

**Bank of Smithtown v 15 W. 17th St., LLC**

2010 NY Slip Op 31552(U)

June 16, 2010

Sup Ct, NY County

Docket Number: 117340/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**  
*Justice*

PART 15

Index Number : 117340/2009  
**BANK OF SMITHTOWN**  
VS.  
**15 W. 17TH STREET, LLC**  
SEQUENCE NUMBER : 002  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2  
~~3, 4, 5~~  
6, 7

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

**FILED**

JUN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 6/15/10

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

BANK OF SMITHTOWN,

Plaintiff,

- against -

15 WEST 17<sup>th</sup> STREET, LLC, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, "JOHN DOE  
ONE" to and including "JOHN DOE TEN" the last ten  
names being fictitious and unknown to the plaintiff(s),  
the persons or parties intended being the tenants,  
occupants, persons or corporations, if any, having an  
interest in or lien upon the premises described in the  
complaint, known as 126-128 E. 13<sup>th</sup> STREET, NEW  
YORK, NEW YORK & 123 E. 12<sup>th</sup> STREET, NEW  
YORK, NEW YORK,

Defendants.

-----X

HON. EILEEN A. RAKOWER:

Plaintiff Bank of Smithtown ("Bank") brings this action to foreclose a mortgage lien on real property located at 126-128 E. 13<sup>th</sup> Street, and 123 E. 12<sup>th</sup> Street, both in the City, County, and State of New York ("the property").

Presently before the court is Defendant 15 West 17<sup>th</sup> Street, LLC's ("15 West") motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7). 15 West submits an affirmation and a memorandum of law in support of its motion. Annexed to the motion as an exhibit is a copy of the Bank's complaint. 15 West argues that dismissal is warranted because a) the complaint is impermissibly vague; and b) the complaint is improperly verified.

The Bank cross-moves 1) for leave to serve an amended complaint; 2) to substitute Peridance Center LLC in place of "John Doe One", Taxter & Spengemann

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**DECISION  
and ORDER**

Mot. Seq.  
001&002

in place of “John Doe Two”, and Salvatore del Cielo LLC in place of “John Doe Three”, and to amend the caption accordingly; 3) to add as defendants Joseph Sabbagh and Isaac Mishan, alleged guarantors of the mortgage; and 4) an order appointing a receiver pursuant to RPAPL §1325 & RPL §254. The Bank submits an attorney’s affirmation, a memorandum of law, and the affidavit of Bank Vice President Robert Staron in support of its cross-motion. Annexed to the Staron affidavit as exhibits are copies of the deed for the subject property; the September 21, 2005 mortgage and note in the amount of \$9,000,000 secured by the property and executed by 15 West in favor of the Bank; a June 21, 2006 modification and extension agreement between the Bank and 15 West which was recorded on May 23, 2007; a November 27, 2007 modification agreement between the Bank and 15 West which was recorded on January 3, 2008; an amended and restated mortgage note, along with a mortgage modification and extension agreement dated March 31, 2009 and recorded on April 8, 2009; guarantees on the mortgage signed by Joseph Sabbagh and Isaac Mishan; a March 10, 2010 letter from a tenant in the subject property stating that the tenant is paying rent into an escrow account with its attorneys; the Bank’s summons and complaint; a Notice of Pendency filed with the County Clerk on December 10, 2009; and copies of the affidavits of service of the pleadings upon the defendants; and a proposed amended verified complaint.

15 West submits an affirmation and a memorandum of law in opposition to the Bank’s cross-motion. 15 West argues that the proposed amended pleading submitted by the Bank fails to cure the defects which warrant dismissal of the original complaint, and that the appointment of a receiver is unwarranted.

Pursuant to CPLR 3025(b), “A party may amend his pleading... at any time by leave of court.... Leave shall be freely given upon such terms as may be just....” “CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

The Bank’s motion for leave to file its proposed amended complaint is granted. In light of the fact that the proposed amended pleaded is not plainly lacking in merit, and 15 West does not, and cannot point to any unfair prejudice at this early stage in

the lawsuit, leave to amend is clearly appropriate. Moreover, any alleged defect with respect to the original complaint's verification has been rectified in the amended complaint.

With respect to the Bank's motion to appoint a receiver, Paragraph "6" of the Mortgage provides

That the Mortgagee, in any action to foreclose this Mortgage, shall be entitled (without notice of any kind to the Mortgagor, without regard to the adequacy of any security for the debt, and without regard to the solvency of any person, firm or corporation liable for the payment thereof) to the appointment of a receiver of the rents and profits of the Premises.

The affidavit of Bank Vice President Robert Staron establishes that 15 West defaulted on the mortgage when it failed to pay its monthly payment of \$59,278.22 which became due on July 1, 2009 and monthly thereafter. Based on the foregoing, the Bank is entitled to appointment of a receiver. While the court retains the authority and the discretion to deny the appointment of a receiver under certain circumstances, no such circumstances are presented by 15 West.

Wherefore it is hereby

ORDERED that 15 West's motion to dismiss is denied; and it is further

ORDERED that the Bank's motion for leave to amend its complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served on 15 West upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the caption is hereby amended to take the form of the caption contained in the proposed amended complaint; and it is further

ORDERED that the Bank's motion to appoint a receiver is granted, and the Bank is directed to submit a proposed order appointing a receiver to the court by Wednesday, June 23, 2010; and it is further

ORDERED that the proposed order shall name Ernest Edward Badway, Esq. of Fox Rothschild LLP, 100 Park Avenue, Suite 1500, New York, New York, (212)878-7900 as Receiver of the property.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: June 15, 2010

  
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EILEEN A. RAKOWER, J.S.C.

**HON. EILEEN A. RAKOWER**

**FILED**  
JUN 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE