

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

**Present: Hon. Edward G. McCabe,
Supreme Court Justice**

**FORECLOSURE PART
NASSAU COUNTY**

HSBC BANK, USA,

INDEX NO.: 21301/08
XXX

Plaintiff,

MOT. SEQ. NOS. 1&2

vs.

HENRY FELD, ET AL.,

Defendants.

X

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Answering Affidavits and Reply.....	3

Upon foregoing papers, it is ordered that this motion by plaintiff bank (Seq. #1) for summary judgment (CPLR §3212) and an Order of Reference (RPAPL 1321) is denied. Cross-motion by defendant homeowner (Seq. #2) to dismiss, is granted.

Among the affirmative defenses alleged in defendant's Answer is that of "lack of standing" (Eleventh). The defense is well taken.

Plaintiff posits ownership on an Assignment of Mortgage by MERS acting solely as nominee for Freemont Investment and Loan, the lender, dated December 9, 2008, which purports to assign not only the subject mortgage but also the "bond or obligation described in said mortgage". The Assignment is stated to be effective October 22, 2008. The action was instituted November 25, 2008.

The fact that the Assignment was executed after institutions file claims does not establish a lack of standing (see, **Bankers Trust v. Hoover**, 263 AD2d 937). However, plaintiff has failed to establish it is the holder of the Note and Mortgage. No evidence has been offered as to MERS authority as nominee to assign the mortgage. More importantly, no evidence has been provided to establish that MERS, a non-party to the note, had authority to transfer it. Absent such a showing, plaintiff has failed to establish it has the right to maintain the action. Accordingly, the Complaint is hereby dismissed without prejudice.

ENTER:

Dated: August 5, 2009
Mineola, NY



HON. EDWARD G. McCABE
Supreme Court Justice

ENTERED
AUG 20 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE