

SUPREME COURT - STATE OF NEW YORK
IAS PART 14 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Acting Justice of the Supreme Court

APPLICATION FOR AN
ORDER OF REFERENCE
#001 - MD

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U.S. BANK NATIONAL ASSOCIATION AS	:	ROSICKI, ROSICKI & ASSOCIATES, P.C.
TRUSTEE, ON BEHALF OF THE HOLDERS	:	Attorneys for Plaintiff
OF THE TERWIN MORTGAGE TRUST 2006-3,	:	26 Harvester Avenue
ASSET-BACKED CERTIFICATES, SERIES	:	Batavia, New York 14020
2006-3, WITHOUT RECOURSE,	:	
	:	
Plaintiff,	:	
- against -	:	
	:	
LISA L. SMITH, MORTGAGE ELECTRONIC	:	
REGISTRATION SYSTEMS, INC., AS	:	
NOMINEE AND MORTGAGEE OF RECORD,	:	
MORTGAGEIT, INC., LAGNIAPPE GROWTH	:	
& INCOME FUND, LLC, MELVIN BERLIN,	:	
M.D., P.C., MIDLAND CREDIT MANAGEMENT,	:	
INC., FORD MOTOR CREDIT COMPANY,	:	
PEOPLE OF THE STATE OF NEW YORK,	:	
'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,	:	
Defendants.	:	

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Upon the following papers numbered 1 to 7 read on this application for an order of reference; Application and supporting papers 1 - 7; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; it is,

ORDERED that this ex-parte application by plaintiff for an order of reference in this foreclosure action as well as an amendment of the caption of this action is considered under 2008 NY Laws, Chapter 472, enacted August 5, 2008, and is denied without prejudice to resubmission of the application upon proper papers, including but not limited to a copy of all the papers submitted with this application, a copy of this order, and the evidentiary proof specified herein.

This action was commenced on May 22, 2008 to foreclose a mortgage on real property located at 175 Underwood Drive, East Hampton, New York. Defendant Lisa L. Smith signed an Adjustable Rate Note dated September 26, 2005 to obtain a loan from the lender, Mortgageit, Inc., in the sum of \$590,000.00 at an initial yearly interest rate of 6.500 percent and initial monthly payments of \$3,195.83. She also executed a mortgage agreement dated September 26, 2005 which secured said note with a mortgage on the subject premises. The mortgage indicated that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. Defendant Lisa L. Smith allegedly defaulted on her August 1, 2006 loan payment and on subsequent installments and thereafter the loan was accelerated. By assignment dated January 7, 2008, MERS, as nominee for the lender, assigned the subject mortgage to U.S. Bank National Association as Trustee, on behalf of the holders of the Terwin Mortgage Trust 2006-3, Asset-Backed Certificates, Series 2006-3, without recourse.

Plaintiff now seeks an order appointing a referee to ascertain and compute the amount due, to amend the caption of this action to have the fictitious names of "John Does" and "Jane Does" stricken, and to have the deficiency language contained in the complaint against Lisa L. Smith stricken.

Initially, the Court notes that plaintiff may lack standing to sue. A plaintiff seeking foreclosure must establish that it was the owner or holder of the note and mortgage at the time that it commenced the foreclosure action (*see, Mortgage Elec. Registration Sys. v Coakley*, 41 AD3d 674, 838 NYS2d 622 [2d Dept 2007]; *Federal Natl. Mtge. Assn. v Youkelsone*, 303 AD2d 546, 755 NYS2d 730 [2d Dept 2003]; *Aurora Loan Serv. v Grant*, 17 Misc 3d 1102[A], 851 NYS2d 56 [Sup Ct, Kings County, 2007]; *see also*, UCC §§ 3-104, 3-204 [1]). Plaintiff may do so by demonstrating that it was the assignee of the mortgage and the underlying note or the assignee of the mortgage and by indorsement the holder of the note at the time that the action was commenced (*see, Federal Natl. Mtge. Assn. v Youkelsone, supra; First Trust Natl. Assn v Meisels*, 234 AD2d 414, 651 NYS2d 121[2d Dept 1996]; *Slutsky v Blooming Grove Inn, Inc.*, 147 AD2d 208, 542 NYS2d 721[2d Dept 1989]). A mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see, FGB Realty Advisors, Inc. v Parisi*, 265 AD2d 297, 696 NYS2d 207 [2d Dept 1999]). Any purported assignment of a note or mortgage by an entity having no ownership interest therein passes no title to the assignee (*see, LaSalle Bank Natl. Assn. v Lamy*, 12 Misc 3d 1191[A], 824 NYS2d 769 [Sup Ct, Suffolk County, 2006]; *see also, In re Stralem*, 303 AD2d 120, 758 NYS2d 345 [2d Dept 2003]). If MERS, as nominee of Mortgageit, Inc., was not the owner of the note, as it appears, it would have lacked the authority to assign the note to plaintiff, and absent an effective transfer of the note, the assignment of the mortgage to plaintiff would be a nullity (*see, Kluge v Fugazy*, 145 AD2d 537, 536 NYS2d 92 [2d Dept 1988]).

In addition, when applying for a default judgment, plaintiff must submit evidence sufficient to demonstrate a prima facie case (*see, CPLR 3215 [f]; Silberstein v Presbyterian Hosp. in City of New York*, 96 AD2d 1096, 463 NYS2d 254 [2d Dept 1983]). While a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination (*see, Silberstein v Presbyterian Hosp. in City of New York, supra*). In the absence of either a proper affidavit by the party or a complaint verified by the party, not merely by an attorney with no personal knowledge, the entry of judgment by default is erroneous (*see,*

Peniston v Epstein, 10 AD3d 450, 780 NYS2d 916 [2d Dept 2004]; *Finnegan v Sheahan*, 269 AD2d 491, 703 NYS2d 734 [2d Dept 2000]).

Consistent with the foregoing, the instant application is denied without prejudice to resubmission of the application upon proper papers, including the following:

1) Evidentiary proof, including an affidavit from an individual with personal knowledge of the facts as to the proper and timely assignment of the subject note and mortgage or endorsement of the subject note and assignment of the subject mortgage, sufficient to establish that plaintiff was the owner or holder of the of the subject note and mortgage at the time the action was commenced (*see, Mortgage Elec. Registration Sys. v Coakley, supra; First Trust Natl. Assn v Meisels, supra*).

2) An affidavit from an individual with personal knowledge of the facts as to whether or not the type of loan that is being secured by the mortgage is either a “subprime home loan” as defined in RPAPL § 1304 (5)(c) or a “high-cost home loan” as defined in Banking Law § 6-1 or a “non-traditional home loan” as defined in RPAPL § 1304 (5)(e). In the event that the loan meets those statutory definitions, plaintiff must submit evidentiary proof, including an affidavit from someone with personal knowledge, of whether or not the mortgagor defendant is known to be a resident of the subject property in foreclosure (*see, CPLR 3408*). In the event that the loan meets the statutory definition of a “high-cost home loan” or a “subprime home loan,” plaintiff must also submit evidentiary proof of such defendant’s residence address and contact information, sufficient for the Court to properly notify the mortgagor defendant that if he or she is a resident of such property, he or she may request a settlement conference (*see, L 2008, ch 472, § 3-a*). In the event that the loan meets the statutory definition of a “high-cost home loan,” the complaint must contain an affirmative allegation that plaintiff mortgage banker has complied with all of the provisions of Banking Law §§ 595-a and 6-1 (*see, RPAPL §1302 [1]*).

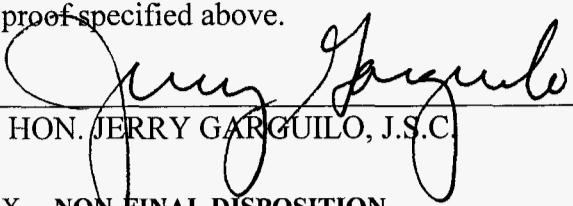
3) An affidavit of merit in admissible form. The affidavit of merit submitted herein of Gerald French, Vice President of Select Portfolio Servicing Inc., as Attorney in Fact, was signed and notarized in the State of Utah and was not accompanied by the required certificate of conformity with the laws of the State of Utah. For an out-of-state affidavit to be admissible, it must comply with CPLR 2309 [c] which requires that an out-of-state affidavit be accompanied by a certificate of conformity (*see, Real Property Law § 299-a [1]; PRA III, LLC v Gonzalez*, 54 AD3d 917, 864 NYS2d 140 [2d Dept 2008]; *see also, NY CLS Real P § 299-a [2008]; 1 Mortgages and Mortgage Foreclosure in N.Y. § 7:17*). In the absence of a certificate of conformity, the affidavit is in effect unsworn (*see, Worldwide Asset Purchasing LLC v Simpson*, 17 Misc3d 1128[A], 851 NYS2d 75[Auburn City Ct 2007]).

4) Proof from someone with personal knowledge of the mailing or service of the notice of default dated April 18, 2008 upon defendant Lisa L. Smith pursuant to sections 15 and 22 (b) of the mortgage (*see, Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]).

Plaintiff is reminded that proper proof of compliance with CPLR 3215(g)(3), concerning the mailing of additional notice, is required upon application for a judgment of foreclosure against any defaulting mortgagor.

Accordingly, the instant application is denied without prejudice to resubmission of the application upon proper papers, including but not limited to a copy of all the papers submitted with this application, a copy of this order, and the evidentiary proof specified above.

Dated: March 11, 2009



HON. JERRY GARGUILO, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION