

**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 : 12/01/05
Adj. Date : 12/07/05
ORDER "NOT SIGNED"

Seq 001- ANS

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as Nominee for NOMINEE FOR FREMONT INVESTMENT AND LOAN, its Successors and/or Assigns
C/o EMC Mortgage Corporation
909 Hidden Ridge Drive, Suite 200
Irving, TX 75038-3817,

Plaintiff(s),

- against -

PATRICIA DELZATTO, a/k/a PATRICIA M. DELZATTO a/k/a PATRICIA M. OWEN, MICHAEL DELZATTO, CITIBANK (SOUTH DAKOTA), N.A., HOMEQ SERVICING CORPORATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendant(s).

STEVEN J. BAUM, ESQ.
Attorneys for Plaintiff(s)
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Amherst, New York 14428

SUSAN A. WEST, ESQ.
Attorneys for Defendant(s) HOMEQ SERVICING CORPORATION AND MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
152 Islip Avenue, Suite 18
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"JOHN DOE", (Said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises,

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 was not the 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"

Nor is there any proof 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; 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: December 9, 2005.



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

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