

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: Hon. William R. LaMarca, Supreme Court Justice

FORECLOSURE PART NASSAU COUNTY

THE BANK OF NEW YORK MELLON,

Plaintiff,

-against-

INDEX NO. 15127/09 MOTION DATE: 10/21/09 MOTION SEQ. 1

RICHARD BUSTRUC, SHELLY BUSTRUC, et al.,

Defendants.

Notice of Motion .....	1
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Upon the foregoing papers, it is ordered that this motion by defendant Richard Bustruc for an order pursuant to CPLR 3211(a)(3) dismissing the complaint is granted and the complaint is hereby dismissed without prejudice.

Movant challenges the Bank of New York's standing as the holder of the note and mortgage securing it. In support of such standing, plaintiff submits an Assignment of Mortgage executed by MERS, as nominee of the lender Premium Capital Funding LLC d/b/a Topdot Mortgage, and plaintiff and a copy of the mortgage note with an unsigned transfer from Premium to Countywide Bank N.A.

Clearly there has been a failure to establish that the mortgage note has been transferred to plaintiff. Not only has plaintiff failed to establish a transfer to the Bank of New York, the unsigned endorsement has failed to establish a valid transfer out of Premium.

Plaintiff cannot establish it as a holder of the note by virtue of MERS' assignment of the mortgage. Not only has plaintiff failed to establish MERS' authority as a nominee for purposes of recording the mortgage to assign the mortgage, there has been complete lack of evidence to support MERS' authority as a non-party to the note to effect its transfer. The provision of the assignment which purports to assign the mortgage "TOGETHER with the notes described in said mortgage" cannot be considered to have transferred the note. Negotiable instruments are transferred by endorsement thereon or allonge affixed thereto, not by a secondary paragraph in a separate document.

Dated: NOV 23 2009

ENTERED DEC 07 2009 NASSAU COUNTY COUNTY CLERK'S OFFICE

Hon. William R. LaMarca Supreme Court Justice