

Short Form Order(h)

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **DUANE A. HART** IAS PART 18
Justice

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE FOR LEND
AMERICA, A NEW YORK CORPORATION,

Index No.: 27396/07

Motion Date:
June 11, 2008

Plaintiff(s),

Cal. No.: 18

-against-

Mot. Seq. No. 1

SHERRI CAUGHMAN, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS NOMINEE
FOR LEND AMERICA, A NEW YORK
CORPORATION,

"JOHN DOE" and "JANE DOE" said names
being fictitious, parties intended
being possible tenants or occupants of
premises,

Defendant(s).

The following papers numbered 1 to 7 read on this motion.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	

On November 10, 2006, Lend America, a New York Corporation (Lend America) issued a mortgage and note to Defendant Sherri Caughman in the amount of \$412,000.00 to purchase a home in Queens County.

An adjustable rate note, subject to change every six(6) months, accompanied the mortgage and was also dated November 10, 2006.

There was a default, and, approximately one year later, foreclosure proceedings were commenced. The Notice of Pendency and the Complaint were dated November 2, 2007 and filed the same day.

On November 7, 2007, Mortgage Electronic Registration Systems, Inc., (MERS), as nominee for Lend America, assigned the mortgage to Central Mortgage Company (CMC). The assignment

states that November 10, 2006 mortgage was made by Defendant Caughman to MERS as nominee for Lend America.

The caption of the action lists MERS, ,as nominee for Lend America, as the plaintiff. Defendants are Sherri Caughman, MERS, as nominee for Lend America, John Doe and Jane Doe.

In this motion, plaintiff seeks an order striking Defendant Caughman's answer; the appointment of a Referee to compute the amount due and owing and the amendment of the caption.

The amended caption would substitute CMC as plaintiff, in place and instead of MERS, as nominee for Lend America. In the amended caption, Sherri Caughmann would remain as a defendant, MERS, as nominee for Lend America, would be added as a defendant and Mr. Caughman and Vicki Douglas were added as defendants.

In support of its motion, plaintiff argues that it is entitled to summary judgment because it has made out a prima facie case and that defendant's answer does not show that there are any issues of fact which would warrant denial of its motion.

Defendants, in opposing the motion, contends that MERS has no standing, as a nominee, to bring action because its status as nominee is limited and does not give it the power to transfer or assign ownership rights in property on behalf of the party for which it is acting as nominee. They add that MERS has said that it is not in possession of the original promissory note and, as such its allegations are inconsistent with its exhibits. Thus, defendants conclude, this raises issues of fact.

Continuing, defendants conted that the mortgage and note involved here were issued in Violation of the Federal Truth in Lending Act in that plaintiff did not provide them with the disclosures required under 15USC1639(a)(1) and (a)(2)(A) and 12 CFR 226.32. These violations, say defendants, leaves them with a "continuing right" to rescind the deal, which they claim to do in their opposition .

Upon review, defendants' motion is granted. Neither MERS nor CMC has shown that it had the mortgage and note at the time the action was commenced. Further, it appears that there is a conflict of interest in that MERS is both a plaintiff and defendant, at least as far as the original caption shows.

The parties are directed to appear before this court on May 4, 2010 at 9:30 am for a conference.

Dated: March 23, 2010

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J.S.C.

Diary