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SHORT FORM ORDER

Index No: 017622 / 2004

**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 DELTA
FUNDING CORPORATION
c/o OCWEN FINANCIAL
1675 Palm Beach Lakes
West Palm Beach, FL 33401,

Plaintiff(s),

- against -

ANTONIA A. PARKER,

"JOHN DOE", (Said name being fictitious, it being the
intention of plaintiff to designate any and all occupants of
premises being foreclosed herein.),

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, Mortgage Electronic Registration Systems, Inc. ("MERS"), for an order fixing the defaults of the defendants served herein; amending the caption to reflect the identity of a certain unknown defendant and to delete other unknown defendants as parties to this action and for an order fixing the defaults of the defendants and appointing a referee to compute amounts due under the terms of the mortgage for which foreclosure is demanded herein is considered under CPLR 3215 and RPAPL Article 1321 and is denied. It is well established that only the owner of the note or debt and the mortgage given as security therefor may prosecute an action for foreclosure of said mortgage (*Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92; see, also, *Federal National Mortgage Association v Yonkelsone*, 303 AD2d 546, 755 NYS2d 730).

Here, the plaintiff does not allege in its complaint that it is the owner of the note and mortgage sought to be foreclosed herein by reason of assignment or otherwise. Instead, the plaintiff alleges

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that it is named as the mortgagee's nominee in the mortgage and that the plaintiff is the "holder" of said mortgage. These allegations are insufficient to establish the facts constituting viable claims on the part of the plaintiff against the defendants as required by CPLR 3215(f)

In view of the foregoing, the instant motion (#001) by the plaintiff for an order fixing the defaults of the named defendant and appointing a referee to compute amounts due is denied. The proposed order of reference attached to the moving papers has thus been marked "*Not Signed*".

Dated: October 19, 2004.



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