

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002 Mot D

Present:

Hon. SANDRA L. SGROI

Return Date: 9-18-06

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Plaintiff,

-against-

DAVIDSON, FINK COOK, KELLY & GALBRAITH,
LLP

Attorney for Plaintiff

28 East Main Street, Suite 1700

Rochester, New York 14614-1990

DOROTHY WELLS, BERNARD L. WELLS,
ETHEL WYCHE, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., as Nominee
for Fremont Investment & Loan, and "JOHN
DOE" and "MARY DOE," (Said nmes being
fictitious, it being the intention of Plaintiff to
designate an and all occupants, tenants, persons
or corporations. if any, having or claiming an
interest in or lien upon the premises being
foreclosed herein.)

Defendants.

Upon the following papers numbered 1 to 22 read on this application for an order of
reference: Proposed order of reference and supporting papers 1-22 ; it is,

ORDERED that the motion of the Plaintiff for an order appointing a referee to compute is denied.

According to the Appellate Division, Second Department in *Kluge v. Fugazy*, (145 A.D.2d 537, 536)

N.Y.S.2d 92):

foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity (*Merritt v Bartholick*, 36 NY 44, 45; *Flyer v Sullivan*, 284 App Div 697, 698; *Beak v Walts*, 266 App Div 900; *Manne v Carlson*, 49 App Div 276, 278).

An assignment of a note must be made by the owner of the note and mortgage and an assignment made by an entity that has not ownership interest in the note and mortgage can pass no title to the assignee (see, *Matter of Stralem* 303 A.D.2d 120, 758 N.Y.S.2d 345). A nominee of the owner of the note and mortgage, without proof of an assignment, may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action (see, *Lasalle Bank Natl. Assn. v. Lamy*, 12 Misc. 3d 1191A, 2006 N.Y. Misc. LEXIS 2127; *Mortgage Electronic Systems, Inc. v Burek*, Misc. 3d 1030A, 798 N.Y.S.2d 346; *Mortgage Electronic Systems, Inc. v Bastian*, 12 Misc. 3d 1182(A), 2006 N.Y. Misc. LEXIS 1901, 2006 WL 1985461; see also, "MERS Foreclosures Continue to Face Challenges in Suffolk County Courts", by Sam Weisberg, 5/30/2006 NYLJ 20). Problems involved in tracing the ownership of paperless assignments are presently being faced by Title Companies but there is no legislation addressing those issues modifying this Court's responsibilities in reviewing foreclosure actions (see, "Alta Adopts New Policy Forms for Both Owners and Lenders" by Elliot L. Hurwitz and Randall Kadlec 8/21/2006 NYLJ 6). It is axiomatic that the Court, for the security of ensuring a proper chain of title, must be able to ascertain from the papers before it that the Plaintiff has the clear authority to foreclose on property and bind all other entities by its actions.

The Plaintiff has alleged that the note has been assigned or endorsed to the entity that now holds the mortgage but the alleged assignment by Mers to Liquidation Properties, Inc. has not been recorded (see, *Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208, 542 N.Y.S.2d 721). Therefore, the request for a order of reference is denied with leave to renew once the assignment is filed with the Suffolk County Clerk.

Dated: 9/25/06


SANDRA L. SGROI, J. S. C.