

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. "MERS" as Nominee for
HOMECOMINGS FINANCIAL NETWORK, INC.
9350 Waxie Way
San Diego, CA 92123,

Plaintiff(s),

ROSICKI, ROSICKI &
ASSOCIATES, P.C.
Attorney for Plaintiff
One Old Country Road, Suite 200
Carle Place, New York 11514

- against -

REYNERIO GARCIA; 'JOHN DOES' and 'JANE
DOES' said names being fictitious, parties intended being
possible tenants or occupants of premises, and
corporations, other entities or persons who claim, or may
claim, a lien against the premises,

Defendant(s).

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 merely 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

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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 Yonkelsone*, 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: February 22, 2005.


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

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