

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 24175/2005

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EMC MORTGAGE CORPORATION,

MOTION DATE: 01/04/2007

Plaintiff,

MOT. NO.: 001 MD

-against-

LORI A. WINK-THILMAN, JOHN THILMAN,
EMC MORTGAGE CORPORATION,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., JENNIFER ZENESKI,

Defendants.

DEFENDANTS PRO SE:

LORI A. WINK-THILMAN
JOHN THILMAN
88 Dana Avenue
Mastic, New York 11950

PLAINTIFF'S ATTORNEY:

STEVEN J. BAUM, P.C.
By: Darleen V. Karaszewski, Esq.
220 Northpointe Parkway, Suite G
Amherst, New York 14228

JENNIFER ZENESKI
88 Dana Avenue
Mastic, New York 11950

Upon the following papers numbered 1 to 6 read on this motion for judgment of foreclosure and sale: Notice of Motion and Affirmation 1 to 6 and supporting papers; it is;

ORDERED that the motion (motion sequence no. 001) of plaintiff EMC MORTGAGE CORPORATION ("EMC") for an order granting judgment of foreclosure and sale is denied.

The submissions reflect that the mortgage that is the subject of this foreclosure action was executed by defendants LORI A. WINK-THILMAN and JOHN THILMAN as mortgagors and Alliance Mortgage Banking Corp. ("Alliance") as mortgagee on February 17, 2005. (The mortgage note was executed by LORI A. WINK-THILMAN only.) The submissions further reflect that on June 9, 2006, after the commencement of this action on October 12, 2005, Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as "nominee" for Alliance, purported to assign the mortgage, "together with the indebtedness or obligation described in said instrument," to plaintiff EMC MORTGAGE CORPORATION. MERS, which is not itself the owner of the note and mortgage, does not have authority to assign ownership of the note and mortgage to plaintiff. See *LaSalle Bank National Association v. Lamy*, 2006 NY Slip Op. 51534U, 12 Misc. 3d 1191A, 824 N.Y.S.2d 769 (Sup. Ct. Suffolk Cty. 2006). Moreover, it is well established that an action for foreclosure of a mortgage may not be brought by one who has no title to it. *Kluge v. Fugazy*, 145 A.D.2d 537, 536 N.Y.S.2d 92 (2d Dept. 1988). Plaintiff's submissions establish that even if the purported assignment by MERS were valid, at the time of the commencement of this action plaintiff was not the owner of the mortgage and note sued upon.

In light of the foregoing, the motion for judgment of foreclosure and sale is denied.

Dated: April 17, 2007 HON. PAUL J. BAISLEY, JR.
J.S.C.

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