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At an IAS Term, Part 27 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of November 2007

P R E S E N T:

HON. ARTHUR M. SCHACK

Justice

HON. ARTHUR M. SCHACK J.S.C.

BANK OF NEW YORK AS TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC. ASSET-BACKED NOTES, SERIES 2006-SD2,

Plaintiff,

- against -

SANDRA OROSCO, *et. al.*,

Defendants.

DECISION & ORDER

Index No. 32052/07

The following papers numbered 1 read on this motion:

Papers Numbered:

Proposed Order of Reference/Exhibits _____

_____ 1 _____

Plaintiff's application, upon the default of all defendants, for an order of reference and related relief for the premises located at 211 Weirfield Street, Brooklyn, New York (Block 3397, Lot 48, County of Kings) is denied without prejudice. The plaintiff, BANK

OF NEW YORK AS TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC. ASSET-
BACKED NOTES, SERIES 2006-SD2 (BANK OF NEW YORK), lacks standing to bring
this action. Despite claiming to be the owner of the note and mortgage in this action by
assignment of the previous mortgagee, there is no record of the assignment recorded in
the Office of the City Register. Therefore, the instant application is denied.

Background

Defendant Sandra Orosco borrowed \$436,000.00 from Encore Credit Corp., d/b/a/
ECC Encore Credit (Encore), on September 15, 2005. The Orosco Note and Mortgage
were recorded in the Office of the City Register of the City of New York on October 5,
2005 at City Register File Number (CRFN) 2005000557175.

Both plaintiff's counsel, in her affirmation in support of this application, and Keri
Selman, who claims to be an Assistant Vice-President of Bank of New York, in her
September 25, 2007-affidavit, asserted that Mortgage Electronic Registration Systems,
Inc. (MERS), as nominee for Encore for the purpose of recording the mortgage, assigned
the mortgage to plaintiff BANK OF NEW YORK on August 21, 2007. A copy of the
putative assignment is Exhibit B of the application. However, according to the
Automated City Register Information System (ACRIS) website of the Office of the City
Register, New York City Department of Finance, as of today, almost three months
subsequent to the alleged assignment, there is no recording of the assignment. Therefore,
the Court must conclude that plaintiff is not the mortgagee. However, leave is granted to

plaintiff to submit a new application for an order of reference if the putative assignment is recorded.

Plaintiff must address a second matter if it applies for an order of reference after demonstrating that the alleged assignment was recorded. Plaintiff's application is the third application for an order of reference received by me in the past several days that contain an affidavit from Keri Selman. In the instant action, she alleges to be an Assistant Vice-President of the Bank of New York. On November 16, 2007, I denied an application for an order of reference (*BANK OF NEW YORK A TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-8 v JOSE NUNEZ, ET. AL.*, INDEX NO. 10457/07), in which Keri Selman, in her affidavit of merit claims to be "Vice President of COUNTRYWIDE HOME LOANS, Attorney in fact for BANK OF NEW YORK." The Court is concerned that Ms. Selman might be engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Ms. Selman describing her employment history for the past three years.

Discussion

The Court of Appeals (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003]), *cert denied* 540 US 1017 [2003]), declared that "[s]tanding to sue is critical to the proper functioning of the judicial system. It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. The plaintiff who has

standing, however, may cross the threshold and seek judicial redress." Professor David Siegel, in NY Prac, § 136, at 232 [4th ed] instructs that:

[i]t is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack "standing" is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.

In (*Caprer v Nussbaum*, 36 AD3d 176, 181 [2d Dept 2006]), the Court held that "[s]tanding to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request." If a plaintiff lacks standing to sue, the plaintiff may not proceed in the action. (*Stark v Goldberg*, 297 AD2d 203 [1st Dept 2002]).

It is clear that plaintiff BANK OF NEW YORK lacks standing to foreclose on the instant Orosco note and mortgage. BANK OF NEW YORK has failed to establish ownership of the note and mortgage with a recording of the alleged assignment by MERS on August 21, 2007. Despite alleging that the assignment is in the process of being recorded, it is not recorded. The Court (*Campaign v Barba*, 23 AD3d 327 [2d Dept

2005], instructed that "[t]o establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note, *ownership of the mortgage*, and the defendant's default in payment [*Emphasis added*]." (See *Witelson v Jamaica Estates Holding Corp. I*, 40 AD3d 284 [1st Dept 2007]; *Household Finance Realty Corp. of New York v Wynn*, 19 AD3d 545 [2d Dept 2005]; *Sears Mortgage Corp. v Yahhobi*, 19 AD3d 402 [2d Dept 2005]; *Ocwen Federal Bank FSB v Miller*, 18 AD3d 527 [2d Dept 2005]; *U.S. Bank Trust Nat. Ass'n Trustee v Butti*, 16 AD3d 408 [2d Dept 2005]; *First Union Mortgage Corp. v Fern*, 298 AD2d 490 [2d Dept 2002]; *Village Bank v Wild Oaks, Holding, Inc.*, 196 AD2d 812 [2d Dept 1993]).

Since BANK OF NEW YORK has failed to establish its ownership of the Orosco note and mortgage, the Court denies plaintiff's application with leave to renew after the recording of the August 21, 2007 assignment and presenting an affidavit from Keri Selman clarifying her employment and what corporation she serves as an officer.

Conclusion

Accordingly, it is

ORDERED, that the application of plaintiff, BANK OF NEW YORK AS TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-SD2, for an order of reference and related relief for the premises located at 211 Weirfield Street, Avenue, Brooklyn, New York (Block 3397, Lot 48, County of Kings) is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff, BANK OF NEW YORK AS TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-SD2, to renew its application for an order of reference and related relief for the premises located at 211 Weirfield Street, Brooklyn, New York (Block 3397, Lot 48, County of Kings), upon presentation to the Court of: evidence of the recording of the August 21, 2007 assignment of the Orosco note and mortgage from MERS to plaintiff; and, an affidavit from Keri Selman describing her employment history for the past three years.

This constitutes the Decision and Order of the Court.

E N T E R



HON. ARTHUR M. SCHACK
J. S. C.

HON. ARTHUR M. SCHACK J.S.C.