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**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**ONEWEST BANK, FSB**  
**155 North Lake Avenue**  
**Pasadena, CA 91101,**

**Index No. 18090/09**

**Motion Submitted: N/A**

**Plaintiff(s),**

**-against-**

**ALEXANDER ROTH, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, INC.  
AS NOMINEE FOR E\*TRADE WHOLESALE  
LENDING CORP., ET AL.,**

**Defendant(s).**  
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Plaintiff's motion for an Order of Reference and summary judgment is denied.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594, [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein Plaintiff. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

In this matter Plaintiff failed to establish that it is entitled to the relief sought. It is well settled that a foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity. (*Kluge v. Fugazy*, 145 A.D.2d 537, 538 536 N.Y.S.2d 92 [2d Dept., 1988]). While Plaintiff alleges that it is the holder of both the note and mortgage, the record before the Court suggests

otherwise and raises factual issues as well as issues of credibility that can not be determined herein.(see *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]).

The Complaint filed September 4, 2009 stated that Plaintiff is “the owner and holder of a note and mortgage being foreclosed.” Bald assertions of possession of the original note, without more, in light of the conflicting evidence, is not sufficient to establish a *prima facie* case.

Furthermore, the assignment recorded on October 1, 2009 specifically states that it is an “assignment of mortgage,” and makes no reference to the note. Thus, a question of fact exists as to whether the note was ever assigned or delivered to Plaintiff. It may well be that the note was neither assigned nor delivered to Plaintiff prior to commencement of this action and Plaintiff would then be without authority to bring this action.

A stamp on the copy of the note provided by Plaintiff appears to be an indorsement of the note in blank, by the original lender, and is not dated (*U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 578 [2d Dept., 2009]). Additional issues regarding the timing of that indorsement on the note and whether MERS, at the time it executed the Assignment of Mortgage had authority, let alone the ability, to assign the note and/or whether, in fact, the note had already been assigned at the time of the purported assignment of the mortgage exist (*id*).

ORDERED that movant shall serve a copy of this Order upon all parties, or their attorneys if represented by counsel and shall there after file affidavits of service with the County Clerk and it is further,

ORDERED that a copy of this Order and proof of service of same be annexed as exhibits to any future applications regarding the subject mortgage and note.

The foregoing constitutes the Order of this Court.

Dated: September 1, 2010  
Mineola, N.Y.

  
J. S. C.  
**ENTERED**

OCT 01 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE