

**SUPREME COURT - STATE OF NEW YORK
IAS/TRIAL PART 9 - SUFFOLK COUNTY**

PRESENT:

Hon. EDWARD D. BURKE
Acting Justice of Supreme Court

Motion R/D : **NONE - Ex parte**
Mot Seq # : **001 MD**
ORDER "NOT SIGNED"

AURORA LOAN SERVICES, INC.,

Plaintiff(s),

- against -

FEIN, SUCH & CRANE, LLP

Attorneys for Plaintiff(s)
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977-6216

GARY A. FITZGERALD; "JOHN DOE # 1-5" and
"JANE DOE # 1-5", the said names being fictitious and
unknown to Plaintiff, the persons or parties intended
being the tenants, occupants, persons or corporations, if
any, having or claiming an interest in, or lien upon the
premises, described in the complaint,

Defendant(s).

Upon the following papers numbered 1 to 3 read on this motion by plaintiff for an order fixing defaults and appointing a referee to compute; Notice of Motion/Order to Show Cause and supporting papers 1 to 3; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this *ex parte* application (#001) by the plaintiff for an order (1) fixing the default in answering of the known defendant; (2) dropping the unknown persons named in the caption as party defendants; and (3) for an order appointing a referee to compute amounts due under the mortgage for which foreclosure is sought herein is considered under CPLR 3215 and RPAPL 1321 and is denied. It is well established that only the owner of the note and mortgage at the time of the commencement of a foreclosure action may prosecute an action for foreclosure (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; *Federal National Mortgage Association v Yonkelsone*, 303 AD2d 546, 755 NYS2d 730; *see, also, Katz v East-Ville Realty Co.*, 249 AD2d 243, 672 NYS2d 308).

Here, the plaintiff stands before this court as an assignee of the entity known as Mortgage Electronic Registration Systems, Inc. (MERS), whom the plaintiff characterizes as the nominee of the lender/obligee under the note and mortgage named in the subject note and mortgage. Review of the documentation attached to the moving papers reveals, however, that the plaintiff's assignor, MERS, was not the owner of the note and mortgage at the time it executed the purported assignment of the note and mortgage to the plaintiff. Rather, MERS was merely named in the mortgage as a "separate corporation acting solely as nominee for the lender and the lender's successors and assigns

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AND FOR PURPOSES OF RECORDING THIS MORTGAGE MERS IS THE MORTGAGEE OF RECORD.” Since MERS was without ownership of the note and mortgage at the time of its assignment thereof to the plaintiff, the assignment did not pass ownership of the note and mortgage to the plaintiff. The failure on the part of the plaintiff to establish its ownership of the note and mortgage at the time of the commencement of this action precludes the granting of the instant motion as the plaintiff has failed to establish the fact(s) constituting a viable claim against the defendants as required by CPLR 3215(f) (*Fappiano v City of New York*, 5 AD3d 627, 774 NYS2d 773; *Green v Dolphy Construction co., Inc.*, 178 AD2d 635, 590 NYS2d 238; *see, also, Gagen v Kipany Production Ltd.*, 289 AD2d 844, 735 NYS2d 225; *Dyno v Rose*, 260 AD2d 694, 687 NYS2d 497; *Feffer v Malpeso*, 210 AD2d 60, 619 NYS2d 46).

In view of the foregoing, the instant motion for an order fixing the defaults of the defendant mortgagor and, *inter alia*, for an order appointing a referee to compute is denied and the proposed order attached to the moving papers has been marked “*Not Signed*”.

Dated: November 1, 2004.



EDWARD D. BURKE, A.J.S.C.

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