SHORT FORM ORDER

COPY

Index No: 030049/2005

SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : **NONE - *Ex parte***
Mot Seq # : **002 MD**
ORDER "NOT SIGNED"

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LASALLE BANK NATIONAL ASSOCIATION, as Trustee
C/O Chase Home Finance, LLC
10790 Rancho Bernardo Road
San Diego, CA 92127,

Plaintiff(s),

- against -

MICHAEL LAMY, JOAN LAMY,

"JOHN DOE", the name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest in or lien upon the Mortgaged Premises,

Defendant(s).

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Upon the following papers numbered 1 to 3 read on this motion by the plaintiff for an order fixing the defaults and, *inter alia*, appointing a referee to compute ; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers_____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the plaintiff for, *inter alia*, an order fixing the defaults in answering of the known defendant/mortgagors and appointing a referee to compute amounts due under the mortgage that is the subject of this foreclosure action, is considered under CPLR 3215 and RPAPL 1321 and is denied. The plaintiff's submissions on this second motion for the relief demanded herein failed to cure the defeciencies outlined in the prior order of this court dated March 31, 2006, which denied the plaintiff's first application for such relief.

The plaintiff originally stood before this court as a purported assignee of the subject note and mortgage pursuant to an assignment made by a nominee of the original lender dated December 29, 2005. On this second application for an order fixing the defaults of the mortgagor defendants and for the appointment of a referee to compute amounts due under the note and mortgage, the plaintiff submits a purported "allonge" to the note in favor of the original lender on some unidentified date wherein the original lender as owner of the note and mortgage purportedly indorsed the note over to the plaintiff. Relying on the December 29, 2005 assignment of the note and mortgage issued by MERS as nominee of the plaintiff and the undated indorsement by "allonge" to the note purportedly

executed by the original lender as owner of the note and mortgage, plaintiff asks that the court now grant its application for an order fixing defaults and appointing a referee to compute amounts due under the terms of the note and mortgage.

As this court indicated in its prior order of March 31, 2006, only the owner of the note and mortgage at the time of the commencement of a foreclosure action may properly prosecute said action ***(Kluge v Fugazy*** 145 AD2d 537, 536 NYS2d 92; *see also,* ***Katz v Eastville Realty Co.,*** 249 AD2d 243, 672 NYS2d 308). To state a cognizable claim sounding in foreclosure, the complaint must contain, *inter alia*, allegations regarding the plaintiff's ownership interest in the note and mortgage which is the subject of the proceeding. Because ownership of both the note and mortgage at the time of the commencement of a mortgage foreclosure action is a necessary element of the plaintiff's cause of action for foreclosure of the mortgage, entry of a default judgment against the defendant mortgagors and others joined as party defendants is precluded where the plaintiff's ownership interest in both the note and the mortgage is not ascertainable from the pleadings and the documentation submitted in support of the motion (CPLR 3215; RPAPL 1321; see also ***Beaton v Transit Facility Corp***, 14 AD3d 637, 789 NYS2d 314, and the cases cited therein; *see also,* ***Morgan v Bagayoko***, 1 AD3d 582, 767 NYS2d 631).

Ownership of the note and mortgage may be established by the lending documents themselves or by proof that the plaintiff is the owner of the note and mortgage by reason of an assignment of both the note and mortgage by the owner thereof to the plaintiff or by the owner's indorsement of the note and its written assignment of mortgage to the plaintiff (***Federal National Mortgage Association v Youkelsone,*** 303 AD2d 546 755 NYS2d 730). Accordingly, a plaintiff who is the assignee of the mortgage and the underlying note at the time of the commencement of the action has standing to maintain the action (***Federal National Mortgage Association v Youkelsone,*** *ibid* @303 AD2d 547). However, this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such Mortgage Electronic Registration Systems, Inc.(MERS), may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action (***Mortgage Electronic Systems, Inc. v Burek***, 4 Misc @d 1030, 798 NYS2d 346; ***Mortgage Electronic Systems, Inc. v Bastian***, 12 Misc3d 1182(A), 2006 WL 1985461; *see also*, "*MERS Foreclosures Continue to Face Challenges in Suffolk County Courts*", by Sam Weisberg, 5/30/2006 NYLJ 20, (col.2); "*Challenges to MERS Standing*, by Kenneth M. Block and Jeffrey R. Steiner, 11/16/05 NYLJ 5 (col. 2); *CF.*, ***Fairbanks Capital Corp. v Nagel,*** 289 Ad2d 99, 735 NYS2d 13). The fact that the County Clerk may record a mortgage which therein states that MERS is the nominee of the original lender and is the mortgagee of record for purposes of recording, does not alter the foregoing rule because the County Clerk's recording and indexing of any such mortgage is purely a ministerial act (***MERSCorp., Inc. v Romaine,*** 24 AD3d 673, 808 NYS2d 307*;* leave to appeal granted 6 NY3d 712, 816 NYS2d 747).

It is axiomatic that to be effective, an assignment of the a note and a mortgage given as security therefor must be made by the owner of such note and mortgage and that an assignments made by entities having no ownership interest in the note and mortgage pass no title therein to the

assignee (see, (***Matter of Stralem***. 303 AD2d 120, 758 NYS2d 345, and the cases cited therein). A nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee. Since a note secured by a mortgage is a negotiable instrument, it may be assigned by indorsement provided such indorsement is affixed on the note itself or on a paper so firmly attached thereto to become a part thereof (***Slutsky v Blooming Grove Inn, Inc.,*** 147 AD2d 208 542 NYS2d 721). One who has been given a written assignment of a mortgage and an assignment of the note by indorsement on the face thereof has standing to maintain a foreclosure action ***(First National Trust Association v Meisels***, 234 AD2d 414, 651 NYS2d 121). An assignor's failure to indorse the note will not render an assignment of mortgage invalid where said assignment was made in a writing and therein transferred the assignor's interests in both the note and the mortgage to the assignee (***Matter of Stralem***, 303 Ad2d 120, 758 NYS2d 345, *supra*).

In addition to the forgoing rules regarding assignments, well established case authorities have held that where a mortgage debt is represented by a bond or other instrument, an assignment of the mortgage without a concomitant assignment of the note or bond for which said mortgage was given as security is a nullity ***(Merritt v Bartholick***, 36 NY 44; ***Flyer v Sullivan*** 284 App.Div.697, 134 NYS2d 521; ***Beak v Walts***, 266 App.Div.900, 42 NYS2d 652; ***Manne v Carlson***, 49 App.Div. 276, 63 NYS2d 162, *supra; Cf.,* ***Payne v Wilson***, 74 NY 348). This is so because the mortgage is merely an incident of and collateral security for the debt and an assignment of the mortgage does not pass ownership of the debt itself ***(Luetchford v Lord,*** 132 NY 465, 30 NE 859; ***Smith v Thompson,*** 118 App.Div. 336, 103 NYS 336). The following corollary rule also evolved: one who has received an assignment of the mortgage debt (note or bond) without a corresponding assignment of the mortgage cannot maintain an action to foreclose, since the assignee has no legal interest in the mortgaged premises (***Manne v Carlson***, 49 App.Div. 276, 63 NYS2d 162). Accordingly, only the owner of the both the note and mortgage at the time of the commencement of the action may seek the remedy of foreclosure.

The record adduced on the instant application clearly establishes that the plaintiff's claims of ownership to the mortgage for which foreclosure is herein demanded are without merit. The December 29, 2005 assignment of the mortgage to the plaintiff, upon which the plaintiff originally predicated its claims of ownership to the subject mortgage, was made by an entity (MERS) which had no ownership interest in either the note or the mortgage at the time the purported assignment thereof was made. The December 29, 2005 assignment of mortgage is thus invalid. Nor does the plaintiff's new submission of a purported separate assignment of the note by a purported indorsement of same by the original lender in favor of the plaintiff establish the plaintiff's ownership interest in the subject note and mortgage. This undated document does not appear to be part of the note itself nor does it appear to be affixed thereto so firmly as to become a part thereof (see, UCC 3-202[2]). Instead the indorsement appears to have been prepared independently of the note and subsequent to its execution on October 1, 2004. It is thus not an indorsement within the contemplation of UCC 3-202[2] (***Slutsky v Blooming Grove Inn, Inc.,*** 147 AD2d 208 542 NYS2d 721 *supra*). In any event, the plaintiff failed to establish a valid assignment of the mortgage by the owner thereof.

The court thus finds that this purported, undated, indorsement by "allonge"to the note by the original lender in favor of the plaintiff and the December 29, 2005 written assignment of the note and mortgage by MERS to the plaintiff failed to pass ownership of the note and mortgage to the plaintiff prior or subsequent to the commencement of this action. Consequently, the original lender remains the owner of both the note and mortgage since no proper assignment of the either the note or the mortgage was ever made by the original lender/owner to the plaintiff or to the plaintiff's purported assignee. Under these circumstances, the plaintiff has no cognizable claims for the relief demanded in its complaint ***(Kluge v Fugazy*** 145 AD2d 537, 536 NYS2d 92, *supra*; *see also,* ***Katz v Eastville Realty Co.,*** 249 AD2d 243, 672 NYS2d 308, *supra).* This second motion (#002) by the plaintiff for a default judgment against the defendants and other incidental relief is thus denied (***Beaton v Transit Facility Corp***, 14 AD3d 637, 789 NYS2d 314, *supr*a, and the cases cited therein; *see also,* ***Morgan v Bagayoko***, 1 AD3d 582, 767 NYS2d 631, *supr*a).

In view of the foregoing, the instant motion (#002) is denied and the proposed order of reference is marked "***Not Signed***".

Dated: August 7, **2006.**

EDWARD D. BURKE, A.J.S.C.