

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

US BANK NATIONAL ASSOCIATION AS TRUSTEE, etc.

Plaintiff,

- against -

MARC D. COMBS, et al.,
Defendants.

Index
No. 8481 2010

Motion
Date October 2, 2012

Motion
Cal. No. 25

Motion
Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendant Marc D. Combs (defendant) for an order: (1) pursuant to CPLR 3211 (a) (3) dismissing the complaint or, in the alternative; (2) dismissing the complaint and imposing sanctions for fraud; (3) tolling the interest on the promissory note and mortgage; (4) awarding costs and fees; (5) canceling the notice of pendency and assignment of mortgage.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	1-5
Answering Affirmation - Exhibits.....	6-8
Reply Affirmation.....	9-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

On July 13, 2006, defendant executed a note, which was secured by a mortgage, in the amount of \$440,000.00 in favor of the lender, Mortgage Lenders Network USA, Inc (Mortgage Lenders). The mortgage document stated, inter alia, that Mortgage Electronic Registration Systems, Inc., or MERS, “is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns” and that MERS was the mortgagee

of record for purposes of recording. On June 16, 2007, MERS, as nominee, assigned the mortgage, together with the bond or obligation described therein, to Wells Fargo Bank, NA (Wells Fargo). On March 30, 2010, Wells Fargo then assigned the mortgage and note to plaintiff.

Plaintiff then commenced the within action by filing a copy of the summons and complaint and *lis pendens* on April 6, 2010, after defendant was alleged to have defaulted by failing to make payments due under the mortgage on September 1, 2009. Defendant was served with process on April 21, 2010, pursuant to CPLR 308 (4). Defendant filed his verified answer on August 2, 2010, asserting, *inter alia*, lack of standing to sue. On his motion, defendant asserts that the purported assignment from Wells Fargo to plaintiff is a nullity since MERS – who had no authority to assign the underlying note as a nominee – executed the first assignment to Wells Fargo. Defendant also points out that “plaintiffs have filed two foreclosure actions on the same property . . . based upon the same mortgages, assignments etc.,” under Index No. 13129/2007; as such, defendant seeks dismissal of the within action and related relief.

In opposition to the motion, counsel for plaintiff states, among other things, that: (1) she has been advised by her client that plaintiff is in possession of the original note but obtaining the document takes “considerable time” and, thus, the motion should be denied or adjourned to allow plaintiff time to evidence its standing; (2) MERS has the authority to assign the mortgage by virtue of the original lender’s membership in the MERS system; and (3) defendant has no authority to challenge the assignment since, *inter alia*, the challenge is not whether the debt exists but rather to whom it is owed.

In an action to foreclose a mortgage, plaintiff establishes standing by demonstrating that it is both the holder or assignee of the subject mortgage as well as the holder or assignee of the underlying note, by proving either physical delivery or execution of a written assignment prior to commencement of the action (*see Deutsche Bank Nat. Trust Co. v Rivas*, 95 AD3d 1061 [2012]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]; *Citimortgage, Inc. v Stosel*, 89 AD3d 887 [2011]).

In the case at bar, plaintiff failed to demonstrate that it had standing to commence the action. To the extent that counsel for plaintiff states that plaintiff is in possession of the underlying note, same is insufficient to warrant denial of the motion. Preliminarily, it is noted that an attorney affirmation is without evidentiary value (*see e.g. Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Winter v Black*, 95 AD3d 1208 [2012]; *Currie v Wilhouski*, 93 AD3d 816 [2012]). It is further noted that plaintiff did not present any evidence (by way of an affidavit from its representative) to demonstrate how or when it became the lawful

holder of the note (*see Citimortgage, Inc.*, 89 AD3d at 888). Finally, upon commencement of this action, plaintiff should have been prepared to demonstrate its standing to sue.

To the extent that plaintiff argues that it had the authority to assign the mortgage, plaintiff has not shown that MERS had any authority as nominee for the original lender to assign the note (*see e.g. Bank of New York v Silverberg*, 86 AD3d 274 [2011]); it is well-settled that a transfer of the mortgage without the underlying obligation is a nullity (*see U.S. Bank Nat. Assn. v Dellarmo*, 94 AD3d 746 [2012]; *Bank of New York*, 86 AD3d at 280).

Finally, plaintiff's contention that defendant does not have the authority to challenge standing is simply without merit. While a debt may indeed be owed, plaintiff cannot demonstrate that it is the party entitled to foreclose on same.

To the extent that defendant seeks other relief based upon the fact that there are two actions pending to foreclose on the same mortgage, the related action was discontinued by order dated February 1, 2012 and, as such, the motion is denied as moot.

Accordingly, defendant's motion is granted to the extent that the complaint is hereby dismissed without prejudice, and the notice of pendency heretofore filed in this action on or about April 6, 2010 is hereby canceled. Upon service of a copy of this order with notice of entry, the Clerk of Queens County is directed, upon the payment of proper fees, if any to cancel and discharge said notice of pendency and to enter upon the margin of record of same a Notice of Cancellation referring to this order.

Dated: October 10, 2012

J.S.C.