has clearly classified the Property as residential.”

Rao also cross-moves to compel disclosure from Frank's West. Rao contends that "[her] requests made in disclosure documents served on Plaintiff are essential in the defense of this case to justify that this action is not based on commercial property, as Plaintiff contends, but on a residential property." Specifically, Rao seeks the production of "any documents in Plaintiff's possession that could substantiate its claim that this was a commercial loan and more importantly Plaintiff's business records which would establish the alleged default."

***Frank's West's Reply and Opposition to Cross Motion***

Frank's West, in opposition to the cross motion, claims that the cross motion is "now moot" because it responded to Rao's document request on November 3, 2020, while the summary judgment motion and cross motion were pending. Frank's West contends that Rao's notice of deposition is "baseless" and "should not be condoned by this court."

Frank's West, in reply, reasserts that the Property is commercial and not residential based on the submission of new evidence. Frank's West submits copies of the closing documents specifying that the Property is commercial with its reply papers. Frank's West also asserts, for the first time on reply, that the recorded mortgage states that "Premises will not be improved by 1 & 2 family dwelling." In addition, Frank's West submits, for the first time on reply, a copy of the Certificate of Occupancy, which states that the Property is used for vehicle parking and storage and storage of empty wood, soda and beer boxes.

### *Discussion*

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]). “The 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, a plaintiff must produce the mortgage, the unpaid note, and evidence of 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]).

“In a residential foreclosure action, a plaintiff moving for summary judgment must

tender sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304” (*Wilmington Savings Fund Society, FSB v Hershkowitz*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 07427, \*2 [2d Dept 2020] [internal quotation marks omitted] [emphasis added]). “[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a residential foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*Christiana Trust v Moneta*, 186 AD3d 1604 [2020] [internal quotation marks omitted]).

RPAPL 1304 (1) provides that:

“at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower.”

The statute sets forth the required content of the RPAPL 1304 notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower.

Similarly, RPAPL 1303 requires the notice “Help for Homeowners in Foreclosure” to be delivered with the summons and complaint in residential foreclosure actions involving an “owner-occupied one-to-four family dwelling.” “[P]roper service of an RPAPL 1303 notice, where required, is a condition precedent to the commencement of a foreclosure action . . .” (*Prompt Mtge. Providers of N. Am., LLC v Singh*, 132 AD3d 833, 833-834 [2015]).

Here, Frank’s West has produced the loan documents and sufficient evidence that



Rao defaulted by failing to pay principal and interest that was due under the mortgage. However, summary judgment is not warranted because Rao has raised an issue of fact as to whether the Property is residential, and Frank's West has failed to satisfy its prima facie burden of proving that the Property is commercial and not subject to the notice requirements of RPAPL 1303 and 1304 (*see Flushing Savings Bank v Latham*, 139 AD3d 663, 664-665 [2016] [summary judgment denied because plaintiff's successor "failed to establish, as a matter of law, that the subject loan did not qualify as a 'home loan' as defined in RPAPL 1304 (5) (a)" and "triable issue of fact (existed) as to whether the debt was incurred by the defendant 'primarily for personal, family, or household purposes,' and whether the subject premises is a 'one to four family dwelling . . . used or occupied, or intended to be used or occupied wholly or partly' by the defendant as his principal dwelling"]; *Prompt Mtge. Providers of N. Am., LLC*, 132 AD3d at 834 [summary judgment denied because "the evidence submitted by Singh in opposition was sufficient to raise a triable issue of fact as to whether he was an occupant of the mortgaged premises at the time this action was commenced and, thus, whether the premises was an 'owner-occupied one-to-four family dwelling' subject to the RPAPL 1303 notice requirement"]).

This court will not consider the Certificate of Occupancy for the Property or the closing documents on this motion, since Frank's West submitted such evidence for the first time with its reply papers. It is well-established that "a party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be

disregarded by the court” (*Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2015]). Rao first raised the issue regarding Frank’s West’s noncompliance with the RPAPL foreclosure notices for residential property in her answer, and thus, Frank’s West was required to submit all evidence that the Property was commercial, and not subject to the RPAPL notice requirements, in its moving papers. Accordingly, it is hereby

**ORDERED** that Frank’s West’s motion (mot. seq. one) is only granted to the extent that: (1) this action is discontinued as against NYCDOF, and (2) the caption is amended to delete the “John Doe” and “Jane Doe” defendants and the NYCDOF. Frank’s West’s summary judgment motion is otherwise denied without prejudice to renewal after the conclusion of discovery; and it is further

**ORDERED** that Rao’s cross motion (mot. seq. two) to compel discovery from Frank’s West is granted, and Frank’s West shall produce documents responsive to Rao’s outstanding document requests within 45 days after service of this decision and order with notice of entry thereof and shall appear for a deposition within 30 days after production of such responsive documents.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPPEL  
ADMINISTRATIVE JUDGE