

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 10-28-08
ADJ. DATE 7-29-09
MNEMONIC: # 002 - MG

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Bank of New York as Trustee for the :
Certificateholders CWMBS, Inc. CHL :
Mortgage Pass-Through Trust 2005-J2 :
Mortgage Pass-Through Certificates, :
Series 2005-J2, :
:
Plaintiff, :
:
- against - :
:
Joseph Cerullo, CAF Realty LLC, Citibank, :
N.A., Peter Ziogiannis, Pat Noto, Equity :
Settlement Services, and "JOHN DOE #1" :
through "JOHN DOE #10", the last ten names :
being fictitious and unknown to the plaintiff, :
the person or parties, if any, having or claiming :
an interest in or lien upon the Mortgage :
premises described in the Complaint, :
:
Defendants. :
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Upon the following papers numbered 1 to 39 read on this motion for leave to reargue; Notice of Motion/
Order to Show Cause and supporting papers 1 - 16; Notice of Cross-Motion and supporting papers___;
Answering Affidavits and supporting papers 17 - 30; Replying Affidavits and supporting papers 31 - 39; Other
_____ and after hearing counsel in support and opposed to the motion it is,

ORDERED that this motion by the plaintiff for leave to reargue its prior motion for summary judgment and the appointment of a referee in this mortgage foreclosure proceeding, which was denied by order of this Court dated July 11, 2008, is considered under CPLR §+2221 and is granted. Upon granting leave to reargue, the Court adheres to its original determination and denies summary judgment for lack of proper proof of standing.

The plaintiff commenced this action on April 6, 2007 to foreclose on premises located at 203 Head of Pond Road in Water Mill, Suffolk County on Long Island, New York. The defendant Joseph Cerullo (hereinafter Cerullo) had executed a note for a loan in the sum of \$500,000.00 from Flagstar Bank, FSB, A Federally Chartered Savings Bank (hereinafter

Flagstar), and a mortgage on the subject premises in favor of Flagstar. The note and mortgage were both dated May 24, 2004. The mortgage agreement indicated that Mortgage Electronic Registration Systems, Inc. (hereinafter MERS) was acting solely as a nominee of the lender and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. Cerullo defaulted on his loan payments beginning on or about October 1, 2006. By an assignment dated April 3, 2007, MERS, acting solely as nominee for Flagstar, assigned the subject mortgage, together with the indebtedness or obligation described in the mortgage, to the plaintiff and the plaintiff thereafter commenced this action. Only Cerullo appeared by filing an answer, which contained general denials and affirmative defenses, including the lack of capacity to sue.

The plaintiff now moves for an order pursuant to CPLR §3212 granting summary judgment in its favor and Cerullo opposes the motion because the plaintiff lacked standing to commence this foreclosure action because it was not the holder of the note and mortgage at the time that the action was commenced.

Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief (see, **U.S. Bank, N.A. v Adrian Collymore**, ___ NYS2d ___, 2009 WL 4432588, 2009 NY Slip Op 09019 [NYAD 2 Dept Dec 01, 2009]). A plaintiff seeking foreclosure must establish that it was the owner or holder of the note and mortgage at the time that it commenced the foreclosure action (see, **Mortgage Elec. Registration Sys. v Coakley**, 41 AD3d 674, 838 NYS2d 622 [2nd Dept 2007]; **Federal Natl. Mtge. Assn. v Youkelsone**, 303 AD2d 546, 755 NYS2d 730 [2nd Dept 2003]; see also, **Wells Fargo Bank, N.A. v Marchione**, ___ AD3d ___, 887 NYS2d 615 [2nd Dept 2009]). A plaintiff may do so by demonstrating that it was the assignee of the mortgage and the underlying note or the assignee of the mortgage and by indorsement the holder of the note at the time that the action was commenced (see, **Federal Natl. Mtge. Assn. v Youkelsone**, *supra*; **First Trust Natl. Assn v Meisels**, 234 AD2d 414, 651 NYS2d 121[2nd Dept 1996]; **Slutsky v Blooming Grove Inn, Inc.**, 147 AD2d 208, 542 NYS2d 721[2nd Dept1989]).

Here, the plaintiff has failed to meet its burden of proof of demonstrating that it has standing as the lawful holder or assignee of the subject note (see, **U.S. Bank, N.A. v Adrian Collymore**, *supra*). Although the plaintiff asserts that it obtained ownership interest in the subject note and mortgage from MERS as the purported nominee of Flagstar, the effectiveness of the subject assignment, dated April 3, 2007, is unclear as there is no evidence that Flagstar ever directly assigned the note to MERS or expressly gave MERS the authority, such as by power of attorney, to act as Flagstar's authorized agent to assign the subject note to the plaintiff (see, **In re Stralem**, 303 AD2d 120, 758 NYS2d 345 [2nd Dept 2003]; **Teitz v Goettler**, 191 AD 924, 181 NYS 956 [2nd Dept 1920]).¹ Without an effective transfer of Flagstar's interest in the note to MERS or express authorization from Flagstar for MERS to

¹ Contrary to the allegations of the complaint, the plaintiff did not promise to pay MERS under the terms of the note. Nowhere in the note is MERS even mentioned.

assign the note on its behalf, the assignment of the mortgage is a nullity (see, **Kluge v Fugazy**, 145 AD2d 537, 536 NYS2d 92 [2nd Dept 1988]). In addition, the plaintiff now submits a copy of the note with an undated endorsement from Flagstar to the plaintiff, which was not submitted with the original motion papers, without explaining why it was not originally submitted and when the endorsement occurred (see, CPLR §2221 [e][3]; **U.S. Bank, N.A. v Adrian Collymore**, ___ NYS2d ___, 2009 WL 4432588, 2009 NY Slip Op 09019 [NYAD 2 Dept Dec 01, 2009]). Moreover, the plaintiff now submits an affidavit, dated September 26, 2008, from the Senior Vice President of another entity, Countrywide Home Loans, Inc., purportedly the attorney in fact of the plaintiff and servicer of the loan, conclusorily attesting that the plaintiff has been in possession of the subject note since prior to the commencement of this action. Said statement is insufficient to establish the plaintiff's prima facie entitlement to judgment as a matter of law (see, **Emigrant Mtge. Co., Inc. v Karpinski**, ___ NYS2d ___, 2009 WL 4068562, 2009 NY Slip Op 08780 [NYAD 2 Dept Nov 24, 2009]). The motion for summary judgment must be denied, regardless of the sufficiency of the opposition papers (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Therefore, the motion for summary judgment, the appointment of a referee and related relief is denied.

Dated: December 14, 2009



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION