

**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"

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. as Nominee for U.S. BANK, N.A.,

Plaintiff(s),

- against -

DORIAN BIAS, PEOPLE OF THE STATE OF NEW
YORK, COMMISSIONER OF TAXATION &
FINANCE

"JOHN DOE" and "JANE DOE", said names being
fictitious, parties intended being the tenants or occupants
of the premises,

Defendant(s).

ROACH & MANNIELLO, P.C.

Attorneys for Plaintiff(s)
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Upon the following papers numbered 1 to 3 read on ex-parte this motion by plaintiff for an order fixing the defaults of defendants 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* motion (#001) by plaintiff for an order fixing the defaults of the known defendant[s], deleting as party defendants the unknown defendants named in the caption and for an order fixing the defaults of the defendants and appointing a referee to compute amounts due under the terms of the mortgage sought to be foreclosed herein is considered under CPLR 3215 and RPAPL Article 13 and is denied. The moving papers reflect that the above named plaintiff, a/k/a MERS, is not the owner of the subject mortgage nor the note for which said mortgage was given as security. The plaintiff, MERS, was not named as the lender in either the note or mortgage sought to be foreclosed herein. Instead, the plaintiff is identified in the mortgage indenture as a "separate corporation acting solely as nominee for the Lender and Lender's successors and assigns" and "FOR PURPOSES OF RECORDING THIS MORTGAGE, MERS IS THE MORTGAGEE OF RECORD".

The record further reflects that the lender named in the subject mortgage is an entity known as Alliance Mortgage Banking Corp. According to the moving papers, said entity purportedly assigned the subject note and mortgage to U.S. Bank, N.A. Plaintiff admits, however, that no assignment or the paper writing transferring the note and mortgage to the plaintiff, MERS, was ever

executed by the original lender. Consequently, there is no evidence that the plaintiff was the owner of the note and mortgage at the time this action was commenced *by reason of assignment or otherwise*. The failure to establish the plaintiff's ownership of the note and mortgage at the time of the commencement of this action precludes the granting of the instant motion since the plaintiff is unable to establish "the facts constituting the claim(s)" against the defaulting defendants as required by CPLR 3215(f) (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; *see, also, Katz v Eastville Realty Co.*, 249 AD2d 243, 672 NYS2d 308; cf., *Federal National Mortgage Association v Youkelsone*, 303 AD2d 546, 755 NYS2d 730).

In view of the foregoing, the instant motion (#001) by the plaintiff for, *inter alia*, an order fixing the defaults of the named defendant and for the appointment of a referee to compute amounts due under the subject mortgage is denied and the proposed order of reference is marked "*Not Signed*".

Dated: May 31, 2006.



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

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