

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
**Justice**

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US Bank National Association, as Trustee for  
Wachovia Mortgage Loan Trust 2006-ALT1  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

-against-

Luz, Urias, Amanda Ramirez, Robert A. Ramirez,  
Good Samaritan Hospital, Medical Center, KMT  
Enterprises, Inc. a/a/o Chase Manhattan Bank,  
Mortgage Electronic Registration Systems, Inc., as  
Nominee for Axiom Financial Services, People of  
the State of New York, Portfolio Recovery  
Associates LLC, The CIT Group/Consumer  
Finance, Inc. (NY), John Doe ( Said name being  
fictitious, it being the intention of Plaintiff to  
designate any and all occupants of premises being  
foreclosed herein, and any parties, corporations or  
entities, if any, having or claiming an interest or  
lien upon the mortgaged premises.)

Defendants.

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Motion Sequence No.: 001; MD

Motion Date:

Submitted:

Index No.: 9187/2008

Attorney for Plaintiff:

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Upon the following papers numbered 1 to 13 read on this application for an order of reference: Application and supporting papers, 1 - 13.

This is an action to foreclose a mortgage on real property located at 418 Windmill Ave., West Babylon, New York. It appears that the plaintiff commenced the action on March 7, 2008. Defendant KMT Enterprises, Inc., submitted a notice of appearance waiving service of all papers except for, *inter alia*, the referee's report and judgment of foreclosure and sale. The remaining defendants have not answered the complaint or otherwise appeared in the action.

the plaintiff alleges that on or about June 15, 2006, the defendant Luz Urias executed and delivered a note in favor of Axiom Financial Services; that to secure payment of the note, defendant also executed and delivered to Axiom Financial Services a mortgage also dated June 15, 2006, duly recorded in the Office of the Suffolk County Clerk; that on or about February 20, 2008, Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Axiom Financial Services, assigned the mortgage to the plaintiff; that Luz Urias defaulted under the terms of the note and mortgage by failing to make monthly payments from November 1, 2007, to date, despite due demand; and that the plaintiff has elected to declare due and owing the entire unpaid balance of principal, together with applicable interest.

As a threshold matter, the Court notes that the plaintiff may lack standing to sue. A plaintiff seeking foreclosure must demonstrate that it was the owner of the note and the mortgage at the time it commenced the action (Federal Natl. Mtge. Assn. v. Youkelsone, 303 AD2d 546 [2<sup>nd</sup> Dept., 2003]; Aurora Loan Servs. v. Grant, 17 Misc 3d 1102[A] [Kings County Sup. Ct., 2007]). Any purported assignment of a note or mortgage made by an entity lacking an ownership interest therein passes no title to the assignee (LaSalle Bank Natl. Assn. v. Lamy, 12 Misc 3d 1191[A] [Suffolk County Sup. Ct., 2006]). Even assuming that MERS, as nominee for Axiom Financial Services, was authorized to assign the mortgage to the plaintiff, it does not appear that it was the owner of the note; if it was not, it would have lacked the authority to assign the note to the plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to the plaintiff would be a nullity (*see*, Kluge v. Fugazy, 145 AD2d 537 [2<sup>nd</sup> Dept., 1988]).

Consistent with the foregoing, the Court finds the plaintiff's application deficient for failure to submit the following:

1) an affidavit from someone with personal knowledge demonstrating whether or not the loan sought to be foreclosed herein is a "non-traditional home loan" as defined in RPAPL §1304 (5)(e), a "subprime home loan" as defined in RPAPL §1304, or a "high-cost home loan" as defined in Banking Law §6-1. In the event the loan herein meets the statutory definition of "subprime home loan" or "high-cost home loan," the plaintiff shall also submit evidentiary proof, including an affidavit from one with personal knowledge demonstrating whether or not the mortgagor defendant is known to be a resident of the property in foreclosure, as well as evidentiary proof of such defendant's residence address and contact information sufficient for the Court to properly notify the defendant, pursuant to 2008 NY Laws, Ch. 472, Section 3-a, that if he or she is a resident of such property, he or she may request a settlement conference (CPLR §3408); and

2) certificates of conformity relative to the notarization of the plaintiff's affidavit of merit and amount due and the assignment of mortgage, both executed outside New York State (CPLR §2309[c]; Real Property Law § 299-a[1]; PRA III, LLC v. Gonzalez, 54 AD3d 917 [2<sup>nd</sup> Dept., 2008]); and

3) proof from an individual with personal knowledge of the mailing or service of the notice of default the upon the defendant mortgagor pursuant to section 15 and 22 (b) of the mortgage agreement (Northwest Bank Minnesota, N.A. v. Sabloff, 297 AD2d 722 [2<sup>nd</sup> Dept., 2002]).

Accordingly, it is

**ORDERED** that the plaintiff's *ex parte* application for an order appointing a referee to ascertain and compute the amount due to the plaintiff on the note and mortgage which are the subject of this action, amending the caption by striking the name of the unknown party "John Doe" defendant and substituting Emanuel Ramirez in his place, is considered under chapter 472 of the Laws of 2008 and is denied without prejudice to renewal upon proper papers, including but not limited to a copy of all papers submitted with this application, a copy of this order, and the evidentiary proof specified herein.

Dated: March 9, 2009

  
HON. WILLIAM B. REBOLINI, J.S.C.