

**Aurora Loan Serv., LLC v Murphy**

2013 NY Slip Op 32670(U)

October 22, 2013

Sup Ct, Greene County

Docket Number: 09-1975

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF GREENE

AURORA LOAN SERVICES, LLC,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 09-1975**  
**RJI NO. 19-10-4916**

MICHAEL W. MURPHY; KIMBERLY MURPHY;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. AS NOMINEE FOR SMC MORTGAGE  
IN LIEU OF TRUE CORPORATE NAME SUNSET  
MORTGAGE COMPANY, LP,

Defendants.

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Supreme Court Greene County All Purpose Term, September 30, 2013  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Gerald Roth, Esq.  
Stein Weiner & Roth, L.L.P.  
*Attorneys for Plaintiff*  
One Old Country Road, Suite 113  
Carle Place, NY 11514

Jonathan E. Cohen, Esq.  
*Attorney for Defendants Michael and Kimberly Murphy*  
Four East Court Street  
Hudson, New York 12534-2406

**TERESI, J.:**

Aurora Loan Services, LLC (hereinafter “Aurora”) commenced this action to foreclose Michael and Kimberly Murphy’s (hereinafter “the Murphys”) Note<sup>1</sup> and Mortgage, both dated March 7, 2007 (hereinafter “Note” and “Mortgage”). Upon each Defendants’ default in

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<sup>1</sup> While the Mortgage was executed by both of the Murphys, only Michael Murphy executed the Note.

answering, this Court granted Aurora's motion for the appointment of a referee on July 27, 2010 (hereinafter "Order of Reference") and subsequently, on October 4, 2010, a Judgment of Foreclosure and Sale (hereinafter "Judgment"). No sale has yet occurred.

Aurora now moves, in part, to vacate the Order of Reference and Judgment. The Murphys do not oppose this portion of Aurora's motion. Accordingly, the Order of Reference and Judgment are vacated on consent.

Aurora also moves to amend the caption of the action to substitute Nationstar Mortgage, LLC as the named plaintiff and for a new order of reference. The Murphys oppose these portions of Aurora's motion. On this record, Aurora failed to establish its entitlement to amend the caption of the action or to an order of reference.

Considering first Aurora's motion to amend the caption, CPLR §1018 provides that "[u]pon any transfer of interest, the action may be continued by... the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." (*see generally* GRP Loan, LLC v Taylor, 95 AD3d 1172 [2d Dept 2012]).

On this record, Aurora failed to establish that it transferred an interest to Nationstar sufficient to justify amending the caption of this action. In support of its motion, Aurora submits its Assignment of Mortgage, dated July 5, 2012 (hereinafter "Assignment"). Such Assignment purportedly assigns all of Aurora's interests in the Mortgage to Nationstar. It includes, however, neither language explicitly assigning the Note nor "language show[ing Aurora's] intention... to transfer it." (Bank of New York v Silverberg, 86 AD3d 274, 280-81 [2d Dept 2011], quoting Suraleb, Inc. v International Trade Club, Inc., 13 AD3d 612 [2d Dept 2004]). The Assignment's undefined and vague "including all mortgages that have been consolidated therewith, with all

interest secured thereby, all liens, and any rights due or to become due thereon” terms, reference only mortgages and do not demonstrate an intent to assign the Note. (*cf.* Chase Home Fin., LLC v Miciotta, 101 AD3d 1307 [3d Dept 2012]). Aurora submitted no additional documentary proof to show that it transferred the Note to Nationstar. Instead, Aurora relies solely on Nationstar’s Assistant Secretary’s affidavit. She does not state that Nationstar is the current holder of the Note, but rather states only that Nationstar is “the assignee of the plaintiff in this case.” Such contention fails to demonstrate that Aurora assigned the Note to Nationstar as it is wholly “conclusory, [and] without probative value.” (Crossett v Wing Farm, Inc., 79 AD3d 1334, 1336 [3d Dept 2010], quoting Morales v Westchester Stone Co., Inc., 63 AD3d 805 [2d Dept 2009]). Because “a transfer or assignment of only the mortgage without the debt is a nullity and no interest is acquired by it,” Aurora failed to establish that it transferred to Nationstar an interest sufficient to support a CPLR §1018 amendment. (Homecomings Fin., LLC v Guldi, 108 AD3d 506, 508 [2d Dept 2013], quoting U.S. Bank Nat. Ass'n v Dellarmo, 94 AD3d 746 [2d Dept 2012]; HSBC Bank USA v Hernandez, 92 AD3d 843 [2d Dept 2012]; Merritt v Bartholick, 36 NY 44 [1867]).

Accordingly, Aurora’s motion to amend the caption of the action is denied.

Aurora similarly failed to demonstrate its entitlement to an order of reference.

On March 2, 2011, the Chief Administrative Judge of the Courts issued Administrative Order 431/11 (hereinafter “AO/431/11”). It requires Plaintiff’s counsel, when submitting a proposed order of reference, to also submit an affirmation stating, in part, that: “I communicated with the following representative or representatives of Plaintiff...” “The filing of this attorney’s affirmation is mandatory.” (U.S. Bank Nat. Ass'n v Eaddy, 109 AD3d 908 [2d Dept 2013]).



Here, Plaintiff failed to comply with AO/431/11. Despite Plaintiff's counsel's submission of an affidavit in the prescribed format, he did not state that he "communicated with [a] representative or representatives of Plaintiff." Rather, he allegedly communicated with "Jaclyn Holloway[,] Assistant Secretary of Nationstar Mortgage, LLC, assignee of plaintiff." Such conferral violates the explicit language of AO/431/11, which demands communication with Plaintiff's representative not an "assignee of Plaintiff." Needless to say, the terms representative and assignee are not synonymous. (Black's Law Dictionary [9th ed 2009], representative - one who stands for or acts on behalf of another; assignee - one to whom property rights or powers are transferred by another). Moreover, as set forth above, this record does not sufficiently establish that Nationstar is Plaintiff's assignee. Nor could Plaintiff's counsel rely on Ms. Holloway's allegations, as her allegations about Plaintiff's business records were unsupported by any foundational proof. (Colonno v Exec. I Assoc., 228 AD2d 859 [3d Dept 1996]; W. Val. Fire Dist. No. 1 v Vil. of Springville, 294 AD2d 949 [4th Dept 2002]; Unifund CCR Partners v Youngman, 89 AD3d 1377 [4th Dept 2011]). Because Plaintiff did not comply with AO/431/11 it failed to demonstrate its entitlement to the order of reference it submitted.

Accordingly, Plaintiff's motion for an order of reference is denied.

This Decision and Order is being returned to the attorney for Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Defendant is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 22, 2013  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated May 6, 2013; Affirmation of Gerald Roth, dated May 6, 2013; Affirmation of Gerald Roth, dated May 6, 2013, Affidavit of Jaclyn Holloway, dated March 25, 2013, with attached unnumbered exhibits.
2. Order to Show Cause, dated June 23, 2013; Affirmation of Jonathan Cohen, dated July 19, 2013, with attached Exhibits A-E.
3. Affirmation of Gerald Roth, dated September 25, 2013, with attached Exhibit A.