

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 GMAC
MORTGAGE CORPORATION, ITS SUCCESSORS
OR ASSIGNS
3451 Hammond Avenue
Waterloo, IA 50704,

Plaintiff(s),

- against -

MARK DUVAL, DONNA DUVAL, GMAC
MORTGAGE CORPORATION

"JOHN DOE", said name being fictitious, it being the
intention of the Plaintiff to designate any and all
occupants of premises described in this action,

Defendant(s).

STEVEN J. BAUM, P.C.
Attorneys for Plaintiff(s)
P.O. Box 1291
Buffalo, New York 14240-1291

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 mortgagor defendant, deleting as party defendants the unknown defendants named in the caption and for an order computing 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 plaintiff is not the owner of the subject mortgage nor the note for which said mortgage was given as security. Nor is the plaintiff the lender named in the note and mortgage attached the moving papers. In addition, 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 known defendants as required by CPLR 3215(f) (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; cf., *Federal National Mortgage Association v Yonkelsone*, 303 AD2d 546, 755 NYS2d 730).

WWW.STOPFORUMS.COM

COPY

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: July 22, 2004.


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

WWW.StopForeclosureFraud.com